(2006) 02 CAL CK 0006

Calcutta High Court

Case No: G.A. No. 3256 of 2005, APOT No. 646 of 2005 With W.P. No. 1922 of 2005

Coal India Ltd		APPELLANT
	Vs	
Indian Explosive Ltd. and Others		RESPONDENT

Date of Decision: Feb. 21, 2006

Acts Referred:

- Constitution of India, 1950 - Article 12, 14, 226, 298, 32
- Contract Act, 1872 - Section 10, 13, 14

Citation: (2006) 3 CHN 433 : (2006) 1 ILR (Cal) 215

Hon'ble Judges: V.S. Sirpurkar, C.J; Arun Kumar Mitra, J

Bench: Division Bench

Advocate: P.C. Sen, P.K. Mallick and K. Mondal, for the Appellant; S.S. Ray, S. Ghosh, Public Prosecutor Banerjee, Rajesh Upadhyay and Pranab Kumar Dutta, for the Respondent

Final Decision: Allowed

Judgement

V.S. Sirpurkar, C.J.
The judgment will dispose of the following four appeals, they being APOT No. 646 of 2005, APOT No. 647 of 2005, APQT No. 648 of 2005 and APOT No. 649 of 2005. The questions of law and the issues involved in these appeals are almost identical. All the above appeals are filed by Coal India Limited, which is a company registered under the Companies Act, 1956 and being the Government company, is a State. In all these appeals, the interim orders passed by the learned Single Judge of this Court in writ petitions filed by the respondent explosive companies are impugned. By that order, the learned Single Judge has issued an injunction restraining the Coal India from incorporating a supplementary clause in the principal contract. The following factual matrix would be necessary to appreciate the" controversies and the issues involved.

2. Appellant Coal India Limited owns and operates coal mines. All the coal mines were nationalized by Coal Mines Nationalization Act and that is how, the private ownership of

the coal mines was brought to an end. Blasting is a necessary operation for excavating coal from the mines and for that Coal India needs explosives from the manufacturers. The respondent explosive companies in all the four appeals are the manufacturers of the explosives. Coal India . procures the explosives through a process of floating tender whereby offers are invited from the various manufacturers of explosives. One such tender notice was floated on 11th January, 2005 inviting offers for supply of bulk loading explosives, cartidge explosives and initiating accessories to the various units of Coal India for the period of 2005-2006. The respondent explosive companies took part in the tender process individually and all the respondent explosive companies were the successful tenders. Negotiations took place in respect of the price offered by these respondent explosive companies and ultimately formal contract was entered into by and between the appellant Coal India on one hand and the respondent explosive companies of the other. For the sake of convenience, we shall be referring to the facts from APOT No. 646 of 2005 wherein the respondent No. 1, Indian Explosive Ltd. is involved. It seems that formal contracts were entered into and on the basis of the same, the supplies of the bulk explosives began and the explosive companies also raised the bills. Even some part payment of the bills were made by the Coal India. A communication dated 5.8.2005 was addressed by Coal India. By this communication, the Chief General Manager of Coal India intimated that one supplementary clause was incorporated to clause XV (Performance Clause) of the subject contract. The proposed supplementary clause was as under :

The weighted average powder Factor, separately for Coal and OB for 10 (ten) years commencing from 2004-05 to 1995-96 and that of 2004-05 shall be worked out mine-wise. The higher of weighted average Powder Factor for 10 (ten) years (from 2004-05 to 1995-96) and that of 2004-05 shall be hereinafter referred to as the minimum yield.

The mine-wise achievement of Powder Factor should not be less than the minimum yield referred to above. For every 1% (one per cent) or part thereof decrease in Powder Factor of Coal/OB compared to the minimum yield as above, commensurate deduction of the cost of explosives and accessories shall be made. Such computation for deduction shall be made on monthly basis.

It was also informed that the said supplementary clause would have the retrospective effect from 01.03.2005.

3. Clause XV to which the aforementioned clause was to be added as a supplementary clause is to be found in the running contract which was accepted by the letter of Coal India dated 18.05.2005. By that letter the offers of the explosive companies were accepted and the terms of the running contract for supply of bulk loading explosives were set out. In the said letter, the following are mentioned as the references :

(1) CIL Tender No. CIL/C2D/Sec.II/Bulk Loading Explosives/2005-06/26 dtd. 11.01.2005 and opened on 12.02.2005.

