

Before Hemant Gupta & Fateh Deep Singh, JJ.

POLLUTION CONTROL COMMITTEE — *Petitioner*

versus

MUNICIPAL CORPORATION — *Respondents*

CWP No. 2032 of 2006

July 23, 2013

Constitution of India, 1950 — Art. 226 — Code of Civil Procedure, 1908 — O.1 R.8 — Municipal Solid Wastes (Management & Handling) Rules, 2000 — R.4 — Cancellation of contract to set up waste management plant — Petitioner no.1 — Pollution Control Committee preferred writ petition to direct Municipal Corporation for scientific disposal of Municipal solid wastes and dead animals - Municipal Corporation granted contract to set up municipal solid waste management plant to petitioner no.2 — Lease deed of land on which plant was to be set up was executed — Petitioner no.2 failed to obtain necessary clearance certificate from Pollution Control Board and Environment Regulatory Authority — Resultantly, lease cancelled by passing speaking order and possession of land not given to petitioner No.2 — Contract cancelled — Cancellation challenged for non-grant of opportunity of hearing — Held, that petitioner no. 2, as an agent of Corporation, was bound to comply with direction of Municipal Corporation to obtain permission from Pollution Control Board which was in interest of general public — Fact that no permission was taken, would alone disentitle petitioner no.2 to dispute cancellation of contract — Argument regarding opportunity of hearing academic — Absence of challenge to cancellation of lease would disentitle petitioner to any indulgence of this court in matter of alleged breach of contract — power of judicial review in concluded contract limited — not all pervasive as in the matter of awarding of contract.

Held, that the petitioner was requested to seek approval from the Pollution Control Board to comply with the Rules. However, the petitioner has failed to seek authorization in respect of the solid waste management site at Bhagtanwala. For its inability to seek authorization, the possession of the leased land was also not given. The said fact alone disentitles the petitioner to dispute the cancellation of the contract awarded to it to manage the solid waste of the Municipal Corporation. The Petitioner has failed to comply with the first basic condition to set

up the plant that is authorization from the Pollution Control Board. Therefore, the reliance of the petitioner in the second writ petition on the order passed in respect of another Municipality, was misconceived and to misdirect not only the Corporation, but also the Pollution Control Board. Still further, the petitioner as an agent of the Corporation was bound to comply with the direction of the Municipal Corporation to obtain permission from the Pollution Control Board, which in any case, was in the interest of the general public.

(Para 18)

Further held, that the powers of the Writ Court are plenary in nature and in exercise of such power, the Court can embark an inquiry into the disputed questions of facts as well, but whether such powers should be exercised or not is one of the discretion. The Power of judicial review in the matter of awarding contract conferred by Article 14 is wide, which enjoins the public authority to act fairly, reasonably by excluding irrationality and arbitrariness. But the power of judicial review in a concluded contract is limited and is not all pervasive as in the matter of awarding of contract. The Writ Court in exercise of judicial review can intervene even in respect of concluded contracts if the contract is statutory contract or there is a public law element in it.

(Para 34)

Further held, that in the present case, the Corporation terminated the contract on 28-5-2010 to set up municipal solid waste management plant. On the same day, the Corporation also served a show cause notice for cancellation of the lease of the land on which such plant was to set up by the Petitioner in the second petition. The possession of the land leased was never given to the Petitioner. The Lease stands cancelled after passing a speaking order. There is no challenge to the said cancellation of lease of the land on which the Solid Waste Management Plant was to be erected. Therefore, the argument that the contract has been terminated without serving any show cause notice is only academic.

(Para 36)

Further held, that the contract is to set up municipal solid waste management plant, an obligation cast on the Municipal Corporation under a Statute and also part of its functioning to provide clean and hygienic living conditions to the residents within the limits of Municipal Corporation. The first writ petition to seek shifting of

dumping ground is pending before this Court since the year 2006. The contract awarded to the Petitioner in the second petition could not take off for the reason that the Petitioner insisted on possession of land without obtaining authorization under the Rules. We have already found that such authorization is mandatory.

(Para 37)

Further held, that The right to seek an opportunity of hearing before cancellation of the contract, even when the possession of the land was not delivered and in the absence of challenge to such cancellation, disentitles the petitioner to any indulgence of this court in the matter of alleged breach of contract. For the reasons recorded above, we do not find any merit in the second writ petition (CWP No.12188 of 2010), which is hereby dismissed.

