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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) No. 726 OF 2015

M/s. Madra Construction ... Petitioner
Vs.
Hindustan Petroleum Corporation Ltd. ... Respondent

Mr. Yogendra Singh i/b Auris Legal, for the Petitioner.

Mr. Minoo Siodia a/w Raksha Thakkar i/b Rustomjee & Ginwal, for
Respondent.

CORAM : V. M. KANADE, &
A. R. JOSHI, JJ.

DATE : MARCH 16, 2015

PC.

1. Heard the learned counsel appearing on behalf of the
Petitioner and the counsel appearing on behalf of the Respondent. By
this petition, which is filed under Article 226 of the Constitution of
India, Petitioner is challenging termination of contract, executed
between the Petitioner and the Respondent, by letter of termination
dated 26th February, 2015. The Petitioner is also seeking an
appropriate writ, order and direction, directing the Respondent to
permit the Petitioner to complete the balance work, relating to
construction of water tank.

2. The Petitioner issued a letter of acceptance dated 3rd February, 2014 for carrying out water tank fabrication works at its Bhatinda site. According to the Petitioner, though the said contract was to be completed within five months, the site was handed over almost after 8 months. It is submitted that while work was going on some time in November 2014, during excavation since there was some under ground cable which was to be removed, the work had to be stopped for removal of the cable by the Respondent. It is submitted that Petitioner issued a show-cause notice dated 15th November, 2014 for stoppage of work from November 11, 2014 to November 15, 2014. The Petitioner gave reply on 17th November, 2014 and pointed out the correct facts for stoppage of work during the said period and asked the Respondent to grant five months extension for completing the work. There was meeting between the Petitioner and the Respondent in respect of various jobs done by the Petitioner. It is submitted that, surprisingly, second show-cause notice was issued on 2nd December, 2014, and despite reply being given by the Petitioner herein, the contract was terminated by the Respondent on 26th February, 2015. It is submitted that almost 90% of the work of excavation has already

been completed, but the contract was terminated illegally and in arbitrary manner. Therefore, Petitioner invoked writ jurisdiction of this Court under Article 226 of the Constitution of India.

3. A preliminary objection is raised by the Respondent regarding maintainability of the petition. It is submitted that there is arbitration clause in the Contract, and therefore, the Petitioner has an alternative efficacious remedy of approaching the arbitral tribunal. The learned counsel appearing on behalf of the Petitioner submitted that mere existence of an alternate remedy is not an absolute bar for invocation of writ jurisdiction of this Court. A reliance is placed on the judgment of the Apex Court in the case of – *Union of India & Ors., Petitioners Vs. Tania Construction Private Limited, Respondent [(2011) 5 Supreme Court Cases 697]*. It is submitted that Respondent had caused delay in providing clear site for carrying out the work to the Petitioner, and despite that, the Petitioner agreed to carry out the construction work. It is submitted that Petitioner had given reply to the show-cause notice which was issued and had given sufficient explanation for not doing the work during the relevant period. Our attention was invited to the correspondence between the parties, and

also the emails, which were exchanged. It is submitted that therefore, the Respondents being a public undertaking was under an obligation to act fairly and the impugned action of termination was arbitrary and high-handed.

4. On the other hand, the learned counsel appearing on behalf of the Respondent invited our attention to the terms of the Contract. He submitted that Clause 12 of the of the said Contract authorises the Respondent to terminate the contract and under clause 14 all disputes between the parties should be referred to the arbitrators. It is submitted that therefore, all the disputed question of facts, which were raised by the Petitioner in this petition, cannot be heard in this petition and the only efficacious remedy is available to the Petitioner is to refer the matter to arbitration. Learned counsel also relied upon the judgments of the Division Bench of this Court in the case of –(i) *Naresh P. Advani, Petitioner Vs. The Hindustan Petroleum Corporation Ltd. & Ors., Respondents* [Writ Petition No. 515/2003, dated 26th June, 2003]; and (ii) *Om Sri Premji Fuel Centre, Petitioner Vs. Union of India & Anr., Respondents* [Writ Petition No. 6564/2010, dated 17th September, 2010].

5. After having heard the learned counsel appearing for the parties at length, we are of the view that this Court will not be in a position to decide the disputed question of facts, since the facts which are pleaded by the Petitioner in this petition have been disputed by the Respondents in their reply dated 12th March 2015. According to the Petitioner, there was stoppage of work only for a limited period in November 2014 on account of time taken by the Respondents for removal of the under ground cable, and also on account of ban on mining, whereas according to the Respondents, the Petitioner had abandoned the work from 11.11.2014 for a period of 64 days till January, 2015. In our view these facts, which are disputed, cannot be relevant while exercising writ jurisdiction under Article 226 of Constitution of India. It is not in dispute that under the contract, Respondent has power to terminate the Contract under Clause 12. Clause 12.1 of the said Contract reads as under:

“12.1 The owner may terminate the contract at any stage of the construction for reasons to be recorded in the letter of termination.”

6. Respondents have terminated the contract by their letter

dated 26th February, 2015 and have stated the reasons for termination of the contract. We are of the view that, therefore, it cannot be *prima-facie said* that action of termination of contract is arbitrary or capricious, as alleged by the Petitioner. Secondly, so far as preliminary objection, which is raised by the Respondent is concerned, it is true that the Apex Court in *Union of India & Ors. Vs. Tania Construction Pvt. Ltd. (supra)* stated that existence of an alternate remedy is not an absolute bar to the invocation of writ jurisdiction of the High Court. The said observation, which is found in paragraph 33 of the judgment will have to be applied, taking into consideration the facts of the case in certain circumstances. Where the Court comes to the conclusion that decision of the statutory authority or government is arbitrary, it can entertain writ petition though there is an alternate remedy available to the Petitioner. The Apex Court has laid down ambit of the powers to be exercised by High Court under Article 226 of the Constitution of India. The Apex Court in *Union of India & Ors. Vs. Tania Construction Pvt. Ltd. (supra)* has observed in paragraph 33 as under:

“33. Apart from the above, even on the question of

maintainability of the 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 writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr Chakraborty would clearly indicate 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.”

Therefore, though there is an alternative remedy, in certain circumstances, High Court cannot entertain writ petition under Article 226 of the Constitution of India. The circumstances under which it can do so are very limited.

7. In the present case, taking into consideration the various facts which are disputed by both the parties, in our view, appropriate efficacious remedy available to the Petitioner is to approach the arbitral tribunal. We are, therefore, not inclined to entertain this

petition. Reserving the right of the Petitioner to approach the arbitral tribunal for resolving the disputes and differences, which are raised by the parties, writ petition is disposed of.

Sd/-
[A. R. JOSHI, J.]

Sd/-
[V. M. KANADE, J.]

Vinayak Halemath