

* **THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on : 14.02.2013
Judgment delivered on : 02.07.2013

+ WP(C) 2673/2011

PIRAMAL HEALTHCARE LIMITED PETITIONER

Vs

UNION OF INDIA AND ANR. RESPONDENTS

ADVOCATES WHO APPEARED IN THIS CASE:

For the Petitioner: Mr. Amit Sibal, Ms. Rekha Palli, Ms. Punam Singh and Mr. Sidhartha Silwal, Advocates
For the Respondents: Mr. Rajeeve Mehra, ASG with Mr. Saqib and Mr. Aditya Malhotra, Advocates

**CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER**

RAJIV SHAKDHER, J

1. This writ petition essentially seeks two reliefs. The first relief sought is for issuance of a direction to quash the letter dated 09.07.2010, issued by respondent no.1. The second relief, which is a consequential relief, seeks refund of Rs.18 Crores paid by the petitioner as one time license fee alongwith interest at the rate of 18% p.a. w.e.f. 20.05.2010. There is also an ancillary prayer made, which is directed against the respondents for production of documents and records pertaining to the issuance, and the subsequent surrender of license, to set up a manufacturing facility for production of opium alkaloids (in short alkaloids) and Active Pharmaceutical Ingredients (in short APIs).

2. It would be relevant to note at the very outset, that, there is admittedly no clause in the advertisement issued by the respondents, inviting Expression of Interest (in short EOI) or, in the tender conditions, empowering the respondents to retain and / or forfeit the license fee paid by the applicants, which included the petitioner. This is one of the main issues which arise for consideration in the instant case.

2.1 As a matter of fact, it is the case of the petitioner that the respondents have discriminated qua the petitioner, in as much as, a similarly circumstanced applicant i.e., Dr. Reddy's Laboratories Ltd. (in short DRL) was allowed to not only withdraw from the process but was also refunded the license fee deposited by it. Violation of Article 14 of the Constitution is thus brought into play by the petitioner. As is expected, respondents have repelled the charge and taken the stand that the circumstances in which DRL was allowed to withdraw from the process and was refunded the license fee were quite different to that which obtained in the petitioner's case. I will be discussing this aspect of the matter in the course of my judgment.

3. As for now, it may be in order to broadly refer to the background facts, which led to the petitioner approaching this court by way of a petition under Article 226 of the Constitution.

3.1. The petitioner, apparently, was sent a communication dated 16.05.2006 by The Organization of Pharmaceutical Producers of India (in short OPPI) seeking to know as to whether it would be interested in participating in a meeting called by the Additional Secretary, Department of Revenue, Government of India (GOI) to discuss the issue of allowing private sector entry into production of alkaloids and APIs. The said communication was accompanied by a facsimile sent by GOI in that behalf. Evidently, the authorized representative of the petitioner attended this meeting.

3.2 Soon thereafter, GOI issued an advertisement on 29.07.2006, inviting EOIs from Indian companies to set up a facility for manufacturing opium derivatives from opium supplied by it. The purpose was, apparently, to identify two Indian companies which could in public interest process 100 MTs of opium supplied by GOI works, to produce alkaloids and APIs. Importantly, apart from various other eligibility criteria fixed qua the interested applicants, one such criterion was that, the applicant should have achieved a minimum turnover of Rs.100 Crores in the previous three years.

3.3. It appears that, the GOI did not receive a response by a sufficient number of applicants though, the petitioner, had submitted its EOI. The EOI was evidently submitted by the petitioner with a demand draft of Rs.5000/-, which as per the terms indicated in the advertisement was non-refundable.

3.4 Consequently, on 08.11.2006, a second advertisement was issued by GOI. This time, however, the turnover criterion was reduced to a figure of Rs.50 Crores, though the period over which it had to be achieved remained the same i.e., three years.

3.5 It appears that GOI for this purpose had constituted a committee to evaluate the credentials of the applicants and the bids, if any, which may be received consequent to the advertisement. The second advertisement made it clear that those who had applied against the first advertisement need not apply again. Consequently, the petitioner did not apply against the second advertisement.

3.6 Apparently, twenty applications were received by the committee constituted by GOI for this purpose. The committee short listed sixteen companies, which qualified for grant of license under Rule 36A of the Narcotic Drugs and Psychotropic Substances Rules, 1985 (in short NDPS Rules) on the basis of norms set up for pre-qualification. This was the first

stage of pruning. The petitioner was one such applicant, which qualified for the pre-bid conference. A communication to this effect was sent to the petitioner, on 22.06.2007. Accordingly, the pre-bid conference was held on 10.07.2007.

3.7 Fourteen (14) out of the sixteen (16) companies which had qualified, participated in the meet. At the meet, various issues concerning the applicants were discussed and minutes drawn up. The applicants were called upon to submit their technical and financial bids. The terms and conditions qua which were communicated by respondent no.1 vide communication dated 17.08.2007. The committee finally approved the technical bids of the following four (4) applicants. The financial bids submitted by these applicants, which included the petitioner were as follows :-

S.No.	Name of the Organisation	Amount of the bid (Rs.)
1.	M/s. Emmellen Biotech Pharmaceuticals Ltd. (in short EBPL)	18,00,00,000
2.	M/s. Dr. Reddy's Laboratories (in short DRL)	15,66,00,000
3.	M/s.Nicholas Piramal India Ltd.	11,01,00,000
4.	M/s. Malladi Drugs Pharmaceuticals Ltd.	1,00,00,000 plus royalty of Rs.1. crore payable for period of 5 years

3.8 It would be evident that EBPL was the highest bidder, with DRL and the petitioner being the second and third highest bidders respectively. Consequently, the committee recommended issuance of the license under Rule 36 (2A) of NDPS Rules to not only EBPL but also to DRL provided it agreed to match the highest bid of Rs.18 Crores submitted by EBPL. This decision

was taken by the Committee at its meeting held on 05.11.2007. Evidently, DRL submitted its revised financial bid amounting to Rs.18 Crores [in terms of clause (m) of the terms and conditions stipulated in that behalf], on 06.11.2007.

3.9 Accordingly, the recommendation of the committee was accepted by GOI subject to the successful applicants submitting their applications, license fee and other details; as required. This decision of GOI was conveyed to all concerned including EBPL and DRL vide office memorandum dated 11.03.2008. These two companies were required to apply to respondent no.2 for issuance of the license within sixty days of the said communication.

