REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. OF 2022
(Arising out of SLP (C) Nos.4609-4610 OF 2021)

M.P. POWER MANAGEMENT COMPANY LIMITED, JABALPUR …**APPELLANT(S)**

Versus

M/S. SKY POWER SOUTHEAST SOLAR INDIA PRIVATE LIMITED & OTHERS …**RESPONDENTS(S)**

J U D G M E N T

K.M. JOSEPH, J.

1. Leave granted.

2. The appellant impugns the Judgment of the High Court dated 27.02.2020 in Writ Petition No. 420 of 2019. It further challenges the Order dated 28.12.2020 in Review Petition No. 682 of 2020. By the said Judgment in the Writ Petition, the High Court allowed the Writ Petition filed by the first respondent and quashed the Order dated 07.07.2018, which was passed by the appellant, terminating the Power Purchase Agreement

(hereinafter referred to as 'the PPA', for short), which was entered into by the appellant and the first respondent. The review filed by the appellant was dismissed. Hence the appeals.

THE FACTS

3. **The appellant, which is "a wholly owned company of the Government of Madhya Pradesh" (as described by the appellant in the Special Leave Petition), is responsible for the bulk purchase of electricity in the State of Madhya Pradesh for onward sale/supply to the distribution utilities (DISCOMS). The appellant issued a request for proposal (RFP) dated 06.05.2015 for long-term procurement of 300 MW of solar energy through tariff-based competitive bidding. The bid of M/s Sky Power Southeast Asia Holding Limited was accepted. It was declared the successful bidder for three units of 50 MW each at different tariff rates. The bidder subsequently incorporated the first respondent, *viz.*, M/s Sky Power Southeast Solar India Private Limited as a special purpose company. This was for developing one project of 50 MW. The rate, which is applicable in**

respect of the first respondent, was Rs.5.109 per unit. In respect of the other two bids, the bidder incorporated other companies, *viz.*, M/s Sky Power Solar India Private Limited and M/s Sky Power Southeast Asia One Private Limited. The rates applicable in respect of said companies for the other two projects consisting of 50 MW each was Rs.5.298 per unit and Rs.5.051 per unit, respectively. The PPA was entered into on 18.09.2015. The agreement, *inter alia*, provided for pre-commissioning activities. They are described as satisfaction of conditions subsequent by the seller. The first respondent is the seller under the PPA.

4. The Agreement contemplated completion of the conditions subsequent, within a period of 210 days. In other words, the Agreement, admittedly, provided that the first respondent was to achieve fulfilment of conditions subsequent by 15.04.2016. The Agreement further contemplates an extension of the period of fulfilment of the condition subsequent on payment of penalty for a further period of nine months. Thus, calculating 210 days and an additional nine months from 18.09.2015, which is the date of the PPA, the period

would come to an end on 15.01.2017. A communication was addressed dated 12.01.2017 by the first respondent. The first respondent purported to refer to Article 2.1 of the PPA, which, *inter alia*, reads as follows:

> **"Article 2.1 Seller agrees and undertaken to duly perform and complete all of the following activities seller's own cost and risk within 210 days from the effective Date unless such completion is affected by any force Majeure event, or if any of the Effective is specifically waived in writing by MPPMCL:**
>
> **a) The Seller shall obtain all Consents, Clearance and Permits required for supply of Power to MPPMCL as per the terms of this Agreement;"**

5. The first respondent purported to present certain documents and contend that there was compliance of its obligations under the PPA. This led to communication dated 22.02.2017 addressed by the appellant to the first respondent. It referred to the status of the documents, which the appellant noted. Furthermore, appellant sought certain documents. It is, *inter alia*, pointed out by the appellant that the first respondent had no documents in regard to 34.12 hectare of land and an unregistered lease deed for only 12 months was submitted, which could not be considered as fulfilment

of the condition subsequent. Thereafter, it was stated that the PPA is liable to be terminated in terms of Article 2.5.1 of the PPA. Explanation/justification if any was called for from the first respondent. Acting on the request of the first respondent, the appellant granted time for response of the first respondent till 10.03.2017. The response, which was given on 10.03.2017, reads as follows:

> **"Firstly, we are thrilled to update you that the project is under advanced construction and all equipment order for the project have been placed and construction happening on site we expect that the project will be top quality using the best equipment in the market and constructed by a top-tier EPC, for the benefit of both Sky Power and the state of MP.**
>
> **1. Satisfaction of Condition subsequent <u>regarding Construction Financing</u>**
>
> **MPPMCL Comment: "Loan sanction letter of Mis L&T Finance vide letter No. S07201A03/16-17 DATED 29.08.2016 Copy of facility agreement and affecting compliance documents as stated in above letters are required to be submitted"**
>
> **SKY POWER comment: reference is made to paragraph 2.1.1.(b) of the PPA, reproduced below:**
>
> **Sd/-**
> **D.G.M. (Commerical-3)**
> **R.0. MPMCL, Bhopal"**

6. **Thereafter, the first respondent sent communication dated 14.03.2017. It reads as follows:**

"SKY POWER GLOBAL

March 14, 2017

To,
The Managing Director
MP Power Management Company Limited
Bittan Market,
Bhopal-462016

Attention: Chief General Manager Commercial, MPPMC, Jabalpur.

Ref: Submission of Documents to MP Power Management Company limited ("MPPMCL") for fulfilment of Conditions subsequent by SkyPower southeast solar India private Limited ("Sky Power")

Reference: 1. Sky Poer Letter dated 10 March 2017,

2. Sky Power Letter SKP2/MP/SOLAR MPPMCL/2015-16/06 dated 12 Jan 2017

3. Agreement (PPA) dated September 18, 2015 between MPPMCL and Skypower

Dear Sir,

Further to our office letter dated 10 March 2017 & skyP2/MP/SOLAR/MPPMCL/2015-16/06 dated 12 Jan 2017 we hereby submit that we have completed the entire acquisition for land 29, 85 Acres including balance 87.S Acres of land parcels.
The relevant land registration documents have been enclosed for your perusal

We hereby submit that we have duly completed land registration for 249,85 Acer for the project

Thanking you in anticipation.

MIS SKYPOWER SOUTHEAST SOLAR INDIA PRIVATE LIMITED

Sd/- Shivani Jhariya
(Authorized Signatory)

Sd/-
D.G.M. (Commerical-3)
R.O. MPMCL, Bhopal"

7. After a gap of nearly five months, the next date, which is invoked by the appellant, is 09.08.2017. It is the case of the appellant that as the first respondent had failed to comply with the conditions subsequent, by misrepresentation and manipulation, it purported to obtain approval from the Chief Electrical Inspector General (CEIG) under Regulation 32 of the Central Electricity Authority (Measures relating to safety and electricity supply) Regulation, 2010 read with Section 162 of the Act. According to the appellant, the Report of the CEIG came to the knowledge of the appellant on 20.08.2017. Prior to the said date, the appellant purported to terminate the PPA in terms of Article 2.5.1(d) of the PPA, considering it to be

mandatory by communication dated 11.08.2017. In short, according to the appellant, as the maximum period, within which, the conditions subsequent, had to be fulfilled, had run out on 15.01.2017, under the PPA, the appellant had no other option but to terminate the Agreement. This led to the first Writ Petition filed by the first respondent. The said Writ Petition, *viz.*, Writ Petition No. 12880 of 2017, came to be allowed by the High Court by Judgment dated 20.06.2018. The relevant portion of the Judgment reads as follows:

> **"2. The contract has been terminated on account of 54 days delay in achieving the first milestone i.e., procurement of land, financial closure and necessary permissions from the competent authority within 2 I 0 days from the date of execution of agreement for completing the first part of the project. The only reason to terminate the agreement is that the petitioner has failed to achieve first milestone within 210 days though the condition of - procurement of land was modified after 210 days on 20.04.2016. The delay in achieving the first milestone is visited with penalty in terms of Clause 2.5. of the agreement.**
>
> **3. Similar communication terminating the contract was set aside by this Court in Writ Petition No.12432/2017 (Renew Clean Energy Private Limited vs M.P. Power Management Company Limited and another) vide order dated 18.08.2017. In the said petition, the petitioner has admittedly commissioned the**

power project within the time prescribed except that there was delay of 16 days in achieving the first milestone. The said order has been affirmed on 05.04.2018 by the Hon'ble Supreme Court in Civil Appeal No.3600/2018 (M.P. Power Management Company Limited vs Renew Clean Energy Private Limited and another).

4. The parties are not ad idem about the stage of commissioning of the power project in the present petition.

5. Mr. Kaurav sought to justify the termination of the Power Purchase Agreement (PPA) asserting that the petitioner has not commissioned the power project within the time fixed in the agreement, but the lack of commissioning of power project is not the reason for terminating of the contract. Since, such is not the reason mentioned in the order terminating the agreement, therefore, the respondents cannot supplement the reasons for termination of the contract by virtue of additional assertions in the return and/or in the arguments raised in view of the Supreme Court decision in Mohinder Singh Gill v. Chief Election Commissioner (1978) 1 SCC 405.

6. In view of the fact that the similar reason of termination of the agreement has not been found to be justified in the matter of Renew Clean Energy Private Limited (supra), therefore, the impugned communication dated 11.08.2017 is hereby set aside. However, liberty is granted to the respondents to pass fresh orders in terms of Power · Purchase Agreement dated 18th September, 2015 in accordance with law."

8. On 07.07.2018, the appellant issued the fresh termination notice. This came to be challenged by the

first respondent by Writ Petition No. 420 of 2019. After exchange of pleadings, by the first impugned judgment dated 27.02.2020, the High Court set aside the termination order. Thereafter the appellant in September, 2020 filed review petition which came to be dismissed by the second impugned order. On 15.04.2021 this court issued notice and stayed the impugned orders.

9. We have heard Mr. K.M. Natraj, learned Additional Solicitor General on behalf of the appellant and Dr. A.M. Singhvi, learned Senior Counsel along with Mr. Naman Nagrath, learned Senior Counsel on behalf of the first respondent. We also heard Shri V. Giri, learned Senior Counsel appearing for the fifth respondent (Madhya Pradesh State Load Despatch Centre).

10. Shri K.M. Natraj, learned Additional Solicitor General submits that the impugned judgments are clearly unsustainable. He would firstly point out that the writ petition filed by the first respondent is not maintainable. The PPA in question is not a statutory contract and therefore interference with the order terminating the contract was not justifiable. In this

regard he drew support from the judgment of this Court in *Kerala State Electricity Board and Another v. Kurien E. Kalathil and Others*[1]. He would next contend that the PPA contemplated provisions to resolve disputes. He further contended that first respondent should have resorted, if at all, to a civil suit to claim redress. He pointed out that a writ petition is a public law remedy. The contract in question not being statutory in nature, there was no public law element so as to justify the approach under Article 226. He would next contend that there is no basis for the High Court to have interfered at all. This is a case where broadly the contract contemplated fulfilment of conditions at two stages. The first stage related to various conditions that had to be fulfilled by the first respondent which are described as conditions subsequent in the PPA. They are also aptly described as the pre-commissioning stage. The PPA clearly contemplated fulfilment of these conditions on an indisputable basis on or before 15.01.2017. In arriving at this date, the maximum period of 9 months contemplated under the PPA

[1] (2000) 6 SCC 293

as the period which can be extended on payment of penalty is also included. However, the first respondent did not fulfil the conditions subsequent except with a further delay of 56 days. The PPA clearly provides that if the time limit is exceeded which in this case was 15.01.2017, the appellant shall terminate the contract. This is not a question of power or a discretion. This is a right which inhered with the appellant, a party to a contract. In this regard he would emphasise that while the State may be burdened with the obligation to act in a fair manner, it does not take away the rights available to the State as a party to a contract to exercise the right with it under the contract. In other words, the appellant as State within the meaning of Article 12 should not be denied the very right which could be duly exercised by a private party if it stood in the shoes of the appellant in similar circumstances. This is all that has been done by the appellant. Coming to the second stage, namely, commissioning of the project by the first respondent, our attention was drawn to Article 2.6 of the PPA. He contended that agreement contemplated commissioning of plant within

12 months from the date of the financial closure subject to Force Majeure. He would point out that there were no circumstances for invoking Force Majeure. The period of 12 months from the date of financial closure determined the maximum period within which the commissioning had to take place. He would submit that first respondent was in breach of even commissioning. Therefore, on that score also, there is no justification for the High Court to have interfered in the matter. He would further submit that there is another vital circumstance which should have dissuaded the High Court from granting relief. The case threw up disputed questions of facts. On the one hand, it was the case of the first respondent, that the first respondent had proceeded to do everything within the time which is a period of two years from 18.09.2015, the date of the PPA, and it was only if commissioning was not done within the said period that what is described in the agreement as Seller's default occurs. Here is a case where the first respondent had not actually on the ground carried out necessary installation. In this regard, he would contend that

while the CEIG has given its approval, the approval was granted without the first respondent having complied its obligations under the contract. In this regard essentially two aspects are projected. It is firstly pointed out that while the first writ petition was pending consideration, the appellant carried out an inspection on 19.04.2018. A report ensued on 21.04.2018. It was revealed that the approval which is granted by the CEIG may not advance the case of the first respondent as certain lacunae emerged. It was found by the inspecting team of the appellant that in the blocks 9 and 10 (the project of 50MW consisted of 10 blocks of 5 MW each), 61 inverters were missing. It was further revealed that in regard to 258 invertors, there was duplication of numbers. In other words, without there being the professed numbers of invertors as required under the contract, the approval of the CEIG was procured. In fact, this aspect, which when it was discovered by the appellant, formed the foundation for the review petition but was not favourably considered by the High Court. A writ petition in the facts of this case would not lie. He would submit that

while a writ petition may be maintainable when the State is awarding its largesse in the form of award of contract, once it enters into a contract there would arise no occasion for the court to do judicial review and strike it down. Action taken by the state as contracting party when it is within the four walls of the contract is immune in public law proceedings. That an action may lie for breach of contract where the aggrieved party can seek damages should have weighed with the court. He would further contend that there is yet another dimension which has been overlooked by the High Court. The overwhelming public interest in the facts of this case did not favour the writ court interfering in the matter. In this regard he would expatiate by pointing out that the interference by the High Court will produce the following results:

The PPA casts an obligation on the appellant to purchase power at the rate of Rs.5.109 per unit for a period of 25 years. Power is available in the market at a far cheaper rate. The inevitable result of implementing the order of the High court would be that the appellant would have to purchase power

at a much higher rate and what is more disturbing and should have troubled the High Court to decline jurisdiction is the aspect that the increased rate would have to be passed on to the end consumer. Put it differently, when the appellant being entitled to terminate the contract and would be in a position to purchase power at a cheaper rate and charge the consumers at the lower rate, by the court granting relief to the first respondent, the appellant is compelled to purchase power at the higher rate and that too for a long period of 25 years, and what is more, compelled to pass on the burden to the hapless consumer. Thus, public interest in fact in the case lay in the court declining to grant relief to the first respondent. He would further point out that the impugned judgment does not deal with any of the aspects, be it the factual dimensions or the legal requirements. The judgment is bereft of discussion of the contentions raised by the appellant. He would therefore contend that the impugned judgments should be set aside and appeals allowed.

11. ***Per contra*****, Dr. A.M. Singhvi, learned Senior Counsel for the first respondent would point out that there is absolutely no basis for maintaining the appeal in the facts. He would point out that this is a case where the first respondent turned out to be the lowest bidder in respect of the project in question and what is more an incredible number of 182 bidders participated. It is trouncing its competitors that the holding company of the first respondent turned out to be the lowest bidder (here we must notice that during the course of the arguments the appellant did propose that first respondent could come up with proposal which apparently should involve rates lower than the contract rate so that the public interest concern is adequately addressed whereas the first respondent pointed out since it has planned for the project on the basis which made it the lowest bidder, it would not be feasible for it to reduce the rate any further). Dr. Singhvi pointed out that there is no basis for discriminating the case of the first respondent and M/s. Renew Energy. It is pointed out that the High Court in the first round of litigation had interfered with the termination order**

following the judgment in Renew Energy. In the case of Renew Energy, it could achieve fulfilment of the conditions subsequent with a delay of 16 days which was condoned finally. In the case of the first respondent, the delay happened to be 56 days. Otherwise, their cases are similar. Renew Energy was allowed to commission whereas the first respondent was at the receiving end of discrimination without any basis. He would point out that the first respondent under the contract had 24 months from 18.09.2015 to commission the project. Well before the expiry of 24 months, the project was ready. The respondent was prevented from commissioning. A party cannot take advantage of its own wrong. He would point out that the law has not stood still after this Court adopted a hands off approach in the decision in *Radhakrishna Agrawal and others v. State of Bihar and others*[2]. Imbibing the grand mandate in Article 14 that it behoves the State to steer clear of unfairness in all its acts, this Court has weaved a taboo against arbitrary action by the state even after it entered into a contract. He would point out in this

[2] **(1977) 3 SCC 457**

regard the judgment of this Court in *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.*[3] and the decisions following the same approving of the writ court granting relief in contractual matters also. He would point out that, present arbitrariness, be it after a contract is entered into, the State has no place to hide when action is challenged and its action must pass the scrutiny of the constitutional court. It must demonstrate that the action was fair. The action of the State falls far short of the exacting standard of fairness that the Constitution demands in the case at hand for the following reasons:

12. Outbidding an unusually large body of competitors, a bid based on competitive tariff, the first respondent which is a global player in Renewable Energy (solar power) bids at a rate which was very much acceptable to the appellant and investment was made by the first respondent in the region of nearly Rs. 350 crores. There was an initial hiccup. One of the conditions subsequent was that the first respondent had to acquire

[3] **(2004) 3 SCC 553**

land for the project by way of sale deeds. There were insuperable obstacles which upon the first respondent pointing them out to the appellant, the appellant realized the genuine difficulty and amended the Article. This, in fact, would necessarily mean that the period of 210 days would commence not from the date of the agreement but thereafter on the basis of the amended Article. The first respondent engaged the services of a company for the purposes of purchase and installation of the parts of the project. It had procured, *inter alia* the invertors which were to be installed, from abroad. There are irrefutable documents in the form of invoices, bills of lading, lorry receipts which fortify the first respondent in its stand that it had installed all the invertors. The project was ready to take off well within 24 months. The first respondent would suffer grave avoidable financial loss, besides fall in esteem as a global player, if the termination dated 07.07.2018 is allowed to stand. Under the contract, the first respondent was obliged to sell power at an agreed rate for a period of 25 years. The fact that in view of the play of market

forces, there has been a fall in the price of solar power and it would be open to the appellant to procure solar power at a cheaper rate should not allow the appellant to resile from its contractual obligations. In fact, it is pointed out that the appellant is purchasing power even now at even higher rates. Being State under Article 12, the appellant should not be permitted to seek shelter under the theory of alternate remedies. This Court is reminded of the chronology of events commencing from the date of the PPA in the year 2015. The first respondent has succeeded before the High court on two occasions. In this regard he would point out that in the impugned termination order dated 07.07.2018, the appellant has purported to revive the closed chapter relating to non-fulfilment of conditions subsequent. The contention runs that by the judgment in the first writ petition the impugned order therein which was based on the first respondent not fulfilling the conditions subsequent was quashed. This was done being inspired by the judgment of the High court in the case of Renew Energy which has received the seal of approval by this Court as well. As far as the only

other aspect about commissioning not being in time Dr. Singhvi addressed two submissions. Firstly, he would point out that admittedly, the appellant has not issued the pre-termination notice contemplated in Article 9.1 of the PPA. This suffices to sustain the judgment. Secondly, equally importantly the appellant has acted arbitrarily in not realizing that the first respondent had 24 months to commission the project and before the expiry of the same, the respondent was fully ready to fulfil its obligation. The learned senior counsel would also submit that contention of there being disputed questions of fact is premised on *red herrings*. In this regard he would point out that on 09.07.2017, a notice was issued by the first respondent to the appellant calling upon the appellant to inspect and it would be ready to commission the project and that it was ready to supply power. However, no inspection was carried by the appellant till 19.04.2018. The competent body namely the CEIG had carried out inspection which spread over a few days. The Body was fully satisfied with the first respondent being compliant. All that happened was after the inspection, in September, 2017 since the

first respondent was visited with the first order of termination dated 11.08.2017 which was challenged in the High Court, there was a shortage of personnel around the project site. This facilitated thefts of the parts which were installed. FIRs promptly registered in September 2017 should rule out the possibility of the case of theft being an afterthought. This is as the inspection was carried by the appellant much later on 19.04.2018. It is further pointed out that as far as the duplication is concerned in the number of certain invertors, it has been established as inconsequential by the first respondent. The inspection and the report of the CEIG cannot be lightly brushed aside on such a case. Still furthermore, it is pointed out that having regard to the massive cost of the project which stood at nearly Rs. 350 crores, what is involved is a miniscule percentage. In this regard learned counsel would emphasise the contravention of Article 9.1 under which the appellant was obliged to serve a notice in case of the alleged seller's default for not commissioning the project in 24 months from the date of PPA. If such a notice had been given, the first

respondent would have had an opportunity if at all even proceeding on the basis of appellant's contention being tenable to procure invertors which are portable and available in the market and redress the problem. When the project has progressed in the manner, it had to deny the first respondent the fruits of its labour, acting under a solemn contract awarded to it would be clearly unfair. The mere fact that there had been a fall in the market price of solar power should not persuade this Court to find that there is no overwhelming public interest. In this regard he also sought to draw support from recent Judgment of this Court in *Vice Chairman & Managing Director, City and Industrial Development Corporated of Maharashtra Ltd. and Another v. Shishir Realty P. Ltd. and others*. He would further point out that solar power being renewable energy and green energy must be encouraged and it was on this basis that the first respondent participated in the global tender and was selected, upon it being the lowest bidder amongst a large number of bidders. Dr. Singhvi would point out that for various reasons the contract in question is a statutory

contract. He would submit that any rate irrespective of being statutory contract or not, it is but a fact in deciding whether the writ applicant should be relegated to an alternate remedy. The jurisdiction of the High Court under Article 226 in the overpowering presence of Article 14 would embrace the power to strike at arbitrary action by the State, even in the working out of rights in a non-statutory contract.

