M/S Puravankara Projects Ltd. Ã ... vs M/S Hotel Venus International And Ors. Ã ... on 2 February, 2007

Author: Arijit Pasayat

Bench: Arijit Pasayat, S.H. Kapadia

```
           CASE NO.:
Appeal (civil)  7560 of 2005

PETITIONER:
M/s Puravankara Projects Ltd.                                .Appellant

RESPONDENT:
M/s Hotel Venus International and Ors.          Respondents

DATE OF JUDGMENT: 02/02/2007

BENCH:
Dr. ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
```

J U D G M E N T (With Civil Appeal No.7561 of 2005) Dr. ARIJIT PASAYAT, J.

Challenge in these appeals is to the judgment of a Division Bench of the Kerala High Court holding that the order of cancellation dated 13.4.2005 passed by respondent No.2 was illegal and that respondent No.1 was entitled to further time to furnish the bank guarantee after the order granting exemption in terms of Section 81(3)(b) of the Kerala Land Reforms Act, 1963 (in short the 'Act') is issued.

The background facts in a nutshell are as follows:

> The State Government transferred 51.96 acres of land in favour of Goshree Island Development Authority (in short the 'GIDA) a non statutory State Government Undertaking to enable it to sell it and to use the proceeds for its developmental schemes. GIDA was authorized to sell the land in public auction in part or in full. GIDA invited tenders on several occasions but the tenders were cancelled. Finally, as per Notification dated 10.1.2005 fresh tenders were invited and pre bid meeting was held on 10.2.2005. Tenders were submitted, which were opened on 16.2.2005. In the tender documents four options were indicated. The individual extent of plots mentioned in option IV which was accepted by the GIDA was less than the ceiling limit contemplated under Section 82(d) of the Act i.e. 15 acres.
>
> Respondent No.1 i.e. M/s Hotel Venus International (hereinafter referred to as the

'Venus') was the successful bidder in respect of plot Nos. D3, D4 and D5 and its sister concerns were successful in respect of plots B, C3, C4 and C5 under Option IV. Appellant M/s Puravankara Projects Ltd. was the second highest bidder in respect of plot Nos. D3, D4 and D5 measuring about 8.78 acres each. In the pre bid meeting held on 10.2.2005 one of the queries raised by one of the participants was as to when exemption notification under Section 81(3)(b) of the Act would be obtained. The reply by the Secretary, GIDA forms the foundation of several stands in the present appeals. The Secretary admittedly replied as follows:

"GIDA had moved for general exemption under Section 81(3)(b) of the Kerala Land Reforms Act from the Government and the same will be obtained in a few days".

On 28.2.2005 the General Council of GIDA accepted bids of Venus for plot Nos. D3, D4 and D5 and confirmation letters of the said acceptance were issued on 1.4.2005 from Cochin addressed to the addressees in terms of Clause 19 of the tender. The addressees were in Trivandrum (Thiruvananthapuram).

By letter dated 31.3.2005 Venus insisted on an exemption notification being obtained by GIDA as a pre condition to fulfill the tender terms and conditions, more particularly relating to furnishing of bank guarantee in terms of Clause 10 of the tender. There is some dispute as to whether the bidders had received the letters because the postal endorsements indicate that on account of oral instructions of the owner of Venus, the letters were delivered on 28.4.2005 i.e. much after the normal period of delivery of letters. Appellant knowing that Venus had not furnished the bank guarantee in terms of Clause 10 of Tender Terms and Conditions vide its letter dated 19.4.2005 matched the highest offer in respect of the concerned plots and agreed to pay the entire amount in a lump sum. When GIDA did not respond to the offer, the appellant moved the High Court of Kerala by a Writ Petition (C) No.13735 of 2005 which relates to C.A. 7561 of 2005. Prayer in the writ petition inter alia was for a declaration that the tender of Venus in relation to plot Nos D3, D4 and D5 was to be treated as cancelled as the requisite bank guarantee was not furnished. A consequential prayer was made not to extend the time for furnishing bank guarantee and for a direction to GIDA to consider the appellant's tender which till then was not accepted.

Learned Single Judge of the High Court passed an interim order restraining the alteration of the terms and conditions contained in the tender until further orders. In the meantime, Venus failed to furnish the bank guarantee and, therefore, GIDA issued letters of cancellation of the letters of confirmation issued earlier.

