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(2008) 03 BOM CK 0121

Bombay High Court

Case No: Writ Petition No. 1889 of 2007

Vijay Kumar Gupta, Sanjay Transport Service, Well Water Suppliers	APPELLANT
Vs	
State of Maharashtra, School Education and Sports Department, Lirin Roadlines Private Limited and The Hon"ble Minister of Sports, Govt. of Maharashtra, Department of Education, Cultural Affairs and Sports	RESPONDENT

Date of Decision: March 13, 2008

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1
- Constitution of India, 1950 - Article 14, 16, 226, 298, 299

Citation: (2008) 3 ALLMR 240 : (2008) 3 BomCR 593 : (2008) 4 MhLj 370

Hon'ble Judges: Swatanter Kumar, C.J; J.P. Devadhar, J

Bench: Division Bench

Advocate: Ritu Singh, for the Appellant; Shindhu Sreedharan, Assistant Government Pleader for respondent Nos. 1 and 3 and M.S. Singhvi and J.N. Pandhi, for the Respondent

Judgement

Swatanter Kumar, C.J.

Rule. Rule made returnable forthwith. Heard parties.

1. Prelude Vijay Kumar Gupta, sole proprietor of M/s. Sanjay Transport Service, has filed this petition under Article 226 of the Constitution of India challenging the legality, propriety and validity of the contract awarded to M/s. Lirin Roadlines Pvt. Ltd., respondent No. 2, vide Government Resolution No. WPP 2003/CR-177/YSS2 dated 1st September, 2006. This contract, according to the petitioner, has been awarded through private negotiations without inviting tenders and in an arbitrary manner. Such awarding of contract is unconstitutional, violative of principles of governance and contrary to the constitutional mandate contained in Article 299 of the Constitution of India. It denies fair competition amongst similarly placed persons who hold similar qualifications like respondent No. 2 for performing the function to lift water from the Government owned wells and distribute the same at a much higher amount than what has been demanded by respondent No. 1 from respondent No. 2, thus causing huge loss to the exchequer and is colourable exercise of power. Therefore, he has prayed for quashing and setting aside the Government Resolution dated 1st September, 2006.

2. Facts in brief:

2.1 According to the petitioner, there are two wells situated at Azad Maidan, one opposite B.M.C. Building, Mahapalika Marg and the other opposite Metro Cinema, owned by the Government of Maharashtra. The former is a smaller well which has one point for lifting water and has one pump of 5 Horse Power while the latter is a bigger well which has two commercial points and one non-commercial point for lifting water with a capacity of 10 Horse Power each. The larger well has higher water level i.e. 5 to 6 times more capacity than the smaller well.

2.2 On 31st December, 1987, contracts were given to respondent No. 2 and one M/s. Zulekhs Mohd. Lorrywala for a period of 10 years which were to expire on 31st December, 1997. On or about 11th July, 1989, both these concerns were not permitted to fetch water from the well. M/s. Zulekhs Mohd. Lorrywala filed a writ petition in this Court which was dismissed vide order dated 20th August, 1999. Respondent No. 2, thereafter moved City Civil Court and the matter was decided in favour of the said respondent. The City Civil Court permitted the said respondent to continue to fetch water for a term of ten years which was to expire on 30th December, 1997. The said contract in favour of respondent No. 2 was renewed without any reason on 21st December, 1994, three years prior to the expiry date, for a period of ten years which was to expire on 31st December, 2004. The contract in favour of respondent No. 2 was again renewed vide G.R. No. AZM 1080/692 (6) SYS-2 dated 23rd February, 2004, ten months prior to the date of expiry, for a further period of ten years so as to expire in December, 2014. This was communicated vide letter dated 7th June, 2007, to the Deputy Director and amongst others to respondent No. 2. The communication dated 7th June, 2004 reads as under:

GOVERNMENT OF MAHARASHTRA

Urgent G.R. No. WPP-2003/C.R.177/YSS 2

Social Justice, Cultural Programmes,

Sports and Special Assistance

Department, Mantralaya Annex

Bhavan, Mumbai-400 032.

Date: 7th June, 2004.

To

Dy. Director,

Sports & Yuvak Seva,

Mumbai/Nashik Division,

Mumbai.

Sub: Regarding contract of pumping the water from the Govt. Well situated at Azad Maidan, Opp. Metro Cinema.

M/s. Lirin Road Lines Pvt. Ltd., Mumbai.

Ref: (1) G.R. No. AZM-1080/692 (6)/SYS-2 dated 23.2.2004 of this Department.

(2) Your letter No. M.A.D./N. No. 10/LRL/D-7/422, dated 25.3.2004 addressed to Director, Sports and Yuvak Seva, Pune.

With reference to the letter as referred at above reference No. 2 this is to inform you that vide the G.R. As referred in above ref. No. 1 the extension for further 10 years from December, 2004 is given to M/s. Lirin Road Lines Pvt. Ltd., Navroji Hill Road No. 9, Plot No. 8, Dongari, Mumbai-400 009 for drawing off water from Government well situated at Azad Maidan, Near Metro Cinema subject to the terms and conditions of said G.R.

2. As per the provisions of the said Government Resolution execute an agreement with the concerned society on the stamp paper of Rs. 500/- and the government hereby grants approval to the draft prepared by your office with minor changes (copy enclosed).

Sd/

(S.V. Chavan)

Under Secretary, Maharashtra Government.

2.3 In the year 2005, the Minister for School Education and Sports inspected the site at Azad Maidan and found serious irregularities being carried out by respondent No. 2. Respondent No. 2 was unauthorisedly using point "B" of the bigger well which was sealed after the expiry of the term of contract and continued to withdraw water right from January, 1998 to 3rd December, 2005. Vide letter dated 14th September, 2005, notice for termination of contract in favour of respondent No. 2 was issued by the Deputy Director, Sports, Yuvak Seva, Mumbai and after the expiry of the period of two months i.e. 19th November, 2005, the contract was terminated. The Deputy Director is stated to have imposed a penalty of Rs. 9,95,578/- on respondent No. 2 for drawing water unauthorisedly from one extra point for the period from 12th May, 1998 to 3rd December, 2005. The copy of the said letter is at Exhibit-F to the writ petition. Thereafter both the points of bigger well were sealed. Respondent No. 2 then moved the City Civil Court and prayed for an interim injunction against the termination of his contract which was rejected. Respondent No. 2 approached this Court against the rejection of the said application. The appeal filed by respondent No. 2 was also dismissed vide order dated 8th December, 2005, with liberty to move the trial Court for expeditious disposal.

2.4 Despite no injunction had been granted either by the City Civil Court or by this Court in favour of respondent No. 2, the contract was again awarded to respondent No. 2 vide order dated 1st September, 2006. This contract was awarded through private negotiations and without following any procedure for awarding the contract.

2.5 It is specifically averred by the petitioner in the writ petition that tenders had been issued for other two points i.e. Point "A" of the smaller well and point "B" of the bigger well on 25th April, 2007 for a period of three years and the contract has been awarded to M/s. Hans Transport on a payment of Rs. 41,000/- per month for point "A" and to M/s. Saileela Jankalyan on a payment of Rs. 85,000/- per month for point "B" of the bigger well. The contract to respondent No. 2 for point "C" has been awarded for a meagre amount of Rs. 50,000/- per month which is causing huge loss to the State exchequer.

2.6 The petitioner being an interested person had filed various representations to respondent No. 1 on 5th October, 2006, 6th December, 2006 and 3rd April, 2007. Despite such representations and without affording any opportunity to the petitioner of fairly contesting for the allotment of the said points, the petitioner has been compelled to file the present writ petition. The grant/extension of the contract is challenged, inter alia, on the grounds that the contract had been awarded through private negotiation and without inviting tender and that the action of the State Government is wholly unjustified, mala fide and abuse of power by discriminatory action. The State of Maharashtra cannot enter into a private contract by negotiations as it distributes state largess and must follow fair and equitable procedure for allotment of tenders. The State Government had taken a policy decision on 1st December, 2005 that the contract should be awarded by inviting tenders. It will be useful to reproduce the note of the Desk Officer dated 28th December, 2005 and subsequent notings on the subject.

