STATE OF U.P. A

v.

SUDHIR KUMAR SINGH AND ORS.

(Civil Appeal No. 3498 of 2020)

OCTOBER 16, 2020 B

[R. F. NARIMAN, NAVIN SINHA AND K. M. JOSEPH, JJ.]

Principles of Natural Justice – audi alteram partem – *Breach of – U.P. State Warehousing Corporation issued e-tender* inter alia *for unloading/loading of foodgrains/fertilizer bags from/into railway wagons, trucks etc.; transporting from Railway Station to Corporation godowns or vice versa – Tender cancelled – e-tender again published in the same terms, for Vindhyachal (Mirzapur) region, it was regarding appointment of Handling and Transport Contractor for food grain in FCI for four depots/centres of Uttar Pradesh for two years – Cancelled again – Another tender reissued for the same region – Respondent No.1 declared as successful bidder for the Bhawanipur-I centre – Agreement entered into between the Corporation and Respondent No.1 for execution of the work under the tender – Complaints of financial irregularities in the issuance of the e-tender – Tender cancelled – Respondent no.1 filed Writ Petition – Allowed – On appeal, held: Prayer in the Writ Petition confined itself to the cancellation of the tender – However, impugned judgment went ahead and not only set aside such cancellation vide letter dtd. 26.07.19, but also set aside the Managing Director's report dtd. 14.06.19, and the Special Secretary's order of 16.07.19, which required taking disciplinary action and recovery of financial loss from those responsible – Set aside to that extent – Further, entire proceedings leading to cancellation of the tender, together with the cancellation itself, were done on an* ex parte *appraisal of the facts behind respondent no.1's back – Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice – In the present case, respondent no.1 was completely in the dark so far as the cancellation of the tender is concerned, the* audi alteram partem *rule having been breached in its entirety – Impugned judgment upheld on this ground – Tenders – Maxims – Constitution of India – Arst.226, 14.* C D E F G H

A *Constitution of India – Art.226 – Writ petition – Maintainability of, for enforcing contractual obligation of the State/its instrumentality – Discussed.*

Disposing of the appeals, the Court

B **HELD: 1.1 Despite the fact that the prayer in the Writ Petition filed by Respondent No.1 was set out in the very beginning of the impugned judgment, confining itself to the cancellation of the second tender, the impugned judgment went ahead and not only set aside such cancellation *vide* the letter dated 26.07.2019, but also went ahead and set aside the Managing** C **Director's report dated 14.06.2019, and the Special Secretary's order of 16.07.2019, which required the taking of disciplinary action and recovery of financial loss from those who are responsible. It was fairly conceded that no relief was asked *qua* the delinquent officers. This being the case, the impugned judgment is set aside insofar as it has quashed the Managing** D **Director's report dated 14.06.2019, and the order of the Special Secretary dated 16.07.2019. Any consequential action that is to be taken pursuant to these orders must follow in accordance with law. 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** E **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. The present** F **case is, therefore, a case which involves a "public law element" in that the petitioner (Respondent No.1) 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*** G ***parte* appraisal of the facts behind his back. [Paras 18, 23][589-F-H; 590-A-B; 598-E-G]**

Nawabkhan Abbaskhan v. State of Gujarat **(1974) 2 SCC 121 : [1974] 3 SCR 427 – relied on.**

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1.2 In some of the early judgments of this Court, the non-observance of natural justice was said to be prejudice in itself to the person affected, and proof of prejudice, independent of proof of denial of natural justice, was held to be unnecessary. The only exception to this rule is where, on "admitted or indisputable" facts only one conclusion is possible, and under the law only one penalty is permissible. In such cases, a Court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice, but because Courts do not issue writs which are "futile". Equally, the prejudice that is caused, apart from natural justice itself being denied, cannot be said to be present in a case in which there are admitted facts. What is important to note is that it is the Court or Tribunal which must determine whether or not prejudice has been caused, and not the authority on an *ex parte* appraisal of the facts. [Paras 28, 29 and 33][600-C-D; 601-B; 605-E-F]

S.L. Kapoor v. Jagmohan and Ors. **(1980) 4 SCC 379 : [1981] 1 SCR 746;** P.D. *Agrawal v. State Bank of India and Ors.* **(2006) 8 SCC 776 : [2006[1 Suppl. SCR 454;** *K.L. Tripathi v. State Bank of India and Ors.* **(1984) 1 SCC 43 : [1984] 1 SCR 184;** *State of U.P. v. Neeraj Awasthi and Ors.***(2006) 1 SCC 667 : [2005] 5 Suppl. SCR 906;** *Managing Director, ECIL and Ors. v. B. Karnakumar and Ors.* **(1993) 4 SCC 727: 1993 (2) Suppl. SCR 576;** *Haryana Financial Corporation and Anr. v. Kailash Chandra Ahuja* (**2008) 9 SCC 31 : [2008] 10 SCR 222 – relied on.**

1.3 Under the broad rubric of the Court not passing futile orders as the case is based on "admitted" facts, being admitted by reason of estoppel, acquiescence, non-challenge or non-denial, the following judgments of this Court are all illustrations of a breach of the *audi alteram partem* rule being established on the facts of the case, but with no prejudice caused to the person alleging breach of natural justice, as the case was one on admitted facts. [Para 38][618-B-C]

A *Punjab and Sind Bank and Ors. v. Sakattar Singh* **(2001) 1 SCC 214: 2000 (3) Suppl. JT 450;** *Karnataka SRTC and Anr. v. S.G. Kotturappa and Anr.* **(2005) 3 SCC 409 : [2005] 2 SCR 520;** *Viveka Nand Sethi v. Chairman, J&K Bank Ltd. and Ors.* **(2005) 5 SCC 337 : [2005] 3 SCR 1095;** *Mohd. Sartaj and Anr. v. State of U.P. and Ors.* **(2006) 2 SCC 315: [2006] 1 SCR 377;** *Punjab National Bank and Ors. v. Manjeet Singh and Anr.* **(2006) 8 SCC 647 : 2006 (6) Suppl. SCR 825;** *Ashok Kumar Sonkar v. Union of India and Ors.* **(2007) 4 SCC 54 : [2007] 3 SCR 95;** *State of Manipur and Ors. v. Y. Token Singh and Ors.* **(2007) 5 SCC 65: [2007] 2 SCR 965;** *Secretary, A.P. Social Welfare Residential Educational Institutions v. Pindiga Sridhar and Ors.* **(2007) 13 SCC 352 : [2007] 4 SCR 145;** *Peethani Suryanarayana and Anr. v. Repaka Venkata Ramana Kishore and Ors.* **(2009) 11 SCC 308 : [2009] 2 SCR 48;** *Municipal Committee, Hoshiapur v. Punjab State Electricity Board and Ors.* **(2010) 13 SCC 216 : [2010] 13 SCR 658;** *Union of India and Anr. v. Raghuwar Pal Singh* **(2018) 15 SCC 463 : [2018] 4 SCR 1012 – referred to.**

E **1.4 (1) Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the *audi alteram partem* rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.**

F **(2) Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction *per se* does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.**

G **(3) No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel,**

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acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.

(4) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.

(5) The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice. [Para 39][618-H; 619-A-E]

1.5 Judged by the touchstone of these tests, it is clear that Respondent No.1 has been completely in the dark so far as the cancellation of the award of tender in his favour is concerned, the *audi alteram partem* rule having been breached in its entirety. Prejudice has indeed been caused to respondent no.1, not only from the fact that one year of the contract period has been taken away, but also that, if the impugned High Court judgment is to be set aside today, he will be debarred from bidding for any of the Corporation's tenders for a period of three years. Undoubtedly, *prima facie*, the rates at which contracts have been awarded pursuant to the tender dated 01.06.2018 are way above the rates that were awarded of the same division, and for exactly the same amount of work awarded *vide* the earlier tender advertisement dated 01.04.2018. The argument that in the neighbouring regions the rates tendered were also high, and nothing has yet been done to nullify these tenders and the financial loss caused, does carry some weight. That a huge financial loss to the Corporation has also taken place is something for the Corporation to probe, and take remedial action against the persons responsible. The impugned judgment of the High Court is therefore, upheld on

the ground that natural justice has indeed been breached in the facts of the present case, not being a case of admitted facts leading to the grant of a futile writ, and that prejudice has indeed been caused to Respondent No.1. In view of this finding, there is no need to examine the other contentions raised by the parties. [Paras 40, 41][619-F-H; 620-A-C]

1.6 The submission that as respondent no.1 is working for the Corporation in another subsequent tender, he is not going to claim damages for the lost period post cancellation of the tender is reiterated. This being the case, and other things being equal, the earnest money deposit and security deposit made by him is ordered to be returned by the Corporation within a period of eight weeks from today. He may also request the Corporation to pay any amount that remained unpaid for work actually done, which the Corporation will, after a hearing, either allow or reject for reasons to be stated. The appeals arising out of SLP (C) 5136 of 2020 and SLP (C) 7351 of 2020 are thus partially allowed, and the impugned judgment of the High Court of Judicature at Allahabad dated 11.12.2019 is set aside only to the extent indicated. [Paras 42, 43][620-C-E]

