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

% **Date of decision: 18th September, 2015.**

\+ **<u>W.P.(C) 8789/2015 & CM No.19504/2015 (for stay)</u>**

HEJIAN SOLIDKEY PETROLEUM MACHINERY CO LTD. ..... **Petitioner**

Through: Mr. Raman Gandhi, Adv.

Versus

INDIAN OIL CORPORATION LTD. AND ANR ..... **Respondents**

Through: Mr. V.N. Kaura, Mr. S. Sirish Kumar and Mr. Abhinav Tandon, Advs. for R-1.

Mr. Ashish Aggarwal and Mr. Ashish Virmani, Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition seeks a mandamus to the respondent No.1 to release a payment of Rs.3,41,69,381/- minus Rs.20 lakhs to the petitioner towards actual costs of work done under a contract entered into between the petitioner and the respondent No.1. The respondent No.1 and respondent No.2 Punj Lloyd Ltd. are also sought to be restrained from commencing the completion of the work left by the petitioner under the contract.

2. It has been enquired from the counsel for the petitioner, as to how in a purely simple contractual matter, writ remedy can be permitted to be

invoked.

3. The counsel for the petitioner first contended that, because the respondent No.1 is a State within the meaning of Article 12 of the Constitution of India, the writ petition would be maintainable.

4. The aforesaid, according to me, is not correct position in law. Merely because there is a money claim against an entity which qualifies as State within the meaning of Article 12 of the Constitution of India, does not justify the resort to Article 226 of the Constitution of India, instead of to the ordinary remedy available under the civil law.

5. The counsel for the petitioner has next invited attention to para 10 of ***Food Corporation of India Vs. M/s. Seil Ltd.*** AIR 2008 SC 1101 but upon the attention of the counsel being invited to the fact that the supply of goods in that case was under a statutory order as distinct from under a contract as in this case, the counsel contends that it was also observed that writ petition was maintainable because there was no factual dispute to be adjudicated. It is contended that writ remedy against State can be invoked for money claims simplicitor, if undisputed.

6. It is pleaded in the writ petition itself that the petitioner has already has had two rounds of litigation with the respondent No.1 i.e. firstly by way

of challenge to the termination by the respondent No.1 of the contract with the petitioner and by way of a Original Miscellaneous Petition (OMP) under Section 9 of the Arbitration and Conciliation Act, 1996 with respect to the measurements of the work done by the petitioner and which OMP is still pending. It has been enquired, whether not the same is indicative of the monetary claims of the petitioner, as made in this writ petition being also disputed by the respondent No.1 and being not undisputed.

7. The counsel for the petitioner though does not reply to the aforesaid, states that in the OMP aforesaid, relief of payment of the admitted amounts i.e. deductions made towards service tax have also been claimed.

8. I am of the opinion that unless the petitioner is able to show an admission of the State / State instrumentality, against whom writ petition is filed, for the monetary liability claimed, writ remedy cannot be invoked contending that the monetary claimed made is undisputed. It is not open to file a writ petition on this ground contenting that let a notice be issued to find out whether the claim is disputed or not. Ordinarily, the State / State instrumentality is expected to act reasonably and if is not disputing the claim, not withhold the same.

9. The counsel for the respondent No.1 appearing on advance notice

states that in fact there have been six earlier rounds of litigations and this is the seventh litigation front which the petitioner is attempting to open. The counsel further states that the respondent No.1 disputes the claim made in this petition.

10. In view of the aforesaid, it has been enquired from the counsel for the petitioner, as to how he can contend that there is no disputed question of fact.

11. The counsel for the petitioner then states that though the respondent No.1 is now disputing the payment which the petitioner is claiming but the dispute raised is not *bona fide* and the notice of the petition be issued and a counter affidavit of the respondents be called and thereafter the Court should adjudicate whether there is any *bona fide* dispute or not and if finds *bona fide* dispute, to relegate the petitioner to the suit.

12. I am not able to fathom the aforesaid proposition of law. This Court is inundated with writ petitions making monetary claims simplicitor. There seems to be a misunderstanding prevalent that merely because the claim of money is against a State, the same can be recovered in a writ petition.

13. The counsel for the petitioner has then invited attention to ***ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd.*** (2004) 3 SCC 553 to contend that in that case also, a direction for payment

of the insurance claim, was issued in writ jurisdiction.

14. That case turned on its own facts. The Supreme Court, thereafter in ***Godavari Sugar Mills Ltd. Vs. State of Maharashtra*** (2011) 2 SCC 439 after considering all the earlier judgments on the subject culled out the situations in which a writ petition in contractual matters would lie or not lie. Recently also, in ***Joshi Technologies International Inc. Vs. Union of India*** MANU/SC/0616/2015 it has been held as under:

> *"67. The Court thereafter summarized the legal position in the following manner:*
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> *27. From the above discussion of ours, 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 facts 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.*
>
> *28. However, while entertaining an objection as to the maintainability of a writ petition Under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs Under Article 226*

of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors.*** *[MANU/SC/0664/1998: 1998 (8) SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction.*

68. The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, can refuse to exercise. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:

(a) the Court may not examine the issue unless the

action has some public law character attached to it.

(b) Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion Under Article 226 of the Constitution and relegate the party to the said made of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

(c) If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

(d) Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

69. Further legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to the contracts entered into by the State/public Authority with private parties, can be summarized as under:

(i) At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

(ii) State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

(iii) Even in cases where question is of choice or consideration of competing claims before entering

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. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc.

(iv) Writ jurisdiction of High Court Under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.

(v) Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

(vi) Ordinarily, where a breach of contract is complained

of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

(vii) Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

(viii) If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court Under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.

(ix) The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. Dichotomy between public law and

private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions Under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

(x) Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

(xi) The scope of judicial review in respect of disputes falling within the domain of contractual obligations

may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes".

15. Reliance is also placed by the counsel for the petitioner on ***M/s Dwarkadas Marfatia Vs. Board of Trustees of the Port of Bombay*** (1989) 3 SCC 293 and ***Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai*** AIR 1999 SC 22 but in both of which, there was a statutory flavour and an element of statutory function i.e. of the Port Trusts Act, 1963 and the Trade and Merchandise Marks act, 1958 respectively as distinct from the present case which is purely contractual. Moreover, the Supreme Court, in ***Joshi Technologies International Inc.*** supra has pronounced as aforesaid after considering all the earlier judgments.

16. It is also the contention of the counsel for the petitioner that, because the arbitration agreement provided for in the contract excludes money claims, the writ petition would be maintainable.

17. The petitioner forgets that money claim can also be made under the general civil law by way of suit and merely because arbitration is not provided for, is no ground to entertain a writ petition. I remind the petitioner, that a writ petition under Article 226 of the Constitution of India

is an extra-ordinary remedy. However, it appears to have been made an ordinary remedy, with writ petitions being preferred over ordinary remedies available under the general law. The same, according to me was not the purport thereof.

18. The same is the position with respect to the other relief qua which it is contended that the respondent No.1, at the cost and risk of the petitioner, is getting the balance work done from the respondent No.2 at a much higher rate, of 20 times its cost. The same also, cannot be adjudicated in writ jurisdiction.

19. The writ petition is indeed misconceived in its inception and is dismissed and, for pressing the same, at the cost of considerable time of this Court, the petitioner is burdened with costs of Rs.20,000/- payable to the respondent No.1, as a pre-condition to institution of appropriate proceedings, if any against the respondent No.1.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 18, 2015
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