The order of cancellation was challenged by Venus in respect of the concerned Plots in Writ Petition Nos. 15032/2005, 15048/2005 and 15052/2005. It is to be noted that the first two related to plot Nos. B, C3, C4 and C5. During the pendency of the writ petitions, the General Council of GIDA in its meeting on 21.5.2005 ratified the cancellation and directed forfeiture of the earnest money deposited in respect of the bids made by Venus in respect of the plots. In the said meeting in respect of plot Nos. D3, D4 and D5 it was resolved to accept the offers made by the appellant who had offered the same price as that offered by Venus earlier. The decision was however made subject to

the decision of the High Court in the pending writ petitions.

The Notification of exemption of land in terms of Section 81(3)(b) of the Act was issued and published in the official gazette on 20.5.2005. The learned Single Judge allowed the writ petition filed by Venus essentially holding that the exemption Notification should have preceded the tender and Venus could not have been expected to comply with tender conditions without an exemption Notification. The Writ Petitions filed by the appellants were dismissed. The writ appeals preferred in respect of the writ petitions were dismissed affirming the judgment of the learned Single Judge though on different grounds.

It is to be noted that a Division Bench of the High Court had issued notice and passed interim order to maintain status quo in respect of the concerned plots by order dated 18.8.2005.

According to the appellants Venus had not come to Court with clean hands. Both learned Single Judge and the Division Bench proceeded on erroneous premises as if exemption was a condition precedent to issuance of tender. In fact all concerned knew that the exemption could be granted later on. The exemption was necessary only when the total area exceeded the prescribed limit. As noted above, the successful bidder could be allotted a plot of land which was less than the ceiling limit. It is submitted that Venus was aware that exemption notification was not a condition precedent. Therefore, it had by its letter dated 16.3.2005 addressed to the Chief Minister of State expressed its willingness for execution of the sale deeds in respect of the plots for which they had submitted tenders. Prayer was made in respect of the benefit of stamp duty. In that context they had clearly stated in the writ petition that instead of waiting for instalments they had prepared to raise their own resources to save a huge amount. In other words, attempt of Venus was to save the stamp duty and absence of the exemption order was not even taken as a ground for permission to execute the sale deeds. The High Court, it is submitted, had erroneously considered the terms of the tender and the effect of Section 87 of the Act. The High Court by its judgment virtually re-wrote the terms of the tender document and in essence introduced new aspects in the contract.

Section 87 had no application because it relates to cases when a person either acquires any land after the notified date under Section 83 of the Act by gift, purchase, mortgage with possession, lease, surrender or any other kind of transfer inter vivos or by bequest or inheritance or by otherwise. It comes into existence once there is acquisition of title or interest over the property. The agreement for sale does not create any interest in the property and, therefore, the High Court was not justified in applying Section 87 to the facts of the case.

In response, learned counsel for Venus-respondent No.1 submitted that Section 81(3)(b) of the Act relates to exemption. Section 82 specifies the ceiling area and, therefore, no person can hold land in excess of the ceiling limit. There is a total prohibition. Since the global tender notification was issued in respect of the entire 51 acres 96 cents of land, it was obvious that even if a bidder succeeds in the tender for more than 51 acres of land he cannot own or hold the land for any purpose without the exemption. Clause 14 of Tender Terms and Conditions provides that allottees can avail loan from the banks/financial institutions for effecting payment and for that purpose GIDA was requested to issue NOC. That being so, no any bank or financial institution will advance any amount without a clear

title. In the absence of the exemption notification legally the successful bidder cannot hold any land. That actually would affect the generation of finances. In the pre bid meeting a specific stand was raised as to when the exemption notification is likely to be issued and the reply of GIDA authorities was that it was to be obtained shortly. In the absence of the exemption notification the requirement of furnishing the bank guarantee could not have been insisted upon and both the learned Single Judge and the Division Bench have therefore rightly held that the exemption notification was a condition precedent. If a bidder is constrained to fulfill the conditions regarding payment of bank guarantee without exemption that would cause great hardship and if there is non compliance, the inevitable result would be that GIDA would forfeit the EMD for no fault of the tenderer. Therefore, the High Court has rightly accepted the contention of Venus that time for compliance would be computed only from the date of exemption notification and the receipt of the confirmation thereof. When the parties entered into an arrangement it is impliedly understood that there should be an effective transfer of undisputed clear title to the transferee. It is therefore submitted that the order of learned Single Judge and the Division Bench do not warrant any interference.

