2012 eGLR_HC 10006545

Before the Hon'ble MS HARSHA DEVANI, JUSTICE

ABG KANDLA CONTAINER TERMINAL LTD AND 1 - PETITIONER(S) Vs. UNION OF INDIA AND 1 - RESPONDENT(S)

SPECIAL CIVIL APPLICATION No: 17536 of 2011 , Decided On: 30/10/2012

Mihir Thakore, Nanavati Associates, Indira Jaising, P.S.Champaneri, Dhaval D.Vyas

MS. HARSHA DEVANI 1. By this writ petition under Article 226 of the Constitution of India, the petitioners seek the following substantive reliefs:

"[a] Your Lordships may be pleased to hold and declare that the 1st respondent is bound to act in a manner which is fair, reasonable and transparent in discharge of its functions, obligations and duties under the provisions of MPT Act and the PPP Policy, inter alia, in relation to the provisions and maintenance of the committed draught in the navigation channel at Kandla Port and that the impugned actions / inaction of the respondents in relation to the same are arbitrary, unreasonable, discriminatory and violative of petitioners rights/liberties under Articles 14, 19(1)(g) and 21 of the Constitution of India;

[b] Your Lordships may be pleased to hold and declare that the 1st respondent is bound to intervene and issue appropriate directions to the 2nd respondent to ensure that it carries out the required dredging to provide and maintain the committed draught of at least 12.5 metres in the navigation channel at Kandla Port as well as address all the grievances raised by the petitioners, particularly those highlighted in the 1st petitioners letter dated 27th September, 2011, in accordance with law;

[c] Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India directing the 1st respondent to intervene and issue appropriate directions to the 2nd respondent to ensure that it carries out the required dredging to provide and maintain the committed draught of at least 12.5 metres in the navigation channel at Kandla Port as well as address all the grievances raised by the petitioners, particularly those highlighted in the 1st petitioners letter dated 27th September, 2011, in accordance with law;

[d] Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India directing the 2nd respondent to carry out the required dredging to provide and maintain the committed draught of at least 12.5 metres in the navigation channel at Kandla Port as well as address all the grievances raised by the petitioners, particularly those highlighted in the 1st petitioners letter dated 27th September, 2011, in accordance with law;

[e] Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India restraining the 2nd respondent from collecting royalty from the 1st petitioner in terms of the agreement till such time as it does not provide and maintain the committed draught of at least 12.5 metres in the navigation channel at Kandla Port as well as address all the grievances raised by the petitioners, particularly those highlighted in the 1st petitioners letter dated 27th September, 2011, in accordance with law;"

2. The facts of the case as averred in the petition are that in keeping with the general policy of liberalization and globalization of the economy followed by the first respondent-Union of India, the port sector was opened to private sector participation. Accordingly, the first respondent framed "Guidelines for Private Sector Participation in Major Ports" dated 26th October, 1996 as modified and supplemented by the Guidelines for Private Sector Participation in Major Ports dated 1st June, 1998, 28th March and 17th July, 2001 (hereinafter referred to as the "PPP Policy"). Pursuant to the aforesaid initiative of the first respondent, the second respondent floated a "Global Notice Inviting Tender" on 22nd January, 2004 inviting tenders for a project for development, operation, management and maintenance of Berths 11 and 12 in Kandla Port as container terminal on Build, Operate and Transfer (BOT) basis (hereinafter referred to as "the Project") for a period of thirty years.

2.1 On 3.2.2004,, the second respondent issued a "Request for Qualification" document (hereinafter referred to as "the RFQ"), inter alia, to M/s ABG Infralogistics Ltd. (then called M/s ABG Infralogistics Limited) (hereinafter referred to as "the Bidder"), wherein it was, inter alia, stated that:

(i) The Project was being undertaken pursuant to the PPP Policy of the first respondent, and

(ii) The second respondent planned to deepen and widen the navigation channel and increase the draught alongside berths to 12.5 metres in order to attract main line (Panamax size) vessels directly to destination so as to save the freight cost, become more competitive and to save foreign exchange.

2.2 On the basis of the representations made by the second respondent in the RFQ, the Bidder submitted an application in terms thereof. Subsequently, the second respondent informed the bidder that its application had been found acceptable and issued a "Request for Proposal document" (hereinafter referred to as "the RFP") on 16.4.2004. At a pre-bid meeting held on 11.11.2004, the second respondent, inter alia, clarified as under:

(i) Kandla Port was facing stiff competition from neighbouring minor ports like Mundhra Port and Pipavav Port and, therefore, adherence to time schedule shall be the essence of the Project;

(ii)The second respondent was committed to carry out dredging and provide the draught of 12.5 metres specified in the RFQ and RFP;

(iii)The maintenance of the required draught in the navigation channel at Kandla Port was not only for private terminal operators but was for the entire Kandla Port and the second respondent was, therefore, committed to the same; and

(iv)The provision of infrastructure facilities by the second respondent would enable private terminal operators to meet the minimum guarantee throughput requirements.

2.3 In addition to the aforesaid clarifications made and recorded in the pre-bid meeting held on 11.11.2004, by a letter dated 7.2.2005, the second respondent issued amendments to RFP wherein, in response to a query regarding reduction of MGT, the second respondent, inter alia, clarified/stated that the facilities and infrastructure being offered by the second respondent would accelerate the growth of traffic. On 8.2.2005, the second respondent addressed a letter stating that the bids submitted by the bidders should contain an undertaking that their bid was unconditional and in conformity with the documents/clarifications/ statements issued by the second respondent. According to the petitioners, it was clear and apparent to the Bidder as well as other qualified bidders that all the clarifications / statements / representations and commitments made in the RFQ, the RFP as well as in the pre-bid meetings would form part of the agreement that would ultimately be entered into between the 2nd respondent and the successful bidder for implementing the Project.

2.4 The bidder submitted its bid for the project quoting a revenue share/royalty of 48.997% which was the highest revenue share/royalty offer, and accordingly, by a Letter of Intent of Award dated 14.4.2006, it was declared the successful bidder for the Project. Pursuant thereto, the first petitioner was incorporated as a special purpose vehicle and an agreement was executed between the second respondent and the first petitioner for implementing the Project.

2.5 It is the case of the petitioners that under Article 4.14.2 of the Agreement, the respondent is required to maintain a depth sufficient for navigation of container vessels requiring 12.5 metres draught with tidal advantage in the navigation channel throughout the Licence Period (as defined in the agreement). In terms of the Letter of Intent, the first petitioner paid an upfront fee of Rs.10 crores to the second respondent and thereafter also, invested substantial amounts in the Project aggregating to around Rs.240 crores. In addition to the aforesaid, the first petitioner was paying royalty, licence fees, etc. to the second respondent in terms of the agreement and the aggregate amount of such royalty paid till date is in excess of Rs.145 crores.

2.6 The main grievance voiced in the petition is that the second respondent has failed and neglected to provide and maintain the draught of 12.5 metres in the navigation channel. The petitioners have annexed various circulars periodically issued by the Marine Department of the second respondent which indicate the permissible draught for ships and tankers at Kandla Port, which, according to the petitioners, establish that the second respondent has failed and defaulted in providing and/or maintaining the committed draught of 12.5 metres in the navigation channel. It is the case of the petitioners that due to failure on the part of the second respondent to provide and maintain the committed draught of 12.5 metres in the navigation channel, main line vessels are unable to call at any of the berths at Kandla Port, thereby, drastically affecting the container traffic at Kandla Port and completely derailing the intent of the Project, which was to change the very profile of Kandla Port from a feeder port to a main line port. This has also undermined the very basis on which the Bidder had quoted the revenue share/royalty that it would pay to the second respondent in the event its bid was successful. The grievance of the petitioners is that the absence of main line vessels since commencement of operations at berth Nos.11 and 12, has resulted in far lesser throughput than what was envisaged by the first petitioner on the basis of the second respondents clarifications/statements/ representations/ commitments. Consequently, the first petitioner has incurred losses aggregating to around 72 crores in the Project during the period upto 31.3.2011 and continues to incur losses of around Rs.2 crores per month for every month during which the committed draught of 12.5 metres in the navigation channel at Kandla Port is not provided by the second respondent. According to the petitioners, unless the respondents perform their statutory duties to ensure that the committed draught is maintained in the navigation channel to enable the main line vessels to berth at Kandla Port, the Project will come to a standstill as the first petitioner and/or its shareholders do not have the resources to continue incurring such huge losses indefinitely.

2.7 It is further the case of the petitioners that they addressed several letters to the second respondent bringing the aforesaid situation to its notice and calling upon it to carry out dredging alongside berths No.11 and 12 as well as in the navigation channel at Kandla Port. The said issue was also raised in the meeting held with the second respondent on 5.8.2008. Consequently, further letters were also addressed to the second respondent raising the issue of inadequate draught in the navigation channel at Kandla Port. It is the case of the petitioners that instead of remedying the aforesaid situation, the second respondent has further compounded the problems being faced by the Project by unilaterally and completely suspending night navigation at Kandla Port between 16.12.2008 and 14.8.2009. The issue of inadequate draught in the navigation channel at Kandla Port as well as the issue of suspension/restriction of night navigation was discussed at a meeting with the first respondent held on 3.3.2010. It appears that ultimately, the petitioners addressed a letter dated 27.9.2011 to the first respondent

seeking its intervention to resolve the issue of inadequate draught in the navigation channel at Kandla Port. However, no response was received to the aforesaid letter. Apprehending that the low throughput in the Project will adversely affect the standing of the Bidder and create hurdles for its participation in other PPP projects, the petitioners have filed the present petition seeking the reliefs noted hereinabove.

3. In response to the petition, the second respondent has filed an affidavit in-reply denying the averments made in the petition. It is averred that the petition has been filed purely with mala fide and dishonest intentions to cover up the repeated breach committed by the petitioners of Licence Agreement dated 23.6.2006 and to avoid paying the second respondent the various amounts payable under the said agreement. It is categorically averred in the affidavit that the assured draught of 12.5 metres as per the licence agreement has been achieved and declared for the navigational channel as well as the berths No.11 and 12 and that the draught of 12.5 metres has been provided since the last two and half years. However, the petitioners have not made use of the higher draughts permissible at Kandla Port and continue to bring small low draught vessels to the terminal. It is the case of the second respondent that it has continuously carried out the dredging towards maintenance of the draught in the navigational channel despite various severe special natural conditions in the Port. According to the second respondent it has committed and declared at the COD-12 a draught of 12.5 metres with tidal advantage; however, it has been clarified that on certain days, when the height of the tide falls below the average, the above draught cannot be maintained. However, at no time, any of the vessels calling at the petitioners terminal, has faced constraints due to draught. Also, the complaint of suspension of night pilotage has been redressed by restoring night pilotage with effect from 15.8.2009. It is alleged that the present petition is an attempt to camouflage the petitioners failure to attract business by trying to find fault with the respondents. It is also the case of the second respondent that the Kandla Port regularly handles vessels up to 12 metres at its own berths and almost every day, there are vessels of 11.5 to 12 metres being brought in or sailed out of the Port. If the Port had not maintained the channel draughts, this would never have been possible. According to the second respondent, the petitioner has at no time made application for bringing in a vessel of the maximum permissible draught and none of the vessels programmed by the petitioners have ever been refused entry or exit due to draught constraints. All these years, vessels of 12 metres draught have been handled with regular frequency and even vessels with 12.5 metres draught have been brought in without any problems.