13. Shri V. Giri, learned senior counsel for respondent No.5 would support the appellant in its stand that the first respondent was in clear breach of the contract. It is the case of fifth respondent that there are various steps to be undertaken and completed under regulations extant before which commissioning can be permitted. It is the case of the fifth respondent that the first respondent could not therefore be said to have acted in compliance with the regulations and therefore cannot be heard to say that it had commissioned the project.

14. Shri K.M. Natraj, Additional Solicitor General would submit that the judgment of the High court in the first-round litigation left it open to the appellant

to take fresh proceedings under the contract. It is for the said reason that the said judgment was not challenged by the appellant. He would also point out at any rate even proceeding on the basis that the High Court is bound by the earlier judgment at any rate, as far as this Court is concerned, it would be free to consider the issue as to whether on account of there being an admitted delay of 53 days by the first respondent beyond the maximum time contemplated under the contract for fulfilling conditions subsequent, whether the appellant was justified being duty bound in the matter of terminating the contract? He further pointed out that there was a distinction in the case of the first respondent and the case of Renew Energy. In the case of Renew Energy, this Court while refusing to interfere with the judgment of the High Court had made it clear that it is not pronouncing on the question as to the delay in fulfilling the conditions subsequent and its impact. Secondly, it is pointed out that in the case of Renew Energy, the said company had gone ahead and commissioned the project and the only aspect was the delay of 16 days whereas in the case of the first

respondent the contract was liable to be terminated both for the reasons that the conditions subsequent was not fulfilled within the maximum time and also for the reason that the first respondent had not commissioned the project within the time provided under the contract.

15. After hearing the learned counsel for the parties, we find that the following points arise for our consideration.

(1) Whether the PPA in question, is a statutory contract?

(2) What is the scope of judicial review of action by the State in a matter arising from a contract and what is the effect of the contract not being statutory? What is arbitrariness?

(3) What is the concept of public law in judicial review in a contractual matter?

(4) Whether there is an arbitration clause in regard to the subject matter?

(5) Whether the order dated 07.07.2018 terminating the contract based on first respondent not fulfilling the conditions subsequent is sustainable having

regard to the judgment rendered by the High Court in the earlier round of litigation on 20.06.2018? And will the said judgment bar the appellant from terminating the contract on the ground of non-fulfilment of conditions subsequent?

(6) Whether the writ petition must be dismissed as the case involves disputed questions of facts?

(7) Whether the case of the first respondent is on par with Renew Energy?

(8) What is the effect of non-compliance of Article 9.1 of the PPA, namely, the effect of appellant not issuing notice contemplated therein before issuing the impugned termination dated 07.07.2018?

(9) What is overwhelming public interest in the context of judicial review in a contractual matter? Is the concept applicable only to cases which involve challenge to award of largesse by the State or is it applicable across the Board irrespective of the stage when the matter arises in relation to a contract?

(10) Whether this Court should interfere with the judgment of the High Court in the totality of facts?

16. Before we proceed to consider the question whether what is involved is a statutory contract or not, we may make the following prefatory remarks:

> Under Article 298 of the Constitution, the Executive Power of the Union and each State, inter alia, extends to making of contracts for any purpose. Article 299 provides for manner in which contracts made in the exercise of the executive power of the Union or the State is to be made.

17. In this case, we are dealing not with a case where a contract has been made by the State in exercise of its executive power within the meaning of Article 298. The PPA is a contract which has been entered into by the appellant, which is a fully owned Government Company. It is one thing to hold that the appellant, as a fully owned Government Company, would be State for the purpose of Article 12 of the Constitution of India and, quite another, to find that a contract is one

which is made in the executive power of the State within the meaning of Article 162 of the Constitution. What is contemplated, is the power of the Union or the State read in conjunction with Article 73 and Article 162 of the Constitution of India, respectively. In other words, for the purpose of Article 298, the broader concept of State, as defined in Article 12 of the Constitution, which, no doubt, would include the appellant, is inapposite and inapplicable. The appellant, being a Company, would not be entitled to exercise the executive power contemplated in Article 162 of the Constitution, which is the power with the Union or the State Governments. In this regard we may notice that the present avtar of Article 298 is born by substituting in 1956 the original version and the present version reads as follows: -

> **"298. Power to carry on trade, etc. The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose:**
>
> **Provided that —**
>
> **(a) the said executive power of the Union shall, in so far as such trade or business or**

such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State; and

(b) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament."

It is pertinent to notice the Objects and Reasons.

"Clause 19.-In this clause it is proposed to revise and amplify the scope of article 298, mainly to make it clear that Union Government, as well as the State Governments, are competent to carry on any commercial or industrial undertaking, whether or not it is related to a matter within the legislative competence of the Union, or, as the case may be, of the State. Similarly, the holding, acquisition and disposal of property and the making of contracts by the Union or a State could be for any purpose without constitutional impropriety. At the same time, the revised article provides that this extended executive power of the Union and of the States will be subject, in the former case, to legislation by the State, and in the latter case, to legislation by Parliament."

WHETHER THE PPA IS A STATUTORY CONTRACT?

18. **Moving on to the concept of the Statutory Contract, the learned Additional Solicitor General, no doubt, sought to draw considerable support from the Judgment of this Court reported in *Kerala SEB and another v.***

Kurien E. Kalathil and others[4]**. That was a case, which involved, a Writ Petition filed by a contractor, who was awarded the work of construction of a dam, staking a claim, for enhanced minimum wages, which the contractor claimed, he had paid to his workers. There was no dispute that the workmen were entitled to the enhanced wages under a Notification. The appellant-Board, however, contended that the respondent-contractor had failed to prove the payment of the enhanced wages to the workmen. The High Court allowed the Writ Petition and this Court, while setting aside the Judgment, proceeded to make the following statement:**

> **"10. We find that there is a merit in the first contention of Mr Raval. Learned counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a**

[4] (2000) 6 SCC 293

statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. 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. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for

adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies."

19. As to what is a statutory contract, fell for consideration before this Court in the case reported in *India Thermal Power Ltd. v. State of M.P. and others*[5]. Incidentally, it dealt with generation, distribution and supply of electricity and, what is more, emanated from the State of Madhya Pradesh. While negotiations were going on between the respondent-State, Electricity Board and independent power producers, on the basis of State inviting offers from potential private investors, for establishing power projects, the Central Government amended the earlier Tariff Notification. The Electricity Board decided to prioritize the projects, which offered the least tariff. The appellant-independent power producer challenged the said decision in a Writ Petition. It

[5] (2000) 3 SCC 379

must be noticed that MoU and Power Purchase Agreement had been entered into by the appellant therein. The Division Bench of the High Court took the view that the PPAs therein were statutory contracts, entered into under Sections 43 and 43(A) of the Electricity Supply Act, 1948. This Court, while dealing with this aspect and rejecting the contention that the Electricity Board could not unilaterally alter the conditions of the contract and invite bids, held as follows:

> **"11. It was contended by Mr Cooper, learned Senior Counsel appearing for appellant GBL and also by some counsel appearing for other appellants that the appellant/IPPs had entered into PPAs under Sections 43 and 43-A of the Electricity Supply Act and as such they are statutory contracts and, therefore, MPEB had no power or authority to alter their terms and conditions.** .....
>
> ..... **Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between**

the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory."

(Emphasis supplied)

20. **The decision in *India Thermal Power Ltd*. (supra), dealing with the concept of statutory contract, came to be considered in the light of Section 6A of U.P. Industrial Area Development Act of 1976. The said provision reads as follows:**

> **"6A. Power to authorize a person to provide infrastructure or amenities and collect tax or fee. - Notwithstanding anything to the contrary contained in any other provisions of this Act and subject to such terms and conditions as may be specified in the regulations, the Authority may, by agreement, authorize any person to provide or maintain or continue to provide or maintain any infrastructure or amenities under this Act and to collect taxes or fees, as the case may be, levied therefor."**

21. **This Court interpreting a contract entered into under Section 6A in *Jaypee Kensington Boulevard***

Apartments Welfare Association and others v. NBCC (India) Ltd. and others[6], **took the view that the agreement in question did not acquire the status of a statutory contract merely for having been executed in terms of the power under Section 6A.**

22. The contention of the respondent is that the PPA is a statutory contract since it incorporates essential features such as tariff determined through bidding (paragraph-4.7-CUF, paragraph-4.4-change in law, paragraph-4.5-payment security, paragraph-4.6-and bidding process, paragraphs-5.4 and 5.5-prescribed under the guidelines for tariff based competitive process for grid connected power project based on renewable energy resources issued by the MNRE under Section 63 of the Act).

23. The respondent relies on *India Thermal Power Ltd.* (supra) to contend that if the contract incorporates certain statutory terms and conditions, it is statutory.

[6] **(2022) 1 SCC 401**

24. **Section 63 of the Electricity Act, 2003, reads as follows:**

> **"63 (Determination of tariff by bidding process) Notwithstanding anything contained in Section 62, the appropriate Commission shall adopt the tariff, if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government."**

25. **In the PPA in question, under the definition clause (Article 1), bidding guidelines have been defined as follows:**

> **"Bidding Guidelines" shall mean the "Guidelines for Tariff Based Competitive Bidding Process for Grid Connected Power Projects Based on Renewable Energy Sources" issued by Government of lndia, Ministry of New and Renewable Energy on December, 2012 under Section - 63 of the Electricity Act and as amended from time to time;"**

26. **We are of the view that it may not be appropriate to describe the PPA as a Statutory Contract. Section 63 of the Electricity Act, 2003 must be understood in the background of immediately preceding provision, *viz.*, Section 62, In a paradigm shift from the earlier regime, the task of determining the tariff has been**

conferred on the appropriate Commission. Section 62 indicates the procedure. Section 63, on the other hand, compels the Commission to adopt the tariff determined through a transparent process of bidding. However, the transparent process of bidding must be in accordance with the guidelines issued by the Central Government. Thus, it is for the purpose of applying the tariff determined under Section 63 for the purpose of adopting the tariff under Section 62, that the guidelines issued by the Central Government become relevant. It is true that there is reference to the guidelines made under Section 63 in the PPA. However, it is for the purpose of conducting the bidding that the guideline would become relevant. That the tariff has been arrived at in accordance with the transparent process of bidding, which is in tune with the guidelines under Section 63, may not be sufficient to make the PPA a Statutory Contract. What is contemplated in India Thermal Power Limited (supra), is that a contract containing prescribed terms and conditions being mandatory under the Statute, results in the contract becoming a Statutory Contract. If this test is applied, we fail

to see how the reference to the bidding guidelines, under which the bids were made and finally the PPA is entered into, can be treated as tantamounting to saying that the PPA contains prescribed statutory terms and conditions as an indispensable part of a Statute. We are not shown also as to how the PPA can be described as containing terms and conditions, which are statutory in nature. The expression 'terms and conditions', which are statutory in nature, must be understood as those statutory terms and conditions, which provide for rights and obligations of the contracting parties. Such reference is conspicuous by its absence in the PPA. It is common case that the appellant is incorporated under the Companies Act. It is not a statutory body or a corporation. Therefore, we would come to the conclusion that we cannot describe the contract as a Statutory Contract. We must also notice that the PPA is not made either in purported compliance with the statutory dictate, either in the form of parent enactment or a subordinate legislation. The terms and conditions of the PPA are not transplanted into the PPA from any Statutory provision. The appellant being company under

the Companies Act, would be free as any other contracting party, subject, no doubt, to its position as an instrumentality of the State under Article 12 of the Constitution of India and the law otherwise. Moreover, the terms, which are relevant to the *lis* before us, viz, the Articles relating to the fulfilment of the condition subsequent and the provisions relating to commissioning, sellers' default and power of termination, are not demonstrated to be statutory in nature.

What is the scope of judicial review of action by the State in a matter arising from a contract and what is the effect of the contract not being statutory?

What is the concept of public law in judicial review in a contractual matter?

What is 'arbitrary' action?

27. ***In Radhakrishna Agarwal and Ors. v. State of Bihar and Ors.***[7] **writ petitions were filed against orders of the State Government revising the rate of royalty under**

[7] **(1977) 3 SCC 457**

a lease. The contention was both against the revision of rate of royalty during the period of the lease and the cancellation of the lease on various grounds. Though an attempt was sought to draw support from the judgment of this Court in *Erusian Equipment and Chemicals Limited v. State of West Bengal*[8], the Court took the view that the said case involved discrimination at the threshold or at the time of deciding as to whether the Government should enter into the contract. The Court took the view that the only question which normally arises in such cases is as to whether the action complained of was in conformity with the agreement. We may notice the earlier opinions of this Court which came to be dealt with in the following statement:

> **"We do not think that any of these cases could assist the appellants or is at all relevant. None of these cases lays down that, when the State or its officers purport to operate within the contractual field and the only grievance of the citizen could be that the contract between the parties is broken by the action complained of, the appropriate remedy is by way of a petition under Article 226 of the Constitution and not an ordinary suit. There is a formidable**

[8] **(1975) 1 SCC 70**

array of authority against any such a proposition. In *Lekhraj Satramdas Lalvani v. N.M.Shah, Deputy Custodian-cum-Managing Officer, Bombay* (supra) this Court said:

> **"In our opinion any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Article 226 of the Constitution."**

In Banchhanidhi Rath v. The State of Orissa and Ors.[9], this Court declared:

> **"If a right is claimed in terms of a contract such a right cannot be enforced in a writ petition."**

In *Har Shankar and Ors. vs. The Dy. Excise and Taxation Commr. and Ors.*[10], a Constitution Bench of this Court observed:

> **"The appellants have displayed ingenuity in their search for invalidating circumstances but a writ petition is not an appropriate remedy for impeaching contractual obligations."**

---

[9] **(1972) 4 SCC 781**
[10] **(1975) 1 SCC 737**

28. **The Court also took the view "the correct view is that it is the contract and not the executive power regulated by the Constitution which governs the relations of the parties on facts apparent in the case before us". No doubt the learned Additional Solicitor General asserts that the destiny of the appeals before us must be governed by the law laid down in Radhakrishna Agarwal (supra). However, as shall be presently noticed the law has not stood still.**

29. **In *Ramana Dayaram Shetty v. International Airport Authority of India*[11] this court inter alia held as follows:**

> **"10. Now, there can be no doubt that what para (1) of the notice prescribed was a condition of eligibility which was required to be satisfied by every person submitting a tender. The condition of eligibility was that the person submitting a tender must be conducting or running a registered IInd Class hotel or restaurant and he must have at least 5 years' experience as such and if he did not satisfy this condition of eligibility, his tender would not be eligible for consideration. This was the standard or norm of eligibility laid down by Respondent 1 and since the Respondents 4 did not satisfy this standard or norm, it was not competent to Respondent 1 to entertain the tender of Respondents 4. It is a well-settled rule of administrative law that an executive**

[11] **(1979) 3 SCC 489**

authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr Justice Frankfurter in *Viteralli* v. *Saton* [359 US 535 : Law Ed (Second series) 1012] where the learned Judge said:

"An executive agency must be rigorously held to the standards by which it professes its action to be judged .… Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed .... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

This Court accepted the rule as valid and applicable in India in *A.S. Ahluwalia* v. *Punjab* [(1975) 3 SCC 503, 504 : 1975 SCC (L&S) 27 : (1975) 3 SCR 82] and in subsequent decision given in *Sukhdev* v. *Bhagatram* [(1975) 1 SCC 421, 462 : 1975 SCC (L&S) 101 : (1975) 3 SCR 619] , Mathew, J., quoted the above-referred observations of Mr Justice Frankfurter with approval. It may be noted that this rule, though supportable also as an emanation from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause

of the United States Constitution, but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pp. 540-41 in Prof Wade's "*Administrative Law*", 4th Edn. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law. Today with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the Rule of Law, whether it be the meaning given by Dicey in his "*The Law of the Constitution*" or the definition given by Hayek in his "*Road to Serfdom*" and "*Constitution of Liberty*" or the exposition set forth by Harry Jones in his "*The Rule of Law and the Welfare State*", there is as pointed out by Mathew, J., in his article on "The Welfare State, Rule of Law and Natural Justice" in "*Democracy, Equality and Freedom*" [Upendra Baxi, Ed. : Eastern Book Co., Lucknow (1978) p. 28] "substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual

against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege."

This case while it dealt with the issue of arbitrariness at the stage of award of largesse by the State, it paved the way for future development in this field of law.