A belated special leave petition has been filed by the State taking the stand that there has been considerable increase in price and cost of the land and the appellant should not be allowed to get the land by matching price offered by Venus. It is to be noted that the order of learned Single Judge was not challenged either by the State Government or GIDA and this fact has been noted by the Division Bench.

A few clauses in the Tender Terms and Conditions need to be noted. They are Clauses 3, 7, 8, 10, 14 and 15 which read as follows:

> "3 The tenderers have to acquaint themselves with regard to the nature and other conditions of the land before submitting tender. The Tender form quoting unit rate (rate per cent) enclosed in sealed cover with the superscription "Tender for goshree Land at Marine Drive, Kochi" shall reach the Secretary, Goshree Islands Development Authority, Park Avenue, Kochi-682 011 before 3.00 P.M. on 16th February, 2005. Tender received after the time fixed will not be considered. The tenders will be opened by the Secretary, GIDA or an officer authorized by him at 4.00 P.M. on the same day at District Collector's Camp office, Club Road, Kochi-682 011 in the presence of the bidders or their authorized representative if present.
>
> xx xx xx
>
> 7. The tenders shall remain open for a period of 90 days.
>
> 8. The tenders received in each option, will be evaluated by the General Council and appropriate decision which is most advantageous to GIDA will be taken. The General Council is free to take any decision, which it deems fit in the best interest of GIDA.
>
> xx xx xx

10. Within 10 days of receipt of confirmation letter, the bidder shall furnish two bank guarantees each covering 20% of the bid amount for a period of 180 days. On failure of compliance, the tender shall stand cancelled without further notice and the earnest money deposit shall be forfeited. If the tenderer to whom the notice intimating confirmation is sent, fails to respond within the specified time of 10 days, GIDA will be free to consider any other tender without any further notice.

Xx xx xx

14. If after payment of Ist instalment, the allottee desires to avail loan from banks/financial institutions for paying the 2nd and 3rd instalments of sale value of the land, GIDA will issue necessary NOC favouring the bank/financial institution.

15. Sale deed will be registered and possession handed over to the purchaser on payment of the full value of the land".

Sections 81(3)(b) and 87 on which much of the controversy revolves round read as follows:

"81(3) The Government may, if they are satisfied that it is necessary to do so in the public interest.

(a) xx xx xx xx

(b) on account of any land being bona fide required for the purpose of conversion into plantation or for the extension or preservation of an existing plantation or for any commercial, industrial, education or charitable purpose, by notification in the Gazette, exempt such land from the provisions of this Chapter, subject to such restrictions and conditions as they deem fit to impose:

Provided that the land referred to in clause (b) shall be used for the purpose for which it is intended within such time as the Government may specify in that behalf; and where the land is not so used within the time specified, the exemption shall cease to be in force".

Section 87: Excess land obtained by gift, etc., to be surrendered:-(1) Where any person acquires any land after the date notified under section 83 by gift, purchase, mortgage with possession lease, surrender or any other kind of transfer intervivos or by bequest or inheritance or otherwise and in consequence thereof the total extent of land owned or held by such person exceeds the ceiling area, such excess shall be surrendered to such authority as may be prescribed.

Explanation I.- Where any land is exempted by or under section 81 and such exemption is in force on the date notified under section 83, such land shall, with effect from the date on which it ceases to be exempted, be deemed to be land acquired

after the date notified under section 83.

Explanation II.-. Where, after the date notified under section 83, any class of land specified in Schedule II has been converted into any other class of land specified in that Schedule or any land exempt under section 81 from the provisions of this Chapter is converted into any class of land not so exempt and in consequence thereof the total extent of land owned or held by a person exceeds the ceiling area, so much extent of land as is in excess of the ceiling area, shall be deemed to be land acquired after the said date.

(1A) Any person referred to in sub-section (1) shall file a statement containing the particulars specified in sub- section (1) of section 85A within a period of three months of the date of the acquisition.

