

**HON'BLE THE CHIEF JUSTICE SRI RAGHVENDRA SINGH CHAUHAN
AND
HON'BLE DR. JUSTICE SHAMEEM AKTHER**

WRIT APPEAL No.418 OF 2019

JUDGMENT: (Per The Hon'ble The Chief Justice Sri Raghvendra Singh Chauhan)

Although, this case is listed in the category of 'Interlocutory', with the consent of both the learned counsel for parties, this case is being decided finally at this stage.

The appellant-petitioner, M/s. Chabbras Associates, has challenged the legality of the order dated 30.04.2019, passed by a learned Single Judge, in W.P.Nos.4528 and 8361 of 2019.

The present Appeal arises out of W.P.No.4528 of 2019. By the impugned order, dated 30.04.2019, the learned Single Judge has dismissed the writ petition mainly on the ground that complex disputed questions of fact are involved in the present case, which cannot be adjudicated upon in a writ jurisdiction. Moreover, since the petitioner has the availability of alternative remedy before the Disputes Redressal Committee, and also has the availability of arbitral proceedings for resolution of disputes between the parties, the writ jurisdiction cannot be invoked by this Court.

The brief facts of the case are that on 11.04.2018 HSCC (India) Limited - respondent No.2, a Government of India undertaking, called for tenders on 11.04.2018 on behalf of The Director, National Institute of Biotechnology, the respondent No.3, "for construction of Phase-II works comprising Director Residence, Type-II, III, IV and V, Residential Quarters for National Institute of Animal Biotechnology

(NIAB) at Hyderabad”. In pursuance of the tender notice, four contractors, including the petitioner firm, participated in the tender process, while the estimated cost of construction was Rs.16.60 crores, the petitioner quoted 3.06% less than the estimated cost. Since the petitioner’s bid was the lowest, respondent No.2 issued a Letter of Award (LoA), dated 20.08.2018. According to the said LoA, the construction work was to be completed within one year; the said period of one year would commence with effect from “after fifteen days from the date of issuance of Letter of Award.”

According to the petitioner, though the LoA was issued on 20.08.2018, necessary designs, drawings and other incidental information required to enable the petitioner to commence the work was not provided. Therefore, the petitioner addressed a series of e-mails on 11.09.2018, 03.11.2018, 01.04.2019 and 19.02.2019, wherein it requested for the drawings, designs and the signed copy of the agreement. Moreover, according to the petitioner, even the layout of the work site and the location for orientation of the buildings was not provided by the respondent No.2. Despite repeated requests of the petitioner to the respondent No.2, no reaction was elicited from the respondent No.2. On 03.10.2018, however, an architect was sent by the respondent No.2, who visited the work site, and informed the petitioner to clear out the jungle, and to start the earth work excavation for the recreation centre. Therefore, the petitioner complied with the said direction. Further, according to the petitioner, although on 11.10.2018

respondent No.2 supplied the structural designs up to plinth beam level, for study purpose only, but the said drawings consist of several flaws, and items in the designs and the drawings were found to be ambiguous. Therefore, the petitioner could not commence the execution of work. Since the petitioner brought out the flaws in the drawings to the notice of the respondent No.2, on 23.10.2018, respondent No.2 issued three sets of drawings suitable for construction up to plinth beam level. Therefore, the petitioner started the construction of recreation centre. In fact, the petitioner completed the work, worth more than Rs.1.50 crores, well within the stipulated period of four months; in fact the petitioner completed the said work only within 1½ months. However, the petitioner found it difficult to carry out the work in respect of residential quarters of Type-II, III, IV and V and Director's residence as there were discrepancies with regard to orientation of the designs, and the given designs which were contrary to each other. Furthermore, the layout given for the building, and the structural designs were not matching with the layout. The petitioner had brought these discrepancies to the notice of the respondent No.2 by its e-mail, dated 4.1.2019. Therefore, according to the petitioner, its inability to complete the contract within the stipulated period of twelve months, can be attributed to the flaws in the drawings provided by the respondent No.2. Thus, the fault lies with the respondent No.2, and not with the petitioner.

The petitioner further claims that despite having entered into an agreement on 18.09.2018, between the petitioner firm and the

respondent No.2, a copy of the said agreement was never given to the petitioner. Hence, the respondent has acted in a *mala fide* manner.

