

HIGH COURT OF GUJARAT**SHYAM SEL & POWER LIMITED THRO AUTHORISED PERSON AND ORS*****Versus*****STATE OF GUJARAT THRO SECRETARY & 1 ORS****Date of Decision:** 16 August 2012**Citation:** 2012 LawSuit(Guj) 723**Hon'ble Judges:** [K M Thaker](#)**Case Type:** Special Civil Application**Case No:** 3625 of 2012**Subject:** Constitution**Acts Referred:**[Constitution Of India Art 19\(1\)\(g\)](#), [Art 226](#), [Art 14](#)**Final Decision:** Petition disposed**Advocates:** [Dipen C Shah](#), [Nanavati Associates](#)**Cases Referred in (+): 8****K. M. Thaker, J.**

[1] In present petition under Articles 226, 14 and 19(1)(g) of the Constitution of India. The petitioner has prayed for below mentioned relief:

"27(a) Your Lordships may be pleased to issue a writ of certiorari and /or mandamus or a writ in the nature of certiorari or mandamus and/or any other appropriate writ, order or direction quashing and setting aside the impugned decision dated 02.03.2012 of the Respondent No.2-GMDC on the facts of the present case and further be pleased to direct the respondent no.2 GMDC to return the Bank Guarantee of Rs.3.10 crores furnished by the petitioners;

[2] The matrix of the facts leading to present petition, as stated by the petitioner, is that:-

2.1. The petitioner, a Public Limited Company, having its registered office at Calcutta is engaged in the business of manufacturing and sale of iron and steel

products Ferro Alloys etc. It is claimed by the petitioner that the respondent No.2 Corporation intended to set up a joint venture Company to explore and develop opportunities in the field of mining and wanted to set up 1000 MV power project. It is also claimed that a Memorandum of Understanding was executed between the petitioner and respondent Corporation in November 2007 whereby it was agreed to form two separate entities.

2.2. It is also claimed that an agreement was prepared in December 2009 to set up 54 M.V.A capacity Ferro Alloys plant with captive power station of 45 MV for beneficiation of Manganese Ore in the said plant. It appears that while the said process and deliberation in the said direction was in progress between the parties the respondent Corporation issued notice inviting tenders somewhere in December 2009 for sale of Manganese Waste Dump ("the said material" for short) at its Shivrajpur mines on "as-is-where-is-basis".

2.3. The petitioner has claimed that since the discussions regarding proposed projects were in progress the petitioner contemplated that if it can secure offer for sale of Manganese Dump and Manganese Powder under the said tender process then it would ensure continuous and uninterrupted supply of the required raw material.

2.4. With the said idea the petitioner submitted its bid/request for lifting Manganese Dump/Manganese Powder. It is also claimed that under its letter dated 30.01.2010 the respondent allotted 5,50,000 Metric Ton at basic rate of Rs. 465/- (excluding royalty and applicable taxes).

2.5. According to clause 10 of the agreement, the period of contract was 3 months i.e. the supply was to be made and material was to be lifted within period of 6 months.

2.6. The respondent company, while making the said allotment, demanded an undertaking from the petitioner that the offered material shall be exclusively used for captive purpose of beneficiation only in Gujarat. The petitioner has claimed that such condition was not mentioned in the notice inviting tenders or in the tender document. In compliance of the said requirement the petitioner furnished Bank Guarantee for a sum of Rs.3.10 crores. Subsequently, the respondent Corporation agreed, vide its letter dated 1st April 2010, to allow the petitioner to lift the entire offered quantity within period of two years instead of the period originally mentioned in the contract i.e. 3 months (clause No.10). On this count also, the petitioner has alleged that neither the terms of tender nor the communication dated 30.01.2010 stipulated any time frame for lifting the material and the

respondent subsequently introduced the said condition. The petitioner claims that it started lifting the material gradually and before the impugned action it had lifted and procured almost 55000 M.T. of the Manganese Waste Dump.

2.7. It transpires from the record that after having lifted about 55000 M.T. material the petitioner did not lift the balance quantity of the material (i.e. 4,95,000 M.T. of Manganese Ore/Powder) either within 3 months or within the renewed/extended period i.e. within two years.

2.8. It also emerges from the record that in view of the petitioner's failure in lifting the material and for certain other alleged defaults/failures respondent Corporation imposed penalty on prorata basis by invoking clause 12 of the contract.

2.9. The petitioner is aggrieved by the said decision and action of respondent of imposing penalty of alleged non-lifting of material and of demanding a sum of Rs.44,53,196/- towards penalty on prorata basis. In background of such facts the petitioner has approached this Court by presenting the petition and seeking above mentioned relief.

[3] Upon considering the petitioner's submissions the Court directed the office, vide order 22.03.2012, to issue Notice making it returnable on 28.03.2012 and by way of ad-interim arrangement, the respondent Corporation was restrained from encashing the bank guarantee.

[4] The respondent Corporation has claimed, inter alia, that the contract between the petitioner and the respondent is not a statutory contract but the contract is purely in realm of private law without any public law element. It is also claimed that the respondent has not acted against any statutory provision and any statutory or legal right is not affected and all that is challenged is the decision of imposing penalty in accordance with the terms of the contract. The substance of the objections of the respondent is that a petition invoking provisions under Articles 14, 19(1)(g) and 226 of the Constitution of India is not maintainable since the petition involves private and commercial dispute.

4.1. Besides the said objections, the respondent Corporation has, inter alia, stated, so far as the factual aspects are concerned, in the reply affidavit that:

"5. I say and verily submit that Gujarat Mineral Development Corporation invited sealed tenders for sale of manganese waste dump as well as manganese powder available at Shirvajpur on 23.12.2009 with the last date of receipt of duly filled tender being 11.01.2010. That clause 2.03 of the said tender condition expressly reproduced the spirit of the Government policy dated 19.11.2009 and that award of

tender was made subject to the satisfaction of Gujarat Mineral Development Corporation that the bidder shall be using the manganese ore for value addition in Gujarat only. The clause 2.03 which was mandatory condition of the tender is reproduced below:

"2.03 Preference for sale/allotment

First preference will be given to captive users of Gujarat who are doing value addition of manganese. Bidders will have to satisfy GMDC that manganese waste bought through this tender would in fact be subject to value addition."

The essential and mandatory term of the tender document was that along with the bidding schedule, the bidders were required to furnish details about value addition units setup or proposed by them. The answering respondent submits that the petitioner neither furnished any details about the progress of value addition plant proposed by them nor tendered a road map as to in what time and place the proposed value addition unit is likely to be developed by the petitioner.