30. **No doubt, in *Bareilly Development Authority and another v. Ajai Pal Singh and others*[12], the appellant-Authority constituted under the U.P. Planning and Development Act, 1973, issued advertisement offering to register the names of applicants desirous of purchasing houses/flats. The terms and conditions were sought to be revised. The Court went on to hold as**

[12] **(1989) 2 SCC 116**

follows:

> **"22. There is a line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple — *Radhakrishna Agarwal* v. *State of Bihar* [(1977) 3 SCC 457 : (1977) 3 SCR 249] , *Premji Bhai Parmar* v. *Delhi Development Authority* [(1980) 2 SCC 129 : (1980) 2 SCR 704] and *DFO* v. *Biswanath Tea Company Ltd.* [(1981) 3 SCC 238 : (1981) 3 SCR 662]"**

31. **In *Mahabir Auto Stores and others v. Indian Oil Corporation and others*[13], the appellant complained that the respondent, which was a company incorporated under the Companies Act was denying or discontinuing to deal with the appellant, which had been dealing with the respondent for nearly eighteen years. We listen to the following words spoken by this Court:**

> **"12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in**

[13] **(1990) 3 SCC 752**

this connection may be placed on the observations of this Court in Radha Krishna Agarwal v. State of Bihar [(1977) 3 SCC 457]. It appears to us, at the outset, that in the facts and circumstances of the case, the respondent company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. See Radha Krishna Agarwal v. State of Bihar [(1977) 3 SCC 457] at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration; it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest.

Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu [(1974) 4 SCC 3 : 1974 SCC (L&S) 165] , Maneka Gandhi v. Union of India [(1978) 1 SCC 248] , Ajay Hasia v. Khalid Mujib Sehravardi [(1981) 1 SCC 722 : 1981 SCC (L&S) 258] , R.D. Shetty v. International Airport Authority of India [(1979) 3 SCC 489] and also Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay [(1989) 3 SCC 293] . It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions

and nature of the dealing as in the present case.

17. We are of the opinion that in all such cases whether public law or private law rights are involved, depends upon the facts and circumstances of the case. The dichotomy between rights and remedies cannot be obliterated by any strait-jacket formula. It has to be examined in each particular case. Mr Salve sought to urge that there are certain cases under Article 14 of arbitrary exercise of such "power" and not cases of exercise of a "right" arising either under a contract or under a statute. We are of the opinion that that would depend upon the factual matrix.

18. Having considered the facts and circumstances of the case and the nature of the contentions and the dealing between the parties and in view of the present state of law, we are of the opinion that decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. It is true that there is discrimination between power and right but whether the State or the instrumentality of a State has the right to function in public field or private field is a matter which, in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be dealt with by the State or the instrumentality of the State without informing and taking into confidence, the party whose rights and powers are affected

or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not taken into confidence."

(Emphasis supplied]

32. **In the judgment of this Court rendered by a Bench of two learned Judges decided in Shrilekha Vidyarthi (Kumari) v. State of U.P[14], the court was concerned with a challenge to a general order by which the appointment of all government counsel in all the districts of the state of U.P. came to be terminated. The writ petition was filed under Article 32 of the Constitution of India. Important and apposite are the following observations:**

> **"22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter**

[14] **(1991) 1 SCC 212**

that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. 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 Article 14 of non-arbitrariness at the hands of the State in any of its actions.

24. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which

is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in pubic interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

27. Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest.

28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic

to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14."

(Emphasis supplied)

33. **As to what constitutes arbitrariness is captured in paragraph 36 and it reads as follows:**

> **"36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always."**

34. **The pronouncement made by this Court would later become the springboard or the charter for the further evolution of the concept of public law element as also**

premise for the superior courts invoking Article 14 in various contractual matters.

35. **In *State of U.P and others v. Bridge and Roof Company (India) Ltd.*[15], the Court was dealing with a case of a writ petition filed by the respondent therein which was a public sector corporation and seeking payment allegedly due from the appellant state. The Court noted that the contract in question contained Articles providing inter alia for settlement of disputes by reference to arbitration. The very resort to Article 226 was found to be misconceived in the circumstances.**

The Court also laid down as follows: -

> **"Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or maybe, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for**

[15] **(1996) 6 SCC 22**

the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matter which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting a particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer."

36. **In *Verigamto Naveen v. Govt. of A.P. and others*[16], the case involved, mining leases granted to a corporation and a sub-lease, which was permitted by the Government. Thereafter, the permission was sought to be withdrawn. The withdrawal of the permission, was the subject matter of challenge in writ proceedings, inter alia. Against, the Order of the Full Bench of the High Court, (which is reported in AIR 1995 A.P.1), appeals were carried to this Court. On the issue relating to**

[16] **(2001) 8 SCC 344**

the jurisdiction of the Court in cases arising out of contract, this Court held as follows:

> **"21. … Though there is one set of cases rendered by this Court of the type arising in *Radhakrishna Agarwal case* [(1977) 3 SCC 457 : AIR 1977 SC 1496] much water has flown in the stream of judicial review in contractual field. In cases where the decision-making authority exceeded its statutory power or committed breach of rules or principles of natural justice in exercise of such power or its decision is perverse or passed an irrational order, this Court has interceded even after the contract was entered into between the parties and the Government and its agencies. We may advert to three decisions of this Court in *Dwarkadas Marfatia & Sons* v. *Board of Trustees of the Port of Bombay* [(1989) 3 SCC 293] , *Mahabir Auto Stores* v. *Indian Oil Corpn.* [(1990) 3 SCC 752] and *Shrilekha Vidyarthi (Kumari)* v. *State of U.P.* [(1991) 1 SCC 212 : 1991 SCC (L&S) 742 : AIR 1991 SC 537] Where the breach of contract involves breach of statutory obligation when the order complained of was made in exercise of statutory power by a statutory authority, though cause of action arises out of or pertains to contract, brings it within the sphere of public law because the power exercised is apart from contract. The freedom of the Government to enter into business with anybody it likes is subject to the condition of reasonableness and fair play as well as public interest. After entering into a contract, in cancelling the contract which is subject to terms of the statutory provisions, as in the present case, it cannot be said that the matter falls purely in a contractual field. Therefore, we do not think it would be**

appropriate to suggest that the case on hand is a matter arising purely out of a contract and, therefore, interference under Article 226 of the Constitution is not called for. This contention also stands rejected."

(Emphasis supplied)

The basis for interference was located in a statute which made its presence felt.

37. In *Binny Ltd. and Another v. V. Sadasivan and Others*[17], this Court was dealing with termination of services of respondents who were working as Members of the Management, staff of the appellant company. The appellant company purported to terminate their services. The respondents thereupon filed a writ petition under Article 226 of the constitution of India. The appellant company contended that it was neither a public authority nor did its action involve a public law element, and a writ of Mandamus would not lie. The High Court granted only the declaratory relief to the effect that the termination was illegal. We notice the following: -

"30. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a

[17] (2005) 6 SCC 657

statutory body. But nevertheless, it may be noticed that the Government or government authorities at all levels are increasingly employing contractual techniques to achieve their regulatory aims. It cannot be said that the exercise of those powers are free from the zone of judicial review and that there would be no limits to the exercise of such powers, but in normal circumstances, judicial review principles cannot be used to enforce contractual obligations. When that contractual power is being used for public purpose, it is certainly amenable to judicial review. The power must be used for lawful purposes and not unreasonably."

(Emphasis supplied)

38. **The Court went to hold that the decision of the employer to terminate the services of the employees could not be said to have any element of public policy. The Court did not find any public element in the termination of the employees. We may at once notice that the appellant in the said case was not a public sector unit as the appellant in the present case.**

39. **In *G. Bassi Reddy v. International Crops Research Institute and another*[18], the services of the appellant came to be terminated by the respondent-ICRISAT. The**

[18] **(2003) 4 SCC 225**

Court went on to hold that the respondent could not be treated as State under Article 12. The Court further proceeded to hold that the Writ Petition was not maintainable against the respondent, noticing that neither was the respondent set up by a Statute nor were its activities statutorily controlled.

40. ***ABL*** ***(supra)*** **marks a milestone, as it were, in the matter of the superior court interfering in contractual matters where the State is a player even after the contract is entered into. A petition was filed under Article 226 wherein the respondent which was incorporated under the Companies Act repudiated an insurance claim made by the appellant-writ petitioner. This Court undertook an elaborate discussion of the earlier case law. We find that this Court dealt with several obstacles which were sought to be posed by the respondent. They included disputed questions of facts being involved, availability of alternate remedy, and the case involving entertaining a money claim. This court went on to hold as follows:**

> **"27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:**

(*a*) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(*b*) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(*c*) A writ petition involving a consequential relief of monetary claim is also maintainable."

41. **No doubt, we must also notice para 28 which serves as an admonition against considering the availability of the remedy under Article 226 as an absolute charter to invoke jurisdiction in all cases.**

"28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whirlpool Corpn.* v. *Registrar of Trade Marks* [(1998) 8 SCC 1].) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which

the Court thinks it necessary to exercise the said jurisdiction."

(Emphasis supplied)

42. **We may also notice how this Court steered clear of the criticism that it was not following the principle laid down by this Court in *State of U.P. v. Bridge & Roof Co. (India) Ltd.*[19]. The Court noted that the said case did involve a contract which contained an arbitration clause. It is found that in the case before it there was no arbitration clause. In regard to the question as to whether the first respondent in the said case was discharging a public duty or public function was involved while repudiating the claim of the appellants arising out of the contract, the Court drew support from the judgment in *Kumari Shrilekha Vidyarthi* (supra).**

43. **In *Noble Resources Ltd. v. State of Orissa*[20], this court followed *ABL* (supra). However, in the facts of the said case again the matter involving refusal by a public authority to honour the contract in the matter**

[19] (1996) 6 SCC 22
[20] (2006) 10 SCC 236

of purchase of Iron ore, the Court held as follows:

> **"15. It is trite that if an action on the part of the State is violative of the equality clause contained in Article 14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Article 14 of the Constitution. While exercising contractual powers also, the government bodies may be subjected to judicial review in order to prevent arbitrariness or favouritism on their part. Indisputably, inherent limitations exist, but it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter."**

44. The court went on to approve of *ABL* (supra) and observed that this Court had declared that no decision lays down as an absolute rule that in all cases of disputed questions of fact, the parties should be relegated to a civil Court. We may also notice paragraph 29:

> **"29. Although the scope of judicial review or the development of law in this field has been noticed hereinbefore particularly in the light of the decision of this Court in *ABL International Ltd.* [(2004) 3 SCC 553] each case, however, must be decided on its own**

facts. Public interest as noticed hereinbefore, may be one of the factors to exercise the power of judicial review. In a case where a public law element is involved, judicial review may be permissible. (See *Binny Ltd.* v. *V. Sadasivan* [(2005) 6 SCC 657 : 2005 SCC (L&S) 881] and *G.B. Mahajan* v. *Jalgaon Municipal Council* [(1991) 3 SCC 91]"

45. Of further relevance to notice is the case of the respondent therein that only because the price of iron ore increased in the international market, the appellant had filed the writ petition only in February 2004. It was found that the said contention was not wholly misconceived. Thereafter the court went on to following observations:

"41. The submission of Mr Desai that rise in international price would not by itself be a relevant consideration to rescind the contract may be correct, but then the same was not the sole ground for Respondent 2 to refuse to supply iron ore fines to the appellant.

42. Moreover, certain serious disputed questions of fact have arisen for determination. Such disputed questions of fact ordinarily could not have been entertained by the High Court in exercise of its power of judicial review."

46. In the context of upgradation of aided schools and a complaint of discrimination, we notice the following

observations of this court in *State Of Kerala and others v. K. Prasad and another*[21].

> **" Para 11. This Court in Shrilekha Vidyarthi v. State of U.P. [(1991) 1 SCC 212: 1991 SCC (L&S) 742] held that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 and basic to the rule of law, the system which governs us, arbitrariness being the negation of the rule of law. Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary in whatever sphere must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all powers must be for public good instead of being an abuse of power."**

47. We may notice that as to what constitutes arbitrariness fell for consideration by this court in a case which involved cancellation of the examination held as part of a recruitment process, in *East Coast Railway and another v. Mahadev Appa Roa and others*[22]. We notice the following passages which are apposite for this case.

> **"19. Black's Law Dictionary describes the term "arbitrary" in the following words:**

---

[21] **(2007) 7 SCC 140**
[22] **(2010) 7 SCC 678**

"Arbitrary. —1. Depending on individual discretion; specif., determined by a judge rather than by fixed rules, procedures, or law. 2. (Of a judicial decision) founded on prejudice or preference rather than on reason or fact. This type of decision is often termed arbitrary and capricious."

20. To the same effect is the meaning given to the expression "arbitrary" by Corpus Juris Secundum which explains the term in the following words:

"Arbitrary.—Based alone upon one's will, and not upon any course of reasoning and exercise of judgment; bound by no law; capricious; exercised according to one's own will or caprice and therefore conveying a notion of a tendency to abuse possession of power; fixed or done capriciously or at pleasure, without adequate determining principle, non-rational, or not done or acting according to reason or judgment; not based upon actuality but beyond a reasonable extent; not founded in the nature of things; not governed by any fixed rules or standard; also, in a somewhat different sense, absolute in power, despotic, or tyrannical; harsh and unforbearing. When applied to acts, 'arbitrary' has been held to connote a disregard of evidence or of the proper weight thereof; to express an idea opposed to administrative, executive, judicial, or legislative discretion; and to imply at least an element of bad faith, and has been compared with 'willful'."

xxx xxx xxx

23. Arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Every order

passed by a public authority must disclose due and proper application of mind by the person making the order. This may be evident from the order itself or the record contemporaneously maintained. Application of mind is best demonstrated by disclosure of mind by the authority making the order. And disclosure is best done by recording the reasons that led the authority to pass the order in question. Absence of reasons either in the order passed by the authority or in the record contemporaneously maintained is clearly suggestive of the order being arbitrary hence legally unsustainable."

48. We would, therefore, sum up as to when an act is to be treated as arbitrary. The court must carefully attend to the facts and the circumstances of the case. It should find out whether the impugned decision is based on any principle. If not, it may unerringly point to arbitrariness. If the act betrays caprice or the mere exhibition of the whim of the authority it would sufficiently bear the insignia of arbitrariness. In this regard supporting an order with a rationale which in the circumstances is found to be reasonable will go a long way to repel a challenge to state action. No doubt the reasons need not in every case be part of the order as such. If there is absence of good faith and the action is actuated with an oblique motive, it could

be characterised as being arbitrary. A total non-application of mind without due regard to the rights of the parties and public interest may be a clear indicator of arbitrary action. A wholly unreasonable decision which is little different from a perverse decision under the Wednesbury doctrine would qualify as an arbitrary decision under Article 14. Ordinarily visiting a party with the consequences of its breach under a contract may not be an arbitrary decision.

49. We may now notice the judgment of this court in *Joshi Technologies International Inc. v. Union of India and others*[23], which is also relied upon by the learned Additional Solicitor General. The said case actually involved the complaint of the writ petitioner therein that it was entitled to the benefit of Section 42 of the Income Tax Act, 1961 which provided for certain deductions. The petitioner had entered into an agreement with the respondent, the Government of India. The case of the respondent, *inter alia,* was one denying the case of the petitioner that the omission of Section

[23] **(2015) 7 SCC 728**

42 was by oversight. The prayer in the writ petition itself inter alia was essentially to declare entitlement to the deduction under Section 42, inter alia. It is while dealing with the said case that this court no doubt proceeds to, inter alia, lay down as following after adverting to *ABL limited* (supra) also:-

> **"69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such a discretion:**
>
> **69.1. The Court may not examine the issue unless the action has some public law character attached to it.**
>
> **69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.**
>
> **69.3. If there are very serious disputed questions of fact which are of complex nature**

and require oral evidence for their determination.

69.4. Money claims *per se* particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances."

"70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended

to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision-making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

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

remedies provided for adjudication of purely contractual disputes."

50. **In *State of Kerala v. M.K. Jose*[24], the specific question with which we are concerned with, namely, entertaining a writ petition in a contractual matter and where the specific question was the validity of the termination of the contract, fell for consideration. We may notice the following:**

> **"13. A writ court should ordinarily not entertain a writ petition, if there is a breach of contract involving disputed questions of fact. The present case clearly indicates that the factual disputes are involved."**

51. **Thereafter, the court went on to consider in detail the judgment of this Court in *ABL* (supra) and found that it was a case where the court granted relief as the facts were absolutely clear from the documentary evidence and it pertained to interpretation of such clauses of the contract of insurance. We need notice only paragraph 20 in *M.K. Jose* (supra). It reads as under:**

> **"20. We have referred to the aforesaid authorities to highlight under what**

[24] **(2015) 9 SCC 433**

circumstances in respect of contractual claim or challenge to violation of contract can be entertained by a writ court. It depends upon facts of each case. The issue that had arisen in *ABL International* [(2004) 3 SCC 553] was that an instrumentality of a State was placing a different construction on the clauses of the contract of insurance and the insured was interpreting the contract differently. The Court thought it apt merely because something is disputed by the insurer, it should not enter into the realm of disputed questions of fact. In fact, there was no disputed question of fact, but it required interpretation of the terms of the contract of insurance. Similarly, if the materials that come on record from which it is clearly evincible, the writ court may exercise the power of judicial review but, a pregnant one, in the case at hand, the High Court has appointed a Commission to collect the evidence, accepted the same without calling for objections from the respondent and quashed the order of termination of contract."

(Emphasis supplied)

52. In ***State of U.P. v. Sudhir Kumar Singh and Others***[25], the first respondent the successful tenderer had worked the contract for a year when he was visited with cancellation. This Court exhaustively referred to the earlier case law including ***ABL*** (supra) and ***Joshi Technology*** (supra) and held, inter alia, as follows: -

"23. It may be added that every case in which a citizen/person knocks at the doors of the writ court for breach of his or its fundamental

[25] 2020 SCC Online 847

> rights is a matter which contains a "public law element", as opposed to a case which is concerned only with breach of contract and damages flowing therefrom. Whenever a plea of breach of natural justice is made against the State, the said plea, if found sustainable, sounds in constitutional law as arbitrary State action, which attracts the provisions of Article 14 of the Constitution of India - see Nawabkhan Abbaskhan v. State of Gujarat (1974) 2 SCC 121 at paragraph 7. The present case is, therefore, a case which involves a "public law element" in that the petitioner (Respondent No. 1 before us) who knocked at the doors of the writ court alleged breach of the audi alteram partem rule, as the entire proceedings leading to cancellation of the tender, together with the cancellation itself, were done on an ex parte appraisal of the facts behind his back."

53. We have already concluded that PPA is not a Statutory Contract. However, that would not be the end of enquiry. Dr. A.M. Singhvi, learned Senior Counsel, would point out that the contract, not being a statutory contract, assumes relevance only for the purpose of deciding as to whether the Court should relegate the writ applicant, to alternate remedies. In other words, while the Court would retain its discretion to entertain the petition or decline to do so, in the facts of each case, there is no absolute taboo against the Court granting relief, even if the challenge to the termination of a contract is made in

the case of a contract, which is not statutory in nature, when the offending party is the State. In other words, the contention is that the law in this field has witnessed an evolution and, what is more, a revolution of sorts and a transformatory change with a growing realisation of the true ambit of Article 14 of the Constitution of India. The State, he points out, cannot play the Dr. Jekyll and Hyde game anymore. Its nature is cast in stone. Its character is inflexible. This is irrespective of the activity it indulges in. It will continue to be haunted by the mandate of Article 14 to act fairly. There has been a stunning expansion of the frontiers of the Court's jurisdiction to strike at State action in matters arising out of contract, based, undoubtedly, on the facts of each case. It remains open to the Court to refuse to reject a case, involving State action, on the basis that the action is, *per se*, arbitrary.