(2) The provisions of sections 85 and 86 shall, so far as may be, apply to the vesting in the Government of the ownership or possession or both of the lands required to be surrendered under sub-section (1).

It is clear that the Division Bench of the High Court was of the view that duty is cast on the Government as well as GIDA to inform the prospective bidders as to whether they propose to place any restriction or condition in granting exemption under Section 81(3)(b). The High Court also noted that both the Government and the GIDA were aware of the necessity of issuing a statutory notification in the gazette under Section 81(3)(b) of the Act failing which the entire contract would be rendered void and unworkable. Once the Government refuses exemption the entire contract would be frustrated, as also, the restrictions or conditions the Government may impose in a given case may not be acceptable to the parties. Disregard of statutory requirements may render the contract illegal and when the contract is entered into in violation of these statutory requirements it would be opposed to public policy and may violate Section 23 of the Indian Contract Act, 1872 (in short the 'Contract Act'). Therefore, it was held that notification under Section 81(3)(b) should have come before inviting the global tender so that the bidders were in a position to know the restrictions and conditions which Government would impose while granting exemption. That being so, learned Single Judge's view is affirmed by the Division Bench of the High Court.

Clauses 10 and 15 in the tender document which have been extracted above are of considerable significance. Clause 10 provides the mode of payment. Clause 13 provides that in case of non payment of 1st instalment, the bank guarantee can be invoked. Clause 15 provides that the sale deed is to be registered on payment of the full value of the land.

Section 87 deals with acquisition of title after the notified date. Section 87(1)(a) deals with action to be taken within a period of three months from the date of acquisition. The bank guarantee was to be furnished within a period of 10 days. The High Court held that the contract was un- enforceable in view of Section 87 of the Act is not correct. The High Court mis- construed the scope of Section 87 of the Act. The reason that the bank guarantee was not given is of no consequence. In fact as rightly submitted by learned counsel for the appellant, Venus itself being conscious that the exemption

notification was not necessary before furnishing of bank guarantee, requested for immediate registration of the sale deed. The only reason indicated was that if it is done before a particular date considerable amount of stamp duty would be saved. At that stage, GIDA was never even intimated by Venus that it had no money or that it was awaiting for bank finances or that there was any necessity to obtain exemption notification. It appears even the stands regarding the availability of finances are different at different points of time.

In the pre bid meeting also admittedly there was no demand to change the condition regarding the exemption notification being obtained first. GIDA's stand was very specific. It never treated the exemption notification to be a condition precedent.

Clause 11 also throws considerable light on the actual intention. The same when read with Clause 14 makes the position clear that if after payment of first instalment the allottee desires to avail loan from a bank or financial institution for paying the second and third instalments of the sale value of the land, GIDA will issue NOC in favour of bank/financial institution. Therefore, only after the payment of the first instalment, the question of GIDA issuing NOC arises, that too when the allottee desires to avail loan for paying the second and third instalments.

Clause 13 provides for forfeiture in case of non payment of the first instalment and permits the bank guarantee to be invoked without further notice. It specifically provides for furnishing of bank guarantee in respect of the required percentage of the bid amount and permits cancellation of the tender and forfeiture of the amount deposited.

The High Court also has held that the exemption notification can be treated as part of implied terms. It is to be noted that the Government itself permitted GIDA to sell the property initially. Section 23 of the Contract Act has really no application to the facts of the case. Section 87 as noted above, deals with acquisition after the date of notification and permits filing of the statement subsequently in terms of Sub-section (1A) of Section 87. Illegality is attached to a case where a person continues to hold the land and there is a requirement of surrender after acquisition.

There is a vital distinction between the administrative and contractual law decisions.

It is to be noted that there was no privity of contract between Government and the bidders. The tender conditions inter alia contained provisions relating to signing of contract and payment of money. There can be no implied terms so far as the Government is concerned. Terms can be claimed to be implied by the parties to the contract. Thus, it was open to the contracting parties to say that subject to obtaining exemption notification, the contract would be given effect to. It is not so in the present case.

Government by a contract cannot be compelled to grant permission. The statutory parameters have to be kept in view. A condition may be there, as appears to be in present case, to take steps to obtain permission. An agreement may fail because of absence of permission. Then it becomes unenforceable.