7. I say and verily submit that the petitioner submitted duly filled tender document on 11.01.2010 for a total quantity of 5,50,000 metric ton (five lakhs fifty thousand Metric Ton) and provided a delivery schedule of manganese ore which will be purchased by the petitioner in next 15 months. That as per the delivery schedule provided in the filled tender document, the petitioner was to take delivery of 50,000 metric ton of manganese ore waste dump in first 3 months from the date of award of tender, 2, 50, 00 metric ton of manganese ore within the next 6 months, and remaining 2,50,000 metric ton in next six months. That for ready reference the delivery schedule in the tender document duly filled by the petitioner is reproduced below:

DELIVERY SCHEDULE

First 3 months

50,000 metric ton

Next 6 months

2,50,000 metric ton

Next 6 months

2,50,000 metric ton

The copy of duly filled tender by the petitioner on 11/1/2010 is annexed and marked herewith as Annexure R4.

12. I say and verily submit that pursuant to the award of tender on 30.1.2010, the petitioner obtained first delivery order from the answering respondent by pre-depositing the amount equivalent to the value of manganese ore, on 9.4.2010 and pursuant thereto delivery of Manganese ore was taken by the petitioner on various dates like 30.04.2010, 31.05.2010, 30.06.2010, 31.07.2010, 30.09.2010 and the last dispatch pursuant to the delivery order taken by the petitioner was made on 13.10.2010. The Answering Respondent submits that the petitioner has not taken any delivery order from 31.10.2010 onwards till 24.03.2011. The answering respondent submits that between 28th April 2010 and October 2010 petitioner obtained delivery order and delivery of 54,332 metric ton of Manganese Ore. The copy of table showing delivery of manganese ore to the petitioner herein pursuant to the award of tender is annexed and marked herewith as Annexure-R9.

13. The Answering Respondent submits that pursuant to the last delivery dispatched on 31.10.2010, the petitioner has not sought delivery of manganese ore on any instance after 31.10.2010. The petitioner did not apply for delivery order with the answering respondent Corporation at any date after 31.10.2010 and hence the petitioner committed the breach of the delivery schedule prescribed in the tender document. The answering respondent submits that as per the delivery schedule provided by petitioner in the tender document, the petitioner ought to have obtained delivery of 300,000 metric ton of manganese ore up to Feb 2011, as against that the petitioner had only applied for delivery order of 54334 metric ton of manganese ore. The petitioner therefore committed breach of the terms and conditions of the tender contract on twofold basis

(I) Not taking delivery as per delivery schedule provided by petitioner in the tender.

(II) Non-furnishing of details about value addition plant propose to be set up by the petitioner and failure to furnish undertaking as per the terms of the award of tender dated 30.01.2010.

17.The answering respondent submits that petitioner has never approached the respondent-Corporation for a delivery order pursuant to 31-10-2010 and hence has never shown inclination to obtain delivery of manganese ore waste dump in pursuance of terms and conditions of the tender awarded to the petitioner. The answering respondent Corporation has decided to stop the supply of manganese ore at the contracted rate in the tender as late as on 24.3.2011, however the decision to stop the supply has no bearing on the outcome of the

present petition since no penalty has been levied on the petitioner for not taking of delivery by the petitioner after 24.3.2011. The answering respondent submits that penalty has been levied on the petitioner only for the period between 1.4.2010 to February 2011 when the terms and conditions of the contract-Tender were operating and in full force.

21. That the answering respondent vide letter dated 22.12.2011 levied a penalty of Rs.92,42,697/- on the petitioner. That pursuant to various representations from the petitioner and the meeting with the managing director of the company, it was principally resolved that a penalty of Rs.44,53,196/- can be imposed on the petitioner, considering delivery schedule as 15000MT per month as against 23000 MT on earlier occasion to bring the case of petitioner in parity with other bidders. That accordingly the petitioner vide letter dated 2-3-2012 was informed to deposit a sum of Rs.44,50,196/- towards the penalty imposed on the unlifted quantity of 95,767.67 metric ton of manganese ore waste dump. The answering respondent denies that imposition of penalty is outside the purview of the contract and further states that clause 12 of tender conditions expressly stipulates levy of penalty on breach of conditions of contract.

22. The Answering Respondent submits that the lifting of material on pro-rata basis every month in terms of the delivery schedule in the filled tender form was an essential condition of the contract. The answering respondent submits that the capacity of the respondent Corporation to deliver manganese ore waste dump is dependent on the number of machineries deployed and the capacities of those machineries. That delivery schedule and pro-rata basis of delivery is required to be ascertained by the Corporation at the time of awarding tender, in order to ensure that monthly deliveries can be planned. That based on this planning of deliveries on per month basis the Corporation determines the number of machineries required, man power, weigh-bridge, machine maintenance staff etc. required for a particular mine. Therefore, if deliveries are demanded by a purchaser in a manner which disturbs this planning and upsets the number of machineries etc. required, it is usually declined by the Corporation. The maximum threshold production was achieved by the respondent Corporation in the year 2010-2011 of delivering 2.45 lakhs metric ton of manganese ore to various parties. That the entire loading of the manganese ore waste dump from the mining site is being carried out by the respondent by employing various machineries on the mine."

[5] In response to the Notice, the respondent Corporation entered appearance and has opposed the petition by filing reply affidavit raising contentions against maintainability of petition as well as disputing the allegations and contentions raised by the petitioner. In turn, the petitioner has filed additional affidavit and a rejoinder affidavit.

[6] The petitioner and respondents have declared that the pleadings are complete and the petition may be heard finally.

[7] After the order dated 22.03.2012 and after entering appearance in response to the notice, respondent Corporation filed Civil Application being C.A.No.3818 of 2012 with a request that the ad-interim relief may be vacated. The Court considered the request and after taking into account the order dated 22.03.2012, passed order dated 28.03.2012 in the said C.A.3818 of 2012 with below mentioned observations and directions:

"4. In this order Court has unequivocally recorded that "learned counsel for the petitioner has submitted that the bank guarantee of Rs.3.10 crore would be extended but as on date, the demand of Rs.44 lacs and odd to be realized out of the bank guarantee may not be permitted to be carried out, especially in view of the fact that alleged penalty is not on the part of petitioner or attributed to the petitioner alone."