3.1 It is further averred that under the Licence Agreement, the petitioner had an obligation to handle a minimum container traffic of 1,72,000 TEUs (Twenty Equivalent Units) within one year, which was to go up to 1,86,000 TEUs p.a. then to 2,00,000 TEUs and so on. For the present year, the minimum guaranteed throughput (MGT) to be achieved is 2,43,000 TEUs, whereas the petitioner under the licence agreement, has to pay the differential amount of royalty which has not been paid to the second respondent. The amount payable by the petitioners in respect of the shortfall in MGT amounts to Rs.19.12 crores excluding interest for period 1 to period 3. It is
alleged that the petitioner is yet to pay part of the licence fee amounting to Rs.1.04 crore for usage of 129.9 metres length at berth No.12. That there are various items in respect of which the petitioners have not made payment to the second respondent and it is with the object of avoiding payment of these amounts and to fulfill its obligation under the Licence Agreement that the petitioners have filed the present petition.

4. In response to the averments made in the affidavit-in- reply filed by the respondents, the petitioners have filed an affidavit-in-rejoinder controverting such averments.

5. Mr. Mihir Thakore, Senior Advocate, learned counsel for the petitioners submitted that from the licence agreement as well as the RFQ, it is apparent that the intent of the Project was to change the very profile of Kandla Port from feeder port to mainline port for which the second respondent would provide the necessary infrastructure facilities for implementation of the Project, paramount being the deepening and widening of the navigational channel at Kandla Port to provide 12.5 metres draught. Thus, the very object of inviting the tender was to boost the container traffic at the port. However, despite assurance having been given by the second respondent that a draught of 12.5 metres would be provided and maintained both at the navigational channel as well as berths No.11 and 12, it has failed to provide the same. Consequently, larger vessels having more than 12.5 metres depth are not in a position to come to Kandla Port.

5.1 Attention was invited to the "Guidelines to be followed by Major Ports Trusts for Private Sector Participation in the Major Ports" framed by the Government of India, to submit that private sector participation would result in reducing the gestation period for setting up new facilities and help bring in the latest technology and improved management techniques. One of the areas of privatization was construction and operation of container terminals. It was now, under the policy that open tenders would be invited for private sector participation on B.O.T. basis. Thus, the entire project has been set up pursuant to the aforesaid policy decision taken by the Union of India. Referring to the Global Notice inviting applications for development of Container Terminal on BOT basis at Kandla Port, it was pointed out that the container terminal was proposed to be developed on berths No.11 and 12 having a combined quay length of 545 metres and a depth of 12.5 metres alongside the berth. Reference was also made to the qualifications issued by the second respondent in respect of RFQ documents and Draft Licence Agreement and particularly, to items No.12, 36, 38 and 41 thereof, which read thus:

Sr. No. Clause Confirmation / Clarification required Final clarification of KPT

12. Clause No.iii.2

36 Clause 4.11.1. (a).iii

Please confirm as to when the Navigational Channel has been deepened to 12.5 mtrs. to attract Panamax size vessels.

This sub-clause shall be amended as under :

"If draft of a container vessel is more than the declared depth of water of 14.6 mtr. at berth No.11, then such vessel can be berthed by the Licensor at any other berth having required draft.

Currently under progress. KPTs obligation, however, is from COD-11

Change is made in this sub- clause as under :

In case availability of channel and approaches of KPT for reception of 13.5 mtrs., draft vessels, the licensee will be allowed to undertake dredging "if the draft of the vessel is 13.5 mtrs., the same can be berthed by the Licensee at Container Terminal. However, declared draft of the berth will be limited to 12.5 mtrs.". During the period starting from COD-11 and ending COD-12, if the draft of the container vessel is more than declared permissible vessel draft at the berth, then such vessel can be berthed by the Licensor at any other berth having required draft.

38 Clause No.4.11.1 (b).ii

41 Clause No. 4.12.2.i

This sub clause shall be amended as under:

"If the draft of a container vessel is more than the declared depth of water of 14.6 mtr. at berth No.11 and 12, then such vessel can be berthed by the Licensor at any other berth having required draft."

The sub clause shall be amended as under:

"scheduling the entry, berthing and sailing of the vessels, pilotage and stowage on a non-discriminatory basis both during day and night, subject to priority berthing norms set out in clause 4.11.1 and the sailing schedule as determined by the Deputy Conservator of the Port depending on individual ship characteristics and tidal conditions."

Clause 4.11.1 Preferential & Priority Berthing.

The committed draft of Berth Nos.11 and 12 will be 12.5 m.

The clause is amended to read as suggested:

"scheduling the entry, berthing and sailing of the vessels, pilotage and stowage on a non-discriminatory basis both during day and night, subject to priority berthing norms set out in clause 4.11.1 and the sailing schedule as determined by the Deputy Conservator of the Port depending on individual ship characteristics and tidal conditions."

5.2 Referring to Statement "B" annexed thereto wherein final clarifications have been issued by the KPT in response to queries raised during pre-proposal meeting and more particularly item No.5 thereof, it was pointed out that the obligation of permissible draft at entrance channel as well as at berth have been specifically given in the Draft License Agreement. Attention was also drawn to item No.27 of Statement "C" whereby clarification had been sought for in the context of clause 4.12.2.vi as to whether fee for the licensed premises includes dredging cost, in response to which KPT had clarified that dredging is one of the obligations of the licensor. It was submitted that despite the fact that it was the obligation of the second respondent to maintain a depth of 12.5 metres, insofar as the navigational channel is concerned, the depth of 12.5 metres has not been achieved even on a single day. Reference was made to the various circulars issued by the second respondent regarding the permissible draught for ships and tankers at Kandla Port to submit that at no point of time, was the draught of 12.5 metres provided and maintained in the navigation channel.

5.3 The attention of the court was also invited to the contents of the licence agreement and more particularly, to the following clauses thereof:

"[4.14] - Obligation of the Licensor:

In addition to any of its other obligations in this Agreement, the Licensor shall:

[4.14.2] Marine and Port Services -

The Licensor shall provide / cause to be provided, at its own cost and expense, to the Licensee, the following services:

[iii] starting from COD-12 and throughout the License Period thereafter, maintenance of Committed Depth, in respect of berth No.11, berth No.12 and the navigation channel;

[iv] such capital or maintenance dredging operations, as may be required to ensure availability of Committed Depths in respect of the navigation channel and alongside the berths, provided that such capital or maintenance dredging shall be undertaken by the Licensor, as per Good Industry Practice, causing minimum inconvenience to the operations of the Container Terminal;

[v] If the depth alongside the berths or in the navigation channel is found by the Licensee to be lower than the corresponding Committed Depth, for any reason whatsoever, the Licensor shall promptly, on receipt of a written notice from Licensee in this regard, initiate the process of carrying out such amount and type of dredging as may be necessary to achieve and maintain the Committed Depth. Provided that, when such dredging is to be carried out alongside any of the berths, the Licensee shall make such berth available to Licensor for such time period as may be commensurate with the amount and type of dredging required in accordance with Good Industry Practices. Any dispute between the Licensor and the Licensee, regarding the actual depth, amount and type of dredging required pursuant hereto and the time period for which the Licensee may have to make such berth available to the Licensor, shall be referred to the Independent Engineer for resolution, failing which, such dispute shall be resolved in accordance with the Dispute Resolution Procedure;

[4.14.5] Breach of Licensors Obligation:

In the event of the Licensors failure to provide the marine and port services in accordance with Clause 4.14.2, the Licensee shall, without prejudice to any other right or remedy available to it, be compensated by the Licensor for direct loss, if any, suffered by the Licensee on account of such failure / breach, provided such failure is directly attributable to any neglect and/or failure and/or an Event of Default, on the part of the Licensor. Any dispute between the Parties, regarding the occurrence of such failure on the part of the Licensor and/or the extent and amount of direct loss suffered by the Licensee as a consequence thereof, shall be resolved in accordance with the Dispute Resolution Procedure.

[9.2.4] Additional Dredging:

If depth of the navigation channel at any time during the License Period is adequate for navigation with tidal advantage, of vessels requiring more than 12.5 metres of draft, the Licensor may undertake additional dredging, so as to enable berthing of such vessels alongside berths No.11 and 12 also. Notwithstanding anything contained herein, Licensors obligation, in respect of the

depths to be provided by it, alongside berths no.11, 12 and the navigation channel shall always be limited to the Committed Depths.

5.4 The learned counsel next submitted that in order to ensure implementation of the policy of the Government, section 42 of the Major Port Trusts Act, 1963 (hereinafter referred to as "the Act") came to be amended in the year 2000 by introducing clause (f) under sub-section (1) thereof empowering a Board to undertake the service of developing and providing, subject to the previous approval of the Central Government, infrastructure facilities for ports. Vide sub-section (3A) thereof a Board was empowered with the previous approval of the Central Government to enter into any agreement or other arrangement, (whether by way of partnership, joint venture or in any other manner) with any body corporate or any other person to perform any of the services and functions assigned to the Board under the Act on such terms and conditions as may be agreed upon. It was contended that such approval of the first respondent in the matter of entering into such agreement is coupled with duties and obligations of the first respondent to ensure due performance of all statutory and other obligations by the second respondent, inter alia, under sections 106 to 111 of the Act, both of which warrant supervision of all acts of the second respondent in the discharge of its obligations under such agreement and in the matter of any wrongful, illegal and arbitrary or otherwise unfair act or conduct of the second respondent in connection with the same. It was submitted that the provisions of the Act as well as the licence agreement impose a duty on the second respondent to carry out dredging, cleaning, deepening and improvement of the navigation channel at Kandla Port. However, it has failed to perform its duty despite several requests having been made by the petitioners in this regard. There is a duty cast on the first respondent under the provisions of section 106 to 111 of the Act to intervene and issue appropriate directions to the second respondent in a situation where the second respondent fails to perform its statutory duties under the Act. However, the first respondent has failed to perform its duty to intervene and issue appropriate directions to the second respondent to carry out dredging, cleaning, deepening and improvement of the navigation channel despite representations made by the petitioners requesting for such intervention. It was argued that the obligations of the first respondent under the Act include the obligation to supervise the affairs of the second respondent in order to ensure that its affairs are conducted in a manner which
is fair, reasonable and transparent while also carrying into effect the objective of the PPP Policy.