(Para 38)

In CWP No. 2032 of 2006

V.K. Kaushal, Advocate, *for the petitioner.*

R.D. Bawa, Advocate, *for respondent No. 1.*

H.S. Brar, Additional Advocate General, Punjab, *for respondent Nos. 2, 3 and 6.*

D.S. Patwalia, Advocate and Salil Sabhlok, Advocate, *for respondent Nos. 4 & 5.*

In CWP No. 12188 of 2010

Vikram Chaudhary, Advocate, *for the petitioner.*

H.S. Brar, Additional AG, Punjab *for respondent No.1*

Ashok Aggarwal, Senior Advocate with

Mukul Aggarwal, Advocate, *for respondent No 2.*

D.S. Patwalia, Advocate and Salil Sabhlok, Advocate, *for respondent No.3.*

HEMANT GUPTA, J.

(1) This order shall dispose of CWP No. 2032 of 2006 (hereinafter referred to as 'the first petition') preferred by the Pollution Control Committee, Amritsar, for directing the respondents, including the Municipal Corporation, Amritsar to shift the dumping place of Municipal solid waste and dead animals to an authorized and approved place in accordance with the provisions of the Municipal Solid Wastes (Management & Handling) Rules, 2000 (for short 'the Rules') and for scientific disposal of the Municipal solid wastes and dead animals.

(2) During the pendency of the aforesaid writ petition, on 5.5.2009, the Municipal Corporation has granted contract of processing and disposal of the Municipal solid waste to M/s AKC Developers Ltd., but such contract stands cancelled vide communication dated 28.5.2010. It is the said communication (Annexure P.32), which is subject matter of challenge in CWP No.12188 of 2010 (hereinafter referred to as 'the second petition') preferred by the successful bidder. The said writ petition is also being disposed of with the present writ petition.

(3) A Division Bench of this Court passed an order on 7.5.2009 on the basis of the status report furnished by the Commissioner, Municipal Corporation, Amritsar. The order reads as:-

“Municipal Corporation, Amritsar has today filed a status report on the affidavit of Shri D.P.S. Kharbanda, Commissioner, Municipal Corporation, Amritsar. From a reading of the said affidavit, it appears that the substantial progress has been made towards setting up of a Solid Waste Treatment Plant in as much as setting up of the Plant has already been allotted to M/S A.K.C. Developers Limited Noida and the funds required for the project already arranged from JNNURM Cell of the Ministry of Urban Development and Poverty Alleviation, Delhi. Learned counsel appearing for the Municipal Corporation, Amritsar submits that according to his instructions, the Solid Waste Treatment Plant shall be set up within 9 to 12 months.

In the circumstances, therefore, we deem it fit to adjourn this petition by six months to be posted again on 21.12.2009 to enable the Corporation to submit a status report about the progress made by it.

We make it clear that setting up of the Solid Waste Treatment Plant shall be strictly in accordance with the provisions of the Water & Air (Prevention and Control of Pollution) Acts and all the permissions required for setting up such a plant shall be obtained from the competent authority by the Corporation before the work actually starts.”

(4) It is thereafter, the letter of intent was issued to M/s AKC Developers Limited, the writ petitioner in the second writ petition. It is pointed out by the petitioner in the first petition that the solid waste of the city of Amritsar was being dumped at the Jhabal Road since the

partition of the country which became a source of pollution to the locality. A processing unit of the dead animals also existed at that place, which also added to the pollution. The petitioner submitted a complaint to the Punjab State Human Rights Commission, but during the pendency of the complaint, the Rules were notified and the respondents assured the implementation of the said Rules. In pursuance of the direction of the Punjab State Human Rights Commission dated 24.9.2003, a status report was filed by the Municipal Corporation that the land fill at site at Bhagtanwala measuring 194 kanals, is now being used and an application for authorization under the Rules, has been made to the Punjab Pollution Control Board, which is under consideration. It is the stand of the petitioner that such authorization has not been granted by the Pollution Control Board under Rule 4(2) of the Rules to use the site at Gate Bhagtanwala as the land fill. The site is said to be adjoining the biggest grain market in the city, where large number of people visit everyday. A copy of the status report filed before the Punjab State Human Rights Commission, has been appended as Annexure P.2, wherein it has been, *inter-alia*, stated that the land fill site at village Jhabal has been abandoned and the same is covered with the good earth. The Corporation stated to the following effect:-

“1. That in compliance with the Municipal Solid Waste Handling Rules, 2000, Schedule-I and Rules 4.2 & 4.3 page 4, the land fill site at Bhagtanwala measuring 194 kanals, is being used. Photographs of this land fill site are enclosed herewith for ready reference. It is further submitted that an application for authorisation under the Rules, was submitted in September, 2002 to the Pollution Control Board, which is still under consideration of the Board.

2. That for setting up a Solid Waste Treatment Plant, tenders were invited and are under process. A report in this regard has already been submitted before this Hon'ble Commission on dated 24.9.2003.