(2) Offer No. Bulk Loading Explosives/IEL/TS/2005-06/02 dated 12.02.2005.

(3) The letter dtd. 11.04.2005 and subsequent correspondence, discussions and negotiations.

4. The clause XV to which the aforementioned supplementary clause was to be added appears to be as under :

CLAUSE XVï¿½PERFORMANCE

1(A) Review of your product performance will be made on the basis of fragmentation/muck piling costs per Cu.M. and capacity improvement achieved for the total system. In the event of your product not providing satisfactory results mutually agreed upon, proportionate reduction in prices for the products which failed will be made.

You are to provide optimum blast design for each mine bench wise and render all related including provisioning of vibration monitoring.

In the event of failure of blast, the cost of explosives used in the blast and all other incidental charges will be recovered from you.

(B) If there is a complaint for low powder factor, you must be penalized/ supply restricted for continuous poor performance. The management of the respective subsidiary companies would then divert the balance quantity (supposed to be allotted to you and there is a product complaint for low powder factor etc. against your past supplies) to the other manufacturers (on pro rata basis) whose products are having better powder factor. This diversion of quantities due to poor product performance should be made with the approval of D(T) of concerned subsidiary companies.

2. The limits of velocity of detonation, density and cap/booster sensitivity which will govern at the time of random testing of the products ordered on you are indicated below :

SI.	Particulars of Test to be conducted		Limits of Ranges	
			Emulsion	Slurry
1.	Velocity of Detonation (m/sec.)	Fresh Sample	4000+/-500	3800+A500
		After sleepage in water (24 hrs.)	4000+/-500	3800+/-
2.	Density (gm/cc)	Fresh Sample	1.15+/-0.05	1.15+/-
		After sleepage in water (24 hrs.)	1.15+/-0.05	1.15+/

3.	Cap/Booster Sensitivity	Fresh Sample	Sample should fire 100 gm Cast Booster
		After sleepage in water (24 hrs.)	Sample should fire 100 gm Cast Booster

5. The explosive companies took exception to this clause as according to them, the Coal India was seeking to alter a condition of the contract after the contract had been concluded and had progressed for a considerable length of time. Further, according to them, there could be no such supplementary clause included as the contract was to be governed by the NIT documents and the clauses in the running contract only. Further by adding the supplementary clause to the original contract amounted to an arbitrary action on the part of Coal India. The action was dubbed as malicious action and an exception was raised that the Coal India was unilaterally altering the terms and conditions after the parties had entered into firm contract. On these grounds and various other grounds, four individual petitions were filed on behalf of the four explosive companies.

6. Those petitions initially did hot find favour with the learned Single Judge of this Court. The said petitions were, therefore, permitted to be withdrawn. However, a liberty was granted to file fresh petitions. This was not objected to by the Coal India. Four fresh writ petitions then came to be filed again. In case of Indian Explosive Ltd."s petition, the only addition was paragraph 27 to the writ petition. The rest of the contents of the petition remained as they were in the earlier writ petitions. The learned Single Judge has passed the interim orders in all the four petitions granting the injunction in the terms which we have stated above. These interim orders are the subject-matter of the present appeals.

7. Sri Sen, senior Advocate and Sri Mallick, senior Advocate argued on behalf of the Coal India while Sri S. S. Ray, senior Advocate argued for the explosive companies in addition to Sri Dutta and Sri Banerjee,

8. Sri Sen and Sri Mallick firstly took serious objections to the tenability of these writ petitions. According to both the learned senior Counsels, present contracts were non-statutory contracts. Admittedly, the contracts were already entered into by both the parties and they were being worked also. According to the learned Counsel, the exercise on the part of Coal India in introducing a supplementary clause to the original Clause XV was nothing but a clarification of the expression "powder factor". According to the learned Counsel, the supplementary clause did not, in any manner, alter or change the contract but was in the nature of specie emanating from Clause XV which could be termed as a general clause.

8.1. The further contention is that, at any rate, if the petitioners felt aggrieved by the introduction of the supplementary clause and if their case was that the supplementary clause would amount to the alteration of contract, then the proper remedy for the petitioners was by way of civil suits and not by way of writ petitions. The further argument

is that in order to succeed in the writ petitions, the petitioners would have to establish that the supplementary clause introduced amounts to alteration of contract and for that purpose, the Court would have to interpret the original Clause XV to examine as to whether the supplementary clause is a natural fall out from Clause XV or amounts to alteration of the Clause XV in particular and contract in general. According to the learned Counsel for this, evidence would be required and findings would have to be given on the factual questions. The learned Counsel, therefore, suggests that this cannot be done in a writ petition under Article 226 and, therefore, the learned Judge had committed an error of jurisdiction in firstly entertaining a writ petition and secondly, passing an order granting injunction.