1.7 Insofar as the appeal arising out of SLP (C) No. 7364 of 2020 is concerned, the facts therein are distinct from the other two connected appeals before this Court only to the extent that Respondent No.1 therein, M/s Dharam Raj Singh, was the successful bidder for the Tendu (Sonbhadra) region, which award of tender was also cancelled by the Corporation's order dated 26.07.2019. The judgment impugned in this appeal, dated 07.01.2020 of the High Court of Judicature of Allahabad (Lucknow Bench), allowed M/s Dharam Raj Singh's writ petition challenging the cancellation order, stating that it was to be governed by the judgment of the High Court of Judicature at Allahabad dated 11.12.2019. As a result, the judgment in the two connected appeals, and all consequential reliefs granted, will apply on all fours to this appeal also. [Para 44][620-F-G]

ABL International Ltd. and Anr. v. Export Credit Guarantee Corporation of India Ltd. and Ors. **[2004]**

3 SCC 553; *Food Corp. of India and Anr. v. SEIL Ltd. and Ors.***(2008) 3 SCC 440 : [2008] 1 SCR 663;** *Central Bank of India v. Devi Ispat Ltd. and Ors.* **(2010) 11 SCC 186 : [2010] 9 SCR 417;** *Surya Constructions v. State of U.P. and Ors.* **(2019) 16 SCC 794;** *Verigamto Naveen v. Govt. of A.P. and Ors.* **(2001) 8 SCC 344 : 2001 (3) Suppl. SCR 112;** *Rishi Kiran Logistics v. Board of Trustees of Kandla Port and Ors.* **(2015) 13 SCC 233 : [2014] 5 SCR 411;** *Joshi Technologies International Inc. v. Union of India and Ors.* **(2015) 7 SCC 728 : [2015] 6 SCR 1042;** *Dharampal Satyapal Ltd. v. Dy. Comm. Of Central Excise, Gauhati and Ors.* **(2015) 8 SCC 519 : [2015] 6 SCR 437;** *State Bank of Patiala and Ors. v. S.K. Sharma* **(1996) 3 SCC 364 : 1996 (3) SCR 972;** *M.C. Mehta v. Union of India and Ors.* **(1999) 6 SCC 237 : [1999] 3 SCR 1173;** *Aligarh Muslim University and Ors. v. Mansoor Ali Khan* **(2000) 7 SCC 529; 2000 (2) Suppl. SCR 684;** *Union of India and Ors. v. Alok Kumar* **(2010) 5 SCC 349 : [2010] 5 SCR 35 – relied on.**

Raunaq International Ltd. v. I.V.R. Construction Ltd. and Ors. **(1999) 1 SCC 492: [1998] 3 Suppl. SCR 421;** *Jagdish Mandal v. State of Orissa and Ors.* **(2007) 14 SCC 517;** *Michigan Rubber (India) Ltd. v.State of Karnataka and Ors.* **(2012) 8 SCC 216 :[2012] 8 SCR 128;** *Tata Cellular v. Union of India* **(1994) 6 SCC 651 : [1994] 2 Suppl. SCR 122;** *Rajasthan State Housing Board and Anr. v. G.S. Investments and Anr.* **(2007) 1 SCC 477 : [2006] 7 Suppl. SCR 868 – distinguished.**

Noble Resources v. State of Orissa and Anr. **(2006) 10 SCC 236 : [2006] 6 Suppl. SCR 53;** *Radhakrishna Agarwal and Ors. v. State of Bihar and Ors.* **(1977) 3 SCC 457 : [1977] 3 SCR 249 – referred to.**

On Justice- Book by J.R. Lucas **(Page 86) – referred to.**

Case Law Reference

[2006] 6 Suppl. SCR 53	**referred to**	**Para 20**
[2008] 1 SCR 663	**relied on**	**Para 20**
[2010] 9 SCR 417	**relied on**	**Para 20**
[1977] 3 SCR 249	**referred to**	**Para 21**
[2001] 3 Suppl. SCR 112	**relied on**	**Para 21**
[2014] 5 SCR 411	**relied on**	**Para 22**
[2015] 6 SCR 1042	**relied on**	**Para 22**
[1974] 3 SCR 427	**relied on**	**Para 23**
[1998] 3 Suppl. SCR 421	**distinguished**	**Para 24**
[2012] 8 SCR 128	**distinguished**	**Para 25**
[1994] 2 Suppl. SCR 122	**distinguished**	**Para 25**
[2006] 7 Suppl. SCR 868	**distinguished**	**Para 25**
[1981] 1 SCR 746	**referred to**	**Para 28**
[2006] 1 Suppl. SCR 454	**referred to**	**Para 28**
[1984] 1 SCR 184	**referred to**	**Para 29**
[2005] 5 Suppl. SCR 906	**referred to**	**Para 30**
1993 (2) Suppl. SCR 576	**referred to**	**Para 31**
[2008]10 SCR 222	**referred to**	**Para 32**
[2015] 6 SCR 437	**referred to**	**Para 33**
1996 (3) SCR 972	**referred to**	**Para 34**
[1999] 3 SCR 1173	**referred to**	**Para 35**
[2000] 2 Suppl. SCR 684	**referred to**	**Para 36**
[2010] 5 SCR 35	**referred to**	**Para 37**
[2005] 2 SCR 520	**referred to**	**Para 38**
[2005] 3 SCR 1095	**referred to**	**Para 38**
[2006] 1 SCR 377	**referred to**	**Para 38**

[2006] 6 Suppl. SCR 825	**referred to**	**Para 38**
[2007] 3 SCR 95	**referred to**	**Para 38**
[2007] 2 SCR 965	**referred to**	**Para 38**
[2007] 4 SCR 145	**referred to**	**Para 38**
[2009] 2 SCR 48	**referred to**	**Para 38**
[2010] 13 SCR 658	**referred to**	**Para 38**
[2018] 4 SCR 1012	**referred to**	**Para 38**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3498 of 2020.

From the Judgment and Order dated 11.12.2019 of the High Court of Judicature at Allahabad in Writ C. No. 25389 of 2019.

With

Civil Appeal Nos. 3499 and 3500 of 2020.

Tushar Mehta, SG, Dr. Abhishek Manu Singhvi, Ms. Meenakshi Arora, Rakesh Dwivedi, Sidharth Dave, Sr. Advs., Mrs. Rachna Gupta, Amit Bhandari, Ms. Sakshi Kakkar, Shakti Singh, Ms. Preetika Dwivedi, Mr. Imran Syed, Advs. for the appearing parties.

The Judgment of the Court was delivered by

R. F. NARIMAN, J.

1. Leave granted.

2. An e-tender notice was issued on 06.01.2018 by the U.P. State Warehousing Corporation ("**Corporation**") for unloading/loading of foodgrains/fertilizer bags from/into railway wagons, trucks etc., stacking the foodgrains/fertilizers in bags, bagging, weighment, standardisation, cleaning of foodgrains/fertilizers etc. and transporting of foodgrains/fertilizers etc. from Railway Station to Corporation godowns or *vice versa* or transporting them from any place to any other place for the Vindhyachal (Mirzapur) Region. Ten days later i.e. on 16.01.2018, the said tender was cancelled by the Corporation due to "administrative reasons". On 01.04.2018, an e-tender was again published in the same terms, and so far as the region Vindhyachal (Mirzapur) is concerned, it was for the "appointment of Handling and Transport Contractor for food grain in FCI and alleged material etc." of the following depots/centres of Uttar Pradesh for a period of two years:

Sl. No.	Name of Depot/Centre	Workable capacity (in M.T.)	Estimated annual value of contract	Earnest money @20% security amount through RTGS/NEFT	Security deposit (in rupees)
1.	Mirzapur	8430	50000000.00	1000000.00	5000000.00
2.	Bhawanipur PEG-1	30000	60000000.00	1200000.00	6000000.00
3.	Bhawanipur PEG-II	10000	10000000.00	200000.00	1000000.00
4.	Tendu (Sonbhadra)	61400	9000000.00	180000.00	900000.00

3. Technical bids for these four centres were opened on 17.04.2018. Price bids of technically qualified bidders were then opened on 23.04.2018. The price bids that were received, so far as these four centres were concerned, were as follows:

"**PEG Bhawanipur-I Centre**

Serial No.	Bidder	Rate
1.	Maa Bhawani Transport	222% ASOR
2.	Iqbal Ahmad Ansari	154% ASOR
3.	Suresh Singh	174% ASOR

PEG Bhawanipur-II Centre

Serial No.	Bidder	Rate
1.	Maa Bhawani Transport	198% ASOR
2.	Iqbal Ahmad Ansari	153% ASOR
3.	Suresh Singh	174% ASOR

Mirzapur Centre

Serial No.	Bidder	Rate
1.	Maa Bhawani Transport	219% ASOR
2.	Iqbal Ahmad Ansari	139% ASOR
3.	Suresh Singh	134% ASOR
4.	Shaquil Ahmad	248% ASOR

Tendu (Sonbhadra) Centre

Serial No.	Bidder	Rate
1.	Maa Bhawani Transport	180% ASOR
2.	Dharam Raj Singh	300% ASOR
3.	Sonbhadra Transport	Not specified in words and numbers
4.	Manisha Engineering	225% ASOR
5.	Arjun Singh	25% ASOR

(Where ASOR means Above Schedule of Rates)"

4. On 04.05.2018, the then Managing Director of the Corporation cancelled the aforesaid tender apparently on the ground that it was "impractical" to go ahead with such tender. As a result, on 01.06.2018, for the same region, the aforesaid tender was reissued for the same workable capacity and estimated annual value of the contract. It may be added that each of these tenders were for a period of two years.