3. & 4. xxx xxx

5. That the Municipal Corporation, Amritsar has submitted an application for authorisation on the prescribed proforma to the Pollution Control Board vide letter No. A.C. (D)/1510 dated 23.9.2002 and the queries raised by the Board were clarified by the Municipal Corporation, Amritsar vide No. MOH/785 dated

29.10.2003. Copies of both these letters are enclosed herewith for ready reference.”

(5) In reply filed on behalf of the Municipal Corporation in the first writ petition, it was asserted that the Corporation is making every effort for the management of the Municipal solid waste as per the Rules and also delineated the steps taken by it including the processing of the Municipal solid waste over land measuring 194 kanals situated outside gate Bhagtanwala.

(6) The Pollution Control Board in its separate reply, asserted that the Municipal Corporation has been requested to submit a time bound action plan in accordance with the Rules. Even a notice for violation of the provisions of the Rules was issued on 5.12.2003. The Corporation was asked to submit action plan for management of the Municipal solid waste as per the Rules, in terms of the order of the Hon’ble Supreme Court dated 27.7.2004 passed in CWP No. 888 of 1996-Almitra H. Patel and Others v. Union of India. In an affidavit dated 1.11.2011 filed on behalf of the Punjab Pollution Control Board, it has been stated that there is no change in Clause (7)(d) of Notification No.SO1533 dated 14.9.2006 as amended on 1.12.2009 and that common Municipal solid waste management facilities requires environmental clearance from the State level Environment Impact Assessment Authority.

(7) An affidavit has been filed by the Deputy Commissioner in respect of the actions taken by the Municipal Corporation, but there is no averment that the Municipal Corporation has obtained authorization in terms of Sub Rule (2) of Rule (4) of the Rules. In a status report filed on behalf of the Municipal Corporation dated 17.9.2012, it is pointed out that the contract regarding collection and transportation of the Municipal waste was allotted to M/s Antony Waste Handling Cell Pvt. Ltd., but the said agency closed the work without any notice on 26.7.2012 and that the Corporation has deployed tractor-trolleys for collection and transportation of the garbage from the area of 40 wards allocated to the said agency.

(8) Shri Navjot Singh Sidhu, Member Parliament, Amritsar, filed an application under Order 1 Rule 8 CPC for intervening in the matter, pointing that the piles of garbage have come up on roadsides and streets all over the city. It is so averred in para No.4 of the application as under:-

“4. That the current situation of garbage disposal in the entire city is very bad and is worsening with each passing day. There is

practically no collection of garbage, either door to door or area wise, that is taking place in Amritsar. Similarly, the processing plant for the disposal of the collected garbage is also not functioning. As a result, piles of garbage have come up on roadsides and streets all over the city. Unless immediate steps are taken for cleaning of the city & regular collection as well as proper disposal of the garbage, there is high possibility of spreading of diseases in the area, especially in the current warm & humid climatic conditions.”

(9) Admittedly, the authorization, the reference of which finds mention in the status report filed by the Corporation and produced in the first petition as Annexure P.2, has not been obtained even though there was a direction of the Punjab State Human Rights Commission on 22.1.2004 to the Corporation that it shall ensure that the action already initiated is completed expeditiously.

(10) In the second petition, the petitioner was issued letter of intent on 5.5.2009 and in terms of the conditions of letter of intent, the petitioner furnished Bank Guarantee for `50 lacs on 14.5.2009. Thereafter, a contract agreement was also executed on 19.5.2009. The petitioner furnished bank guarantee in the sum of `2,57,50,000/- on 27.5.2009 for release of 10% of the mobilization advance as per the terms of the payment in contract agreement. In terms of the contract agreement, a lease deed of the land measuring 21 acres situated at Bhagtanwala was executed for a period of 30 years on 2.7.2009, which was registered on 3.7.2009. Thereafter, on 9.7.2009, the petitioner submitted balance performance Bank Guarantee for `78,75,000/-.

(11) The Municipal Corporation on 21.10.2009 communicated that the writ petitioner was required to obtain necessary clearance certificate from the statutory agencies like the Pollution Control Board and the Environment Regulatory Authority as per Clause 5.1.6 of the agreement, but the petitioner has failed to take the necessary clearances. In response to the said communication, the stand of the petitioner was that the present site awarded to the petitioner is an old dumping site which is more than five years old, therefore, in terms of the order dated 17.3.2009 of this Court in CWP No. 8504 of 2003 – Sat Priya Mehamia Memorial Education Trust (Regd.) v. State of Haryana and others, it is not necessary to take environmental impact assessment clearance from the Punjab Pollution Control Board. The petitioner