8.2. The learned Counsel further supplement their argument by suggesting that the only change introduced in the second set of writ petitions was to give an estimated loss which the petitioners would have suffered on account of the introduction of the supplementary clause. The learned Counsel point out that firstly such apprehension was baseless and in order to establish their claim essentially the evidence would have to be led by the parties and, therefore, such writ petition could not be entertained. The learned Counsel further highlighted that firstly being a non-statutory contract, there was no public law element involved in the same. So also there could be no question of any arbitrariness on the part of Coal India which was merely clarifying the method of measuring the powder factor and explaining as what has to happen and in what manner the powder factor would be measured if it was found that the bulk explosives supplied by these companies did not come up to the expected standards. The learned Counsel pointed out that even for this, the evidence would be required to be led before the Court which was not possible in the Constitutional jurisdiction under Article 226. The learned Counsel, therefore, prayed that under the appellate powers, the orders passed by the learned Single Judge be stayed altogether or set aside.

9. As against this, the learned Counsel for the explosive companies, Sri Ray, urged that this undoubtedly was a concluded contract on the basis of firm price. According to the learned Counsel this being a bilateral exercise, the Coal India which was also a State within Article 12 could not introduce an entirely new clause which would change the terms of the contract and such exercise on the part of Coal India would be arbitrary in nature. The learned Counsel suggests that Coal India as a State had to be fair even in the contractual obligations of the contract to which Coal India is a party. According to the learned Counsel, the introduction of a supplementary clause was nothing but unilateraly changing the terms of the contract which was nothing but an arbitrary exercise on the part of Coal India and hence, the Court was justified in entertaining the writ petitions.

9.1. The further contention is that the only question which would be required to be decided by the Court would be as to whether the introduction of the supplementary clause would amount to alteration of contract and for that purpose, there was no necessity of leading any evidence or going to the facts and as such, the aggrieved party like the explosive companies could approach the High Court. The learned Counsel argued that

the supplementary clause was a unilateral declaration by Coal India and in the absence of any agreement, would amount to a unilateral variation in the contract. It was urged that since Coal India is a State, there would be a public law element involved in the matter particularly, where the State is acting in an unreasonable, arbitrary and capricious manner by unilaterally introducing a supplementary clause,

10. Sri Banerjee arguing on behalf of one of the petitioners took an exception to the tenability of the writ appeals on various technical grounds. Sri Dutta also adopted the argument of Sri Ray and in addition, contended that a unilateral exercise of power by Coal India in introducing a supplementary clause was permissible and challenge to the same could always be entertained by the High Court. It was also argued by Sri Dutta that such an introduction of the supplementary clause amounted to a punishment and that could not have been done unless the respondent explosive companies were heard by the appellant Coal India. He also explained the significance of the terms like "powder factor" and "surface mining" in order to explain as to what was the precise change brought about in the terms of the contract.

11. Broadly speaking, three main issues which would require our consideration on the basis of contentions raised by the parties would be.

(1) as to whether the Coal India could unilaterally introduce a supplementary clause to Clause XV of the contract and what is the effect thereof on the inter se contractual relations between the parties.

(2) whether the issue of unilateral introduction of the supplementary clause fell within the realm of public law and whether such action could be said to be arbitrary and contrary to the principles of Article 14, and

(3) whether the respondent explosive companies could challenge the said action of introducing the supplementary clause by filing a writ petition and whether the learned Single Judge was right in entertaining the writ petition and further granting an injunction against the appellant Coal India.