Certain decisions of this Court are relevant. In W.B. State Electricity Board v. Patel Engineering Co. Ltd. and Ors. (2001 (2) SCC 451) it was held that the conditions cannot be changed. The relevant paragraphs are 24, 30 and 31. They read as follows:

> "24. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest.
>
> 30. Though clause 29 in this case appears to be similarly worded as in the bid documents in Spina case a close reading of these clauses shows that no power of waiver is reserved in the case on hand. That apart, the nature of the error in these two cases is entirely different. There, the error was apparent $ 400 for $ 4, non-material and waivable by the Corporation; in the present case the errors pointed out above are not simply arithmetical and clerical mistake but a deliberate mode of splitting the bid which would amount to rewriting the entries in the bid document and cannot be treated as non-material. Therefore, the judgment in Spina case does not help Respondents 1 to 4.
>
> 31. The submissions that remains to be considered is that as the price bid of respondents 1 to 4 is lesser by 40 crores and 80 crores than that of respondents 11 and 10 respectively, public interest demands that the bid of respondents 1 to 4 should be considered. The Project undertaken by the appellant is undoubtedly for the benefit of the public. The mode of execution of the work of the Project should also ensure that the public interest is best served. Tenders are invited on the basis of competitive

> bidding for execution of the work of the Project as it serves dual purposes. On the one hand it offers a fair opportunity to all those who are interested in competing for the contract relating to execution of the work and, on the other hand it affords the appellant a choice to select the best of the competitors on a competitive price without prejudice to the quality of the work. Above all, it eliminates favouritism and discrimination in awarding public works to contractors. The contract is, therefore, awarded normally to the lowest tenderer which is in public interest. The principle of awarding contract to the lowest tenderer applies when all things are equal. It is equally in public interest to adhere to the rules and conditions subject to which bids are invited. Merely because a bid is the lowest the requirements of compliance with the rules and conditions cannot be ignored. It is obvious that the bid of respondents 1 to 4 is the lowest of bids offered. As the bid documents of respondents 1 to 4 stand without correction there will be inherent inconsistency between the particulars given in the annexure and the total bid amount, it (sic they) cannot be directed to be considered along with the other bids on the sole ground of being the lowest."

In Directorate of Education and Ors. v. Educomp Datamatics Ltd. and Ors. (2004 (4) SCC 19) it was observed as follows:

> "9. It is well settled now that the courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular v. Union of India (1994 (6) SCC 651). After examining the entire case-law the following principles have been deduced: (SCC pp. 687-88, para 94) "94. The principles deducible from the above are:
>
> (1) The modern trend points to judicial restraint in administrative action.
>
> (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
>
> (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
>
> (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers.

More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. 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."

10. In Air India Ltd. v. Cochin International Airport Ltd. (2000 (2) SCC 617), this Court observed: (SCC p. 623, para 7) "The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation.

It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedure laid down by them and cannot depart from them arbitrarily.

Though that decision is not amenable to judicial review, the court can examine the decision-

making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness."

11. This principle was again re-stated by this Court in Monarch Infrastructure (P) Ltd. v. Commr, Ulhasnagar Municipal Corpn. (2000 (5) SCC 287) It was held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the ones prescribed in the earlier tender invitations".

In Har Shankar and Ors. v. The Dy. Excise and Taxation Commr. and Ors. (1975 (1) SCC 737) the case of a bid with full knowledge was considered. It was observed as follows:

> "15. Learned counsel for the respondents raised a preliminary objection to the maintainability of the writ petitions filed by the appellants to the grant of reliefs claimed by them. He contends that the appellants who offered their bids in the auctions did so with knowledge of the terms and conditions attaching to the auctions

and they cannot, by their writ petitions, be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids. This objection is well- founded and must be accepted.

16. Those interested in running the country liquor vends offered their voluntarily in the auctions held for granting licences for the sale of country liquor. The terms and conditions of auctions were announced before the auctions were held and the bidders participated in the auction without a demur and with full knowledge of the commitments which the bids involved. The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them. The successful bidders were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of all trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim, Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force".