5. Sudhir Kumar Singh, Respondent No.1 in the appeals arising out of SLP (C) No. 5136 of 2020 and SLP (C) No. 7351 of 2020, was declared as the successful bidder for the Bhawanipur-I centre, at the rate of 341% ASOR, the other successful tenderers for Mirzapur, Bhawanipur-II and Tendu (Sonbhadra) being at 314%, 338% and 290% ASOR respectively. On 13.07.2018, an agreement was entered into between the Corporation and Respondent No.1 for execution of the work under the tender, which began on and from that day, and continued for a period of over one year.

6. Meanwhile, on 27.05.2019, two complaints were made by one Shri Pramod Kumar Singh of the Purvanchal Trucker Owner's Association to the Principal Secretary of the State of U.P. regarding financial irregularities that occurred in the issuance of the e-tender notice dated 01.06.2018. These complaints were then forwarded by the Principal Secretary of the State of U.P. to the Managing Director of the Corporation by a letter dated 30.05.2019. The said letter, insofar as Respondent No.1 is concerned, read as follows:

> "Shri Pramod Kumar Singh should analyse two enclosed complaints dated 27.05.2019 of Truck Owners Association wherein loss of Crores to Corporation is shown due to serious financial irregularities caused in handling and transport contracts in Vindhyanchal Division.

A *xxx xxx xxx*

Tendering was done in Vindhyanchal Division on 16.04.2018, wherein low rate of tenders were received. Issued tenders are cancelled on 05.05.2018 without telling any reason and tender of centres cancelled on 16.06.2018 were re-tendered wherein rates are too high in new tenders than older one and by allotting work on higher rates work is being done.

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Kindly assure providing report within five days in respect of aforesaid and in respect of all points mentioned in enclosed letters."

7. As a result of this letter, the Managing Director of the Corporation held an *ex parte* enquiry into the matter, and insofar as Respondent No.1 was concerned, the Managing Director went into the cancellation of the previous tender dated 01.04.2018, and into the comparative details of rates received for these four centres earlier, as compared to the rates of the same tendered quantity of the tender dated 01.06.2018, and found the latter rates to be extremely high. In his report dated 14.06.2019, he therefore ultimately concluded:

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"It is mentionable that cancellation of e-tendering process done earlier through Advertisement No.1.1001.23318 dated 01.04.2018 on the ground that received minimum rates are impractical is not acceptable in any circumstance. In this respect, for getting e-tendering process done the committee constituted at Division Level considered PEG Tendu (Sonbhadra) Centre only as impractical whereas the Head Office accepted it as it is in respect of all centres. As far as question of hiding of fact regarding forfeiture of security deposit by Uday Construction or application filed for producing the same are concerned, then in this respect it is to be known that Uday Construction applied only for PEG Tendu through Advertisement No.1.1001.23318 dated 01.04.2018. Therefore, on this ground rejection of bids received for other centres was prima facie not justified."

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G 8. Meanwhile, the Commissioner, Vindhyachal Mandal Mirzapur, also conducted an *ex parte* investigation and found in his report dated 29.06.2019 as follows:

"1. State regional manager Sh. Madhukar Gupta has mentioned in his letter no. R.BH.N/dated 26-05-2018 forwarded to State

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General Manager (finance) Uttar Pradesh State Warehousing Corporation that committee of e-tendering has been formed only for the purpose of formalities. It is cleared from examining the paragraph that formality has been done in the tender. On 12-07-2018 the state manager gave the recommendation of acceptance and on 13-07-2018 Uttar Pradesh State Warehousing Corporation gave acceptance. On 13-07-2018 Sh. Madhukar Gupta State Regional Manager, Uttar Pradesh State Warehousing Corporation Vindhyachal gave appointment order to the concerned contractors. Hereby uncommon vigilance has been shown in entire procedure.

2. Regional Manager, Uttar Pradesh State Warehousing Corporation Sh. Anuj Shukla, computer consultant was got involved by Sh. Madhukar Gupta which is not appropriate. It is objectionable in keeping contract work in bid is objection.

3. Condition was kept on to participate only to the registered contractors which is objectionable. Due to, only participation of registered contractor, no contest took place amongst the contractors. Because of which rate was obtained at manifold high rate. Whereby damaged was caused to department.

4. Regional Manager in his letter no. R.B.N/284/dated 12-07-2018 which is addressed to Managing Director Uttar Pradesh State Warehousing Corporation Lucknow. For determined rate to 314 percent, 341 percent, 338 percent, and 290 percent at high rate conformation of recommendation of appointment of regular contractors have been given for work of Indian Fertilizer Corporation Handling and Transport. It is mentioned that despite the high rate from determined rate regional manager neither any market survey was conducted regarding high rate nor he mentioned in his letter and he recommended the acceptance irresponsibly. Hence Sh. Madhukar Gupta State Regional Manager has not followed his duty and responsibility and he is responsible for high rate and acceptance without any reason.

5. Even corporation Headquarter did not deem fit to take any action regarding high rate from determined rate. What was examined by Headquarter it is not cleared.

6. In this regard categorically it is not possible to determine the financial loss since neither in this case, opportunity to contest has

A been given and nor market survey has been conducted. On the basis of that formality rate can be determined. Damage has been surely caused. But it cannot be explained. Record is sent for perusal and necessary action."

9. Given these two reports, the Special Secretary, Government of
B U.P. wrote a letter dated 16.07.2019 to the Managing Director, in which the Managing Director's report dated 14.06.2019 was referred to, and concluded:

"In this, the role of Officer of Regional Level (Vindhyachal Division) and accepting Officer and erstwhile Managing Director
C and officers concerned with Headquarter, also appears to be doubtful.

So, I have been instructed to say that you by doing enquiry of matter at your own level, the financial loss caused to the Government and after evaluating the same, shall take action to
D recover the said amount from concerned Contractor and concerned Officers. The Officers/Employees against whom any previous departmental proceeding is pending, in respect of them by including these charges as additional Charge Sheet action shall be taken and against officers/employees found guilty in the matter against whom no proceedings are pending, proceeding shall be done by
E marking them.

The tenders of abovementioned firms which are granted contrary to rules, by cancelling them the appointment of contractors be done through e-tendering again for handling and transport work of concerned Warehouses.

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Said proceedings be done as soon as possible and the action taken shall be informed to the Government."

10. Pursuant to this letter, the aforesaid tenders were then cancelled on 26.07.2019, and disciplinary proceedings were taken against
G certain employees of the Corporation. These proceedings led to a report dated 18.10.2019, in which the difference between the earlier rates and the present rates were gone into, and it was found that an excess of INR 4,40,05,369 had been paid relative to what was sanctioned previously – this amount being the financial loss suffered by the Corporation.

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11. Mean while, Respondent No.1 filed Writ Petition no. 25389 of 2019 in July 2019 before the High Court of Judicature at Allahabad, in which he challenged the "illegal and arbitrary" termination of the contract with the Corporation after successful completion of over one year of a two-year term, and prayed for the setting aside of the Corporation's cancellation order dated 26.07.2019 of the tender dated 01.06.2018.

12. By the judgment dated 11.12.2019 in this Writ Petition, which is impugned in the appeals arising out of SLP (C) No. 5136 of 2020 and SLP (C) No. 7351 of 2020, the High Court, after setting out the prayer in the Writ Petition, set out four questions that arose before it as follows:

> "(a) Whether the two enquiry reports are procedurally defective inasmuch as the findings returned thereunder are based upon no material and hence perverse;
>
> (b) Whether the respondent Managing Director was justified in cancelling the written agreement with the petitioner after a lapse of a year, without putting him to notice;
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> (c) Whether being an autonomous body, Corporation could not have been directed to take action in particular manner and Managing Director was not justified in cancelling the agreement under an executive fiat of Special Secretary; and;
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> (d) Whether the order passed by Managing Director is vitiated for bias as he himself had been Inquiry Officer and without inviting the petitioner to explain in his defence he himself conducted the inquiry and then on the basis of report prepared by him, he proceeded to cancel the agreement."