12. A lengthy debate ensued on all the three questions which are interlinked with each other.

13. The learned Counsel for the appellant initiated the debate by first questioning the tenability of the writ petition. The contention raised is that firstly this was a non-statutory contract in between the parties. The further argument is that in the writ petition, one of the contentions raised is that the addition of supplementary clause amounts to a material alteration or variation of contract whereas according to the appellant, it was merely in the nature of a clarification. The learned Counsel argued that this question as to whether the supplementary clause was a mere clarification or amounted to material alteration or variation depended upon the interpretation of Clause XV of the contract dated 18.05.2005 and as such, the Writ Court could not be asked to interpret the Clause XV or, as the case

may be, the supplementary clause because that would be the task of the Civil Court alone. It was pointed out that being a non-statutory contract, it was purely within the realm of private law and as such, it was outside the writ jurisdiction. The argument was further buttressed by suggesting that in order to consider the true impact and interpretation of Clause XV and further to examine as to what would be the effect of the introduction of the supplementary clause, evidence would be required to be led by the parties. The learned Counsel further argued that in the writ petition the appellant was being held liable for breach of contractual obligations and not regarding any public function. The learned Counsel further argued that there was no question whatsoever of the breach of Article 14 merely because the appellant was the State within the meaning of Article 12. Its action of introducing a new clause could at best be deemed to be a breach of contract and such breach would essentially have to be established by the writ petitioners by leading evidence, without which the finding of breach of contract was not possible. The learned Counsel relying on number of Supreme Court judgments also suggested that the law is now settled down by the Apex Court and the Supreme Court which discourages the user of this Constitutional jurisdiction under Article 226, particularly where the complaint against the State was regarding the breach of the contract of a non-statutory nature.

14. There can be no dispute and indeed, it was not disputed that this was a non-statutory contract where the explosive companies had contracted to supply the explosive material for enabling the blasting in the mines. The terms of the contract which were to be found in the Notice Inviting Tender (NIT) and the communication dated 18.05.2005 do suggest that the contract was merely for the purpose of supplying of the blasting material. The Coal India runs about 500 mines and has been using such material which is supplied by the explosive companies. Therefore, it was a simple contract of material supply for which the tenderers were entitled to be paid for the material supplied by them. This is, therefore, a case of purely non-statutory contract depending upon the terms agreed to in between the parties.

15. The further contention of Mr. Sen and Mr. Mallick is that there is no public law element in the present contract. The parties were very seriously at issue on this aspect. According to Sri Sen, this contract was a simple contract for supply of materials though that supply was to be made to the State. The learned Counsel argues that, that by itself does not bring it into the reach of public law as otherwise every contract to which State. Corporation or any authority is a party, would automatically involve a public law element. Sri Sen particularly invited our attention to the ruling Life Insurance Corporation of India Vs. Escorts Ltd. and Others, , where the Supreme Court had clearly held that the action of the State related to the contractual obligations was not to be ordinarily examined by the Court unless such action had some public law character attached to it. Therein the Court had further expressed the difficulty involved in demarcating the public law domain and private law field and had further ordered that the question must be decided in each case with reference to the particular action. It was further held therein that where the State assurnes itself the ordinary role its rights and liability should be tested as an ordinary

contracting party.

15.1 Sri sen also relied heavily on the other cases, namely State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., , Orissa Agro Industries Corporation Ltd. and Others Vs. Bharati Industries and Others, , Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, , National Highway Authority of India Vs. Ganga Enterprises and Another, , National Highway Authority of India v. Ganga Enterprises etc. The learned Counsel pointed out that in all these cases, the Supreme Court had discouraged the user of Article 226 for resolving the issues arising from the contract between the State on one side and the private individuals on the other and particularly, where such contracts were non-statutory contracts having no public law element in them. The principle of law which emerges from all these decisions is that where the State is one of the parties to the contract which is of a non-statutory nature and further where there is no public law element involved, there would be no question of issuing any writ or order under Article 226 so as to compel the State to remedy a breach of contract pure and simple. It is indeed true that in the case of National Highway Authority of India and Orissa Agro Industries cited supra, the language of the Court is very imperative. In Orissa Agro Industries" case, the Supreme Court in paragraph 13 held:

The third category indicated is where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract and in exercise of executive power of the State. The present case is covered by the said category. No writ order can be issued under Article 226 to compel the authorities to remedy a breach of contract, pure and simple.

15.2. So also in paragraph 6 in National Highway Authority of India"s case cited supra, the supreme Court quotes :

It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, ; State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., and Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, . This is settled law.