5.5 Referring to the provisions of section 111 of the Act, it was submitted that the Central Government is obliged under the said section to issue directions on questions of policy to the Board in the discharge of its functions under the Act. In the present case, the maintenance of draught of 12.5 metres at the navigational channel and the berths was pursuant to the policy framed by the Central Government and as such, the second respondent having failed to fulfill the obligations of private participation as promised, a mandamus would lie to the Central Government to implement its policy. It was further submitted that despite the fact that on the one hand the second respondent has utterly failed to fulfill its obligation of maintaining a draught of 12.5 metres, inasmuch as, not on a single day has the draught of 12.5 metres been provided or maintained at the navigational channel, thereby causing immense prejudice to the petitioners, on the other hand, the petitioners have to pay royalty of 49 per cent to the second respondent. It was, accordingly, urged that a mandamus be issued to the Central Government to direct the second respondent to maintain the draught of 12.5 metres and till the same is provided and maintained,

the second respondent be restrained from recovering royalty on such terms as may be deemed proper.

5.6 Insofar as the question as regards the maintainability of the present petition in the light of the fact that the Licence Agreement itself provides for reference of disputes to arbitration is concerned, the learned counsel submitted that this is not a matter which requires to be referred for arbitration and as such, it is open for the petitioner to seek a writ of mandamus to fulfill the promise held out by the second respondent before entering into the contract. Referring to sub-clause (v) of clause 4.14.2 of the agreement, it was pointed out that it is only a dispute regarding the actual depth, amount and type of dredging required and time period for which the licensee may have to make such berth available to the licensor that is required to be referred for resolution to the Independent Engineer, failing which, such dispute is required to be resolved in accordance with the Dispute Resolution Procedure. In the facts of the present case, there is no dispute as to the actual depth requiring determination and hence, the arbitration clause would not be attracted. It was submitted that the requirement of providing and maintaining 12.5 metres draught is a pre- condition and not an arbitration issue, and as such, this is a clear case of non-fulfillment of primary obligation under the contract.

5.7 The learned counsel submitted that the petitioners are not seeking merely performance of a contractual duty, but performance by the second respondent of its obligation as a Port Trust to maintain a particular draught, which duty flows under section 35 of the Act and that the petitioners seek the indulgence of this court to direct the Central Government to see that the KPT discharges its duties.

5.8 In support of his submissions, learned counsel placed reliance upon the following decisions:

[a] The decision of the Supreme Court in case of M/s Radhakrishna Agarwal and others v. State of Bihar and others, (1977) 3 SCC 457, and more particularly, paragraphs 12 and 17 thereof.

[b] Strong reliance was placed on the decision of the Supreme Court in case of Gujarat State Financial Corporation v. M/s Lotus Hotels Pvt. Ltd., (1983) 3 SCC 379 wherein, on behalf of the GSFC it had been contended that the dispute between the parties was in the realm of contract and the failure of the Corporation to carry out its part of obligation may amount to breach of contract for which a remedy lies else where, but a writ of mandamus cannot be issued compelling the Corporation to specifically perform the contract. The court held that it was too late in the day to contend that the instrumentality of the State which would be "other authority" under Article 12 of the Constitution can commit breach of a solemn undertaking on which other side has acted and then contend that the party suffering by the breach of contract may sue for damages but cannot compel specific performance of the contract. The court held that if the appellant GSFC entered into a solemn contract in discharge and performance of its

statutory duty and the respondent acted upon as to cause harm and injury, flowing from its unreasonable conduct, to the respondent, in such a situation, the court is not powerless from holding the to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty. It was held that a petition under Article 226 of the Constitution would certainly lie to direct performance of a statutory duty by "other authority" as envisaged by Article 12.

Adverting to the facts of the present case, the learned counsel submitted that the whole premise on the basis of which the petitioners have entered into the contract is the assurance given by the second respondent that they would maintain draught of 12.5 metres, and as such, they are bound by their solemn promise. Under the circumstances, in the light of the provisions of section 35 of the Act, the second respondent having failed in its statutory obligation, the present writ petition seeking the relief as prayed for, would be maintainable.

[c] Reference was made to the decision of the Supreme Court in case of Mahabir Auto Stores and Others v. Indian Oil Corporation and others, (1990) 3 SCC 752, wherein the court had held that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. Article 14 of the Constitution would be applicable to those exercises of power. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing.

[d] The decision of the Supreme Court in case of ABL International Ltd. and another v. Export Credit Guarantee Corporation of India Ltd. and another, (2004) 3 SCC 553, wherein the Court had culled out the following legal principles as regards maintainability of a writ petition :

[i] In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

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

[iii] A writ petition involving a consequential relief of monetary claim is also maintainable.

It was submitted that the above said decision would be squarely applicable to the facts of the present case and that merely because some disputed questions of fact may arise for consideration, would not be a ground to refuse to entertain the present writ petition. Moreover, the relief sought against the third respondent restraining them from collecting the amount of royalty under the license agreement is only a consequential relief.

[e] The decision of the Supreme Court in case of Karnataka State Forest Industries Corporation v. Indian Rocks, (2009) 1 SCC 150, wherein the court was dealing with the question as to whether the State in exercise of its power under Article 162 of the Constitution of India could issue a binding direction so as to confer a legal right on a third party having regard to cancellation of contract of agency by the State in favour of the appellant. The court held that although ordinarily a superior court in exercise of its writ jurisdiction would not enforce the terms of a contract qua contract, it is trite that when an action of the State is arbitrary or discriminatory and, thus, violative of Article 14 of the Constitution of India, a writ petition would be maintainable. It was observed that there cannot be any doubt whatsoever that a writ of mandamus can be issued only when there exists a legal right in the writ petition and a corresponding legal duty on the part of the State, but then if any action on the part of the State is wholly unfair or arbitrary, the superior courts are not powerless.

[f] The decision of the Supreme Court in case of Zonal Manager, Central Bank of India v. Devi Ispat Limited and another, (2010) 11 SCC 186 was cited wherein the Court held that:

(a) in the contract if there is a clause for arbitration, normally a writ court should not invoke its jurisdiction;

(b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and

(c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably, discriminatory and violative of Article 14 of the Constitution in its contractual or statutory obligation, writ petition would be maintainable.

However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power.

The learned counsel submitted that in the facts of the present case, there is a legal right on the part of the petitioners for provision of a committed depth of 12.5 metres in the navigation channel and a corresponding legal duty on the part of the KPT to provide the same. That the KPT having failed to abide by its duties, it is permissible for the Court to exercise its power of writ jurisdiction.

[g] The decision of the Supreme Court in case of M/s Hyderabad Commercials v. Indian Bank and others, 1991 Supp (2) SCC 340 was cited wherein the Court observed that since

the basic facts regarding the unauthorized transfer of the disputed amount from the appellants account as well as the banks liability was admitted, there was no justification for the High Court to direct the appellant to file suit on ground of disputed questions of fact. The respondent bank is an instrumentality of the State and it must function honestly to serve its customers. It was submitted that in the present case, the fact that the committed depth of 12.5 metres has not been maintained by the second respondent is writ large from the facts as emerging on record and as such, the present writ petition is very well maintainable and that the petitioners are entitled to the reliefs claimed in the petition.

[h] The decision of the Supreme Court in case of Food Corporation of India v. SEIL Ltd., (2008) 3 SCC 440 was cited wherein the court held that when supply of sugar was made in terms of a statutory order as also on the directions issued by the Central Government and in the cases there did not exist any factual dispute, there is no reason as to why the writ petitions would not be maintainable. The court observed that it is now no longer res integra that contractual disputes involving public law element are amenable to writ jurisdiction. The court observed that Article 14 of the Constitution of India has received a liberal interpretation over the years. Its scope has also been expanded by creative interpretation of the court. The law has developed in this field to a great extent. It was observed that in the facts of the said case, no disputed question of fact was involved and that the High Court in an appropriate case, may grant such relief to which the writ petitioner would be entitled to in law as well as in equity.

[i] The decision of the Supreme Court in case of Godavari Sugar Mills Limited v. State of Maharashtra and others, (2011) 2 SCC 439 was referred to wherein the court has laid down the principles with regard to maintainability of the writ petitions which shall be referred to in detail at an appropriate stage.

[j] The decision of the Supreme Court in case of Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others, (2003) 2 SCC 107 was cited for the proposition that as the remedy by way of recourse to arbitration clause was available, therefore, the writ petition was liable to be dismissed is concerned, the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies:

(i) where the writ petition seeks enforcement of any of the fundamental rights;

(ii) where there is failure of principles of natural justice; or

(iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

[k] The decision of the Supreme Court in case of Union of India and others v. Tantia Construction Private Limited, (2011) 5 SCC 697 was cited for the proposition that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution. It was urged that it is the statutory duty of the Kandla Port Trust to maintain the channel with a particular draught which was promised by them, on the basis of which the petitioners have spent huge sums of money. It was submitted that in the light of the decision of the Supreme Court in case of Gujarat State Financial Corporation v. M/s Lotus Hotels Pvt. Ltd. (supra), the second respondent is bound to perform its promise and that even in a contractual field, the promise does not go away and the second respondent has to perform his promise. It was submitted that the petitioners had approached the Central Government, but the Central Government did not perform its duties. Under the circumstances, a writ of mandamus would lie to both the respondents and this is a fit case for interference and that so long as the respondents do not perform their duties, the relief prayed for vide paragraph (E) of the petition deserves to be granted. It was argued that the question of arbitration does not arise inasmuch as the dispute involved is not arbitrable. It was submitted that the fact that the petitioners have given an arbitration notice is irrelevant inasmuch as the respondents are bound to perform their promise in accordance with law.

[i] Reliance was also placed upon the decision of the Supreme Court in the case of Allied Metals v/s B.P.C. Ltd., (2012) 2 SCC 1.

6. Vehemently opposing the petition, Ms. Indira Jaisingh, learned Additional Solicitor General appearing for the respondent resisted the petition mainly on the following grounds:

[i] That the controversy involved in the present case falls within the realm of contractual disputes and as such, a writ petition is not maintainable before this Court.

[ii] That the petition is a disguised camouflage giving an appearance of public law to achieve a private end.

[iii] The matter is governed by contract and it is a self- contained contract with built-in remedies which have to be followed.

[iv] The petition involves disputed questions of fact which require expert evidence and the court cannot come to the conclusion as to who has committed breach of contract.

[v] Section 111 of the Act has no application to the facts of the present case and it cannot transgress into contractual law.

[vi] In any case, the petitioners have exhausted the potential of section 111 of the Act.

6.1 Elaborating upon the said submissions, the learned counsel at the outset contended that the petition is not maintainable and is a camouflage in the guise of a public law petition for ventilating a private contractual dispute which is evident from the reliefs claimed in the petition. Referring to the prayers in the petition it was argued that prayer A has no connection with prayers B, C, D and E all of which are in the realm of contract and governed by Contract Law and the Arbitration Act. It was submitted that the prayers made in the petition are essentially for enforcement of a contractual duty cast upon the second respondent under a contract and that no writ petition is maintainable in relation to contractual matters, more so, when there is a self contained remedy under the contract. The petitioners have alleged breach of contract and accordingly, pray that royalty should not be collected. It was argued that if the reliefs pertaining to contract are ignored, the only other relief is to restrain the second respondent from collecting royalty from the first petitioner. Thus, in effect and substance the petition has been filed so as not to make payment of royalty. It was contended that this is a case of a concluded contract, under the circumstances once the contract is concluded the parties are relegated to the remedy under the Contract Act. It was submitted that courts have consistently held that petitions under Article 226 of the Constitution are not maintainable for enforcement of contract. Referring to the Licence Agreement it was pointed out that Article 16 thereof provides for a dispute resolution procedure. Not only does the contract provide for such procedure, the petitioners have in fact resorted to the same by issuing a notice dated 6.1.2010 for appointment of arbitrator. However, with a view to short circuit the procedure they have filed the present petition.