54. **We may cull out our conclusions in regard to the points, which we have framed:**

i. **It is, undoubtedly, true that the writ jurisdiction is a public law remedy. A matter,**

which lies entirely within a private realm of affairs of public body, may not lend itself for being dealt with under the writ jurisdiction of the Court.

ii. **The principle laid down in *Bareilly Development Authority* (supra) that in the case of a non-statutory contract the rights are governed only by the terms of the contract and the decisions, which are purported to be followed, including *Radhakrishna Agarwal* (supra), may not continue to hold good, in the light of what has been laid down in *ABL* (supra) and as followed in the *recent judgment in Sudhir Kumar Singh* (supra).**

iii. **The mere fact that relief is sought under a contract which is not statutory, will not entitle the respondent-State in a case by itself to ward-off scrutiny of its action or inaction under the contract, if the complaining party is able to establish that the action/ inaction is, *per se*, arbitrary.**

iv. **An action will lie, undoubtedly, when the State purports to award any largesse and, undoubtedly,**

this relates to the stage prior to the contract being entered into [See *R.D. Shetty* (supra)]. This scrutiny, no doubt, would be undertaken within the nature of the judicial review, which has been declared in the decision in *Tata Cellular vs. Union of India*[26].

v. After the contract is entered into, there can be a variety of circumstances, which may provide a cause of action to a party to the contract with the State, to seek relief by filing a Writ Petition.

vi. Without intending to be exhaustive, it may include the relief of seeking payment of amounts due to the aggrieved party from the State. The State can, indeed, be called upon to honour its obligations of making payment, unless it be that there is a serious and genuine dispute raised relating to the liability of the State to make the payment. Such dispute, ordinarily, would include the contention that the aggrieved party

[26] (1994) 6 SCC 651

has not fulfilled its obligations and the Court finds that such a contention by the State is not a mere ruse or a pretence.

vii. The existence of an alternate remedy, is, undoubtedly, a matter to be borne in mind in declining relief in a Writ Petition in a contractual matter. Again, the question as to whether the Writ Petitioner must be told off the gates, would depend upon the nature of the claim and relief sought by the petitioner, the questions, which would have to be decided, and, most importantly, whether there are disputed questions of fact, resolution of which is necessary, as an indispensable prelude to the grant of the relief sought. Undoubtedly, while there is no prohibition, in the Writ Court even deciding disputed questions of fact, particularly when the dispute surrounds demystifying of documents only, the Court may relegate the party to the remedy by way of a civil suit.

viii. The existence of a provision for arbitration,

which is a forum intended to quicken the pace of dispute resolution, is viewed as a near bar to the entertainment of a Writ Petition (See in this regard, the view of this Court even in *ABL* (supra) explaining how it distinguished the decision of this Court in *State of U.P. and others v. Bridge & Roof Co.*[27], by its observations in paragraph-14 in *ABL* (supra)].

ix. The need to deal with disputed questions of fact, cannot be made a smokescreen to guillotine a genuine claim raised in a Writ Petition, when actually the resolution of a disputed question of fact is unnecessary to grant relief to a writ applicant.

x. The reach of Article 14 enables a Writ Court to deal with arbitrary State action even after a contract is entered into by the State. A wide variety of circumstances can generate causes of action for invoking Article 14. The Court's approach in dealing with the same, would be

[27] **(1996) 6 SCC 22**

guided by, undoubtedly, the overwhelming need to obviate arbitrary State action, in cases where the Writ remedy provides an effective and fair means of preventing miscarriage of justice arising from palpably unreasonable action by the State.

xi. Termination of contract can again arise in a wide variety of situations. If for instance, a contract is terminated, by a person, who is demonstrated, without any need for any argument, to be the person, who is completely unauthorised to cancel the contract, there may not be any necessity to drive the party to the unnecessary ordeal of a prolix and avoidable round of litigation. The intervention by the High Court, in such a case, where there is no dispute to be resolved, would also be conducive in public interest, apart from ensuring the Fundamental Right of the petitioner under Article 14 of the Constitution of India. When it comes to a challenge to the termination of a contract by the State, which is a non-statutory body, which

is acting in purported exercise of the powers/rights under such a contract, it would be over simplifying a complex issue to lay down any inflexible Rule in favour of the Court turning away the petitioner to alternate Fora. Ordinarily, the cases of termination of contract by the State, acting within its contractual domain, may not lend itself for appropriate redress by the Writ Court. This is, undoubtedly, so if the Court is duty-bound to arrive at findings, which involve untying knots, which are presented by disputed questions of facts. Undoubtedly, in view of *ABL Limited* (supra), if resolving the dispute, in a case of repudiation of a contract, involves only appreciating the true scope of documentary material in the light of pleadings, the Court may still grant relief to an applicant. We must enter a caveat. The Courts are today reeling under the weight of a docket explosion, which is truly alarming. If a case involves a large body of documents and the Court is called upon to enter upon findings of

facts and involves merely the construction of the document, it may not be an unsound discretion to relegate the party to the alternate remedy. This is not to deprive the Court of its constitutional power as laid down in *ABL* (supra). It all depends upon the facts of each case as to whether, having regard to the scope of the dispute to be resolved, whether the Court will still entertain the petition.

xii. In a case the State is a party to the contract and a breach of a contract is alleged against the State, a civil action in the appropriate Forum is, undoubtedly, maintainable. But this is not the end of the matter. Having regard to the position of the State and its duty to act fairly and to eschew arbitrariness in all its actions, resort to the constitutional remedy on the cause of action, that the action is arbitrary, is permissible (See in this regard Kumari *Shrilekha Vidyarthi and others v. State of U.P. and*

others[28]***)*. However, it must be made clear that every case involving breach of contract by the State, cannot be dressed up and disguised as a case of arbitrary State action. While the concept of an arbitrary action or inaction cannot be cribbed or confined to any immutable mantra, and must be laid bare, with reference to the facts of each case, it cannot be a mere allegation of breach of contract that would suffice. What must be involved in the case must be action/inaction, which must be palpably unreasonable or absolutely irrational and bereft of any principle. An action, which is completely malafide, can hardly be described as a fair action and may, depending on the facts, amount to arbitrary action. The question must be posed and answered by the Court and all we intend to lay down is that there is a discretion available to the Court to grant relief in appropriate cases.

[28] (1991) 1 SCC 212)

xiii. **A lodestar, which may illumine the path of the Court, would be the dimension of public interest subserved by the Court interfering in the matter, rather than relegating the matter to the alternate Forum.**

xiv. **Another relevant criteria is, if the Court has entertained the matter, then, while it is not tabooed that the Court should not relegate the party at a later stage, ordinarily, it would be a germane consideration, which may persuade the Court to complete what it had started, provided it is otherwise a sound exercise of jurisdiction to decide the matter on merits in the Writ Petition itself.**

xv. **Violation of natural justice has been recognised as a ground signifying the presence of a public law element and can found a cause of action premised on breach of Article 14. [See *Sudhir Kumar Singh and Others* (supra)].**

WHETHER THERE IS AN ARBITRATION CLAUSE?

55. **Before we proceed to deal further with the matter,**

we would have to first find whether there is any arbitration clause. We have already referred to the dispute resolution clause, namely, Article 13.2.1 and Article 13.2.3. They would appear to indicate that the clauses may not constitute an arbitration clause. As far as Article 13.3.1. is concerned, to which resort is to be made when the dispute remains unresolved under 13.2.3, it deals with disputes arising from a claim for any matter relating to the tariff. Therefore, we would take the view that it may not be a case where the PPA provides for an arbitration clause capable of determining the *lis* in question. The situation therefore contemplated in *U.P. Roof* (supra) as laid down in ABL (supra) does not exist.

THE IMPACT OF THE JUDGMENT IN THE FIRST WRIT PETITION

56. **Taking up point no. 5., *viz.*, the effect of the judgment of the High Court in the earlier round, we must notice indeed that this is a case which represents the second round of the litigation. In the earlier round the respondents had successfully invoked the**

jurisdiction under Article 226 when it was served with the order of termination of the contract dated 11.08.2017. We have already noticed the fate of the said case. The first battle which commenced in the year 2017 resumed as it were with the present writ petition. We are not oblivious to the fact that the appellant did not think it fit to challenge the verdict in the first round of litigation. No doubt, the case of the appellant is that the appellant was of the view that the court has left it free to the appellant to take steps under the contract for termination of the contract. It is the case of the appellant in fact, that the judgment of the High Court in the earlier round would not be an obstacle for the appellant to revisit and terminate the contract for the reason that the PPA made it incumbent on the appellant to terminate the contract under Article 2.1(d) if the contractor did not fulfil the conditions subsequent even after the expiry of 210 days and a further period of nine months after the commencement of PPA. We must examine whether the earlier judgment, in fact, in law permits the appellant to re-open the said issue. A perusal of the judgment

dated 20.6.2017 would reveal that the court was dealing with the challenge to the order dated 11.08.2017. The order dated 11.08.2017 would reveal that the appellant has found that there is a delay of 54 days in achieving the condition subsequent deadline. After considering the representation by the respondent, the appellant found that there is no merit in the case of force majeure and there was no justification for the delay in achieving conditions subsequent. Thereafter, the appellant, in terms of Article 2.5.1(d), terminated the PPA. Still further, a sum of Rs.1180.50 lakhs was found recoverable as penalty in terms of Article 2.5. It is this order which was challenged. Thereafter we find that the High court went on to notice that in a similar case, *viz.*, relating to New Clean Energy Pvt. Ltd., the petitioner therein admittedly commissioned the project within the time prescribed except that there was a delay of 16 days in achieving the first milestone.

57. Here we must understand the word 'first milestone' as fulfilment of the conditions subsequent. In regard to fulfilment of said milestone for which there was a delay of 16 days in the case of Renew clean Energy,

there was a delay of 54 days in the case of the first respondent. It is further noticed by the High Court that there was an order passed in favour of the Renew clean energy setting aside the termination of the contract in the said petitioner's case as confirmed by this Court. Next the High Court went on to record that there is a dispute as to whether the respondent had commissioned the power project in the present case. We notice that an attempt was made by the appellant to justify the termination on the basis that the respondent had not commissioned the power project within the time fixed. The High Court proceeds to notice that the aspect of commissioning the project was not the basis for terminating the contract. Relying on *Mohinder Singh Gill*[29], the appellants were not permitted to supplement the reasons for termination. Finally, the High court has proceeded to find that since the similar reason for termination of the agreement in the communication dated 11.8.2017 was not found justified in the case of Renew Clean Energy, the impugned communication dated 11.08.2017 was set aside.

[29] **(1978) 1 SCC 405**

It is thereafter that the liberty was given to the appellants to pass fresh orders in terms of the PPA in accordance with law.

58. The appellants would persuade us to hold that the High Court intended, by the liberty granted to leave it open to the appellant to pass orders invoking its power under the PPA which would not only include termination of the PPA based on respondent not commissioning the project within the time but also revisit the aspect relating to non-fulfilment of the conditions subsequent. The respondent would join issue with the appellant on the score that judgment of the High Court must be understood as meaning that on the issue relating to non-fulfilment of the conditions subsequent the court made its pronouncement on merits with reference to the decision in Renew Clean Energy. All that was left open was the question related to the delay in commissioning the project.

59. Learned Additional Solicitor General apart from reiterating his contention would point out that the earlier judgment should not be treated as res judicata and the only reason appellant did not challenge the

High court judgment, dated 20.06.2018, was the liberty granted. He would further submit that at any rate even proceeding on the basis that the High court could not revisit the issue of the non-fulfilment of the conditions subsequent, the decision of the High Court would not stand in the way of this Court considering whether the order which is impugned in this case which includes the issue relating to non-fulfilment of the conditions subsequent is sustainable. This is apart from pointing out that even in the case of Renew Clean Energy, this Court in its order refusing to interfere in the judgment of the High Court has made it clear that it was not going into the merits of the said contention having regard to observations which had been made, namely, that the contractor therein being faced with unavoidable circumstances as also the factum of huge investment made in the project.

60. Having noticed the contents of the decision of the High court dated 20.06.2018 and also bearing in mind the terms of the notice of termination dated 11.08.2017 we are of the view that the High Court must be treated as having interfered with the order based no doubt on

the order of the said court as affirmed by this Court in the case of Renew Clean Energy. Noticing, however, the contentions based on the aspect relating to project not being commissioned by the respondent within time and further clearly finding that the impugned order was not premised on project not being commissioned the impugned order was set aside finding that the termination was not justified as regards to non-fulfilment of conditions subsequent. It is thereafter that the liberty was granted and it had to pass fresh order in terms of the PPA. We have to take the order as it is and we are of the firm view that the analysis of the order leads us to only one conclusion which is that the High Court intended to only leave open the right of the appellant to invoke its power under the contract in regard to the issue relating to commissioning of the project or rather in the matter of default in commissioning the project. It would neither be legal nor equitable to permit the appellant to contend that the issue relating to not having fulfilled the conditions subsequent can be canvassed all over again.

AN ASIDE?

THE STATE LOAD DISPATCH CENTRE (RESPONDENT NO.5): ITS STAND AND THE IMPACT OF THE SAME

61. **Respondent No.5 filed a counter affidavit in this Court. It claims to be the 'Authority charged to perform functions under Section 32 (2) of the Electricity Act, 2003. Its responsibility is limited to monitoring and controlling of existing Grid elements and generating stations keeping the account of energy transmitted through the Grid. It specifically states that its role emerges after commissioning of the generating plant. It further states all activities prior to readiness of generator to inject power into the Grid are beyond its purview. The further stand is that none of the regulatory provisions allows it to interfere in pre-requisite regulatory compliance by the generator before injecting of power into the Grid. There is reference to short-term open access for which there are regulations. In respect of Renewable Energy generators intending to connect with the Grid, certain regulatory requirements, before injecting of power**

therein, are to be complied with. They are registration, data and speech communication facility, interface metering and communication of meter data through automatic meter reading.

Single line diagram indicating connectivity with the grid duly certified by MPPTCL (fourth respondent), when connected to 132KV and above, *inter alia*, copy of connection agreement with the fourth respondent, *inter alia*, information regarding sale of power under long-term access, medium-term open access or short-term open access, approval of CEIG for construction, operation and maintenance of electrical plans and electrical lines under Section 73C of the Electricity Act, 2003 and approval of Power, Telecommunication and Coordination Committee (PTCC). It is further stated that on compliance with procedures it first issues a unique code for charging power evacuation line. When the line holds for a reasonable time, unique code for injection is issued. Real time generation is monitored. If it is satisfied with the data recorded by the interface meters (Main and check) then a generating station is deemed to be commissioned. It is pointed

out by letters dated 2.12.2015 and 3.11.2016 respondent No.5 requested Respondent No.1 for compliance of the procedure/ response. Mandatory documents were not submitted for injecting of Grid except registration. CEIG approval is only for renewable energy generation units and equipments installed in the Switchyard. Respondent No.1 has not obtained CEIG approval of transmission line. The details of the interface meters, metering equipments are not mentioned in the report of CGIG. It is pointed out that other units including M/s. New Clean Energy was ready for evacuation of power with all regulatory requirements.

62. In the reply affidavit filed by the first respondent to the said counter affidavit, it is complained that respondent No.5 though a party in the earlier writ petition as also in the present writ petition it never responded, objecting to the readiness of first respondent in August 2017. The belated reply in the High Court is stated to seem as ill motivated and done at the instance of the appellant. Furthermore, the first respondent points out that it is not the case of the first respondent that its project

was commissioned. Its case was that it was complete in all respects and would have commissioned before the expiry of 24 months but for the illegal termination on two occasions as noted. In regard to non-compliance with certain regulatory requirements, various steps taken by it are referred to.

63. As far as registration is concerned, it was completed on 15.12.2016. In regard to data and speech communication facility, it is stated by Respondent No.1 that it is completed on 23.03.2017. In the said communication, on a letterhead showing the name of the fourth respondent and also showing the name of the fifth respondent, it is stated that the telemetry scheme for the 100MW solar power plant was generally in order and accepted for implementation, subject to four conditions stipulated therein. Thereafter, it is stated that "*it is, therefore, required that the telemetry and voice communication from the control centre of the proposed power plant upto Back Up SLDC Bhopal/Sub-LDC Indore/SLDC Jabalpur be arranged before synchronization of your power plant. It may please be noted that synchronization of plant with grid shall not*

be allowed without commissioning of telemetry and voice communication." **It is seen signed by the Superintending Engineer (LD:E&T), SLDC, MPPTCL, Jabalpur. As far as the requirement of connection agreement, it has been stated in the reply affidavit of the first respondent that such connection agreement was, indeed, executed between Respondent No.1 and Respondent No.4. The agreement is dated 18.05.2017. At this juncture, we may notice that a Sur-Rejoinder has been filed by Respondent No.5. Having regard to the connection agreement, all that is stated is, till date, Respondent No.5 was not provided with a copy by the first respondent. It is also stated that Respondent Nos. 4 and 5 are two distinct entities and, therefore, it was required for compliance that the same should have been submitted to Respondent No. 5. We have already noticed that letter dated 23.07.2017 is on the same letterhead, showing the names of Respondent Nos. 4 and 5 and signed by the Superintending Engineer, wherein also, the names of Respondent Nos. 4 and 5 appear. It is a little intriguing and strange, that the fifth respondent did not know about the agreement and referred to it as a**

requirement and as though it had not been complied with by the first respondent. The first respondent has stated that, with regard to the single-line diagram indicating connectivity with the grid, that it was completed on 19.10.2016. An extension was sought for by Respondent No.1, in which required diagrams were furnished to Respondent No. 4. Respondent No.4, it is stated, has granted permission for charging the transmission line connected from the project to the STU. Diagrams were also, it is stated, approved by the CEIG. The answer of Respondent No.5 in the Sur-Rejoinder that the letter dated 29.08.2017 was not issued by Respondent No.5 but by Respondent No.4. It is admitted that it is stated therein that the line is ready for charging but further necessary action, like issuing of charging code, has to be taken from Respondent No.5 by Respondent No.1. It is again stated that Respondent No.1 has never approached Respondent No.5 with copy of letter dated 29.08.2017 and CEIG approval for readiness of evacuating line. It is again stated that Respondent No.5 is not an arm or even unit of Respondent No.4. In regard to the contention that

information regarding sale of power for access, including long-term access, was not made available by the first respondent. It is pointed out that the first respondent set up the project to supply power to the appellant only as per the PPA and the said requirement was not applicable.

64. The fifth respondent in the Sur-Rejoinder responded by pointing out that Respondent No.5 is the Nodal Body for managing the grid operations and within the State and it is generally seen that if the plant is commissioned the same cannot be left idle and be allowed to inject power into the grid, and it was in this regard, it was mentioned that if a third-party sale was to be undertaken by Respondent No.1 so that its plant was not left idle, then, it was incumbent on Respondent No.1 to have obtained open access. We find that as per Article 9.8 of the PPA, the first respondent was obliged to sell the contracted capacity for a period of twenty-five years from COD. Elaborate provisions have been made, which would visit the first respondent with monetary compensation to be paid to the appellant, in case of breach. Article 9.7 also provides

for the obligation of the appellant to buy power for twenty-five years. It is only if there was refusal or inability to buy by the appellant, fully or partially, or in the event of default, as per Article 9.5, leading to termination, the first respondent was left free to sell power to a third party, which sale was to be regulated by certain terms.