School Education and Sports Dept./KYS-2 Submitted according to the notes on previous page issued by Secretary to Chief Minister:

2. That the contract of drawing off water from the Govt. well situated at Azad Maidan, Op. Metro Cinema was given to M/s. Lirin Roadlines for further 10 years vide the G.R. Dated 23rd February, 2004. However, but when Hon"ble Minister, School Education inspected the said site found some irregularities being carried out by the said contractor and therefore the instructions were issued from the Government level vide letter dated 14.9.2005 issued two months notice to the said contractor as per the act and to terminate the said contract. Pursuant to that Dy. Director, Sports and Yuvaksena, Mumbai, Nashik Division, Mumbai, vide notice dated 19th September, 2005, issued to the said company. And pursuant to the said notice the said contract is terminated on 19.11.2005 and the said company has filed the Civil Suit No. 4984/2005 in the Civil Suit against the said act of termination of the said agreement. Pursuant to the said suit the said contractor further filed Notice of Motion in the same court bearing No. 4290/2005 for stay to the said action of termination of the contract. The said matter is heard from time to time and the Hon"ble Court on 3rd December, 2005, rejected the said application for stay vide its detailed order. Against the said order the Appeal (No. 28050/2005) was filed by the said company in Hon"ble High Court. The said appeal is heard on 8.12.2005 and the said appeal is also rejected. Presently the suit filed by the said company in civil court is pending before the Court. Hon"ble Court has granted time till 31.1.2006 to file the affidavit in the said matter. However, the said company has filed its new application in City Civil Court for early hearing of the said suit and till no decision is taken on the same.

3. At the time of hearing in the Civil and High Court Mumbai the following points were mainly raised for and on behalf of the said society.

1) That the said society has not violated any terms and conditions of the said agreement.

2) The society is using more than one pump since long and now no increase is made in the same by the society and hence there is no breach of term No. 9.

Both the Courts have rejected the said points. Specially the said contract is made between the Government and the Contractors for drawing off the water as the said contract is totally of commercial nature, both the Courts has given their opinion that the action taken for cancelling the said contract by giving the two months notice is proper. In result, therefore, no stay order is granted by the said Courts.

4. Considering the judgment of the court in this matter it is clear that the decision taken by the Court for terminating the said contract is legal. It is further noted that the contract given to the one other contractor (Kurban Lorrywala) is terminated in the year 1998 and the pump which were used by the said contractor were sealed. However, said M/s. Lirin Roadlines used to use the said pump unauthorisely and when the said fact was observed and noticed, notice was issued to the said society calling upon to pay the penalty amount

of Rs. 4,85,48/- for the period of 1998 to 2003 for water drawn off illegally and used the same. Even after repeated notices the said company has not paid the said amount to the government. Possession of the said well is taken back on 3.12.2005 and it is found that till the date of taking back possession the said society has drawn off and used the water by that pump unauthorisedly. And, therefore, the process on the level of Dy. Director is under process to issue notice to the said society to pay the penal amount for the period from 2004-2005.

5. In between one proposal was submitted before Hon''ble Minister, Education and Sports in respect of the wells situated in Mumbai under the jurisdiction of this division and in the said proposal it was decided to conduct survey of water of the wells including the well at Azad Maidan and to invite tenders for the drawing off the water and to grant contract of the same to the high biding contractor. Pursuant to that necessary orders are issued by Dy. Director, Sports and Yuvakseva on 1.12.2005 and this fact has been brought to the notice of Hon''ble High Court at the time of hearings held before Mumbai City Civil Court.

6. Considering the refusal of the Mumbai City Civil Court for granting interim stay order and the judgment of Mumbai High Court passed in the appeal filed against the said refusal, orders given to Director vide letter dated 1.12.2005 for inviting tenders for drawing off water, and the pending suit before City Civil Court it feels that it will not proper to give new contract to said M/s. Lirin Roadlines adding or inserting new terms, and on publishing the tenders in respect of the said well the said company could take part in the same and hence stated that it will not proper to assign the contract of drawing water directly.

Pursuant to the notes given by the Secretary to Chief Minister the said matter be placed before Hon''ble Chief Minister for contemplation. Submitted for approval.

Sd/-

Desk Officer,

28.12.2005.

2.7 The above noting, according to the petitioner, clearly shows that the respondents have acted arbitrarily, discriminatorily and without following its own policy decisions. Respondent No. 2 was a party which had unauthorisedly drawn water from the extra point and had committed breach of the terms of the agreement. It would even otherwise be unjust and unfair to grant the contract to such a party.

3. Stand of Respondents.

3.1 Respondent No. 2 filed a reply affidavit justifying the extension of the contract in their favour. It is denied that the contract at point "C" of bigger well had been awarded for a meagre sum. On the contrary, according to the terms of the contract, respondent No. 2

has to pay Rs. 50,000/- per month and there is provision in the contract for enhancement of the said payment by 10 per cent each year or till the contract is subsisting. According to respondent No. 2, they are drawing water only for 12 hours a day whereas under the previous contracts for the period from 1987 to 1994 and 1994 to 2004 respectively, they were entitled to draw water for all the 24 hours. It is also averred that the tender was invited on 25th April, 2007 in respect of point "B" of the well and the petitioner and respondent No. 2 had submitted their tenders. The bid of the petitioner was rejected as the documents submitted by the petitioner were not in order. In the entire reply, respondent No. 2 has not denied the fact that a penalty of Rs. 9,95,578/- had been imposed upon respondent No. 2 for unauthorisedly drawing the water from one of the wells.

3.2 A separate reply affidavit was filed on behalf of the State where the facts mainly stated by the petitioner have not been disputed. However, it is averred that there had been increase in the State revenue of two and half times than the original rate which was Rs. 20,000/- to Rs. 50,000/- per month now. The Government has imposed various conditions about time limit to lift the water upto 12 hours and restricted the utility of any electric motor pump upto 10 Horse power. The contract is stated to have been extended for a period of ten years vide order dated 23rd February, 2004 where the rent was increased from Rs. 7,200/- to Rs. 20,000/- per month. Pursuant to the show cause notice dated 19th September, 2005, the contract was terminated and the well points were sealed. In paragraph 10 of the reply, it is averred as under:

10. With reference to para 3 (j) of the petition, I say that as already stated hereinabove, the Respondent No. 2 had agitated his rights for the said contract by filing a Civil Suit in the City Civil Court after receipt of the Deputy Director of Sports and Youth Services, Mumbai notice dated 19th September, 2005. The Respondent No. 2 did not secure any interim relief against this Respondent and thereafter he filed an appeal challenging the orders of the Hon''ble City Civil Court in Hon''ble High Court. Taking into consideration the revenue loss due to closure of the site, these respondents have awarded the contract to Respondent No. 2.

In these circumstances, the contract has been awarded to respondent No. 2 as per terms and policy of the Government by increasing the rent and putting restrictions and as such there is no colourable exercise of power by the authorities.

4. Submissions

The learned Counsel appearing for respondent No. 2 has strenuously contended that:

(i) the petitioner had withdrawn the petition before this Court and as such no lis is pending and the court may not pronounce any order;

(ii) the present petition suffers from the defect of delay and laches and, in any case, the petitioner has no locus standi to file this petition before this Court.

(iii) the action of the Government is neither arbitrary nor discriminatory. It is not necessary for the Government to always invite tenders for giving contracts to the public. The Government, in exercise of its discretion, can award private contracts particularly for a limited period even by negotiations. No rule or policy has been violated. The action of the Government being normal and proper, it does not offend any constitutional protection available to the petitioner. The rent for drawal of water has been increased in terms of the agreement.

5. First of all, we may deal with contention 4 (i), whether the Court can dismiss the writ petition as no lis subsists or the Court should deal with the matter on merits.