6.2 It was submitted that the prayers made in the petition clearly expose the intention of the petitioners to enforce private law by using public law. It was argued that a contract does not become statutory simply because it has been awarded by a statutory body. It was submitted that the petitioners have prayed for a writ of mandamus to direct the second respondent to carry out dredging, to provide and maintain the committed draught of at least 12.5 metres. The committed draught is defined only in the licence agreement and as such, in effect and substance, what the petitioners are seeking is enforcement of the terms of the licence agreement. Referring to the provisions of the MPT Act it was submitted that the said Act does not talk about committed draught which is clearly a matter of contract. The statute also does not contemplate the extent of dredging. The contract between the first petitioner and the second respondent is in the realm of private law and as such, the prayer in the petition like maintenance of draught or restraining the respondents from claiming MGT and royalty are not prayers which can be granted by the High Court under Article 226 of the Constitution.

6.3 Next it was contended that the petitioners are attempting to place reliance on the policy of the Government to give the dispute a colour of public law. Under the policy produced on record by the petitioners, there is no commitment that a draught of 12.5 metres will be maintained by the

Central Government at Kandla Port and hence, reliance on the policy is totally misplaced. It was submitted that firstly, no promise has been made to the petitioners by the Government of India, nor is any such promise alleged to have been made. In any event, once the contract is signed with the first petitioner, the matter ceases to be in the realm of policy and is in the realm of private law contract. This is not a case of challenge by the petitioners of the formation of the contract or the terms and conditions of the contract, but a case of concluded contract having been entered into. It was argued that the principles of arbitrariness, reasonableness and violation of Article 14 of the Constitution etc., apply to pre-contract stage and not post-contract stage.

6.4 It was further submitted that the petition involves disputed questions of fact as to whether or not the second respondent has maintained the committed draught which will require expert evidence. This court in a writ petition under Article 226 of the Constitution of India cannot come to the conclusion as to who has committed breach of the contract.

6.5 In support of her submissions, the learned counsel placed reliance upon the following decisions:

[a] The decision of the Supreme Court in the case of Bareily Development Authority and another v. Ajit Pal Singh and others, (1989) 2 SCC 116, was cited for the proposition that where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple.

[b] The decision of the Supreme Court in the case of State of U. P. & others v. Bridge & Roof Company (India) Ltd., (1996) 6 SCC 22 was cited for the proposition that when a contract 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 of the Constitution. The existence of an effective alternative remedy provided in the contract itself is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226. The said article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognized situations.

[c] Reliance was placed upon the decision of the Supreme Court in the case of Kerala State Electricity Board and another v. Kurien E. Kalathil and others, (2000) 6 SCC 293, for the proposition that the interpretation and implementation of a clause in a contract cannot be the subject- matter of a writ petition. If a term of a contract is violated, ordinarily the remedy is not a writ petition under Article 226. A statute may expressly or impliedly confer power on a statutory

body to enter into contracts in order to enable it to discharge its functions. Disputes arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act.

[d] Reliance was also placed upon the decision of the Supreme Court in the case of National Highways Authority of India v. Ganga Enterprises and another, (2003) 7 SCC 410, and more particularly, paragraph 6 thereof.

[e] The decision of the Supreme Court in the case of M/s Radhakrishna Agarwal and others v. State of Bihar and others, (1977) 3 SCC 457, was cited for the proposition that at the time of entry into the field of consideration of persons with whom the Government could contract at all, the State acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens imports into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act.

It was, accordingly, submitted that the present writ petition having been filed for enforcing the conditions of a contract between the second respondent and the first petitioner, is, therefore, not maintainable.

6.6 As regards the relief seeking a direction to the Central Government to intervene and issue appropriate directions to the second respondent to carry out required dredging to provide and maintain committed draught of at least 12.5 metres in the navigation channel, the learned counsel submitted that the maintenance or non-maintenance of a draught of 12.5 metres is subject matter of a contract between the petitioners and the second respondent and that the powers of the Central Government under section 111 of the Act are not intended to enforce contracts. According to the learned counsel, section 111 of the Act is concerned with the policy making by the Central Government and is not a statute to enforce contracts or for dispute resolution between the port and a third party. It was argued that it might have been a policy decision of the Central Government to direct the ports to enter into development of ports on PPP basis or BOT basis, but that cannot be extended to enforcement of contracts or dispute resolution by the Government. Section 111 of the Act is confined to matters between the Government and the Board/Authority and does not extend to third parties and as such, the petitioners are not entitled to any direction to the first respondent to pass any directions to the second respondent under the licence agreement. It was argued that the Union of India has nothing to do with contractual matters of a Board. The scope of section 111 of the MPT Act does not extend to supervision by the Central Government of individual contracts entered into by

a Board for execution of its policy decisions. The petition, therefore, must be rejected on the ground that this is an attempt to ventilate a commercial grievance under the guise of a petition under Article 226 of the Constitution.

6.7 Next, it was submitted that assuming for the sake of argument that under section 111 of the Act, the Ministry can go into contractual disputes between the port and a third party, the petitioners have approached the Ministry and the Ministry has, in the meeting held on 3.3.2010, concluded that the issue may be resolved amicably by mutual discussion and the remedial measures provided in the licence agreement. This decision of the Ministry that it is a contractual issue has not been challenged in the petition. Thus, the petitioners have already exhausted the remedy under section 111 of the MTP Act in March 2010 itself. However, they have remained silent from 2010 to 2012 which is indicative of the fact that the sole reason for filing the present petition is their failure to pay royalty in terms of the contract.

6.8 The learned counsel further submitted that before the MPT Act was framed, the Central Government was taking direct responsibility of Kandla Port Trust. The whole purpose of enacting the Act was to remove the direct responsibility of the Central Government and to create an autonomous body to distance the Central Government from day to day activities of the port. Therefore, under the MPT Act, the role of the Central Government is minimal and the roles of the Kandla Port Trust and the Central Government cannot be mixed up inextricably. It was submitted that section 111 of the MPT Act is a matter between the first and second respondent and does not create any right in favour of the petitioners. That the Central Government is concerned only with the policy making and has no other control over the second respondent and that the powers of the Central Government are limited to financial powers. Reference was made to the provisions of sections 107, 106, 108, 109 and 111 of the MPT Act. It was submitted that section 111 of the MPT Act is a part of the whole chapter and does not stand on its own legs. It is in aid of the Central Government to enable it to supervise the functions of the Board. That the policy is to privatise the Board and the Central Government is not concerned with the contract It was submitted that the supervision of the Central Government over the second respondent does not extend to contractual obligations. Accordingly, there is no power in the Central Government to intervene in such matters and no right vested in the petitioners to enforce such an obligation. Referring to the scheme of the MPT Act, it was submitted that the Central Government has very limited power over the Port Trust, which is restricted to financial matters under sections 66, 93, 106 and 117 of the MPT Act. Nowhere does the said Act cast any duty on the Central Government to protect the petitioners rights. Under the circumstances, the entire petition is misconceived, inasmuch as, the invocation of powers under section 111 of the MPT Act itself is without any basis. It was submitted that the petitioners have no locus standi to invoke section 111 of the MPT Act as framing of a policy is a matter between the Board and the Central Government and the petitioners have no say therein under the circumstances, no case has been made out for invocation of powers under section 111 of the Act.

6.9 It was vehemently argued that the petitioners do not disclose any cause of action in their favour. The cause of action has to be based on a legal right, whereas in the present case, there is no legal right under the MPT Act. The petitioners are strangers to the MPT Act and come in only under the contract. It was submitted that by the relief claimed vide clause (e), the petitioners seek to injunct the Kandla Port Trust from enforcing the contractual rights. None of the decisions on which reliance has been placed by the learned counsel for the petitioners pertain to a case

where a party to a contract has been injuncted from exercising contractual rights. It was submitted that the petition is a ruse by the petitioners in trying to prevent the second respondent from enforcing its claim. No public element is involved in the present case so as to entitle the petitioners to a writ of mandamus against the respondents.

6.10 The learned counsel also vehemently objected to taking the affidavit in rejoinder made by the petitioners on record, contending that the same contains false averments on oath, namely, that the deponent was at Ahmedabad when the affidavit came to be affirmed. It was urged that in view of the above false averment, the deponent of the affidavit in rejoinder is required to be prosecuted for perjury.

6.11 On the merits of the case, it was submitted that as regards the maintenance of committed depth in the navigational channel, the same means depth sufficient for navigation of container vessels requiring 12.5 metres draught with tidal advantage. This means that provision of 12.5 metres in navigational channel is conditional and the condition is when there is "Tidal Advantage". Such a condition is not there for committed draught in respect of Berth No.11 and 12 and where the petitioners admit that it is provided. It was submitted that this is a tidal port and there will be times when the tide does not favour entry of vessels and that it is impossible to provide any guaranteed minimum depth in the navigation channel 24x7. Insofar as committed draught of 12.5 metres as per the licence agreement is concerned, the same has been achieved and declared for the navigational channel as well as berth No.11 and 12. Such draught of 12.5 metres has been provided since the last two and a half years but the petitioners have not made use of the higher draughts permissible at Kandla Port. However, it is the petitioners who continue to bring small low draught vessels to the terminal. The complaint of suspension of night pilotage has also been redressed by restoring night pilotage since 15.8.2009. Insofar as reliance placed by the petitioners on the circulars issued by the Port to show that the committed draught as declared by the second respondent was less than what had been agreed upon, it was submitted that permissible draught excludes the under keel clearance of 10 to 15% of the permitted draught. According to the learned counsel it is not possible on the basis of the circulars to come to the conclusion that the second respondent had not provided the committed draught which is a matter of evidence to be led at an appropriate stage in appropriate proceedings.

6.12 It was urged that the second respondent has been continuously carrying out the dredging towards maintenance of the draught in the navigational channel despite various severe special natural conditions in the Port. The records of dredging would show that the draught has been maintained. However, all these are disputed questions of fact which cannot be gone into in a writ petition under Article 226 of the Constitution. It was, accordingly, urged that the petition being totally devoid of merit deserves to be dismissed.

7. Mr. P. S. Champaneri, learned Assistant Solicitor General appearing on behalf of the first respondent submitted that the entire petition is misconceived, inasmuch as, there is no statutory right vested in the petitioners to seek a direction to the first respondent to issue such directions to the second respondent as prayed for in the petition. It was submitted that the power

under section 111 of the MPT Act is restricted to issuance of directions to the Board for the purpose of discharge of its functions in connection with the policy of the Central Government. The rights and obligations and the claim of the petitioners flow from the agreement entered into between the petitioners and the second respondent in respect of which the dispute resolving mechanism has been provided under the MPT Act. Section 111 of the MPT Act operates in a limited sphere, that is, in respect of functions of the Board on decisions of policy of the Central Government. It was submitted that, accordingly, the petition being misconceived, deserves to be dismissed.

