

Adjudicating the Public-Private Law Divide: The Case of Government Contracts in India

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Abstract: As a general rule, where a matter falls purely in the realm of contract law (i.e. where there is a contractual dispute, pure and simple, in relation to a contract with the Government/State), a writ petition cannot be moved under article 32 or 226 of the Constitution of India, rather private law remedies should be sought. But, it is also equally true that there is no absolute rule about the jurisdiction of the Supreme Court or the High Courts, under articles 32 and 226 respectively, getting inevitably ousted. Rather, the correct position is that, in an appropriate case, the writ Court has the jurisdiction to entertain a writ petition involving disputes arising out of a contract and/or involving some disputed questions of fact, *provided the nature of the transaction or dispute involves some public law element*. However, the distinction between public law and private law elements in the contract with Government/State is progressively getting imprecise, and at times, it becomes quite challenging to identify the line demarcating the public law and private law elements in such contracts. There, of course, cannot be a cast-iron rule for such distinction, as it depends upon the nature of the transaction in question and the consequent rights and obligations involved in the matter. In this paper, an attempt has been made to substantiate these propositions with the help of leading case laws. It is because of the subject that the author has largely relied upon the judicial pronouncements. The scope of this paper is confined to the Indian law.

A. Introduction

The subject of government contracts has assumed pronounced significance because in this modern era of the welfare state, the Government's economic activities are expanding and it is increasingly assuming the role of the dispenser of a large number of benefits.¹ Additionally, with the liberalisation and privatisation of the economy, the Government is increasingly acting through private contractors in preference to doing it through its own departments. Although the Government enjoys considerable discretion and pliability in the field of con-

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1 *MP Jain*, *Indian Constitutional Law*, Gurgaon 2010, p. 1671.

tract, yet it is not and should not be as free as a private individual in selecting the recipients of the contract. It is because regardless of the nature of activity or transaction, the Government, given its unique position, cannot lay down arbitrary and capricious standards for the choice of persons for the award of a contract or grant of largess. The principles of article 14 (i.e. the rule of reason, rules against arbitrariness and discrimination, and rules of fair play and natural justice) govern every action of the Government or public authority in dealings with private parties, even though the rights are contractual in nature. Where a *prima facie* case of arbitrariness is made out, and the Government/State fails to prove that its decision was informed and reasonable, then, such a decision will be declared arbitrary and unconstitutional.

This article discusses the judicial trend as regards the range of judicial review in contractual matters. The attempt is to determine the scope of judicial review where the State action is in relation to pure contractual disputes. Can the Supreme Court or the High Court entertain such disputes in its extraordinary writ jurisdiction under article 32 or 226 of the Constitution? The paper also endeavours to ascertain the judicial attitude where it is called upon to examine the validity of the State actions falling within the public law domain. It also argues that there is no single standard or parameter to demarcate the frontier between the public law domain and the private law domain in such matters, and that it is done on the basis of facts and circumstances of each case. In this paper, the expression ‘Government’ is used to signify both the Government of India (Union Government) and the Government of a State. Whereas, the expression ‘State’ is used to signify ‘State’ as defined under article 12 of the Constitution of India.² Unless otherwise mentioned, ‘article’ means article of the Constitution of India.

B. Government Contract

1. Power of making contracts in the exercise of executive power

The power of making contracts in the exercise of the executive power is vested in the Government by virtue of article 298 of the Constitution. This provision explicates that the executive power of the Union and the States, as provided for in articles 73³ and 162⁴ respectively, encompasses the power to carry on any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose.⁵ However, where the executive power of the Union in this regard is in relation to a subject on which Parliament cannot legislate, then the exercise of such executive power by the Union Gov-

2 The Constitution of India was adopted on 26 November 1949, and a few provisions of it came into force immediately. But, the Constitution, altogether, came into force on 26 January 1950.

3 It provides for the extent of executive power of the Union.

4 It provides for the extent of executive power of the State.

5 *VN Shukla*, *VN Shukla’s Constitution of India, Revised by Mahendra Pal Singh*, Lucknow 2013, p. 885.

ernment will be subject to legislation by the State. Correspondingly, where the executive power of a State in this regard is in relation to the subject on which the State Legislature cannot legislate, then exercise of such executive power by the State Government will be subject to legislation by Parliament.

II. Essentials of a Government Contract

While article 298 confers power on the Government to make contracts, article 299 provides for the mandatory formalities to be complied with while making such contracts and assurances of property in the exercise of that power. Article 299 (1) provides for the following essentials of a government contract:

- (1) It should be made in the exercise of the executive power of the Union or of a State;
- (2) It should be expressed to be made by the President, or by the Governor of a State, as the case may be;
- (3) It should be executed on behalf of the President or the Governor, as the case may be; and
- (4) It should be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

All the afore-stated essentials are mandatory in nature and not just directory, and therefore, their non-conformity would render the contract void.⁶ However, the question whether or not there is a contract which fulfils the requirements of article 299 is not a pure question of law, but is a question which depends on investigation of facts.⁷ The object of article 299 is to enhance public interest by protecting the Government from being saddled with liability for entering into unauthorised contracts, so as to save the Government from spurious claims made on account of such unauthorised contracts.⁸

As all the conditions prescribed in article 299 (1) are mandatory, therefore, there can be no implied contract between the Government and another person. In *KP Chowdhary v State of Madhya Pradesh*⁹, taking into consideration the previous judgments on the subject, the Supreme Court observed that in view of article 299 (1) there could be no implied contract with the Government because if such implied contracts with the Government were allowed, it would in effect make article 299 (1) meaningless. Further, a contract not in full compliance with article 299 (1) would be no contract at all and could not be enforced by either party.