13. The High Court concluded that since the entire proceedings were conducted behind the back of Respondent No.1, and considering that the tender notice dated 01.06.2018 had never been challenged by anybody in a court of law, an *ex parte* appraisal of the complaints received was done in a hurry by the Managing Director of the Corporation and the learned Commissioner, and was liable to be set aside on several grounds, the single most important one – insofar as Respondent No.1 is concerned – being the breach of natural justice. The High Court, therefore, held:

> "If the officials had cancelled the earlier tender notice in their wisdom and the cancellation of those tender notice was never

A questioned, merely because those earlier tender notices were cancelled/ withdrawn, a necessary presumption cannot be raised that the third notice inviting tender was for some extraneous considerations. It is true that the prices this time were taken to be very high as against the earlier ones in the process of tender in which the prices were quoted very low but that does not itself become the ground to cancel the entire tender process which had not only been finalized but even the agreement had been entered into and the party under the contract was carrying out the work making huge investment of money. Had it been a case also of the kind where the party to the contract had violated the terms and conditions of the contract, it could have been said that the tender was liable to be cancelled for violation of terms and conditions of the tender agreement. But in the instant case no such finding has come to be returned. The reasons for which the tender proceedings that had already been concluded with the execution of the agreement, has been cancelled without assigning any reason of wrong practice adopted by the petitioner in obtaining the agreement. Thus the petitioner cannot be said to be at fault in the matter and, therefore, in our considered opinion if the petitioner was already working under the agreement and no charge was there that he violated the terms and conditions of the agreement, the respondents were not justified in cancelling the agreement ex parte.

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There is no finding returned that at the stage of submission of the application against the notice inviting tender, the petitioner was not eligible or that at the time of the opening of the technical bid and financial bid the petitioner got wrongfully qualified and that the financial bid of the petitioner was wrongly approved and that the agreement entered between the petitioner and the Corporation was void being against the law. If in all the above three stages the petitioner cannot be held to be guilty in any manner for manipulating the things and obtaining the tender by hatching any conspiracy in connivance with the officials of the Corporation, cancellation of the agreement suddenly by the Managing Director holding that the entire Notice Inviting Tender was bad, certainly required a notice and opportunity of hearing to be afforded to the petitioner

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prior to passing of such an order. It is a settled principle of law that in administrative exercise of power, the authority exercising power has to not only render due application of mind but also to follow the procedure which would not render the entire action arbitrary. It is settled legal principle that whatever is arbitrary, is hit by Article 14 of the Constitution of India and in the present case we find that only the procedure that was followed by the respondents in taking impugned action was not only quite ex parte but also under the executive fiats of the Special Secretary of the Government which was quite uncalled for."

14. Having so held, the High Court then concluded:

"Order impugned is basically based on the enquiry report prepared by the Managing Director himself and that the enquiry was conducted in the ex parte manner and the Managing Director failed to offer any opportunity of hearing to the petitioner before passing the order impugned which has the effect of terminating the agreement for no justifiable reason to hold that the petitioner was at fault at any point of time. Element of bias therefore, under the circumstances at the end of Managing Director, cannot be ruled out. The order impugned, therefore, terminating the agreement dated 26.7.2019 cannot be sustained in law.

Thus, for the forgoing discussions writ petition succeeds and is allowed. The order dated 26.7.2019 (Annexure-13) to the writ petition and the enquiry report dated 14.6.2019 submitted by the Managing Director as well as the order passed by the Special Secretary dated 16.7.2019 are also hereby quashed.

The consequential action if taken pursuant to the impugned order is also quashed. The consequences to follow, however, there will be no order as to costs."

15. Dr. Abhishek Manu Singhvi, learned Senior Advocate appearing on behalf of the Corporation, first adverted to the prayer in the Writ Petition filed by Respondent No.1, and argued that the High Court had gone way beyond what was asked for. According to him, the Writ Petition only prayed for a quashing of the cancellation order dated 26.07.2019 of the second tender. The High Court went way beyond, and not only quashed the aforesaid cancellation, but also quashed the enquiry report of the Managing Director dated 14.06.2019, as well as the order passed by the

A Special Secretary dated 16.07.2019, and the consequential action taken, namely, the departmental proceedings against the delinquent officers, which was never the subject matter of challenge in the Writ Petition. He went on to argue, based upon the comparison between the rates that were received in the earlier tender dated 01.04.2018 that was cancelled, and the rates in the 01.06.2018 tender, that the disparity was so great as to make it clear that the contracts for these four centres ought not to have been entered into at these rates at all. He argued that the High Court ought to have appreciated the huge financial loss that was caused as a result of awarding the contract at these rates, and ought not to have interfered with the cancellation of the tender, as it could not be characterised as arbitrary, given the huge increase in rates in such a short period for the same works. Further, he argued that the case law on natural justice showed that it was not an inflexible straitjacket, but had to be used wisely and well, and cited a number of judgments of this Court for the proposition that even though natural justice may be breached in the facts of a given case, if otherwise such breach does not result in prejudice, it would be a mere exercise in futility to set aside the order and remand it to the authorities to pass an order after hearing the affected party. He also argued that as of today, the two year term of the contract is over, and this very contractor, i.e. Respondent No.1, is doing the same work awarded at Mirzapur on 21.03.2020 at rates (139% ASOR) which are much lower than the rates tendered for previously, as is the successful tenderer Tilotama Devi on and from 31.09.2019 so far as Bhawanipur-II is concerned, which was awarded at 221% ASOR. Dr. Singhvi also argued that the writ court ought not to have interfered in contractual matters, and ought to have left Respondent No.1 to approach a civil court to file a suit for appropriate reliefs.

16. Shri Tushar Mehta, learned Solicitor General appearing on behalf of the State of U.P., argued that he had a limited role, and confined his arguments to the setting aside of the letter dated 16.07.2019 of the Special Secretary to take departmental action. He argued that this letter could not have been set aside by the High Court, as no such prayer or argument was made before it by the writ petitioner.

17. Shri Rakesh Dwivedi, learned Senior Advocate appearing on behalf of Respondent No.1, argued that the High Court judgment ought not to be interfered with, inasmuch as his client had pumped in a lot of money, and had worked the contract for a period of over one year

successfully and without any complaint whatsoever from the Corporation. He reiterated the fact that nobody had challenged the award of the tender to his client, and that the cancellation of the tender was done behind his client's back. Had the authorities bothered to give his client a hearing, his client could have pointed out that in other nearby divisions, tenders were awarded at roughly the same rates, all of which contracts had been worked out, and none of which have been cancelled. Thus, he argued that his client suffered serious prejudice, in that he was able to work his contract for only one out of the two years that was awarded to him. He further argued that had a hearing been given, his client would also have demonstrated that the rates that were awarded could not be characterised as unreasonable, given the magnitude of the contract in his favour. He also argued that the award of tender at a lower rate at Mirzapur, which is currently being processed through his client, is not comparable with the tender that was awarded to his client for Bhawanipur I, because, *inter alia,* there was a huge difference between the volume of work awarded in the two contracts. He argued that it is idle to say that no prejudice has been caused, inasmuch as he has not been able to work the contract for one year, the contract period now being over, and that if the contract with his client is set aside, his client is debarred from bidding for a period of three years for any other contract with the Corporation. He further argued, in support of the impugned High Court judgment, that the action of termination by the Corporation was without an independent application of mind, and was purely at the instruction of the Special Secretary of the Government of U.P. dated 16.07.2019. He also fairly argued that his statement may be recorded that his client is not going to claim damages for the period of the agreement post cancellation, and that in fairness, the earnest money deposit and security deposit made by his client ought to be returned by the Corporation.

18. Having heard learned counsel for all the parties, one thing becomes clear. Despite the fact that the prayer in the Writ Petition filed by Respondent No.1 was set out in the very beginning of the impugned judgment, confining itself to the cancellation of the second tender, the impugned judgment went ahead and not only set aside such cancellation *vide* the letter dated 26.07.2019, but also went ahead and set aside the Managing Director's report dated 14.06.2019, and the Special Secretary's order of 16.07.2019, which required the taking of disciplinary action and recovery of financial loss from those who are responsible. Shri Rakesh

A Dwivedi also fairly conceded that his client had not asked for any relief *qua* the delinquent officers. This being the case, we set aside the impugned judgment insofar as it has quashed the Managing Director's report dated 14.06.2019, and the order of the Special Secretary dated 16.07.2019. Any consequential action that is to be taken pursuant to these orders must follow in accordance with law.

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19. Dr. Singhvi's preliminary objection as to Respondent No.1 having to approach a civil court, and not a writ court, for actions that pertain to breach of contract, need not detain us. In **ABL International Ltd. and Anr. v. Export Credit Guarantee Corporation of India Ltd. and Ors.** (2004) 3 SCC 553, this Court held that it was no longer *res integra* that a writ petition under Article 226 of the Constitution is maintainable at the instance of an aggrieved party to enforce a contractual obligation of the State or its instrumentality when the State acts in an arbitrary manner, as follows:

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> "**8.** As could be seen from the arguments addressed in this appeal and as also from the divergent views of the two courts below, one of the questions that falls for our consideration is whether a writ petition under Article 226 of the Constitution of India is maintainable to enforce a contractual obligation of the State or its instrumentality, by an aggrieved party.
>
> **9.** In our opinion this question is no more *res integra* and is settled by a large number of judicial pronouncements of this Court. In *K.N. Guruswamy* v. *State of Mysore* [(1955) 1 SCR 305] this Court held:
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> *"20. The next question is whether the appellant can complain of this by way of a writ. In our opinion, he could have done so in an ordinary case. The appellant is interested in these contracts and has a right under the laws of the State to receive the same treatment and be given the same chance as anybody else. ...*
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> *We would therefore in the ordinary course have given the appellant the writ he seeks. But, owing to the time which this matter has taken to reach us (a consequence for which the appellant is in no way to blame, for he has done all he could to have an early hearing), there is barely a fortnight of the contract left to go...A writ would therefore be ineffective and*

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as it is not our practice to issue meaningless writs we must dismiss this appeal and leave the appellant content with an enunciation of the law."