4. By an office memorandum of 12.03.2008, other terms and conditions for issuance of license were also conveyed to EBPL and DRL.

4.1 By a communication dated 05.05.2008, respondent no.1 informed respondent no.2 that the license under Rule 36 (2A) of the NDPS Rules would be issued in terms of OM dated 11.03.2008 to EBPL and DRL only on payment of the license fee of Rs.18 Crores and satisfaction of other conditions contained in the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short NDPS Act) and the extant rules framed thereunder.

4.2 Respondent no.2, was reminded that one of the pre-conditions for issuing a license under Rule 36(2A) was that the concerned unit is required to produce a license from the State Drug Control Authority under the Drugs and Cosmetics Act, 1940. It was noted in the said communication by respondent no.1 that, it had been informed by EBPL and DRL that the State Drug Control Authority will issue a license only after the factory is set up, and therefore, for them to obtain a license within sixty (60) days as stipulated, was a condition, which could not be met. Accordingly, respondent no.1 advised respondent no.2, that upon the said two companies paying the sum of Rs.18 Crores and satisfying other conditions, they may be granted licenses to set up factories subject to

their obtaining clearances from the State Drug Control Authority, within a period of three years.

4.3 Therefore, the license under Rule 36(2A) which was to be issued by respondent no.2 could only be issued once the factory was set up and the State Drug Control Authority issued a license under Rule 39. The only concession which was made by respondent no.1 at this stage was that for the purposes of obtaining clearance from the State Drug Control Authorities, the permission to set up a factory may be treated as equivalent to a license under Rule 36. Both EBPL and DRL were however, directed to deposit the sum of Rs.18 Crores prior to expiry of sixty (60) days i.e., 09.05.2008.

4.4 It emerges that EBPL made a request on 05.05.2008 for extension of time by further period of sixty days w.e.f. 09.05.2008. The said request was followed by yet another communication dated 06.05.2008 addressed on behalf of EBPL to respondent no.1, for extension of time.

4.5 DRL, on its part remitted an amount of Rs.18 Crores to respondent no.1 under the cover of a letter dated 08.05.2008. In this communication, DRL indicated that the said payment was being made on behalf of an entity by the name of Macred India Pvt. Ltd. (in short Macred), which was the entity incorporated to implement the project. Macred was apparently, a joint venture between DRL and Johnson Mathey Group. DRL, in this communication requested GOI, to confirm that the license would be issued in the name of Macred and that, pending decision on this aspect; remittance had been made by it.

4.6 Respondent no.1, however, vide communication dated 06/12.05.2008 informed EBPL that their request for extension of time for payment of license fee could not be granted.

4.7 On the other hand, by a communication dated 13.05.2008, respondent no.2 accepted the demand draft in the sum of Rs.18 Crores submitted by DRL without prejudice to respondent no.1's decision on the request made for issuance of license in the name of Macred.

4.8 Pertinently, in an internal correspondence dated 15.05.2008, exchanged between respondent no.2 and respondent no.1, it got communicated that neither DRL nor EBPL had submitted an application for grant of license / permission for setting up a factory. Apart from this, the position regarding payment of license fee was also noticed in the said communication. It was recorded that, while DRL had made the payment subject to respondent no.1's decision on the Macred issue, EBPL had not made the payment and instead relied upon its communication to respondent no.1 for extension of time.

4.9 Evidently, on 16.05.2008, EBPL wrote to respondent no.1 that it was desirous of withdrawing from the tender process. Consequently, by a return communication dated 04.06.2008, respondent no.1 cancelled its offer for grant of license made to EBPL. It was also indicated that, no offer would be accepted from EBPL, in any subsequent bidding process for issuance of a similar license, for a period of three years.

5. In the interregnum, the petitioner offered to fill the vacuum caused on EBPL failing to come good qua the offer made to it. In terms of clause (m), the petitioner paid the highest license fee of Rs.18 Crores vide demand draft dated 28.07.2008, pursuant to respondents decision taken in that behalf in favour of the petitioner, on 05.06.2008. This payment was made by the petitioner under the cover of its letter dated 30.07.2008. At the time of making the payment, it was brought to the notice of respondent no.1 that though the bid was made in the name of Nicholas Piramal India Ltd., its name stood changed to Piramal Healthcare Limited (which is how the petitioner is presently described).

5.1 Having regard to the above, on 01.08.2008, respondent no.2 acknowledged the receipt of payment and change in name. The petitioner, was further informed that, in line with its letter of 05.05.2008, it was required to set up a factory for manufacture of alkaloids and APIs from Indian opium within a period of three years subject to obtaining necessary clearances from the State Drug Control Authority. The petitioner, was also informed that the license under Rule 36 would be issued on submission of an application form and fulfillment of other regulatory requirements contained in the NDPS Rules as also in the Drug and Cosmetics Rules. It may be of some relevance to note that, copies of the letter dated 05.05.2008, to which reference was made, were issued, in the first instance only to EBPL and DRL as at that point in time, these were the only two companies, which had succeeded in winning the bid.

5.2 It is hereafter that, trouble started between the parties. By a letter dated 11.05.2009, respondent no.1 called upon respondent no.2 to seek information from the petitioner as to the steps it had taken to execute the project. Respondent no.2 was called upon to obtain an activity chart so that progress of the project could be monitored and delays, if any, could be assessed.

5.3 Consequent thereto, the petitioner on 25.05.2009, wrote to respondent no.2 setting out the steps it had taken towards execution of the project, which included the selection of site at Baddi in Himachal Pradesh for setting up a factory; execution of technical agreement with an entity by the name of Noramcco, a division of Johnson and Johnson Pharmaceuticals; and the request made to the Ministry of Commerce and Industry for approving its technical collaboration agreement entered into with Noramcco. It was conveyed by the petitioner that, it would be in a position to erect the facility within fifty four (54) weeks.