It is true that article 299 (1) uses the word 'executed' and that a government contract must essentially be in writing, yet this provision does not, in terms, require that a formal

6 *Seth Bhikraj Jaipuria v Union of India*, AIR 1962 SC 113; *State of West Bengal v BK Mondal & Sons*, AIR 1962 SC 779; *Union of India v AL Rallia Ram*, AIR 1963 SC 1685.

7 *Nirod Baran Banerjee v Dy Commissioner of Hazaribagh*, AIR 1980 SC 1109.

8 See, *Seth Bhikraj Jaipuria v Union of India*, AIR 1962 SC 113.

9 AIR 1967 SC 203.

contractual document is necessarily to be executed on behalf of the Government. Therefore, in the absence of any direction by the President/Governor under article 299 (1) prescribing a particular manner, a valid contract may result from exchange of correspondence (offer and acceptance) if the requisite conditions are fulfilled.¹⁰ In *Union of India v AL Rallia Ram*¹¹, it was held that submission of a tender for purchase or supply of goods in response to an invitation issued by or on behalf of the Government and its acceptance thereof in the name of the President/Governor, and its execution on his behalf by a person authorised in that behalf would satisfy the requirements of article 299 (1).

Not only is it important that such contracts be entered into in the name of the President/Governor, but such contracts must also be entered into by persons duly authorised in this behalf by the President/Governor.¹² However, it is not necessary that the authority under article 299 (1) to execute the contract could only be granted by rules expressly promulgated in that behalf or by formal notifications. Normally, such conferment is done by notification in the Official Gazette, but there is nothing in the constitutional provision to preclude authorisation being conferred *ad hoc* on any person, and when that is established, the requirements of the law must be held to be satisfied.¹³ Special authority may validly be given in respect of a particular contract by the President/Governor to an officer other than the officer notified under the rules.¹⁴

Since article 299 (1) provides for certain mandatory requirements only, therefore, subject to the essential requirements of this provision, the general contract law applies even to a government contract in the same manner as to any other contract for the purposes of other issues pertaining to contract, such as, discharge of contract, damages and other remedies in the event of breach of contract, etc.

III. Immunity to the President/Governor and Government Officials

A valid contract with the Government in compliance with the provisions of article 299 (1) binds both the parties to the contract and can be enforced by them. However, as per article 299 (2), there is no personal liability to the President/Governor and Government officials under government contracts. It is the Government which becomes party to such contracts. And accordingly, contracts couched in terms of article 299 (1) are enforced by and against the Government.

10 *Union of India v AL Rallia Ram*, AIR 1963 SC 1685.

11 *Ibid.*

12 See, *Union of India v NK Pvt Ltd*, AIR 1972 SC 915. See also, *Karamshi Jethabhai Somayya v The State of Bombay*, AIR 1964 SC 1714.

13 *The State of Bihar v Karam Chand Thapar*, AIR 1962 SC 110.

14 *Seth Bhikraj Jaipuria v Union of India*, AIR 1962 SC 113.

IV. Application of the doctrines of estoppel and ratification

Reiterating that article 299 (1) is mandatory in character and its contravention nullifies the contract, the Supreme Court in *Mulamchand v State of Madhya Pradesh*¹⁵ held that there was no question of *estoppel* or ratification in such a case.¹⁶ It is because the provisions of article 299 (1) have not been enacted for the sake of mere form, but they have been enacted for safeguarding the Government against unauthorised contracts. The formalities stated in the said provision cannot be waived or dispensed with, or circumvented by invoking doctrine of *estoppel* or ratification. If the plea of *estoppel* or ratification is admitted, then that would, in effect, amount to the repeal of an important constitutional provision intended for the protection of the general public. More so, there cannot be any *estoppel* or ratification against explicit provisions of the law.

V. Government contracts and statutory contracts

A government contract is one which is made ‘in the exercise of the executive power’ of the Union or a State. It is different from a contract which is statutory in nature (‘statutory contract’), i.e. a contract entered into in the exercise of the ordinary statutory power. A statutory contract is not regulated by article 299 (1), and thus, it need not be couched in terms of that constitutional provision. A statutory contract is governed by the provisions of the statute in question and rules made thereunder providing for the terms and conditions of the contract. The rights and obligations of the parties arising under such contracts are determined as a matter of statutory interpretation. For example: grant of license or exclusive privilege of liquor vending in the exercise of statutory powers. Article 299 (1) is not applicable to a case where a particular statutory authority, as distinguished from the Union or the States, enters into a contract which is statutory in nature. Such a contract, although for securing the interest of the Government, is not a contract which has been entered into by or on behalf of the Union or the State in the exercise of its executive powers.¹⁷

In *India Thermal Power Ltd v State of MP*, the Court observed: ‘Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties.’¹⁸ Likewise, a contract would

15 AIR 1968 SC 1218.

16 The same view was resonated in *State of Uttar Pradesh v Murari Lal & Brothers Ltd*, AIR 1971 SC 2210.

17 *State of Haryana v Lal Chand*, AIR 1984 SC 1326.

18 (2000) 3 SCC 379, paragraph 11. See also, *State of Haryana v Lal Chand*, AIR 1984 SC 1326.

not become statutory just because it is for construction of a public utility and it has been awarded by a statutory or public body.¹⁹ Although the principles of *estoppel* and ratification do not apply to government contracts which are not made in terms of article 299 (1), nonetheless, in appropriate cases, these principles do apply to statutory contracts or contracts awarded by statutory corporations.²⁰

VI. *Quasi contractual liability of the Government*

Sections 68-72 of the Indian Contract Act deal with ‘certain relations resembling those created by contract’. To be exact, these sections do not deal with the rights or liabilities accruing from any contract. Therefore, under these sections, contractual rights and remedies cannot be claimed. Quasi contractual obligations, as stated in these sections, apply even against the Government or public authority because the object of these obligations is to prevent unjust enrichment.