5. In view of this, the Civil Application is required to be allowed and is accordingly allowed without prejudice to the right of the respondents to file appropriate application for vacation and/or modification of this order. Shri Chudgar's urging for not directing the petitioner to accede the bank guarantee of the entire sum of Rs. 3.10 crore and confine it only to Rs.44 lacs as per the impugned order is not justified, as in a writ petition filed under Article 226 of the Constitution of India, the parties are to be governed by the principle of fairness and equity and when the aforesaid unequivocal statement is recorded it would not be permitted the petitioner to take advantage of the order impugned and confine the bank guarantee only qua 44 lacs or the sum demanded. As it transpires during the hearing that the entire quantity is not lifted and it was absolutely open to the contracting respondent i.e. respondent no.2 to forfeit the entire bank guarantee as against that only Rs.44 lacs penalty amount is sought to be recovered.

6. In view of this matter, at this stage, it would not be possible or rather appropriate by this Court to accede to the prayer of Shri Chudgar, learned advocate appearing for the petitioner and hence while disposing of this Civil Application petitioner is hereby directed to renew the bank guarantee in the entire sum on or before 29.03.2012 and copy be furnished to the present applicant-respondent no.2. In case if, this direction is not complied, then it would be open to the original respondent no.2 to encash the bank guarantee by 31.03.2012."

[8] Heard Mr. Joshi, learned Senior Counsel with Mr. Chudgar, learned Advocate for the petitioner and Mr. Soparkar, learned Senior Counsel with Mr. D.C.Shah, learned

Advocate for the respondent Corporation.

[9] Mr. Joshi, learned Senior Counsel has submitted, inter alia, that the impugned decision of the respondent Corporation is a non-speaking and unreasoned order-decision and it does not disclose application of mind to relevant facts and circumstances. It is also claimed that the notice inviting tender or the tender did not contain any condition requiring the successful bidder to give any undertaking. Any condition regarding time frame for lifting the material was also not part of the invitation to tender or the tender. It is also claimed that in the facts and circumstances of the case clause 12 could not have been invoked because the relevant clause which would apply in light of the facts of present case would be clause 16. It is also claimed that in view of the order passed by High Court in S.C.A.No.601 of 2011 and the two circulars by the State Government the execution of the contract was frustrated and that therefore the petitioner should not be visited with order of penalty. It is also claimed that the petitioner's alleged default was not deliberate but the petitioner was placed in impossible circumstances and situation as a result of which the petitioner could not lift the material. The petitioner has claimed that the tender conditions prescribed three months time for lifting material, however, the letter of allotment modified the said condition and allowed two years time from 01.04.2010 to 31.03.2012 for lifting the material and in the said modification there was no stipulation that the material should be lifted every month on prorata basis and any time bound schedule was not prescribed. Consequently, the entire material was to be lifted at petitioner's convenience but before 31.03.2012. However, the respondent imposed the penalty vide order dated 02.03.2012 i.e. before the completion of period allowed vide letter dated 01.04.2010. The petitioner has also claimed that in anticipation of receipt of the entire quantity the petitioner changed its status and position, however, because of decision and action of the respondent it has suffered huge losses. During his submissions, Mr. Joshi, learned Senior Counsel referred to and relied upon the letters dated 30.01.2010, 01.04.2010, 06.02.2010, 12.04.2010, 28.04.2010, 24.05.2010, 05.08.2010, the circulars dated 22.02.2011 and 23.02.2011, the various representations made by the petitioner including the representations dated 01.06.2011, 21.06.2011 and 14.07.2011, he also referred to the letters dated 07.10.2011, 28.12.2011.

[10] Mr. Soparkar, learned Senior Counsel has opposed the submission claiming that the petitioner's attempt of connecting the contract for lifting of the material in question with the MOU/Agreement for setting up the plant is misconceived, unjust and unreasonable and actually there is no co-relation or connection between the contract in question and the said MOU. He also submitted that petition is not maintainable not only because the contract in question is purely commercial contract but it is not maintainable also because the petition involves and raises diverse disputed questions

of fact which would oblige the parties to lead evidence, documentary as well as oral. He also submitted that by not lifting the material as per agreed schedule and by not submitting the undertaking as per the terms of the contract, the petitioner committed breach of the terms of the contract and that therefore the said conduct of the petitioner invited action under clause 12 of the contract, which allows the Corporation to impose penalty. Mr. Soparkar, learned Senior Counsel has placed reliance on the letters dated 06.01.2010, 30.01.2010, 10.02.2010, 01.04.2010, 30.05.2010, 22.10.2010, 31.10.2010, 08.03.2011, 24.03.2011 and 22.12.2011.

[11] The learned counsel for the contesting parties have relied on the decisions in the case between (1) [Radhakrishna Agarwal v. State of Bihar](#), 1977 3 SCC 457, (2) [Bareilly Development Authority & Another v. Ajai Pal Singh & Ors.](#), 1989 2 SCC 116, (3) [Assistant Excise Commissioner & Ors. v. Issac Peter & Ors.](#), 1994 4 SCC 104, (4) [State of Madhya Pradesh & Ors. v. Lalit Jaggi](#), 2008 10 SCC 607, (5) [ABL International Ltd. & Anr. v. Export Credit Guarantee Corporation of India Ltd. & Ors.](#), 2004 3 SCC 553 and (6) [Shrilekha Vidhyarthi v. State of U.P.](#), 1991 1 SCC 212.

[12] I have considered the documents/correspondence referred to and relied upon by the learned Senior Counsel for the petitioner and respondent and the other material available on record. I have also considered the submissions made by the learned Senior Counsel for the contesting parties.

[13] In order to consider the grievance raised and relief prayed for by the petitioner it is relevant to take into account clause 2.03 (page 32/page 118), clause 3 (page 32/page 118), clause 6 (page 33/page 119), clause 10 (page 34/page 120), clause 12 (page 34/page 120) and clause 16 (page 35/page 121) and clause 17 (page 35/page 121) of the contract and the bidding schedule (page 36) vis- -vis the bidding schedule (page 122), which read thus:

"02.03 Preference for sale/allotment

First preference will be given to the captive users of Gujarat who are doing value addition of Mn. Bidders will have to satisfy GMDC that manganese waste bought through this tender would in fact be subject to value addition.

03. Scope of the offer

Sale of Manganese waste dump/Mn.powder material available at Shivrajpur is on "AS IS WHERE IS BASIS".

The successful bidder has to deploy own manpower and machinery for transportation of manganese waste dump from Shivrajpur area.

Loading of manganese waste dump/Mn.powder and weighment of the trucks would be permitted strictly during the office hours on all working days only.

In case of any exigency, however, the bidder has to take prior permission of General Manager (Project) for the loading and weighment of manganese waste dump trucks outside office hours and all relevant expenses incurred by GMDC in this regard shall be borne by the bidder. The decision taken in this regard by the General Manager (Project) shall be final.