5.4 However, five (5) months down the road, the petitioner informed respondent no.1 vide letter dated 23.12.2009 that its technical team had visited the facilities of its collaborator Noramcco in U.S.A and the inputs obtained in its interaction with its collaborator was suggestive of the fact that the project would be financially viable only if GOI, provided support to it, in respect of the following:

- (i). reduction in the price of opium from current selling price;
- (ii). increase in the capacity of the facility to 200 MT without levy of additional license fee qua incremental capacity;
- (iii). refund of license fee of Rs.18 Crores paid to secure the license;
- (iv). flexibility to fix selling prices of Codeine Phosphate; and
- (v). lastly, use of Concentrated Poppy Straw (CPS) route to manufacture APIs and grant of permission to directly import CPS from foreign suppliers.

5.5 Respondent no.1, however, vide a return communication dated 18.01.2010 refuted most of the suggestions made by the petitioner.

5.6 The aforesaid response of respondent no.1 propelled the petitioner to convey vide communication dated 20.08.2010 addressed to respondent no.1 that, it was no longer desirous of taking benefit of the permission granted to it to set up a factory for manufacture of alkaloids and APIs, and therefore, would request that it be refunded the license fee of Rs.18 Crores paid to it in that behalf. It was sought to be conveyed that after the petitioner had paid Rs.18 Crores, it was conveyed to it that the issuance of license was subject to the petitioner obtaining necessary clearances from the State Drug Control Authority within a period of three (3) years. The not so subtle suggestion was that there was a change in the terms and conditions, post the payment of license fee by it.

5.7 Respondent no.1, however, vide the impugned letter dated 09.07.2010 rejected its request for refund of the license fee. The sum and substance adduced from the involved reasons given therein, was that, the petitioner by first entering the fray and thereafter withdrawing, had blocked interested bidder (s) and therefore, was not entitled to the refund of, one time license fee, paid by it.

5.8 In so far as the petitioner was concerned, there was no further movement though it did discover that DRL had been refunded the license fee paid by it. In this behalf, the petitioner has placed reliance on a response dated 01.09.2010 issued by respondent no.1 to a query raised by one Sh. Shobhit Mishra.

5.9 In the meanwhile, respondent no.1 apparently issued a fresh advertisement, on 07.04.2011, inviting EOIs. This time around, however, respondent no.1 permitted multinational companies to participate in the bidding process and also indicated that they would be allowed to process 200 MTs of Indian opium, which was, one of the demands of the petitioner. By this advertisement, applicants were also asked to submit a bid bond for a sum of Rs.1 Crore, which was required to be backed by a bank guarantee of an equivalent amount. The terms contained therein clearly stipulated that if, the highest bidder failed to honour his bid, his bid bond would be forfeited. Furthermore, both the petitioner and EBPL were barred from participating in the bidding process.

6. It is in this background that the petitioner moved this court on 27.04.2011, by way of the captioned writ petition, when notice was issued to the respondents. Upon completion of pleadings, arguments were heard in the matter.

Submissions of Counsels

7. On behalf of the petitioner, arguments were advanced by Mr. Amit Sibal assisted by Ms. Rekha Palli, Advocate while on behalf of the respondents, submissions were made by Mr. Rajeev Mehra, learned ASG assisted by Mr. Saqib, Advocate.

8. Mr. Sibal broadly made the following submissions:-

8.1 That the petitioner's principal relief was to seek quashing of the letter dated 09.07.2010 issued by respondent no.1. He submitted that the decision taken thereupon by respondent no.1 to reject the petitioner's request for refund and the resultant forfeiture of its license fee of Rs.18 Crores was illegal, arbitrary and discriminatory. On the last aspect, reference was made to the case of DRL in as much as in similar circumstances, the said entity had been allowed to withdraw from the bidding process and obtain refund of the license fee.

8.2 Respondent no.1 could not have forfeited the license fee even if it was in the nature of earnest money or security deposit unless there was an express stipulation made in that behalf, in the contract. Reliance in this regard was placed on the judgment of the Madhya Pradesh High Court in the case of Bhanwarlal and Ors. Vs. Babu Lal and Ors., AIR 1992 MP 6 at page 12 in paragraph 19. The admitted position being: that there was no such clause of forfeiture and hence, the amount in issue had to be refunded.

8.3 The case of the respondents was that, the license fee paid was not an amount paid towards either earnest money or security deposit and hence, even assuming that the petitioner was in breach of its obligations, even then, in the absence of a specific provision, empowering respondent no.1 to forfeit the license fee, the said amount was required to be refunded to the petitioner. Reliance in this regard was placed on the provisions of Section 64 and 65 of the Contract Act and the following judgments:-

(i). *De-Smet (India) Private Limited Vs. B.P. Industrial Corporation (P). ltd. , AIR 1980 Allahabad 253 (Page 9-11, and 13) and (ii). Surendranath Talukdar and Ors. Vs. Lohit Chandra Talukdar, AIR 1975 Gauhati 58 (para 10).*

8.4 The petitioner had paid the license fee as consideration for the privilege that GOI was to extend to it to process the opium. What the petitioner obtained as a matter of fact was a permission to set up a facility / a factory. The contract fell through at this stage; albeit prior to issuance of license to process the opium. Respondent no.1 must, therefore, return the benefit received even if the petitioner was in breach of the contract.

8.5. The reasons given in the impugned letter dated 09.07.2010 were not sustainable, in as much as, the allegation that it had blocked the issuance of license for as long as it wanted to and then backed out of the process and claimed refund, was not sustainable. It was contended that, such a charge could have been levied if there was an entity available other than the petitioner to fill the void caused on EBPL withdrawing from the process. EBPL had not paid the license fee. Thus apart from the petitioner, the only other entity which had paid the licensee fee was DRL, which had been allowed to withdraw from the process and retrieve the amount paid.

8.6 The petitioner, was given thirty six (36) months vide respondent no.2's letter dated 01.08.2008, to set up a factory. The petitioner, much prior to the expiry of that period, on 20.05.2010, surrendered the permission to erect a facility; a situation which was accepted by the respondents. The time frame for this purpose expired on 31.07.2011. The respondents, however, on their part issued a fresh advertisement much prior to the expiry of the said period, that is on, 07.04.2011; which is premised on the fact that it had accepted the recession of the contract by the petitioner. Therefore, it could not be contended by the

respondents in these circumstances that the petitioner had blocked the issuance of the license.