If there is no contract in terms of article 299 (1), then, of course, the parties are not bound by it. But, under certain circumstances, a person (including the Government) can still be made liable for quasi-contractual obligations. In *State of West Bengal v BK Mondal and Sons*²¹, the respondent claimed a sum of money from the appellant for some construction work. The officers, who requested the respondent for the work, however, had not been authorised by the Government to make such request on its behalf. Still, the Government accepted the work, but denied its liability on the strength that there was no valid contract binding it under section 175 (3) of the Government of India Act 1935 (corresponding to article 299 of the Constitution)²². In the alternative, the respondent contended that if the contract in question was invalid then its claim fell under section 70 of the Indian Contract Act²³. Although there was no valid government contract, the State Government was still held liable to compensate under section. 70 of the Contract Act. The Court correctly held that recognition of a claim for compensation under section 70 would not directly or indi-

19 *Kerala State Electricity Board v Kurien E Kalathil*, (2000) 6 SCC 293, paragraph 10. At paragraph 11, the Court observed: ‘Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law.’

20 *Gujarat State Financial Corporation v Lotus Hotels Pvt Ltd*, AIR 1983 SC 848.

21 AIR 1962 SC 779.

22 The ancestry of article 299 of the Constitution is traced to section 175 (3) of the Government of India Act 1935.

23 Section 70 of the Indian Contract Act 1872 reads thus:

‘Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.’

rectly nullify the effect of section 175 (3) of the Government of India Act. It would also not amount to treating as valid a contract which is invalid. The Court observed, 'The fields covered by the two provisions are separate and distinct, section 175 (3) deals with contracts and provides how they should be made. Section 70 deals with cases where there is no valid contract and provides for compensation to be paid in a case where the three requisite conditions prescribed by it are satisfied...therefore...there is no conflict between the two provisions.'²⁴

C. Concept of the 'State' under Article 12 of the Constitution

As fundamental rights are enforced against the State (as defined in article 12 of the Constitution), therefore, it is imperative to spell out the meaning of the 'State'. Under article 12, the expression 'State' includes the following: (i) Government of India; (ii) Parliament of India; (iii) Government of each of the States; (iv) Legislature of each of the States; (v) All local authorities; and (vi) Other authorities within the territory of India or under the control of the Government of India.

It is, thus, noticeable that the term 'State' is much broader than 'Government'. The latter includes only the Government of India and the Government of each of the States. Whereas the term 'State' includes 'Government' within its ambit. This broad connotation of the term 'State' has to be taken only for the purposes of Part III²⁵ and Part IV²⁶ of the Constitution. In the afore-stated list, the expression 'other authorities' has been given a very wide meaning by the judiciary. It includes within its fold statutory bodies, corporations and even non-statutory bodies acting as 'instrumentality or agency of the Government'. In *Ajay Hasia v Khalid Mujib Sehravardi*²⁷, the Supreme Court summarised the following relevant tests for determining whether or not a body is an instrumentality or agency of the Government:

- (1) If the entire share capital of the corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.
- (2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.
- (3) It may also be a relevant factor whether the corporation enjoys monopoly status which is the State conferred or State protected.

24 AIR 1962 SC 779, at p. 788. This principle was reiterated in *Mulamchand v State of Madhya Pradesh*, AIR 1968 SC 1218. See also, *New Marine Coal Co v Union of India*, AIR 1964 SC 152.

25 Part III deals with fundamental rights (articles 12-35).

26 Part IV deals with directive principles of state policy (articles 36-51).

27 AIR 1981 SC 487. The Court gathered these tests from the observations made in an earlier judgment of *Ramanna Dayaram Shetty v The International Airport Authority*, AIR 1979 SC 1628.

- (4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.
- (5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of the Government.
- (6) Specifically, if a department of the Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of the Government.

The concept of instrumentality or agency of the Government is, thus, not limited to a corporation created by a statute, and is equally applicable even to a company or society in the light of the above-mentioned tests. Stating that the tests formulated in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must, *ex hypothesi*, be considered to be a State within the meaning of article 12, the Supreme Court, in *Pradeep Kumar Biswas v Indian Institute of Chemical Biology*²⁸, has laid down the following proposition for determining ‘other authorities’:

‘The question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.’ (Emphasis supplied)

The implication of knowing whether an entity can be qualified as State or not under article 12 is that once the entity is characterised as the ‘State’, certain significant incidents invariably follow:²⁹

- (1) The entity becomes subject to the discipline of fundamental rights. That is to say, its actions and decisions can be challenged with reference to the fundamental rights.
- (2) The entity becomes subject to the discipline of administrative law.
- (3) The entity becomes subject to the writ jurisdiction of the Supreme Court under article 32 and also of the High Courts under article 226.

D. Scope of Judicial Review in Contractual Matters

I. General guiding principles

Article 32 gives extraordinary jurisdiction to the Supreme Court to issue directions or orders or writs for the enforcement of fundamental rights. Likewise, under article 226, every

28 (2002) 5 SCC 111, at p.34.

29 *Jain*, note 1, p. 911.

High Court has the power to issue directions, orders or writs for the enforcement of fundamental rights *and for any other purpose*.

