

\$~22

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

+ **W.P.(C) 1729/2018**

PRASHANT NARULA

..... Petitioner

Through: **Mr.Gautam Das, Mr.Sunil Kumar
Sethi, Advocates**

versus

UNION OF INDIA & ORS.

..... Respondents

Through: **Mr.Roshan Lal Goel, Ms.Anju Gupta,
Advocates**

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

ORDER

% **23.02.2018**

CM No.7175/2018

Exemption allowed subject to all just exceptions.

W.P.(C) 1729/2018, CM No.7174/2018

Prashant Narula, the landlord has filed the present writ petition primarily against his tenant, namely, Punjab National Bank and the Bank Manager and Deputy Manager of the bank impleaded as respondent Nos. 2, 3 and 4 respectively, with the following prayers:

A) Issue appropriate writ/order/direction in the nature of mandamus directing the respondents No.2, 3 & 4, more particularly the respondent no.3 & 4 to comply the statutory rules and guidelines as directed under the Goods and Services Tax Acts and Rules and the orders/directions passed by this Hon'ble Court from time to time;

B) Issue appropriate writ/order/direction in the nature of mandamus directing the respondents No.2, 3 & 4, more particularly the respondent no.3 & 4 to release

outstanding amount of Goods and Services Tax along with outstanding amount of agreed rent as due and payable since July, 2017 till date;

C) Issue appropriate writs/orders/directions in the nature of mandamus directing the respondents No.3 and 4 to pay the interest at the rate of 18% per annum from the date of illegal withholding of the amount of GST and the rent till its realization;

D) Costs of the Petition be also allowed in favour of the petitioner and against the respondent No.2, 3 and 4;

E) Such other order or further orders be passed as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

The contention of the petitioner is that the respondent bank has failed and neglected to pay rent with effect from July, 2017 on the pretext that the petitioner/landlord was liable to pay Service Tax/Goods and Service Tax. The second respondent, it appears, has denied its liability to pay Service Tax/Goods and Service Tax relying upon certain clauses in the lease deed.

Counsel for the petitioner submits that the stand and stance of the second respondent is contrary to law and decision of this Court in ***Pearey Lal Bhawan Association vs. M/s Satya Developers Pvt. Ltd.*** decided on 20th October, 2010. The said decision was rendered in a civil suit and not in a writ petition. Counsel for the petitioner has also relied upon ***All India Tax Payers Association vs. Union of India***, 2006 (4) STR 18 which observes that service tax is an indirect tax.

We are not inclined to entertain the present writ petition and issue notice as the dispute between the petitioner and the second respondent arises

from a commercial contract and relates to a lease. The petitioner is a landlord and claims that the second respondent/tenant has failed to pay the rent. It is also asserted that in addition to rent, the second respondent is liable to pay Service Tax/Goods and Service Tax. Supreme Court in ***Joshi Technologies International Inc. versus Union of India, (2015) 7 SCC 728***, after referring to catena of judgments had examined whether and when in pure contractual matters, extraordinary jurisdiction by way of writs can be invoked. Distinction was drawn between public law remedy with private law remedy simpliciter under the contract. In matters of private character in purely contractual field, in which no public duty element is involved, writ petitions are not entertained and parties are left to enforce their contractual rights in a civil contract under ordinary remedies. It has been held:-

68. The Court thereafter summarised the legal position in the following manner: (*ABL International Ltd. case* [(2004) 3 SCC 553] , SCC pp. 572, paras 27-28)

“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 Corpn. v. Registrar of Trade Marks* [(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.”

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

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

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

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence

for their determination.

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

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

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

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the

licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

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

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

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

70.9. The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a

particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision-making process or that the decision is not arbitrary.

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

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.

We accordingly, for the above mentioned reasons do not find any good grounds and merits to entertain the present writ petition. The writ petition is accordingly not entertained giving liberty to the petitioner to raise the issue and contentions for the recovery of arrears of rent and service tax by way of Civil suit or any other remedy.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

FEBRUARY 23, 2018/MR/pk