8. In rejoinder, Mr. Thakore, learned counsel submitted that in the present case, no disputed questions of fact are involved inasmuch as, the second respondent has not alleged any counter breaches which require arbitration. It was submitted that the second respondent declares the permissible draught at the port every month which are predictions. These are only announcements of draught and no evidence is available with the second respondent of the actual draught. Such predictions are based on a scientific calculation and phases of the moon. According to the learned counsel, the statement of permissible draught is an admission on the part of the second respondent that beyond this draught, a ship cannot enter. Hence, no disputed questions of fact are involved in the present case. It was argued that for a ship of 12.5 metres of depth, a draught of one metre more than 12.5 metres would be required, whereas in the facts of the present case, even a draught of 12.5 metres has never been achieved. It was submitted that if there was a dispute as regards the depth, then a dispute could have been raised under clause (iv) of clause 4.12.2, otherwise, there is no dispute.

8.1 Insofar as the applicability of section 111 of the Act is concerned, it was submitted that it has been the policy of the Central Government to increase the draught of ports and consequently, the petitioners are entitled to a direction by the first respondent to the second respondent to maintain the committed draught. Insofar as the decisions on which reliance has been placed by the learned counsel for the respondent for contending that the petition is not maintainable, it was submitted that the petitioners are not seeking merely performance of a contractual duty, but the performance of its obligations as a port to maintain a particular draught which duty flows under section 35 of the Act. The petitioners are seeking this courts indulgence to direct the Central Government to see that the Kandla Port Trust discharges its duties.

9. For the purpose of better understanding the controversy involved in the present case, it may be necessary to note the nature of the reliefs claimed by the petitioner. The petitioners seek a declaration that the first respondent - Union of India is bound to act in a manner which is fair and reasonable and transparent in discharging its functions, obligations and duties under the provisions of the MPT Act and the PPP policy, inter alia, in relation to the provision and maintenance of the committed draught in the navigation channel at Kandla Port and that the impugned actions/inactions of the respondents in relation to the same are arbitrary and violative of the rights of the petitioners under Articles 14, 19(1)(g) and 21 of the Constitution of India. The petitioners also seek a declaration that the Union of India is bound to intervene and issue appropriate directions to the Kandla Port Trust to ensure that it carries out required dredging to provide and maintain the committed draught of at least 12.5 metres in the navigation

channel of Kandla Port as well as address all the grievances raised by the petitioners, more particularly those highlighted in their letter dated 27th September, 2011. The third relief claimed is more or less similar to the second relief, namely, that a direction be issued to the first respondent to issue appropriate directions to the second respondent in respect of the matters stated in relation to the second relief prayed for. Insofar as the fourth relief is concerned, the petitioners instead of seeking a direction to the first respondent to issue such directions to the second respondent, as prayed for. The last relief prayed for is to restrain the second respondent from collecting royalty from the first petitioner in terms of the agreement till the matters in respect of the relief is prayed for in the preceding paragraphs are not provided.

10. Since part of the reliefs claimed are in respect of the grievances highlighted in their letter dated 27th September, 2011 reference may be made to the contents thereof. The letter dated 27th September, 2011 has been addressed to the Honble Minister of Shipping and the subject thereof is "Development of Container Terminal at Berths No.11 and 12 of Kandla Port on Build Operate Transfer (BOT) Basis ("Project") - Failure of the Kandla Port Trust ("KPT") to Provide and Maintain Adequate draft in the Navigation Channel at Kandla Port". By the said letter the petitioners have sought issuance of directions to KPT under the provisions of the MPT Act. Reference is made to Article 4.14.2 of the license agreement to submit that the KPT has failed and neglected to carry out required dredging for providing and maintaining depth of 12.5 metres draught despite the petitioners having addressed various communications bringing the said failure to the notice of the KPT calling upon it to carry out further dredging along side berths No.11 and 12 as well as in the navigation channel. That despite persistent representations and discussions at the meeting held in the Ministry of Shipping on 3rd March, 2010 which was chaired by the Joint Secretary, Ports, KPT has not addressed the said issue and has not provided and maintained adequate draught in the navigation channel at Kandla Port. Therefore, all efforts to resolve the issue and achieve the adequate draught in the navigation channel have been exhausted and it is unlikely that any further meeting with the KPT officials would yield any results or provide any relief to them. It is further stated that on account of the inadequate draft in the navigation channel at Kandla Port, all their concerted efforts and attempts to attract mainline vessels to Kandla Port have gone in vain. Reference is made to the difficulties faced by the petitioner as a result of such failure on the part of KPT, including restricting night navigation to vessels with draft up to 10.5 metres only and unilaterally suspending night navigation at Kandla Port between 16th December, 2008 and 14th August, 2009, which resulted in reduction of revenues of the project by 50%. According to the petitioners, the Maritime Agenda 2010-2020 released by the first respondent called upon the ports to increase the draught to at least 14 metres and that the failure to provide and maintain the draught of even 12.5 metres is clearly contrary to the said policy. Setting out the difficulties faced by them on account of failure on the part of the KPT to provide the required draught, the petitioners have requested immediate intervention in the matter by directing the KPT to carry out required dredging to maintain adequate draught in the navigation channel at Kandla Port so as to ensure that the petitioners are able to attract main line vessels with 12.5 metres draught day and night to Kandla Port. Thus, in effect and substance, by virtue of the letter dated 27th September, 2011, the petitioners have voiced grievances against the KPT alleging failure on its part to provide and maintain a draught of 12.5 metres and seek intervention of the first respondent in this regard.

11. From the reliefs claimed in the petition read with the above letter dated 27th September, 2011, it is apparent that the principal and the only relief claimed in the petition is for a direction to the first respondent to direct the second respondent to carry out required dredging to provide and maintain the committed draught of at least 12.5 metres in the navigation channel at Kandla Port. An additional relief to restrain the second respondent from collecting the royalty from the petitioners in terms of the agreement till such committed draught is provided has also been prayed for.

12. From the facts noted hereinabove, it emerges that the petitioners have entered into a licence agreement with the Board of Trustees of Kandla Port for a project envisaging development of berth No.11 and 12 as container terminal and of licensing out its operation, management and maintenance on build, operate and transfer (BOT) basis for a period of thirty years. The licence agreement is comprised of various articles. It would, therefore, be germane to advert to the relevant provisions of the License Agreement. Article 4 thereof pertains to "Project requirements, rights and obligations" and is comprised of various sub-articles. Article 4.13 thereof provides for "Rights of Licensee" and Sub-article 4.14 makes provision for "Obligation of the Licensor". Sub-article 4.14.2 makes provision for "Marine and Port Services", and postulates that the licensor shall provide/cause to be provided, at its own cost and expense, to the licensee, the services enumerated thereunder. Sub-clause (iii), (iv) and (v) thereof are relevant for the present purpose. Sub-clause (iii) reads thus: "starting from COD-12 and throughout the License Period thereafter, maintenance of Committed Depth, in respect of berth No.11, berth no.12 and the navigation channel". Under sub-clause (iv) thereof the Licensor is required to provide such capital or maintenance dredging operations, as may be required to ensure availability of Committed Depths in respect of the navigation channel and alongside the berths, provided that such capital or maintenance dredging shall be undertaken by the licensor, as per Good Industry Practices, causing minimum inconvenience to the operations of the Container Terminal. Sub- clause (v) thereof, provides that if the depth alongside the berths or in the navigation channel is found by the licensee to be lower than the corresponding Committed Depth, for any reason whatsoever, the licensor shall promptly, on receipt of a written notice from licensee in this regard, initiate the process of carrying out such amount and type of dredging as may be necessary to achieve and maintain the Committed Depth. Provided that, when such dredging is to be carried out alongside any of the berths, the Licensor shall make such berth available for such period as may be commensurate with the amount and type of dredging required in accordance with Good Industry Practices. Any dispute between the Licensor and the Licensee, regarding the actual depth, amount and type of dredging required pursuant thereto and the time period for which the Licensee may have to make such berth available to the Licensor, shall be referred to the Independent Engineer for resolution, failing which, such dispute shall be resolved in accordance with the Dispute Resolution Procedure. Sub-article 4.14.5 makes provision for Breach of Licensors Obligations and lays down that in the event of the Licensors failure to provide the marine and port services in accordance with Clause 4.14.2, the Licensee shall, without prejudice to any other right or remedy available to it, be compensated by the Licensor for direct loss, if any, suffered by the Licensee on account of such failure/breach, provided such failure is directly attributable to any neglect and/or failure and/or an Event of Default, on the part of the Licensor. Any dispute between the parties, regarding the occurrence of such failure on the part of the Licensor and/or the extent and amount of direct loss suffered by the Licensee as a consequence thereof, shall be resolved in accordance with the Dispute Resolution Procedures

13. Article 16 provides for "Dispute Resolution Procedure". Sub-article 16.1 provides for amicable settlement and postulates that if any dispute or difference or claims of any kind arise between the Licensor and the Licensee in connection with construction, interpretation or application of any terms and conditions or any matter or thing in any way connected with or in connection with or arising out of the agreement, or the rights, duties or liabilities of any part under the agreement, whether before or after the termination of the agreement, then the parties shall meet together promptly, at the request of any party, in an effort to resolve such dispute, difference or claim by discussion between them. Sub-article 16.2 makes provision for assistance of expert in appropriate cases. Sub-article 16.3 makes provision for "Arbitration". Clause (a) thereof provides that failing amicable settlement and/or settlement with the assistance of Expert, the dispute or differences or claims as the case may be, shall be finally settled in accordance with Rules of Arbitration of the Indian Council of Arbitration and shall be subjected to the provisions of the Indian Arbitration and Conciliation Act, 1996 and any amendments thereto. The arbitration shall be by a panel of three Arbitrators, one to be appointed by each party and the third to be appointed by the two arbitrators appointed by the parties. A party requiring arbitration shall appoint an Arbitrator in writing, inform the other party about such appointment and call upon the other party to appoint its Arbitrator. If the other party fails to appoint its Arbitrator, the party appointing Arbitrator shall take steps in accordance with Indian Arbitration and Conciliation Act, 1996 and any amendments thereto.

14. Since the dispute involved pertains to the provision and maintenance of committed depth, reference may be made to the definition thereof in terms of the licence agreement. "Committed Depth" in respect of berth No.11 and berth No.12 has been defined to mean, depth sufficient for berthing of Container Vessels requiring 12.5 metres draught, and in respect of the navigation channel to mean, depth sufficient for navigation of Container Vessels requiring 12.5 metre draught with tidal advantage.

15. It may be recalled that it is the case of the petitioners that the committed depth of 12.5 metres draught, both in respect of berths No.11 and 12 as well as in the navigation channel has at no point of time been maintained by the second respondent. That despite several representations to the second respondent, it has failed to discharge its duties of providing necessary draught and it is in these circumstances, that the petitioners have filed the present petition seeking a direction to the first respondent to issue necessary directions in exercise of powers under section 111 of the Act to the second respondent to provide necessary draught of 12.5 metres in the navigation channel and till such facilities are provided, the second respondent should be restrained from collecting royalty from the first petitioners in terms of the agreement.