Where both the parties to a contract are private entities, the matter falls purely in the private law field and such a contract is governed by the ordinary law of contract. In such a case, there is no question of judicial review under article 32 or 226 of the Constitution.

However where one of the parties to a contract is the Government or State, then things are not exactly the same. Such a contract has to be looked at from two angles: *firstly*, as the matter is contract, the Government/State must have minimum liberty and leeway to act efficaciously; *secondly*, as it represents the people, it has to observe some minimum standards of fairness in its action by not deviating from the path of acting in the interest of the public. Law on this subject has developed through a series of judgments delivered by the Supreme Court; and on that basis, it may be said that, as a general rule, the extraordinary remedy of writ jurisdiction under article 32 or article 226 cannot be invoked in pure contractual matters, even where one of the parties to the contract is the Government/State. Nevertheless, in certain limited cases, remedies by invoking writ jurisdiction are available, provided the non-Government/State contracting party is able to demonstrate that it is seeking a public law remedy, in contradistinction to the private law remedy simpliciter under the contract.

As a remedy, the non-Government contracting party normally seeks the writ of mandamus against the Government/State. Writ of mandamus is a judicial remedy in the form of an order from a superior court to a subordinate court or government or public official/authority or corporation requiring it to do or abstain from doing some specific act which is in the nature of public duty. However, as Professor De Smith writes, 'to be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract'³⁰. Further, the public duty sought to be enforced should be an imperative or absolute duty, and not a discretionary one. And since, by and large in the matters of private character or purely contractual disputes, no such 'public duty element' is involved, therefore, the remedy of mandamus normally does not lie.

Since the decision of the Government under article 298 is an executive/administrative decision, therefore it is subject to Part III of the Constitution and can be scrutinised on the touchstone of the principles of fairness in action (as prescribed in article 14) or on any of the grounds available in the public law field. The same standards of fairness in action are applicable to contracts entered into by the 'State' because they are also subject to the discipline of fundamental rights and writ jurisdiction of the higher judiciary. The principles of fairness and reasonableness in action are extended to 'statutory contracts' as well. With reference to the constitutional limitations upon the power and discretion of the Government while dealing with its property or awarding a contract, some important principles emerging

30 *De Smith, Stanley A, and JM Evans*, *De Smith's Judicial Review of Administrative Action*, London 1980, p. 540.

from *Ramanna Dayaram Shetty v The International Airport Authority* may be summarised as under:³¹

- (i) Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement.
- (ii) The discretion of the Government is not unlimited. It cannot act in its arbitrary discretion or at its sweet will.
- (iii) The Government cannot, like a private individual, deal with any person it pleases. Its action must be in conformity with standards or norms which are rational and non-arbitrary. If the Government departs from the standards or norms in any particular case(s), its action would be liable to be struck down, unless it can be shown that the departure was not arbitrary, but was based on some valid principle which, in itself, was not irrational, unreasonable or discriminatory.
- (iv) The Government has the right to refuse to enter into a contractual relationship with any one. But, if it does so, it cannot capriciously and arbitrarily select any person it likes for entering into such relationship and discriminate between persons similarly circumstanced.

The scope of judicial review in contractual matters can be bifurcated into two broad spheres: 'in the matters of awarding a contract' and 'post-award matters'. With the object of averting arbitrariness and favouritism 'in the matters of awarding a contracts', the Court can entertain writ petitions on the well-established grounds of (i) illegality, (ii) irrationality and (iii) procedural impropriety.³² In other words, the Government/State is subject to constitutional limitations 'in the matters of awarding a contract'. However, after the Government/State has entered into a contract, the relations between the parties (i.e. rights and obligations of the parties *inter se*) are no longer governed by the constitutional provisions, but by the contract so made. After the award, they can only claim rights conferred upon them by the 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 the contract.³³ Thus, disputes relating to 'award of a contract' by the Government/State would be amenable to writ jurisdiction on the well-established grounds; but 'post-award matters' (such as, interpretation and implementation of contract; discharge of contractual obligations by way of performance, frustration, breach, agreement and novation; claims of contractual remedies, and the like) fall primarily within the domain of *private law* and are, therefore, generally not amenable to writ jurisdiction. Nevertheless, if

31 AIR 1979 SC 1628. These principles have been reiterated by the Court in a number of judgments. See, *Reliance Energy Ltd v Maharashtra State Road Development Corp Ltd*, (2007) 8 SCC 1; *Business Link v AS Advertising Co*, (2003) 10 SCC 258; *Tata Cellular v Union of India*, (1994) 6 SCC 651; *FCI v Kamdhenu Cattle Feed Industries*, AIR 1993 SC 1601.

32 *Tata Cellular v Union of India*, (1994) 6 SCC 651.

33 *Radhakrishna Agarwal v State of Bihar*, AIR 1977 SC 2573. See also, *State of Punjab v Balbir Singh*, AIR 1977 SC 1717; *DFO v Biswanath Tea Co*, AIR 1981 SC 1368.

‘post-award matters’ fall within the realm of *public law* (i.e. where there is a public law element involved), they may be amenable to the writ jurisdiction.³⁴

Elements of public interest: Although the commercial considerations remain the same, whether a contract is awarded by a private entity or by the Government/State; yet, when the Government/State enters into a contract, there would be, in a given case, an element of public law or public interest, and a violation of the same would be amenable to the writ jurisdiction. In *Raunaq International Ltd v IVR Construction Ltd*, the Supreme Court enumerated some elements of public interest as follows:³⁵

- ‘(1) Public money would be expended for the purposes of the contract.
- (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities.
- (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously.
- (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work, thus involving larger outlays or public money and delaying the availability of services, facilities or goods.’

