

CHAPTER XXXIX

GOVERNMENT CONTRACTS

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A. INTRODUCTORY

The subject of government contracts has assumed great importance in modern times. To-day state is the source of wealth. In the modern era of a welfare state, government's economic activities are expanding and the government is increasingly assuming the role of the dispenser of a large number of benefits. More and more of an individual's wealth to-day consists of new forms of property. More and more individuals and businesses enjoy largess in the form of government contracts, licences, quotas, mineral rights, jobs, etc. Most of these forms of wealth are in the nature of 'privileges', though some may be regarded as legal rights.¹

There is thus need to develop some norms to protect individual interest in such wealth. The basic question is to regulate, structure and discipline government discretion to confer such benefits.

B. POSITION IN BRITAIN

At Common Law, before 1947, the Crown could not be sued in a Court on a contract. This privilege was traceable to the days of feudalism when a lord could

1. Charles A. Reich. The New Property, 73 *Yale LJ* 733 : (1964); also by the same author. Individual Rights and Social Welfare: The Emerging Legal Issues, 74 *Yale LJ* 1245 (1965).

not be sued in his own courts. Another maxim which was pressed into service was that the King can do no wrong.

A subject could, however, seek redress against the Crown through a petition of right in which he set out his claim, and if the royal fiat was granted, the action could then be tried in the Court. The royal fiat was granted as a matter of course, but not as a matter of right, and there was no remedy if the fiat was refused.

The Crown Proceedings Act, 1947, abolished this procedure and permitted suits being brought against the Crown in the ordinary courts to enforce contractual liability, a few types of contracts being, however, excepted.²

C. POSITION IN INDIA : ART. 299 OF THE CONSTITUTION

(a) FORMATION OF CONTRACTS

Article 299(1) of the Constitution lays down three conditions which the contracts made in the exercise of the executive power of the Centre or a State must fulfil to be valid: These conditions are:

- (1) Such contracts must be *expressed* to be made by the President/ Governor as the case may be;
- (2) Such contracts made in exercise of the *executive* power are to be *executed* on behalf of the President/Governor as the case may be; and
- (3) The contracts are to be '*executed*' by *such* persons and in *such* manner as the President/Governor may direct or authorise.
- (4) The word *executed* in Art. 299(1) indicates that the contract between the government and any person must be in writing. A mere oral contract is not sufficient for the purposes of Art. 299(1).³

Questions often arise whether a contract not fulfilling the above requisites is valid.

Generally, the courts have taken the position that Art. 299(1) has not been inserted in the Constitution for the sake of mere form. Its function is to safeguard the government from being saddled with liability for unauthorised contracts. The provisions have been embodied to protect the general public as represented by the government. The terms of the Article have therefore been held to be mandatory and not merely directory. This means that a contract not couched in the particular form stipulated by Article 299(1) cannot be enforced at the instance of any of the contracting parties. Neither the government can be sued and held liable for

2. WADE AND PHILLIPS, *CONST. LAW*, 623 *et. seq.* (1977).

3. For detailed discussion of this topic see: JAIN & JAIN, *Principles of Administrative Law*, Ch. XXII (1986); Jain, *A Treatise on Adm. Law*, II (2002).

breach of such a contract, nor can the government enforce such a contract against the other contracting party.⁴

The Supreme Court has observed in *K.P. Chowdhry v. State of Madhya Pradesh*,⁵ that “in view of Art. 299(1) there can be no implied contract between the Government and another person.” Art. 299(1) being in ‘mandatory terms’ “no implied contract could be spelled out between the Government and the appellant” as “Art 299 in effect rules out all implied contracts between the Government and another person.”⁶ The Court also ruled that “if the contract between the Government and another person is not in full compliance with Art. 299(1), it would be no contract at all and could not be enforced either by the Government or other person as a contract.”⁷

In *K.P. Chowdhry v. State of Madhya Pradesh*,⁸ a person before bidding at an auction, signed a sale notice agreeing to abide by the terms of the auction. One of the terms was that if the bidder failed to complete the formalities after acceptance of his bid, his earnest money would be forfeited, the contract reauctioned at his risk and any deficiency occurring was to be recoverable from him as arrears of land revenue. The question arose whether signing of the sale notice by the bidder created any contract between the government and the bidder. It was not in full compliance of Art. 299. The Supreme Court held that there was no contract between the bidder and the government. The Court also ruled out any implied contracts between government and another person.

The Court justified this strict view by saying that if implied contracts between the government and other persons were allowed, they would, in effect, make Art. 299 a dead letter, for then a person who had a contract with the government which was not executed at all in the manner provided in Art. 299(1) could get away by pleading that an implied contract be inferred from the facts and circumstances of the case.

The Court took a similar rigid stand in *Mulamchand v. State of Madhya Pradesh*.⁹

But, then, the courts have also realised that insistence on too rigid observance of all the conditions stipulated in Art. 299 may not always be practicable. Hundreds of government officers daily enter into a variety of contracts, often of a petty nature, with private parties. At times, contracts are entered into through cor-

4. *Chatturbhuj v. Moreshwar*, AIR 1954 SC 236 : 1954 SCR 236; *Bhikraj Jaipuria v. Union of India*, AIR 1962 SC 113 : (1962) 2 SCR 880; *Mulamchand v. State of Madhya Pradesh*, AIR 1968 SC 1218 : (1968) 3 SCR 214; *Jit Ram Shiv Kumar v. State of Haryana*, AIR 1980 SC 1285 : (1981) 1 SCC 11; *Bishandayal & Sons v. Orissa*, AIR 2001 SC 544.

A contract for the supply of goods would not cease to attract S. 7(d) of the Representation of the People Act merely because it does not comply with Art. 299(1) and as such is not enforceable against the government: *Chatturbhuj v. Moreshwar*, *supra*; also see, *Abdul Rahiman Khan v. Sadasiva Tripathi*, AIR 1969 SC 302; *Konappa Rudrappa Nadgouda v. Vishwanath Reddy*, AIR 1969 SC 447 : (1969) 1 SCR 395.

But in *Laliteshwar Prasad v. Bateshwar Prasad*, AIR 1966 SC 580 : (1966) 2 SCR 63, the Court refused to extend the *Moreshwar* principle to a situation where a contract not complying with Art. 299 has in fact not been ratified.

5. AIR 1967 SC 203 : (1966) 3 SCR 919.

6. *Ibid.*, at 207.

7. Also see, *Mulamchand v. State of Madhya Pradesh*, AIR 1968 SC 1218 : (1968) 2 SCR 880.

8. AIR 1967 SC 203 : (1966) 3 SCR 919.

9. AIR 1968 SC 1218 : (1968) 2 SCR 880.

respondence or even orally. It would be extremely inconvenient from an administrative point of view if it were insisted that each and every contract must be effected by a ponderous legal document couched in a particular form.

The judicial attitude to Art. 299 has sought to balance two motivations:

- (i) on the one hand, to protect the Government from unauthorised contracts; and
- (ii) on the other hand, to safeguard the interests of unsuspecting and unwary parties who enter into contracts with government officials without fulfilling all the formalities laid down in the Constitution.

A strict compliance with these conditions may be inequitable to private parties, and, at the same time, make government operations extremely difficult and inconvenient in practice. Consequently, in the context of the facts of some cases, the courts have somewhat mitigated the rigours of the formalities contained in Art. 299(1), and have enforced contracts even when there has been not full, but substantial, compliance with the requirements of Art. 299(1). In effect, it may be true to say that judicial view has oscillated between the liberal and the rigid interpretation of Art. 299.

A contract to be valid under Art. 299(1) has to be in writing. It does not, however, mean that there should always be a formal legal document between the government and the other contracting party for the purpose. A valid contract could emerge through correspondence, or through offer and acceptance, if all the conditions of Art. 299(1) are fulfilled.

In *Union of India v. Rallia Ram*,¹⁰ the Chief Director of Purchases, Government of India, invited tenders for purchase of some cigarettes. The respondent's tender was accepted and the acceptance letter was signed by the Director and it contained an arbitration clause. The Supreme Court held that the constitutional provision [Art. 299(1)] did not in terms stipulate that only a formal document executed on behalf of the Government of India with the other contracting party was effective. In the absence of any direction by the President prescribing the manner in which a contract is to be executed, a valid contract may result from correspondence between the parties concerned. A tender for purchase of goods in pursuance of an invitation issued by, and acceptance in writing which is expressed to be made in the name of, the President and executed on his behalf by a person authorised for the purpose would conform to the requirements of Art. 299(1). In the instant case, the correspondence between the parties ultimately resulting in the acceptance note was held to amount to a contract. This means that a binding contract by tender and acceptance can come into existence if the acceptance is by a person duly authorized in this behalf by the President.¹¹

Under Art. 299(1), a contract can be entered into on behalf of the government by a person authorised for the purpose by the President, or the Governor, as the case may be. The authority to execute the contract on behalf of the government may be granted by rules, formal notifications, or special orders; such authority may also be given in respect of a particular contract or contracts by the President/Governor to an officer other than the one notified under the rules. Art. 299(1) does not prescribe any particular mode in which authority must be con-

10. AIR 1963 SC 1685 : (1964) 3 SCR 164.

11. *Union of India v. N.K. Pri. Ltd.*, AIR 1972 SC 915 : (1973) 3 SCC 388.

ferred; authorisation may be conferred *ad hoc* on any person.¹² A contract entered into by an officer not authorised to enter the same is not valid or binding.¹³

In *Bhikraj Jaipuria v. Union of India*,¹⁴ the firm tendered large quantity of foodgrains. The offer was accepted by the Railway Administration. A scheme to distribute it to railway employees was accepted by the Railway Board. Officers were authorised to take delivery, transport and distribute it. They fixed programme of inspection, kept wagons for taking delivery, returned empty wagons, entered into correspondence, accepted bills and railway receipts and made payments of bills. No express authority to execute contracts had been conferred on the Divisional Superintendent who had issued the purchase orders. Nevertheless, the Court inferred from the facts that he acted under special authority granted to him to enter into the contract for the purchase of foodgrains.