16. The respondents have opposed the petition mainly on the ground that the controversy in issue arises out of a concluded contract which is not statutory in nature and that the rights of the parties are purely contractual and are governed by the terms of the contract and as such, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the respondents to discharge any obligations under such contract. It has also been contended that section 111 of the MPT Act does not envisage issuance of directions of the nature sought for by the petitioners by the Central Government to a Board.

17. Thus, the central issues which arise for consideration in the present petition are firstly, as to whether this writ petition under Article 226 of the Constitution of India is maintainable in relation to the reliefs claimed by the petitioners, and secondly, as to whether the provisions of section 111 of the Major Ports Act, can be invoked in the facts and circumstances of the case.

18. Dealing with the first question regarding the maintainability of the petition, reference may be made to the various decisions on which reliance has been placed by the learned counsel for the respective parties in this regard.

[i] In State of U. P. & others v. Bridge & Roof Company (India) Ltd. (supra), the Supreme Court held thus:

"16. Firstly, the contract between the parties is a con- tract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, maybe, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agit- ated, and could not have been agitated, in a writ peti- tion. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justi- fied, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from de- ducting a particular amount from the writ petitioners bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.

21. There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration (clause 67 of the contract). 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 ex- traordinary jurisdiction under Article 226. The said article was not meant to supplant the existing remedies at law but only to supplement them in certain wellrecognised situations. As pointed out above, the prayer for is- suance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to en- force any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appel- lants. Indeed, the very resort to Article 226 - whether for issuance of mandamus or any other writ, order or direction - was misconceived for the reasons men- tioned supra."

[ii] In Kerala State Electricity Board and another v. Kurein E. Kalathil and others (supra), the Supreme Court held thus:

"10. We find that there is a merit in the first contention of Mr. Rawal. Learned Counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract? If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not of itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have been relegated to other remedies."

[iii] In Bareilly Development Authority v. Ajai Pal singh (supra), the Supreme Court held thus:

20. Thus the factual position in this case clearly and unambiguously reveals that the respondents after voluntarily accepting the conditions imposed by the BDA have entered into the realm of concluded con- tract pure and simple with the BDA and hence the re - spondents can only claim the right conferred upon them by the said contract and are bound by the terms of the contract unless some statute steps in and confers some special statutory obligations on the part of the BDA in the contractual field. In the case before us, the contract between the respondents and the BDA does not contain any statutory terms and/or conditions. When the factual position is so, the High Court placing reliance on the decision in Ramana Da- yaram Shetty case has erroneously held:

It has not been disputed that the contesting op - posite party is included within the term other author- ity mentioned under Article 12 of the Constitution. Therefore, the contesting opposite parties cannot be permitted to act arbitrarily with the principle which meets the test of reason and relevance. Where an authority appears acting unreasonably this Court is not powerless and a writ of mandamus can be issued for performing its duty free from arbitrariness or un- reasonableness.

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

22. There is a line of decisions where the contract entered into between the State and the persons ag- grieved is non-statutory and purely contractual and the rights are governed only by the terms of the con- tract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the au- thorities to remedy a breach of contract pure and simple - Radhakrishna Agarwal v. State of Bihar, Premji Bhai Parmar v. Delhi Development Authority and DFO v. Biswanath Tea Company Ltd.

23. In view of the authoritative judicial pronounce- ments of this Court in the series of cases dealing with the scope of interference of a High Court while exer- cising its writ jurisdiction under Article 226 of the Constitution of India in cases of non-statutory con- cluded contracts like the one in hand, we are con- strained to hold that the High Court in the present case has gone wrong in its finding that there is arbit- rariness and unreasonableness on the part of the appellants herein in increasing the cost of the houses / flats and the rate of monthly instalments and giving directions in the writ petitions as prayed for.

[iv] In National Highways Authority of India v. Ganga Enterprises (supra), the Supreme Court held thus:

6. The respondent then filed a writ petition in the High Court for refund of the amount. On the plead- ings before it, the High Court raised two questions viz.: (a) whether the forfeiture of security deposit is without authority of law and without any binding con- tract between the parties

and also contrary to Sec- tion 5 of the Contract Act; and (b) whether the writ petition is maintainable in a claim arising out of a breach of contract. Question (b) should have been first answered as it would go to the root of the mat- ter. The High Court instead considered Question (a) and then chose not to answer Question (b). In our view, the answer to Question (b) is clear. It is settled law that disputes relating to contracts cannot be agit- ated under Article 226 of the Constitution of India. It has been so held in the cases of Kerala SEB v. Kurien E. Kalathil, State of U.P. v. Bridge & Roof Co. (India) Ltd. and Bareilly Development Authority v. Ajai Pal Singh. This is settled law. The dispute in this case was regarding the terms of offer. They were thus con- tractual disputes in respect of which a writ court was not the proper forum. Mr Dave, however, relied upon the cases of Verigamto Naveen v. Govt. of A.P. and Harminder Singh Arora v. Union of India. These, how- ever, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the peti- tion should have been dismissed.

[v] In M/s Radhakrishna Agarwal and others v. State of Bihar and others (supra), the Supreme Court held thus:

"10. It is thus clear that the Erusian Equipment & Chemicals Ltd.s case (supra) involved discrimination at the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all. At this stage, no doubt, the State acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other constitutional provision when the State of its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.

11. In the cases before us the contracts do not contain any statutory terms or obligations and no statutory power of obligation which could attract the application of Article 14 of the Constitution is involved here. Even in cases where the question is of choice or consideration of competing claims before an entry into the field of contract facts have to be investigated and found before the question ,of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can, only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. Such proceedings are summary proceedings reserved for extraordinary cases where the exceptional and what are described as, perhaps not quite accurately, "prerogative" powers of the Court are invoked. We are certain that the cases before us are not such in which powers under Article 226 of the Constitution could be invoked. The Patna High Court had, very rightly divided the types of cases in which breaches of alleged obligation by the State its agents can be set up into three types. These were stated as follows:

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

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

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

The learned counsel for the appellants therein had contended before the Supreme Court that in the cases before it, breaches of public duty were involved. Whenever a State or its agents or officers deal with the citizen, either when making a transaction or, after making it, acting in exercise of powers under the terms of a contract between the parties, there is a dealing between the State and the citizen which involves performance of "certain legal and public duties". The court was of the view that if such a wide proposition were to be accepted, every case of a breach of contract by the State or its agents or its officers would call for interference under Article 226 of the Constitution and accordingly, did not be consider it to be a sound proposition of law.

[vi] In Mahabir Auto Stores v. Indian Oil Corporation (supra), the Supreme Court held that every action of the State or an instrumentality of the State in exercise of its executive power must be informed by reason. In an appropriate case, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. However, Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. The court held that if a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing. The Court was of the view that having regard to the nature of the transaction, it would be appropriate to state that in cases where the instrumentality of the State enters the contractual field, it should be governed by the incidence of the contract.

[vii] In Godavari Sugar Mills Limited v. State of Maharashtra, (supra), wherein the High Court relying upon the decision of the Supreme Court in the case of Sugamal v. State of M.P., AIR 1965 SC 1740, held that the prayer in the writ petition being one for payment of interest, it should be considered to be a writ petition filed to enforce a money claim and therefore, not maintainable, the Supreme Court held that normally, a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of a contract or a tort to pay an amount of money due to the claimants. But an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the State or its officers. The High Court, while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realised by the Government without the authority of law. A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right. The aggrieved party seeking refund has to approach the civil court for claiming the amount, though the High Courts have the power to pass appropriate orders in the exercise of the power conferred under Article 226 for payment of money. Where the lis has a public law character, or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of a public law remedy under Article 226 of the Constitution will not be denied.

[viii] In Union of India v. Tantia Construction Private Limited (supra), the Supreme Court found that the submissions made on behalf of the petitioners therein that in terms of Clause 23(2) of the agreement, the petitioners were entitled to alter and increase/decrease the scope of the work was not attracted in the facts of the said case where the entire design of the rail over-bridge was altered, converting the same into a completely new project. It was not merely a case of increase or decrease in the scope of the work of the original work schedule covered under the tender in question, but a case of substantial alteration of the plan itself. In the above backdrop the court held that even on the question of maintainability of a writ petition on account of the arbitration clause included in the agreement between the parties, it is now well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. It was observed that the various decisions of the Supreme Court on which reliance had been placed by the respondent would clearly indicate that the constitutional powers vested in the High Court or Supreme Court cannot be fettered by any alternative remedy available to the parties. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.

[ix] In Food Corporation of India v. SEIL Ltd. (supra), the Supreme Court was of the view that when supply of sugar was made in terms of a statutory order as also on the directions issued by the Central Government and in the cases there did not exist any factual dispute, there is no reason as to why the writ petitions would not be maintainable. The court observed that it is now no longer res integra that contractual disputes involving public law element are amenable to writ jurisdiction. Article 14 of the Constitution of India has received a liberal interpretation over the years. Its scope has also been expanded by creative interpretation of the court. The law has developed in this field to a great extent. The High Court in an appropriate case may grant such relief to which the writ petitioner would be entitled to in law as well as in equity.

[x] In Harbanslal Sahnia v. Indian Oil Corporation Ltd. (supra), the Supreme Court held thus:

"7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, inspite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn. v. Registrar of Trade Marks). The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

[xi] In Zonal Manager, Central Bank of India v. Devi Ispat Limited and another (supra), the Supreme Court observed that in the case on hand, the respondent company had demonstrated that based on the advice of the appellant bank, they shifted their accounts to another nationalized bank and through an arrangement with State Bank of India, a cheque of Rs.15 crores was deposited by their bank and in token of the same, by statement of accounts dated 14.5.2009, the appellant bank clearly mentioned that there is no due or nil balance from the respondent Company. In such circumstances, when the relief sought for does not relate to interpretation of any terms of contract, the bank being a nationalized bank, a writ court can issue appropriate direction in certain circumstances. The court further held as under:

"28. It is clear that (a) in the contract if there is a clause for arbitration, normally a writ court should not invoke its jurisdiction; (b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and (c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably, discriminatory and violative of Article14 of the Constitution in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power. In the light of the legal position, writ petition is maintainable even in contractual matters, in the circumstances mentioned in the earlier paragraphs."

[xii] In Karnataka State Forest Industries Corporation v. Indian Rocks, (supra), the Supreme Court held that although ordinarily a superior court in exercise of its writ jurisdiction would not enforce the terms of a contract qua contract, it is trite that when an action of the State is arbitrary or discriminatory and, thus, violative of Article 14 of the Constitution of India, a writ petition would be maintainable. It was observed that there cannot be any doubt whatsoever that a writ of mandamus can be issued only when there exists a legal right in the writ petition and a corresponding legal duty on the part of the State, but then if any action on the part of the State is wholly unfair or arbitrary, the superior courts are not powerless.