When a writ petition challenging the award of a contract by the Government/State is filed, the Court must be satisfied that there is some element of ‘public interest’ involved in the matter. A mere difference in the prices offered by two tenderers may not be conclusive in deciding whether any public interest is involved in intervening in such a decision because price is only one of the several criteria taken into account before making an award. This is important because an inappropriate intervention by the Court may affect public interest adversely. In particular, where a public interest litigation (PIL) is filed, the Court must be extra careful and satisfied that the party instituting the PIL is litigating *bona fide* for public good. This is to ensure that PIL should not be just a cloak for attaining private ends of a third party or of the party bringing the litigation.

Judicial restraint in contractual matters: Accentuating the inherent limitations in the exercise of the power of judicial review in contractual matters, the Supreme Court in *Tata Cellular v Union of India* deduced the following principles:³⁶

34 See, *Gujarat State Financial Corporation v Lotus Hotels Pvt Ltd*, AIR 1983 SC 848.

35 (1999) 1 SCC 492, at paragraph 10.

36 *Tata Cellular v Union of India*, (1994) 6 SCC 651, at p. 687, paragraph 94. These principles have been reiterated in a number of subsequent judgments. See, *Asia Foundation & Construction v Trafalgar House Construction, (I)*, (1997) 1 SCC 738; *New Horizons Ltd v Union of India*, 1995 SCC (1) 478; *Delhi Science Forum v Union of India*, AIR 1996 SC 1356; *Assistant Collector of Central Excise v Dunlop India Ltd*, AIR 1985 SC 330.

- (1) *The modern trend points to judicial restraint in administrative action.*
- (2) *The Court does not sit as a court of appeal, but merely reviews the manner in which the decision was made.*
- (3) *The Court does not have the expertise to correct the administrative decision. 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.*
- (4) *The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*
- (5) *The Government must have freedom of contract...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.*
- (6) *Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.'*

An important point to be borne in mind is that the Constitution does not prescribe any particular mode for the award of contract or distribution of resources or grant of largess. But whatever route the Government/State adopts, it must not be arbitrary, unreasonable, capricious or discriminatory. In *Natural Resources Allocation, re*³⁷, the Supreme Court has held that there is no constitutional mandate in favour of auction under article 14. Thus, the Government/State can adopt any route to award contract and very well deviate from the course of auction, and the Court has consistently upheld such actions. The judiciary tests the route adopted on the limited scope of arbitrariness and fairness under article 14 and its role is limited to that extent.³⁸

II. *Application of general principles*

The judicial approach manifests that where the dispute is within the contractual field, pure and simple, a writ petition cannot be moved under article 32 or 226. A significant reason for this judicial standpoint, as reiterated by the Supreme Court in *State of Bihar v Jain Plastics & Chemicals Ltd*³⁹, is that seriously disputed questions or rival claims of the parties

37 *Special Reference No. 1 of 2012*, (2012) 10 SCC 1. This reference was occasioned by the decision of the Supreme Court in *Centre for Public Interest Litigation v Union of India* ('2G Case'), (2012) 3 SCC 1, wherein the Court quashed 122 licenses for providing 2G services because the policy of 'first come and first served', which was adopted by the Government for issuance of the licences, was found to be fundamentally flawed.

38 See also *Manohar Lal Sharma v The Principle Secretary* [(2014) 9 SCC 516], wherein the Supreme Court held that the allocation of 214 coal blocks made, both under the Screening Committee route and the Government dispensation route, was arbitrary and illegal.

39 AIR 2002 SC 206.

with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit, rather than by a Court exercising prerogative of issuing writs. For that reason, where there are disputed questions of facts, the writ petition under article 32 (or 226) is neither an occasion, nor an appropriate remedy.⁴⁰ In *Lekhraj Satramdas, Lalvani v Deputy Custodian-Cum-Managing Officer*⁴¹, the Court held that ‘any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Article 226’. Likewise, in *Banchhanidhi Rath v The State of Orissa*⁴², the Court observed that ‘if a right is claimed in terms of a contract such a right cannot be enforced in a writ petition’. Where parties to a contract have agreed to settle their dispute by arbitration and if there is an agreement in that regard, the Court will not allow recourse to any other remedy without invoking the remedy by way of arbitration unless, of course, both the parties to the dispute agree on another mode of dispute resolution.⁴³

The case of *Divisional Forest Officer v Biswanath Tea Company Ltd*⁴⁴ involved ‘interpretation and enforcement of a term of the contract of lease’ and ‘investigation of facts’. The High Court erroneously entertained the petition and issued a mandamus against the appellant. In appeal, the Supreme Court quashed and set aside the judgment and held that the High Court was in error in entertaining the writ petition.⁴⁵ The reason why such a case ought to be brought before the civil court was pertinently explained by the Supreme Court in the following words:⁴⁶

‘As the High Court has also disposed of the case on merits after overruling the preliminary objection...we may examine the case on merits and that itself would demonstrably show the dangerous course adopted by the High Court in examining rights and obligations claimed under the contract without proper or adequate material or evidence to reach a conclusion, more so when the petition raised disputed questions of facts which needed investigation.’

It is trite law that in contractual matters the scope of judicial review is more limited and in doubtful cases, the Court adopts the policy of restraint. But, where the challenge is made on the ground of infringement of fundamental rights; for instance, violation of article 14 by

40 See, *Defence Enclave Residents Society v State of UP*, AIR 2004 SC 4877.

41 AIR 1966 SC 334.

42 AIR 1972 SC 843. See also, *Pimpri Chinchwad Municipal Corporation v Gayatri Construction Co.*, (2008) 8 SCC 172 and *National Highways Authority of India v Ganga Enterprises*, (2003) 7 SCC 410.