In the case mentioned below,¹⁵ the respondent company made an offer to purchase surplus rails from the Railway Board. The letter accepting the offer was written by the Secretary to the Railway Board. The Supreme Court ruled that no binding or concluded contract came into effect because the only person authorised to enter into a contract for the sale of the rails was the Director of Stores, and the Secretary was not authorised to enter into the contract on behalf of the President of India.

Lastly, under Art. 299(1), a contract between the government and a private party to be enforceable has to be expressed in the name of the President (or the Governor). Even though a contract is made by a person authorised by the President (or the Governor) to make it, it will still not be enforceable against the government if it is not expressed to be made on behalf of the President (or the Governor).¹⁶ The constitutional provision regarding the form of contract is regarded to be mandatory.

In *Bhikraj*, mentioned above, no formal contracts were executed for the supply of foodgrains by the appellant. He had merely offered to supply foodgrains by letters sent to the divisional Superintendent, East India Railway, and he had accepted those offers through purchase orders. These purchase orders were not expressed to be made in the name of the Governor-General, nor were they executed on behalf of the Governor-General, but were signed by the divisional superintendent himself. The Court ruled that the resultant contracts were unenforceable. The result was that the appellant in *Bhikraj* was held not entitled to claim compensation for the foodgrains supplied by him as the contract was not in the proper form.

This rule has at times been judicially criticised, for a contract fully in order otherwise becomes unenforceable only because of a single defect in form.¹⁷ In some cases, however, the rigours of this rule have been somewhat relaxed because of considerations of practical convenience not only of the private parties entering into agreements with the government but even of the government itself. Thus, the mere fact that the signing officer fails to mention that he was signing

12. *State of Bihar v. Karam Chand Thapur*, AIR 1962 SC 110 : (1962) 1 SCR 827.

13. *Union of India v. Chouthmal*, AIR 1976 MP 199.

14. AIR 1962 SC 113 : (1962) 2 SCR 880.

15. *Union of India v. N.K. Pvt. Ltd.*, AIR 1972 SC 915 : (1973) 3 SCC 388.

16. *Bhikraj Jaipuria v. Union of India*, *supra*, footnote 14.

17. See, *G.S. Partners v. Union of India*, AIR 1959 Cal 287.

on behalf of the President, has been regarded not an infirmity fatal to the validity of the contract when it was expressed to have been made on behalf of the President. According to the *Rallia Ram*¹⁸ ruling, when an officer signs in his official capacity but fails to state in the description that the contract was being executed on behalf of the President, the Court could ignore the technicality if from the correspondence it could reasonably be inferred that the contract was executed on behalf of the President.¹⁹

But, in several cases, the courts have adopted the rigid concept of Art. 299(1). In *Karamshi v. State of Bombay*,²⁰ there was an agreement for the supply of canal water for the irrigation of a cane-farm entered into by letters, but no formal contract in the name of the Governor was executed. After supplying water for sometime, the supply was stopped by the government. The Court found from the documentary evidence that though an agreement had been reached between the government and the party concerned, yet it could not be enforced because no formal document was executed in the name of the Governor and it was also not clear whether the Superintendent Engineer who had entered into the agreement was legally authorized to do so. The letters in question mentioned the names of the Minister of Public Works Department as well as the government but these letters did not purport to emanate from the Governor. The Court did not like to stretch the point further for fear of its resulting in the negation of the constitutional provision.²¹

In the case mentioned below,²² the Supreme Court has reiterated the well established principle that no valid contract between the State Government and a tenderer for any work can arise unless the acceptance letter is signed in the name of the Governor. Here, the Executive Engineer, P.W.D., accepted the tender of the respondent for construction of a bridge; the letter of acceptance was signed by him as Executive Engineer, but not in the name of the Governor. Later the respondent withdrew his offer. According to the P.W.D. Code, the Executive Engineer was authorised to enter into such a contract. Nevertheless, the Supreme Court ruled that no valid contract had come into existence between the State Government and the respondent. The Court refused to accept the plea of the State that as the Executive Engineer had authority to accept the tender on behalf of the Government, it must be presumed that the contract had been entered into in accordance with the provisions of Art. 299. The Court reiterated that Art. 299(1) has been enacted not merely for the sake of form but as a matter of public policy to protect the government against unauthorised contracts.

(b) RATIFICATION

Before 1968, a judicial view was expressed that though, ordinarily, the government could not be sued on informal contracts, yet the government could accept responsibility for them by ratifying them.²³ For example, in *Mondal*²⁴ the Supreme Court stated that a contract not conforming with Art. 299(1) was not 'void' in the 'technical sense' that it could not be ratified.

18. *Supra*, footnote 10.

19. *D.G. Factory v. State of Rajasthan*, AIR 1971 SC 141 : (1970) 3 SCC 874.

20. AIR 1964 SC 1714 : (1964) 6 SCR 984.

21. Also, *Nanlal Madhavji v. Andhra Pradesh*, AIR 1982 Cal 167.

22. *State of Punjab v. Om Prakash Baldev Krishan*, AIR 1988 SC 2149 : 1988 Supp SCC 722.

23. *N. Purkayastha v. Union of India*, AIR 1955 Ass 33; *Chatturbhuj v. Moreshwar*, *supra*; *Laliteshwar Prasad v. Bateshwar Prasad*, AIR 1966 SC 580 : (1966) 2 SCR 63.

24. *State of West Bengal v. B.K. Mondal*, AIR 1962 SC 779 : 1962 Supp (1) SCR 876.

Again, in *Karam Chand Thapar*,²⁵ the Supreme Court expressed the view that when a contract was entered into by an unauthorized person, it could be ratified by the government, especially when the contract was for its benefit.

But, in *Mulamchand*,²⁶ the Supreme Court adopting a rigid view of Art. 299(1) held that there was no question of ratification or estoppel by or against the government in case of a contract not conforming to Art. 299(1). The Court reiterated the view that Art. 299(1) has not been enacted for the sake of mere form and, therefore, the formalities prescribed by it cannot be dispensed with. If the plea of the government regarding estoppel or ratification is admitted, that would mean repeal of an important constitutional provision intended for the protection of the general public.

In *State of Uttar Pradesh v. Murari Lal*,²⁷ the Court specifically said that “the consensus of opinion is that a contract entered into without complying with conditions laid down in Art. 299(1) is void”. The Court was very specific that no question of ratification of such a contract could arise because being void it was not capable of ratification.

(c) NO ESTOPPEL

No estoppel can apply against the government if it seeks to nullify a contract which is not in the form as prescribed by Art. 299. “There is no question of estoppel or ratification in such a case”.²⁸ Therefore, Art. 299(1) cannot be bypassed by invoking the doctrine of estoppel.

Estoppel can however apply in case of statutory contracts, or contracts by statutory bodies, as such contracts do not fall under the purview of Art. 299(1).²⁹

(d) VOIDNESS OF CONTRACT IS RELATIVE

A view has been expressed that a contract not complying with the requirements of Art. 299 is only relatively void but not void for all purposes. It means that while the contract is not enforceable by the parties thereto, it can still subsist for some collateral purposes.³⁰

(e) SERVICE AGREEMENTS

A contract of service with government is not to be struck down for non-compliance with the provisions of Art. 299.³¹ The reason is that once appointed, the government servant acquires a status and his rights and obligations are no longer determined by consent of the two parties, but by statutory rules framed by the government under Art. 309.³²

25. *Bihar v. Karamchand Thapar Bros.Ltd.*, AIR 1962 SC 110.

26. *Infra*, footnote 28.

27. AIR 1971 SC 2210 : (1971) 2 SCC 449.

28. *Mulamchand v. State of Madhya Pradesh*, AIR 1968 SC 1218 : (1968) 3 SCR 214; *N. Ramanatha v. State of Kerala*, AIR 1973 SC 2461. *Bihar E.G.F. Cooperative Society v. Sipahi Singh*, AIR 1977 SC 2149 : (1977) 4 SCC 145; *Jit Ram Shivkumar v. State of Haryana*, AIR 1980 SC 1285 : (1981) 1 SCC 11.

29. *Gujarat State Financial Corp. v. Lotus Hotels Pvt. Ltd.*, AIR 1983 SC 848 : (1983) 3 SCC 379, see, *infra*.

30. *M. Mohammed v. Union of India*, AIR 1982 Bom 443.

31. *Ranjit Kumar v. State of West Bengal*, AIR 1958 Cal 551; *Union of India v. Jyotirmoyee*, AIR 1967 Cal 461.

32. *Supra*, Chapter XXXVI, Sec. B.

Usually, no formal document is executed between the government and the servant; government's service starts with nothing more than a letter of appointment. In this context, it is necessary to regard service contracts as falling out of the scope of Art. 299(1).