16. The Division Bench decision of our Court reported in 2005(3) CLT 196 , Director of Supply and Disposals and Anr. v. Vijay Shree Limited and Ors. where one of us was a party has also taken the same view. In that decision, the decision of the Supreme Court reported in ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, . was noted and discussed. Particularly the observations made in paragraphs 27 and 28 of the ABL International Ltd. "s case were relied upon to hold that the jurisdiction under Article 226 was plenary but the Court itself has imposed upon itself certain restrictions and this jurisdiction would not normally be exercised to the exclusion of the other available remedies unless the action of the State or its

instrumentality is arbitrary and unreasonable so as to violate the Constitutional manadate of Article 14 or for other valid and legitimate reasons for which the Court thinks it necessary to exercise the jurisdiction. Undoubtedly therein, the Division Bench observed that though the writ petition was not absolutely barred in the matters of non-statutory contract with the State, the factual situation has to be tested to see whether the writ petition should be entertained at all as there is a lot of differences between the two concepts of tenability of the petition and the propriety to entertain the same.

17. As against these cases, Sri Ray argued that none of these cases applied to the present controversy as the question of public law element was not discussed in any one of them. According to Sri Ray, even where the contract was non-statutory but if public element is involved and it is shown that the State has acted arbitrarily, the writ petition would He. Sri Ray very heavily relied upon the case reported in Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, and the observations at page 1036 as also on the other case in Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, , particularly on paragraphs 22,23 and 24. Relying on the later case, Sri Ray invited our attention to the observations that there is a difference in the contracts between private parties and contracts to which the State is a party in the sense that while in the former only the personal interests are involved but in the later, the State must act for public good while exercising its powers and discharging its functions. The learned Counsel argued that where the State action is found to be arbitrary, unfair or unreasonable merely because the dispute fell within the domain of contractual obligations, the State could not be relieved of its obligations to comply with the basic requirement of Article 14. Our attention was invited to the following observations :

The State cannot be attributed the split personality of D. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off is garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it.

17.1. The learned Counsel also invited our attention to the decision of Mahabir Auto''s case (supra). Our attention was also invited to the following observations:

It is well-settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, action uniformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution....

The State acts in his executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of Constitution would be applicable to those exercises of power.... We are of the opinion that decision of the State Public Authority under Article 298 of the Constitution, is an administrative decision and

can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field.

18. As regards the case of Mahabir Auto, it appears to us the decision applied in the matters of entering into or not entering into the contracts. In fact, there are clear-cut observations to that effect in a much as Their Lordships "The State acts in its executive power under Article 298 of the Constitution in entering 0r not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises power." Again further the Court has observed in the same para. "In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and can be taken only upon lawful and relevant consideration.... Where there is arbitrariness in State action of this type of entering into contracts. Article 14 springs up and judicial review strikes such an action down.

19. From these observations, it is clear that in the case of Mahabir Auto, the applicability of Article 14 and the requirement of the State action being reasonable were restricted to the matters of entering and not entering into the contract. We are, therefore, not impressed by the argument of Sri Ray when lie relies on this case to suggest that even later on when the contract was being worked out, as is the present case, the action of the State must answer the acid test of Article 14. We hasten to add that we do not mean to say that the State, once it has entered into the contract, has a license to take some unreasonable, arbitrary action. That situation has already been clarified in Shrilekha Vidyarthi"s case that the State cannot have a dual role of Dr. Jekyll and Mr. Hyde, one at the time of entering into the contract and quite another thereafter. What appears to be the principle is that State should act reasonably and in a non-arbitrary manner. However, the further question would be as to whether in the matter of a non-statutory contract where no public law element is available, whether the actions of the State could be questioned by way of a writ petition. In our opinion, in Shrilekha Vidyarthi"s case, the whole thrust is On the public law element. Therefore, even if the contract is non-statutory it there is a public law element in the same, the State action can be assalied if it is unreasonable and arbitrary. However as was expressed in LIC of India"s case (supra), such public law element would have to be found out on the basis pf the facts of that case. In Shrilekha Vidyarthi"s case, such public law element was actually found out and the clear finding to that effect is to be found in the judgement. The questions is whether such public law element was there in the present contract.

