

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:

THE HON'BLE JUSTICE ARINDAM MUKHERJEE.

W.P.A. 1998 OF 2020

MAA NANDI KESHRI RICE MILL & ANR.

VS.

THE UNION OF INDIA & ORS.

For the petitioners	:	Mr. Pratip Kumar Chatterjee, Mr. Soumya Majumder. Advocate
For the Respondents no. 2, 3, 4 & 5	:	Mrs. Lipika Ghosh, Mr. Ashis Kumar Mukherjee, Mr. Saurabh Prasad. Advocates
Heard on	:	03.03.2021, 09.03.2021 and 18.03.2021
Judgement on	:	06th May, 2021.

Arindam Mukherjee, J.:

1. The petitioner no. 1 is a Rice Mill. On or about 22th July, 2005, the petitioner no. 1 made an application for sanction of a Term Loan amounting to Rs.108 Lakhs and a Working Capital Loan amounting to Rs.40 lakhs to the United Bank of India, a nationalized bank at its Sainthia Branch (hereinafter referred to as the said bank). The said two facilities were given to the petitioner no. 1 on 5th September, 2005. To avail the credit facilities, the petitioner created an equitable mortgage of a land with building at Ward no. 1, P.O. Sainthia, Khatian no. 432, Dag no. 45, J.L. No. 95 measuring about 10 decimals standing in the name of petitioner no. 2. The value of

which was Rs.20 lakhs on or about 5th September, 2005. The petitioners also created an equitable mortgage of a land with two-storied building also at Ward no. 1, P.O. Sainthia, P.S. Suri, having an area of about 9 decimals standing in the name of one Gayatri Saha, the value of which as on 5th September, 2005 was approximately Rs. 30 lakhs. The properties so mortgaged are hereinafter for the sake of convenience jointly referred to as “mortgaged properties”.

2. Submission of the Petitioners:-

a) The petitioners say that the Term Loan of Rs. 108 lakhs has been duly repaid by the petitioners to the satisfaction of the Bank. The Bank has also issued a certificate declaring closure of the Term Loan Account on 16th August, 2013 upon full payment having been made. The petitioner no. 2 on behalf of the petitioners requested the said Bank to release the two mortgaged properties on the ground that the Term Loan has already been repaid. The Bank has refused to release the mortgaged properties as will appear from a letter dated 15th September, 2014 on the ground that the Cash Credit account has not been closed and unless the outstanding amount against the same is repaid, the mortgaged properties cannot be released. Challenging the rejection of the petitioners’ prayer to release the mortgaged properties, the petitioners have filed the instant writ petition inviting this Court to pass mandatory orders directing release of the mortgaged properties.

- b) The petitioners say that the Term Loan has been repaid. The Working Capital Loan of Rs.40 Lakhs also referred to as Cash Credit limit is secured by the petitioner no. 2 as the personal guarantee given by the proprietor of petitioner no. 1 and one Gayatri Saha. That apart and in any event, the Cash Credit Loan is also otherwise secured by the stock, work in progress and raw materials of the Rice Mill. In such circumstances, the petitioners say that the said bank could neither refuse to release the mortgaged properties nor can contend that the mortgaged properties will be released only upon repayment of the entire outstanding against the Cash Credit limit. The petitioners also say that by refusing to release the mortgaged properties, the bank has infringed the rights guaranteed under Article 300 A of the Constitution of India. In such circumstances, the petitioners say that mandatory order should be passed for release of the mortgaged properties, failing which the petitioners will suffer irreparable loss and injury.

3. Submission of the Respondents :-

- a) On behalf of the Bank, it is submitted that the sanction granted on 5th September, 2005 was a composite one. The petitioners had mortgaged the properties both for the Term Loan and the Cash Credit facility. The mortgage, being a composite one cannot be released unless the outstanding amount in the Cash Credit Account is fully repaid even if the Term Loan has been fully repaid.