The petitioner further claims that although construction of temporary structures with false ceiling, vitrified flooring, air-conditioning, luppum finish, and new furniture comprising of conference table, revolving chairs, computer systems, were not part of the agreement entered into between the parties, but still the petitioner was forced to raise temporary structures and to provide the furnishings. Under coercion, the petitioner had no other option, but to carry out the construction of temporary structures and the furnishings.

Moreover, the petitioner pleaded that on 27.11.2018 respondent Nos. 5 and 7 invited the petitioner to Delhi and demanded a payment of Rs.1.25 crore, as extraneous consideration for extending cooperation to the petitioner for smooth progress of the work. When the petitioner refused to give in, respondent No.2 (respondent No.5 in the personal capacity) challenged the petitioner firm. Moreover, the respondent Nos. 5 and 7 threatened the petitioner with grave consequences.

It is further alleged, that on 30.01.2019 respondent No.2 issued a show-cause notice to the petitioner, and pointed out certain lapses with regard to the work carried out by the petitioner. Immediately, the petitioner replied to the same, wherein it pointed out the lapses and the laches committed by the respondent No.2. However, by notice dated 20.02.2019 the respondent No.2 terminated the contract work, and

also forfeiting the Bank Guarantee of Rs.89,46,404/-. Hence, the writ petition.

Adjudicating the above, by the impugned order, dated 30.04.2019, the learned Single Judge dismissed the writ petition. Hence, the present Writ Appeal before this Court.

Sri A. Sudershan Reddy, the learned Senior Counsel for the appellant, has pleaded that the learned Single Judge was not justified in rejecting the writ petition on the ground of alternative remedy available to the petitioner. Therefore, the learned Single Judge was not inclined to interfere to invoke writ jurisdiction. In order to buttress the said plea, the learned Senior Counsel has relied on the case of **Union of India v. Tania Construction (P) Limited**¹ and **Harbanslal Sahnia v. India Oil Corpn. Ltd.**².

Secondly, learned Single Judge was unjustified in concluding that there were complicated questions of fact. According to the learned Senior Counsel, it is rather obvious that the petitioner firm could not complete the construction work due to the delay in furnishing structural designs, and due to contradictions between the designs furnished and the actual layout. Further, it is abundantly clear that respondent No.2 has terminated the contract since the petitioner refused to cough up Rs.1.25 crores as illegally demanded illegally by respondent Nos. 5 and 7. Therefore, the termination of the contract was *mala fide*.

¹ (2011) 5 SCC 697

² (2003) 2 SCC 107

Thus, the learned Single Judge should have invoked the writ jurisdiction. Hence, the impugned order deserves to be set aside by this Court.

On the other hand, Mr. Sourav Mishra, the learned Senior Counsel for the respondent Nos. 2 to 7, has submitted that invoking of writ jurisdiction is a discretionary power bestowed upon by the High Court under Article 226 of the Constitution of India. While the power may be vast one, High Courts have self-imposed certain limitations on the vast power. Two of well known limitations on the power are namely if disputed questions of fact are involved, and where production of oral and documentary testimonies is necessary, writ jurisdiction should not be invoked. Secondly, if the party has the availability of efficacious alternative remedy, the party should be directed to avail the said alternative remedy. According to the learned counsel, in the present case, the party has raised complicated and disputed questions of fact, which can neither be proved, nor be disproved by either of the party, without the production of oral and documentary evidence. Further, the petitioner has an alternative remedy of raising his dispute either before the Disputes Redressal Committee, or before an Arbitral Tribunal. Once, the agreement entered into between the parties contains the arbitration clause, the petitioner was required to invoke the said clause, and to proceed for arbitration. Therefore, the learned Single Judge was justified in refusing to invoke the writ jurisdiction, and in dismissing the writ petition.

Heard the learned counsel for both parties and perused the impugned order.

According to the petitioner despite issuance of LoA on 20.08.2018, the necessary designs, drawings and other incidental information required for enabling the petitioner to commence the work was not provided. Moreover, despite repeated requests, respondent No.2 failed to provide the drawings and the designs at a reasonable pace. Furthermore, even though the drawings and the structural designs were supplied to the petitioner on 11.10.2018, they revealed certain flaws; they also suffered from ambiguity; the designs, the drawings were also contrary to the layout plans.