again sought possession of the land asserting that the petitioner does not require clearance from the Pollution Control Board in respect of the existing dumping site. After exchange of correspondence, it was on 28.5.2010, the contract awarded to the petitioner was cancelled in pursuance of the communication of the Local Department, of the Government of Punjab dated 24.5.2010. Copy of the said communication is annexed with the writ petition as Annexure P.32. On the said date, the petitioner was also served with the show cause notice Annexure P.36 in terms of Clause 13 of the lease deed as to why the lease deed be not cancelled. The petitioner submitted reply dated 30.6.2010, which is not on record, but produced by the Corporation and is taken on record and is marked as Annexure P.39. After considering the reply, the lease was cancelled and an order was passed for cancellation of lease on 5.7.2010 (Annexure P.38). The petitioner filed the writ petition seeking setting aside of the communication dated 28.5.2010 and also sought a writ of mandamus directing the respondents to forthwith allow the petitioner to start the work at site and hand over the physical possession of the site for completion of the project.

(12) The stand of the Corporation again is that it had asked the petitioner vide communications dated 21.10.2009; 9.12.2009; 24.12.2009; 25.1.2010 and 4.12.2010 to obtain necessary clearance from the Pollution Control Board as per Clause 5.6.1 of the agreement and also requested the Environment Engineer, to act in this regard without delay. It is pointed out that the petitioner has not obtained clearance from the Punjab Pollution Control Board, Patiala, therefore, the possession of the site could not be given to the petitioner. It is denied that the Municipal Corporation was satisfied that the site which has already been used for dumping the garbage does not require any sanction from the Punjab Pollution Control Board.

(13) The State filed its affidavit pointing out that the Chief Vigilance Officer of the Local Government in his detailed report dated 23.10.2009 has reported that the Consultant of the project as well as the functionaries of the Municipal Corporation have committed serious and grave illegalities and irregularities and that the financial parameters have been thrown to winds so as to extend undue favour to the petitioner. It is pointed out that the bid of the petitioner was accepted in disregard and disobedience of the Detailed Project Report and that too without any tenable justification against the sanctioned project costs. It was pointed out that one of the bidders M/s A to Z Infrastructure stated

that the consultant of the project appointed by the Municipal Corporation had obtained blank but signed tender document from it by misrepresentation and that tender form was later on used to project that healthy bidding has taken place. The rates approved in the detailed project report were exorbitant and that the consultant of the project has throughout acted mala-fidely. Even the Deputy Controller (Finance & Accounts), Municipal Corporation, Amritsar, has stated that his signatures on the technical evaluation report were obtained by distorting the facts. Reference was made to the exorbitant rates of land in gross violation of the detailed project report. It is also pointed out that since the petitioner-Company, was provided the land for the project at nominal lease rate of Re.1/- sqm. Per year and also suitable financial assistance given, there was no justification to share the income of the carbon credits, revenue generated from the sale of site for display of advertisement besides the amount of central subsidy to be received, if any. The terms and conditions of the similar project awarded to the consortium member of the petitioner at Rajkot has not been taken into consideration. The negotiations were avoided and technical evaluation was only a farce. The State has also produced the communication addressed by it to the Municipal Corporation on 24.5.2010 (Annexure R.2), which was made basis for termination of the contract.

(14) In fact the consultant of the Municipal Corporation has filed an affidavit dated 7.9.2012, a copy of which was received by the counsel for the petitioner. However, it is intriguing that how such affidavit came to be placed on record when the consultant is not a party to the writ petition nor the consultant has sought permission to become a party or even to place on record the affidavit. In the said affidavit the consultant has justified the grant of contract to the petitioner, which *prima-facie* supports the stand of the State Government that the consultant of the project as well as the functionaries of the Municipal Corporation has committed serious and grave illegalities and irregularities.

(15) The common question in both the cases is whether the permission of the Pollution Control Board for use as land fill or dumping site is required to be obtained in terms of Rule 4 of the Rules. The relevant extracts from the Rules are as under:-

“3. Definitions.-- In these rules, unless the context otherwise requires,-

(i) xx xx xx

- (ii) “**authorisation**” means the consent given by the Board or Committee to the “operator of a facility”

Xx xx xx

4. Responsibility of municipal authority.-

1. Every municipal authority shall, within the territorial area of the municipality, be responsible for the implementation of the provisions of these rules, and for any infrastructure development for collection, storage, segregation, transportation, processing and disposal of municipal solid wastes.
2. The municipal authority or an operator of a facility shall make an application in Form-I, for grant of authorisation for setting up waste processing and disposal facility including landfills from the State Board or the Committee in order to comply with the implementation programme laid down in Schedule I.
3. The Municipal authority shall comply with these rules as per the implementation schedule laid down in Schedule I.
4. The municipal authority shall furnish its annual report in Form-II-
 - a. to the Secretary-in-charge of the Department of Urban Development of the concerned State or as the case may be of the Union Territory, in case of a metropolitan city; or
 - b. to the District Magistrate or the Deputy Commissioner concerned in case of all other towns and cities,

with a copy to the State Board or the Committee on or before the 30th day of June every year.