20. We have seen the NIT as well as the document dated 18.5.2005 very carefully. We do not see any public law element in contract which is of a simple nature of supplies of materials, in this case the explosives. The contract clearly suggests via Clause XV that where explosive material supplied for blasting is not potent enough so as to give the proper results of blasting, the supplier would be punished. A plain reading of the supplementary clause suggests as to how the Coal India would take the action of

punishment. We do not want to comment at this stage on the true interpretation of Clause XV or the supplementary clause because that is not our task and indeed, it is settled law now that the interpretation of the clauses in contract particularly which depends upon the evidence, shall not be done in a writ petition under Article 226. What we want to point out is that the contract affects only the contracting company on one hand and the Coal India on the other. The contract is simple that the explosive companies have to supply the explosive material of sufficient potency for effecting the blasting in the coal mines of the appellant Coal India. It further provides the manner in which the supplies would be made and the manner in which the consideration would be paid to the explosive companies. If the materials are not potent enough, the Coal India has reserved to itself the right to punish the explosive company whose material is found to be wanting in potency. There can therefore, be no question of any public law element being involved in the whole affair. It is a simple and pure contract of supply of materials. It only assures to the Coal India the regular supply of proper material, that is the explosives in this case. Now merely because the mines are nationalized under the Coal Mines (Nationalisation) Act, 1973 and that is how, they go under the management and ownership of Coal India, there would be no question of any public law being involved or public good being involved. Sri Banerjee tried to rely on the preamble of the Coal Mines (Nationalisation) Act to suggest that these supplies were for better administration and better yield from the coal mines and since the coal is being consumed by the public, there would be a public law element involved. We do not agree. In that way, all the contracts would be in the realm of public law as practically all the contracts can be attributed to some or the other enactment. If what is argued by Sri Banerjee is accepted, then each contract entered into by Coal India on one side would attract public law element. Such is not the import of public law element. In Shrilekha Vidyarthi"s case, what was found that all the Government Pleaders working in the State were relieved of their job on the change of the Government. In paragraph 14 there is a clear reference to be found to the public element:

There can be no doubt that this function of the Public Prosecutor relates to a public purpose entrusting him with the responsibility of so acting only in the interest of administration of justice. In the case of Public Prosecutors, this additional public element flowing from statutory provisions in the Code of Criminal Procedure undoubtedly, invest the Public Prosecutors with the attribute of holder of a public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it.

20.1. The whole decision is on the backdrop of this element though undoubtedly some observations are to be found in paragraph 20. They are1 to the following effect:

We have no hesitation in saying that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14, does not undergo such a radical change after making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirements of Article 14 and contractual obligations are alien concepts, which cannot co-exist.

20.2. Again in paragraph 22, the Court has noted the difference between the private parties and contracts to which State is a party. It is suggested :

The State while exercising its powers and discharging its functions, acts indubitably as it expects 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 a minimum requirement of the public law obligations and impress with this character the contracts made by the State or its instrumentality.

20.3. The Court further observed :

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 then-rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation in of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto

(Emphasis supplied)

21. A plain reading of these observations would suggest that firstly the judicial review in respect of the disputes falling within the domain of contractual obligation is more limited and that in the doubtful cases, the Courts would be justified in relegating the parties to remedies provided for adjudication of purely contractual disputes, that is Civil Courts. Secondly, in order to entertain a writ petition, there has to be evidence of arbitrariness, unfairness or unreasonableness and in addition to that, even if the dispute falls within the contractual obligation, the State still must meet the challenge on the basis of Article 14. Thus even in the above decision, it is not provided that every dispute where State is a party can be resolved by way of a writ petition. The approach, in Our opinion, is undoubtedly a limited approach. It would have to be established that the State action is arbitrary and violative of Article 14. We have also already shown that there is absolutely no public element covered in this contract in the sense that it was going to affect the general public in any manner or for that matter, the contract does not even concern the general public. We could Coal India Ltd. v. Indian Explosive Ltd. have understood if the contract had the effect of affecting the labourers or the workers of Coal India or was, in some way, connected to their welfare or otherwise in any manner. However, that is not the case. The basic cause of the writ petition is to avoid some estimated loss because of the introduction of the supplementary clause. This loss is only to the company. It does not affect the general public or for that matter, even any employee. It is, therefore, a purely contractual matter.

21.1. The Constitution Bench verdict in the case of Life Insurance Corporation of India v. Escort. Ltd. and Ors. (supra), would clearly suggest that there has to be a public law domain for testing the State action even on the anvil of Article 14 in the matter of contracts. We rely on the following observations in paragraph 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 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.

21.2. Further observations in paragraph 102 are more telling. They are :

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. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the company, like any other shareholder.

22. There is no doubt that this case has been commented upon in number of other Supreme Court and High Court decisions. The essential principles falling out from the case have remained unchanged and unaffected. We have, therefore, ventured to examine in the peculiar facts of this case as to whether there was any public law element to be found in this contract and we have failed to find any.