5.1 This writ petition was filed by the petitioner on the facts aforenoticed. The petitioner had pleaded arbitrariness, discrimination and colourable exercise of power by the respondents. The case was heard on different dates. We had asked the respondents to produce the original records in Court. On the very next day of hearing, the learned Counsel appearing for the petitioner prayed for time to take instructions and the case was adjourned to 15th January, 2008. On that day, a letter was filed on record by the counsel appearing for the petitioner stating that she had been instructed to withdraw the petition as the petitioner did not want to continue with the matter any further. The records were produced by the State on that date. The Court did not accept the request of the counsel and passed the following order on 15th January, 2008.

1. Learned Counsel appearing for the petitioner has placed a letter addressed to her by the petitioner asking her to withdraw this petition.

2. We find this request is mala fide and abuse of the process of the Court. On the previous date, when the writ petition was vehemently argued before us there were certain queries which were raised by us and the respondents were directed to react and seek instructions. The extension of contract to the petitioner in a arbitrary manner is not only violative of Articles 14 and 16 of the Constitution of India but also in direct violation of the Division Bench judgment of this Court in the case of Subhash R. Acharya v. State of Maharashtra and Ors. in Writ Petition No. 580 of 2007 decided on 16/8/2007 where even grant of extension under the terms of the contract was found to be arbitrary and unconstitutional. Therefore, we decline permission to withdraw the petition. However, the counsel for petitioner is at liberty to argue the matter or not. We direct that the petition will be heard on its own merits. The respondents shall produce the record in the court on the next of hearing. We make it clear that the above observation would in no way prejudice the right of the private party i.e. Respondent No. 2 or any other respondents. They will be at liberty to address their arguments. The record which are available in the Court today shall be left in the Court against the receipt to be given by the Court official.

3. Stand over to 21/1/2008.

5.2 When the case came up for hearing, the learned Counsel appearing for the petitioner argued the matter and was present all throughout the hearing. Since the Court had not dismissed the writ petition as withdrawn, she argued the entire matter before the Court whereafter the case was reserved for orders.

5.3 The jurisdiction of the Court under Article 226 of the Constitution of India is not strictly controlled by the procedural law as contemplated under Order 23 of the Civil Procedure Code. In exercise of its equitable jurisdiction, where the Court finds that withdrawal of the writ petition is not bona fide and the request for withdrawal has been made to overreach the order of the Court, the Court would decline such a request. A writ of certiorari is for production of records and the records had been asked for by the Court. The State was under obligation to produce the records particularly in face of the notings in Exhibit-F to the writ petition. In the present case one party was permitted to continue with the contract awarded in the year 1987 on one pretext or the other. This is a case where State largess is being distributed while entering into contract. The water is being withdrawn from the wells on commercial basis and it was admitted before us by all the learned Counsel appearing for the parties that this is a pure and simple business and commercial transaction between the State and the private parties. Thus, in our view, there is no reason for excluding the persons who wish to participate in the tender. In fact, the conduct of the petitioner himself is not appreciable. He himself was enjoying the benefit of private contract. It is only when the Government had taken the decision to invite tenders for awarding of contract for the other two other points for withdrawal of water, that he opted to file this petition. For obvious reasons when the matter was exposed before the court he opted to make the request for withdrawal of the petition. This conduct is most unfair conduct not only of the petitioner and respondent No. 2 but even of the State. In these circumstances, we had declined the request of the petitioner for withdrawal of the writ petition. Once the request is declined, the lis pending before the Court is required to be decided in accordance with law. The request for withdrawal was a mere camouflage for covering colourable and arbitrary exercise of power as the loss was being caused to the public at large and as well as to the State exchequer. This issue we will proceed to discuss in greater detail hereinafter.

5.4 Suffice it to note that the contention of the counsel for respondent No. 2 does not even survive in view of the fact that the learned Counsel for the petitioner had argued the matter after passing of the order on 15th January, 2008. Even under Order 23 Rule 1 of the Civil Procedure Code, the Court is well within its jurisdiction to reject the prayer for withdrawal of the suit. It is a settled principle of law that if the Court is of the opinion in the circumstances brought before it that it should not grant permission to withdraw the suit, it can refuse the prayer. Of course, plaintiff is dominus litis of his proceedings and would normally be permitted to withdraw the suit unless and until the prayer for withdrawal falls within the exceptional circumstances like the present case. In the case of K.S. Bhoopathy and Ors. v. Kokila and Ors. AIR 2000 SC 2132, the Supreme Court clearly stated the principle that Court should record its satisfaction about existence of proper grounds and

reasons for granting permission to withdraw the proceedings. Once the circumstances are brought to the notice of the Court, it would be the duty of the court to protect the rule of public policy and prevent wrong being perpetrated. To permit the request for withdrawal of a litigation ex facie would be an action which is questionable particularly in exercise of power under Article 226 of the Constitution of India.

6. Can the Government and its Instrumentalities, in exercise of its power under Articles 298 and 299 of the Constitution of India, while entering into private contract and in the matters relating to distribution of State largess, act in violation of Article 14 and due process of law?

6.1 In order to understand the above formulated question, it is necessary to recapitulate the relevant facts once again. An element of favouritism and arbitrariness is demonstrated by the historical background of this case. The petitioner was already having a monopoly in extraction and supply of water, an essential commodity, and was trading in the same as per its terms. Sudden extension was granted for a period of ten years in favour of the petitioner vide order dated 31st December, 1987. This permission was cancelled and terminated vide G.R. Dated 10th July, 1989. Still the petitioner continued with the contract, though by limited activity, and again vide letter dated 21st December, 1994, the period of contract was extended without adoption of any fair competition or by following normal procedure for inviting tenders for a period of ten years. This period of ten years would have expired in December, 2004 but before expiry of the said period, another extension for a period of ten years was granted with effect from December, 2004, vide letter dated 7th June, 2004, obviously upto December, 2014. However, because of further unfair practices adopted by the petitioner, notice for termination and recovery of penalty amount as indicated above was given but again to the surprise of all, the contract was granted for a further period of three years vide letter dated 1st September, 2006. All this was done without following any accepted norms of awarding of contract and principles governing distribution of State largess. It may also be noticed that not only the Desk Officer had written a note against extension of contract, but even the Department had taken a decision to issue new tenders without ratifying the contract of M/s. Lirin Road Lines. However, the final decision was taken to the contrary without recording any appropriate reasons.

6.2. Article 298 vests the State with the power to carry on any trade or business and make contracts for any purpose in so far as it falls within its legislative domain. Article 299 requires that all contracts shall be made and expressed in the name of the Governor in the case of a State. This constitutional empowerment is subject to the rigours of Article 14 of the Constitution. The power of the State, thus, in such regards is not free of limitations, may be of the finest kind. Unlike a private individual who can enter into contract with any person for any work in accordance with law, the State, as a public policy, does not enjoy an absolute freedom to act like a private individual. State is expected to prescribe norms and guidelines in conformity with its policy and constitutional mandate for entering into such contract particularly, while executing distribution of State largess or allotment of

restricted items by entering into contract or otherwise. The rule of fairness in State action, it being in conformity with public policy and public good is applicable to every action of the State. The executive power of the State to make contract is affirmed by Article 298 of the Constitution. The public policy and the public interest underlying Article 299(1) is that `the State should not be saddled with liability for unauthorised contracts which do not show on their face that they are made on behalf of the State". In matters relating to entering into contracts by the State, adherence to the rule of fairness is essential. Any contract which is entered into by the State is subject to general provisions of Contract Act and in terms of Law of Contract. Development of law particularly by judicial pronouncement has consistently accepted the principle that rigours of Article 14 would apply to exercise of contractual powers by the State. The public authorities which invite tenders may not be under any strict liability until tender is accepted. But those who tender are entitled that their tenders should be fairly considered according to the terms of invitation to tender. Public interest also requires that the tenders are properly considered so as to obtain best value for the tax-payer"s money. A Government contract is seen as a privilege or a largess, and unlike a private person who may choose with whom to contract, the Government or public body has to use its power of contracting in public interest, as regards the person with whom it would contract, as well as the terms of contract. The diversification of State activity in a Welfare State require the State to discharge its wide ranging functions even through its several instrumentalities, to enter into contracts. It is unjustified to exclude contractual matters from the sphere of the State actions which are required to be non-arbitrary and justified on the touchstone of Article 14. The judicial review of State action in contractual matters is now permissible, of course, within its prescribed limitations. Judicial quest in administrative matters has to find the right balance between the administrative discretion to decide matters contractual in nature, or issues of social policy and the need to remedy any unfairness. A State need not enter into any contract with any one but when it does so, it must do so fairly without discrimination and without unfair procedure. Public law in a broad sense, may be said to be those branches of law which deal with the rights/duties and privileges of the public authorities and their relationship with the individual citizens. The distinction between private law and public law is explained by the Court that the court will examine 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. It is difficult to draw the line of distinction with precision but the activity in which the State instrumentality is engaged when performing the action and a host of other relevant circumstances within the field expanding operational dimension of contractual matters would fall within the scope of such judicial review.