Xx xx xx

7. Management of municipal solid waste

1. Any municipal solid waste generated in a city or a town, shall be managed and handled in accordance with the compliance criteria and the procedure laid down in Schedule-II.

2. The waste processing and disposal facilities to be set up by the municipal authority on their own or through an operator of a facility shall meet the specifications and standards as specified in Schedules III and IV.”

Schedule III
[See rules 6(1) and (3), 7(2)]
Specifications for Landfill Sites

Site Selection

1. In areas falling under the jurisdiction of 'Development Authorities', it shall be the responsibility of such Development Authorities to identify the landfill sites and hand over the sites to the concerned municipal authority for development, operation and maintenance. Elsewhere, this responsibility shall lie with the concerned municipal authority.
2. Selection of landfill sites shall be based on examination of environmental issues. The Department of Urban Development of the State or the Union Territory shall coordinate with the concerned organizations for obtaining the necessary approvals and clearances.
3. The landfill site shall be planned and designed with proper documentation of a phased construction plan as well as a closure plan.
4. The landfill sites shall be selected to make use of nearby wastes processing facility. Otherwise, wastes processing facility shall be planned as an integral part of the landfill site.
5. The existing landfill sites which continue to be used for more than five years, shall be improved in accordance of the specifications given in this schedule. ”

(16) The primary challenge to the cancellation/termination of the contract is for the reason that the contract has been terminated without granting any opportunity of hearing and thus, the action violates the principles of natural justice. It is also alleged that the stand of the Corporation that the petitioner requires clearance from the Pollution Control Board in terms of the Rules is misconceived in view of the judgment of this Court dated 17.3.2009 rendered in CWP No.8504 of 2003 (Annexure P.2). In the said case, the disposal of the Municipal solid waste of Rohtak Municipality on a land measuring 20 bighas and 19 biswas acquired in 1975 for dumping of the Municipal waste was in question.

(17) The sole reliance of the petitioner on the question whether the Municipal Corporation and/or the Contractor requires authorisation in terms of Rule 4(2) of the Rules for its land fill facility at Bhagtanwala is based upon an order dated 17.3.2009 passed in CWP No. 8504 of 2003 by the Division Bench of this Court (of which one of us Hemant Gupta J.), was a member. The marked distinction between the two cases is that the acquisition of the land for dumping the Municipal waste in the aforesaid case was completed in the year 1975 and at that time the site was outside the Municipal limits of Rohtak. The site came to be within the Municipal limits only in the year 1990. The writ petitioner had purchased 25 acres of land at a short distance from the dumping site nearly after 20 years of the use of the dumping site. It was a case of purchaser of land seeking shifting of dumping site. Thus Clause 5 of Schedule-III was interpreted to mean that the landfill sites existing as on the date of framing of the Rules, have only to be improved in accordance with the specifications given in the Schedules and that there is no prohibition for use of an existing landfill site by the Municipal Authorities.

(18) In the present case, firstly, the date from which the site at Bhagtanwala has been put to use, has not come on record. Whether such site was in use for more than five years prior to the promulgation of the Rules to be part of the exception is not made out. Even otherwise, the stand of the Municipal Corporation, as per the status report filed and also in the replies filed in the first writ petition and the second writ petition, is that the authorization from the Pollution Control Board is required. The petitioner was requested to seek approval from the Pollution Control Board to comply with the Rules. However, the petitioner has failed to seek authorization in respect of the solid waste management site at Bhagtanwala. For its inability to seek authorization, the possession of the leased land was also not given. The said fact alone disentitles the petitioner to dispute the cancellation of the contract awarded to it to manage the solid waste of the Municipal Corporation. The Petitioner has failed to comply with the first basic condition to set up the plant that is authorization from the Pollution Control Board. Therefore, the reliance of the petitioner in the second writ petition on the order passed in respect of another Municipality, was misconceived and to misdirect not only the Corporation, but also the Pollution Control Board. Still further, the petitioner as an agent of the Corporation was bound to comply with the direction of the Municipal Corporation to obtain permission from the Pollution Control Board, which in any case, was in the interest of the general public.