8.7 In this behalf, it was contended that the petitioner was entitled to surrender the license in terms of Rule 51 of NDPS Rules which, provided that a licensee could surrender the license upon giving fifteen (15) days notice. It was submitted that under Section 39 of the Contract Act, a contract is rendered void when one party refuses to perform its obligations and the other party accepts the non performance. In such a situation, it was argued, the contract stands rescinded allowing both parties to seek their respective remedies under the contract. In the impugned letter, no objection was taken by the respondents to the petitioner's assertion that it did not want to avail of the benefit extended by the respondents in the form of a permission given by them to set up a facility for processing Indian opium. Having regard to this aspect, the respondents were bound to refund the amount to the petitioner.

9. On the other hand, learned ASG who appeared on behalf of the respondents, raised a preliminary objection that the reliefs claimed in the petition could not be granted by this court, in exercise of its powers, under Article 226 of the Constitution. The petitioner, according to the learned ASG, failed to demonstrate violation of a statutory right by the respondents in not refunding the one time license fee paid by it. The petitioner's remedy was to approach a civil court by way of a recovery Suit where, all defences would be available to the respondents.

9.1 It was contended that it was the petitioner which had failed to perform its obligations in line with the terms and conditions stipulated under the contract. The lis, between the parties, did not arise out of the public law functions of the State but related to contractual obligations obtaining between the parties. The petitioner was not entitled to recovery of money paid in the form of license fee

under any statutory provision / rule and therefore, no mandamus could be issued in the facts and circumstances of the present case.

9.2 The one time license fee paid by the petitioner for procuring permission to set up a factory to process Indian opium to derive alkaloids and APIs, was not money paid which had attributes of earnest money, advance deposit and / or security. The said lump sum amount was consideration paid by the petitioner for grant of license / permission of the respondents to part with their right to undertake processing/ manufacture of Indian opium.

9.3. I must, however, point out that in the written submissions filed on behalf of the respondents on 08.02.2013, the respondents have taken a stand that the petitioner was granted a license under Rule 36(2A) and that, terms and conditions contained in OM dated 12.03.2008 and 05.05.2008 would apply to the petitioner as well. It was also contended that OM dated 05.06.2008 was in the knowledge of the petitioner as was evident on perusal of the petitioner's letter of 21.07.2008 addressed to respondent no.1.

9.4 Based on this, it was sought to be contended that the petitioner's submission that the change in terms was not known to it was misleading and incorrect. The petitioner, according to the respondents, had paid a sum of Rs.18 Crores, on 30.07.2008, after having become fully aware of the terms and conditions on which the offer was based.

9.5 Respondent no.1, it was submitted, never accepted surrender of license from the petitioner, and that there is no reference to the said aspect in the impugned letter i.e., letter dated 09.07.2010.

9.6. It was also contended that the offer made to the petitioner was subject to fulfillment of certain conditions, and that refusal by the petitioner, would not entitle the licensee to seek refund. It was factually incorrect to contend that the respondent no.1 had acceded to the petitioner's request for surrender of license.

There was no letter of cancellation issued by respondent no.1 qua the petitioner. Since, the one-time license fee was not in the nature of earnest money or security for performance of contract, by necessary implication, the money was liable to be forfeited in case of default on the part of the payer or the depositor. It was contended that, the petitioner had sought to withdraw from the process as the project, according to it, was economically unviable without the substantive support of GOI. It was submitted that, these aspects ought to have been considered by the petitioner prior to submission of its bid as every aspect of the matter was made clear to it in the pre-bid conference held on, 10.07.2007.

9.7 The refund of license fee to DRL was made in different circumstances. DRL, while depositing the license fee had clearly indicated that the deposit was being made on the premise that the license would be issued in the name of Macred. Since, the Government, did not accept this request of DRL, it proceeded to return the license fee.

10. In rejoinder, Mr. Sibal, apart from reiterating what he submitted in the opening, refuted the submission qua the maintainability of the writ petition by adverting to the following arguments. Firstly, it is the case of the petitioner that the stand taken by respondent no.1 of refusing to refund the license fee was violative of Article 14 being: arbitrary, discriminatory, unreasonable and unfair; and it is in the context of considering this question, that the terms of contract entered into between the parties would have to be examined by the court.

10.2 Secondly, the contract in issue was a statutory contract, which was governed by the provisions of Section 10 of the NDPS Act. The license, if issued, would have been issued under Rule 36(2A), and thus, was amenable to the jurisdiction of this court. The refund of license fee to DRL, while

forfeiting the license fee paid by the petitioner, was a clear pointer to the fact that the respondents had acted arbitrarily, and in a discriminatory manner, in violation of the provisions of Article 14 of the Constitution. Similarly, EBPL was permitted to withdraw from the bidding process without being penalized. EBPL was fortuitous in as much as, when it withdrew from the process it had not even deposited the license fee. These actions of the respondents were, according to Mr.Sibal, amenable to scrutiny under Article 226 of the Constitution. In support of his submissions, the learned counsel relied upon the following judgments:- *ABL International Ltd. And Anr. Vs. Export Credit Guarantee Corporation of India Ltd. and Ors.*, (2004) 3 SCC 533 and *Zonal Manager, Central Bank of India Vs. Devi Ispat Limited and Ors.*, (2010) 11 SCC 186, *Godavari Sugar Mills Ltd. Vs. State of Maharashtra and Ors*, (2011) 2 SCC 439 and *T.A. Anandan Vs. Union Territory of Pondicherry*, *Manu/TN/3319/2009*.

REASONS

11. I have heard the learned counsels for the parties and perused the record. Before I venture to discuss the various legal and factual submissions made by the parties including the preliminary objection taken by the respondents, it would be necessary to cull out the main factual aspects over which there is no dispute at all. This is so, as in my view, whether or not, I should even entertain the petition would be pivoted on these facts. What has emerged is as follows:-

11.1 The GOI, keeping in mind public interest, had taken a decision to involve private entities in its attempt to augment the production of alkaloids and APIs. The attempt was, to identify, two Indian companies which could process 100 MTs of opium supplied by GOI Works. Towards this end, it issued an advertisement for the first time, on 29.07.2006, inviting EOIs.

Amongst other eligibility conditions, it was stipulated that the applicant evincing interest should have achieved a minimum turnover of Rs.100 Crores in the past three years. GOI received a lukewarm response to the same, though the petitioner had jumped into the fray. Before the issuance of the advertisement parleys were held between Government officials and OPPI.