[xiii] In ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd. (supra), the Supreme Court 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 case is empowered to grant the relief. In respect of its earlier decision in the case of State of U. P. v. Bridge & Roof Co. (India) Ltd. , (1996) 6 SCC 22, the court observed thus :

"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 cause of Bridge & Roof Co. are of no assistance to the first respondent in its contention that in contractual matters, writ petition is not maintainable."

The court ultimately held that once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants, the first respondent as an instrumentality of the State has acted in contravention of the above requirement of Article 14, then a writ court can issue suitable directions to set right the arbitrary actions of the first respondent. The court held that the following principles emerge as to the maintainability of a writ petition:

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

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

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

[xiv] In Gujarat State Financial Corporation v. M/s Lotus Hotels Pvt. Ltd. (supra) the appellant-Gujarat State Financial Corporation sanctioned a loan of Rs.29.93 lakhs in favour of the respondent-M/s Lotus Hotels Pvt. Ltd. on certain terms and conditions. Acting on two pseudonymous letters making serious allegations against the promoter of the respondent certain inquiries were made leading to delay in processing the promised loan. Ultimately the appellant did not disburse the loan in terms of the agreement entered into between the parties. The respondent moved a writ petition under Article 226 of the Constitution of India before the High Court of Gujarat. A learned Single Judge issued a mandamus directing the appellant to disburse the promised loan. In a Letters Patent Appeal preferred by the appellant, the Division

Bench agreed with the conclusion arrived at by the learned Single Judge and dismissed the appeal. The Supreme Court while holding that the High Court was fully justified in issuing a writ of mandamus to disburse the loan held thus:

"9. In Motilal Padampat Sugar Mills Co. (P) Ltd. v. State of U.P., (1979) 2 SCC 409, this Court ob- served as under:

"The true principle of promissory estoppel, there- fore, seems to be that where one party has by his words of conduct made to the other a clear and unequivocal promise which is intended to create legal relations or af- fect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not."

10. Thus the principle of promissory estoppel would certainly estop the Corporation from backing out of its obligation arising from a solemn promise made by it to the respondent.

11. Jit Ram Shiv Kumar v. State of Haryana, (1981) 1 SCC 11, which slightly differs from the view taken by this court in the aforementioned decision at any rate would not help the appellant because it only lays down that the principle of promissory estoppel cannot be in- voked for preventing the Government from discharging its functions under the law. Even then, it was held that when the officer authorised under a scheme enters into an agreement and makes a representation and a person acting on that representation puts himself in a disadvant- ageous position, the court is entitled to regulate the of- ficer to act according to the scheme and the agreement or the representation. The officer cannot arbitrarily on his mere whim ignore his promise on some undefined and undisclosed grounds of necessity or changed the condi- tions to the prejudice of a person which had acted upon such representation and put himself in a disadvantage- ous position. On this point, both the decisions concur and the ratio would govern the decision in this appeal. The re- spondent acting upon the solemn promise made by the appellant incurred huge expenditure and if the appellant is not held to its promise, the respondent would be put in a very disadvantageous position and therefore also the principle of promissory estoppel can be invoked in this case.

12. Viewing the matter from a slightly different angle altogether, it would appear that the appellant is acting in a very unreasonable manner. It is not in dispute that the appellant is an instrumentality of the Govern- ment and would be "other authority" under Article 12 of the Constitution. If it be so, as held by this court in R.D. Shetty v. International Airport Authority of India, (1979) 3 SCC 489 the rule inhibiting arbitrary action by the Gov- ernment would equally apply where such corporation dealing with the public whether by way of giving jobs or entering

into contracts or otherwise and it cannot act ar- bitrarily and its action must be in conformity with some principle which meets the test of reason and relevance.

13. Now if appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondent acted upon it, the statutory corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to the respondent. In such a situation, the court is not powerless from holding the appellant to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty. A petition under Article 226 of the Con- stitution would certainly lie to direct performance of a statutory duty by "other authority" as envisaged by Art- icle 12."

19. Examining the facts of the case at hand in the light of the above referred principles, the main grievance voiced in the present petition is that the second respondent has failed to discharge its obligation of providing and maintaining the committed depth of 12.5 metres in the navigation channel, thereby causing immense prejudice to the petitioners. The obligation to provide and maintain such committed depth arises under clauses (iii) and (iv) of Article 4.14.2 of the License Agreement. The remedy in case the depth alongside the berths or in the navigation channel is found to be lower than the corresponding committed depth, is provided under clause (v) of Article 4.14.2 which says that in such an eventuality the Licensor, shall upon receipt of a written notice from the Licensee in this regard, initiate the process of carrying out such amount and type of dredging as may be necessary to achieve and maintain the Committed Depth. The clause further, inter alia, provides that any dispute between the Licensor and the Licensee, regarding the committed depth, amount and type of dredging required pursuant thereto shall be referred to the Independent Engineer for resolution, failing which, such dispute shall be resolved in accordance with the Dispute Resolution Procedure. The Dispute Resolution Procedure is provided under Article 16 of the License Agreement. Article 16.1 makes provision for "Amicable Settlement" and lays down that if any dispute or difference or claims of any kind arises between the Licensor and the Licensee in connection with construction, interpretation or application of any terms and conditions or any matter or thing in any way connected with or in connection with or arising out of the Agreement, or the rights, duties or liabilities of any Party under the Agreement, whether before or after the termination of the Agreement, then the Parties shall meet together promptly, at the request of any Party, in an effort to resolve such dispute, difference or claim by discussion between them. Article 16.2 provides for "Assistance of Expert" and says that the Parties may, in appropriate cases agree to refer the matter to an Expert appointed by them with mutual consent. Article 16.3 makes provision for "Arbitration" and insofar as the same is relevant for the present purpose says that failing amicable settlement and/or settlement with the assistance of Expert, the dispute or difference or claims as the case may be, shall be finally settled in accordance with Rules of Arbitration of the Indian Council of Arbitration and shall be subject to the provisions of the Indian Arbitration and Conciliation Act, 1996 and any amendments thereto. The arbitration shall be by a panel of three Arbitrators, one to be appointed by each Party and the third to be appointed by the two arbitrators appointed by the Parties. A Party requiring arbitration shall appoint an Arbitrator in writing, inform the other Party about such appointment and call upon the other Party to appoint its Arbitrator. If the other Party fails to appoints its Arbitrator, the Party appointing Arbitrator shall take steps in accordance with Indian Arbitration and Conciliation Act, 1996 and any amendments thereto. Thus, the License Agreement itself provides for the manner in which disputes arising from the contract are to be resolved.

20. As regards the applicability of clause (v) to the case at hand, on behalf of the petitioners it has been contended that in the facts of the present case there is no dispute as to the actual depth requiring determination and hence, the arbitration clause would not be attracted. According to the learned counsel, the requirement of providing and maintaining draught of 12.5 metres depth is a pre-condition and not an arbitration issue and is a case of non-fulfilment of primary obligation under the contract. Testing the aforesaid contention in the light of the facts of the case and the provisions of the License Agreement, the grievance which is sought to be ventilated in the present case is that the second respondent has not provided and maintained draught of the committed depth of 12.5 metres. However, according to the second respondent, such committed depth has in fact been provided and is so maintained. Evidently, therefore, the dispute relates to the actual depth of the navigational channel. On a conjoint reading the clauses (iii) (iv) and (v) of Article 4.14.2 of the Licensee Agreement, it is abundantly clear that there is an obligation on the second respondent to provide and maintain the committed depth both at the berths and the navigational channel. However, if for some reason, the depth at the berths or the navigational channel does not correspond to the committed depth, the procedure provided under clause (v) is to be resorted to. When on reads clause (v) of Article 4.14.2, there is nothing therein to indicate that the same does not apply even if the precondition of providing the committed depth is not satisfied. On a plain reading of clause (v), it appears that the same can be invoked if for any reason the depth does not correspond to the committed depth, irrespective of whether or not prior thereto such committed depth has in fact been provided. Therefore, if the petitioners find that the actual depth at the navigational channel or at the berths does not correspond to the committed depth, the remedy is to give a notice in writing as envisaged under clause (v) of the License Agreement and follow the procedure thereunder. Thus, there is an in-built remedy under the terms of the License Agreement for resolution of the dispute involved in the present case. Under the circumstances, the contention, that this is not an arbitration issue does not merit acceptance. Moreover, it has come on record that the petitioners have in fact resorted to the remedy of arbitration under the provisions of the License Agreement.

21. Apart from the fact that the License Agreement itself provides for a remedy for resolution of a dispute of such nature, as noticed earlier, the main dispute is as regards provision and maintenance of committed depth at the navigational channel in terms of clauses (iii) and (iv) of Article 4.14.2 of the License Agreement. Indubitably, therefore, the relief claimed in the present petition arises out of the license agreement entered into between the petitioners and the second respondent. In other words, the petition has been filed at the stage when there is a concluded contract, (which is not a statutory contract) and certain disputes have arisen between the parties. True it is that the said contract has been entered into pursuant to a general policy of liberalization/globalization of economy of the Government of India. However, it cannot be gainsaid that ultimately the parties are governed by the terms of the contract which is a self contained contract with built in remedies as discussed hereinabove. Thus, the controversy involved falls within the realm of contractual disputes.

22. Another relevant factor for deciding the maintainability or otherwise of the petition is that the obligation on the part of the KPT to provide draught of a committed depth of 12.5 metres arises under the License Agreement. The contract between the first petitioner and the KPT undoubtedly is not in the nature of a statutory contract, but has been entered into pursuant to a policy decision framed by the first respondent, and is, therefore, not governed by any statutory provision. The principal grievance voiced in the petition is against the failure of the second respondent to carry out required dredging to provide and maintain draught of the committed depth

of at least 12.5 metres in the navigation channel at Kandla Port. In support thereof, reliance has been placed upon the circulars issued by the KPT from time to time regarding permissible draught at Kandla Port in respect of different quarters to submit that the same make it apparent that at no point of time, the assured draught of 12.5 metres had been maintained in the navigation channel. It has been contended that such circulars would be the sole basis for deciding such issue. However, the say of the petitioners has been denied by the second respondent - KPT in its affidavit in reply, wherein it has been categorically averred that the assured draught of 12.5 metres as per the license agreement has been achieved and declared in the navigation channel as well as the berths No.11 and 12 and that such draught of 12.5 metres has been provided since last two and half years. Au contraire, it is the case of the second respondent that the petitioners have not made use of the higher draught permissible at Kandla Port and continue to bring small low draught vessels to the Terminal. In this regard, reliance has been placed upon a communication dated 12th October, 2009 of the Deputy Conservator, Kandla Port Trust to the Terminal Manager of the first petitioner, whereby it has been informed that the assured draught of 12.5 metres as per agreement has since been achieved and declared in the Navigation Channel as well as Berths No.11 and 12. That the draught of 12 metres has been provided since the last more than two years, but the first petitioner has not made use of higher draughts permissible at Kandla Port and continued to bring small low draught vessel to the Terminal. According to the second respondent the circulars issued by it, would not form the sole basis for deciding the controversy and that the adjudication of the dispute would involve leading expert evidence. Evidently, therefore, the principal dispute viz., whether or not, the assured draught of 12.5 metres depth as per the license agreement has been achieved and maintained by the second respondent, is a highly disputed question of fact. It is by now well settled that if a serious disputed question of fact is involved arising out of a contract qua contract, ordinarily a writ petition would not be entertained. Serious disputed questions or rival claims of the parties with regard to non- performance of obligations under a contract would be required to be determined on the basis of evidence which may be led by the parties in a properly instituted civil suit or by way of arbitration (if such dispute falls within the scope of the arbitration clause) rather than by exercising prerogative of issuing writs. In the case at hand, the fulcrum of the petitioners case rests on a seriously disputed question of fact, viz. whether or not the assured draught of 12.5 metres has been provided and maintained. It would, therefore, not be possible for this court in exercise of its extraordinary powers under Article 226 of the Constitution of India, to embark upon an inquiry into such a highly disputed question of fact and give a finding one way or the other. Thus, the petition does not deserve to be entertained on this ground alone.