43 *ABL International Ltd v Export Credit Guarantee Corporation of India Ltd*, (2004) 3 SCC 553.

44 AIR 1981 SC 1368.

45 In *Har Shankar v The Dy Excise & Taxation Commissioner* (AIR 1975 SC 1121) also, the Supreme Court held that ‘a writ petition is not an appropriate remedy for impeaching contractual obligations’.

46 *Divisional Forest Officer v Biswanath Tea Company Ltd*, AIR 1981 SC 1368.

alleging that the impugned act is arbitrary or unfair or unreasonable, the mere fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to adhere to the basic requirements of the equality principles. It is because every action of the State has a public element in it and is meant for public good, and accordingly, it has to be just, fair, reasonable and non-discriminatory. It has to be reminisced that the Constitution does not envisage; nor does it permit unfairness or unreasonableness in State actions in any sphere of its activity. Further, article 14 is not a free-standing provision. It has to be read together with rights conferred by other articles like article 21, which deals with 'right to life'. Besides several other facets, 'right to life' includes 'opportunity'. And, in this context, the doctrine of 'level playing field', as protected under article 19 (1)(g) should also be taken into consideration.⁴⁷

Hence, the constitutional scheme does not allow the total exclusion of article 14 in State actions even in contractual matters. It becomes all the more imperative when the modern trend is also to examine the unreasonableness of contractual terms where there is an unequal bargaining power, particularly in standard form contracts wherein one of the parties is a Government/State. These principles relating to the scope of judicial review in contractual matters have been very aptly stated in *Kumari Shrivlekha Vidyarthi v State of UP*⁴⁸ in the following words:

'20. ...[T]he personality of the State, requiring regulation of its conduct in all spheres by requirements of Art. 14 does not undergo such a radical change after the making of a contract merely, because some contractual rights accrue to the other party in addition. It is not as if the requirements of Art. 14 and contractual obligations are alien concepts, which cannot co-exist.

21... [I]t would be alien to the Constitutional scheme to accept the argument of exclusion of Art. 14 in contractual matters...

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 minimum requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality... However,

47 See, *Reliance Energy Ltd v Maharashtra State Road Development Corp Ltd*, (2007) 8 SCC 1.

48 AIR 1991 SC 537, at paragraphs 20-22. In this case, the State of UP had issued Government Order (dated 6.2.1990) whereby appointments of all Government Counsels (Civil, Criminal, Revenue) in all the Districts of the State of UP were terminated w.e.f. 28.02.1990, irrespective of whether the term of the incumbents had expired or was subsisting. Validity of this GO was challenged. The respondent State contended that the appointment of these Government Counsel was purely contractual and writ petition to enforce the contract was not maintainable. But, allowing the writ petitions, the Supreme Court quashed the impugned circular which resulted in restoration of *status quo ante* as on 28.02.1990, the date from which the circular was made effective.

to the extent, challenge is made on the ground of violation of Art. 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 Art. 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 Art. 14 of non-arbitrariness at the hands of the State in any of its actions.’ (Emphasis supplied)

Therefore, article 14 undoubtedly applies to matters of governmental policy and actions of the Government or State, even in contractual matters; and, if such policy or actions fail to satisfy the test of reasonableness and fairness, they would be declared unconstitutional.⁴⁹

Thus, action of a public authority invested with statutory power can be challenged by way of a writ petition, albeit the right to relief arises out of an alleged breach of contract. In *DFO v Ram Sanehi Singh*⁵⁰, at an auction held by the Forest Officer, the respondent purchased the right to cut timber for the period of one year. But, the Divisional Forest Officer (DFO) passed an order depriving the petitioner of some timber cut by him. This order was challenged by way of a petition for a writ of *certiorari* quashing that order and for incidental reliefs on the ground that the petitioner was not given a hearing before passing the order. Dismissing the petition, the High Court held that the DFO had acted in exercise of authority, and that the remedy of the respondent was to claim relief in a regular suit for enforcement of the agreement or for damages and not in a petition under article 226. But, the Supreme Court rejected the contentions of the DFO, quashed the order, and stated:⁵¹

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

In *ABL International Ltd v Export Credit Guarantee Corporation of India Ltd*⁵², to the question — was the respondent (an instrumentality of State) discharging a public duty or a

49 This fundamental tenet has been reinforced in several Supreme Court judgments. *DFO v Ram Sanehi Singh*, AIR 1973 SC 205; *Ramana Dayaram Shetty v The International Airport Authority*, AIR 1979 SC 1628; *Kasturi Lal Lakshmi Reddy v State of Jammu and Kashmir*, AIR 1980 SC 1992; *Col AS Sangwan v Union of India*, AIR 1981 SC 1545; and *LIC of India v Consumer Education & Research Centre*, AIR 1995 SC 1811.