11.2 A second advertisement was issued on 08.11.2006, which received a response better than the first advertisement.

11.3 The committee appointed by GOI appraised the credentials of twenty (20) applicants and thereafter, shortlisted sixteen (16) for a pre-bid conference. The pre-bid conference was held on 10.07.2007, which was attended by fourteen (14) out of the sixteen (16) companies short listed for the purpose. These companies were called upon to submit their technical and financial bids against terms and conditions supplied to them.

11.4 The appraisal of the technical and financial bids led to short listing of four (4) companies. EBPL, which was the highest bidder, offered Rs.18 Crores as one time license fee, while DRL, which was, the second highest bidder, offered Rs.15.66 Crores. At this stage, the petitioner had offered only a sum of Rs.11.01 Crores.

11.5 GOI accepted the recommendations of the Committee, which was communicated to all concerned including EBPL and DRL vide its OM dated 11.03.2008. As per the terms stipulated for submission of bids, in particular, clause (m), DRL revised its financial bid to equal that of the highest bidder. Accordingly, this was communicated by DRL on 05.11.2007 prior to the issuance of OM dated 11.03.2008. At this stage, the petitioner was not in the fray and hence, no communication was sent to it.

11.6 By another OM i.e., dated 12.03.2008, EBPL and DRL being the successful bidders, were communicated other terms and conditions.

11.7 The aforesaid was followed by communication dated 05.05.2008 which was exchanged between respondent nos.1 and 2; copies of this communication was, however, sent only to EBPL and DRL. What is important is that in this communication, respondent no.1 accepted the position that license for processing opium by respondent no.2 was dependent on a license being issued in turn by the State Drug Control Authority under the Drugs and Cosmetics Act. The license to be issued by the State Drug Control Authority was dependent on a factory /facility being set up. Therefore, respondent no.2 was advised to issue, for the moment, permission for setting up a facility / factory to process the opium. This permission, of course, was subject to payment of license fee by EBPL and DRL (prior to 09.05.2008; which was the date originally fixed) and fulfillment of all other conditions.

11.8 DRL, paid the sum of Rs.18 Crores under the cover of its letter dated 18.08.2008, albeit on behalf of a joint venture company by the name of Macred. It also sought issuance of the license in the name of Macred.

11.9 EBPL, on its part sought extension of time for payment of license fee, which was rejected by respondent no.1, vide communication dated 06/12.05.2008.

12. Undoubtedly, EBPL sought to withdraw from the process; a fact which was communicated by it, to respondent no.1, vide its letter dated 16.05.2008. Consequently, the offer made to it was cancelled on 04.06.2008.

12.1 This resulted in a slot becoming vacant. Consequently, the petitioner paid the said sum of Rs.18 Crores under the cover of its letter dated

30.07.2008, on a decision taken in its favour by respondent no.1, on 05.06.2008.

12.2 The petitioner, was thus communicated of decision taken by respondent no.1 which is contained in its letter dated 05.05.2008 communicated to respondent no.2, only on 01.08.2008. I must note at this juncture the argument of the respondents that petitioner was aware of this decision. This argument, which is based on the contents of letter dated 21.07.2008 is erroneous, as that letter, refers to the decision contained in communication dated 05.06.2008 and not 05.05.2008.

12.3 From the correspondence produced in court by the learned ASG, it appears that on 30.03.2009, DRL wrote to respondent no.1 that it was no longer interested in pursuing the project, and accordingly, it was desirous of withdrawing from the same as there had been much delay in issuing the license in the name of Macred. The project according to DRL had become economically unviable. This request of DRL was accepted by respondent no.1 evidently vide its communication dated 06.05.2009. Once again, this letter was produced by the learned ASG in court. A reading of the letter dated 30.03.2009 alongwith letter dated 06.05.2009 would show that admittedly, a show cause notice was issued on 07.06.2008 to DRL to which a reply dated 17.07.2008 was filed by DRL.

12.4 Both the show cause notice and the reply have not been produced in court; though by letter dated 06.05.2009, not only did respondent no.1 cancel the approval granted to DRL vide OM dated 11.03.2008 but also directed refund of Rs.18 Crores submitted by it on behalf of Macred. As a matter of fact, respondent no.1 directed respondent no.2 to take urgently, necessary action, to move the Ministry of Finance, Department of Revenue, so that requisite provision could be made in the budget, if required, to process the

refund. The reason accorded for not issuing a license in the name of Macred was that, at the time when the bid was made by DRL, Macred was not in existence. I am not getting into the legal niceties of whether such a reason, if factually correct, can be sustained, though it is not unknown to law that promoters of companies do enter into pre-incorporation contracts.

12.5 Respondent no.1 seems to have accepted the reason supplied by DRL that, pursuing a project was “no longer feasible or in no way viable in the context of economic slow-down (*sic*)”.

12.6 The petitioner also put forth the case of commercial unviability of the project in its letters dated 25.05.2009 and 23.12.2009. The petitioner, while alluding to the fact that it was still interested in continuing with the project sought support from GOI in certain areas, (to which I have already made a reference hereinabove), to make the project viable. Respondent no.1, however, rejected the contention of the petitioner vide its communication dated 18.01.2010. This is how the petitioner, vide its letter of 20.05.2010 conveyed to respondent no.1 that, it was no longer interested in taking benefit of the permission granted to it to set up a facility / factory to process opium. In the very same communication, a request for refund of license fee was made.

12.7 Not only did respondent no.1 reject the request made vide impugned letter dated 09.07.2010 but had also set about to commence a fresh process. Accordingly, an advertisement was issued on 07.04.2011.

13. There is no dispute whatsoever that there is no provision for forfeiture of the license fee in either the advertisements of June, 2006 and November, 2006 or, in the terms and conditions issued to bidders at the time when, technical and financial bids were invited. As a matter of fact, even the minutes of the pre-bid conference do not allude to this aspect. This would

have been one of the issues for consideration in the lis between the parties irrespective of the remedy adopted by the petitioner to agitate the issue.