6.3 The law of contract describes a contract which determines the circumstances in which a promise shall be legally binding on the person making it. The nature of the contract and circumstances would indicate the extent of freedom of contract and its implications. Statutory restrictions or laws today interferes at numerous points with inroads into the freedom of the parties to a contract. Besides statutory restrictions, in the case of a Government, the limitation of fairness, equal opportunity to persons even in a stated class

are also indicated in law relating to contracts. A State is free to choose its course of action in relation to contracts and matters of State largess. It must adhere to the principle of equality and fairness in the distribution of State largess either directly or by inviting tenders for utilisation of the assets, commodities and resources of the state. Except in exceptional circumstances, where the State may, out of public necessity in the larger interest of administration, choose to enter into private contracts by negotiations or otherwise. This mode may be for the contracts relating to specialised technical-know how and in such fields where recourse to normal methodology of inviting tenders may be prejudicial to the interest of the State or such other circumstances in the opinion of the authorities which are bona fide and ex facie unquestionable. (Refer Mulla Indian Contract and Specific Relief Acts, twelfth Edition & Anson"s Law of Contract, 28th Edition by J. Beatson).

6.4 The scope of judicial review in public contracts or such actions of the State is limited and it is a settled rule that the judicial review will be concerned in reviewing not the merits of the decision made but the decision making process itself. If the contract by State or its instrumentalities has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into the contract. If the court is of the opinion that public interest has been made to suffer then it would interfere in the larger interest of the public. Another facet of this is the legitimate expectation of the persons who claim to be interested or similarly situated is that where persons are legitimately entitled to expect that certain entitlements would continue with them, but they are not continued. The Courts insist that the decision affecting such expectation should be taken after giving to such persons an opportunity of being heard. There must exist good and even compelling circumstances to justify exclusion of all other eligible persons. The legitimacy of expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. In other words, the orders and decisions in such commercial field would be tested by the touchstone of fairness in executive action and exceptions may be there where larger public interest may outweigh the legitimate expectation of the public at large.

6.5 Now we may proceed to discuss the law in relation to scope and effect of limitations imposed upon the State in relation to awarding of contracts by tenders or otherwise. The earlier view restricted the scope of judicial review as well as granted greater freedom to the State in matters of contracts. However, with the passage of time, the law developed so as to make the concept of equality enshrined in Article 14 of the Constitution applicable to the matters of contract. Referring to the contractual policy of the State, the Supreme Court in the case of Tata Cellular Vs. Union of India, stated that where decision/action is vitiated by arbitrariness, unfairness, illegality, irrationality or "Wednesbury unreasonableness, it will require judicial intervention and the Courts will set

right the decision making process. The Court also indicated that mere power to choose cannot be termed arbitrary but use of such power for collateral purpose is interdicted by Article 14 of the Constitution of India. The Court after discussing all the relevant case laws and principles of Administrative law deduced the following principles:

(1) The modern trend points to judicial restraint in administration action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

6.6 In the case of New Horizons Limited and Another Vs. Union of India (UOI) and Others, , the Supreme Court while dealing with the case of awarding of contracts for printing, binding and supply of specified number of telephone directories in English for Hyderabad clearly enunciated the principle that while dealing with public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, the Court held as under.

At the outset, we may indicate that in the matter of entering into a contract, the State does not stand on the same footing as a private person who is free to enter into a contract with any person he likes. The State, in exercise of its various functions, is governed by the mandate of Article 14 of the Constitution which excludes arbitrariness in State action and requires the State to act fairly and reasonably. The action of the State in the matter of award of a contract has to satisfy this criterion. Moreover, a contract would either involve expenditure from the State exchequer or augmentation of public revenue and consequently the discretion in the matter of selection of the person for award of the

contract has to be exercised keeping in view the public interest involved in such selection. The decisions of this Court, therefore, insist that while dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognised that certain measure of "free play in the joints" is necessary for an administrative body functioning in an administrative sphere [See: Ramana Dayaram Shetty v. International Airport Authority of India SCR p. 1034 : SCC pp. 50506, para 12; Kasturi Lal Lakshmi Reddy v. State of J & K SCR p. 1355 : SCC pp. 1112, para 11; Fasih Chaudhary v. Director General, Doordarshan SCR p. 286 : SCC p. 92; Sterling Computers Ltd. v. M & N Publications Ltd.; Union of India v. Hindustan Development Corporation at p. 513.]

In the above case, the Supreme has clearly stated that the terms and conditions of the tender should be construed from the stand point of a prudent businessman and the decision of the State authorities should also stand the test of fairness. This principle was further expanded by the supreme Court in the case of New India Public School and other etc. Vs. HUDA and others etc., where the Court has held that exercise of discretionary power has to be in furtherance to clear and unequivocal guidelines, criteria, rules or regulations and held as under.

4. A reading thereof, in particular Section 15(3) read with Regulation 3(c) does indicate that there are several modes of disposal of the property acquired by HUDA for public purpose. One of the modes of transfer of property as indicated in Sub-section (3) of Section 15 read with Sub-regulation (c) of Regulation 3 is public auction, allotment or otherwise. When public authority discharges its public duty the word "otherwise" would be construed to be consistent with the public purpose and clear and unequivocal guidelines or rules are necessary and not at the whim and fancy of the public authorities or under their garb or cloak for any extraneous consideration. It would depend upon the nature of the scheme and object of public purpose sought to be achieved. In all cases relevant criterion should be predetermined by specific rules or regulations and published for the public. Therefore, the public authorities are required to make necessary specific regulations or valid guidelines to exercise their discretionary powers; otherwise, the salutary procedure would be by public auction. The Division Bench, therefore, has rightly pointed out that in the absence of such statutory regulations exercise of discretionary power to allot sites to private institutions or persons was not correct in law.

The Court while making the above observations also took note of the fact that the direction issued by the High Court to issue fresh notification for allotment is strictly in accordance with the rules, regulations and guidelines.

6.7 Expanding the scope of judicial review and distribution of State largess, the Supreme Court in the case of Jespar I. Slong Vs. State of Meghalaya and Others, cited with

approval the principle that the Government could not act like a private individual in exercise of its powers in such subjects. The Court clearly stated that Article 14 would be attracted wherever such action of the State smacks of arbitrariness and violates the basic principles. The Court held as under:

18. The next question for our consideration is: does the principle of predatory pricing apply to the contract of the like involved in this appeal? The learned single Judge who applied this principle had obviously in mind the law laid down by this Court in the case of Union of India and others Vs. Hindustan Development Corpn. and others, wherein this Court did discuss the principle of predatory pricing in the context of cartelling or creating monopolistic rights. The facts involved in the said case pertain to formation of c cartel by some of the manufacturers and the underpricing of their products which on the facts of that case was held to be amounting to unfair trade practice. In our opinion, principles discussed in the said case do not apply to the facts of this case.