65. As regards another requirement, viz., approval of the CEIG for construction, operation and maintenance of the electrical plants and electrical lines, it is the case of the first respondent that such approval was obtained by letter dated 10.08.2017. It was also marked to Respondent No.4. CEIG approval for the electrical plant was received on 09.08.2017. Respondent No.4, it is pointed out, had also, on 24.08.2017, issued a Joint Inspection Report certifying that the project may be charged. In fact, we find, in the Joint Inspection Report issued by the fourth respondent that:

> ***"Newly constructed 132KV D.C.D.S. line from 400KV PS Chhegaon to 50MW Pooling Station of M/S Sky Power Solar India Pvt. Ltd. And 50MW Pooling Station of M/S Sky Power Southeast Solar India Pvt. Ltd. At village Chhirbel has been jointly inspected with EE (EHT-M) MPPTCL, Indore on dt.24/08/2017.***

During Joint Inspection No. any major defects has been found and line. May be charged."

(Emphasis supplied)

66. **In regard to the same, Respondent No.5 in the Sur-Rejoinder would state that it is misleading and incorrect on the basis that it has been averred by Respondent No.1 that the approval of the CEIG for readiness of 132KV double circuit line for connection with the grid was submitted by the sister concern of Respondent No.1, while requesting code for charging the 132KV line for the sister concern. It is stated that in the approval issued on 10.08.2017, there is no mention that the second line will be utilised by Respondent No.1. The letter of the CEIG dated 10.08.2017 is said to be addressed to the sister concern. There was to be a specific approval of CEIG in favour of Respondent No.1. Copy was not marked to Respondent No.5 but only marked to Respondent No.4. It again reiterated that they are two different entities.**

67. **It appears to us that though letter dated 10.08.2017 is addressed to the sister concern of Respondent No.1, viz., Sky Power Solar India Pvt. Ltd.,**

what was the subject matter of the communication was for 100MW solar power project, and what is more, and it was for the establishment of 132KV 'dual' circuit transmission. This understanding of this CEIG Report is clear from the Joint Inspection Report of Respondent No.4 as Respondent No.1 has entered into a PPA for 50MW, and the sister concern, apparently, had a PPA for 50MW. Lastly, even given an opportunity, this is a matter which could have been clarified by the CEIG, for which no opportunity appears to have been given. We bear in mind Article 9.1 of the PPA. From the Joint Inspection Report, bearing in mind that 132KV line had a dual circuit, the same line was to be used by the first respondent and its sister concern. This appears to be the only possible meaning on a joint reading of the CEIG Report dated 10.08.2017 and Joint Inspection Report dated 24.08.2017. We stand fortified in this regard by the report dated 21.04.2018 also where it is inter alia stated as follows:-

> **"1. Present Status of Transmission Line for power evacuation from Power Plant to Grid Substation**
> **132 kV DCDS line is found erected between Pooling Substation to 400 kV Chhegaon (Torni)Substation. One circuit is used for**

> **already existing 50 MW plant of M/s Sky Power and 2nd circuit is proposed to be used for M/s Sky Power South East Solar India Pvt. Ltd. at village Chirbel, Distt. Khandwa, for which site verification visit is conducted."**

68. The next requirement, according to the fifth respondent was that approval of the PTCC was required. The first respondent has, in the reply, stated the said requirement was completed on 05.09.2017. We find that Chief Engineer (Procurement) of the fourth respondent has recorded in the communication dated 05.09.2017 that PTCC had accorded PTCC route approval:

> **"With reference to the subject cited above, DET (PTCC), Mumbai has accorded PTCC route approval for charging 132KV DCDS line from 400kV S/s Chhegaon to 100MW Solar Power Project of M/s SkyPower Solar India & M/s SkyPower Southeast Solar India Pvt. Ltd. Chhirbel, Dist. Khandwa."**

69. The fifth respondent, in the Sur-Rejoinder, in response to the same, would respond by stating that the Respondent No.4 granting approval, did not mean that the same was issued with the knowledge or concurrence of Respondent No.5. We only remind ourselves that in the Counter Affidavit filed by Respondent No.5, Respondent No.5 had only stated against Requirement

No.VIII that there was the requirement of approval of PTCC. What is reflected in letter dated 05.09.2017 is that DET [PTCC] has accorded PTCC route approval. The approval is not granted by the fourth respondent. We are a little mystified by the statement that the PTCC approval should be one issued with the knowledge and concurrence of the fifth respondent.

70. **It is, no doubt, true that as regards the contention of the fifth respondent that there must be interface metering and communication of the meter data through automatic meter reading (AMR), which details are to be provided to the SLDC before the commissioning of the plant, there is no specific averment by the first respondent. Here we must notice that it is for the first time such a plea is being raised by the fifth respondent. Even proceeding on the basis that it was a requirement; it is required to be provided before commissioning. This is not a matter, which could not be set right at any rate, if an opportunity to remove a defect was provided, as we shall see, may be contemplated under Article 9.1. It is also true that as far as the data and speech communication facility,**

the first respondent has claimed that it was completed on 23.03.2017. We have already referred to it also. The stand of the fifth respondent is that there is approval but it is only in principle. It is complained that till date, the telemetry and voice communication was not working, in spite of the fact that by letter dated 03.04.2017, relevant IP address for real time data communication was furnished. It is not functional till date, in the case of the first respondent, whereas, in regard to its sister concern, it is operational. A letter dated 14.10.2021 is produced to indicate that the telemetry of the first respondent was not integrated and no real time data was received from the IP address provided to it. Even, in regard to this matter, if an opportunity was to be given in law, to the first respondent under Article 9.1, it is not something which may be not achievable.

71. We are also dealing with these aspects on the basis of an affidavit filed raising such issues for the first time by the fifth respondent. The fifth respondent had all the opportunity in the writ petition to raise such contentions. Even in the Review Petition, there is only

adoption of the contentions of the appellant.

72. Emphasis is placed on the statement of Respondent no.5 by respondent no.1 wherein it is stated "whereas though the generating station is ready for generation of power but the power cannot be evacuated into the grid in the absence of transmission line". This is taken as an admission of the readiness of the first respondent for generation of power. It is pointed out further that necessary approval was taken before December 2016 to August 2017 for operating the transmission line. Respondent No.1 was not allowed to commission. Reliance is also placed on the inspection report of the appellant to show that the transmission line was ready. The examples about other operators are brushed aside as irrelevant. It is the generator's prerogative to sell power in the open market.

73. A Sur-Rejoinder is filed by respondent No.5. Therein, it has interestingly produced its return in the review petition filed by the appellant before the High court. Therein we may notice that it referred to Section 32(2) of the Electricity Act and its functions. Thereafter it has stated as follows:

"3. That, in accordance with Electricity act, 2003, role of SLDC comes after commissioning of the generating plant and its evacuating transmission lines. On receipt of commissioning certificate of a generator, connectivity with the Grid, metering arrangement and other regulatory compliances, SLDC accords permission of injection of power into the Grid. Further, SLDC schedules power of generator to the beneficiary/ consumer if the valid Power Purchase Agreement exists between buyer and seller.

4. That, writ proceeding in the instant petition is regarding completion of commissioning of solar Generating Plant of M/s. Sky Power Southeast Solar India Pvt. Ltd., whereas the responsibility of SLDC begins after commissioning of the Solar Generating Plant and other regulatory compliances. As per provisions of Electricity Act, 2003 and MPEGC, commissioning certification is beyond the jurisdiction of SLDC.

6. That, the answering respondent is more of a formal respondent as the agreement was entered into between MPPMCL and the Original Petitioner in Writ Proceedings which is M/s. Sky Power."

74. No doubt, it has also stated in paragraph-7 that it adopts all the facts and grounds raised by the review petitioner, namely, the appellant.

75. It will be noticed that though respondent no.5 was a party to the earlier writ petition as much as it is

a party in the present writ petition, respondent no.5 has not filed any counter affidavit in either of the writ petitions. It is only in the review petition that the respondent no.5 has filed a reply and we have noticed its stand. The stand appears to be that it is more of a formal respondent. Its role comes in only after commissioning. It is in this Court that there has been blossoming of its case for the first time. It is also admitted by respondent No.5 that it is not concerned with the pre-commissioning. It is its specific stand that all the activities prior to readiness of the generator to inject power are beyond its purview. It has specifically stated that its role comes only after commissioning the project. First respondent states that it has not commissioned the project. Its only case is that it was ready to commission the project within 24 months as provided in the PPA but it was illegally prevented from doing it.

76. We may only observe that the fifth respondent has, in the Sur-Rejoinder, owned up letter dated 23.03.2017 as the letter it has sent. The said letter is in the letterhead of the fourth respondent and therein the

name of the fifth respondent is also shown. It would appear that the fifth respondent is created under Section 31 of the Electricity Act, 2003. Section 31 reads as follows:

> **"Constitution of State Load Despatch Centres.—(1) The State Government shall establish a Centre to be known as the State Load Despatch Centre for the purpose of exercising the powers and discharging the functions under this Part.**
> **(2) The State Load Despatch Centre shall be operated by a Government company or any authority or corporation established or constituted by or under any State Act, as may be notified by the State Government:**
>
> **Provided that until a Government company or any authority or corporation is notified by the State Government, the State Transmission Utility shall operate the State Load Despatch Centre:**
>
> **Provided further that no State Load Despatch Centre shall engage in the business of trading in electricity."**

77. Therefore, it would appear to us that actually the fifth respondent is to be operated by the State Transmission Utility, which is defined in Section 2(67) as the Board (defined as the State Electricity Board) or the Government company specified by the State Government under Section 39(1), unless it is operated by a Government company or any authority or corporation

established or constituted by or under and State Act. It would, therefore, appear to us that if the fourth respondent is the State Transmission Utility, it would be the Body to operate the fifth respondent. The attempted disassociating of the fifth respondent from the fourth respondent, appears to us to be without justification. However, we leave the matter there. We may conclude nearly that all the requirements were met. There remained the metering requests and the aspects about furnishing data. They clearly appear to be matters which could have been remedied at any rate if a default notice was given.

THE NARRATIVE RESUMES

78. At this juncture, we must make certain observations. While the law has evolved from the hands-off approach to one of contracts lending ground for writ courts making a foray into decisions by State and its instrumentalities even in contractual matter, there are certain principles which we have already in fact generally noticed. We have already found that the contract in question, i.e., the PPA, is not a statutory

contract. We have also noticed that even if it is a non-statutory contract, there is no absolute bar in dealing with a cause of action based on acts or omission by the State or its instrumentalities even during the course of the working of a contract. We again reiterate that a monetary claim arising from a contract may be successfully urged by a writ applicant but the premise would not be a mere breach of contract. Being part of public law the case must proceed on the basis of there being arbitrariness vitiating the decision. The matter should not fall within a genuinely disputed question of facts scenario. The dispute which must be capable of being resolved on a proper understanding of documents which are not in dispute may furnish a cause of action in a writ court. Such was the case in *ABL* (supra). What is this litigation all about? This litigation is not about enforcing a monetary claim. The writ petition lays a challenge to the termination of the contract. A termination of the contract, no doubt, again may not be immune if it is found to be afflicted with the vice of arbitrariness. Interference again may be refused if the court finds that the case

really belongs to the small area with unclear contours where it can be appropriated as a private law dispute. The distinction between public law and private law has concededly been reduced to nearly imperceptible terms but the distinction in law remains. As far as the public law aspect is concerned, we are inclined to take the view that in view of what has been laid down in *Shri Vidhyarthi Lekha* (supra), the impact of the action in a contractual matter in the facts by public authority is felt in public domain. We are dealing with the action of the appellant in terminating the contract dealing with the right to generate renewable energy and for supplying it to the consumers. Supply of power and its consumption are imperative and indispensable needs for not only the common man but also for the efficient functioning of trade and industry. Decisions in this domain do impinge on public interest. Therefore, we would not be inclined to shut the doors on the first respondent in this matter. We also bear in mind that this is the second round of litigation. As noticed already, in the first round, the first respondent did succeed.

79. **Having found that though a non-statutory contract and that there is no absolute prohibition against judicial review on the score that action is shown to be arbitrary, the questions which would fall for further consideration are: (1) whether action is arbitrary (2) the projected disputes of facts and their impact; (3) what is the impact of the principle that there must be overwhelming public interest in favour of the writ applicant for the writ court to interfere.**

THE ARGUMENT OF 'OVERWHELMING PUBLIC INTEREST'

80. **The case based on 'overwhelming public interest not being present in this case is based on the following submissions by the learned Additional Solicitor General. It is pointed out that under the PPA, if the appellants are compelled to comply with the impugned Judgment and that too for a period of twenty-five years, it would be liable to purchase power at the rate of Rs. 5.109/- unit. On the other hand, if the Writ Petition filed by the first respondent is dismissed, there would be no obligation and consequent burden. It**

is important to notice that the appellant would be compelled to pass on the burden to the ultimate consumers. All of this is to be viewed in the scenario, when power is available at a cheaper rate in the market. In other words, public interest lies not in favour of exercise of jurisdiction under Article 226 of the Constitution of India. The High Court erred in not bearing in mind this fundamental principle the argument runs. The appellant relied on the decision in *All India Power Engineer Federation and others v. Sasan Power Limited and others*[30], for the proposition that the Court must be mindful of public interest, which consists of interest of the consumers ultimately.

81. ***Per contra*****, the submission of the first respondent is that the Court must not be oblivious to certain facts. The rate per unit, in the case of the first respondent, is Rs.5.109 per unit. In respect of another project, where the PPA was entered into with a sister concern of the first respondent, the project price was Rs.5.298 per unit. The project stands commissioned. The**

[30] **(2017) 1 SCC 487**

tariff was arrived at on the basis of highly competitive bids. There were, in fact, 183 bids. It is further contended that the bid of the first respondent was found to be the lowest in the competitive bidding. The appellant is, in fact, buying power at higher tariff from at least 5 generators, who commissioned their projects in the year 2017-2018. It was further contended that the daily demand of the appellant is approximately 15000 megawatts. The quantum of the project of the first respondent is only 50 megawatts, which constitutes 0.33 per cent of the total demand. Purchasing such a small capacity, in terms of the rate under the PPA, would make no difference to the consumer tariff. This is apart from countenancing the appellant reneging on a binding contract, which involves reaching a reward for arbitrary State action, besides, destroying an investment of Rs.331 crores. In this regard, reliance is placed on the Judgment of this Court in Vice Chairman & Managing Director, City and Industrial Development Corporation of Maharashtra Ltd. and another v. Shishir Realty Private Limited and

others[31]. Public interest cannot be determined with reference to monetary considerations alone, it is pointed out.

82. As far as *All India Power Engineer Federation* (supra) is concerned, in fact, the Court was dealing with Civil Appeals, which were filed under the Electricity Act, 2003. The question about public interest arose in the context of the provision in the contract, which provided for waiver, which would be a unilateral act under Article 18.3 of the PPA therein. The Court also discussed the effect of Section 63 of the Indian Contract Act, 1872. The Court, while dealing with waiver and public interest, held as follows:

> **"21. Regard being had to the aforesaid decisions, it is clear that when waiver is spoken of in the realm of contract, Section 63 of the Contract Act, 1872 governs. But it is important to note that waiver is an intentional relinquishment of a known right, and that, therefore, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. But the matter does not end here. It is also clear that if any element of public interest is involved and a waiver takes place by one of the parties**

[31] **(2021) SCC Online SC 1141**

> **to an agreement, such waiver will not be given effect to if it is contrary to such public interest. This is clear from a reading of the following authorities.**
>
> **xxx xxx xxx**
>
> **25. It is thus clear that if there is any element of public interest involved, the court steps in to thwart any waiver which may be contrary to such public interest."**

83. **In the said case, the Court further held that the moment the electricity tariff gets affected, the consumer interest comes in and public interest gets affected and further that there is a statutory recognition for the same in Sections 61 to 63 of the Electricity Act, 2003. Therefore, this Judgment, though in the context of a Statutory Appeal, has laid down that consumer interest in tariff is intertwined with public interest.**

84. **On the other hand, in Vice Chairman & Managing Director, City and Industrial Development Corporation of Maharashtra Ltd. (supra), this Court, while dealing with a case involving the question of award of contract, held as follows:**

> **"58. When a contract is being evaluated, the mere possibility of more money in the public coffers, does not in itself serve public interest. A blanket claim by the State claiming loss of public money cannot be used to forgo contractual obligations, especially when it is not based on any evidence or examination. The larger public interest of upholding contracts and the fairness of public authorities is also in play. Courts need to have a broader understanding of public interest, while reviewing such contracts."**

85. **In fact, the principle of public interest has found expression in cases which involved challenge to the legality of the award of contract.[See in this regard *Tata Cellular v. Union of India* (1994) 6 SCC 651[32] (supra) and Raunaq International Ltd. v. I.V.R. Construction Ltd. and Others, (1999) 1 SCC 492.**

86. **In *Michigan Rubber (India) Limited v. State of Karnataka and Others*[33] after referring to *Tata Cellular and Raunaq International Limited* (supra), the Court inter alia held as follows: -**

> **"35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract**

---

[32] *(2017) 1 SCC 487*
[33] *(2012) 8 SCC 216*

by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable."

87. **In *Raunaq International Ltd. v. I.V.R. Construction Ltd. and Others*[34] the case involved award of contract for the purpose of Thermal Power Station. In fact, the Appeals in this court were maintained against the grant of an interim order against the appellant to whom the contracts stood awarded. The case also involved relaxation of the criteria which was based on valid principles it was found. It was further found that the construction of two Thermal Power Units was being held up due to the dispute. The Court, inter alia, held as follows: -**

"9. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. The elements of public interest are: (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly

[34] **(1999) 1 SCC 492**

interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work — thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. Price may not always be the sole criterion for awarding a contract."

88. Therefore, on a conspectus of the case law, we find that the concept of overwhelming public interest has essentially evolved in the context of cases relating to the award of contract by the State. It becomes an important consideration in the question as to whether

then the State with whatever free play it has in its joints decides to award a contract, to hold up the matter or to interfere with the same should be accompanied by a careful consideration of the harm to public interest. We do not go on to say that consideration of public interest should not at all enter the mind of the court when it deals with a case involving repudiation of a claim under a contract or for that matter in the termination of the contract. However, there is a qualitative difference in the latter categories of cases. Once the State enters into the contract, rights are created. If the case is brought to the constitutional court and it is invited to interfere with State action on the score that its action is palpably arbitrary, if the action is so found then an appeal to public interest must be viewed depending on the facts of each case. If the aspect of public interest flows entirely on the basis that the rates embodied in the contract which is arbitrarily terminated has with the passage of time become less appealing to the State or that because of the free play of market forces or other developments, there is a fall

in the rate of price of the services or goods then this cannot become determinative of the question as to whether court should decline jurisdiction. In this case, it is noteworthy that the rates were in fact settled on the basis of international competitive bidding and in which as many as 182 bidders participated and the rate offered by the first respondent was undoubtedly the lowest. The fact that power has become cheaper in the market subsequently by itself should not result in non-suiting of the complaint of the first respondent, if it is found that a case of clear arbitrariness has been established by the first respondent.