(19) In respect of the second argument that the contract has been terminated on the direction of the State Government without providing any opportunity of hearing, it is contended that the State or its functionaries are bound to act fairly, reasonable, diligently, and not arbitrarily, whimsically and unreasonably in all spheres of activities including not only the matters of award of contract, but also cancellation thereof. In respect of such argument, the learned counsel for the petitioner, has relied upon the following judgments:-

1. *K.N. Guruswamy versus State of Mysore*¹.
2. *Smt. Gunwant Kaur and ors. versus Municipal Committee, Bathinda and others*².
3. *Century Spinning and Manufacturing Co. Ltd. versus Ulthasnagar Municipal Council and another*³.
4. *South Kheri versus Ram Sanehi Singh*⁴.
5. *Ramana Dayaram Shetti versus International Airports Authority of India*⁵.
6. *The Gujarat State Financial Corporation versus M/s Lotus Hotels Pvt. Ltd.*⁶.
7. *Indian Oil Corporation Ltd. versus Amritsar Gas Service and Others*⁷.
8. *Kumari Shrilekha Vidyarthi versus State of U.P.*⁸,
9. *Sterling Computers Ltd. versus M/s M and N Publishers Ltd.*⁹.
10. *Whirpool Corporation versus Registrar of Trademarks, Mumbai & Others*¹⁰

¹ AIR 1954 SC 552

² AIR 1970 SC 802

³ AIR 1971 SC 1021

⁴ (1971)3 SCC 864

⁵ (1979) 3 SCC 489

⁶ (1983)3 SCC 379

⁷ (1991)1 SCC 533

⁸ AIR 1991 SC 537

⁹ (1993)1 SCC 445

¹⁰ (1998)8 SCC 1

11. Modern Steel Industries versus State of U.P.¹¹.

12. Harbanslal Sahnia versus Indian Oil Corporation Ltd.¹²

13. ABL International Ltd. versus Export Credit Guarantee Corporation of India Limited and others¹³.

(20) On the other hand, Shri Ashok Aggarwal, Learned Senior Counsel, appearing for the Corporation has also relied upon equally on a large number of judgments pointing out that the contract in question was a non statutory contract and, therefore, no writ can be issued under Article 226 of the Constitution of India so as to compel the authority to remedy the breach of contract. Reference was made to the judgments of the Hon'ble Supreme Court reported as *Bareilly Development Authority and another versus Ajai Pal Singh and Others*¹⁴; *Karnataka Power Corpo. Ltd. versus West Asia Trading Corporatio*¹⁵; *Kerala State Electricity Board and another versus Kurien E. Kalathil and others*¹⁶ and the judgments of this Court reported as *M/s Parkash Platinum Private Ltd. versus National Fertilizers Ltd.*¹⁷; *Munish Gupta versus Union of India and others*¹⁸. It is also argued that the contract of such nature in its very nature is determinable on account of default of any of the parties, therefore, in view of Section 14(1)(c) of the Specific Relief Act, 1963, such contract cannot be enforced. Even if the termination of the contract is illegal, only damages can be claimed from the Civil Court and/or through Arbitration. Reliance is placed upon the judgments reported as **Indian Oil Corporation Ltd. versus Amritsar Gas Service and others**,¹⁹ and *E.Venkatakrishna versus Indian Oil Corporation and another*²⁰. It is also pointed out that the agreement entered between the parties contains an Arbitration Clause i.e. Clause 12.2, therefore, the Petitioner is bound to avail the remedy agreed upon by the parties.

¹¹ (2001)10 SCC 491

¹² (2003)2 SCC 107

¹³ (2004)3 SCC 553

¹⁴ (1989)2 SCC 116

¹⁵ JT 1999(10) SC 414

¹⁶ (2000)6 SCC 293

¹⁷ 1993(2) RRR 360

¹⁸ 2009(2) PLR 110

¹⁹ (1991)1 SCC 533

²⁰ (2000)7 SCC 764

(21) Learned counsel for the Municipal Corporation has also pointed out that the power of judicial review conferred on this Court under Article 226 of the Constitution of India could be invoked in contractual matters only if the public law element is present and not in respect of the contracts falling within the realm of private law. Reference is made to judgments reported as *M/s Radhakrishna Agarwal and others versus State of Bihar and others*²¹, and *G.B. Mahajan and others versus Jalgaon Municipal Council and others*²².

(22) In Radha Krishna Agarwal's case (supra), a three-Judge Bench judgment of the Hon'ble Supreme Court, upheld the judgment of the Patna High Court dividing the contracts into three categories i.e. i) where a petitioner makes a grievance of breach of promise on the part of the State in cases where on assurance or promise made by the State he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Article 299 of the Constitution; ii) where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Act or Rules framed there under and the petitioner alleges a breach on the part of the State; and iii) where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State.