14. I must also point out at this juncture that, the respondents, as noticed above by me, have clearly stated that the license fee paid by the petitioner was not in the nature of earnest money or even security deposit. It is the stand of the respondents that the said amount was a consideration for the privilege of parting with the right to process Indian opium. There has been no argument made by either side that such a power to issue a license for processing did not vest in the Central Government. If that be the position, could it be said that the power exercised by respondent no.1, did not have a public law flavour. In my view no, and this view I hold without taking recourse to a substantial argument and the opinion expressed thereto by the Supreme Court, in more recent cases, that even while exercising contractual powers, the State is bound to act within the realm of Article 14 of the Constitution. In other words, if parties claim rights under a contract to which a State or its instrumentality is a party, a remedy by way of writ petition would not be shut out only because it seeks to enter the contractual field.

15. Notably, there is not even a suggestion either in the impugned letter or in the counter affidavit filed on behalf of the respondents that cancellation of the permission granted to the petitioners to set up a factory had resulted in a damage or injury to them. The reason perhaps, for not making such an assertion is obviously that it had permitted EBPL to withdraw from the process, after having accepted its bid, without seeking to even contend that it would recover loss or damage caused to them by its action. DRL's case was, on the other hand, if at all, worse in that, permission was given to it to withdraw from the process after its bid has been accepted and license fee received. The u-turn which DRL was permitted to take was sought to be

explained by adverting to the fact that while paying the license fee, DRL had made it clear that the license fee was being paid on behalf of Macred, and it expected the license to be issued in Macred's favour.

15.1 This explanation, in my view, papered over the fact that respondents had, in the first instance, issued a show cause notice to DRL dated 17.06.2008. This submission, made in court, also glossed over the fact that respondent no.1 had accepted DRL's explanation that the project was no longer feasible or viable on account of economic slow-down.

15.2. What is startling, in both cases (i.e., EBPL and DRL's case), the respondents permitted them to withdraw from the project after the bids had been accepted. Both EBPL and DRL were the original successful bidders. In the first case, EBPL was allowed to renege from a concluded contract for the reason that its request for extension of time to make the payment was not accepted. In the second case, (which pertains to DRL), it was allowed not only to exit from the contract but also to receive back the license fee of Rs.18 Crores deposited by it. Though respondents have tried to argue that DRL's case stood on a different footing, a close scrutiny of the facts detailed out above, would show that respondents could have held DRL to its promise. For this purpose, one would have to look at the financial bid of 08.10.2007 preferred by DRL. The financial bid which was accompanied by a letter dated 08.10.2007 read as follows :-

“..We, Dr. Reddy's Laboratories Limited, offer to pay the Government of India an amount of Rs.15,66,00,000/- (Rupees Fifteen Crores Sixty Six Lakhs only) as a one time fee to obtain a license to manufacture of alkaloids from 100 MT of Indian opium per year...”

15.3 This bid was accepted by respondent no.1 vide its OM dated 11.03.2008. The contract, according to me, stood concluded at this stage. It

was only in April, 2008, perhaps vide letter dated 24.04.2008 that DRL sought to change the terms of contract by seeking to make the payment in the name of Macred. This aspect is reflected in DRL's letter dated 08.05.2008.

15.4 In my view, what is sauce for the goose is sauce for the gander. Therefore, the respondents would have, perhaps, been well within their right to say that they would not allow either EBPL or DRL to withdraw from the process. The respondents, on the other hand, chose to do exactly what was sought for, both by EBPL and DRL, and in fact facilitated it by conveying their cancellation for grant of license to these entities vide letters dated 04.06.2008 and 06.05.2009. It is quite possible that, since no injury or harm was caused to the respondents by virtue of the withdrawal of EBPL and DRL, it chose not to assert or take any punitive action.

15.5 Is the position any different vis-à-vis the petitioner; evidently not. The petitioner seeks to withdraw from the process; albeit after the acceptance of its bid on the ground of commercial and economic unviability. As indicated above, there is no assertion of any harm or injury; in the impugned letter of rejection. The only assertion in the impugned letter is that the petitioner's offer not to pursue with the permission granted to set up the factory could not be accepted for the reason that it had blocked the chance of another entity; I would assume, to get into the fray. Whether or not, this was a tenable explanation, is not relevant in these proceedings, what can, however, be unreservedly said, is that, it stopped short of saying that harm and injury had been caused to it. If that assertion is not made, what, has to be examined is that, could the respondents withhold the return of the license fee to the petitioner.

16. Therefore, before I proceed further, the first question which requires an answer is: whether a writ petition under Article 226 would be maintainable in the background of these facts.

16.1 The respondents sought to rely upon the judgment of the Supreme Court in *Suganmal*'s case to contend that a mandamus could not be issued to them to refund the license fee as a writ petition claiming a sole relief of refund was not maintainable. *Suganmal*'s case was a matter in which the appellants had approached the Supreme Court against the judgment of the High Court where its writ petition for refund of tax had been rejected by the High Court on the ground that it simply claimed refund of tax. The appellants in that case, had succeeded in satisfying, in the first round, the authorities under the Act, that tax sought to be recovered qua cotton mills under the Indore Industrial Tax Act, 1927, was not leviable and thus payable, as they did not run a cotton mill. While this direction was upheld, no direction was issued to refund the tax, which is how, the appellants in the second round, filed a petition under Article 226. It is, in this background, that the following observations were made by the Supreme Court, on which reliance was sought to be placed by the respondents:-

“...(6). On the first point, we are of opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Art. 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the state to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax..”

“..We do not consider it proper to extend the principle justifying the consequential order directing the refund of amounts illegally realized, when the order under which the amounts had been collected has been set aside, to cases in which only orders for the refund of money are sought. The parties had the right to question

the illegal assessment orders on the ground of their illegality or unconstitutionality and, therefore, could take action under Art. 226 for the protection of their fundamental right, and the courts, on setting aside the assessment orders, exercised their jurisdiction in proper circumstances to order the consequential relief for the refund of the tax illegally realized. We do not find any good reason to extend this principle and, therefore, hold that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right...”

(emphasis is mine)

16.2 It may be pertinent to note in the same judgment (*Suganmal*'s case) the Supreme Court in paragraph 11, while agreeing with the observations made in the judgment in the case of *State of Madhya Pradesh Vs. Bhailal Bhai* alluded to two situations by way of illustration when, exercising power under Article 226 a High Court may refuse to give consequential relief. The two instances referred to were: where there was unreasonable delay in approaching the court or, where prima facie triable issues were raised as regards merits, such as, limitation etc.