6.8 In the case of Association of Registration Plates Vs. Union of India (UOI) and Others, , the Court was concerned with the merits of the plea of arbitrary action where selection of one manufacturer through process of open competition was finalised and ultimately one single manufacturer was chosen for a region or State. The Court held that such action would not amount to creating a monopoly of business in favour of a private party. The following observations of the Supreme Court need to be noticed which would have some bearing on the controversy in the present case.

43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (supra) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors.

7. Another facet of fairness in administrative action is whether the action suffers from the vice of arbitrariness. The courts while exercising the powers of judicial review within the prescribed limitation are bound to examine this aspect of executive actions. The executive besides taking decisions effecting its powers are expected to act in consonance with the rule of fair play. Normally, such actions could be examined by the court on the touch-stone of Wednesbury''s principles. This doctrine has emerged from English Law and has now been accepted in India as well. The judicial pronouncements now, for a considerable time, have applied this principle with all its rigours. Normally, it will be impermissible for a State to exercise its discretion free of any checks and balances and

without any objectivity in their decisions. As already noticed, it is the fairness of decision making process which squarely falls within the ambit of judicial review and if such a decision making process suffers from basic infirmities and it unreasonably denies the principles of equality of participation as well as infringes fair competitiveness in contractual matters with the State, the judicial intervention in such cases may be justified. Noting reasonableness in State action relating to distribution of State largesse particularly, in the field of trade would have its own consequences. Primary onus would be, on the party pleading discrimination or arbitrariness, to establish the same before the court and within the concept of probable preponderance but once such a burden is discharged, onus will shift to the State to justify its decision making process and objectivity of the decision to exclude arbitrariness, unreasonableness and unfairness in State action. Applicability of principles to administrative action is an accepted norm and to examine its application particularly to the writ jurisdiction of the court, the reference can be made to the case of Sudarshan Kumar, Retd. Asst. v. Union of India and Ors. Writ Petition No. 821 of 2004, decided on 16th November, 2006 wherein the court examined various judgments of the Supreme Court and other courts and concluded as under:

Unreasonableness or arbitrariness of an administrative action would be subject to judicial review. The respondents are not expected to give detailed reasons for their actions but they must apply their minds in all fairness. In this regard, we may refer to a recent judgment of this Court in the case of Major General B.D. Wadhwa, AVSM v. Union of India and Ors. W.P. (c) No. 10630/2006 decided on 19.10.2006 where the Court while categorically holding that the action of the respondents which is arbitrary or unreasonable would be liable to be interfered with held as under:

...This doctrine covers various facets of arbitrariness, the Courts more than often have applied this principle to examine the merits or otherwise of such contentions. In the case titled as Dr. Sudha Suri v. Union of India and Ors. 2002(1) SLR 665, a Bench of the Punjab and Haryana High Court had discussed at some length the applicability of this principle and had discussed various judgments of the Supreme Court and even the case of Wednesbury Corporation"s (supra). The relevant conclusions of the Court can usefully be referred to at this stage:

42. Learned Counsel for the both the parties heavily relied upon the Wednesbury"s principle in support of their respective case. According to learned Counsel for the petitioner, the said principle is applicable as there has been patent unfairness in appointment of respondent No. 4 as the Dean while according to the learned Counsel for the respondents the principle has a very restricted application and scope. Once eligible persons have been considered and after looking into their service records, respondent No. 4 has been appointed, then such appointment cannot be subjected to judicial review on the strength of principles of Wednesbury.

43. In the case of Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation 1947 (2) AELR 680 enunciating the aspects of unreasonableness in executive action of

the public authorities, it was stated that if the power is exercised so as to give impression or inference to the Court that there has been unreasonableness in such action, it is taken in bad faith extraneous circumstances have been taken into consideration, there has been disregard of public policy and relevant consideration have been ignored then authorities would be said to have acted unreasonable. Lord Greene, M.R., expressing the unanimous view observed as under:

He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "Unreasonably." Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. WARRINGTON, L.J. I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration.

The aforesaid Wednesbury''s principle has not only been adopted in various pronouncements by the Hon''ble Apex Court, but even its expanded principles have been applied extensively by our Courts. The apparent unreasonableness in executive action, whatever be its foundations, would normally invite chastisism upon judicial scrutiny. The requirement of fairness is in built in every rule and regulation be it an executive or an administrative act. This basic rule of law is ab antique and its application has been consistently expanded. The Court would not draw a comparative merit of the eligible candidates who were considered for the appointment to the post, but where the appointment predominantly indicates that concerned authorities have violated this rule of fairness by un-necessarily emphasising on the irrelevant materials on the one hand, while on the other they have excluded what ought to be taken note of. The rule of fairness has an inbuilt directive to eliminate afore-noticed elements. Then alone an embargo on the scope of judicial review can be entertain(sic)....

...The cumulative effect of the above discussion is that action of the respondent-authorities lacs fairness and the element of unreasonableness is traceable in various facets of the process of appointment to the post of Dean of the Institute. The Hon''ble Supreme Court of India in the case of Badrinath Vs. Government of Tamil Nadu and Others, applied the Wednesbury''s principle to the facts of that case and held

Unless there is a strong case for applying the Wednesbury doctrine or there are mala fides, courts and Tribunals cannot interfere with assessments made by Departmental Promotion Committees in regard to merit or fitness for promotion. But in rare cases, if the assessment is either proved to be mala fide or is found based on inadmissible or irrelevant or insignificant and trivial material and if an attitude of ignoring or not giving weight to the positive aspects of one''s career is strongly displayed, or if the inferences drawn are such that no reasonable person can reach such conclusions, or if there is illegality attached to the decision, then the powers of judicial review under Article 226 of the Constitution are not foreclosed.

Their Lordships while further elaborating the applicability of this principle also stated that even if favourable aspects of career of a candidate are dealt with casually and without being given due importance and undue over-emphasis is given to unfavourable aspect of the matter, which itself was old enough, in that event, the case would squarely offend the Wednesbury"s principle even in its limited dimensions.

...35. It is also true that providing of reasoning in administrative actions may not be of sense in all administrative actions, but in order to attach credence to the process of selection and fairness to the decision-making process, it may be proper and even somewhat obligatory upon the authorities concerned to provide some kind of expression to the thought of processing, which ultimately culminates into final selection or decision. It will be in the administrative interest and would help in spreading confidence in the process of fair selection to all concerned that records indicate proper application of mind in relation to all the ingredients of criteria prescribed by the authorities for such selection. Fairness in administrative action must not only be done but also appears to have been done in consonance with the basic principles of law. The Supreme Court in the case of Union of India and Ors. v. E.G. Nambudiri 1991(2) S.L.R. 675 answered in affirmative the need for the authorities to record reasons in support of their decisions. Still in another case titled as U.P. Jal Nigam and Others Vs. Durga Prasad Singh and Others, , the Supreme Court though declining to interfere in the selection made, enunciated and stressed the need for recording of reasons, while a junior is promoted superseding his senior. The scope of judicial review of Courts is limited and the Court would not go into the niceties of selection process and would interfere where the selection is arbitrary, contrary to criteria or suffers from the element of malafides etc. Right from the case of A.K. Kraipak and Others Vs. Union of India (UOI) and Others, , the Supreme Court had said that the aim of the rules of natural justice is to secure or to put it negatively, to prevent `miscarriage of justice". The principles of equality includes fair opportunity of consideration to all eligible persons. A fair consideration must emerge from the record itself and not submitted by way of affidavits before the Court as the members of the Selection Committees/Selection Boards are normally not parties before the court and there is no way that the Court can go into the minds of the Selection Board, except by going through the proceedings recorded in the files produced before the Court. For a decision not to be hit by Rule of Wednesbury, it is essential that there should be patently no infirmity in the decision-making process and it ought not to have been arbitrary.