(23) The first set of cases relates to the doctrine of promissory estoppel, which is not relevant in the present case, nor the present case falls in the second set of the cases, which contemplates the contract entered by the State in exercise of the statutory powers in certain cases. The present is a case of a contract, which falls in the third set of cases i.e. non statutory contracts. The Hon'ble Supreme Court has held as under:-

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

²¹ (1977)3 SCC 457

²² (1991)3 SCC 91

compel the authorities to remedy a breach of contract pure and simple”.

(24) Another three-Judge Bench judgment in G.B. Mahajan’s case (*supra*), was examining award of the contract by the Municipal Council to a developer of a real estate for the execution of a project for Administrative Building’ and a Commercial Complex on a plot of land belonging to the Municipality. The Court observed as under:-

“46. While it is true that principles of judicial review apply to the exercise by a government body of its contractual powers, the inherent limitations on the scope of the inquiry are themselves a part of those principles. For instance, in a matter even as between the parties, there must be shown a public law element to the contractual decision before judicial review is invoked. In the present case the material placed before the court falls for short of what the law requires to justify interference.”

(25) In *Bareilly Development Authority’s case (supra)*, the Supreme Court, while examining the judgments in *Ramana Dayaram Shetti’s case (supra)* (Three-Judge Bench Judgment) and *Radha Krishna Agarwal’s case (supra)*, held that the contract awarded by the Bareilly Development Authority for construction of dwelling units for the people belonging to different income groups, is a non statutory contract. The Court observed as under:

“21. This finding, in our view, is not correct in the light of the facts and circumstances of this case because in Ramana Dayaram Shetty's case there was no concluded contract as in this case. 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. BDA in this case) in the said contractual field.

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 :

Radhakrishna Agarwal versus State of Bihar (1977) 3 SCR 249, *Premji Bhai Parmar versus Delhi Development Authority* (1980) 2 SCR 704 and *D.F.O. versus Biswanath Tea Company Ltd.* (1981) 3 SCR 662.

23. In view of the authoritative judicial pronouncements of this Court in the series of cases dealing with the scope of interference of a High Court while exercising its writ jurisdiction under Article 226 of the Constitution of India in cases of non-statutory concluded contracts like the one in hand, we are constrained to hold that the High Court in the present case has gone wrong in its finding that there is arbitrariness and unreasonableness on the part of the appellants herein in increasing the cost of the houses/flats and the rate of monthly instalments and giving top, directions in the writ petitions as prayed for.”

(26) In *Kerala State Electricity Board's* case (*supra*), the contract, in respect of which the writ petition was filed, related construction of a Dam for generation of electricity. The Court observed that 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. It was held that the contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India.

(27) The judgments referred to by the learned counsel for the petitioner i.e K.N. Guruswamy's case; Smt. Gunwant Kaur's case; Century Spinning and Manufacturing Co. Ltd.'s case and Gurjarat State Financial Corporation's case, do not relate to issuance of a writ in the cases of breach of contract but deals with the either rule of promissory estoppel or power of the Court to issue prerogative writs etc. and thus

not helpful to examine the issues raised. In Indian Oil Corporation Ltd's case again the dispute arose out of the proceedings under the Arbitration and Conciliation Act and the same does not deal with the jurisdiction and scope of the powers of the Writ Court in exercising the powers under Article 226 of the Constitution of India. In **Whirlpool Corporation's** case (*supra*), the writ petition challenging the show cause for cancellation of certificate of registration of trade mark. In **Modern Steel Industries'** case (*supra*), the challenge was to the recovery of minimum guarantee charges by issuing revenue recovery certificate. The Hon'ble Supreme Court set aside the order passed by the High Court relegating the appellant to seek remedy by way of arbitration. The issue raised and decided is not in the context of violation of contract in public or private law.

(28) In **South Kheri's case** (*supra*), the Divisional Forest Officer passed an order to rescind an order passed by an Officer duly authorized. The High Court found that the order was passed by the Divisional Forest Officer on erroneous considerations. The Hon'ble Supreme Court dismissed the appeal, inter-alia, for the reason that the Divisional Forest Officer did not give any hearing before passing the order.

(29) In **ABL International Limited's case** (*supra*), the writ petition was filed for the failure of the first respondent to adhere to the contract of insurance. Though the writ petition was allowed by the learned Single Bench of the High Court, but the Letters Patent Bench set aside the order and held that the disputed questions of facts cannot be adjudicated upon in the writ proceedings. The Supreme Court held that though normally a petition involving serious disputed questions of facts will not be entertained in exercise of the jurisdiction under Article 226 of the Constitution of India, but it does not lay down an absolute rule that in all cases involving the disputed questions of fact, the parties should be relegated to a civil suit. The Court observed as under:-

“23. It is clear from the above observations of this Court, once State or an instrumentality of State is a party to the contract, it as 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 above said requirement of Article 14 then we have no hesitation that a

writ court can issue suitable directions to set right the arbitrary actions of the first respondent....”