23. We hasten to add at this juncture that all that had happened after the withdrawal of the writ petitions in the first round was addition of paragraph

27 wherein some estimated losses were highlighted. Now, what was the basis of such estimates would also have to be proved by leading evidence. Therefore, if the introduction of the supplementary clause could result into some monetary loss to one of the contracting parties, would that action by itself be arbitrary, unreasonable or unfair, is a question to be answered. In our opinion, even if the petitioners'' case is to be accepted in

full, this case would not go beyond a doubtful case as referred to in paragraph 22 in Shrilekha Vidyarthi"s case and would, therefore, have to be sent for adjudication before a proper forum.

24. However, the further contention of Sri Ray, Sri Dutta and Sri Banerjee is that the act of unilaterally adding a supplementary clause would by itself amount to an arbitrary action on the part of the State. We do not think so because whether the supplementary clause could be culled out from the original Clause XV would depend upon the true meaning and interpretation of original Clause XV. In short, in order to substantiate their contentions, the writ petitioners would have to show that the supplementary clause amounts to a variation of a contract. As against this, the contention raised by the appellant Coal India is that the said supplementary clause is nothing but a natural fall out from the clause XV and it is nothing but a clarification of Clause XV which provided for the punishment for the supply of explosives of unsatisfactory potency. Again in order to decide this issue, the parties would necessarily have to lead evidence. The Coal India could lead the evidence to the effect that such action as covered in supplementary clause was always understood between the parties or was even the subject of negotiations or that even in the other contracts, such clause was a part and parcel of the original contract. There could be number of other contentions raised in support of the clause. In short, merely because the clause was introduced by the Coal India, would that by itself raise the question of arbitrariness, unreasonableness or unfairness, is a question which cannot be answered particularly because everything would depend upon the true scope and interpretation of Clause XV and the supplementary clause which task cannot be done in a writ petition.

25. We have not been shown any judgment to suggest that any unilateral change or variation in the contract by itself become an arbitrary exercise on the part of the State. The whole argument of Sri Ray, Sri Dutta and Sri Banerjee revolved round this very concept of unreasonableness and arbitrariness due to the action on the part of Coal India of introducing the clause. Good deal of arguments were directed on the question as to whether the added clause was clarificatory or explanatory and/or amounted to the unreasonable and arbitrary change in the contract. It is obvious that if on the correct interpretation of Clause XV it is established that the supplementary clause is a natural fall out and not a variation thereof, there would be no question of the State action adding that clause being arbitrary.

26. In our opinion, it would be futile for us to go to that question for the reasons stated above and we would not allow ourselves to be dragged in that controversy particularly because in order to decide that, the evidence would be required. Sri Sen and Sri Mallick took us through the principles of contract and referred to the number of passages from Mulla and Chitty on Contracts. Similarly, it was vociferously argued by Sri Ray that the change in contract was an arbitrary action since it was unilateral and without meeting of minds. Sri Ray relied on the decision in Tata Cellular Vs. Union of India, . He urged that the action on the part of introducing this clause was fraught with illegality, irrationality as also the procedural impropriety. In our opinion, the reference to this case is unnecessary.

On facts this case was obviously different. This did not pertain to a contract which was already a working contract. On the other hand, this was about the acceptance or rejection of the tender. Now whether in this-case the introduction of the clause was illegal, irrational or was hit by the Wednesbury Principles cannot certainly be decided without the parties leading evidence. Such was not the case in Tata Cellular (supra). There could be no question of the principles laid down in respect of the reasonableness and the tests to find the State action. However, in the circumstances of this particular case, it is difficult to straightaway dub the action as unreasonable, arbitrary or unfair. At any rate, the petitioners would not be without a remedy, but writ petition is certainly not that remedy.

27. For suggesting that the Coal India could not have added the supplementary clause. Sections 10, 13 and 14 of the Contract Act were relied upon by Sri Ray as also the three reported decisions, they being Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas and Co. and Others, and Citi Bank N.A. Vs. Standard Chartered Bank and Others, The reliance was on the observations made to the effect that the novation, rescission and alteration of the contract can be done only with the agreement of the parties and not unilaterally. There can be no difficulties about the observations of the Supreme Court in para 47. However, in our opinion, the authority does not say anywhere that a unilateral addition of a clause by itself becomes an arbitrary action attracting Article 14.