89. **In other words, public interest cannot also be conflated with an evaluation of the monetary gain or loss alone.**

POINTS NO. 6 - 8 AND 10

90. **The time is now ripe to take a closer look at the relevant clauses of the PPA. Article 2 deals with the pre commissioning activities. Article 2.1 deals with satisfaction of the conditions subsequent by the**

respondent. Clause 2.1.1 contemplates that the respondent must complete all the conditions which are set out at his own cost and risk within 210 days from the effective date. The only two exceptions were 'force maejure' or if any of the conditions subsequent was specifically waived by the appellant in writing. The consequences of non-fulfilling the condition subsequent is dealt with in Article 2.2 which related to force majeure obstructing the fulfilment of the conditions subsequent. Article 2.2.2 in fact provided that any increase in the time period for completion of the conditions subsequent mentioned under Article 2.1 would also lead to an equal extension in the scheduled commissioning date. Article 2.5 provided for delay in achieving the conditions subsequent. Article 2.5.1 reads as follows:

> **"2.5.1. In case of delay in achieving any of the Conditions Subsequent under clause 2.1 (a to h), as may be applicable, MPPMCL shall encash CPG (submitted by Seller @ Rs. 30 Lakhs/MW) as under, subject to Force Majeure: -**
>
> **a) Delay from 0-3 months - 1 % per week.**

b) Delay from 3-6 months - 2% per week for the period exceeding 3 months, apart from (a) above.

c) Delay from 6-9 months - 3% per week for the period exceeding 6 months, apart from (a) and (b) above.

d) In case of delay of more than 9 months, MPPMCL shall terminate PPA and release balance amount of CPG."

91. Thereafter, PPA deals with the aspect of commissioning. Article 2.6 deals with commissioning and it reads as follows:

"2.6. COMMISSIONING

In case of Solar Project of capacity up to 50 MW, commissioning of plant shall be within 12 months from the date of financial closure subject to Force Majeure. In case of Solar Project of capacity beyond 50 MW and up to 100 MW, commissioning of plant shall be within 15 months from the date of financial closure subject to Force Majeure For capacity beyond 100 MW, commissioning period shall be within 18 months from the date of financial closure subject to Force Majeure..1

In case of failure to achieve this milestone, provision of PPA as mentioned below shall apply: -

MPPMCL shall en cash the CPG in the following manner for the capacity not commissioned, subject to Force Majeure:-

a) Delay from 0-3 months - 1% per week.

b) Delay from 3-6 months - 2% per week for the period exceeding 3 months, apart from (a) above..

c) Delay of more than 6 months – 3% per week for the period exceeding 6 months, apart from (a) and (b) above.

Part Commissioning: In case of Solar PV Projects, Part commissioning of the Project shall be accepted by MPPMCL subject to the condition that the minimum capacity for acceptance of part commissioning shall be 5 MW. Or in multiple of 5 MW

COD means the commissioning date of just units (s) of the power project where upon the seller starts injecting power from full contracted capacity of the power project to the delivery point; as approved by competent authority of the Transco/Discom. The PPA will remain in force for a period of25 month from the COD."

92. There are other Articles which need not detain us. Article 3 deals with Supply Arrangements under Open Access. Article 3.1.1 reads as under:

"3.1.1. The power generated through 50 MW Solar Power Project (PY/Thermal Technology) installed by the Seller Located at Village bedhsya, Tai: Khandwa, Dist: Khandwa, State: Madhya Pradesh shall be injected into the Transmission/Distribution system of

Transco/Discom on 33kV or above side of 33kV /EHV Substation situated at Deshgaon at injection point for sale to MPPMCL, subject to fulfilling the terms and conditions and protection schemes by the Seller as approved by the concerned Transco/Discom's.

3.1.2. The Seller shall ensure to interconnect and operate the solar power plant in parallel with the grid of Transco/Discom (in the area of the location of the generating unit) system subject to the terms and provisions of this agreement. The Seller shall be fully responsible for obtaining and maintaining any or all licenses and permissions required by law. The Seller shall abide by any law, rules, regulations or any notification or order issued there under by the Central Govt. or State Govt. or Commission or Local Authority or any other Authority prescribed under the law connected with the project of the Seller.

The Seller shall be fully responsible for the design, construction, testing, operation and maintenance of the solar power plant in accordance with Standard Utility Practices, relevant technical standards and specifications.

b) For the power plant situated in MP State, the power evacuation infrastructure laid by the Seller shall be the property of the concerned licensee (Transco/Discom) in whose territorial area the above lines are located - notwithstanding the fact that the cost of the said infrastructure has been paid by the Seller and the same . shall then be maintained by the concerned licensee at its cost. A separate transfer agreement

shall be subsequently signed in this regard with the concerned licensee, if required.

3.1.3. The Seller shall obtain all statutory and non-statutory permissions as required. The seller supplying power from outside of MP State shall require to obtain long term open access permission as per relevant regulations of central and state regulators, as the case may be, from the state or regional load dispatch center and/or the state/central transmission utilities."

93. Article 4 deals with System Operations. Article 4.2 deals with system operation and scheduling. We may notice Articles 4.2.1 and 4.2.4.

"4.2.1. The State Load Despatch Center shall be the Nodal Agency if the project is located in MP, for system operation, power accounting, scheduling, etc. The foes and charges of SLDC as approved by the MPERC shall be payable by the Seller to the SLDC. In case of the system is located in any other state, the Seller has to follow the regulations of the particular SLDCIRLDC and the fees and charges shall be payable by the seller accordingly."

"4.2.4. SLDCs/Control Centers of the States/UTs/DVC, in which the solar power plant is located, shall provide the 15-minute block-wise data of schedule and actual generation from Solar Grid Connected Power Plant as recorded in the Energy Meters to the concerned RLDC and NLDC on a weekly basis as per the requirement of SLDCIRLDC/NLDC. All the

data shall be submitted in the form prescribed by the NLDC."

94. Article 4.3 deals with open access. Article 5.1 deals with commercial operations date (COD). COD has been defined in the agreement as meaning the commissioning date of the last unit(s) of the power project whereupon the seller starts injecting power from full contracted capacity of the power project to the delivery point as approved by competent authority of the TRANSCO/DISCOM. DISCOM has been defined as a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in the State of Madhya Pradesh. Article 5.1 reads as under:

"5.1. COMMERCIAL OPERATIONS DATE

The Commercial Operation Date of the plant shall mean the commissioning date of last unit (s) of the power project where upon the seller starts injecting power from contracted capacity of the power project to the delivery point as approved by competent authority of the Transco/discom.

After Each part commissioning and/por CoD of the contracted capacity, the commissioning certificate (s) certified by Transco/Discom shall be attached as

Annezure- XII to the Power Purchase Agreement

However part commissioning of the plant shall be accepted as laid out in clause 2.6 and the energy supplied from the same shall be considered for billing and payment of the energy supplied from such commissioned units."

95. **Article 5.2. deals with Pre-Commercial Operations and it inter alia provides that the discom shall take all power produced through the STU/CTU during the testing of the plant without any charges. Thereafter 5.3 deals with Notice of Commercial Operations. It reads as follows:-**

"5.3 NOTICE OF COMMERCIAL OPERATIONS:-
The Seller will specify in a written notice to the MPPMCL that:

a) The Plant is constructed in accordance with this Agreement and is ready to deliver Solar Power in accordance with the terms hereof;
b) All permissions and approvals required for the Plant to sell Solar Power at the rates and terms specified under this Agreement have been obtained and
c) All interconnection facilities are available to receive Solar Power from the Plant.

Such notice shall take effect and the Commercial Operations Date will be achieved following the Transco/Discom's declaration that all of the conditions set forth in this Article have been satisfied or waived by the STU/CTU/MPPMCL/Transco/Discom i.e.:

a) The Seller has successfully completed

the testing of the Plant in accordance with the manufacturer's recommendations and the Seller has obtained and provided to the STU/CTU/Transco/Discom Certificates from the Electrical Inspectorate of GoMP or any other state government authorised agency, and the STU/Transco/Discom's officer as may be designated; in case project is located in MP. In case project is located outside MP, similar certificates be obtained from the concern authority of respective state.

b) The Seller has delivered to the Transco/Discom a list of the Plant's equipment, showing the make, model, serial number and certified the installed capacity of the Plant;

c) The Plant has achived initial synchronization with the Transco/Discom's/STU/CTU Grid System and has demonstrated the reliability of its communications systems and communications with the STU/CTU/Transco/Discom;

d) The Seller has operated the Plant without experiencing any abnormal or unsafe operating conditions on any interconnected system;

e) The Seller shall also have notified the MPPMCL/Trancso/Discom/STU/CTU no later than 30 days prior to the Commercial Operations Date that all the Conditions Subsequent as laid out in clause 1.01 have been met and MPPMCL shall verify the same and shall provide the Seller a written endorsement in this behalf acknowledging the documents, certificates, approvals etc provided by the Seller in this regard."

The respondent was duty bound to notify to the appellant that the plant is constructed as per PPA and

it was ready to produce solar power and that all permissions and approvals to sell power at the rates and terms under the agreement had been obtained and all inter connection facilities were available to receive solar power from the plant. The PPA further contemplates that the said notice would take effect and the COD be achieved upon the TRANSCO/DISCOM declaring that all conditions in this Article were either fulfilled or waived. The PPA further deals with Sale and Purchase of Solar Power in Article 6 commencing at COD date. The seller, that is, the respondent was to sell and the appellant was to purchase and accept 50MW solar power at the point of delivery. The respondent undertook not to sell any solar power (all of which is committed to the appellant) to any other person. Article 7 deals with Metering and Measuring. Article 8 deals with Billing and Power Accounting. Article 9 deals with Events of Default and Remedies. Article 9.1 is relevant and it deals as follows:

> "9.1. DEFAULTS AND TERMINATION.
>
> In case of default, the non-defaulting party shall issue a default notice to the defaulting party. If the default is not

fully set right within three months from the date of issue of the default notice, then in case of default by the Seller, the MPPMC.L by giving seven days termination notice in writing, may terminate the agreement. In case of default by MPPMCL, the Seller may in the same way terminate the agreement."

96. **Article 9.4 deals with various events which are described as seller event of default. The relevant provision reads, inter alia:**

> **"9.4. SELLER EVENT OF DEFAULT**
>
> **The occurrence and continuation of any of the following events, unless any such event occurs as a result ofa Force Majeure Event, shall constitute Seller Event of Default:**
>
> **a) The failure to commence supply of power to MPPMCL up to the Contracted, · Capacity, relevant to the Scheduled Commissioning Date, by the end of 24 months; or"**

97. **Article 9.5 provides for appellant's events of default. Article 9.7 falling under 9.6 which generally deals with 'Remedy'. It reads as follows:**

> **"9.7. MPPMCL commits to buy power, as indicated in Article Error! Reference source not found. of PPA, from Seller at Rs. *5.051* per kWh for a period of 25 years from COD. In case MPPMCL refuses or is unable to buy the said power, fully or partially, or there is an event of default**

as per Clause 9 .5 of PPA leading to termination of the PPA, the seller would be free to sell the said power to a Third Party at any rate which will be decided between the Seller and the said Third Party and such sale would be governed by the following principles:"

(Emphasis supplied)

The principles are set out providing for two cases.

98. Article 11.6.3 deals with Change in Law. Article 13 deals with Jurisdiction and Dispute Resolution. Article 13.2.1 reads as follows:

"13.2.1. Either Party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement ("Dispute") by giving a written notice (Dispute Notice) to the other Party, which shall contain:

• a description of the Dispute;
• the grounds for such Dispute; and
• all written material in support of its claim

13.2.2. The other Party shall, within thirty (30) days of issue of Dispute Notice issued under 13.2.1, furnish:

• counter-claim and defences, if any, regarding the Dispute; and

• all written material m support of its defences and counter-claim.

13.2.3. Within thirty (30) days of issue of Dispute Notice by any Party pursuant to Article 13 .2.1 if the other Party does

- not furnish any counter claim or defence under Article 13.2.2 or thirty (30) days from the date of furnishing counter claims or defence by the other Party, both the Parties to the Dispute shall meet to settle such Dispute amicably. If the Parties fail to resolve the Dispute amicably within thirty (30) days from the later of the dates mentioned in this Article, the Dispute shall be referred for dispute resolution in accordance with Article 13.3."

99. **Article 12.2 reads as follows:**

> **"12.2 GRID CODE DISCIPLINE**
>
> **The concerned Transco/Discom and the Seller shall observe the State/Indian Electricity Grid Code or its amendment if any, and operate their systems to the best of their capacity and resources."**

100. **Article 13.3.1 reads as follows:**

> **"13.3.1. Where any Dispute arising from a claim made by any Party for any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, shall be submitted to adjudication by the MPERC. Appeal against the decisions of MPERC shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time."**

101. **Article 15.1.4. deals with Compliance with Law and in substance it provides that the provisions of the Electricity Act, 2003 will prevail in case of**

repugnancy or deviation from the terms of the agreement from the Act.

102. **In the impugned judgment the High Court has proceeded to hold inter alia that the respondent has invested Rs. 350 crores in establishing the unit and after replacing the stolen parts, the unit is ready for commissioning on any date. The High court has further proceeded on the basis that the project involved two milestones and the High court has set aside the earlier order which dealt with delay in achieving the first milestone. Thereafter, the finding is that the project was certified to be completed much prior to 24 months which period ended on 19.9.2017 and the notice of commissioning was given on 4.7.2017. The CEIG approval was also granted on 9.8.2017. It is further found that another inspection was done on 19.04.2018 after nine months of the notice of commissioning and the CEIG approval. It is despite the same that the impugned order has been passed. Still further the High court proceeds to find that it is undisputedly established that both the milestones of the project were completed whereas only some of the invertors were stolen for**

which an FIR was also lodged. It is again found that it is not in dispute that the aforesaid parts have been replaced by the respondent. Support was drawn from the case of Renew Energy and the courts discretion to interfere in the matter was reiterated. The decision was found to be arbitrary. The court directed the respondent to file necessary application for statutory sanction for operation of the unit and the appellant was to decide on the application. To complete the narrative a review petition, was filed by the appellant. The appellant sought to project the aspect of fraud. The fraud consisted of the act of the respondent relying on unique/distinctive serial numbers of the invertors in regard to a number of invertors which were found to be common/duplicate. In other words, the case of the appellant was that the project for 50 MV was divided into 10 blocks of 5 megawatt. Each block had 116/117 invertors. A fraud was committed on the CEIG. In other words, it was the appellants case that the respondent had not complied with the PPA in regard to the installing of the required number of invertors. The first respondent took the

stand that the all the serial number of the invertors were quite legible though the contrary was contended. The CEIG reported the physical readiness of the project for commissioning. The respondent also drew upon the inspection report of the appellant itself. The High Court bearing in mind the limited jurisdiction dismissed the review.

103. **In the impugned Termination Notice dated 07.07.2018, after referring to the delay of 54 days in fulfilling condition subsequent, it is mentioned that the commercial operation date, as per Article 2.6, was 14.04.2017. It was indicated that there was no indication regarding commissioning against the column 'readiness of plant' as on 11.08.2017. The last date for commencement of supply was shown as 18.09.2017. The expiry date of three months period for commencement of supply from the last due date was 18.12.2017. It is further provided that the expiry date of seven days of PPA Termination Notice period was 25.12.2017. The status of the project as on 19.04.2018 was indicated as 'not ready for commissioning'. Thereafter, it is pointed out that there is no**

justification for delay in achieving condition subsequent. Still further, reference is made to the Order passed by the High Court in the earlier Writ Petition. Physical verification was carried out on 19.04.2018, whereupon, it was found that installation work of plant and equipment was incomplete in Blocks 9 and 10. It was further pointed out that the copy of the Inspection Report was enclosed, where installation of invertors, installation of solar EV panels, cabelling and earthing work, was yet to be completed. It was further pointed out that even after more than six months, after deadline of commissioning of project, the plant is not ready for commissioning. Thus, there was not only failure to achieve condition subsequent but also failure to commission the project within time. In comparison with the case of Renew Clean Energy, it is pointed out that apart from failure to comply with condition subsequent, even the outer timeline has not been observed, whereas, in the case of Renew Clean Energy, they were ready to commission by the scheduled commissioning date. The timeline under Article 9.1 was not conformed to. After referring to the Order of the

High Court, it was found that, with reference to Article 2.5.1(d) and Article 9.1 of the PPA, the PPA was terminated.

104. **Let us demystify the case for termination. Apart from non-fulfilment of the condition subsequent, apparently, in tune with the liberty granted by the High Court, the appellant has set out a case that the last date of commencement of supply was 18.09.2017, and even as on 19.04.2018, the respondent was not ready for commissioning of the project. With reference to Articles 5.1, 5.2 and 5.3 of the PPA, which consisted of the commercial operation date, pre-commercial operation and notice of commercial operation, it is stated that the respondent has not intimated regarding the schedule of commissioning, till the date of the Termination Notice. A distinction is sought to be drawn between Renew Clean Energy and the respondent, in that the case of the first respondent, even the first respondent was not ready to commission the project within the stipulated time.**

105. **The case that the first respondent has projected in the Writ Petition, on the other hand, is, inter**

alia, as follows:

On 04.07.2017, while issuing letter to respondent no.4, it issued notice for commissioning by 31.07.2017, in terms of Article 5.1(c) of the PPA. Site inspection by the appellant was solicited through its EPC. The respondent obtained approval from the CEIG for commissioning on 09.08.2017. The CEIG certified that all infrastructure and installation pertaining to the project were ready and the respondent may proceed with the commissioning activities. CEIG approval is requirement under Article 5.3(a). However, the appellant proceeded to terminate the PPA by Order dated 07.07.2018. Thus, it is stated that the appellant, for reasons best known to it, chose to ignore the first respondent's request for proceeding with the commissioning of the project. The respondent also obtained in principle connectivity for the project from the appellant. It is the specific case of the respondent that prior to 11.08.2017, first respondent had received intimation from its EPC Contractor that the project

was ready for commissioning barring minor works pending completion such as construction of shed/cubical for the Guard which would have no bearing on the project commissioning. The respondent pointed out that the appellant was obliged to issue default notice under Article 9.1 of the PPA. The respondent was entitled for a period of three months. No such notice was issued. As far as the Report of the Inquiry Committee dated 19.04.2018, relied on by the appellant, it is pointed out that the challenge to the earlier termination notice was pending and the respondent was constrained to demobilise its staff/security guards. Thefts took place. It is pointed out that these thefts took place after the certification by the CEIG. In other words, the respondent would blame the appellant for not conducting an inquiry immediately after the certification by the CEIG. It is also the case of the first respondent that, through its EPC Contractor, it had procured, *inter alia*, 1163 string invertors. Some of the string invertors were stolen, as stated earlier. That the

case of the respondent is not that the project had been commissioned but that the appellant prevented it from commissioning the project before the last date. It is also seen stated that the project was complete in all respects from the side of the respondent but on account of theft of a very small number of equipment, highlighted by the appellant in its Inspection Report, the first respondent had, in the meanwhile ensured to get these miscellaneous equipments and parts reinstalled and the project was complete in all respects as on that date. As far as the theft is concerned, the first respondent had lodged two FIRs through its EPC Contractor well before the inspection carried out on 19.04.2018.