50 AIR 1973 SC 205.

51 AIR 1973 SC 205, paragraph 4.

52 (2004) 3 SCC 553.

public function while repudiating the claim of the appellant arising out of a contract — the Supreme Court (taking support from the observations made in *Kumari Shrilekha Vidyarthi* judgment) held that when an instrumentality of the State acted contrary to public good and public interest, unfairly, unjustly and unreasonably (in its contractual, constitutional or statutory obligations), it really acted contrary to the constitutional guarantee enshrined in article 14. Applying these principles to the case in hand, the Court allowed the writ petition and granted the relief. The Court observed that while entertaining an objection as to the maintainability of a writ petition under article 226, the Court should keep in mind that the power to issue prerogative writs under the said provision is plenary in nature and is not limited by any other provisions of the Constitution. The Court has, however, imposed upon itself certain limitations in the exercise of this power.⁵³ The Court also summarised the following legal principles as to the maintainability of a writ petition:⁵⁴

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

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

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

A very interesting situation arose in *Mahabir Auto Stores v Indian Oil Corporation*⁵⁵. The respondent was a statutory body incorporated under the Indian Companies Act 1956. The appellant was a partnership firm that had been carrying on business as the lube distributor of the respondent and selling all kinds of lubricants since 1965. It also contended that the respondent had consistently, uninterruptedly, and repeatedly dealt with the appellant and recognised it as its authorised dealer, distributor and agent. Although the appellant firm had been receiving continuous supply of lubricants from the respondent, it was suddenly stopped on 27 May 1983 by the respondent (on account of the change of policy). The appellant contended that such an action of the respondent would have the effect of black-listing the firm and was therefore arbitrary and against the principles of natural justice, besides being hit by the doctrine of promissory *estoppel*. It thereupon filed a writ petition in the High Court praying for a writ of mandamus directing the respondent to desist from denying or discontinuing the supply of lubricants and thereby save the appellant from being ousted from the business; it also claimed for damages from the date the supply was discontinued. It, therefore, sought the specific performance of the alleged contract. It was averred that there was no written concluded contract between the parties and that the transaction continued under an *ad hoc* arrangement. The High Court held that the writ of mandamus was not

53 See, *Whirlpool Corporation v Registrar of Trade Marks, Mumbai*, 1998 (8) SCC 1.

54 (2004) 3 SCC 553, at paragraph 27.

55 AIR 1990 SC 1031.

maintainable in the circumstances of the case. However, holding the respondent as an organ or instrumentality of the State (under article 12), the Supreme Court said that ‘whether public law or private law rights are involved, depends upon the facts and circumstances of the case. The dichotomy between rights and remedies cannot be obliterated by any straight jacket formula. It has to be examined in each particular case’. Setting aside the judgment and the order of the High Court, the Supreme Court directed the respondent to consider afresh the submissions made by the appellant, namely, that the existing arrangement amounted to a contract by which the distributorship was continued in case of the appellant without any formal contract and further that the new policy of the Government (introduced in December 1982) would not impact the appellant. The following significant observations of the Court may be reproduced:⁵⁶

‘18. ... It appears to us that in respect of corporation like IOC when without informing the parties concerned, as in the case of the appellant firm herein on alleged change of policy and on that basis action to seek to bring to an end to course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the monopolistic nature of the power of the respondent in this field... It is true that there is discrimination between power and right but whether the State or the instrumentality of a State has the right to function in public field or private field is a matter which, in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be dealt with by the State or the instrumentality of the State without informing and taking into confidence, the party whose rights and powers are affected or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not taken into confidence.’

Another noteworthy judgment in this regard is *Gujarat State Financial Corporation v Lotus Hotels Pvt Ltd*⁵⁷ wherein the appellant (a statutory corporation) did not disburse the loan to the respondent in terms of the agreement entered into between them. It was contended by the appellant that the dispute was in the realm of contract and even if there was a concluded contract between them about the loan, the failure of the corporation to carry out its part of the obligation might amount to breach of contract for which the remedy lies elsewhere, and accordingly, a writ of mandamus could not be issued compelling the corporation to specifically perform the contract. The Supreme Court, however, held that ‘if the appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondent acted upon it, the statutory corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to the respondent. In such a situa-

56 *Mahabir Auto Stores v Indian Oil Corporation*, AIR 1990 SC 1031, at paragraph 18.

57 AIR 1983 SC 848.

tion, the Court is not powerless from holding the appellant to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty'.⁵⁸

It thus cannot be said that, as a rule, in the matters of contract, the Court's jurisdiction under article 226 (or 32) gets inexorably ousted. In fact, the general rule that the 'Court may not ordinarily examine it unless the action has some public law character attached to it' itself suggests that in appropriate cases (determined on comprehensive consideration of facts and circumstances), a remedy under article 226 (or 32) will be available even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.⁵⁹

III. Non-statutory contract with the State under article 12 of the Constitution

Where a transaction with the State (under article 12) is purely contractual and the rights of the parties are governed only by the terms of the contract, no writ or order can be issued under article 32 or 226 so as to compel the authorities to remedy a breach of contract, pure and simple.⁶⁰ It is because writ under article 32 or 226 is a public law remedy to be made available for correcting a breach of public law, and is not available in the private law field, for example, where the matter is governed by a non-statutory contract.⁶¹ In *Bareilly Development Authority v Ajai Pal Singh*⁶², reversing the High Court judgment, the Supreme Court held:

'Even conceding that the BDA has the trappings of a state or would be comprehended in 'other authority' for the purpose of Article 12 of the Constitution, while determining price of the houses/flats constructed by it and the rate of monthly instalments to be paid, the Authority or its agent after entering into the field of ordinary contract acts purely in its executive capacity. Thereafter the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter se. In this sphere they can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority (i.e. B.D.A. in this case) in the said contractual field.'

58 AIR 1983 SC 848, paragraph 13. See also, *KN Guruswamy v State of Mysore*, AIR 1954 SC 592.

59 *ABL International Ltd v Export Credit Guarantee Corporation of India Ltd*, (2004) 3 SCC 553; *Ramchandra Murarilal Bhattad v State of Maharashtra*, AIR 2007 SC 401; *Gunwant Kaur v Municipal Committee, Bhatinda*, AIR 1970 SC 802; *Century Spinning & Manufacturing v The Ulhasnagar Municipality*, AIR 1971 SC 1021; *Life Insurance Corporation of India v Escorts Ltd*, AIR 1986 SC 1370.