(30) In *Shrilekha Vidyarthi (Kumari) versus State of U.P.*²³, the Court observed that 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. It was further held that 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.

(31) The judgment in *Harbanslal Sahnia's case (supra)*, is on the similar lines, wherein the three tests i.e., (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act, were delineated.

(32) The Constitution Bench judgment in *LIC versus Escorts Ltd.*²⁴, has held that Article 14 cannot be a charter for judicial review of State actions and to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. It was held that the Court will examine the actions of the State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The Court held to the following effect:-

“101. ... While we do not for a moment doubt that every action of the State or an instrumentality of the State must be informed by reason and that, in appropriate cases, actions

²³ (1991) 1 SCC 212

²⁴ (1986) 1 SCC 264

uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution, we do not construe Article 14 as a charter for judicial review of State actions and to call upon the State to account for its actions in its manifold activities by stating reasons for such actions.

102. If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances.”

(33) In *LIC versus Consumer Education & Research Centre*,²⁵ the Court observed that 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 Court observed as under:-

- “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

²⁵ (1995) 5 SCC 482

activity, scope and nature of the controversy. The distinction between public law and private law remedy has now become too thin and practicably obliterated.”

(34) The reading of the aforesaid judgments would lead to the conclusion that the powers of the Writ Court are plenary in nature and in exercise of such power, the Court can embark an inquiry into the disputed questions of facts as well, but whether such powers should be exercised or not is one of the discretion. The Power of judicial review in the matter of awarding contract conferred by Article 14 is wide, which enjoins the public authority to act fairly, reasonably by excluding irrationality and arbitrariness. But the power of judicial review in a concluded contract is limited and is not all pervasive as in the matter of awarding of contract. The Writ Court in exercise of judicial review can intervene even in respect of concluded contracts if the contract is statutory contract or there is a public law element in it.

(35) The contract for construction of dam as in *Kerala State Electricity Board's case* (*supra*) and administrative and commercial building of the Municipalities as *G.B. Mahajan's case* (*supra*), have been held to be not involving any public law element. On the same analogy, the contract of erection of Municipal Solid Waste Management Plant would not be a contract involving public law element in it

(36) In the present case, the Corporation terminated the contract on 28.05.2010 to set up municipal solid waste management plant. On the same day, the Corporation also served a show cause notice for cancellation of the lease of the land on which such plant was to set up by the Petitioner in the second petition. The possession of the land leased was never given to the Petitioner. The Lease stands cancelled after passing a speaking order. There is no challenge to the said cancellation of lease of the land on which the Solid Waste Management Plant was to be erected. Therefore, the argument that the contract has been terminated without serving any show cause notice is only academic.

(37) The contract is to set up municipal solid waste management plant, an obligation cast on the Municipal Corporation under a Statute and also part of its functioning to provide clean and hygienic living conditions to the residents within the limits of Municipal Corporation. The first writ petition to seek shifting of dumping ground is pending before this Court since the year 2006. The contract awarded to the

Petitioner in the second petition could not take off for the reason that the Petitioner insisted on possession of land without obtaining authorization under the Rules. We have already found that such authorization is mandatory.

(38) The right to seek an opportunity of hearing before cancellation of the contract, even when the possession of the land was not delivered and in the absence of challenge to such cancellation, disentitles the petitioner to any indulgence of this court in the matter of alleged breach of contract. For the reasons recorded above, we do not find any merit in the second writ petition (CWP No.12188 of 2010), which is hereby dismissed.

(39) The larger public interest warrants that the Corporation should be directed to award contract to a person who is ready to comply with the terms of the Rules and set up plant without any further delay. Therefore, the first writ petition (CWP No.2032 of 2006) is allowed with the following directions:-

1. The Corporation shall award contract to set up Municipal Solid Waste Management Plant within six months from today.
2. The Municipal Corporation shall apply for authorization in respect of its site at Bhagtanwala, but the grant of such authorization shall not be a condition precedent for awarding contract to set up Municipal Solid Waste Management Plant.
3. The successful contractor shall be bound to obtain permission or to carry forward the request of the Municipal Corporation to obtain authorization from the stage, it may be pending at the time of grant of Contract.
4. Till such time, the contract is awarded, the Corporation shall make all efforts to keep the Municipal Limits free from garbage and ensure its disposal so as to minimize the hazards which the residents may suffer.

M.Jain