06. Security Deposit

The Successful bidder has to deposit 10% of the total contract value (rate offered by bidder plus royalty multiplied by the offered quantity) as a non-interest bearing Security Deposit. The said amount should be deposited by way of Bank Guarantee from any Nationalized Bank or by Demand Draft in favour of "GMDC Limited", payable at Ahmedabad, within 15 days from the date of issue of Work Order to lift the material. In case of failure on the part of the bidder to do so, his EMD shall be liable for forfeiture. Security Deposit shall be refunded to the party within one month from the date of completion of contract.

10. Contract period.

The contract period will be three months from the date of issue of Work Order.

12. Penalty

If the bidder defaults in lifting the entire quantity of manganese waste dump/Mn. Powder available at Shivrajpur during the currency of the contract, a penalty @ 10% of the total value of the material shall be levied on the bidder and shall be payable by him within 15 days on receipt of such intimation by him from GMDC. If Bidder does not pay the penalty amount by DD the same shall be deducted from the Security Deposit of the Bidder lying with GMDC.

GMDC shall be free to dispose off unlifted quantity.

16. Non-fulfillment of terms and conditions of the contract

If the Bidder fails to carry out the work as per the terms and conditions of the contract to the complete satisfaction of GMDC, GMDC shall be entitled to forfeit the Security Deposit paid by the Bidder.

In case of any change in the directives/rules of the Central/State Government regarding sale of manganese/manganese waste dump/manganese powder and

execution of work related thereto, the same shall have to be strictly adhered to and shall be binding upon the bidder, GMDC will not be responsible for any compensation for any damages suffered by the bidder due to such changes.

If required for any reason, GMDC reserves the right to terminate, amend and/or alter the contract and/or bifurcate and/or reduce the contract work, at any time, without giving any notice to the Bidder and without incurring any responsibility for such termination, modification and/or alteration and in such an event the Bidder shall have to take away his labour, tools, tackles, machinery, equipment etc. and shall leave the site at once and fully comply with the instructions of GMDC.

17. Bidding schedules

The bidder shall quote the bids in enclosed schedule only.

BIDDING SCHEDULE (page 36)

BIDDING SCHEDULE (page 36)

Sr. No.	Type of material	Net floor price Rs./MT	Price per MT offered by bidder	Total quantity demanded in MT
1.	Manganese Waste dump	432/-		
2.	Manganese Powder	600/-		

BIDDING SCHEDULE (page 122)

1.	Manganese Waste dump	432/-	432/-	5,50,000 MT
2.	Manganese Powder	600/-	-	-

* DELIVERY SCHEDULE AS BELOW

REMARKS: Alongwith Bidding Schedule, the bidders are required to furnish details about value addition units set up or proposed by them.

NOTE

1.

2.

3.

4.

Sd/-

Seal and Signature of bidder

* DELIVERY SCHEDULE:

FIRST 3 MONTHS

50,000 MT

NEXT 6 MONTHS

2,50,000 MT

NEXT 6 MONTHS

2,50,000 MT

[14] Besides the above referred provisions, it is also necessary to take into account the contents of the communication dated 30.01.2010 (page 37), letter dated 01.04.2010 (page 42), 04.03.2010 (page 43), letter dated 24.11.2010 (page 50), relevant portion of the contents of letter dated 07.04.2011 (page 61 and 62), letter dated 28.12.2011 (page 71), letter dated 08.03.2011 (page 132).

"GMDC/P, R & D/936/09-10 January 30, 2010

M/s. Shyam Sel Limited

Vishwakarma,

86-C, Topsia Road,

1st floor,

KOLKATA 700 016

Sub: Tender No.GMDC/PR&D/MN/1/2009 for sale of Manganese waste dump and Mn. Powder material available at Shivrajpur.

Dear Sirs

With reference to above subject and the offer submitted by you, management is pleased to offer you 5,50,000 MT of Manganese waste dump material available at Shivrajpur at a basic rate of Rs.465/- plus royalty and applicable taxes extra to be

lifted entirely on or before 31.12.2010, subject to furnishing an undertaking that the material being offered shall be exclusively used for captive use or for beneficiation for further value addition only in Gujarat as per the policy of Govt. of Gujarat.

You are requested to kindly furnish us an undertaking to enable further necessary action from our end."

"GMDC/Tech/01/2010-11/191 April 1, 2010

M/s. Shyam Sel Limited

Vishwakarma - 86-C,

Topsia Road, 1st floor,

Kolkata 033 2285 2212

"Sub: Sale of Manganese Waste Dump

Dear Sir,

With reference to our tender No.GMDC/PRD/MN/1/2009 and offer submitted by you, the Management has offered you 5,50,000 MT of Manganese waste dump available at Shivrajpur at a basic rate of Rs.465/- plus royalty and applicable taxes etc. to be lifted entirely after taking 10% advance from the party which would ultimately be adjusted in the last transaction bill. The qty. would be reserved for next two years. Further, an Undertaking is to be submitted by you that within next two years you will carry out beneficiation and value addition of this material in Gujarat only. Therefore, you are kindly requested to send 10% advance immediately and also an Undertaking as mentioned above is required to be submitted within next 10 days failing which, the above waste dump material will not be supplied to you, which please note."

"Date: 04.03.2010

To,

Managing Director

Gujarat Mineral Development Corp.Ltd.

Khanij Bhavan,

Ahmedabad.

Kind Attn: Mr. V. S. Ghadvi

Sub: Purchase of M/n waste dump from Shivrajpur

Dear Sir,

With reference to tender we have requested to buy 5,50,000 ton of waste dump which is confirmed by GMDC and requested us to lift the same at the earliest. Against this, we deposited amount of Rs.1,40,43,750/- through D.D.No.078872 dated 22.2.10 drawn on Axis Bank but it is informed by you that we will not give material to you as the plants is in Eastern India. We clarify our position as under.

(i) We have been selected by GMDC for JV in setting up Ferro Alloy with power plant in Gujarat.

(ii) Our JV proposal is at advance stage of signing by GMDC board.

(iii) We have mentioned in our letter submitted with D.D. That we will sort the material at Shivrajpur.

(iv) Initially about 40% of sorted material will be taken to our existing Ferro Alloys plants where we will use this ore and carry out technical studies as to which type of technology will be befitting to designed Ferro Alloy plant at Gujarat.

In view of above, we request to give us material by that time future course of concrete action plant of our JV will be in place. Remaining material will be used for JV purpose only."