Bose, J., in *Parshotamlal Dhingra v. Union of India*,³³ has stated that, as a service contract with the government is subject to 'pleasure' under Art. 310(1),³⁴ and can be terminated at will despite an express condition to the contrary, it cannot be regarded as a contract in the usual sense of the term and, as such, it should not be brought within the purview of Art. 299(1).

(f) STATUTORY CONTRACTS

Article 299 does not apply to a statutory contract, i.e., a contract made in exercise of statutory powers and not general executive powers.³⁵ A distinction is thus drawn between contracts executed in exercise of the executive powers and those executed in exercise of the ordinary statutory powers. Art. 299(1) applies to the former, but not to the latter, types of contracts.

In *Lal Chand*,³⁶ the Supreme Court considered a contract granting exclusive privilege of liquor vending, executed in exercise of the statutory powers referable to the Punjab Excise Act, and the rules made thereunder. The Court held that the grant of exclusive privilege gave rise to a contract of a statutory nature, distinguished from the one executed under Art. 299(1) and, therefore, compliance with Art. 299(1) was not required in such a case.

The Supreme Court has clarified that only because one of the parties to the agreement is statutory or public body, the contract cannot be characterised as a statutory contract. The Court has observed on this point:³⁷

“Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law”.

Allotment of land pursuant to declared socio economic policy of the state is an executive act covered under Art. 162 and not a contract coming within ambit of Art. 299.³⁸

D. CONTRACTUAL LIABILITY

Article 299(2) immunizes the President, or the Governor, or the person executing any contract on his behalf, from any personal liability in respect of any

33. AIR 1958 SC 36 : 1958 SCR 828; *supra*.

34. *Supra*, Ch. XXXVI, Sec. C.

35. *B.C. Gowda v. State of Mysore*, AIR 1974 Kant 135; *A Damodaran v. State of Kerala*, AIR 1976 SC 1533 : (1976) 3 SCC 61.

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

Also, *Lalji Khimji v. State of Gujarat*, (1993) Suppl. (3) SCC 567; *Steel Authority of India v. State of Madhya Pradesh*, AIR 1999 SC 1630 : (1999) 4 SCC 76.

37. *Kerala State Electricity Board v. Kurien E. Kalathil*, AIR 2000 SC 2573, at 2576 : (2000) 6 SCC 293.

On statutory contracts, also see, *India Thermal Power Ltd. v. State of Madhya Pradesh*, AIR 2000 SC 1005, at 1009 : (2000) 3 SCC 379. To the extent, the terms of the contract entered into by a statutory body are fixed by a statute, the contract may be regarded as statutory.

38. *Govt. of A.P. v. Maharshi Publishers (P) Ltd.*, (2003) 1 SCC 95 : AIR 2003 SC 296.

contract executed for the purposes of the Constitution, or for purposes of any enactment relating to the Government of India heretofore in force.

This immunity is purely personal and does not immunize the government, as such, from a contractual liability arising under a contract which fulfils the requirements of Art. 299(1).³⁹

RESTITUTION

Earlier, a view was expressed that when a contract was not in proper form, the exemption of Art. 299(2) would not apply to the officer executing the contract and it could be enforced against him personally under S. 230(3) of the Indian Contract Act.⁴⁰ But, a different view was expressed by the Supreme Court in *State of Uttar Pradesh v. Murari Lal*.⁴¹ A contract entered into without complying with Art. 299(1) is void. There is no contract in the eyes of law and so S. 230(3) of the Contract Act is inapplicable.

The governmental liability is practically the same as that of a private person, subject, of course, to any statutory provision to the contrary.⁴²

In order to protect innocent parties, the courts have held that if government derives any benefit under an agreement not fulfilling the requisites of Art. 299(1), the Government may be held liable to compensate the other contracting party under S. 70 of the Indian Contract Act, on the basis of a *quasi*-contractual liability, to the extent of the benefit received. The reason is that it is not just and equitable for government to retain any benefit it has received under an agreement which does not bind it. Art. 299(1) is not nullified if compensation is allowed to the plaintiffs for work actually done or services rendered on a reasonable basis and not on the basis of the terms of the contract.

The courts have adopted this view on practical considerations also. Modern government is a vast organisation. Officers have to enter into a variety of petty contracts, many a time orally or through correspondence without strictly complying with Art. 299. In such a case, if what has been done is for the benefit of the government for its use and enjoyment, and is otherwise legitimate and proper, S. 70 of the Contract Act should step in and support a claim for compensation made by the contracting parties notwithstanding the fact that the contract in question had not been made as required by Art. 299. If S. 70 were to be held inapplicable, it would lead to extremely unreasonable consequences and may even hamper the working of the government. Like ordinary citizens, even government should be subject to the provisions of S. 70.⁴³

The basis of Section 70 of the Indian Contract Act is the equitable doctrine of restitution and not any implied contract. In *Mondal*,⁴⁴ a contractor constructed a building at the request of an official who had accepted his tender. The building was constructed and accepted by the government but the contractor was not paid. The government argued that the request in pursuance of which the building was

39. *State of Bihar v. Sonabati*, AIR 1954 Pat 513.

40. *Chatturbhuj v. Moreshwar*, *supra*, footnote 4.

41. *Supra*, footnote 27.

42. *State of Bihar v. Abdul Majid*, AIR 1954 SC 245 : 1954 SCR 786.

43. *State of West Bengal v. B.K. Mondal*, AIR 1962 SC 779 : 1962 Supp (1) SCR 876; *New Marine Coal Co. v. Union of India*, AIR 1964 SC 152 : (1964) 2 SCR 859.

44. *State of West Bengal v. B.K. Mondal*, *supra*, footnote 43.

constructed was unauthorised and so there was no privity of contract between the contractor and the government. There was no contract fulfilling the requisites of Art. 299(1) and enforceable as such. The Supreme Court held that though the contract was unenforceable as it did not fulfil the requisites of Art. 299, yet the State was still liable to pay under S. 70 of the Contract Act on a *quasi*-contract for the work done by the contractor and accepted by the government.

Section 70 lays down three conditions, namely:

(i) a person should lawfully do something for another person or deliver something to him;

(ii) in doing so, he must not intend to act gratuitously, and

(iii) the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof.

In *Mondal*, all the three elements had been satisfied and so the government was held liable.⁴⁵

Similarly, if under a contract with a government, a person has obtained any benefit, he can be sued for the dues under S. 70 of the Indian Contract Act though the contract did not conform to Art. 299.⁴⁶ If the government has made any payments under a void contract, it can recover the same under S. 65 of the Contract Act.⁴⁷

The *Mondal* principle has been applied in a number of cases.⁴⁸

It needs to be emphasized that S. 70, Contract Act, does not deal with the rights and liabilities of parties accruing from a contract. It deals with the rights and liabilities of the parties accruing from relations which resemble those created by contract. Thus, in cases falling under S. 70, the person doing something for another cannot sue for specific performance of the contract nor can he ask for damages for breach of contract for the simple reason that no valid contract exists between the parties. All that S. 70 provides is that if the goods delivered are accepted, or the work done is voluntarily enjoyed, then the liability to pay compensation for the said work or goods arises. S. 70 deals with cases where a person does a thing not intending to act gratuitously and the other enjoys it.

Section 70, Contract Act, in no way detracts from the binding character of Art. 299(1). The cause of action for the respondent's claim under S. 70 is not any breach of contract by the government. In fact, the claim under S. 70 is based on the assumption that the contract in pursuance of which the respondent has supplied the goods, or made the construction in question, is ineffective and, as such, amounts to no contract at all. Thus, S. 70 does not nullify Art. 299(1). In fact, S. 70 may be treated as supplementing the provisions of Art. 299(1). What s. 70

45. *Mulamchand v. State of Madhya Pradesh*, AIR 1968 SC 1218 : (1968) 3 SCR 214; *Manohar Lal v. Union of India*, AIR 1974 Pat 56; *Rambabu v. State*, AIR 1981 All 16.

46. *State of Orissa v. Rajballav*, AIR 1976 Ori 79.

47. *Pannalal v. Deputy Commissioner*, AIR 1973 SC 1174 : (1973) 1 SCC 639; *Union of India v. Sita Ram Jaiswal*, AIR 1977 SC 329 : (1976) 4 SCC 505; *Nanlal Madhoji v. State of Andhra Pradesh*, AIR 1982 Cal 167; *Union of India v. J.K. Gas Plant*, AIR 1980 SC 1330 : (1980) 3 SCC 469.

48. See, for example, *The New Marine Coal Co. v. Union of India*, AIR 1964 SC 152, 155 : (1964) 2 SCR 859.

prevents is unjust enrichment and it applies as much to individuals as to corporations and governments.

E. AWARD OF CONTRACTS

In modern times, the welfare state is the source of enormous wealth and more and more persons enjoy government largess in the form of jobs, contracts, licenses, quotas, mineral rights, concessions, etc. This raises the possibility of exercise of power by a government to dispense largess in an arbitrary manner. It is axiomatic that a government or any of its agencies ought not to be allowed to act arbitrarily and confer benefits on whomsoever they want. Questions have often arisen whether the state is bound by any norms in dispensing its largess.

Since 1979, there have been far reaching developments in the law relating to government contracts outside Art. 299.⁴⁹ Art. 299 has a very limited range, *viz.*, it lays down only some formal rules regarding such mundane matters as how a contract between government and a private person is to be executed, or expressed, and who can enter into such a contract on behalf of the government? But Art. 299 does not say anything as to how the executive power to enter into contracts is to be exercised by the government? Whether there are any limitations subject to which this power is to be exercised? To what extent can there be judicial review of government contracts under Art. 226?