The difference between administrative law and contractual law was succinctly stated in Indian Oil Corporation Ltd. v. Amritsar Gas Service and Ors. (1991 (1) SCC 533). It was noted in paras 9, 10 and 11 as follows:

"9. The argument advanced by Shri Harish Salve on behalf of the appellant-Corporation to the validity of the award are these. The first contention is that the validity of the award has to be tested on the principle of private law and the law of contracts and not on the touchstone of constitutional limitations to which the Indian Oil Corporation Ltd., as an instrumentality of the State may be subject since the suit was based on breach of contract alone and the arbitrator who proceeded only on that basis to grant the reliefs. It is urged that for this reason the further questions of public law do not arise on the facts of the present case. The next contention is that the relief of restoration of the contract granted by the arbitrator is contrary to law being against the express prohibition in Sections 14 and 16 of the Specific Relief Act. It is urged that the contract being admittedly revokable at the instance of either party

in accordance with clause 28 of the agreement, the only relief which can be granted on the finding of breach of contract by the appellant-Corporation is damages for the notice period of 30 days and no more. It was then urged that the reasons given in the award for granting the relief of restoration of the distributorship are untenable, being contrary to law. Shri Salve contended that the propositions of law indicated in the award and applied for granting the reliefs disclose an error of law apparent on the face of the award. It was also urged that the onus of proving valid termination of the contract was wrongly placed by the arbitrator on the appellant-Corporation instead of requiring the plaintiff-respondent 1 to prove that the termination was invalid. It was also contended that the failure of the arbitrator to consider and decide the appellant-Corporation's counter-claim when the whole suit was referred for decision constitute legal misconduct.

10. In reply, Shri Sehgal on behalf of respondent 1 contended that there is a presumption of validity of award and the objections not taken specifically must be ignored. This argument of Shri Sehgal relates to the grievance of the appellant relating to placing the onus on the appellant-Corporation of proving validity of the termination. This contention of Shri Sehgal must be upheld since no such specific ground is taken in the objections of the appellant. Moreover, there being a clear finding by the arbitrator of breach of contract by invalid termination, the question of onus is really of no significance. The other arguments of Shri Sehgal are that the termination of distributorship casts stigma on the partners of the firm; counter claim of the appellant-Corporation was rightly not considered since it was not made before the order of the reference; the reference made being of all disputes in the suit, the nature of relief to be granted was also within the arbitrator's jurisdiction; and interest also must be awarded to the respondent.

11. We may at the outset mention that it is not necessary in the present case to go into the constitutional limitations of Article 14 of the Constitution to which the appellant-Corporation as an instrumentality of the State would be subject particularly in view of the recent decisions of this Court in Dwarkadas Marfatia and Sons v. Board of Trustees of the Bombay, Mahabir Auto Stores v. Indian Oil Corporation and Shrilekha Vidyarathi v. State of U.P.. This is on account of the fact that the suit was based only on breach of contract and remedies flowing therefrom and it is on this basis alone that the arbitrator has given his award. Shri Salve is therefore right in contending that the further questions of public law basis on Article 14 of the Constitution do not arise for decision in the present case and the matter must be decided strictly in the realm of private law rights governed by the general law relating to contracts with reference to the provisions of the Specific Relief Act provided for non-enforceability of certain types of contracts. It is, therefore, in this background that we proceed to consider and decide the contentions raised before us".

In essence, it was held that tender terms are contractual and it is the privilege of the Government which invites its tenders and Courts did not have jurisdiction to judge as to how the tender terms

would have to be framed.

By observing that there was implied term which is not there in the tender, and postponing the time by which the bank guarantee has to be furnished, in essence the High Court directed modification of a vital term of the contract.

In M/s New Bihar Biri Leaves Co. and Ors. v. State of Bihar and Ors. (1981 (1) SCC 537) it was observed at para 48 as follows:

> "48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbat non reprobate (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (Per Scrutton, L.J., Verschures Creameries Ltd. v. Hull @ Netherlands Steamship Co. (1921 (2) KB 608; see Douglas Menzies v. Umphelby (1908 AC 224, 232; see also Stround's Judicial Dictionary, Vol. I, page 169, 3rd Edn.)"