"GMDC/P, R&D/171/1440/10-11 November 24, 2010

M/s. Shyam Sel Limited

Vishwakarma Building , 1st Floor

86-C, Topsia Road,

KOLKATA 700 046

Kind attn. Shri Nilesh Agrawal, Director

Sub: Setting up of Ferro Alloys Plant in Joint Venture

Dear Sirs,

GMDC had invited "Expression of interest "for setting up of Manganese based down-stream units which includes Ferro Alloys Plant also. In response to your offer, your Company was shortlisted for setting up of Ferro Alloys Plant in Gujarat.

In this context, we wish to inform you that your proposal has been approved by GMDC Board and forwarded to Govt. of Gujarat for approval which is awaited.

GMDC being a Govt. of Gujarat PSU, the directives and approval of Govt. of Gujarat for participation in the JV, shall be final and binding on both the parties.

This is for your information please"

"Ref: GMDC/Mn Waste Dump/11-12 Date:07.04.2011

To,

The General Manager (Geo.)

Gujarat Mineral Development Corporation Limited

Khanij Bhavan, Near University Ground,

132 Feet Ring Road, Vastrapur,

Ahmedabad 380 052, Gujarat

Kind Attn: Shri D.U.Vyas

Sub: Sale of Manganese Waste Dump & undertaking for value addition

Ref. Your letter no.GMDC/GEO/551/2010-11/29839 dated 24.03.2011

Dear Sir,

* We had started lifting the material and lifted about 55,000 Mtn of above said material till October 2010 and stored the same in our existing plot situated nearby Mines. But due to space constraint in our existing plot and non-availability of new Land in the nearby area of the Shivrajpur mines, we had not lifted any further material.

* For acquiring new land we made all possible efforts but could not succeed. For acquiring land we are thankful to GMDC who had also requested to the Collector, Panchmahal District for providing land to us in this regard and we are still awaiting for their outcome in this regard.

.....

With regard to provide under taking we wish to inform you that we have already entered into an agreement with GMDC for setting up JV plant n dated 27.11.2007 on NJ Paper (photo copy enclosed). However, if you still insist us to provide the undertaking, we will provide the same shortly subject to the approval of our JV with GMDC by the Government of Gujarat."

"GMDC/GEO/232/2011-12 December 22/28, 2011

M/s. Shyam Sel & Power Ltd.

Corporate Office

Vishwakarma

86-C, Topasya Road

1st Floor

Kolkata 700 046

Sub: Tender no.GMDC/PRD/MN/1/2009 dt. December, 2009 for sale of Manganese Waste Dump available at Shivrajpur.

Dear Sir,

With reference to above subject tender, you have been allotted 5,50,000 MT of manganese waste dump @ of Rs.465/- plus royalty plus applicable taxes valid from 1.4.2010 to 31.3.2012 (i.e. for Two Years). You have lifted only 54,232.330 MT during 2010-2011.

As per the tender document published for above manganese waste dump, at point no.12 of the tender document, penalty is leviable.

We have issued a notice vide our email letter dt. October 7,2010 at 1.17 p.m. stating inter alia that a penalty would be levied as per the clause f the contract.

In response to the said notice, your representation dt.28.10.2010 has been considered. However, in pursuance to the breach of contract committed by your company of non-submission of necessary undertaking and also failing to lift manganese waste dump since Oct, 2010 we have decided to impose penalty as stipulated in the contract.

We have stopped you to lift the material vide letter dt.8th March 2011, because you failed to submit required undertaking and also not lifted the waste dump since October, 2010. Therefore, we have considered penalty clause applicable for the period of 1st April 2010 to February, 2011 (eleven months) and prorata target of 2,53,000 MT is considered for penalty clause and as such, we have calculated penalty on 1,98,767.67 MT which amounts to Rs.92,42,697/- (1,98,767.67 MT x Rs.465/- x 10%) for penalty.

The Bank Guarantee which is submitted to us for an amount of Rs.3.10 crores dt. 17.10.2011 valid up to 20.1.2011 is with us which will be invoked and balance amount of Rs.2,17,57,303/- will be refunded to you. Otherwise, you can deposit Rs.92,42,697/- within a week's time period and collect your original Bank Guarantee."

"GMDC/GEO/536/2010-11/27762 March 8th, 2011

M/s. Shyam Sel & Power Ltd.

1st Floor, Vishwakarma

86/C, Topasia Road,

Kolkata (WB) Kind Attn. Shri Rajesh Mohata, GM

Sub: Sale of Manganese Waste Dump

Ref:

Dear Sir,

Please refer our letter dt.5.1.2011 in which, it was clearly mentioned to submit an Undertaking on non-judicial stamp paper latest by 20.1.2011. However, till date we have not received any communication from your end.

It is therefore, presumed that you are no more interested to submit an Undertaking as well as procurement of manganese waste dump. Hence, GMDC will not issue any delivery order as per the tender no. GMDC/P, R&D/MN/1/2009 and take suitable decision as deemed fit without any further communication in future."

[15] It emerges from the above mentioned details contained in the agreement and the correspondence exchanged between the parties that according to the contract executed between the parties the period of contract (as per clause 10) was 3 months.

15.1. On this count the petitioner has, inter alia, claimed that the contract did not provide for any time limit. However, the provision under clause 10, prima facie, belies the said contention.

15.2. It is also contended by the petitioner that any schedule for lifting the material was not agreed and settled between the parties. So as to support and justify the said submission the petitioner has relied on the bidding schedule and the remarks below the schedule at page 36.

15.3. On the other hand, while disputing the said contention of the petitioner, the respondent Corporation has relied on the bidding schedule and the remarks below the schedule and the delivery schedule (handwritten portion) of the same document, copy whereof is produced by the respondent at page 122.

15.4. The petitioner's claim on this count also stands controverted-disputed and the details emerging from perusal of page 122 and page 36 clearly give out the dispute between two rival claims of petitioner and respondent.

15.5. The document and details at page 36 and at page 122 give out conflicting version. In light of the said part of the document (i.e. the part of the document page 36), the petitioner claims that any schedule was not fixed, whereas, in light of the part of the same document at page 122 the Corporation claims that the schedule mentioned there was agreed and settled between the parties and the said schedule has not been observed and maintained by the petitioner.

[16] The respondent also claims that the petitioner was obliged to submit an undertaking as per the award of tender vide communication dated 30.01.2010 whereas the petitioner claims that such condition was never prescribed in the invitation to tender.