Before 1979, the position was that the Government enjoyed lots of discretion in the matter of awarding contracts to whomsoever it liked. The contractual freedom of the government was equated practically to that of a private person. The courts followed the general principle that the government was free to enter into a contract with any one it liked. Thus, the Supreme Court stated in *Achutan* in 1959⁵⁰ : “When one person is chosen rather than another, the aggrieved party cannot claim the protection of Art. 14 because the choice of the person to fulfil a particular contract must be left to the Government,” and also that “a contract which is held from Government stands on no different footing from a contract from a private party.”

The Kerala High Court observed in the same tenor in 1974⁵¹ : “It is perfectly open to the Government even as it is to a private party to choose a person to their liking to fulfil a contract which they wished to perform.”

But, in course of time, the judicial attitude has undergone a sea change on this question. The courts had to shed their passive attitude in this area as a realisation dawned on them that a welfare state exists for the welfare and common good of the largest number of people, and not for the good of the favoured few, and that the state does not enjoy the same freedom as a private person does because a government is always a government subject to rule of law in all its activities.⁵²

So, the Supreme Court veered round to the view that there is need to develop some norms to regulate, structure and discipline the government discretion to

49. For a more detailed discussion of this topic, see, Jain, *A Treatise on Administration Law*, II. Ch. XXIV.

50. *C.K. Achutan v. State of Kerala*, AIR 1959 SC 490 : 1959 Supp (1) SCR 787.

51. *G.E. & E. Co. v. Chief Engineer*, AIR 1974 Ker 23.

52. For discussion on this topic, see, *supra*, Ch. XXI, Sec. D(iv).

confer such benefits, and impose judicial review in this area to some extent. In 1975, in *Eurasian*,⁵³ the Supreme Court stated that “the government is not and should not be as free as an individual” in the matter of entering into contracts and that “whatever its activity, the government is still the government”:

It is now well established that in dispensing its largess, the state is expected not to act as a private individual but should act in conformity with certain healthy standards and norms. The principle of non discrimination contained in Art. 14 has been applied by the Supreme Court in an area of great contemporary importance, viz., conferment of benefits and award of contracts by the government.⁵⁴

The leading case in this area is *Ramana*.⁵⁵ In 1979, the Supreme Court laid down some principles for awarding contracts by a government or its agencies. The Court declared that the executive power of a government to award contracts would be subject to Art. 14 which means that no government can award contracts in an arbitrary or discriminatory manner. The government is still the government when it acts in the matter of granting largess and it cannot act arbitrarily in this respect. No government can give or withhold largess “in its arbitrary discretion or its sweet will”. The government cannot discriminate between individuals in the matter of entering into contracts and the government action must be based on standards that are not arbitrary or unauthorised.

The government is bound by the standards which it announces it will observe. The government cannot relax those standards in favour of a specific person without bringing it to the notice of others who may be similarly situated. For example, if the notice inviting tenders says that the tenders would be received by a specific time on a specific date, then it will be wrong on the part of the concerned authority to receive a tender after the specified time and date.

The Court has also insisted that the norms laid down for qualification of the person to whom the contract is to be awarded ought to be “reasonable, objective and non-discriminatory” and must be strictly adhered to. The Court accordingly observed;

“It must therefore follow as a necessary corollary from the principle of equality enshrined in Art. 14 that though the state is entitled to refuse to enter into relationship with anyone, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground.”

The Court observed further :

“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

53. *Erusian Equipment & Chemicals Ltd. v. State of West Bengal*, AIR 1975 SC 266 : (1975) 1 SCC 70.

Also see, *Sukhdev v. Bhagatram*, AIR 1975 SC 1331 : (1975) 1 SCC 421; *Kasturi Lal v. State of Jammu & Kashmir*, AIR 1980 SC 1992; see also *Jespar I. Slong v. State of Meghalaya*, (2004) 11 SCC 485 : AIR 2004 SC 3533.

54. For discussion on Art. 14, see, Ch. XXI, *supra*.

55. *Ramana Dayaram Shetty v. International Airport Authority*, AIR 1979 SC 1628 : (1979) 3 SCC 489.

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.”

The following main principles emerge from *Ramana*:

- (1) The government does not have an open and unrestricted choice in the matter of awarding contracts to whomsoever it likes.
- (2) The government is to exercise its discretion in conformity with some reasonable non-discriminatory standards or principles.
- (3) The government is bound by the standards laid down by it.
- (4) The government can depart from these standards only when it is not arbitrary to do so and the departure is based on some valid principle which in itself is not “irrational, unreasonable or discriminatory”.

The above-mentioned propositions have been reiterated by the Supreme Court in a number of cases. For example, in 1993, in *F.C.I. v. Kamdhenu Cattle Feed Industries*,⁵⁶ the Supreme Court has observed :

“In contractual sphere as in all other state actions, the state and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is not unfettered discretion in public law : A public authority possesses powers only to use them for public good. This imposes the duty to act fairly, and to adopt a procedure which is fairplay in action.”

It is thus clear from the above observations of the Supreme Court that the government cannot act arbitrarily in the matter of entering into contractual relationship with third parties. It cannot choose any person it likes. Its action must conform to some standard or norm which is rational and non-discriminatory.

Since *Ramana*, in order to ensure that the government exercises its power to award contracts in a non-discriminatory manner, the Supreme Court has laid down *inter alia* the following propositions in respect of award of contracts by the government or its agencies :

- (i) The government must lay down some norms or standards of eligibility. These standards ought to be rational and non-discriminatory. A democratic government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.
- (ii) The government must adhere to, and must not deviate from, the standards laid down by it.⁵⁷
- (iii) The government ought not to award the contract to some one not fulfilling the prescribed conditions of eligibility. If the authority does so, its action becomes discriminatory since it excludes other persons similarly situate from tendering for the contract and that would be plainly arbitrary

⁵⁶. AIR 1993 SC 1601 : (1993) 1 SCC 71.

⁵⁷. *West Bengal Electricity Board v. Patel Engineers*, AIR 2001 SC 682 : (2001) 2 SCC 451.

and without reason. The rule flows from Art. 14 as well as from Administrative Law.⁵⁸

- (iv) The terms and conditions issued in the advertisement inviting tenders cannot be altered to the advantage of a particular person having regard to the fact that if such favourable terms and conditions were known to all other participants, they would have participated in the tender.⁵⁹
- (v) Expression of different views and opinions in exercise of contractual powers may be there. However, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision maker and the bidders and other stakeholders, uncertainty and question of breach of the rule of law will not arise.⁶⁰
- (vi) For execution of any work, tenders must be invited. The contract must be awarded to one with the lowest tender except when, in a specific case, there are some good reasons for not doing so.

As the Supreme Court has insisted in *Tata Cellular*⁶¹ : “But the principles laid down in Art. 14 of the Constitution have to be kept in view while accepting or refusing a tender.”

The Supreme Court has stated in another case⁶² : “.....the Government had the right to either accept or reject the lowest offer but that of course, if done on a policy, should be on some rational and reasonable grounds.”⁶³

It is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Art. 14 of the Constitution. Therefore once the State or an instrumentality of the State is a party, it has an obligation in law to act fairly, justly and reasonably consistent with Article 14. Since the Export Credit Guarantee Corporation being an instrumentality of the State and a monopoly body had to be approached by the appellants by compulsion to cover its export risk and the policy was issued after seeking all required information and after receiving huge sums of money as premium exceeding Rs. 16 lakhs and the liability of the insurer under the policy arose when the default of the exporter occurred and thereafter when the Government of the country to which the goods were exported failed to fulfil its guarantee, the appellant was entitled to relief even though a suitable efficacious alternate remedy was available by way of a suit.⁶⁴

Article 14 prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. However, no person can claim a Fundamental Right to carry on business with the Government. All that he can claim is that in competing for

58. *Premium Granites v. State of Tamil Nadu*, (1994) 2 SCC 691 : AIR 1994 SC 2233; *Raunaq International Ltd. v. I.V.R. Construction Ltd.*, AIR 1999 SC 393 : (1999) 1 SCC 492.

59. *G.J. Fernandez v. State of Karnataka*, AIR 1990 SC 958.

60. *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.*, (2007) 8 SCC 1 : (2007) 11 JT 1.

61. *Tata Cellular v. Union of India*, AIR 1996 SC at 25.

62. *Union of India v. Hindustan Development Corporation*, AIR 1994 SC 1000.

63. *Lalzawmliana v. Mizoram*, AIR 2001 Gau 23.

64. *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.*, (2004) 3 SCC 553; (2003) 10 JT 300.

the contract, he should not be unfairly treated and discriminated against, to the detriment of the public interest. Thus the notices inviting tenders for supply of high security vehicle registration places are open to response by all, and even if one single manufacturer is ultimately chosen for a region or State, it cannot be said that the State has created a monopoly of business in favour of private party.⁶⁵

In the context of privatisation of Delhi and Mumbai Airports and selection of joint venture partners by multi-tier bidding process alteration of terms of original tender documents could not be expanded or narrowed down at the evaluation stage as it was beyond authority and contrary to the scoring system that was to be followed.⁶⁶

It is well settled that the State and its authorities including instrumentalities of States have to be just fair and reasonable in all their activities including those in the field of contracts. In the field of contracts the State and its instrumentalities ought to so design their activities as would ensure fair competition and non discrimination. They can augment their resources but the object should be to serve the public cause and to do public good by resorting to fair and reasonable methods.⁶⁷

The Supreme Court has further intensified review in this area. In *Reliance Energy*⁶⁸ the Supreme Court has sought to co-relate the right conferred by Article 14 with those under Article 21 of the Constitution. It also laid down that the norms laid down by the administration must be clearly and properly understood by the administration as well as those interacting with the administration. If such norms are uncertain then the rule of law could be breached. The Court observed that legal certainty was an important aspect of the rule of law and any vagueness or subjectivity in such norms could result in unequal and discriminatory treatment and thereby violate the doctrine of "level playing field". *Reliance Energy* shows the depth to which a Court in exercise of its power of judicial review could travel when such norms are challenged on the grounds of uncertainty, vagueness and subjectivity.