THE ASPECT OF DISPUTED QUESTIONS OF FACTS

106. **What are the disputed questions of facts? The most important disputed question of fact is as to whether the first respondent was, in fact, ready to commission the project by the end of the peremptory date, which was fixed as a period of twenty-four months from the date of the agreement. On the one hand, the appellant**

would contend that first respondent was not ready to commission the project. This is for the reason that in the 9th and the 10th Blocks, certain string invertors were found missing. On the other hand, the case of the respondent is based on the Report of the CEIG, which would show that the respondent was ready to commission the project. As far as the CEIG Report is concerned, the case of the appellant appears to be that the respondent had played a fraud in obtaining the CEIG Report. This was unsuccessfully canvassed before the High Court in the Review Petition. In other words, the case sought to be set up by the appellant is that as many as 272 string invertors were bearing duplicate numbers and, therefore, it was being held out by the first respondent that it had performed its contractual obligation, when it was not the case. As far as the delay of 53 days in fulfilling the conditions subsequent is concerned, there is no dispute that there was such a delay. Though, an attempt was made by the first respondent to contend that in view of the amendment substituting one of the conditions subsequent, *viz.*, the condition relating to land and,

therefore, there would be further extension of time. We do not think that we can allow the first respondent to set up such a plea. However, we have already concluded that the issue as to the right or power of the appellant to terminate the PPA on account of the delay of 53 days, may not be open to the appellant, in view of the Judgment of the High Court.

107. The learned Senior Counsel for the first respondent, Dr. A.M. Singhvi, would, in fact, contend that this Court may proceed on the basis that actually there is a disputed question of fact. This is on the reasoning that even if this Court proceeds on the basis of the Inspection Report dated 19.04.2018, a miniscule percentage of Rs. 350 crores would be the subject matter of the lacunae that was pointed out by the Inspecting Team in its Report dated 19.04.2018. It is pointed out that the first respondent should not be visited with the highly arbitrary decision to terminate the PPA when nearly Rs. 350 crores have been sunk into the project. The project itself is an environment friendly project. An unusually large number of competitors had bid in the bidding process and the

first respondent had emerged as a lowest bidder, which, at that time was hailed.

THE CASE UNDER ARTICLE 9.1 READ WITH ARTICLE 9.4(a)

108. One of the grounds taken by the first respondent against the termination notices is that it is issued without complying with Article 9.1 of the PPA. We have already adverted to the said Article. We have also referred to Article 9.4.(a). Let us divine what is contemplated under the PPA. The PPA contemplates Article 9 with its sub-divisions to provide for events of default and remedies. Under Article 9, the sub-Articles provide for seller's event of default and the appellant's Event of default. Reading Article 9.1 with Article 9.4 and, more particularly, Article 9.4.(a), which alone is relevant, we understand the following to be what is contemplated by the parties. Article 9.1 begins with the words 'in case of default'. The default in the case of seller's event of default would be the default, which is the subject matter of the termination. Here, we can safely conclude that the seller's event of default, which is apposite, is the

failure to commence the supply of power to the appellant at the contracted capacity, relevant to the scheduled commissioning date by the end of twenty-four months. The words 'scheduled commissioning date', have been defined in the PPA itself, to mean, for solar project of capacity 50MW as per the quantum indicated in LOI, the commissioning period allowed shall be nineteen months from the date of signing of the PPA. The period of twenty-four months must be reckoned from the date of the PPA and, so understood, since the date of the PPA is 18.09.2015, twenty-four months therefrom would expire on 18.09.2017. We, therefore, proceed on the basis that such an event, constituting default on the part of the first respondent, had taken place. Continuing with the analysis of Article 9.1, what was expected of the appellant was, as the non-defaulting party, to issue a default notice to the defaulting party, viz., the seller, which in this case is the first respondent. Article 9.1 further clearly contemplates that if the default is not fully set right within three months from the date of issue of the default notice, then, in the case of default by the

seller, the appellant was to serve a seven days' notice of termination. The notice was, undoubtedly, to be in writing. It is by the second notice, which is to be of the duration of seven days that the appellant could validly terminate the agreement. Thus, PPA clearly indicates the issuance of a default notice when seller commits an act of default. Without issuing the first default notice, giving three months' time from the date of issue of the notice, the second notice, which would be a notice of termination, cannot be issued.

109. Now, let us find whether the appellant has followed this procedure. In the impugned termination notice dated 07.07.2018, what is indicated in a Table in paragraph-9 is that there was a delay of 54 days in the matter of fulfilment of conditions subsequent and the scheduled commercial operation date, as per Article 2.6 was 14.04.2017. 11.08.2017 is noted as the date of notice of termination. 18.09.2017, being the end of twenty-four months from the date of signing of the PPA is shown as the last date of commencement of supply of the contracted capacity and Article 9.4 is referred to. 18.12.2017 is shown as the expiry date of three months,

apparently, from 18.09.2017, for commencement of supply from the last due date. Thereafter, 25.12.2017 is shown as the expiry date of seven days of the PPA termination notice period. In paragraphs-21, 22 and 23 of the impugned notices, the appellant takes the following stand:

> **"21. As per table-I, time line for commissioning of project has been indicated. You were required to adhere to st1pulated provisions of the PPA. Whereas this has not been achieved by you, within the time line even considering provisions of Article 9.1 of the PPA i.e., 24 months (supply to power to. contracted capacity from date of PPA) + 3 months (default notice period) + 7 days (termination notice period), from the signing of the PPA have already being exhausted.**
>
> **22. Whereas, in light of showcause notice issued vide this office letter no. 108 dated 22.02.2017 and liberty granted " by Hon'ble Court to MPPMCL, in its order dated 20.06.2018 for issuing fresh order in terms of PPA dated 18.09.2015 to you, in accordance with law, it is evident that you have failed to fulfil your contractual obligation as per PPA executed with you on 18.09.2015. Thus, the PPA qualifies for termination.**
>
> **23. Therefore, in line and in compliance to the Hon'ble High Court judgment dated 20.06.2018 and pursuant to the provision under Article-2.5.1 (d) along with the consideration of the timeline stipulated in Article 9 .1 of the PPA and showcause notice**

dated 22.02.2017, the PPA signed on 18 Sept. 2015, between Mis Sky Power Southeast Solar India Pvt. Ltd. New -Delhi, (SPV of Parent Company Sky power Southeast Asia Holding 2 Ltd.) and MPPMCL, for supply of Power from the proposed, 50MW. Solar PY plant located at Village-Bedhaya District - Khandwa and subsequently location changed to Village Chhibel, Teb-Khalliiwa, Distt- Khandwa at a rate of Rs. 5.091 per unit, is hereby terminated."

110. Thus, we find the twenty-four months period from the date of the PPA, plus three months default notice period, plus seven days termination notice period, had been already exhausted. In paragraph-22, support is sought to be drawn from the show-cause notice dated '22.02.2017' and the liberty granted by the High Court in the first Writ Petition, for issuing a fresh Order. The PPA, it was found by the appellant, qualified for termination. In paragraph-23, it is explicitly stated that based on Article 2.1.1(d) along with the timeline stipulated in Article 9.1 and the show-cause notice dated 22.02.2017, the PPA was terminated.

111. Therefore, the show-cause notice dated 22.02.2017 is what the appellant lays store by to conclude that it was acting in compliance with the requirement of

issuance of the default notice under Article 9.1. It, therefore, becomes necessary to advert to the notice dated 22.02.2017. We may extract the following:

"MP POWER MANAGEMENT COMPANY LIMITED
CIN: U4010MP2006SGC018637
(A Govt. of M.P. UNDERTAKING)
Regd. Office: Shakti Bhawan, Rampur, Jabalpur, Madhya Pradesh, india-482008, Tel: 0761-2661111;-2660500, Fax: 0761- 261696, website:-www.mppmcl.com, email: md@mppmcl.com,

No. 05-01/Solar Bidding-III/PP A/108

'Jabalpur Date 22.02.2017

To,
M/s Sky Power Southeast Solar Pvt. Ltd.
16A/20 W.E.A. Main Ajmal Khan Road,
Karol Bagh,
New Delhi-110005.

Subject: submission of documents for fulfilment of condition subsequent in respect of your 50MW Solar Power project proposed at Village Chhirbel, Tallika Dist Khandwa under Phase-III solar competitive bidding.

Ref: 1. Power purchase Agreement executed on 18.09.2015.
2. Your letter No. SKP/MP/SOLAR/MPPMCL/2015-116/06, dated 12.01.2017

Dear Sir,

With reference to your latter cited above, this is to intimate that on scrutiny of the documents submitted by you for fulfilment of condition subsequent after 210 days from signing of PPA. In respect of your 50 MW solar power project proposed at village Chhirbel, Taluka & dist Khandwa, status of the documents found as under:

Sr. No.	Location Proposed in PPA/Final Location	Status of grid connectivity	Status of financial closure	Details of land acquisition		
				Acqu-ired land in hectar e	Mode of acquisition	Remarks
	BEDHSYA, Khandwa/ chhibel Khandwa	In principal connectivity issued by Transco vide letter No.04-02/PSP-147-LI & 1.2/95 7, Jabalpur, dated 19.10.16, which is generally found in order	Loan sanction letter of M/s L&T finance vide letter No.LTF/89 2567/16-17 dated 29.08.16, L&T INFRA vide letter No. S07201A0/ 16-17, dated 29.08.16, copy of facility Agreement and affecting complian-ces documents as stated in above letters are require to be submitted.	99.06	64.94 HEET, UNDER REGISTERED SALE DEED 34.12 HEET under unregistered sale deed for 12 months only from Sterling Wilson to sky power	Out of 34.12 Heet… only 7.28 is undue Regi-stered sale deed to Sterling , balance is undue Sauda Raseed to Sterling Wilson on Rs.500/- Stamp Paper.

D.G.M. (Commercial-3)
R.O., MPPMCL, Bhopal

Chief General Manager (Commercial): Block No. 11, Shakti Bhawan, Rampur, Jabalpur (MP) 482008
Tel: 0761-2661245, 2702404, Fax: 0761-2661245,
email: makarand.chincholkar@mppmcl.com

It needs to be mentioned here that as per provisions of amended clause 2.1 (f) of the PPA pertaining to acquisition of land for the project, Seller shall be required to furnish the following ~ documentary evidence:-

- **Ownership or lease hold right (for at least 30 years) or right to use permission (for revenue land in Madhya Pradesh) in the name of seller and possession of 100% of the area of the land required for the allotted project.**
- **Requisite documents from the concerned and competent revenue registered authority for the acquisition ownership vesting of the land in the name of the seller and in case of private land clear title for ownership and/ or registered lease deed for land taken on lease.**

As can be seen from the above table you have submitted clear title for ownership for only 64.94 hectare land. whereas for 34.12 hectare land you have submitted unregistered lease deed for only 12 months, which cannot be considered for fulfilment of condition subsequent as per provisions of the PPA as mentioned above.
Further, as per provision of clause 2.5.1 (dO of the PPA, referred PPA is liable for termination. Therefore, you are requested to submit your explanation/ justifications, if any, within 10 days from the issue of this letter, for further - necessary action in the matter.

Chief General Manager Commercial
MPPMCL, Jabalpur"

112. **A perusal of this notice, would reveal the following:**

The subject matter of the said notice appears to be the fulfilment of condition subsequent. It is clearly mentioned that as per Article 2.5.1, the

PPA was liable for termination. The first respondent was asked for the explanation within ten days from the date of the letter for further necessary action in the matter.

We are of the view that the said notice cannot qualify as one which was issued as a default notice under Article 9.1. We have already found that Article 9.1, dealing with default, which in this case, is the default by the seller, and, furthermore, the default being non-observance of the time limit of twenty-four months from the date of agreement dated 18.09.2015, the notice dated 22.02.2017, could not have been issued, even before the expiry of the period of twenty-four months from 18.09.2015. In other words, the seller's event of default under Article 9.4(a) could have become the subject matter of a notice under Article 9.1 only if there was failure on the part of the first respondent to supply power, as provided in Article 9.4(a), within twenty-four months. That point of time, viz., the expiry of twenty-four months from

18.09.2015, would arrive, at the earliest, only on 18.09.2017. Therefore, it is only after 18.09.2017 that the first notice or, what is described as the default notice, could have been issued by the respondent under Article 9.1. Apparently, what has happened is the appellant has combined the default alleged with reference to Article 2.5.1(d), to which, undoubtedly, notice dated 22.02.2017, could be said to be related and has projected the said show-cause notice as the default notice within the meaning of Article 9.1 read with Article 9.4. Article 9.1 contemplates a default, the issuance of default notice and, most importantly, giving a period of three months for the seller (first respondent) to set right things. It is if the seller does not remedy the matter within three months, that the second notice, which is essentially an Order of termination of the PPA, can be issued. A perusal of the notice dated 22.02.2017 does not make any reference to the seller's event of default contemplated in Article 9.4.(a). The reasons are not far to seek. For the

reasons, which we have indicated hereinbefore, the notice could not have been issued based on there being a seller's default within the meaning of Article 9.4.(a) on 22.02.2017. We reiterate that as on 22.02.2017, the seller's event of default under Article 9.4.(a), could not exist in law or in facts. Still further, we notice from the tenor of the notice dated 22.02.2017 that the first respondent was, in fact, asked to give its justification within ten days from the date of issue of the notice for necessary action in the matter. This is totally incompatible with the notice contemplated as a default notice within the meaning of Article 9.1. Article 9.1 contemplates the existence of a default by the seller and the giving of a period of three months to the seller to remove the defect. We are unable to understand how notice dated 22.02.2017 could be understood as affording any such opportunity as is contemplated under Article 9.1. Therefore, we have no hesitation in holding that the appellant cannot seek shelter under notice dated 22.02.2017 to justify the notice

of termination dated 07.07.2018, if reliance is to be placed on Article 9.1 read with Article 9.4.(a). We have already found that the appellant cannot be permitted to reopen the issue relating to the non-fulfilment of the conditions subsequent, as the issue has attained finality by virtue of the Judgment of the High Court dated 20.06.2018.

113. Appellant has attempted to justify the notice dated 22.02.2017 as the show-cause notice within the meaning of Article 9.1 based on the Judgment of the High Court in the first round of litigation. We are of the view that appellant would not be justified in drawing support from the said Judgment to contend that the issuance of notice dated 22.02.2017, would suffice and it absolves the appellant from complying with Article 9.1. From a perusal of the said Judgment in Writ Petition No. 12880 of 2017, we find that the High Court found that an attempt was made by the appellant to justify the earlier termination dated 11.08.2017 on the ground that respondent had not commissioned the power project within the time fixed in the agreement. The High Court was not impressed as it found that the lack

of commissioning of the power project was not the reason for terminating the contract and the appellant could not supplement the reason in view of Judgment of this Court in *Mohinder Singh Gill and another v. Chief Election Commissioner, New Delhi and others*[35]. It is thereafter, after setting aside the Order dated 11.08.2017, that liberty was granted to the appellants to pass fresh Order in terms of the PPA, in accordance with law. High Court, therefore, only permitted the appellants to invoke the PPA with respect to the lack of commissioning, and moreover, in accordance with law. It becomes clear as day light that since by the date of the Judgment, i.e., 20.06.2018, the period of twenty-four months from the date of the agreement, had expired, and if, in terms of the liberty granted by the High Court, the appellant was to lawfully terminate the contract, it could not have acted in breach of the mandate of the PPA, which, in fact, the High Court had specifically directed appellant to comply with. In other words, though nearly nine months had gone by from 18.09.2017, when the High Court pronounced Judgment on

[35] **(1978) 1 SCC 405**

20.06.2018, if the appellant wanted to terminate the agreement, at least under the contract, the appellant was obliged to issue the default notice. As we have noticed, the appellant was perhaps persuaded to issue the impugned termination notice on the basis of the earlier notice dated 22.02.2017 as it felt that it was entitled to ask the Court to revisit the issue relating to the non-fulfilment of the condition subsequent as well. The appellant has, in fact, proceeded in the notice of termination that the three months period, contemplated in Article 9.1, came to an end automatically, on 18.12.2017 and things had not changed on the ground, entitling it to issue the notice dated 07.07.2018, after the further expiry of seven days on 25.12.2017. The appellant, in this regard, appears to have laboured under the apprehension that the mere expiry of the period of three months, after the occurring of the event of seller default, within the meaning of Article 9.4.(a) and the further expiry of another seven days, entitled it to issue the notice of termination. What, on the other hand, Article 9.1 read with Article 9.4.(a) contemplated was not the mere

running of time for a period of three months, after the occurrence of the seller's event of default but an opportunity to the seller by the giving of a notice of default and waiting for three months. It is only after the seller was put on notice of the default, which it had committed and an opportunity was granted to remove fully the default and it persevered in breach, that a valid Order of termination could be passed. On this reasoning, there can be no dispute that the appellant has clearly failed to act in terms of the clear mandate of Article 9.1 read with Article 9.4.(a).

114. There is another vital aspect to be borne in mind. The impugned notice dated 11.08.2017, brought about the termination of the contract. This is while notice dated 04.07.2017 was issued by the first respondent, as noticed. Therein, the appellant was specifically asked to inspect the premises. The CEIG also issued the certificate on 09.08.2017. Now the really significant fact is that after the appellant terminated the contract on 11.08.2017, it is wholly inconceivable and arbitrary to predicate that the first respondent should have commenced the project and complied with Article

9.4(a) by 18.09.2017. Even more unfair it would be to find that the first respondent had three months period from 18.09.2017 to cure the defect which period came to an end on 18.12.2017. Yet, this very premise is reflected in the impugned notice dated 07.07.2018. There is no case at all for the appellant that immediately on the expiry of 24 months contemplated in Article 9.4(a), a notice was given under Article 9.1. This could not be, also for the reason that the appellant had well before 18.09.2017, on 11.08.2017, terminated the contract. This is indisputable. Equally significantly, termination of the contract dated 11.08.2017 clearly was illegal though it was found later and set aside by judgment dated 20.06.2018. Thus, we cannot also brush aside the complaint of the first respondent that this is a case where it stood prevented from commencing supply within the meaning of Article 9.4(a). The fact of termination by order dated 11.08.2017 and its invalidation by the High court on 20.06.2018 are again not matters of dispute.

115. There is another aspect to the matter. The termination of a contract, undoubtedly, results in the

intrusion into and deprivation of valuable rights, which are vouchsafed to the awardee of the contract. It could be argued that *dehors* a contractual provision, unless it be that the contract peremptorily provides for the termination of the contract expressly without service of the notice on the occurrence of certain stipulated events, principles of natural justice may not be out of place and under the Theory of Fair State Action, in consonance with Article 14, an opportunity to the awardee as to why the contract should not be terminated, may be just. In this regard, we may recapitulate what this Court in *State of U.P. v. Sudhir Kumar Singh and Others*[36] has, *inter alia*, held:

> **"23. It may be added that every case in which a citizen/person knocks at the doors of the writ court for breach of his or its fundamental rights is a matter which contains a "public law element", as opposed to a case which is concerned only with breach of contract and damages flowing therefrom. Whenever a plea of breach of natural justice is made against the State, the said plea, if found sustainable, sounds in constitutional law as arbitrary State action, which attracts the provisions of Article 14 of the Constitution of India - see *Nawabkhan Abbaskhan* v. *State of Gujarat* (1974) 2 SCC 121 at paragraph 7. The**

[36] **(2020) SCConline SC 847**

> present case is, therefore, a case which involves a "public law element" in that the petitioner (Respondent No. 1 before us) who knocked at the doors of the writ court alleged breach of the *audi alteram partem* rule, as the entire proceedings leading to cancellation of the tender, together with the cancellation itself, were done on an *ex parte* appraisal of the facts behind his back."

No doubt, it related to a case of cancellation of the tender after the tenderer had worked thereunder for over a year and based on two *ex parte* enquiries. We may bear in mind that Article 9.1 captures not really the principles of natural justice as such but an opportunity to set right a default by the seller.