[17] The respondent also claims that the petitioner was obliged to furnish details about value addition plan which the petitioner never furnished. The petitioner disputes the said claim of the respondent.

[18] The petitioner claims that the order by the High Court and the two circulars by the Government rendered the execution of the contract i.e. lifting of the material impossible.

18.1. Whereas, the respondent claims that quantity of about 8,00,000 M.Tons of the material in question was available and ready for delivery and could have been lifted at the site and that therefore the prohibition vide the said two circulars was not applicable at all in case of the obligation under the contract i.e. for lifting the

material as any excavation or mining was not required to be undertaken and the order by the High Court or the circulars were not applicable to the subject matter of the contract and the petitioner is unjustifiably hiding behind the said order and circulars.

[19] Besides the aforesaid aspects mentioned in paragraphs No.13 to 16.1, which establish that the petition involves and raises several disputed questions of facts the facts and circumstances involved in the case and the contentions and counter contentions raised by the learned Senior Counsel for petitioner and learned Senior Counsel for respondent, below mentioned issues also demonstrate that disputed facts are asserted by petitioner and respondent:

(a) Whether the time frame/schedule for lifting the material (as mentioned on the part of the document at page 122) was mentioned by the petitioner or not.

(b) Whether the time frame/schedule for lifting the material was agreed and settled before or at the time of entering into/signing the agreement contract.

(c) Whether the performance was frustrated/rendered impossible due to external factors (two circulars dated 20.02.2011 and 23.02.2011 and/or the order passed by High Court in Special Civil Application No.601/2011) or on account of acts of omission and commission by the petitioner.

(d) Whether 8,00,000 M.Ton of material was available and ready for delivery on account of which even otherwise the alleged prohibition by virtue of the two circulars would not have stand in way of the petitioner for lifting the material as per the time schedule.

(e) Whether there was any co-relation or connection between the obligation to lift the material within stipulated period of contract and setting up of the plant, or not.

(f) Whether, in light of clause 17 the petitioner is justified in claiming that any time schedule/frame was neither stated by it nor agreed upon by it at the time of or before entering into and signing the agreement.

(g) Whether in light of clause 6 the petitioner is justified in contending that the requirement of submitting Bank Guarantee was imposed by the respondent subsequently.

19.1. The above mentioned and such other issues are involved in and are arising from the allegations and submissions by the petitioner and from the submissions by the respondent. The said issues give rise to disputed questions of facts, which

would require the parties to lead evidence, documentary as well as oral including cross-examination.

19.2. The said and other issues which arise from the facts and circumstances of the case as well as from rival contentions, are not such which can be determined merely on affidavits.

[20] Besides above mentioned issues, it also emerges from the facts of the case and rival submissions that the petitioner claims enforcement of contractual obligation and that the disputes raised by the petitioner are post-contract disputes.

20.1. Additionally, the respondent has also claimed that the petitioner is guilty of breach of terms of the contract. It is also claimed by the respondent that action which is taken by the respondent (and which is impugned in present petition) is taken in accordance with the terms of the contract and on account of the breach of contract by the petitioner.

[21] In this context reference needs to be made to the observations by the Hon'ble Apex Court in paragraph Nos. 21 and 22 in the decision in the case between [Bareilly Development Authority & Another v. Ajai Pal Singh & Ors.](#), 1989 2 SCC 116, which reads thus:

"21. This finding, in our view, is not correct in the light of the facts and circumstances of this case because in Ramana Dayaram Shetty case there was no concluded contract as in this case. Even conceding that the BDA has the trappings of a State or would be comprehended in 'other authority' for the purpose of Article 12 of the Constitution, while determining price of the houses/flats constructed by it and the rate of monthly instalments to be paid, the 'authority' or its agent after entering into the field of ordinary contract acts purely in its executive capacity. Thereafter the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter-se. In this sphere, they can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority (i.e. B.D.A. in this case) in the said contractual field.

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, Premji Bhai Parmar v. Delhi Development Authority and DFO v. Biswanath Tea Company Ltd."

21.1 It would also be appropriate to refer to the observations of the Apex Court in paragraph No.26 in the decision in the case between [Assistant Excise Commissioner & Ors. v. Issac Peter & Ors.](#), 1994 4 SCC 104, which reads thus:

"26. Learned counsel for respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication? The purpose, as we can see, is that though the contract says that supply of additional quota is discretionary, it must be read as obligatory at least to the extent of previous year's supplies by applying the said doctrine. It is submitted that if this is not done, the licensees would suffer monetarily. The other purpose is to say that if the State is not able to so supply, it would be unreasonable on its part to demand the full amount due to it under the contract. In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract or rather more so. It is one thing to say that a contract every contract must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in converse case, i.e., where the State has abundant supplies and wants the licensees to lift all the stocks. The licensees will undertake no obligation to lift all those stocks even if the State suffers loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned counsel for the licensees do not support their proposition. In *Dwarkadas Marfatia v. Board of Trustees of the Port of Bombay*⁷ it was held that where a public authority is exempted from the operation of a statute like Rent Control Act, it must be presumed that such exemption from the statute is coupled with the duty to act fairly and reasonably. The decision does not say that

the terms and conditions of contract can be varied, added or altered by importing the said doctrine. It may be noted that though the said principle was affirmed, no relief was given to the appellant in that case. [Shrilekha Vidyarthi v. State of U.P.](#), 1991 1 SCC 212 was a case of mass termination of District [DWARKADAS MARFATIA AND SONS v. BOARD OF TRUSTEES, PORT OF BOMBAY](#), 1989 3 SCC 293 Government Counsel in the State of U.P. It was a case of termination from a post involving public element. It was a case of non-government servant holding a public office, on account of which it was held to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned counsel. We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein.

21.2. The petitioner would, on the other hand, rely on the observations by the Apex Court in case of [ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd. & Ors.](#), 2004 3 SCC 553. So as to contend that even in matter of contract petition may be entertained. The Hon'ble Apex Court has observed that:

"10. It is clear from the above observations of this Court in the said case though a writ was not issued on the facts of that case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the

Constitution and the court depending on facts of the said case is empowered to grant the relief. This judgment in K.N. Guruswamy Vs. The State of Mysore was followed subsequently by this Court in the case of The D.F.O. v. Ram Sanehi Singh wherein this Court held: (SCC p.865, para 4)

"By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in K.N. Guruswamy's case , there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power." "

23. It is clear from the above observations of this Court, once State or an instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14 then we have no hesitation that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent. In this context, we may note that though the first respondent is a company registered under the Companies Act, it is wholly owned by the Government of India. The total subscribed share capital of this company is 2,50,000 shares out of which 2,49,998 shares are held by the President of India while one each share is held by the Joint Secretary, Ministry of Commerce and Industry and Officer on Special Duty, Ministry of Commerce and Industry respectively. The objects enumerated in the Memorandum of Association of the first respondent at Para 10 states :

"To undertake such functions as may be entrusted to it by Government from time to time, including grant of credits and guarantees in foreign currency for the purpose of facilitating the import of raw materials and semi-finished goods for manufacture or processing goods for export."