In *Reliance Energy* the Supreme Court after referring to the three heads of judicial review namely illegality, irrationality and procedural impropriety, has held that all errors of law are jurisdictional errors.⁶⁹ This is a giant leap because a jurisdictional error has many ramifications e.g. whether it voids the exercise or whether the bar of alternative remedy would apply etc.

In *Reliance Airport*⁷⁰ the scoring system formed part of the evaluation process and its object was to provide identification of factor, alteration of marks of each

65. *Assn. of Registration Places v. Union of India*, (2005) 1 SCC 679 : AIR 2005 SC 469.

66. *Reliance Airport Developers (P) Ltd. v. Airports Authority of India*, (2006) 10 SCC 1 : (2006) 10 JT 424.

67. *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai*, (2004) 3 SCC 214 : AIR 2004 SC 1815.

68. *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.*, (2007) 8 SCC 1 : (2007) 11 JT 1.

69. *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.*, (2007) 8 SCC 1 : (2007) 11 JT 1.

70. (2006) 10 SCC 1 : (2006) 10 JT 424.

of those factors and giving marks at different stages so as to achieve objectivity in the decision making process.⁷¹

Ordinarily a contract ought to be awarded after inviting tenders for the purpose. This provides an opportunity to all those who may be interested in securing the contract to offer their bids for the purpose. Also, the concerned authority may select the best offer on competitive price without affecting the quality of work. It eliminates favouritism and discrimination in awarding the contract. Award of a contract to an individual without inviting tenders is invalid as it amounts to “pick and choose” which violates Art. 14.⁷²

In *Business Link*⁷³ it was contended that the notice inviting tenders was published in newspapers not having wide circulation. This contention was rejected on the finding that one of the newspapers in which the publication was made had a circulation of 39,600 copies per day for about 50 years and the other 30,000 copies per day for about 11 years in the city concerned. The argument that the advertisements were inadequate was negated on the finding that 12% responded which was suggestive of wide circulation.⁷⁴

The terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The government must have a free hand in setting the terms of the tender. The courts can scrutinize the award of the contracts. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.⁷⁵

When tenders are invited for execution of a work, the contract is awarded to the lowest tenderer which is in public interest. Ignoring the instructions subject to which the tenders are invited would 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 instructions is to ensure their enforcement lest “the Rule of Law should be a casualty.” A writ Court can interfere if the lowest tender is illegally rejected.⁷⁶ The Supreme Court has however emphasized in the case noted below⁷⁷ that the rule that the contract ought to be awarded to the lowest tenderer applies when all things are equal. If the lowest tenderer does not satisfy the prescribed conditions, the contract cannot be awarded to him. “Merely because a bid is the lowest the requirements of compliance of rules and conditions cannot be ignored.” The decision to reject the lowest tender must be based upon some reason which would satisfy and meet the requirements of Art. 14 of the Constitution. Also, the concerned authority is not obliged to award contract to a tenderer at the quoted price bid. The authority can always negotiate with the next tenderer (in case the lowest tender is out for any

71. *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.*, (2007) 8 SCC 1: (2007) 11 JT 1.

72. *Sterling Computers, supra*; *V. Sivakumar v. State of Kerala*, AIR 1999 Ker 49.

73. *Business Link v. A. S. Advertising Co.*, (2003) 10 SCC 258 : AIR 2004 SC 4959.

74. *Business Link v. A. S. Advertising Co.*, (2003) 10 SCC 258: AIR 2004 SC 4959.

75. *Directorate of Education v. Educomp Datamatics Ltd.*, (2004) 4 SCC 19 : AIR 2004 SC 1962. The proposition is expressed with undue rigidity e.g., would an eligibility criteria that is designed to favour a particular class.

76. *Pritam Singh v. State of Punjab*, AIR 1997 P&H 194; *Tata Cellular v. Union of India*, AIR 1996 SC 11.

See, Sec. F, *infra*.

77. *West Bengal Electricity Board v. Patel Engg. Co. Ltd.*, AIR 2001 SC 682 : (2001) 2 SCC 451.

reason) for awarding the contract on economically viable price bid.⁷⁸ A practical compulsion which necessitates an avoidable choice cannot be termed as perverse or lacking in rationality.⁷⁹

In the case noted below,⁸⁰ the award of a contract was quashed because the decision of the concerned authority to reject the lower tender of the petitioner was found to be “totally arbitrary, capricious and devoid of any sense of fairplay”.

In a given situation the Court may not upset the grant.⁸¹

Again on some occasions judicial review in tender matters have been restricted. In *Master Marine Services*⁸² the tender document required bidder to have licence to act as surveyor/loss assessor under Insurance Act to prequalify. The appellant company did not have such licence in its name, but its chairman did. The contracting authority, exercising its power under tender conditions to do so, waived this technical requirement for various reasons given by it and the contract was awarded to the appellant on financial grounds since its bid for the work involved was lower. The Court found that 98 per cent of the work being of a clerical nature, which required no licence under Insurance Act, contracting authority was justified in awarding contract to appellant company primarily on financial/commercial considerations.

However, while ascertaining that principles of judicial review applied to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism, the Court cautioned that there are inherent limitations in the exercise of such review. If a review of the administrative decision is permitted indiscriminately it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. Free 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 principles of reasonableness but must be free from arbitrariness unaffected by bias or actuated by *mala fides*. Such caution in quashing decision may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.⁸²

A challenge to the award of contract to the appellant on ground that certain tender conditions relating to applicability of Rules relating to disposal/transportation of hazardous waste was vague in that whether correct Rules and sub rules had been mentioned and incorporated in the contract was turned down on the basis that such ground of attack was irrelevant, since the parties would be bound by the statutory obligations in any case.⁸³

78. *West Bengal Electricity Board v. Patel Engineering Co. Ltd.*, AIR 2001 SC 682 : (2001) 2 SCC 451. Also see : *Y. Konda Reddy v. State of Andhra Pradesh*, AIR 1997 AP 121.

79. *Reliance Airport Developers (P) Ltd. v. Airports Authority of India*, (2006) 10 SCC 1 : (2006) 10 JT 424.

80. *PSC Engineers Pvt. Ltd. v. Tripura*, AIR 2000 Gau 198.

81. *Subhash Projects & Marketing Ltd. v. W.B. Power Development Corpn. Ltd.*, (2005) 8 SCC 438 : AIR 2006 SC 116, where compensation was awarded by the Court in the facts and circumstances of the case.

82. *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.*, (2005) 6 SCC 138 : AIR 2005 SC 2299.

83. *Ganapathi Metals v. MSTC Ltd.*, (2005) 12 SCC 169.

The award of a contract for execution of a public work on the basis of competitive bidding has many advantages for the state:

- (a) it offers fair opportunity to compete for the contract;
- (b) the concerned authority may select the best person for the job on competitive price without compromising with the quality of work;
- (c) it eliminates favouritism and discrimination in awarding the contract.

In the matter of a ward of dealership in petroleum products interpretation of the advertisement inviting application the principle of *casus omissus* can be invoked to gather the true import of an eligibility condition.⁸⁴

A municipal committee awarded a contract to the second respondent with a view to help him, throwing all norms to the winds. The conditions advertised were revised to help him without advertising the same. The action of the committee was held to be arbitrary. The Court ruled that the revised norms ought to have been advertised in order to enable all the eligible persons to take part in the tender.⁸⁵

There have been a large number of cases since *Ramana* in which the award of contracts by the government and its agencies have been challenged before the courts⁸⁶ and, in some of these cases, the award of contracts has been quashed because of improper exercise of power by the concerned authority.⁸⁷

The Supreme Court has affirmed the decision of the High Court which in effect granted specific performance of a contract.⁸⁸

According to the Supreme Court in *Tata Cellular*,⁸⁹ the Court can review administrative discretion in awarding a contract on the following grounds : (1) Illegality; (2) Irrationality and (3) Procedural Impropriety.

These principles have been reiterated by the courts in a number of cases.

In *Dinesh*,⁹⁰ the Railway Board rejected the tender of the respondent. The Supreme Court ruled that the Board had acted arbitrarily and without applying its mind while doing so. It was characterised as a “flagrant violation of the constitutional mandate of Art. 14.”

In the instant case, there was a clause in the Guidelines issued along with the tender saying that the Railway was entitled to reject any tender offer without assigning any reasons. So, it was argued that the Railway had power to accept, or not to accept, the lowest tender. But the Supreme Court said that “a public

84. *Sangeeta Singh v. Union of India*, (2005) 7 SCC 484 : AIR 2005 SC 4459.

85. *S.Y. Nawab v. Municipal Corpn. of Hyderabad*, AIR 2001 AP 403.