116. Having found that the impugned termination Order dated 07.07.2018 ill squares with the requirement of Article 9.1, the question may arise, whether this is a matter which should be the basis for interference in powers of judicial review under Article 226. This is not the basis on which the impugned Judgment is based. Could it be said that this is a matter, which should have formed the subject matter of a proceeding in a civil court. In this regard, we may notice the following aspects:

The object behind giving the default notice under Article 9.1 is to provide an opportunity to the seller under the PPA to comply with the PPA and remove the default within the period of three months. If it is a case where it is demonstrated that removal of the default was an impossibility, then, it would, indeed, be a futile exercise and perhaps, at least, in a writ proceeding based on infraction of Article 14 or that the action is arbitrary, the Court may have refused to exercise the extraordinary jurisdiction and relegate the party to other forum to seek whatever relief it may be entitled to. If on the other hand, complying with Article 9.1 was, indeed, meaningful and the default (Article 9.4.(a) could have been removed as contemplated under Article 9.1, then, undoubtedly, it may constitute arbitrariness to deprive the first respondent of the benefit of a default notice.

We cannot be totally unmindful of the fact that such a Clause like Article 9.1 was inserted with the understanding, that, in such large complex

projects, involving large sums of money being invested, and furthermore, the successful completion of the project being intended to augment the production of energy, in this case solar energy, there was an element of public interest also involved in not allowing the curtains to be rung down by an abrupt termination without affording an opportunity to the seller to remove the default. Therefore, we would also examine whether there is a case where, it could be said that the case of the first respondent is totally bereft of bonafides or merit.

117. In this case, on 04.07.2017, the first respondent addressed what it purports to be the notice of commercial operations within the meaning of Article 5.3. It reads as follows:

> "Ref No. SKP-2/MP/SOLAR/COMM/2017-18/026
> Date: 04-07-2017
>
> To
> The Chief Engineer (Planning & Design)
> M P Power Transmission Company Limited,
> Shakti Bhawan, Rampur,
> Jabalpur – 482008, Madhya Pradesh.

Subject: Notice to Commission on the 50 MW Solar Power Project of SkyPower Southeast Solar India Private Limited located at Village Chirbel, District Khandwa ("Project"), and Evacuation of Power from the Project to the 400 KV Chhagaon Sostation.

Reference: Power Purchase Agreement dated September 18, 2015 between Southeast Solar India Private Limited and MP Power Management Company Limited ("PPA").

Dear Sir,

As per above cited subject matter and reference, we hereby intimate you of our intention to commission the project by 31st July, 2017 ("Proposed Commissioning Date"). By the Proposed Commissioning Date, we are likely to procure and obtain all permissions and approvals required for the Plant and fulfil and obligations specified in Article 5.3 read with Annexure XII of the PPA.

In relating to the commissioning of the Project by the Proposed Commissioning Date, we would like to apprise you of the progress made by use in relation to completion of some of the critical path items for the Project-

- **Transmission Line – 95% work has been completed as on 28th June, 2017 for the 132KV DCDS (double circuit double string) transmission line from location of the Project to the 400KV substation Chhegaon. Balance 5% is expected to be completed by 15th July, 2017 in all respect.**
- **Bay construction- 90% work on the 132 KV bay is completed (post receipt of connectivity approval from MP Power Transmission Company Limited ("MPPTCL")**

for the Project along with installation of specified equipment as required by MPPTCL. Balance 10% of the work, including testing, meter and CRP panel, is expected to be completed by 20th July, 2017.

- Connecting Agreement- Connection agreements have already been signed on 18th May, 2017 between Madhya Pradesh Power Transmission Company Limited, Jabalpur and M/s SkyPower Solar India Private Limited.
- SLDC connectivity- Connectivity from plant to the SLDC-Indore is already established through dedicated 2nox2mbps point to point lease lines from BSNL (as per approved scheme of SLDC on 23rd March, 2017 through letter no. SE./LD. E&T/880, data can be transferred immediately on charging of plant). Specified equipment as per approved scheme of SLDC has been installed at SLDC-Indore and at the Project. Even, IP scheme for both the routers has been allocated by the SLDC, Jabalpur (through letter no. SE/LD.E&T/06, dated 3rd April, 2017).
- CEIG Certification-We have initiated the process to obtain the CEIG certification, and the CEIG certification is expected by 20th July, 2017. The CEIG certificate shall be produced to MPPTCL as an annexure to obtain the commissioning certificate, as required under the PPA.

Considering above facts on project progress we hereby request your kind needful and depute necessary officials and personnels to our site to undertake necessary inspection and testing and help us in the target commissioning dated of 31st July, 2017.

In the event, you require any further information from us, we will be happy to provide the same upon your request."
(Emphasis supplied)

118. **No doubt, Article 5.3 contemplates a notice whereunder the seller specifies that the plant was constructed as per the agreement and it was ready to deliver the solar power in accordance with its terms. Secondly, it must be indicated that all permissions and approvals required for the plant to sell solar power at the rates and terms had been obtained. Still further, all interconnection facilities were available to receive solar power. Notice is to take effect, however, only when the TRANSCO/DISCOM declares that all the conditions in Article 5.3 stood satisfied (or waived by it), *inter alia*, i.e., that the seller had successfully completed the testing of the plant in accordance with the manufacturer's recommendations and the seller had obtained and provided from the Electrical Inspectorate of the Government of Madhya Pradesh or other authorised agency, a certificate and the seller had delivered a list of the equipments with details. The further condition is that the plant had**

achieved initial synchronisation with the appellant and had demonstrated reliability of its communication system, *inter alia*, that the seller had operated the plant without experiencing any abnormal or any unsafe operating condition on any interconnected system. The seller was also to notify the appellant within no later than 30 days prior to the commercial operations date, that the conditions, as laid down in Article 1.01 have been met.

119. However, the first respondent in the letter dated 04.07.2017 has intimated about the intention to commission the project by 31.07.2017, which is on the 27th day after the notice. As far as transmission line was concerned, 95 per cent of the work was claimed to have been completed as on the 28.06.2017. Balance 5 per cent, it is stated, would be completed by the 15.07.2017 in all respects. In regard to bay construction, 90 per cent of work was stated to be completed along with installation of certified equipment. Here also, it is stated that the balance 10 per cent of the work including, testing, meter and CRP panel would be completed by 20.07.2017. Connection

agreement is stated to have been signed on 18.05.2017. As far as SLDC connectivity is concerned, it is stated that connectivity to SLDC indoor was already established through dedicated 2nox2mbps point to point lease lines from BSNL. As far as the certification by the CEIG, it is stated that the process to obtain the CEIG certification would be initiated and it is expected by 20.07.2017. Inspection was prayed for so as to achieve the target commissioning date by 31.07.2017. No doubt, the appellant has proceeded on the basis that the notice dated 04.07.2017 cannot be treated under Article 5.3 of the PPA. As far as the CEIG Report is concerned, it appears to be dated 09.08.2017. It could no doubt be found that what Article 5.3 notice contemplates is a state of accomplishment of conditions when the notice is sent. However, the notice dated 04.07.2017 promised completion by 31.07.2017. Article 5.3 provides for waiver. If a default notice under Article 9.1, was given on 07.07.2018, in place of the termination notice, then, with the state of completion attained and, if anything further remained, doing that also, and

issuing the notice, if insisted, the defect could have been removed.

120. **In this regard, we may notice a significant distinction between Article 2.5.1 (d) which was used as the sheet anchor by the appellant to contend that in the event of non-achievement of condition subsequent termination was mandatory. Article 2.5.1(d) is as follows:**

> **"d) In case of delay of more than 9 months, MPPMCL shall terminate PPA and release balance amount of CPG."**
>
> **(Emphasis supplied)**

121. **When it comes to Article 9.1, we have noticed that it contemplates the giving of default notice when an event of default takes place. The seller is given three months' time to set right things fully. Thereafter, Article 9.1 provides that in case of the default by the seller not being removed fully, apparently, the appellant by giving seven days termination notice 'may' terminate the agreement. The choice of the word 'may' importing discretion in Article 9.1 is in stark contrast with Article 2.5.1 (d).**

122. Apparently, it was so drafted so that in an event like in a seller event of default under Article 9.4.(a), i.e., failure by the seller to supply power within 24 months, bearing in mind the nature of project and the stakes involved for both the appellant and the seller, there may be cases where the seller may wish to grant more time so that a project which has progressed to a state of near completion may not be aborted by the termination and grant of time would, on the other hand, witness the full blossoming of the project.

123. It would appear that the appellant did not carry out any inspection. The inspection carried out by the CEIG in first week of August, 2017 was an inspection conducted by the five-member team and it is further claimed that this inspection lasted for 3-4 days beginning from 01.08.2017. The CEIG has certified that the project was ready and that the first respondent can proceed with the commissioning activity. We bear in mind that the period of twenty-four months contemplated in Article 9.4(a), would expire only on 18.09.2017. The CEIG has given its Report on 09.08.2017 that the

project was ready for commissioning. The factum of the Report cannot be treated as a disputed question of fact as it is covered by a document. In fact, we find that, the appellant proceeded on the basis admittedly that it was reliable, but, however, on 11.08.2017 issued the termination notice solely based on non-fulfilment of conditions subsequent. This notice stood set aside on 20.06.2018. Maybe the manner in which the inspection was carried out and the pitfalls in the same may be characterised as the disputed questions of facts. Also, though the appellant was invited to carry out the inspection on 04.07.2017, the appellant carried out the inspection only on 19.04.2018 and the Report was dated 21.04.2018.

124. If we go by the Report of the CEIG, the project of the respondent would appear to have been completed for the purposes of effecting commissioning. It may be another matter that other formalities had to be completed. When the team of the appellant carried out the physical inspection, (it was done on 19.04.2018), the appellant's team also substantially endorsed the Report of the CEIG. However, it was found that a certain

number of string inverters *inter alia,* were not found at many locations in Block Nos. 9 and 10. It was found as follows:

> **"4. Any other specified observation in respect of installation of solar P.V plant**
>
> **In block 9 and 10, string inverters were not found at many location but those location had solar panels installed interconnections of PV panel (cabling) string work at there location are not found connected with each other Further, at some location the cable and earthing work is observed incomplieto & suspended."**

125. It is here that we must notice the case of the first respondent to be that though the equipment was installed as certified in the Report of the CEIG and what remained was formal connectivity to the grid upon which commissioning certificate would be issued, the final event remained on account of non-issuance of connectivity code for connection to the grid. It is while so, when the challenge against the first termination notice was under consideration and there was demobilisation of manpower, certain string inverters were stolen, the cost of which is stated to be Rs.172000 per string inverter. Based on safety

concerns, the equipment was, according to the first respondent, removed and kept in safe custody. The first respondent has laid store by two first information reports lodged. The first FIR was lodged on 12.09.2017 and another FIR was lodged on 04.03.2018 relating to the theft of certain equipments. This is a case where the first respondent has alleged that it has already invested Rs.331 crores.

126. We will proceed on the basis that there was a CEIG Report dated 09.08.2017 certifying that the project of the first respondent was complete. This is well before 18.09.2017, which was the date by which the commissioning had to be done. It is also clear that the commissioning, as such, was not completed. Still further, if we go by the CEIG Report, the case of the first respondent of it being on the verge of commissioning could not be brushed aside as wanting in bonafides or merit. Still further, there is a case of the appellant that the inspection carried out on 19.04.2018, resulting in Report dated 21.04.2018, revealed certain deficiencies in the form of missing inverters *inter alia* from Block Nos. 9 and 10 *inter*

***alia*. First respondent has a case of thefts occurring. In fact, the first respondent has a definite case that about 39 inverters involved were also replaced in June, 2018 based on Purchase Order of May 2018 [See Annexure R12 produced before the High Court in Review Petition No.682 of 2020]. This is even before 07.07.2018. No doubt, the appellant has a case that the FIRs relied on by the first respondent did not refer to inverters. As to whether, it was a result of thefts that the inverters etc. which were already there as on the date of the CEIG inspection went subsequently missing or as to whether it was as a result of the Report of the CEIG being flawed and, therefore, the inverters etc. were not there in the first place, even as on the date of the CEIG Report, appears to us to be a disputed question of fact. We proceed on the basis that the inverters in question were not there. But as noticed, about 39 stolen invertors were already replaced in June 2018. At any rate, if a default notice had been given pointing out this aspect, the matter could possibly be put right within three months of such a notice. We recall here the few complaints (essentially two in number) which**

remained of Respondent No.5. It could have been pointed out as part of aspect of default if it was so understood. We have also found that the joint inspection of the respondent No.4 had found on 24.08.2017 that the line may be charged. What we can find is only that this is not a case where the first respondent could be said to be in a position where it could be said that it would be unable to comply with the terms of the default notice if it was warranted. In other words, if as on 07.07.2018, instead of issuing a termination notice, if notice had been given within the meaning of Article 9.1, it is quite possible that the first respondent would have remedied the defect as alleged. We have also noted that even in 2017, no notice was given under Article 9.1 and even the contract was terminated illegally as found by the High Court by notice dated 11.08.2017. The whole idea behind the default notice under Article 9.1 was lost sight of by the appellant. We have unravelled also, the impact of the use of the word 'may' in Article 9.1. The action of the appellant in departing from unambiguous regime

of the PPA without any justification would make its actions arbitrary.

127. The other aspect projected by the appellant is what was projected in the Review Petition filed before the High Court. It was contended essentially as follows:

> The first respondent had committed a fraud on the Office of the Chief Electrical Inspector, the appellant and on the Court. It was alleged that the project was divided into 10 blocks of 5MW each and each Block of 5MW would have 116/117 Inverters approximately. Each of the Inverter was to have a unique distinctive serial number. Each inverter was to have 43KV rating, as indicated in the CEIG Report. The fraud consisted of a discovery by the appellant on an alleged 'detailed' analysis of the serial numbers of the inverters, that in each Block, there were several Inverters having numbers which were common/duplicate and interchangeably used in the same or other blocks. It was alleged that for about 186 Invertors serial numbers were commonly, duplicably and interchangeably used. Some of the inverter numbers were not legible.

Therefore, it was alleged that there was lack of due diligence by the authorised personnel of the CEIG.

128. In this regard, the first respondent has countered the case of the appellant not only by producing invoices supplied by the overseas supplier and the bill of entry issued by the Customs Department but the Lorry Receipts, to establish the procurement of 1175 Inverters required for the first respondent Unit in 2017. It is also their case that the inverter serial numbers themselves carry no significance. They were mere identifiers for the purpose of record keeping, warranty claims, etc. All the 1163 Inverters installed by the first respondent had identical mechanical specification and the mere mention of incorrect serial numbers in the Report of the CEIG did not establish that the first respondent was not ready to commission the project. The first respondent also has pointed out that on learning of the duplication of the few inverters serial numbers in the Report of the CEIG, it promptly approached the CEIG on 16.09.2020 with details of the correct unique serial numbers and the

corresponding location of the inverters. It requested the CEIG to inspect and verify the inverters and to issue a corrigendum to the first Report dated 09.08.2017. In fact, there is reference to first respondent in compliance with the first impugned Judgment writing to the CEIG earlier on 15.04.2020, to visit the project site for reissuing/revalidating the approval for commissioning the project, since the validity of the first report dated 09.08.2017 had lapsed. It is specifically contended in the reply to the Review Petition that due to non-cooperation of the appellant on the excuse of Covid-19, the CEIG inspection could not be undertaken. This stand is reiterated, in fact, in the counter affidavit in this Court also. It would appear that the first respondent had deposited the inspection fee of Rs.66,14,000/- which is said to be equipment based meaning thereby that it was paid reckoning all the inverters. It would appear that no inspection has been carried by the CEIG based on the request for revisit. As far as this aspect is concerned, apart from the fact that the CEIG has conducted an inspection and given a Report on

09.08.2017, certifying the readiness of the Unit of the first respondent, the first respondent has produced documents like invoices from overseas sellers, bill of entry with the Customs Department and certain lorry receipts. The alleged fraud is the common number found in 186 inverters in the Report of the CEIG. A physical inspection by the CEIG, which was necessitated in terms of the original Judgement, at any rate, for revalidation of the Report was and is necessary and inevitable even if the appeals fail. The first respondent had alerted the CEIG for the need for a reinspection for ascertaining the aspect relating to duplication in numbers. It would appear that such inspection has not been carried out. In this regard, it is important to notice that the appellant carried out an inspection on 19.04.2018 and it had not found out any such discrepancy as it has not projected in regard to the aspect of common numbers or illegibility of numbers, in the inverters, in its Report dated 21.04.2018. At any rate, the PPA clearly provided for the issuance of a default notice, providing an

opportunity to remove the defect. This obligation has been observed in its breach.

129. Therefore, we would find that an inspection by the CEIG would necessarily have to be carried out in which the appellant would have to be involved to facilitate the exercise. In the facts of this case, on being satisfied, the CEIG would necessarily have to grant the re-validation of the earlier Report. It would also involve an opportunity to the CEIG to look into the aspects which have been projected by the fist respondent itself in its letter dated 16.09.2020. The report would indeed indicate the state of affairs about all the facets. As already noticed, even under the impugned Judgement dated 27.02.2020, the first respondent would have to submit necessary applications. We only clarify that it may involve removing any remaining deficiencies with the fifth respondent.

130. It may not be wholly irrelevant to notice the following aspect which is reflected in the counter affidavit filed by the respondent No.1 before this Court.

"It is of utmost importance to mention here that while the challenge to the 2018 Termination Notice was pending, the Petitioner had proposed a so-called amicable resolution of the dispute with the Respondent No.1 and convened a meeting for this purpose on February 6, 2020. Occurrence of this meeting and the discussions held are recorded at paragraphs 7 and 8 of the Impugned Order 1. During this meeting, the Petitioner had attempted to impress upon the Respondent No.1 to explore 'Third Party Sale' from the project or, agree to a reduction in tariff in line with the recent auctions conducted by SECI for other solar power projects. Respondent No.1 had rejected both the option of 'third Party Sale' or, the attempts to reduce tariff specified in Article 9.7 of the PPA, which was discovered through a transparent competitive bidding process. The very fact that the Petitioner had proposed to the respondent No.1 to explore sale of power from the Project to third parties is proof enough that the Project was complete and ready for commissioning."

In this regard, we may notice paragraph 4 of the minutes of the meeting dated 06.02.2020 which reads as follows: -

"4. MPPMCL further stated that, as the commissioning of the project has been substantially delayed and, in the meantime solar binding tariffs have been considerable reduced up to Rs. 2.61/ Unit for which MPPMCL has already entered into PPAs, therefore MPPMCL offered M/s Sky Power to supply power at reduced tariff of the project was the lowest in the bid and their investment was made during the FY 2016-2017 therefore, supplying power to MPPMCL at reduced tariff will not be viable hence not possible."

We would think that essentially the appellant's attempt was to secure a reduction in the rate. The rate of the first respondent was found to be the lowest after a clearly keenly competitive international bidding, involving a large number of bidders.

131. In the totality of facts, we would, therefore, think that though for reasons, which may not be the same as in the impugned judgment, we need not interfere with the view taken by the High Court. The appeals fail and are dismissed. Parties to bear their own costs.

.....J.
[K.M. JOSEPH]

.....J.
[HRISHIKESH ROY]

NEW DELHI;
DATED; NOVEMBER 16, 2022.