23. It is by now well settled as held by the Supreme Court in the decisions cited hereinabove that when the contract itself provides for a mode of settlement of disputes arising from the contract, the parties should follow and adopt that remedy and should not invoke the extraordinary jurisdiction of the High Court under Article 226. Though a statute may expressly or implied confer power on a statutory body to enter into contracts in order to enable it to discharge its functions, disputes arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the dispute is a statutory or public body will not itself affect the principles to be applied. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. Where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights are governed only by the terms

of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple. Where the question involves discrimination at the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all. At this stage, the State acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In cases where there does not exist any factual dispute, writ petitions would be maintainable. Also, contractual disputes involving public law element are amenable to writ jurisdiction. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

24. In the case at hand, the contract entered into between the statutory body (that is the second respondent) and the petitioner is non-statutory and purely contractual in nature and the rights are governed by the terms of the contract. The petition has been filed at a stage when the contract has been concluded and raises a dispute regarding non-performance of contractual obligations. Moreover, as noticed earlier, the petition involves highly disputed questions of fact which would require leading of expert evidence to establish whether or not draught of the committed depth had been provided and maintained at the navigation channel. The contractual dispute does not involve any public law element. Nonetheless, despite the availability of alternative remedy, writ jurisdiction can be invoked under the three contingencies mentioned hereinabove, namely (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. What is, therefore, required to be examined is as to whether in the facts of the present case any of the three contingencies exist. Insofar as the first contingency is concerned, it may be noted that though the petitioners have alleged violation of fundamental rights, on facts no such violation has been made out. As regards breach of principles of natural justice, the controversy involved in the present case does not involve any element of breach of principles of natural justice. Besides, no order or proceeding has been challenged on the ground that the same is without jurisdiction, nor is the vires of any Act under challenge. Under the circumstances, none of the above three contingencies in which the petitioners could have invoked the extraordinary jurisdiction of this court despite the existence of an alternative remedy are attracted in the present case. Strong reliance has been placed by the learned counsel for the petitioners on the decision of the Supreme Court in the case of Gujarat State Financial Corporation v. M/s. Lotus Hotels Pvt. Ltd. (supra) for the proposition that if the statutory corporation enters in to a solemn contract in discharge and performance of its statutory duty and a person acts upon it, the statutory corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to such person. In such a situation, the court is not powerless from holding the statutory corporation to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty. In this regard, it may be noted that the present contract is not a statutory contract.

Besides, this is not a case where breach of contract on the part of the second respondent is evident on the face of the record. As to whether or not there is any breach on the part of the second respondent in the performance of its part of the contractual obligation is seriously in dispute. Under the circumstances, such a highly disputed question of fact which cannot be adjudicated in a writ petition under Article 226 of the Constitution of India. As held by the Supreme Court in Zonal Manager, Central Bank Of India v. Devi Ispat Limited (supra) (a) in the contract if there is a clause for arbitration, normally a writ court should not invoke its jurisdiction; (b) the existence of effective alternative remedy provided in the contract is a good ground to decline to exercise of extraordinary jurisdiction under Article 226; and (c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution in its contractual or statutory obligations, writ petition would be maintainable. In the facts of the present case, grounds (a) and (b) clearly exist, whereas on facts there is nothing to indicate that the respondents have acted contrary to public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution in its contractual or statutory obligations so as to call for exercise of extraordinary jurisdiction under Article 226 of the Constitution. In the aforesaid premises, this court is of the view that the facts of the case do not justify exercise of the extraordinary jurisdiction of this court under Article 226 of the Constitution.

25. The next question which arises for consideration is whether the provisions of section 111 of the Major Ports Act, can be invoked in the facts and circumstances of this case. As noted hereinabove, the relief claimed in the petition is a direction to the first respondent to issue appropriate directions to the second respondent to ensure that it carries out required dredging to provide and maintain the committed draught of 12.5 metres in the navigation channel in the Kandla Port Trust.

26. The aforesaid relief is based upon the provisions of section 111 of the Major Ports Trust Act, 1963 which reads thus:

"111. Power of Central Government to issue directions to Board. - (1) Without prejudice to the foregoing provisions of this Chapter, the Authority and every Board shall, in the discharge of its functions under this Act be bound by such directions on questions of policy as the Central Government may give in writing from time to time;

Provided that the Authority or the Board, as the case may be, shall be given opportunity to express its views before any direction is given under this sub-section.

[2] The decision of the Central Government whether a question is one of policy or not shall be final."

27. Section 111 of the MPT Act empowers the Central Government to give directions of questions of policy which the Board in the discharge of its functions under the Act would be bound to obey. Thus, when the Central Government issues directions to the Board on questions of policy, such directions are binding on the Board. In the present case, insofar as the directions of the Central Government are concerned, the Central Government has framed a policy directing ports to enter into development of Ports on PPP basis or BOT basis, however as rightly contended by the learned counsel for the second respondent, the same cannot be extended to enforcements of contracts or disputes resolution by the Central Government. From the language employed in the said section there is nothing to indicate that the same would extend to issuance of directions by the Central Government qua implementing contracts entered into by the Board pursuant to such policy. The Board being an independent entity, the duties and functions of the Board vis-?-vis the Central Government are enumerated under Chapter IX of the MPT Act which bears the heading "Supervision and Control of the Central Government". The said chapter is comprised of sections 106 to 111. Section 106 pertains to administrative report and requires the Board to submit a detailed report of the administration of the port during the preceding year to the Central Government. Section 107 requires the Board to submit statements of its income and expenditure in such form as the Central Government may direct. Section 108 of the Act empowers the Central Government to order a local survey or examination of any works of the Board etc. Section 109 makes provision for "Power of Central Government to restore or complete works at the cost of Board and lays down that, if at any time, any Board- (a) allows any work or appliance constructed or provided by, or vested in, the Board to fall in disrepair; or (b) does not, within a reasonable time, complete any work commenced by the Board or included in any estimate sanctioned by the Central Government; or (c) does not, after due notice in writing, proceed to carry out effectually any work or repair or to provide any appliance which is necessary in the opinion of the Central Government for the purpose of the Act, the Central Government may cause such work to be restored or completed or carried out, or such repairs to be carried out or such appliance to be provided and that the cost incurred shall be paid by the Board as prescribed. Section 110 empowers the Central Government to supersede the Board and section 110A empowers the Central Government to supersede the Authority. Thus, none of the above provisions contemplate any control of the Central Government over the Board qua execution and implementation of contracts entered into it with a private party. Under section 111 of the Act the power of the Central Government is limited to issuance of directions on questions of policy; however, the Central Government cannot interfere with the day to day functioning of the Board. The Board, being an independent body, the statute does not envisage such kind of control by the Central Government. The powers under section 111 of the Act cannot be stretched to interference with the disputes arising out of contracts entered into by the Board. The prayer seeking issuance of direction to the first respondent to direct the second respondent to provide the draught of committed depth in the navigation channel is, therefore, misconceived and dehors the powers vested in the Central Government under the Act. If at all the petitioners believe that certain directions are required to be issued to the second respondent, at best, they could persuade the Central Government to issue such directions on a question of policy, but there is no statutory right obtaining in favour of the petitioners to seek a direction to the Central Government to issue directions to the Board under section 111 of the Act. The powers of the Central Government under section 111 of the Act are purely discretionary in nature and in any case such powers are vested in the Central Government alone, and do not give any right to any private party to seek a direction to the Board in relation to the discharge of its functions on a question of policy. Under the circumstances, in the opinion of this Court, reliance placed upon the provisions of section 111 of the Act for the purpose of seeking a

direction to the first respondent is misconceived. Besides from the record it is apparent that the issue of inadequate draught in the navigation channel as well as the issue of suspension/restriction of night navigation was discussed at a meeting held on 3.3.2010 under the Chairmanship of the Joint Secretary (Ports) and the representatives of the second respondent and the petitioner- company wherein the Joint Secretary had stated that the process of discussion should continue between KPT and the petitioner company and issues may be resolved amicably by mutual discussion and whatever remedial measures provided in the Licence Agreement. Thus, according to the Central Government the issues raised by the petitioners were required to be resolved in terms of the Licence Agreement. Subsequently, by the communication dated 27th September, 2011 addressed to the Minister of Shipping, various grievances as referred to hereinabove had been raised and thereafter, the present petition has been filed on or about 30th November, 2011. In the opinion of this court, there being no statutory duty cast upon the Central Government to issue instructions to the second respondent at the instance of a private party, the relief claimed vide paragraphs 15(a), (b) and (c) cannot be granted.

28. Vide paragraph 15[d] of the petition, the petitioners have sought a direction by this court to the second respondent to ensure that it carries out required dredging to provide and maintain the committed draught of 12.5 metres in the navigation channel at Kandla Port. In this regard, it may be noted that the relief claimed by the petitioners is under Article 226 of the Constitution of India. Under the circumstances, the petitioners are required to make out a case regarding violation of a legal or a statutory right. As noted hereinabove, the very fact as to whether or not the committed draught of 12.5 metres has been maintained is itself a disputed question of fact. Besides, the right of provision and maintenance of a committed depth of 12.5 metres in the navigation channel at Kandla Port flows under the license agreement and is, thus, a contractual right and not a statutory right. As laid down by the apex court in the decisions cited hereinabove, in respect of a purely contractual right arising out of a contract, a writ petition would not be maintainable. Besides, the License Agreement provides for an inbuilt mechanism for resolution of disputes. The petitioners are, therefore, not entitled to the grant of such relief.

29. As regards the relief claimed vide paragraph 15(e) whereby the petitioners seek an order or direction restraining the second respondent from collecting royalty from the first petitioner in terms of the Agreement till such time as it does not provide and maintain the committed draught of at least 12.5 metres in the navigation channel at Kandla Port, in the light of the fact that the question as to whether or not the committed draught of 12.5 metres has been provided is itself a dispute question of fact, the petitioners are not entitled to the grant of such relief, more so when the petition is not entertained in respect of principal reliefs claimed therein.

30. In the light of the above discussion, the petition fails and is accordingly dismissed. Notice is discharged with no order as to costs.

Appeal dismissed.