60 *Radhakrishna Agarwal v State of Bihar*, AIR 1977 SC 1496; *Premi Bhai Parmar v Delhi Development Authority*, AIR 1980 SC 738 and *Divisional Forest Officer v Biswanath Tea Company Ltd*, AIR 1981 SC 1368.

61 *State of Gujarat v MP Shah Charitable Trust*, (1994) SCC (3) 552, at paragraph 22.

62 (1989) 1 SCR 743.

IV. *Circumstances when the Court refuses to exercise its extraordinary jurisdiction*

In *Joshi Technologies International Inc v Union of India*, the Supreme Court has stated that under the following circumstances, the Court would not ‘normally’ exercise its extraordinary jurisdiction:⁶³

- (i) Where the impugned action has no public law character attached to it.
- (ii) Where a particular mode of settlement of dispute is provided in the contract, the High Court would relegate the parties to the said mode of settlement, particularly where settlement of disputes is to be resorted to through the means of arbitration.
- (iii) Where there are disputed questions of fact of complex nature requiring oral evidence for their determination.
- (iv) Money claims *per se* particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

E. **Recapitulation of the Legal Position Relating to the Contracts Entered Into by the Government/State/Public Authority with Private Parties**

The legal position pertaining to the contracts entered into by the Government/State/public authority with private parties may be recapitulated as under:⁶⁴

- (1) While entering into a contract, the Government/State acts purely in its executive capacity and is bound to act in a just, fair, non-discriminatory and reasonable manner.
- (2) Where a contractual dispute requires investigation of facts before the question of violation of article 14 could arise, the matter cannot be brought under article 226. In such a matter, the appropriate recourse of the aggrieved party is to resort to the remedy of civil suit.
- (3) Writ jurisdiction is not intended to facilitate avoidance of obligations voluntarily incurred. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions of the contract is no justification in not complying with the terms of contract.
- (4) Where the contract between private party and the Government/State falls under the realm of private law and there is no element of public law, the normal course for the aggrieved party is to invoke the remedies provided under the ordinary civil law rather than approaching the High Court under article 226 by invoking its extraordinary jurisdiction.
- (5) On the other hand, where it is found that the contractual dispute encompasses public law elements, then the matter can be scrutinised by the High Court in writ petition under article 226 to determine whether or not the impugned action of the Government/

63 Civil Appeal No. 6929 of 2012, decided on 14 May 2015, at paragraph 68.

64 This recapitulation is based on the summary prepared by the Supreme Court in *Joshi Technologies International Inc v Union of India*, Civil Appeal No. 6929 of 2012, decided on 14 May 2015, at paragraph 69.

State was fair, just, equitable and non-discriminatory. Thus, writ petition is maintainable in contractual matters where the action of the Government/State is unsupported by law or there is a denial of the right to equality or there is a violation of the principles of natural justice, etc.

- (6) The demarcation between public law and private law elements in contract cannot be done with exact precision. The determination and divide of public law and private law elements in contract would depend on the factual matrix of each case.
- (7) Although the distinction between public law and private law elements in the contract with the Government/State is getting blurred, yet it has not been totally demolished and where the matter falls purely in private field of contract, the writ petition is not maintainable. In fact, each case has to be examined on its facts to determine whether or not the contractual relations between the parties have some public element.
- (8) In appropriate cases, due consideration of a legitimate expectation may form a part of the principle of non-arbitrariness. However, mere reasonable or legitimate expectation of a party to a contract may not by itself be a distinct enforceable right, but failure to consider and give due weightage to it may render the decision arbitrary.
- (9) The scope of judicial review in respect of disputes falling within the sphere of contractual obligations is limited, and in doubtful cases, the parties may be relegated to take the recourse to the forum and remedies provided for adjudication of purely contractual disputes.

F. Conclusion

Despite the inherent limitations on the scope of judicial review in contractual disputes, where it is found that the procedure followed or route adopted by an authority for the purpose of entering into a contract (or even in relation to a post-award matter) is against the constitutional mandate (particularly article 14), the Court cannot ignore such action on the ground that the authorities concerned must have some latitude or liberty in contractual matters and any interference by the Court amounts to encroachment on the exclusive right of the executive to take such decision.⁶⁵ The Court can undoubtedly examine whether or not the 'decision-making process' was reasonable, rational, and non-arbitrary. It is the correct stand adopted by the higher judiciary because, being the protector of the fundamental rights, the onus lies on the higher judiciary to ensure that there is no violation of these rights (particularly right to equality guaranteed under article 14).

It is evident from the foregoing discussion that where the nature of the transaction or dispute involves public law element(s), then the matter can be examined by the Court in writ petition to determine whether or not the action of the Government/State was fair, just and equitable. This debate of public law and private law elements (and consequent rights and remedies) in contracts with the Government/State is going to gain momentum in this

65 *Sterling Computers Limited Etc v M & N Publications Limited*, AIR 1996 SC 51.

era when many of the infrastructure projects are being carried out with the Government/ State as one of the parties to it. In such cases, it is relatively easy to find the insignia of public law elements. In *Star Enterprises v City and Industrial Development Corporation of Maharashtra Ltd*⁶⁶, the Court has indeed observed that in recent times, the scope of judicial review of administrative action has become expansive and is becoming wider day by day, and the traditional limitations have been vanishing.

66 (1990) 3 SCC 280.