However, it is a highly disputed question of fact, whether the drawings and the designs were supplied to the petitioner on time or not? Whether the drawings and the designs were supplied with several flaws and/or ambiguous? The petitioner has further alleged that respondent Nos.5 and 7 had demanded illegal gratification of Rs.1.25 crores in Delhi. Lastly, the issue whether respondent No.2 was justified in invoking the Bank guarantee for Rs.89,46,404/- or not, is again a mixed question of fact and law. All these disputed questions of fact are required to be proved through oral and documentary evidence. Since these complicated and highly disputed questions of facts can only be examined through oral and documentary evidence furnished by the parties, the learned Single Judge was justified in concluding that these questions of facts cannot be adjudicated in writ jurisdiction.

Although, it is true that the availability of alternative remedy does not prohibit the Court from invoking its writ jurisdiction, but considering the complicated questions of fact, the learned single Judge was justified in concluding that it is in the interest of justice for the petitioner to plead his case before the Disputes Redressal Committee, or before the Arbitrator, who would be in a position to appreciate the questions of fact and questions of law. Hence, the learned Single Judge was certainly justified in relegating the petitioner to take recourse to the alternative remedy available to it.

Learned Senior Counsel for the petitioner has relied on the case of **Tantia Construction Private Limited** (1 supra). In the said case, the observation made by the Apex Court is that alternative remedy is not an absolute bar to the invocation of writ jurisdiction of the High Court. However, in a *catena* of cases, the Hon'ble Supreme Court has also opined that if an alternative remedy is available, the litigant should not be permitted to scuttle the alternative remedy, and to directly approach the High Court in its writ jurisdiction. This is more so, when disputed questions of fact need to be appreciated and critically examined. Therefore, the observations made by the Apex Court, mentioned hereinabove, do not necessarily support the case of the petitioner.

In the case of **State of Kerala v. M.K. Jose**³, relying on the decision in *State of Bihar v. Jain Plastics and Chemicals Ltd.* {(2002) 1 SCC 216} the Apex Court reiterated about the exercise of power under

³ (2015) 9 SCC 433

Article 226 of the Constitution of India in respect of enforcement of contractual obligations, and held that “*the writ petition under Article 226 is not the proper proceedings for adjudication of such disputes relating to contractual disputes. It is open to the respondent to approach the court of competent jurisdiction for appropriate relief for enforcement of contract. It is settled law that when an alternative and equally efficacious remedy was open to the litigant, he should be required to pursue that remedy and not to invoke the writ jurisdiction of the High Court.*”

The case of **Harbanslal Sahnia** (2 supra) is distinguishable on the factual matrix of the case. In the said case the appellant, Mr. Harbanslal Sahnia, was a dealer in petroleum products. However, when the sample of petroleum products was found to be adulterated, the State Government, acting through Collector of the District, suspended the appellant’s license which authorized them to deal in petroleum products, and also imposed a fine on the appellant. Therefore, the appellant filed a writ petition challenging the order of termination. The High Court dismissed the writ petition *inter alia* on the ground that the relationship between the parties is contractual, and the dealership agreement contains an arbitration clause. Therefore, the appropriate remedy available to the appellant was to have recourse to arbitration, rather than invoking the writ jurisdiction of the High Court. It is in this scenario, where the termination of dealership would adversely affect the bread and butter of the appellant, that the Hon’ble Supreme Court was of the opinion that

“the availability of an alternative remedy is a rule of discretion and not one of the compulsion.” Moreover, in the said case, the Hon’ble Supreme Court has opined that in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the *vires* of an Act is challenged. However, the present case does not fall in any of the three contingencies mentioned by the Hon’ble Apex Court. Therefore, even the case of **Harbanslal Sahnia** (2 supra) does not buttress the case of the petitioner.

For the reasons stated above, this Court does not find any illegality or perversity in the impugned order. Thus, the Writ Appeal, being devoid of any merit, is dismissed. There shall be no order as to costs.

As a sequel thereto, Miscellaneous Applications, if any, pending in this Writ Appeal shall stand closed.

RAGHVENDRA SINGH CHAUHAN, CJ

DR. SHAMEEM AKTHER, J

July 05, 2019.
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