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* v. *State of Mysore* was followed subsequently by this Court in the case of *D.F.O.* v. *Ram Sanehi Singh* [(1971) 3 SCC 864] wherein this Court held:

"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 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."

11. In the case of *Gujarat State Financial Corpn.* v. *Lotus Hotels (P) Ltd.* [(1983) 3 SCC 379] this Court following an earlier judgment in *Ramana Dayaram Shetty* v. *International Airport Authority of India* [(1979) 3 SCC 489] held:

The instrumentality of the State which would be 'other authority' under Article 12 cannot commit breach of a solemn undertaking to the prejudice of the other party which acted on that undertaking or promise and put itself in a disadvantageous position. The appellant Corporation, created under the State Financial Corporations Act, falls within the expression of 'other authority' in Article 12 and if it backs out from such a promise, it cannot be said that the only remedy for the aggrieved party would be suing for damages for

breach and that it could not compel the Corporation for specific performance of the contract under Article 226.

12. The learned counsel appearing for the first respondent, however, submitted that this Court has taken a different view in the case of *LIC of India* v. *Escorts Ltd.* [(1986) 1 SCC 264] wherein this Court held: (SCC p. 344, para 102)

"If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the company, like any other shareholder."

13. We do not think this Court in the above case has, in any manner, departed from the view expressed in the earlier judgments in the case cited hereinabove. This Court in the case of *LIC of India* proceeded on the facts of that case and held that a relief by way of a writ petition may not ordinarily be an appropriate remedy. This judgment does not lay down that as a rule in matters of contract the court's jurisdiction under Article 226 of the Constitution is ousted. On the contrary, the use of the words "court may not ordinarily examine it unless the action has some public law character attached to it" itself indicates that in a given case, on the existence

of the required factual matrix a remedy under Article 226 of the Constitution will be available. The learned counsel then relied on another judgment of this Court in the case of *State of U.P.* v. *Bridge & Roof Co. (India) Ltd.* [(1996) 6 SCC 22] wherein this Court held:

Further, the contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration. The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy — in this case, provided in the contract itself — is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226.

14. This judgment again, in our opinion, does not help the first respondent in the argument advanced on its behalf that in contractual matters remedy under Article 226 of the Constitution does not lie. It is seen from the above extract that in that case because of an arbitration clause in the contract, the Court refused to invoke the remedy under Article 226 of the Constitution. We have specifically inquired from the parties to the present appeal before us and we have been told that there is no such arbitration clause in the contract in question. It is well known that if the parties to a dispute had agreed to settle their dispute by arbitration and if there is an agreement in that regard, the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration, unless of course both the parties to the dispute agree on another mode of dispute resolution. Since that is not the case in the instant appeal, the observations of this Court in the said case of *Bridge & Roof Co.* [(1996) 6 SCC 22] are of no assistance to the first respondent in its contention that in contractual matters, writ petition is not maintainable."

20. This principle has been consistently upheld by this Court in **Noble Resources v. State of Orissa and Anr.** (2006) 10 SCC 236 (at paragraph 15); **Food Corp. of India and Anr. v. SEIL Ltd. and Ors.** (2008) 3 SCC 440 (at paragraph 16); **Central Bank of India v. Devi**

Ispat Ltd. and Ors. (2010) 11 SCC 186 (at paragraph 28); and **Surya Constructions v. State of U.P. and Ors.** (2019) 16 SCC 794 (at paragraph 3).

21. The judgments cited by Dr. Singhvi do not in any manner detract from the aforesaid principle. **Radhakrishna Agarwal and Ors. v. State of Bihar and Ors.** (1977) 3 SCC 457 was a judgment in which a writ petition against the State Government's revision of the rates of royalty payable to it under a lease, and the cancellation of the said lease, was held to be governed by contract between the parties, no unreasonableness being made out by way of State action so as to attract the provisions of Article 14 of the Constitution of India. The broad proposition that all such questions are to be settled by civil courts, and not by writ petitions, has been expressly dissented from, as "much water has flown" since this judgment, which was delivered during the emergency when the fundamental rights of persons were suspended. Thus, in **Verigamto Naveen v. Govt. of A.P. and Ors.** (2001) 8 SCC 344, this Court stated:

> "**21.** On the question that the relief as sought for and granted by the High Court arises purely in the contractual field and, therefore, the High Court ought not to have exercised its power under Article 226 of the Constitution placed very heavy reliance on the decision of the Andhra Pradesh High Court in *Y.S. Raja Reddy* v. *A.P. Mining Corpn. Ltd.* [(1988) 2 An LT 722] and the decisions of this Court in *Har Shankar* v. *Dy. Excise & Taxation Commr.* [(1975) 1 SCC 737], *Radhakrishna Agarwal* v. *State of Bihar* [(1977) 3 SCC 457], *Ramlal & Sons* v. *State of Rajasthan* [(1976) 1 SCC 112], *Shiv Shankar Dal Mills* v. *State of Haryana* [(1980) 2 SCC 437], *Ramana Dayaram Shetty* v. *International Airport Authority of India* [(1979) 3 SCC 489] and *Basheshar Nath* v. *CIT* [AIR 1959 SC 149]. Though there is one set of cases rendered by this Court of the type arising in *Radhakrishna Agarwal case* [(1977) 3 SCC 457] 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]. 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)

22. In **Rishi Kiran Logistics v. Board of Trustees of Kandla Port and Ors.** (2015) 13 SCC 233, this Court held that a writ petition under Article 226, being a public law remedy, a "public law element" should be present on facts before Article 226 can be invoked – see paragraphs 37 and 38. The law on this subject has been laid down exhaustively in **Joshi Technologies International Inc. v. Union of India and Ors.** (2015) 7 SCC 728, this Court stating:

"**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:

A **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
B 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
C 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
D 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.

E **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,
F 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
G 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
H 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."

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 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 breachofthe *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.

24. The other judgments cited by Dr. Singhvi in his Written Submissions are distinguishable on facts, as all of them deal with either Public-Interest Litigations or tender applicants who have been turned

down, who approach the writ court under Article 226 and ask for stay orders against a proposed project, which may then be considerably delayed and escalate cost, this being contrary to public interest. It is in these situations that observations have been made that before entertaining such writ petitions and passing interim orders, the writ court must be very careful to weigh conflicting public interests, and should intervene only when there is an overwhelming public interest in entertaining the writ petition. This is what was held in **Raunaq International Ltd. v. I.V.R. Construction Ltd. and Ors.** (1999) 1 SCC 492 at paragraphs 11 to 13, 24 and 25. To similar effect is the judgment in **Jagdish Mandal v. State of Orissa and Ors.** (2007) 14 SCC 517 at paragraph 22.

25. Likewise, this Court's judgment in **Michigan Rubber (India) Ltd. v. State of Karnataka and Ors.** (2012) 8 SCC 216 again deals with a writ court not interfering in the award of a tender, having regard to the public interest, which is paramount – see paragraphs 23 and 24. To the same effect are the judgments of this Court in **Tata Cellular v. Union of India** (1994) 6 SCC 651 (at paragraphs 70 and 71), and **Rajasthan State Housing Board and Anr. v. G.S. Investments and Anr.** (2007) 1 SCC 477 (at paragraph 10).

26. Both the learned Senior Advocates locked horns on the *audi alteram partem* part of natural justice. Dr. Singhvi argued that it is not an inflexible tool in the hands of the Court, but must yield when no prejudice is caused, and where it would be an idle formality to set aside an order, as all the facts on record are admitted facts, to which nothing can be added or subtracted by Respondent No.1. Shri Dwivedi, on the other hand, argued that this is a case of a complete lack of natural justice, all orders having been passed behind the back of his client, as a result of which his client has been severely prejudiced.

27. Natural justice is at least as old as the first man created on earth – the biblical 'Adam'. J.R. Lucas in his book 'On Justice' states (at page 86):

> "Hence, when we are judging deeds, and may find that a man did wrong, there is a requirement of logic that we should allow the putative agent to correct misinterpretations or disavow the intention imputed to him or otherwise disown the action. God needed to ask Adam 'Hast thou eaten of the tree whereof I commanded thee that thou shouldest not eat?' Because it was essential that

A Adam should not be blamed or punished unless he had done exactly that deed. If the serpent had planted the evidence, or if he had beguiled Adam into eating it under the misapprehension that it came from another, non-forbidden tree, then Adam had not sinned and should not have been expelled from Eden. Only if the accused admits the charge, or, faced with the accusation, cannot explain his behaviour convincingly in any other way, are we logically entitled to conclude that he did indeed do it."