86. *Tata Cellular v. Union of India*, AIR 1996 SC 11; *Union of India v. Hindustan Development Corpn.*, AIR 1994 SC 989; *Asia Foundation and Construction Ltd. v. Trafalgar House Construction (I) Ltd.*, (1997) 1 SCC 738; *New Horizons Ltd. v. Union of India*, (1995) 1 SCC 478; *Delhi Science Forum v.*, (1996) 2 SCC 405.

87. *Sterling Computers Ltd. v. M. and N. Publications Ltd.*, AIR 1996 SC 51 : (1993) 1 SCC 445; *Harminder Singh v. Union of India*, AIR 1986 SC 1527; *Prestress India Corp. v. U.P. State Electricity Board*, AIR 1988 SC 2035; *Alok Prasad Varma v. Union of India*, AIR 2001 Pat 211; see also *Assn. of Registration Plates v. Union of India*, (2004) 5 SCC 364 : AIR 2005 SC 1354.

88. *State of M.P. v. Ramswaroop Vaishya*, (2003) 2 SCC 254 : AIR 2003 SC 1067.

89. *Tata Cellular v. Union of India*, AIR 1996 SC 11 : (1994) 6 SCC 651.

90. *Union of India v. Dinesh Engineering Corporation*, (2001) 8 SCC 491 : AIR 2001 SC 3887.

authority even in contractual matters should not have unfettered discretion". In contracts having commercial element, the authorities are bound to follow the norms recognised by the courts. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. As regards the specific clause mentioned above, the Court said:

"This does not give an arbitrary power to railways to reject the bid offered by a party merely because it has that power. This is a power which can be exercised on the existence of certain conditions which in the opinion of the railways are not in the interest of the railways to accept the offer."

A few examples of this judicial approach may be cited here. Award of a contract is quashed on such grounds as, *mala fides*; corruption; favouritism; discrimination; arbitrariness; improper motives; non-application of mind on the part of concerned authority; award or terms of the contract being arbitrary or unreasonable;¹ contract awarded without any publicity.²

Award of a contract is quashed if the concerned authority takes into account irrelevant considerations;³ or if the contract is awarded by accepting a tender at a higher rate against the interest of revenue;⁴ or if the contract is awarded to one who does not fulfil the prescribed eligibility conditions.

In *Chaitanya*,⁵ the award of contracts was quashed by the Supreme Court. It characterised the award of contracts to ineligible persons in preference to eligible persons as an "unusual, wilful and perverse way of exercising the power of distributing state largess". It was argued on behalf of the state in the instant case that no loss would be caused to the State Exchequer by the award of the contracts. The Supreme Court rejected this argument saying that even if the award of the contracts "was not at the expense of the Exchequer, there could be no question that what was done was the distribution by the State of favours loaded with bounty by way of enabling the recipients of the favours to earn enormous profits".⁶

Award of a contract by the government or any of its authority may be quashed by the Court if the contract is entered into for a collateral purpose, or if there is discrimination or unreasonableness".⁷

There may however be some special circumstances when the Court may uphold award of a contract without inviting tenders for the same.⁸ For example, a contract reached through negotiations between a State Government and a company to set up as a joint venture a multi-super-speciality hospital to give medical

1. *G.J. Fernandez v. State of Karnataka*, AIR 1990 SC 958 : (1990) 2 SCC 488; *Centre for Public Interest Litigation v. Union of India*, AIR 2001 SC 80 : (2000) 8 SCC 606; *Common Cause, A Regd. Society v. Union of India*, AIR 1999 SC 2979, 2994 : (1999) 6 SCC 667; *Centre for Public Interest Litigation v. Union of India*, AIR 2001 SC 80.
2. *M.I. Builders Pri. Ltd. v. Radhey Shyam Sahu*, AIR 1999 SC 2468 : (1999) 6 SCC 464.
3. *Sterling Computers Ltd. v. M & N. Publications Ltd.*, AIR 1996 SC 51.
4. *Dutta Associates Pvt. Ltd. v. Indo Mercantiles Pvt. Ltd.*, (1997) 1 SCC 53; *P.S.C. Engineers Pvt. Ltd. v. Tripura*, AIR 2000 Gau 198.
5. In *Chaitanya Kumar v. State of Karnataka*, AIR 1986 SC 825 : (1986) 2 SCC 594.
6. *Ibid*, at 828.
7. *Asia Foundation & Construction Ltd. v. Trafalgar House Construction Ltd.*, (1997) 1 SCC 738; *Raunaq International Ltd. v. IVR Construction*, AIR 1999 SC 393 : (1999) 1 SCC 492.
8. *Kasturilal Lakshmi Reddy v. State of Jammu & Kashmir*, AIR 1980 SC 1992 : (1980) 4 SCC 1; *State of Madhya Pradesh v. Nandlal Jaiswal Bengal*, AIR 1987 SC 1109.

aid to government employees on a no profit no loss basis and give free medical aid to the poor people was held to be valid even though no tenders were invited for the same.⁹ The State is not constitutionally obliged to shun a private party who offers to develop a Project and the State negotiates with such a party and agrees to provide resources and other facilities for the purpose of development of the project eg. a Port.¹⁰ The example given by Panchal J. is instructive; “Please wait I will first advertise, see whether any other offers are forthcoming and then after considering all offers, decide whether I should get the Port developed through you”. It would be most unrealistic to insist on such a procedure, particularly, in an area like Pondicherry, which on account of historical, political and other reasons, is not yet industrially developed and where entrepreneurs have to be offered attractive terms in order to persuade them to set up industries. The State must be free in such a case to negotiate with a private entrepreneur with a view to inducing him to develop the Port and if the State enters into a contract with such an entrepreneur for providing resources and other facilities for developing the Port, the contract cannot be assailed as invalid because the State has acted *bona fide*, reasonably and in public interest. The Court ruled that so long as the State action was *bona fide* and reasonable, it would not interfere merely on the ground that no advertisement was given or publicity made or tenders invited. Similarly, State can negotiate with a party to set up an industry in the State.¹¹ Tender conditions may have to be construed differently having regard to fact situation obtaining in each case. In a given situation there may be a variation of tender conditions. No hard and fast rule can be laid down therefor.¹²

A public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it and may vary the tender condition to a reasonable extent in public interest.¹³

Fixation of value of a tender is entirely within the purview of the executive and the courts have hardly any role to play in this process except striking down such action of the executive as is proved to be arbitrary.¹⁴

In the matter of formulating conditions of a tender document and awarding a contract of the nature of those for supply of HSRP's, greater latitude is required to be conceded to the State authorities. Certain conditions have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Unless action of tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable. The manufacturer chosen to supply HSRPs would, in fact, be a sort of agent or medium of the RTOs concerned for fulfillment of the statutory obligations in accordance with R. 50, Central Motor Vehicles Rules, 1989 (as amended), and these obligations would be better discharged if there is one manufacturer instead of multi manufacturers as suppliers. A contract providing for technical expertise, financial capability and experience qualifications with a long term of 15 years would serve

9. *Tej Singh Sarupriya v. Rajasthan State Mines and Minerals Ltd.*, AIR 2001 Raj 225.

10. *Villianur Iyarkkai Padukappu Maiyam v. U.O.I.*, (2009) 7 SCC, 561, 605 : (2009) 8 JT 339.

11. *Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir*, AIR 1980 SC 1992.

12. *BSN Joshi & Sons Ltd. v. Nair Coal Services Ltd.*, (2006) 11 SCC 548 : AIR 2007 SC 437.

13. *BSN Joshi & Sons Ltd. v. Nair Coal Services Ltd.*, (2006) 11 SCC 548 : AIR 2007 SC 437.

14. *Jespar I. Slong v. State of Meghalaya*, (2004) 11 SCC 485 : AIR 2004 SC 3533.

the dual purpose of attracting sound parties to stake their money in undertaking the job of supply of HSVRP and safeguard the public interest by ensuring that for a long period the work of affixation of security HSVRP would continue uninterrupted in fulfillment of the object of the scheme contained in R.50.¹⁵

If there are two alternatives available, of giving a short term or a long term contract, it is not for the Court to suggest that the short term contract should be given.¹⁶

F. ISSUE OF WRITS IN MATTERS OF CONTRACT

A writ petition can be moved in the High Court under Art. 226, or the Supreme Court under Art. 32, to challenge award of a contract on the grounds as discussed above. In the area of exercise of contractual powers by governmental authorities, the function of the courts is to prevent arbitrariness and favouritism and to ensure that the power is exercised in public interest and not for a collateral purpose.¹⁷ The application of Article 14 in contractual matters as well as in matters relating to government policy has been stated in unqualified affirmative terms.¹⁸

After the award of the contract comes the stage of fulfilling the contractual obligations. There has been controversy on the question whether one could resort to the writ jurisdiction for imposing contractual obligations on a public authority.

Even when the courts had veered round to the view that the *award* of a contract by the government and its agencies would be amenable to the writ jurisdiction, to some extent, as stated above, they still maintained the position that the question of *breach* of a contract was one which fell primarily within the area of private law under the Contract Act, and that the remedy therefor lay in a civil Court and not under the writ jurisdiction of the High Courts under Art. 226.¹⁹ The view was held for long that a writ petition would not be an appropriate remedy for imposing contractual obligations on the government.²⁰ “The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition”.²¹ If a term of a contract is violated, ordinarily the remedy is not a writ petition.