28. Similar is the case in Bhagwandas Goverdhandas (supra), where the observations of the Supreme Court speak about the mutuality in the matter of contract contradistinction to the tort. In our opinion, it would be futile to go into the principles of contract as enunciated in paragraphs 6 and 7 of this decision for the simple reason that in this case everything would depend upon the evidence to be led by the parties and that is not the scope of controversy. This decision, therefore, is of no consequence as it does not speak about such action becoming arbitrary or unreasonable.

29. Our attention was also invited to some other cases, like AIR 1940 160 (Privy Council) . to explain as to what would amount to the material alteration as explained in the earlier part of the judgment. We would refuse to go into that question as this introduction of clause amounts to material alteration or is only an explanation of the existing clause for the obvious reason that it would not be our task in a writ petition to interpret the scope of the clause of contract. A reference was also made to a decision reported in State of Madhya Pradesh Vs. Bhailal Bhai and Others, . However, under the circumstances, we do not find that case to be applicable. That is a case on the power of the High Court to grant injunction in case of any threats to the fundamental or statutory rights. Such is not the case here.

30. To sum up, we are of the clear opinion thatï¿½

(1) The controversy in this case emanates from a non-statutory contract purely of private nature in between Coal India and the explosive companies.

(2) There is no public law element involved in the matter and the controversy is purely between the two parties to the contract.

(3) The unilateral" introduction of a clause which is claimed to be of a clarificatory nature and not a variation in the contract cannot by itself become an unreasonable, unfair and arbitrary exercise of power. In fact, the introduction of the clause is not an exercise of the power of Coal India at all. It is purely done in pursuance of the contractual rights of the Coal India. Hence, there will be no question of Article 14 being attracted in any manner.

(4) The question as to whether the Coal India could introduce a supplementary clause would depend upon the correct interpretation of Clause XV and the supplementary clause sought to be added. Such interpretation would have to necessarily depend upon the evidence to be led by the parties and, therefore, it cannot be attempted in a writ petition being a disputed question of fact.

(5) In the light of the above conclusions, the writ-petitions could not have been entertained and the injunction could not have been granted by way of interim orders. The interim orders are, therefore, liable to be set aside and the writ petitions are, therefore, liable to be dismissed.

31. In addition to this, however, it was argued before us that the writ appeals filed by the Coal India are not maintainable under clause 15 of the Letters Patent as it was not a judgment since the learned Single Judge had not decided any rights between the parties. We are unable to agree with this argument. Even if the learned Single Judge has observed that the petitioner could still act upon the added sub-clause to Clause XV and if it could be lawfully done, one thing is certain that the learned Single Judge had passed an injunction against the appellant Coal India for restraining it from incorporating the same in the contract document. Therefore, it cannot be said that no rights are decided upon and the order does not amount to a judgment. We reject the argument regarding the tenability of the writ appeals. It was then submitted that the question regarding the tenability of the writ petitions or propriety of its being entertained was not argued before the learned Single Judge and, therefore, it should not be considered by us. We fail to follow any such argument. We have already shown that the writ petitions should not have been entertained as it involved the disputed questions of fact which could be solved only by leading evidence. Under such circumstances, the entertaining of the writ petitions becomes a question of jurisdiction. Therefore, in our opinion, this question could always be argued in a writ appeal. It could always be further argued that firstly the learned Single Judge should not have entertained the writ petition and, therefore, the learned Judge should not have granted the injunction by way of interim orders. We do not think that such narrow approach could be taken at this stage. It was also tried to be argued that the Court''s power here is limited only to the interim order passed. We do not agree. While considering the correctness or otherwise of the interim orders, the broader question as to whether the writ petitions should have been entertained or not, can always be gone into. We hold accordingly. A ruling was cited for this purpose reported in 2001(1) CHN 649,

Ram Nath Santra and Ors. v. State of West Bengal and Ors. We have gone through the ruling and it is clear from this that there was no jurisdictional question involved. The ruling is, therefore, of no consequence.

32. For all these reasons, we are of the clear opinion that the appeals deserve to be allowed. They are allowed. The interim orders passed by the learned Single Judge are set aside and the writ petitions are directed to be dismissed. No costs.

33. Xerox certified copy of this order may be supplied to the parties on usual undertakings.

Arun Kumar Mitra, J.

34. I agree.

Later;

At this stage, the learned Counsel prays for the stay of the order. In view of the fact that the contract is already running and in further view of the fact that the orders have been set aside, we do not feel any need to stay the judgment at this stage. The request is rejected.