28. In some of the early judgments of this Court, the non-observance of natural justice was said to be prejudice in itself to the person affected, and proof of prejudice, independent of proof of denial of natural justice, was held to be unnecessary. The only exception to this rule is where, on "admitted or indisputable" facts only one conclusion is possible, and under the law only one penalty is permissible. In such cases, a Court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice, but because Courts do not issue writs which are "futile" – see **S.L. Kapoor v. Jagmohan and Ors.** (1980) 4 SCC 379 at paragraph 24. In **P.D. Agrawal v. State Bank of India and Ors.** (2006) 8 SCC 776, however, the Court observed that this statement of the law has undergone a "sea change", as follows:

> **"39.** Decision of this Court in *S.L. Kapoor v. Jagmohan* [(1980) 4 SCC 379] whereupon Mr Rao placed strong reliance to contend that non-observance of principle of natural justice itself causes prejudice or the same should not be read "as it causes difficulty of prejudice", cannot be said to be applicable in the instant case. The principles of natural justice, as noticed hereinbefore, have undergone a sea change. In view of the decisions of this Court in *State Bank of Patiala* v. *S.K. Sharma* [(1996) 3 SCC 364] and *Rajendra Singh* v. *State of M.P.* [(1996) 5 SCC 460] the principle of law is that some real prejudice must have been caused to the complainant. The Court has shifted from its earlier concept that even a small violation shall result in the order being rendered a nullity. To the principle/doctrine of *audi alteram partem*, a clear distinction has been laid down between the cases where there was no hearing at all and the cases where there was mere technical infringement of the principle. The Court applies the principles of natural justice having regard to the fact situation obtaining in each

case. It is not applied in a vacuum without reference to the relevant facts and circumstances of the case. It is no unruly horse. It cannot be put in a straitjacket formula." A

(emphasis supplied)

29. Equally, the prejudice that is caused, apart from natural justice itself being denied, cannot be said to be present in a case in which there are admitted facts. Thus, in **K.L. Tripathi v. State Bank of India and Ors.** (1984) 1 SCC 43, the Court held: B

"**29.** We are of the opinion that Mr Garg is right that the rules of natural justice as we have set out hereinbefore implied an opportunity to the delinquent officer to give evidence in respect of the charges or to deny the charges against him. Secondly, he submitted that even if the rules had no statutory force and even if the party had bound himself by the contract, as he had accepted the Staff Rule, there cannot be any contract with a Statutory Corporation which is violative of the principles of natural justice in matters of domestic enquiry involving termination of service of an employee. We are in agreement with the basic submission of Mr Garg in this respect, but we find that the relevant rules which we have set out hereinbefore have been complied with even if the rules are read that requirements of natural justice were implied in the said rules or even if such basic principles of natural justice were implied, there has been no violation of the principles of natural justice in respect of the order passed in this case. In respect of an order involving adverse or penal consequences against an officer or an employee of Statutory Corporations like the State Bank of India, there must be an investigation into the charges consistent with the requirements of the situation in accordance with the principles of natural justice as far as these were applicable to a particular situation. So whether a particular principle of natural justice has been violated or not has to be judged in the background of the nature of charges, the nature of the investigation conducted in the background of any statutory or relevant rules governing such enquiries. Here the infraction of the natural justice complained of was that he was not given an opportunity to rebut the materials gathered in his absence. As has been observed in *On Justice* by J.R. Lucas, the principles of natural justice basically, if we may say so, emanate from the actual phrase "*audi alteram* C D E F G H

A *partem"* which was first formulated by St. Augustine (*De Duabus Animabus*, XIV, 22 J.P. Migne, PL. 42, 110).

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32. The basic concept is fair play in action administrative, judicial or quasi-judicial. The concept of fair play in action must depend upon the particular lis, if there be any, between the parties. If the credibility of a person who has testified or given some information is in doubt, or if the version or the statement of the person who has testified, is, in dispute, right of cross-examination must inevitably form part of fair play in action but where there is no lis regarding the facts but certain explanation of the circumstances there is no requirement of cross-examination to be fulfilled to justify fair play in action. When on the question of facts there was no dispute, no real prejudice has been caused to a party aggrieved by an order, by absence of any formal opportunity of cross-examination per se does not invalidate or vitiate the decision arrived at fairly. This is more so when the party against whom an order has been passed does not dispute the facts and does not demand to test the veracity of the version or the credibility of the statement.

33. The party who does not want to controvert the veracity of the evidence from record or testimony gathered behind his back cannot expect to succeed in any subsequent demand that there was no opportunity of cross-examination specially when it was not asked for and there was no dispute about the veracity of the statements. Where there is no dispute as to the facts, or the weight to be attached on disputed facts but only an explanation of the acts, absence of opportunity to cross-examination does not create any prejudice in such cases."

(emphasis supplied)

30. Likewise, in **State of U.P. v. Neeraj Awasthi and Ors.** (2006) 1 SCC 667, this Court held that where, on undisputed facts, a retrenchment would be valid in law, the principles of natural justice would not be attracted, unless there is some stigma or punitive measure which would be attached, which would then cause prejudice, as follows:

"**47.** If the employees are workmen within the purview of the U.P. Industrial Disputes Act, they are protected thereunder. Rules

42 and 43 of the U.P. Industrial Disputes Rules provide that before effecting any retrenchment in terms of the provisions of Section 6-N of the U.P. Industrial Disputes Act, the employees concerned would be entitled to a notice of one month or in lieu thereof pay for one month and 15 days' wages for each completed year of service by way of compensation. If such a retrenchment is effected under the Industrial Disputes Act, the question of complying with the principles of natural justice would not arise. The principle of natural justice would be attracted only when the services of some persons are terminated by way of a punitive measure or thereby a stigma is attached.

48. In *Viveka Nand Sethi* v. *Chairman, J&K Bank Ltd.* [(2005) 5 SCC 337] it was held: (SCC p. 345, para 22)

"22. The principle of natural justice, it is trite, is no unruly horse. When facts are admitted, an enquiry would be an empty formality. Even the principle of estoppel will apply. [See Gurjeewan Garewal (Dr.) v. Dr. Sumitra Dash [(2004) 5 SCC 263].] The principles of natural justice are required to be complied with having regard to the fact situation obtaining therein. It cannot be put in a straitjacket formula. It cannot be applied in a vacuum without reference to the relevant facts and circumstances of the case."

49. The High Court, therefore, must be held to have erred in law in holding that the principles of natural justice were required to be complied with."

31. In the five-Judge Bench decision in **Managing Director, ECIL and Ors. v. B. Karnakumar and Ors.** (1993) 4 SCC 727, this Court, after discussing the constitutional requirement of a report being furnished under Article 311(2), held thus:

"**30.** Hence the incidental questions raised above may be answered as follows:

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[v] The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative

A to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-
B wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and
C sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a
D perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice.

E **31.** Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/Tribunal and give the employee an opportunity to show how his or her case was
F prejudiced because of the non-supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/
G Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the Courts/Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate

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or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment."

(emphasis supplied)

32. **B. Karunakar** (supra) was followed by this Court in **Haryana Financial Corporation and Anr. v. Kailash Chandra Ahuja** (2008) 9 SCC 31, as follows:

"**21.** From the ratio laid down in *B. Karunakar* [(1993) 4 SCC 727] it is explicitly clear that the doctrine of natural justice requires supply of a copy of the inquiry officer's report to the delinquent if such inquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment *non est* and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot *automatically* be set aside."

(emphasis in original)

33. What is important to note is that it is the Court or Tribunal which must determine whether or not prejudice has been caused, and not the authority on an *ex parte* appraisal of the facts. This has been well-explained in a later judgment, namely **Dharampal Satyapal Ltd. v. Dy. Comm. Of Central Excise, Gauhati and Ors.** (2015) 8 SCC 519, in which, after setting out a number of judgments, this Court concluded:

"**38.** But that is not the end of the matter. While the law on the principle of *audi alteram partem* has progressed in the manner mentioned above, at the same time, the courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in any straitjacket formula. It all depends upon the kind of functions performed and to the extent

A to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as a necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the courts have held that under certain circumstances principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on.

39. We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasising that the principles of natural justice cannot be applied in straitjacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of *procedural fairness*, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason—perhaps because the evidence against the individual is thought to be utterly compelling—it is felt that a fair hearing "*would make no difference*"—meaning that a hearing would not change the ultimate conclusion reached by the decision-maker—then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in *Malloch* v. *Aberdeen Corpn.* [(1971) 1 WLR 1578], who said that: (WLR p. 1595)

"... A breach of procedure ... cannot give [rise to] a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."

Relying on these comments, Brandon L.J. opined in *Cinnamond* v. *British Airports Authority* [(1980) 1 WLR 582] that: (WLR p. 593)

"... no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."

In such situations, fair procedures appear to serve no purpose since the "*right*" result can be secured without according such treatment to the individual.

40. In this behalf, we need to notice one other exception which has been carved out to the aforesaid principle by the courts. Even if it is found by the court that there is a violation of principles of natural justice, the courts have held that it may not be necessary to strike down the action and refer the matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is taken. Therefore, every violation of a facet of natural justice may not lead to the conclusion that the order passed is always null and void. The validity of the order has to be decided on the touchstone of "*prejudice*". The ultimate test is always the same viz. the test of prejudice or the test of fair hearing.