16.3 *Suganmal*'s case has been explained and distinguished in several subsequent judgments of the Supreme Court including *U.P. Pollution Control Board Vs. Kanoria Industrial Limited*, (2001) 2 SCC 549, *ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd.*, (2004) 3 SCC 553, *Central Bank of India Vs. Devi Ispat Limited*; (2010) 11 SCC 186, and *Godawari Sugar Mills Limited Vs. State of Maharashtra and Ors.*, (2011) 2 SCC 439.

16.4 For the sake of brevity, I would advert to principles enunciated in the judgment of the Supreme Court in the case of *ABL International Ltd.*, in which the court considered the very same submissions, which is that, the dispute in issue was contractual in nature, and no mandamus could be issued

for recovery of money. This is, in addition to the fact that in *ABL*'s case the Supreme Court discussed, distinguished and explained its earlier judgments, which on the face of it took a somewhat different view. Thus, the Supreme Court in *ABL*'s case, while examining a plethora of past precedents including the *Suganmal*'s case, set out the following legal principles to ascertain maintainability of a writ petition :-

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

- (a). In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.
- (b). Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refund 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...”

16.5 What is of significance is that the Bench in *ABL*'s case cited with approval the judgment of its own court in the case of *Gunwant Kaur Vs. Municipal Committee, (1969) 3 SCC 769*, which mildly upbraided the High Court for dismissing the writ petition, in limine, on the ground that it had to contend with disputed questions of fact. The Supreme Court noticed that the Bench in *Gunwant Kaur*'s case had emphatically emphasized that the High Court had the jurisdiction to determine questions of fact even if they are in dispute, and therefore, it ought to have called for an affidavit-in-reply rather than relegating the parties to a separate suit. As a matter of fact, the court observed that the High Court could require parties in a given case to give oral evidence (see observations made at pages 567-568 paragraph 16 and 19).

16.6 Therefore, the court clearly was of the view that there was no absolute rule barring it from entertaining a writ petition involving disputed questions of fact even if they arise out of contractual obligations. It is really for the court to consider: whether it could be convenient to decide the issue based on affidavits or, was it a case, which was fit for relegating the parties to alternative remedies including that by way of a civil suit having regard to the facts obtaining in a particular case. The requirement of oral testimony and triability of a defence raised, are issues that the court could take into account in relegating parties to an alternate and efficacious remedy. Apart from anything else, in **ABL's** case the court refused to relegate the party to a civil suit having regard to the fact that the petitioners claim before it was rejected in May, 1997 and by the time the case reached the Supreme Court, it was nearing the end of 2003.

17. In the context of the above, I must also refer to yet another judgment of the Supreme Court in the case dealing with contract of insurance wherein a Division Bench of the Supreme Court, in paragraph 11 at page 167 of its judgment, titled ***Life Insurance Corporation of India and Ors. Vs. Asha Goel (Smt.) and Anr., (2001) 2 SCC 160***, made the following observations :-

“..The position that emerges from the discussions in the decided cases is that ordinarily the High Court should not entertain a writ petition filed under Article 226 of the Constitution for mere enforcement of a claim under a contract of insurance. Where an insurer has repudiated the claim, in case such a writ petition is filed, the High Court has to consider the facts and circumstances of the case, the nature of the dispute raised and the nature of the inquiry necessary to be made for determination of the questions raised and other relevant factors before taking a decision whether it should entertain the writ petition or reject it as not maintainable. It has also to be kept in mind that in case an insured or nominee of the deceased insured is refused relief merely on the ground that the

claim relates to contractual rights and obligations and he / she is driven to a long-drawn litigation in the civil court it will cause serious prejudice to the claimant/other beneficiaries of the policy. The pros and cons of the matter in the context of the fact-situation of the case should be carefully weighed and appropriate decision should be taken. In a case where claim by an insured or a nominee is repudiated raising a serious dispute and the court finds the dispute to be a bona fide one which requires oral and documentary evidence for its determination then the appropriate remedy is a civil suit and not a writ petition under Article 226 of the Constitution. Similarly, where a plea of fraud is pleaded by the insurer and on examination is found prima facie to have merit and oral and documentary evidence may become necessary for determination of the issue raised, then a writ petition is not an appropriate remedy...”

17.1. Similarly, in ***Godavari’s*** case, principles as to when a writ petition could be entertained are culled out in paragraph 8 at page 442 of the judgment.

18. Having regard to the above, it is quite clear that the Supreme Court has undoubtedly veered from a conservative position that a writ petition would not lie for entertaining disputes which emanate from a breach of contract to now conclude or let me say explain that this is not an absolute rule and much would depend on the facts and circumstances of each case. The position as it obtains today is that, a mandamus can be issued for recovery of money, provided it is a consequential relief.

19. Applying the law to the facts obtaining in the present case, I am inclined to agree with the petitioner that a writ would lie, even though the dispute has its genesis in a contract. There is, as indicated above, no dispute on the material facts. The question which arises for consideration is a question of law which is whether in the absence of a clause for forfeiture obtaining between the parties, the money could be retained by the respondents, especially, in the circumstances that no harm or injury is

pleaded, and similarly circumstanced entities, have been allowed to exit from the contract. I would deal with this a little later as this is an issue on merits.

19.1 Let me deal with another question which relates to the efficacy of the petition. The question is: could the prayers sought in the writ petition be granted. In this case, the principal prayer is to seek a direction for quashing the impugned letter dated 09.07.2010.

19.2 The impugned letter was in response to the petitioner's letter of 20.05.2010 wherein, the petitioner sought to make two requests. First, that it did not wish to continue with the permission accorded to it for setting up a factory. Second, which emanated from the first request, that, the license fee of Rs.18 Crores be refunded to it. Since the first request was declined, the request for refund was also rejected by the respondents.