Para 11 of the said object reads thus :

"To act as agent of the Government, or with the sanction of the Government on its own account, to give the guarantees, undertake such responsibilities and discharge such functions as are considered by the Government as necessary in national interest."

24. The learned counsel for the respondent then contended that though the principal prayer in the writ petition is for quashing the letters of repudiation by the first respondent, in fact the writ petition is one for a 'money claim' which cannot be granted in a writ petition under Article 226 of the Constitution of India. In our opinion, this argument of the learned counsel also cannot be accepted in its absolute terms. This court in the case of [U.P.Pollution Control Board & Ors. vs. Kanoria Industrial Ltd. & Anr.](#), 2001 2 SCC 549 while dealing with the question of refund of money in a writ petition after discussing the earlier case law on this subject held: (SCC pp. 556-58, paras 12 & 16-17)

"12. In the para extracted above, in a similar situation as arising in the present cases relating to the very question of refund, while answering the said question affirmatively, this Court pointed out that the courts have made distinction between those cases where a claimant approached a High Court seeking relief of obtaining refund only and those where refund was sought as a consequential relief after striking down of the order of assessment, etc. In these cases also the claims made for refund in the writ petitions were consequent upon declaration of law made by this Court. Hence, the High Court committed no error in entertaining the writ petitions.

16. In support of the submission that a writ petition seeking mandamus for mere refund of money was not maintainable, the decision in *Suganmal Vs. State of M.P.* was cited. In AIR para 6 of the said judgment, it is stated that -

"We are of the opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax".

17. Again in AIR para 9, the Court held:

"We, therefore, hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction."

This judgment cannot be read as laying down the law that no writ petition at all can be entertained where claim is made for only refund of money consequent upon

declaration of law that levy and collection of tax/cess as unconstitutional or without the authority of law. It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, in the cases on hand where facts are not in dispute, collection of money as cess was itself without the authority of law; no case of undue enrichment was made out and the amount of cess was paid under protest; the writ petitions were filed within a reasonable time from the date of the declaration that the law under which tax/cess was collected was unconstitutional. There is no good reason to deny a relief of refund to the citizens in such cases on the principles of public interest and equity in the light of the cases cited above. However, it must not be understood that in all cases where collection of cess, levy or tax is held to be unconstitutional or invalid, the refund should necessarily follow. We wish to add that even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case."

21.3. In present case the contract is non-statutory contract and it is purely commercial contract. The claim made by the petitioner is based on allegation of breach of terms of contract and the nature of claim is purely monetary claim. Each and every fact urged in support of the claim and raised in defence are disputed by the opposite side.

21.4. In this context reference needs to be made to the observations by the Apex Court in paragraph Nos. 12 to 19 in the decision in the case of [Radhakrishna Agarwal v. State of Bihar](#), 1977 3 SCC 457. The Hon'ble Apex Court in para 12 to 19 observed that:

"12. The Patna High Court had, very rightly divided the types of cases 'in which breaches of alleged obligation by the State units agents can be set up into three types. These were stated as follows :--

"(i) Where a petitioner makes a grievance of breach of promise on the part of the State in cases where an assurance or promise made by the State he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of article 299 of the Constitution;

(ii) Where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Act or Rules framed thereunder and the petitioner alleges a breach on the part of State; and

(iii) Where the contract entered into between the State, and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State."

13. It rightly held that the cases such as Union of India v. M/s. AngloAfghan Agencies,(1) and Century Spinning & Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council(2); and Robertson v. Minister of Pensions,(3) belong to the first category where it could be held that public bodies or the State are as much bound as private individual are to carry out obligations incurred by them because parties seeking to bind the authorities have altered their position to their disadvantage or have acted to their detriment on the strength of the representations made by these authorities. The High Court thought that in such cases the obligation could sometimes be appropriately enforced on a Writ Petition even though the obligation was equitable only. We do not propose to express an opinion here on the question whether such an obligation could be enforced in proceedings under Article 226 of the Constitution now. It is enough to observe that the cases before us do not belong to this category.

14. The Patna High Court also distinguished cases which belong to the second category, such as K.N. Guruswami v. The State of Mysore;(4) ' D.F. South Kheri v. Ram Sanehi Singh;(5) and M/s. Shree Krishna Gyanoday Sugar Ltd. v. The State of Bihar,(6) where the breach complained of was of a statutory obligation. It correctly pointed out that the cases before us do not belong to this class either.

15. It then, very rightly, held that the cases now before us should be placed in the third category where questions of pure alleged breaches of contract are involved. It held, upon the strength of Umakant Saran v. The State of Bihar and Lekhraj Sathram Das v.N.M. Shah and B.K. Sinha v. State of Bihar, that no writ order can issue under Article 226 of the Constitution in such cases "to compel the authorities to remedy are a breach of contract pure and simple".

16. Learned counsel for the appellants has, however, relied upon a passage from Lekhraj Sathram Das's case where this Court observed (at p. 231);

" until and unless in the breach is involved violation of certain legal and public duties or violation of statutory duties to the remedy of which the petitioner is entitled by issuance of a writ of mandamus, mere breach of contract cannot be remedied by the Court in exercise of its powers under Article 226 of the Constitution".

17. Learned counsel contends that in the cases before us breaches of public duty are involved. The submission made before us is that, whenever a State or its agents or officers deal with the citizen, either when making a transaction or, after making it, acting in exercise of powers under the terms of contract between the parties, there is a dealing between the State and the citizen which involves performance of "certain legal and public duties." If we were to accept this very wide proposition every case of a breach of contract by the State or its agents or its officers would call for interference under Article 226 of the Constitution. We do. not consider this to be a sound proposition at all.