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42. So far so good. However, an important question posed by Mr Sorabjee is as to whether it is open to the authority, which has to take a decision, to dispense with the requirement of the principles of natural justice on the ground that affording such an opportunity will not make any difference? To put it otherwise, can the administrative authority dispense with the requirement of issuing notice by itself deciding that no prejudice will be caused to the person against whom the action is contemplated? Answer has to be in the negative. It is not permissible for the authority to jump over the compliance of the principles of natural justice on the ground that even if hearing had been provided it would have served no useful purpose. The opportunity of hearing will serve the purpose or not has to be considered at a later stage and such things cannot be presumed by the authority. This was so held by

A the English Court way back in the year 1943 in *General Medical Council* v. *Spackman* [1943 AC 627]. This Court also spoke in the same language in *Board of High School and Intermediate Education* v. *Chitra Srivastava* [(1970) 1 SCC 121], as is apparent from the following words: (SCC p. 123, para 7)

B *"7. The learned counsel for the appellant, Mr C.B. Agarwala, contends that the facts are not in dispute and it is further clear that no useful purpose would have been served if the Board had served a show-cause notice on the petitioner. He says that in view of these circumstances it was not necessary*

C *for the Board to have issued a show-cause notice. We are unable to accept this contention. Whether a duty arises in a particular case to issue a show-cause notice before inflicting a penalty does not depend on the authority's satisfaction that the person to be penalised has no defence but on the nature of the order proposed to be passed."*

D **43.** In view of the aforesaid enunciation of law, Mr Sorabjee may also be right in his submission that it was not open for the authority to dispense with the requirement of principles of natural justice on the presumption that no prejudice is going to be caused to the appellant since the judgment in *R.C. Tobacco* [(2005) 7 SCC 725] had closed all the windows for the appellant.

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44. At the same time, it cannot be denied that as far as courts are concerned, they are empowered to consider as to whether any purpose would be served in remanding the case keeping in mind whether any prejudice is caused to the person against whom the action is taken. This was so clarified in *ECIL* itself in the following words: (SCC p. 758, para 31)

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"31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the courts and tribunals should cause the copy

G *of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the court/tribunal and given the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the court/tribunal comes to the conclusion that the non-supply of the report would have*

H *made no difference to the ultimate findings and the punishment*

given, the court/tribunal should not interfere with the order of punishment. The court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the courts/tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the court/tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment."

45. Keeping in view the aforesaid principles in mind, even when we find that there is an infraction of principles of natural justice, we have to address a further question as to whether any purpose would be served in remitting the case to the authority to make fresh demand of amount recoverable, only after issuing notice to show cause to the appellant. In the facts of the present case, we find that such an exercise would be totally futile having regard to the law laid down by this Court in *R.C. Tobacco* [(2005) 7 SCC 725] ."

(emphasis supplied)

34. In **State Bank of Patiala and Ors. v. S.K. Sharma** (1996) 3 SCC 364, a Division Bench of this Court distinguished between "adequate opportunity" and "no opportunity at all", and held that the "prejudice" exception operates more especially in the latter case. This judgment also speaks of procedural and substantive provisions of law which embody the principles of natural justice which, when infracted, must lead to prejudice being caused to the litigant in order to afford him relief, as follows:

"**32.** Now, coming back to the illustration given by us in the preceding para, would setting aside the punishment and the entire enquiry on the ground of aforesaid violation of sub-clause (*iii*) be in the interests of justice *or* would it be its negation? In our respectful opinion, it would be the latter. Justice means justice between both the parties. The interests of justice equally demand

A that the guilty should be punished and that technicalities and irregularities which do not occasion failure of justice are not allowed to defeat the ends of justice. Principles of natural justice are but the means to achieve the ends of justice. They cannot be perverted to achieve the very opposite end. That would be a counter-productive exercise.

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33. We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):

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(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (*a*) the provision violated is of a

D substantive nature or (*b*) whether it is procedural in character.

(2) A substantive provision has *normally* to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

E (3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/ employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases

F falling under — "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he

G has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental

H character, whose violation is by itself proof of prejudice. The Court

may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/ government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can *also* be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4) (*a*) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(*b*) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of the said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it *or* that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in *B. Karunakar* [(1993) 4 SCC 727]. The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules/regulations/ statutory provisions and the only obligation is to observe the principles of natural justice — or, for that matter, wherever such

principles are held to be implied by the very nature and impact of the order/action — the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and no *adequate* opportunity, i.e., between "no notice"/"no hearing" and "no fair hearing". (*a*) In the case of former, the order passed would undoubtedly be invalid (one may call it 'void' or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule (audi alteram partem). (*b*) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the standpoint of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/ employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. [It is made clear that this principle (No. 5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.]

(6) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of State or public interest may call for a curtailing of the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision."

35. In **M.C. Mehta v. Union of India and Ors.** (1999) 6 SCC 237, the expression "admitted and indisputable facts" laid down in **Jagmohan** (supra), as also the interesting divergence of legal opinion on whether it is necessary to show "slight proof" or "real likelihood" of prejudice, or the fact that it is an "open and shut case", were all discussed in great detail as follows:

"**16.** Courts are not infrequently faced with a dilemma between breach of the rules of natural justice and the Court's discretion to refuse relief even though the rules of natural justice have been breached, on the ground that no real prejudice is caused to the affected party.

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22. Before we go into the final aspects of this contention, we would like to state that cases relating to breach of natural justice do also occur where all facts are not admitted or are not all beyond dispute. In the context of those cases there is a considerable case-law and literature as to whether relief can be refused even if the court thinks that the case of the applicant is not one of "real substance" or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is followed. See *Malloch* v. *Aberdeen Corpn*. [(1971) 1 WLR 1578] (per Lord Reid and Lord Wilberforce), *Glynn* v. *Keele University* [(1971) 1 WLR 487], *Cinnamond* v. *British Airports Authority* [(1980) 1 WLR 582] and other cases where such a view has been held. The latest addition to this view is *R.* v. *Ealing Magistrates' court, ex p Fannaran* [(1996) 8 Admn LR 351, 358] (Admn LR at p. 358) (see de Smith, Suppl. p. 89) (1998) where Straughton, L.J. held that there must be "*demonstrable beyond doubt*" that the result would have been different. Lord Woolf in *Lloyd* v. *McMahon* [(1987) 2 WLR 821, 862] (WLR at p. 862) has also not disfavoured refusal of discretion in certain cases of breach of natural justice. The New Zealand Court in *McCarthy* v. *Grant* [1959 NZLR 1014] however goes halfway when it says that (as in the case of bias), it is sufficient for the applicant to show that there is "real likelihood — not certainty — of prejudice". On the other hand, *Garner Administrative Law* (8th Edn., 1996, pp. 271-72) says that slight proof that the result would have been different is sufficient. On the other side of the argument, we have apart from *Ridge* v. *Baldwin* [1964 AC 40], Megarry, J. in *John* v. *Rees* [(1969) 2 WLR 1294] stating that there are always "open and shut cases" and no absolute rule of proof of prejudice can be laid down. Merits are not for the court but for the authority to consider. Ackner, J. has said that the "useless formality theory" is a dangerous one and, however

A inconvenient, natural justice must be followed. His Lordship observed that "convenience and justice are often not on speaking terms". More recently Lord Bingham has deprecated the "useless formality" theory in *R.* v. *Chief Constable of the Thames Valley Police Forces, ex p Cotton* [1990 IRLR 344] by giving six reasons. (See also his article "Should Public Law Remedies be Discretionary?" 1991 PL, p. 64.) A detailed and emphatic criticism of the "useless formality theory" has been made much earlier in "Natural Justice, Substance or Shadow" by Prof. D.H. Clark of Canada (see 1975 PL, pp. 27-63) contending that *Malloch* [(1971) 1 WLR 1578] and *Glynn* [(1971) 1 WLR 487] were wrongly decided. Foulkes (*Administrative Law*, 8th Edn., 1996, p. 323), Craig (*Administrative Law*, 3rd Edn., p. 596) and others say that the court cannot prejudge what is to be decided by the decision-making authority de Smith (5th Edn., 1994, paras 10.031 to 10.036) says courts have not yet committed themselves to any one view though discretion is always with the court. Wade (*Administrative Law*, 5th Edn., 1994, pp. 526-30) says that while futile writs may not be issued, a distinction has to be made according to the nature of the decision. Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a "real likelihood" of success or if he is entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where the facts are *not* all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their "*discretion*", refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. We may also state that there is yet another line of cases as in *State Bank of Patiala* v. *S.K. Sharma* [(1996) 3 SCC 364], *Rajendra Singh* v. *State of M.P.* [(1996) 5 SCC 460] that even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it cannot be waived.