8. Proper analysis of the above-stated principles, thus, would indicate that the State is not expected to act as a private individual in relation to the matters of contract more so, when such contracts are for distribution of State largesse in the matter of trade. With the very limited exceptions, the State is expected to adopt the criteria of fairness and equality in such matters. The element of public law is the essence of State actions. It is injure non remota causa sed proxima speltatur requires factors proximate to the decision making process should be looked into in law in preference to remote cause. The cause why the decision has been taken of excluding others, who are equally placed, is a matter which

will ever fall within the ambit of judicial review. Equity is a spice of equality or equalization and the State action is expected to be just, fair and equitable as well in consonance with the basic principles of law. Unless there are compelling circumstances to justify such a decision, the State is obliged to invite all persons interested in participating in the matters of awarding tenders relating to distribution of State largesse. Common error facets just is a maxim which contemplates that the law so favours the public good that it will in some cases permit the common error to pass fair right but the error must not be a reflection of intentional arbitrariness, colourable exercise of power and ex facie discriminatory. The dimensions of public good in public law are significant and had enlarged by a passage of time. It will not lie in the mouth of the State to argue that it can do what it wants with complete disregard to the Constitutional mandate of equality and public good. In the case of Noble Resources Ltd. Vs. State of Orissa and Another, , the court again reiterated its earlier view and said, it is trite that if an action on the part of the State is violative of equality clause contained in Article 14, a writ would be maintainable even in the contractual field. The court even went to the extent of stating that it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter. However, where serious disputed questions of fact are raised requiring appreciation of evidence and witnesses are required to be examined, it will not be proper to exercise the powers in the realm of judicial review. The court emphasized that although the terms of the invitation of tender may not be open to judicial scrutiny, but the courts can scrutinize the award of contract by the Government or its agencies in exercise of their power of judicial review to prevent arbitrariness or favouritism.

9. Now, we may proceed to discuss the second limb of point (iii). It is neither in dispute before us nor it can be disputed that in the present case, the State has exclusive control over drawing of water and it has been allotting the contract to respondent No. 2 without inviting any tenders and in its sole discretion that too without framing any guidelines for that purpose. It is a distribution of State largesse as except the State, nobody could permit the drawing of water from the wells which is the property of the State. Water is essential for life and admittedly, drawing of water and its distribution in the public and private sector by respondent No. 2 was a pure and simple trade activity. While operating in the matter of trade coupled with distribution of State largesse, the State was expected to adhere to the cannons of equality and fairness. Its action was to be beyond the limitations and patent discrimination. Respondent No. 2, for the first time, was awarded contract for a period of 10 years in the year 1987. Nothing is on record to show why the decision of awarding contract to the respondent No. 2 for such a long time was taken without following any fair procedure. No guidelines have been brought to our notice which show on what basis the concerned authorities in the administration of the State hierarchy had applied their mind and in what of administration such guidelines were framed for the State to have taken such an action. This contract was extended time and again without permitting any other person to participate in any manner whatsoever before awarding or extending the contract in favour of respondent No. 2. This perpetual grant/extension right from the year 1987 till date is a strange phenomena adopted by the State which ex facie

is not only arbitrary, unjust, unreasonable but even directly impinges upon the spirit of Article 14 of the Constitution of India. It appears from the record that in the year 2005 on noticing the illegal and unauthorized activities of respondent No. 2, the concerned authorities issued a show-cause notice intending to cancel the contract in favour of the respondent No. 2 as well as for imposing a penalty of Rs. 9,95,578/for drawing water unauthorisedly from one extra point for the period between 12th May, 1998 to 3rd December, 2005. This notice was challenged by respondent No. 2 by filing a suit in the court of competent jurisdiction. The court vide its order dated 3.2.2005, declined to grant any interim order in favour of the respondent No. 2. Correctness of this order was challenged by respondent No. 2 by filing an appeal before the High Court which was also dismissed by order dated 8th December, 2005. However, liberty was granted to the respondent No. 2 to move the trial court for expeditious disposal of the suit. As it is evident that the courts in exercise of their judicial discretion, consistently declined to grant any relief to the respondent No. 2, he had pursued the suit filed by him before the trial court after the order of the appellate court dated 8.12.2005. With some sense of dissatisfaction, we may notice that in the reply affidavit filed on behalf of the Government in the present petition, the reasons for extending the period of contract is recorded in para 10 of the affidavit, which is in reply to para 3(j) of the petition, which reads thus

10. With reference to para 3(j) of the petition, I say that as already stated hereinabove, the Respondent No. 2 had agitated his rights for the said contract by filing a Civil Suit in the City Civil Court after receipt of the Deputy Director of Sports and Youth Services, Mumbai notice dated 19th September, 2005. The Respondent No. 2 did not secure any Interim relief against this Respondent and thereafter he filed an Appeal challenging the orders of the Hon''ble City Civil Court in Hon''ble High Court. Taking into consideration the revenue loss due to closure of the site, these respondents have awarded the contract to Respondent No. 2.

10. It is strange that when courts have not granted injunction in favour of respondent No. 2 and the department had already served the notice for cancellation of contract of unauthorized activities of respondent No. 2 and for recovery of the penalty amount, the question of loss of revenue does not arise. It was of its own accord that the Government created these circumstances and having failed to find any reasonable or plausible ground for extension of the contract, acted in a most arbitrary and unjust manner. For the State to take such a plea in face of the fact that even the petitioner was willing to give a higher bid, the reasoning of the State and the entire decision making process is vitiated. Furthermore, increase in the revenue is nothing but an eye wash. From the year 1987, the respondent No. 2 is stated to have spent an amount of Rs. 7200/- per month which was increased to Rs. 20,000/- per month and at the time of giving extension in the year 2006, it was increased to Rs. 50,000/- per month with 10% increase for each succeeding year. This itself shows that the State could have fetch much higher revenue than what was offered by respondent No. 2. The offer given by respondent No. 2 was found to be insufficient and that is why the State claims to have increased the amount. There is

nothing on record before us and even in the files produced do not show that any effort was made by the State Government to find out whether the people in the trade were willing to execute the work of water distribution as a commercial item after extracting the same from the Government wells at a higher rate than the one offered by respondent No. 2. Drawing of water and its distribution involve no specialized skill or technology that under any circumstances would justify creation of monopoly in favour of respondent No. 2 for all this period right from 1987. This presumes a fact that nobody else wishes to participate in such activity which is factually incorrect and that, there is no better person to look after the State revenue in relation to the distribution of State largesse in the present State. In fact, the whole stand taken by the State in its counter affidavit is falsified by the recommendation of the Desk Officer who after noticing the entire background of unauthorized activity of respondent No. 2, the pendency of the cases in courts, non-grant of any interim injunction by the courts and taking due care of the State revenue, had written that in terms of the letter of the Director dated 1.12.2005 the tenders be invited and it will not be proper to give new contract to respondent No. 2. On this noting of the Desk Officer dated 28th December, 2005, the Under Secretary had made the following observations:

The government has granted permission to assign the contract by inviting tenders and as the said process is being commenced and as the previous contract is cancelled and pump is also taken in possession and hence no question arises to revive the same. Submitted for consideration.

11. However, for the reasons best known to the concerned authorities, this proposal was not accepted and the contract was renewed for another period of 10 years with meager increase in financial return. The files do not reflect any plausible reasons, grounds and even proper application of mind by the concerned authorities to the various facets of awarding the contract in question. The extension smacks of arbitrariness, discrimination and is violative of principle of equality. There is no iota of reasoning in the entire file which could even remotely substantiate that why the Government took a decision not to invite tenders in distribution of State largesse relating to a purely commercial activity of very ordinary nature.

12. In the case of Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, , the Supreme Court clearly stated that arbitrariness would vitiate any action of the State particularly, where it relates to violation of Article 14. The public policy is based upon non-communication or assigning of reasons for decisions requires that decisions made without any cogent reason in furtherance of the object for which the power to take decisions is given. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. Of course, there is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no

conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not be extended even in the sphere of contractual matters for regulating the conduct of State activity. In the present case, the public interest is certainly involved in as much as its distribution as a commercial activity of an essential item which is the obligation of the State and not to follow the basic principles of equality or inviting a fair competition in allocation of such work in commercial terms would be unreasonable and unfair.