The Supreme Court stated this position in *Radhakrishnan*²² where the Court maintained that after the government had entered into a contract with a private

15. *Assn. of Registration Places v. Union of India*, (2005) 1 SCC 679 : AIR 2005 SC 469.

16. *Assn. of Registration Places v. Union of India*, (2005) 1 SCC 679 : AIR 2005 SC 469.

17. See, *Air India Ltd. v. Cochin International Airport Ltd.*, AIR 2000 SC 801; (2002) 2 SCC 617; *Asian Techs Ltd. v. State of Kerala*, AIR 2001 Ker. 388.

18. *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.*, (2007) 8 SCC 1 : (2007) 11 JT 1; see also (2007) 2 SCC 1 : AIR 2007 SC 861.

19. For Art. 226, see, Ch. VIII, Secs. D and E.

20. *C.K. Achutan v. State of Kerala*, *supra*; *State of Bihar v. Jain Plastics and Chemicals Ltd.*, AIR 2002 SC 206 : (2002) 1 SCC 216.

21. *Kerala State Electricity Board v. Kurien V. Kalathil*, AIR 2000 SC 2573.

22. *Radhakrishnan Agarwal v. State of Bihar*, AIR 1977 SC 1496.

party, the relations *inter se* between the contracting parties were not governed by any constitutional provision but by the provisions of the Contract Act which would determine the rights and obligations of the concerned parties. No question arose regarding the violation of Art. 14, or of any other constitutional provision, when the government was acting within the contractual field. In *State of Punjab v. Balbir Singh*,²³ the Supreme Court pointed out that a High Court had no jurisdiction to enforce the liabilities arising out of mutually agreed conditions of contract, in a writ proceeding under Art. 226 of the Constitution.

In *D.F.O. v. Biswanath Tea Co.*,²⁴ the Supreme Court ruled that a party could not claim under Art. 226 enforcement of contractual obligations and recover damages. Proper relief for the party would lie to seek specific performance of the contract or damages in a civil Court. The court has reiterated that it will not enforce the terms of a contract qua contract.²⁵

One of the main reasons for this judicial stance was that question of breach of contract would depend on facts and evidence. Such seriously disputed questions regarding breach of contract ought to be investigated and determined on the basis of evidence which may be led by the contesting parties. This can be done in a properly instituted civil suit rather than in a writ petition.²⁶

Where the dispute is purely a contractual dispute as to whether there is a right reserved in the private party to pass on the additional liability to the purchasers, such dispute is to be determined by the terms of the contract between the parties. It is necessary that the facts in each case have to be investigated, the terms of the contract between the parties determined on evidence and construed before the dispute can be satisfactorily adjudicated.²⁷

The power of judicial review cannot be denied even in contractual matters or matters in which the Government exercised its contractual power.²⁸

Permitting a contractor to get his bill paid the Supreme Court has observed that Art. 14 has received a liberal interpretation over the years and its scope has also been extended by creative interpretation²⁹ SINHA J. speaking for the 2 Judge Bench tried to distinguish *Burmah Construction*³⁰ which had held that a pure money claim could not furnish a cause of action in a proceeding under Art. 226 but the distinction is not traceable from what SINHA J said as he has not disclosed any reason.

But, then, judicial view began to undergo a change. The courts began to adopt the stance that Art. 14 strikes at arbitrariness in governmental action and ensures

23. AIR 1977 SC 1717.

24. AIR 1981 SC 1368.

25. *Karnataka State Forest Industries Corporation v. Indian Rocks*, (2009) 1 SCC 150 : AIR 2009 SC 684.

26. *State of Bihar v. Jain Plastics and Chemicals Ltd.*, AIR 2002 SC 206.

27. *Defence Enclave Residents Society v. State of UP*, (2004) 8 SCC 321 : AIR 2004 SC 4877.

28. *Reliance Airport Developers (P) Ltd. v. Airports Authority of India*, (2006) 10 SCC 1 : (2006) 10 JT 424; see also (2007) 2 SCC 1 : AIR 2007 SC 861.

29. *Food Corporation of India v. SEIL Ltd.*, (2008) 3 SCC 440 : AIR 2008 SC 1101.

30. *Burmah Construction Co. v. State of Orissa*, AIR 1962 SC 1320.

fairness and equality of treatment. The Supreme Court has stated in *Shrilekha Vidyarthi v. State of Uttar Pradesh*³¹ :

“The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies providing for adjudication of purely contractual disputes.”

The Court then observed :

“However, to the extent, challenge is made on the ground of violation of Art. 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the state of its obligation to comply with the basic requirements of Art. 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Art. 14 of non-arbitrariness at the hands of the state in any of its actions.”

The position now is that where the dispute lies within the contractual field pure and simple, a writ petition is not maintainable. The relations between the parties are governed by the contract which determines the rights and obligations of the parties *inter se*. For example, the Supreme Court has ruled that the interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. If a term of a contract is violated, or whether the state has made excess payment to the contractor or not, these are disputes of a civil nature to be adjudicated in civil courts and not fit to be decided in writ petitions.³²

But contractual obligations may fall under judicial review if there is some *public law element* involved therein. For example in *Sterling Computers*.³³

It has been held that even in commercial contracts where there is a public element, it is necessary that relevant considerations are taken into account and the irrelevant consideration discarded.

In *LIC*,³⁴ the Supreme Court has observed:

“The actions of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amenable to judicial review and the validity of such an action would be tested on the anvil of Art. 14”³⁵

Thus, when the matter falls within the realm of public law rather than of private law, the High Court can take cognisance of the same under Art. 226.³⁶

31. AIR 1991 SC 537 : (1991) 1 SCC 212.

32. *Kerala State Electricity Board v. Kurien E. Kalathil*, AIR 2000 SC 2573 : (2000) 6 SCC 293; *N.T. Abraham v. State of Kerala*, AIR 2000 SC 3459; *Radharaman Enterprises v. Cuttack Municipal Corp.*, AIR 2001 Ori 57.

33. *Sterling Computers Ltd. v. M and N Publications Ltd.*, (1993) 1 SCC 445, 464.

34. *LIC of India v. Consumer Education and Research Centre*, AIR 1995 SC 1811, at 1822 : (1995) 5 SCC 482.

35. Also see, Ch. XXI, Sec. D(iv).

36. *Common Cause, a Registered Society v. Union of India*, AIR 1999 SC 2979 : (1999) 6 SCC 667.

If the government takes unreasonable and arbitrary decisions while acting in pursuance of a contract, the matter would fall under the writ jurisdiction. There is the duty on the state to act fairly in respect of a contract as well.³⁷ But where a municipality is financially handicapped, it would not be arbitrary to enter into contract with a private person to take house numbering, erection of street sign boards etc. on the condition that the entire costs of the project would be borne by the private party though some nominal payment would be made by the Corporation and although the private person would be free to let out to its clients space provided for advertising purposes.³⁸

When some statutory element enters into a contract, a writ may be issuable. A writ may be issued when some features of public law are involved along with contractual relationship. In many cases of contracts between government and private persons, the concerned officers seek to exercise statutory or administrative powers. The exercise of such powers can not be viewed as exercise of powers under the contract between the government and the private party concerned. As the Supreme Court has observed in *Ram Sanahi*³⁹ : “We are unable to hold that merely because the source of the right which the respondent claims was initially a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not a petition by way of a writ.”

In *Ram Sanahi*, the petitioner had purchased, through an auction, the right to cut trees for a year. The Divisional Forest Officer (D.F.O.) passed an order depriving the petitioner of some timber cut by him. He filed a writ petition challenging the DFO's order on the ground that he was not given a hearing by him before passing the order. The DFO argued that the matter arose out of the terms of the contract and so no writ petition was maintainable.

The Supreme Court rejected the contention of the DFO and quashed the order passed by him stating that by his order, a public authority had deprived the petitioner of a valuable right. The writ petition was maintainable, even if the “right to relief arose out of an alleged breach of contract where the action challenged was of a public authority invested with statutory power”.

This means that a writ petition is maintainable to challenge action by a public administrator when it is exercising statutory or administrative power even within the frame of contractual relationship between the authority and the person concerned. Besides, there is now a growing body of cases where writ petitions have been held maintainable where the contract has a statutory flavour, or where some question of public law is involved.⁴⁰

37. See, *Gujarat State Financial Corp. v. Lotus Hotels Pvt. Ltd.*, AIR 1983 SC 848; *Asst. Excise Commissioner v. Issac Peter*, (1994) 4 SCC 104; *Mahabir Auto Stores v. India*, AIR 1990 SC 1031; *Dwarka Marfatia & Sons. v. Board of Trustees of the Port of Bombay*, AIR 1989 SC 1642; *India v. Graphic Industries Co.*, AIR 1995 SC 409.

38. *M & T Consultants, Secunderabad v. S.Y. Nawab*, (2003) 8 SCC 100 : AIR 2004 SC 4942.

39. *D.F.O. v. Ram Sanahi Singh*, AIR 1973 SC 205.