19.3 As indicated by me above, the rejection of the petitioner's request to withdraw from the project was clearly erroneous as both EBPL and DRL had been permitted to exit from the project; albeit by cancellation of the offer made by the respondents after it was accepted unequivocally on 11.03.2008. Therefore, the petitioner was right, in my view, in contending that it was not treated even handedly or at least the same yardstick was not applied to it. This approach is not to be confused with the principle that there can be no equality in illegality, if it can be called one. The respondents apparently took a mature decision that withdrawal of EBPL and DRL from the process did not cause any damage to it. Therefore, respondents would have to show or at least indicate in the impugned letter that petitioner's withdrawal from the process was injurious to its interest. It is with respect to this aspect that the petitioner claims it is not treated even handedly. This was, in a sense, the principal relief sought for by the petitioner. The consequential relief would

be the refund of Rs.18 Crores. In my view, therefore, the writ petition would be maintainable.

20. This brings me to the question as to whether, on merits, the petitioner is entitled to the consequential relief. Given the fact that there is no forfeiture clause obtaining between the parties and the stand of the respondents is that license fee paid by the petitioner was not in the nature of earnest money or security for performance of the contract, I am of the opinion that the respondents would have to refund the money.

20.1 I had an occasion to deal with somewhat similar aspects in the case titled *State Bank of India Vs. Union of India and Ors., WP(C) 4567/2001*, wherein in a judgment delivered on 15.05.2013, after examining several authorities, I had come to the conclusion that earnest money or security deposit taken for due performance of the contract stood on a different footing from payments made towards the contract whether paid in full or in part. As long as the contract is not performed, earnest money or security deposit, stands out as a guarantee for ensuring due performance. Once the contract is performed, earnest money paid would ordinarily get adjusted against the payment to be made under the contract. In that sense, earnest money is paid under a contract of security which is distinct and separate from the real or pure contract. Therefore, the right to forfeit earnest money arises under the Contract of Security which could be provided explicitly or impliedly. Thus, if the payment made was in the nature of earnest money or security deposit for due performance of the contract, which it is not, it would have perhaps made little difference to the right claimed by the respondents to retain the license fee even if there was no forfeiture clause. The fact is that Rs.18 Crores was paid by the petitioner to the respondents to obtain a license for processing Indian opium to be supplied by them. In these circumstances,

could it be said that the respondents had the power to retain the amount in the absence of the contract providing for a clause of forfeiture. In my opinion, the respondents, clearly could not have retained the amount unless they at least pleaded if not demonstrated that there was harm and injury caused to them. The facts on record show that there was no assertion made in this respect either when EBPL and DRL withdrew from the project or when the petitioner sought to do the same. The petitioner's request vide the impugned letter was rejected, however, on grounds which did not bear out this assertion. Therefore, the benefit obtained by the respondents, at this stage, in the absence of a clause, for forfeiture obtaining in the contract, would have to be returned in totality, to the petitioner. In law, it would make no difference, even if it is assumed, though this court has not called upon to return a finding on the same, that the petitioner, was in breach of the obligations undertaken under the contract arrived at between the parties. The position of law is well articulated in a Division Bench's judgment of the Allahabad High Court in the case of *De-Smet (India) Pvt. Ltd. Vs. B.P. Industrial Corporation (P.) Ltd.*, AIR 1980 Allahabad 253, which examined the position in various courts and made the following observations :-

“..10. The decision in the cases of Ballabhdas V. Paikaji, AIR 1916 Nag 104. Abas Ali v. Kodhu Sao, AIR 1929 Nag 30(2) (FB). Krishna Chandra Vs. Khan Mahmud Bepari, AIR 1936 Cal. 51. Madan Mohan v. Jawala Prasad, AIR 1950 East Punj 278. Mohd. Jafar V. Hamida Khatoun, AIR 1945 All 70. J. Metal Industries Ltd. v. V. Oil Industries, AIR 1959 Pat 176. Dasu Rattamma v. Krishnamurthi, AIR 1928 Mad 326, show that the view taken by various High Courts in this country is that where the advance payment is not made by the purchaser as guarantee for fulfillment of the contract but is made merely as part payment of the purchase price agreed upon between the parties, it has to be, when the transaction falls through, refunded to the purchaser even though the purchaser himself may be responsible for committing breach of contract.

11. In the instant case, as the contract between the parties has admittedly fallen through and the defendant did not receive the sum of Rs.100,000 as earnest money, the defendant is, notwithstanding the fact that the breach of contract might have been committed by the plaintiff, is liable to refund the money received by him..”

(emphasis is mine)

20.1 *De-smet’s* case was sought to be distinguished by the respondents by emphasizing that it was a matter involving civil proceedings. Would that by itself change the position in law, and should I, therefore, on this specious argument raised before me by the respondents, in a situation where there is no dispute as to the core facts, relegate parties to suit. I think not.

21. At present, at best that can be said vis-à-vis the respondents is that while they were willing to do all that which was required under the contract, the petitioner had reneged on its obligations. There was thus, an alleged failure, on the part of the petitioner to perform its obligations under the contract. Would such an allegation, even if, it is assumed to be correct, enable the respondents in law to retain the money without demonstrating that harm and injury is caused to them. The respondents can only do so by instituting an action before a proper forum and establishing its claim. Admittedly, to date, no such steps have been taken even to initiate a claim. It is well established that a mere allegation does not give rise to any liability unless it is duly established in accordance with the law. All that the respondents can hope for, at this stage, is to press a claim for damages and have the same duly established by taking recourse to an appropriate remedy. [See *Union of India Vs. Raman Iron Foundry, (1974) 2 SCC 231*].

22. Having regard to the above, the second prayer for refund of Rs.18 Crores paid towards license fee would have to be granted sans interest.

22.1 What is true for the respondents is true for the petitioner as well. In the facts and circumstances of the case, the prayer for interest would require

examination of the charge levied against the petitioner that it was responsible for the breach of the contract obtaining between the parties. This is not, an aspect which this court has examined. Hence, the prayer for interest cannot be granted.

23. The third prayer, in view of what is stated above, has now lost its significance.

24. Accordingly, the writ petition is allowed. The impugned letter dated 09.07.2010 is quashed. The respondents are directed to refund the sum of Rs.18 Crores to the petitioner within two weeks from today. It is, though made clear that, the respondents would be at liberty to institute an action against the petitioner in accordance with law to claim damages, if they are otherwise entitled to and, if so advised. The parties shall, however, bear their own costs.

RAJIV SHAKDHER, J

JULY 02, 2013

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