13. In the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , the Supreme Court held that the court can interfere in the matter where the tenders had been invited for running the restaurant and snack bars at the Airport and clearly stated the principle that the government cannot accept tenders of persons who do not fulfill the requisite qualification. The court held as under:

10. ...The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his "The Law of the Constitution" or the definition given by Hayek in his "Road to Serfdom" and "Constitution of liberty" or the exposition set forth by Herry Jones in his "The Rule of Law and the Welfare State", there is, as pointed out by Mathew, J., in his article on "The Welfare State, Rule of Law and Natural Justice" in Democracy, Equality and Freedom "substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.

12. ...The learned Chief Justice said that when the Government is trading with the public, "the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions.... The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure." This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must

be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

13. Now, it is obvious that the Government which represents the executive authority of the State, may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions. In the early days, when the Government had limited functions, it could operate effectively through natural persons constituting its civil service and they were found adequate to discharge governmental functions, which were of traditional vintage.

14. In the case of Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others, , the court was concerned with awarding of contracts where tenders were invited. The authorities after inviting tenders determined the viability range and then called upon the lowest tenderer to raise his offer so as to be covered within the viability range. The entire process is stated to have been vitiated leading to acceptance of tender as it was unfair. Applying the principle of public accountability and protection of Article 14, the court said; "The consideration of the tenders received and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open. While a bonafide error or error of judgment would not certainly matter, any abuse of power for extraneous reasons, would expose the authorities concerned.... "

15. In the case of TVL Sundaram Granites Vs. Imperial Granities Ltd and Others, , the Supreme Court was concerned with grant of largesse wherein it is observed that grant of largesse is within the discretion of the Government. However, discretion should be open, fair, honest and completely above board. In this case, the Supreme Court while declining to interfere with the order of the High Court, allowed the writ petition and directed the State Government to consider the matter afresh after inviting fresh applications and observed that rigours of Article 14 and concept of fairness in State action would be squarely applicable to cases of distribution of State largess. In the case of ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, , the court reiterated the principle that in an appropriate case, the writ court has jurisdiction to entertain the writ petition even involving the disputed questions of facts and also stated that a contractual obligation of the State or its instrumentality is open to challenge and this question was no longer res integra and held as under:

23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of

India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent....

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corporation v. Registrar of Trade Marks) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.

16. As already noticed, colourable exercise of power and arbitrary action of the State, while offending the principle of equality, is an exception to the rule of superior domain of the State in contractual matters. Wherever these ingredients exist, the Court would be doubly cautious in approving State action in exercise of its powers of judicial review. Judicial review of administrative actions, examined in its correct perspective, would cause a logical impediment in implementation of such decisions and would have the effect of directing the State to act fairly. Arbitrariness in State action in commercial/contractual transactions with private parties hurts the spirit of Article 14 of the Constitution and would be open to judicial chastizm. In the case of United India Periodicals Pvt. Ltd. v. M & N Publications Ltd. and Ors. 1993 (1) SCC 336, the Supreme Court stated that once the State decides to grant any right or privilege to others, then there is no escape from the rigors of Article 14 of the Constitution and the executive does not have an absolute discretion. While granting rights or privileges, certain principles have to be followed, the public interest being the paramount consideration. The Court must not usurp the discretion of the public authority wherever the authorities have exercised power genuinely, free of discretion and is not opposed to the rules. In this case, the executive had attempted to justify its actions on the ground that it was necessary and in the administrative interest that the contract was extended/re-awarded in favour of UIP/UDI/Sterling in order to avoid any stalemate and was in the larger interest of the MTNL. In these circumstances, the Supreme Court, while rejecting the contention that the MTNL had applied irrelevant considerations while granting a fresh contract for five years through supplementary agreement and after examining the respective pleas including the likely loss to the MTNL held as under.

The supplemental agreement is really a fresh agreement with fresh terms and conditions which has been entered by MTNL without inviting any tender for the same. The

supplemental agreement has been entered to benefit the parties who are admittedly defaulters by not publishing directories for Bombay for the years 1988,1989, 1990 and 1991 and for Delhi for the years 1989, 1990 and 1991 although they had collected several crores of rupees for the advertisements for the directories to be published in the aforesaid years. We fail to understand as to how a fresh contract for a period up to 1997/1998 was awarded to UIP/UDI/Sterling in the garb of an agreement for extension of the period of the original agreement taking into account irrelevant factors as already enumerated above. If the supplemental agreement has been executed without following the procedures which are essential in view of the repeated pronouncements of this Court and taking into consideration irrelevant factors, then can it be said that "decision-making process" before the supplemental agreement was entered into was consistent with the requirement of Article 14 of the Constitution? In such a situation there is no scope for argument that any interference by Court shall amount to an intervention like a court of appeal. Once the process through which the supplemental agreement was executed is held to be against the mandate of Article 14 of the Constitution, the supplemental agreement shall be deemed to be void.

17. The above enunciated principles clearly show that even in contractual matters, the Court would examine necessary factors to satisfy the judicial conscience as to whether the decision taken by the appropriate authority was patently arbitrary, against the public interest and offended the doctrine of equality.

18. Peculiar facts of the case, as noticed above, are to be examined by the court in the light of the legal principles stated supra. Should the court permit continuation of arbitrary exercise of powers and perpetuate the wrong done to the public at large or inappropriate action of the State should be put to an end forthwith? The action of the State lacks reasonableness and in fact, would not even stand the test of common prudence much less the strict judicial scrutiny. The action of the State showing complete favoritism to the respondent No. 2 cannot be sustained by the court. The decision and the entire decision making process is not in conformity with any guidelines known standards of administrative prudence much less the Constitutional mandate and fair play in State action. The disfunctional approach of the State is discernibly visible by absence of any reasoning to support the decision. In fact, it is a decision void of any reasoning and the process of decision is arbitrary, discriminatory and opposed to fair play.

19. We shall now discuss whether the present writ petition suffers from the defect of delay and laches. Does the petitioner has any interest in the subject matter of writ petition. It has already been noticed that petitioner himself is engaged in similar trade. As argued before us, he was having similar contract in relation to other water points in which the Government vide its decision has even noticed on the file of the present case had invited tenders and had broken the petitioner"s monopoly in relation to those water points. Obviously, the petitioner knew all the tricks of the trade of respondent No. 2 as both of them were part and parcel of the same game. He questioned about the continuity of the respondent No. 2 being aggrieved from his own ouster. The petitioner talked of fairness,

equality and fair play in State action having himself enjoyed the monopoly for quite some time. The petitioner made all kind of allegations against the State Government and continuation of respondent No. 2''s monopoly in trade of distribution of water in Mumbai in private and public sector as a complete arbitrary and discriminatory action. The court issued notice and even directed production of records. It is at that stage the petitioner prayed for leave and wanted to withdraw this petition. However, the leave was declined and this aspect has been discussed by us in complete detail above. Suffice it to note again that after declining of the leave, the petitioner through his counsel fully participated in the proceeding and even submitted written submissions with number of citations. Once patent facts of arbitrariness, discrimination and unfair play in State action is brought to the notice of the court which is duly supported by the records which are produced before the court, there is nothing before the court to condone such action or repudiate the wrong done by the State. The State has done a wrong, the respondents have done a wrong and the petitioner further intended to do a wrong which was not permitted by the Court. Repetitive wrongs are incapable of excuse injuria non excusat injurian.

The jurisdiction of the Court under Article 226 of the Constitution of India is an extraordinary jurisdiction and can be fairly invoked even on equitable principles. Merely because the parties in order to hush up the mater and to prevent proper adjudication of a matter of public importance wanted to withdraw their steps would not frustrate the exercise of constitutional jurisdiction of the court by such clever devises. Nobody should be permitted to over reach the process of law as none is above law. In such circumstances where arbitrariness in State action is exposed, the delay per se is not so material. Furthermore, there is no such inordinate delay in filing the present writ petition that the court should decline to exercise the powers vested in it under Article 226 of the Constitution of India.