In Assistant Excise Commissioner and Ors. v. Isaac Peter and Ors. (1994 (4) SCC 104) this Court highlighted that the concept of administrative law and fairness should not be mixed up with fair or unfair terms of the contract.

It was stated in no uncertain terms that duty to act fairly which is sought to be imported into a contract to modify and/or alter its terms and/or to create an obligation upon the State Government which is not there in the contract is not covered by any doctrine of fairness or reasonableness. The duty to act fairly and reasonably is a doctrine developed in administrative law field to ensure the rule of law and to prevent failure of justice when the action is administrative in nature.

Just as the principles of natural justice ensure fair decision where function is quasi-judicial the doctrine of fairness is evolved to ensure fair action when the function is administrative. But the said principle cannot be invoked to amend, alter or vary the expressed terms of the contract between the parties.

So far as the principles relating to implied terms are concerned the position has been stated by Chitty on Contracts, 28th Edn. Chapter 13. They read as follows:

> "A term will not however thus be implied unless the court is satisfied that both parties would, as reasonable men have agreed to it had it been suggested to them ..The Court will only imply a term if it is one which must necessarily have

> been intended by them, and in particular will be reluctant to make any implications, "where the parties have entered into a carefully drafted written contract containing detail terms agreed between them" A term ought not to be implied unless it is in all the circumstances equitable and reasonable . But this does not mean that a term will be implied merely because in all the circumstances it would be reasonable to do so or because it would improve the contract or make its carrying out more convenient. "the touchstone is always necessity and not merely reasonableness".
>
> "A term will not be implied if it would be inconsistent with the express wording of the contract".

In Halsbury's Laws of England, 4th Edn, Vol. 9, the expression "implied terms" reads as follows:

> "In practice, logically implied terms and the other three types of implied terms tend to merge imperceptibly into each other, all the categories being justified to some extent by reference to the intention of the parties; and the distinctions between classes of implied terms tend to be based on convention rather than logic. The conventional distinction which will be adopted here, are as follows: (1) terms implied by custom; (2) terms implied by law; (3) other terms implied by the courts. The relationship between the parties may be a matter of profound importance in determining whether a contract contains a term implied under one of these heads.

xx xx xx xx Implication by law- There are many cases where apart from local custom or usage, the common law has recognized a general custom that certain terms be incorporated into particular types of contract. In some of these cases, the rules having been decided by the courts, they have been put into statutory form; for example the implied terms in sale of goods, conveyances of interests in land, in contracts of marine insurance or in contractual licences to enter property. Frequently, such statutorily implied terms are expressed to give way to a contrary intention; but there are other cases where the terms implied by statute cannot be excluded by any contrary agreement. Yet a further step in the process is that where statute law has in a particular field codified terms implied at common law, the courts may import those statutory terms into similar transactions by way of analogy. For instance, the statutorily implied term as to fitness in a sale of goods has been imported by analogy into contracts for the manufacturer of dentures, repair of a motor car, the erection of scaffolding, the dyeing of a woman's hair but the courts have shown themselves much more reluctant to import similar terms as to fitness into contracts for the sale or lease of interests in land .The conclusion would appear to be that terms implied by law are not happily described as "implied terms": they are rather duties which (frequently subject to a contrary intention) are imposed by the law on the parties to particular types of contract. In deciding whether to create such duties, the courts tend to look, not to the intention of the parties, but to consideration of public policy ..An implied warranty, or as it has been called, a covenant in law, as distinguished from an express contract or express warranty is really founded on the presumed intention of the parties and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, it draws with the object of giving efficacy to the transaction and preventing such failure of consideration as cannot have been within the contemplation of either side.

In view of what we have stated above, it is not necessary to deal with the grievance raised by the State Government in its belated Special Leave Petition.

Judged at from any angle the order of the learned Single Judge as affirmed by the Division Bench cannot be maintained and is set aside.

The appellants had stated their willingness to match the amount offered by Venus and also to pay interest in terms of the contract. It has been stated that the whole amount shall be paid and they shall not give any bank guarantee. Let the amounts offered by Venus be paid by the appellants within a period of one month from today with interest @12% p.a. from the date of allotment. The amount, if any deposited by Venus will be refunded with interest @ 9% from the date of deposit within a period of six weeks.

The appeals are allowed but without any order as to costs.