18. Learned counsel for the appellants cited certain authorities in an attempt to support his submission that the State and its Officers are clothed with special Constitutional obligations, including those under Article 14 of the Constitution, in all their dealings with the public even when a contract is there to regulate such dealings. The authorities cited were: D.F. South Kheri v. Ram Sanehi Singh where all that was decided, relying upon K.N. Guruswamy v. The State of Mysore , was that, where the source of a right was contractual but the action complained of was the purported exercise of a statutory power, relief could be claimed under Article 226; and, Calcutta Gas Co. (Proprietary) Ltd. v. State of West Bengal & Ors.,(1) where the real question considered was whether the petitioner had a locus standi to question the validity of an enactment; Basheshat Nath v. The Commissioner of Income Tax, Delhi & Rajasthan and Anr.,(2) which has nothing to do with any breach of contract but only lays down that "Article 14 protects us from both legislative and administrative tyranny of discrimination"; State of M.P. & Anr. v. Thakur Bharat Singh.(3) which lays that even executive action must not be exercised arbitrarily but must have the authority of law to support it; S.S. Sawhney v.D. Ramarathnam, Assistant Passport Officer. Govt. of India, New Delhi & Ors.,(4) which repeats requirements of action which satisfy Article 14 and 21 of the Constitution where compliance with these provisions is obligatory.

19. 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 the 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 array of authority against any such a proposition. In Lekhraj Sathramdas Lalwani v. M.M. Shah, Deputy Custodian-cum- Managing Officer, Bombay & Ors., this Court said(at p. 337);

"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 Art. 226 of the Constitution".

In *Banchhanidhi Rath v. The State of Orissa & Ors*(1) this Court declared (at p. 845) (scc P.783, para 8):

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

In *Har Shankar & Ors. etc. etc. v. The Dy. Excise & Taxation Commr. & Ors.*,(2) a Constitution Bench of this Court observed (at p. 265)(scc p.747, para 21):

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

21.5. This case, as in the case of *Radhakrishna Agarwal* , falls under the category where questions of alleged breach of contract and action in accordance with the terms of contract are involved and that therefore as observed by the Apex Court, particularly in para 15, the petition does not deserve to be entertained.

[22] The abovementioned aspects emerging from the agreement and the correspondence between the parties and the submissions by the learned Senior Counsel for contesting parties clearly bring out that there are several issues and questions which involved disputed facts and conflicting claims and versions by the petitioner and the respondent and the said disputed facts and conflicting versions are such which cannot be decided merely on basis of affidavits but would require regular trial i.e. would require the parties to lead evidence, documentary as well as oral, including cross-examination of the respective witnesses. The said process would not be practicable or feasible in writ proceedings but would require regular trial.

[23] Besides this, the disputes and differences between the parties after an agreement/contract is signed and entered into between the parties are matters within realm of contract and therefore they are required to be adjudicated and therefore such disputes would not come within the purview of judicial review. The decision making process before the contract is entered into may be, in given and recognized circumstances, subject matter of judicial review but once a contract, and more particularly, a commercial contract, is entered into between the parties then the contract and the disputes arising from or during the execution of the contract and/or with reference to the terms of the contract cannot be matter of judicial process but have to be adjudicated by way of ordinary civil remedy.

[24] In present case, the petitioner has also raised allegations and claims about losses allegedly caused to it on account of the decision and action of the respondent. Such claim, though incidental to the main dispute against the respondent's action of imposing penalty, cannot be entertained in exercise of prerogative writ jurisdiction. Whether the action of the respondent Corporation of imposing penalty is based on any alleged acts of omission or commission on part of the petitioner or whether the petitioner's conduct amount to breach of terms of contract or not or whether the alleged breach of contract attracts the penalty clause and whether the decision is justified and sustainable upon consideration of the relevant and attending facts and circumstances or not, are the issues which can be adjudicated and decided only after relevant and sufficient evidence is led by the parties.

[25] For the foregoing reasons the writ petition does not deserve to be entertained and the petitioner is required to be relegated to the ordinary civil remedy. In view of the foregoing discussions and for the said reasons, the petition does not deserve to be entertained. Consequently, present petition is not entertained and is accordingly disposed of.

[26] In the event any proceedings are taken out before the trial court, it is clarified that the court should decide such proceedings independently in light of the evidence which may be available on record and without being influenced by observation in this order.

(K.M.THAKER, J.)

FURTHER ORDER

1. Mr. Chudgar, learned advocate for the petitioners, has submitted that in view of the order passed by the Court, the petitioner company has continued and got alive the bank guarantee. He also submitted that the bank guarantee is to remain in operation until September 2012 and the interim relief, which has been granted in favour of the petitioner company subject to the conditions of keeping the bank guarantee alive, may be continued for the period of 4 weeks.

2. In this context, reference can be made to the order dated 22.3.2012, which reads thus:-

"2. The learned counsel for the petitioner has invited this court's attention to the terms of the notice inviting tender, wherein the original period for lifting the entire quantity was three months and assurance was given to captive users using the quantity in the State of Gujarat only. The said period was time and again extended and now, it is expiring on 31.03.2012. The joint venture for utilizing the lifted

goods is to be in the form of special purpose vehicle along with GMDC only and that formality are yet to be completed. As a result thereof, the petitioner was not in a position to use the lifted quantity in Gujarat. A request was made to permit the quantity to utilize outside Gujarat at another plant at Calcutta but the same declined. In any case, the Bank guarantee cannot be encashed on or before 31.03.2012 and the respondent No. 2 GMDC could not be justified in demanding the penalty amount on a prorata basis as if the quantity is not lifted and therefore, the payment of penalty is accrued. Learned counsel for petitioner has submitted that bank guarantee worth Rs.3.10 crore would be extended but as on date, the demand of Rs.44 lacs and odd to be realized out of the bank guarantee may not be permitted to be carried out, especially in view of the fact that alleged penalty is not on the part of petitioner or attributed to the petitioner alone. The non-lifting of the goods is on account of non-availability of the operational plant to be put to SPV which is yet to be finalized and it is awaiting its clearance from the State Government.

3. In view of this, let there be a notice, returnable on 28.03.2012. In the meantime and till the returnable date, the respondent No. 2 GMDC is restrained from encashing the bank guarantee. As this order is passed ex-parte, it goes without saying that the respondents shall have right to approach this court even earlier and prior to the returnable date for vacating / modification of the order with a copy of said application to other side. Direct service permitted today. The petitioner is at liberty to communicate this order to all the concerned."

Since then, the said arrangement/relief has continued until now.

3. The claim of the respondent corporation is protected by virtue of the said order dated 22.3.2012.

4. So as to enable the petitioners to take appropriate course of action, i.e. either to carry the order in appeal before the Hon'ble Division Bench or to approach the Civil Court for civil remedy and so as to enable the petitioners to take appropriate action including action of preferring appeal against present order, interim arrangement which has been in operation, shall continue until 2.9.2012.