20. It is evident that right from the year 2005, there were disputes between respondent No. 2 and the State Government. Despite the courts'' granting no favourable interim orders to the respondent No. 2, the State still chose to extend the contract period for no valid reason whatsoever. The present petition was filed in August, 2007 and of course, after some delay but the delay in the facts and circumstances of the case, cannot be held to be fatal to the maintainability and entertainment of the present writ petition. The petitioner has also stated that he had made an application to the Government under the Right to Information Act and had asked for copies of certain documents and decisions. He has also stated that for point "a" of the smaller well and point "b" for bigger well, the tenders were issued only for a period of three years with effect from 25th April, 2007 and the contract was awarded to one M/s. Saileela Jankalyan on payment of Rs. 85,000/- per month which itself shows that the interest of the State revenue has certainly been damaged by extension of the contract to the respondent No. 2. He had moved an application under the Right to Information Act on January, 2007 seeking certain documents and pursued this application whereof he had got the documents relating to the policy of the State Government. Besides these niceties, he has also stated that he made

various representations to the State Government including the representations dated 5th October, 2006 and 3rd April, 2007 (Exhibits `H" and `H1" respectively to the writ petition) but when the State failed to act upon his representations, he filed the present writ petition. Thus, we are of the considered view that the petitioner has sufficient interest in the subject matter of the writ petition and the present petition does not suffer from the defects of delay and/or laches at all.

21. As is evident from the records produced before us and the noting appearing on those files, it is clear that the noting made by the officer initiating the proposal was not favourable to respondent No. 2. In fact, keeping in view the previous conduct of the petitioner where the department had served show-cause notice and even imposed penalty upon respondent No. 2, it was recommended in consonance with the policy decision of the Government to invite tenders. This reasoning ex facie contains sound reasons and objectivity and is in public interest. The decision taken by the authorities was contrary to the above reasoning and the Government policy which does not specify any separate reason in support of the ultimate decision, thus causing serious loss to the Government revenue coupled with lack of objectivity or public interest which would per se amount to arbitrary action and would vitiate the decision making process. Once the decision making process suffers amongst the other reasons even from the non-application of mind, the decision arrived at by such a process would be liable to be set aside by the court in exercise of powers of judicial review. In the recent judgment in R.R. Tripathi v. State of Maharashtra and Ors. Public Interest Litigation No. 93 of 2007, the court has taken the view that the competent and higher authorities in the hierarchy of administration are expected to record the reasons for their decision, particularly, when they are deferring with the proposal initiated by their department. This Court held as under:

38. ...The Government is expected to take into consideration such relevant material and record the reasons which are in confirmity with the rules and satisfy the canon of larger public interest.... In the decision making process by the respondents, no nexus is made out between the decision and the object of the relevant rules. Exercise of general discretion under a residuary power vests the government with wide discretion but equally places a higher responsibility upon the concerned authorities to exercise such discretion cautiously for valid reasons and its decision making process should be free from element of arbitrariness and discrimination. It essentially must be in the larger public interest. One factor which normally would tilt the judicial review in favour of the authority would be the action being in the larger public interest as opposed to limited interest of one or the other....

39. It is obligatory upon the State to show that the decision is in larger public interest and it cannot take up the plea that it is not prejudicial to the public interest. The decision making process should ex- facie reflect the application of unbiased mind for some good reasons which are intended to achieve the larger public interest in contra-distinction to providing for limited interest.

22. The Supreme Court, keeping in view, the situational changes has been expanding the scope of judicial review. It includes mis-direction in law posing a wrong question or irrelevant question and failure to consider the relevant question on certain grounds. Judicial review on facts would also be maintainable. In the recent judgment in Indian Airlines Ltd. v. Prabha D. Kanan (2006) 11 SCC, the Supreme Court has observed that doctrine of unreasonableness has now given way to doctrine of proportionality. In the case of Daljit Singh and Others Vs. State of Punjab through Secretary Home Affairs, , the Supreme Court held that reasonableness and fairness on the part of the statutory authority has to be considered having regard to the factual matrix of the case. It certainly is an element of flexibility. The courts would be cautious before setting aside an action of the State in exercise of judicial review and ensure that the case was made out for violation of constitutional mandate.

23. The concept of unreasonableness has led to judicial review of administrative action. The real test under doctrine of unreasonableness or proportionality would have to be tested on the touch-stone of constitutional mandate, perversity of decision, arbitrariness and apparent non-application of mind. Standards of unreasonableness could vary on the facts and circumstances of the case and consequent application of this principle would have to be examined by the court in each case. Perversity in the decision in some cases would ipso facto have the effect of rendering the decision unreasonable or devoid of proportionality.

24. A feeble attempt was made to contend on behalf of the petitioner that as a result of grant of contract in his favour and he having made arrangements in furtherance thereto, equities have tilted in favour of the petitioner. He claims to have made some investments for extraction and distribution of water from the well and had entered into the agreements for supply of water to the Government and private sector and he would be exposed to claim of damages if the extension of contract in his favour is set aside. It is a settled principle of law that one who derives benefit in an inequitable manner cannot claim equities in his favour. One who claims the equity must do equity himself. The contract in favour of respondent No. 2 had been extended by one arbitrary stroke of pen for a period of 10 years viz. from 2004 to 2014 ten months in advance to the date of its expiry and thereafter a fresh order was made to give contract afresh to the second respondent for a period of three years vide Government Resolution dated 1st September, 2006, that too without any justifiable cause. Under the contract of 2004 and its cancellation, the second respondent continued to draw water illegally. On noticing the illegal activities of second respondent, the State issued a show cause notice and sealed the point. This resulted in a litigation before the Civil Court where no interim order were granted. Even the appeal against this order was dismissed by the Appellate Court. This decision is arbitrary, contains no reasons while the noting made by the junior officers did not find favour with the senior officers. What was the justification for causing loss to the Government revenue, particularly, when other applicants are willing to pay much higher revenue to the State and when the Civil Court as well as High Court had declined to pass any order of restraint

or otherwise in favour of respondent No. 2. On what basis the stand was taken that pendency of cases in courts was a ground for such unusual extension of the contract. The present case is certainly one of colourable exercise of power, the decision is arbitrary and suffers from the vice of non-application of mind besides being prejudicial to the State and public interest. Keeping in view that it is a mere trade activity for the respondent of extraction and distribution of water, no principles of specialized activity are involved. Water is an essential item even on principles of common sense anybody would be able to pay higher price than a meager sum of Rs. 50,000/- per month where the water is to be supplied to Government, public and private sectors free of any restrictions.

25. In the circumstances aforenoticed, the Rule is made absolute. The Government Resolution dated 1st September, 2006 in so far as it grant contract in favour of respondent No. 2 for a period of three years is hereby quashed. Quashing of the order will in no way affect paragraph 3 of the said order which has been issued in furtherance to the earlier decision of the competent authority to recover a sum of Rs. 9,95,978/- on account of unauthorised extraction of water for the period 12th May, 1998 to 3rd December, 2005.

26. The Governments decision to invite tenders ought to have been implemented in consonance with the rule of law and fairness, particularly in view of the judgment of this Court in Sharad Acharya v. State of Maharashtra and Ors. (supra). In view of the established canons of public administration and decisions of Courts, clearly defining the field of judicial intervention in such matters and with an intention that a greater public purpose and interest is served and to avoid such arbitrary re-occurrence in the matters of State contracts, we consider it proper to issue direction to the State to ensure that no such extension of contracts is granted by its various Departments and instrumentalities in future. However, where it is found necessary in the wisdom of the Competent Authorities to grant such extension, it shall be extended for valid reasons alone, that too to be recorded in writing and after due consultation with concerned Department as also in accordance with Rules of Business, instructions issued by the Government, and in strict adherence to the prescribed procedure.

27. Thus, we further direct the State to invite tenders for extraction and distribution of water from the Government owned wells which are subject matter of the present writ petition as it has already been done in relation to other points of the well and award the contract to the person whose bid is highest in terms of revenue of the State. This exercise should be completed positively within a period of six weeks from the date of pronouncement of this judgment. No order as to costs.