40. See, *Surendra Nath v. DDA*, AIR 1988 Del 277; *M.S. Desai & Co. v. Hindustan Petroleum Corp. Ltd.*, AIR 1987 Guj 20. This topic falls more appropriately in the area of Administrative Law rather than Constitutional Law. For detailed discussion on this topic, see, JAIN, A TREATISE ON ADMINISTRATIVE LAW, II

In regard to a challenge to a voluntary retirement scheme of a nationalized bank, the contention that the writ petition was not maintainable as the employees sought to enforce a contract has been repelled.⁴¹

The Indian Oil Corporation issued a letter of intent to the petitioner allotting a petrol pump to him. Later the Corporation cancelled the letter of intent. The Patna High Court quashed the order of cancellation under Art. 226 as being arbitrary as there was no material supporting the order. The Court asserted that arbitrariness is anathema to law.⁴² The Court maintained that government and its agencies must act fairly even in contractual matters.⁴³

However, confusion is worse confounded when the Supreme Court in regular intervals, says that contractual duties cannot be enforced by way of mandamus. For example, the court has said: (a) The contractual power is used for a public purpose and a contract cannot be characterised statutory simply because it is awarded by a statutory body;⁴⁴ (b) Mandamus will not be issued to compel the authorities to do something, unless it is shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance; (c) The prayer made in the writ petition is for issuance of a writ of mandamus to direct the NTC to supply the contracted goods (cloth) because it was a case of pure and simple business contract.⁴⁵

The question relating to justiciability of matters pertaining to contracts has been considered also in many recent cases.⁴⁶ In *Ramchandra*⁴⁷ the Court recognized the necessity of a statutory authority while exercising its powers under the Act must necessarily take policy decisions and although a tender has been floated and before the completion of the process, a new policy is adopted, the question is not whether the offer of the appellants should have been rejected (being the highest offer) but is as to whether the Authority in law could have altered its policy in regard to disposal of its properties. A policy decision would involve change of the policy from time to time. But only because a change is effected, the same by itself does not render a policy decision to be illegal or otherwise vitiated in law. Hence the decision taken by the authority for canceling a tender process so as to enable it to have a relook of the entire project would not by itself be termed as arbitrary. And the point that the executive committee appointed by the Authority which dealt with the tender process did not cancel the tender was of no significance since it was the Authority, which “exercises a larger power” was clearly entitled to make alterations in the policy.

In *ABL International* the Court held that judicial review is not ousted merely because the activity of the authority relates to a contractual matter subject to the obvious that each case must be decided on its own facts. In *Star Enterprises* the Supreme Court pointed out that the traditional limitation relating to judicial

41. *Bank of India v. O.P. Swarnakar*, (2003) 2 SCC 721 : AIR 2003 SC 858.

42. *Alok Prasad Verma v. Union of India*, AIR 2001 Pat 211.

43. *Mahabir Auto Stores v. Indian Oil Corporation*, AIR 1990 SC 1031 : (1990) 3 SCC 752.

44. *Binny Ltd. v. V. Sadasivan*, (2005) 6 SCC 657 : AIR 2005 SC 3202.

45. *National Textile Corpn. Ltd. v. Haribox Swalram*, (2004) 9 SCC 786 : AIR 2004 SC 1998.

46. *Ramchandra Murarilal Bhattad v. State of Maharashtra*, (2007) 2 SCC 588 : AIR 2007 SC 401; *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.*, (2004) 3 SCC 553 : (2003) 10 JT 300; *Star Enterprises v. City and Industrial Development Corporation of Maharashtra Ltd.*, (1990) 3 SCC 280.

47. (2007) 2 SCC 588 : AIR 2007 SC 401.

review have been vanishing and judicial scrutiny is being expanded. As Ranganath Misra, J said:

“As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze; these necessitate recording of reasons for executive actions including cases of rejection of highest offers”.

By imposing a condition like purchase preference no option is left and a monopoly is being created. The increase in effectiveness of PSEs cannot be done on an uniform policy without examination as to whether such protection is necessary for a particular PSE. It has to be examined individually as to whether any differential treatment is called for, and therefore, directed that industry-wise assessment be done and if there is already cost effectiveness in any PSEs there may not be any need for the preference being given. The examination should be on the line as to whether any preference is called for and what would be the margin of preference which would ensure level playing field.⁴⁸ Where the State or its agency is unable to perform a contract for supplying granite blocks not because of any default on the part of the successful bidders, it is obliged to refund the deposits held by it and the threat of forfeiture by its instrumentality was unjust and arbitrary.⁴⁹

G. SALE OF GOVERNMENT PROPERTY

The basic purpose observed in this area is that a public authority does not have an open end discretion to dispose of its property at whatever price it likes. The principle is that the sale should take place openly and the effort should be to get the best price. The several methods which can be employed for this purpose are : (i) public auction; (ii) inviting tenders for the property.

As the Supreme Court has observed in *State of Uttar Pradesh v. Shiv Charan Sharma*:⁵⁰

“Public auction with open participation and a reserved price, guarantees public interest being fully subserved”.

The Supreme Court has laid down that mineral rights ought not to be granted through private negotiations but by holding a public auction where those interested in the matter may bid against each other. The Court has observed : “Public auction with open participation and a reserved price guarantees public interest being fully subserved.”⁵¹

In *Haji T.M. Hassan v. Kerala Financial Corpn.*,⁵² the Supreme Court has emphasized that public property owned by the state or its instrumentality should be sold generally by public auction or by inviting tenders. Observance of this rule

48. *Doiwala Sehkari Shram Samvidya Samiti Ltd. v. State of Uttaranchal*, (2007) 11 SCC 641 : (2006) 13 SCALE 540.

49. *Karnataka State Forest Industries Corporation v. Indian Rocks*, (2009) 1 SCC 150 : AIR 2009 SC 684.

50. AIR 1981 SC 1722 : 1981 Supp SCC 85.

51. *State of Uttar Pradesh v. Shiv Charan Sharma*, AIR 1981 SC 1722 : 1981 Supp SCC 85.
Also, *Ram and Shyam Co. v. State of Haryana*, AIR 1985 SC 1147 : (1985) 3 SCC 267.

52. AIR 1988 SC 157 : (1988) 1 SCC 166.

not only fetches the highest price for the property but also ensures fairness in the activities of the state and public authorities. There should be no suggestion of discrimination, bias, favouritism or nepotism. But there may be situations when departure from this rule may become necessary. Such situations must however be justified by compulsion and not by compromise. It must be justified by compelling reasons and not by just convenience.

Balco,⁵³ is the latest pronouncement of the Supreme Court on the disposal of government property. 51% equity in Balco, a government undertaking, was sold to a private company by inviting tenders through global advertisement. The sale was challenged on various grounds but the Supreme Court rejected all the contentions and upheld the sale. The following three main propositions emerge from the Court decision:

- (1) Divestment by the government in a public enterprise is a matter of economic policy which is for the government to decide. The Court does not interfere with economic policies unless there is a breach of law.
- (2) Sale of an undertaking to the highest bidder after global advertisement inviting tenders at a price which was way above the reserve price fixed by the government could not be said to be vitiated in any way. The procedure followed was proper.
- (3) The matter of fixation of the reserve price being a question of fact, the Court does not interfere unless the methodology adopted for the purpose is arbitrary

The State or its instrumentalities should not discharge their functions so as to aspire to earn a huge profit at the cost of those who are fully dependent upon it for supply of a monopoly item. They could however be permitted to make a reasonable profit.⁵⁴ In *Ashoka Smokeless*⁵⁵ the Supreme Court was considering the challenge under Articles 14 and 19 as to the validity of price fixation by the coal companies in the public sector by the method of e-auction through the internet. The Court referring to the constitutional and statutory obligations of the Central Government as well as the coal companies observed that since they were exercising monopolistic power, it was their duty to distribute coal equitably and at a fair price.⁵⁶ Although they are not expected to suffer losses but at the same time must make an essential commodity available at a fair price.⁵⁷ The Court considered the advantages as well as the disadvantages of e-Auction and indicated certain factors to be taken into consideration :

- (i) The concept of price fixation is that all persons who are in requirement of the commodity should know the basis or criteria thereof;⁵⁸
- (ii) While adopting a policy decision as regards the mode of determining the price of coal, either fixed or variable, the coal companies were

53. *Balco Employees Union (Regd.) v. Union of India*, AIR 2002 SC 350 : (2002) 2 SCC 333.

54. *Ashoka Smokeless Coal India (P) Ltd. v. Union of India*, (2007) 2 SCC 640 : (2007) 1 JT 125.

55. *Ibid.*

56. *Ibid.*

57. *Ibid* at 687.

58. *Ibid* at 691.

bound to keep in mind social and economic aspect of the matter. They could not take any step which would defeat the constitutional goal;

- (iii) Arbitrary fixation of price and arbitrary mode of fixation would be violative of article 14 of the constitution;
- (iv) A monopoly concern is meant to cater to the needs of all sections of people;
- (v) E-auction is not a policy decision of the Central Government but a policy decision on the part of the executive of the Central Government and must be strictly construed in terms of Article 77 of the Constitution;
- (vi) Since the price fixation of an essential commodity is to be determined on the touchstone of public interest, the state has to follow a rational and fair procedure and for that purpose may collect data, obtain public opinion, and may appoint an Expert Committee;
- (vii) In the facts the coal companies proceeded only to safeguard their own interest as dealer and not as a State and primarily for a profit motive;
- (viii) It was no defence for the coal companies to say that they were acting at the instance of the Central Government when there was no control over the price and had no say in the matter of fixation of price under the Colliery Control Order, 2000;
- (ix) The government or the coal company could change an existing policy subject to satisfaction of the constitutional requirements and adopt e-advertisement or e-tender if due and proper transparency is maintained;

It would not be proper to confine these tests to price fixation through E-auction only. Most of these tests would be applicable to price fixation generally.