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23. We do not propose to express any opinion on the correctness or otherwise of the "useless formality" theory and leave the matter for decision in an appropriate case, inasmuch as, in the case before us, "*admitted and indisputable*" facts show that grant of a writ will be in vain as pointed out by Chinnappa Reddy, J." A

36. In **Aligarh Muslim University and Ors. v. Mansoor Ali Khan** (2000) 7 SCC 529,the aforesaid authorities were relied upon, and the answer given was that there is no absolute rule, and prejudice must be shown depending on the facts of each case, as follows: B

"**24.** The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In *K.L. Tripathi* v. *State Bank of India* [(1984) 1 SCC 43] Sabyasachi Mukharji, J. (as he then was) also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed, quoting *Wade's Administrative Law* (5th Edn., pp. 472-75), as follows: (SCC p. 58, para 31) C D

"[I]t is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. ... There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth." E

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in *State Bank of Patiala* v. *S.K. Sharma* [(1996) 3 SCC 364]. In that case, the principle of "prejudice" has been further elaborated. The same principle has been reiterated again in *Rajendra Singh* v. *State of M.P.* [(1996) 5 SCC 460] F G

25. The "useless formality" theory, it must be noted, is an exception. Apart from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above, there has been considerable debate on the application of that theory in other cases. H

A The divergent views expressed in regard to this theory have been elaborately considered by this Court in *M.C. Mehta* referred to above. This Court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Straughton, L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, de Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the court will be prejudging the issue. Some others have said that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via media rules. We do not think it necessary in this case to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case."

37. In **Union of India and Ors. v. Alok Kumar** (2010) 5 SCC 349, this Court, after eschewing a hyper-technical approach, held that prejudice must not merely be the apprehension of a litigant, but should be a definite inference of the likelihood of prejudice flowing from the refusal to follow natural justice, as follows:

*"***83.** Earlier, in some of the cases, this Court had taken the view that breach of principles of natural justice was in itself a prejudice and no other "de facto" prejudice needs to be proved. In regard to statutory rules, the prominent view was that the violation of mandatory statutory rules would tantamount to prejudice but where the rule is merely directory the element of de facto prejudice needs to be pleaded and shown. With the development of law, rigidity in these rules is somewhat relaxed. The instance of de facto prejudice has been accepted as an essential feature where there is violation of the non-mandatory rules or violation of natural justice as it is understood in its common parlance. Taking an instance, in a departmental enquiry where the department relies upon a large number of documents majority of which are furnished and an opportunity is granted to the delinquent officer to defend himself except that some copies of formal documents had not been furnished to the delinquent. In that event the onus is upon the employee to show that non-furnishing of these formal documents have resulted in de facto prejudice and he has been put to a disadvantage as a result thereof.

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87. In *ECIL* v. *B. Karunakar* [(1993) 4 SCC 727] this Court noticed the existing law and said that the theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are neither incantations to be invoked nor rites to be performed on all and sundry occasions. Whether, in fact, prejudice has been caused to the employee or not on account of denial of report to him, has to be considered on the facts and circumstances of each case. The Court has clarified even the stage to which the departmental proceedings ought to be reverted in the event the order of punishment is set aside for these reasons.

88. It will be useful to refer to the judgment of this Court in *Haryana Financial Corpn.* v. *Kailash Chandra Ahuja* [(2008) 9 SCC 31] at pp. 38-39 where the Court held as under: (SCC para 21)

"21. From the ratio laid down in B. Karunakar it is explicitly clear that the doctrine of natural justice requires supply of a copy of the enquiry officer's report to the delinquent if such enquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the enquiry officer is in breach of natural justice. But it is equally clear that failure to supply a report of the enquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside."

89. The well-established canons controlling the field of bias in service jurisprudence can reasonably be extended to the element of prejudice as well in such matters. Prejudice de facto should not be based on a mere apprehension or even on a reasonable suspicion. It is important that the element of prejudice should exist as a matter of fact or there should be such definite inference of likelihood of prejudice flowing from such default which relates to

A statutory violations. It will not be permissible to set aside the departmental enquiries in any of these classes merely on the basis of apprehended prejudice."

38. Under the broad rubric of the Court not passing futile orders as the case is based on "admitted" facts, being admitted by reason of B estoppel, acquiescence, non-challenge or non-denial, the following judgments of this Court are all illustrations of a breach of the *audi alteram partem* rule being established on the facts of the case, but with no prejudice caused to the person alleging breach of natural justice, as the case was one on admitted facts:

C **(i) Punjab and Sind Bank and Ors. v. Sakattar Singh** (2001) 1 SCC 214 (see paragraphs 1, 4 and 5);

(ii) Karnataka SRTC and Anr. v. S.G. Kotturappa and Anr. (2005) 3 SCC 409 (see paragraph 24);

(iii) Viveka Nand Sethi v. Chairman, J&K Bank Ltd. and Ors. (2005) 5 SCC 337 (see paragraphs 21, 22 and 26);

D **(iv) Mohd. Sartaj and Anr. v. State of U.P. and Ors.** (2006) 2 SCC 315 (see paragraph 18);

(v) Punjab National Bank and Ors. v.Manjeet Singh and Anr. (2006) 8 SCC 647 (see paragraphs 17 and 19);

(vi) Ashok Kumar Sonkar v. Union of India and Ors. (2007) E 4 SCC 54 (see paragraphs 26 to 32);

(vii) State of Manipur and Ors. v. Y. Token Singh and Ors. (2007) 5 SCC 65 (see paragraphs 21 and 22);

(viii) Secretary, A.P. Social Welfare Residential Educational Institutions v. Pindiga Sridhar and Ors. (2007) 13 SCC F 352 (see paragraph 7)

(ix) Peethani Suryanarayana and Anr. v. Repaka Venkata Ramana Kishore and Ors. (2009) 11 SCC 308 (see paragraph 18);

(x) Municipal Committee, Hoshiapur v.Punjab State Electricity Board and Ors. (2010) 13 SCC 216 (see G paragraphs 31 to 36, and paragraphs 44 and 45);

(xi) Union of India and Anr. v. Raghuwar Pal Singh (2018) 15 SCC 463 (see paragraph 20).

39. An analysis of the aforesaid judgments thus reveals:

(1) Natural justice is a flexible tool in the hands of the judiciary to H reach out in fit cases to remedy injustice. The breach of the *audi*

alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.

(2) Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction *per se* does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.

(3) No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.

(4) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.

(5) The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice.

40. Judged by the touchstone of these tests, it is clear that Respondent No.1 has been completely in the dark so far as the cancellation of the award of tender in his favour is concerned, the *audi alteram partem* rule having been breached in its entirety. As has been correctly argued by Shri Rakesh Dwivedi, prejudice has indeed been caused to his client, not only from the fact that one year of the contract period has been taken away, but also that, if the impugned High Court judgment is to be set aside today, his client will be debarred from bidding for any of the Corporation's tenders for a period of three years. Undoubtedly, *prima facie*, the rates at which contracts have been awarded pursuant to the tender dated 01.06.2018 are way above the rates that were awarded of the same division, and for exactly the same amount of work awarded *vide* the earlier tender advertisement dated 01.04.2018. Shri Dwivedi's argument that in the neighbouring regions

A the rates tendered were also high, and nothing has yet been done to nullify these tenders and the financial loss caused, does carry some weight. That a huge financial loss to the Corporation has also taken place is something for the Corporation to probe, and take remedial action against the persons responsible.

B 41. We, therefore, uphold the impugned judgment of the High Court on the ground that natural justice has indeed been breached in the facts of the present case, not being a case of admitted facts leading to the grant of a futile writ, and that prejudice has indeed been caused to Respondent No.1. In view of this finding, there is no need to examine the other contentions raised by the parties before us.

C 42. We reiterate the submission of Shri Dwivedi that as his client is working for the Corporation in another subsequent tender, he is not going to claim damages for the lost period post cancellation of the tender. This being the case, and other things being equal, the earnest money deposit and security deposit made by his client is ordered to be returned by the Corporation within a period of eight weeks from today. Shri D Dwivedi's client may also request the Corporation to pay any amount that remained unpaid for work actually done, which the Corporation will, after a hearing, either allow or reject for reasons to be stated.

43. The appeals arising out of SLP (C) 5136 of 2020 and SLP (C) 7351 of 2020 are thus partially allowed, and the impugned judgment of E the High Court of Judicature at Allahabad dated 11.12.2019 is set aside only to the extent indicated by us above.

44. Insofar as the appeal arising out of SLP (C) No. 7364 of 2020 is concerned, the facts therein are distinct from the other two connected appeals before us only to the extent that Respondent No.1 therein, M/s Dharam Raj Singh, was the successful bidder for the Tendu (Sonbhadra) F region, which award of tender was also cancelled by the Corporation's order dated 26.07.2019. The judgment impugned in this appeal, dated 07.01.2020 of the High Court of Judicature of Allahabad (Lucknow Bench), allowed M/s Dharam Raj Singh's writ petition challenging the cancellation order, stating that it was to be governed by the judgment of G the High Court of Judicature at Allahabad dated 11.12.2019. As a result, our judgment in the two connected appeals, and all consequential reliefs granted, will apply on all fours to this appeal also.

45. With these observations, these appeals are disposed of.

Divya Pandey Appeals disposed.