The said bank has also raised an issue as to the maintainability of the writ petition in view of the nature of the contract pursuant to which the equitable mortgage was credited. The respondent bank says that no relief in the facts and circumstances of the case can be granted by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India as the petitioners are seeking enforcement of the terms of a Contract simplicitor entered by the bank while carrying out commercial activities.

4. Petitioners' Reply:-

- i) In reply, the petitioners say that the value of the mortgaged properties in 2005 was respectively Rs.20 lakhs and 30 lakhs. Even in 2005, the value of the mortgaged properties were more than the working capital loan or the Cash Credit limit facility of Rs.40 lakhs availed by the petitioner. The bank under normal circumstances would not have granted credit facilities to petitioner no. 1 unless the securities given by the petitioners were either above 148 lakhs being the total loan availed or at par with such amount. Now that Rs.108 lakhs have been paid, the mortgaged properties should be released. The market value of the mortgaged properties as on 22nd October, 2008 even according to the bank as per its own valuation is Rs.5,83,05,000.00. The realizable value is Rs.5,24,75,000.00 while the forced sale value is Rs.4,66,44,000.00 which is much in excess of the outstanding in the Cash Credit account. The petitioners in this regard has also referred to a valuation report obtained by the respondent bank from

its valuer on 27th October, 2018 (which appears at page 31 of the writ petition)

- ii) The petitioners have tried to defend the writ petition by contending that the respondent bank in view of the pervasive control of such bank with the Reserve Bank of India (in short 'RBI') and the Ministry of Finance is an authority under Article 12 of the Constitution of India and as such is a 'State'. The said bank entered into the contract while discharging public duty and as such cannot be allowed to act arbitrarily with an ulterior motive and mala fide intent. The writ petition is therefor, maintainable. The petitioners have relied upon a judgement reported in **(2004) 3 SCC 553 (ABL INTERNATIONAL LTD. AND ANOTHER VERSUS EXPORT CREDIT GUARANTEE CORPORATION OF INDIA LTD AND OTHERS)** on the issue of maintainability of the writ petition and scope of judicial review with regard to Government contract.

5. After hearing the parties and considering the materials on record, I have decided to consider the maintainability point raised by the bank without calling for affidavits as the same does not require any factual clarification for which affidavits are required. The parties have agreed to such proposal and as such the hearing of the writ petition restricted only to the maintainability point was allowed and concluded.

6. **Findings with reasons :-**

- a) In the instant case, the question raised by the bank is not whether the respondent bank is an authority under Article 12 of the Constitution of India and a writ lies against it but, whether this Court will exercise its jurisdiction under Article 226 of the Constitution of India to entertain the writ petition by passing orders therein considering the nature of contract between the parties and the character of dispute raised for adjudication.
- b) The Hon'ble Supreme Court of India in the judgement reported in (1977) 3 SCC 457 (**M/s RADHAKRISHNA AGARWAL AND OTHERS VERSUS STATE OF BIHAR AND OTHERS**) has while discussing different types of cases relating to contracts with the State and the exercise of jurisdiction under Article 226 of the Constitution of India divided such cases into three categories as will appear from paragraph 12 thereof - " The Patna High Court had, very rightly, divided the types of cases in which breaches of alleged obligation by the State or its agents can be set up into three types. These were stated as follows:
- (i) Where a petitioner makes a grievance of breach of promise on the part of the State in cases where on assurance or promise made by the State he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Article 299 of the Constitution ;
 - (ii) Where the contract entered into between the person aggrieved and the State is in exercise of a statutory power

under certain Act or Rules framed thereunder and the petitioner alleges a breaches on the part of the State ; and

(iii) Where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State.

- c) Thereafter the Hon'ble Supreme Court approved the view taken by the Patna High Court :-

“13. It is rightly held that the cases such as *Union of India v. M/s Anglo-Afgan Agencies and Century Spinning & Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council* and *Robertson v. Minister of Pensions*, belong to the first category where it could be held that public bodies or the State are as much bound as private individuals are to carry out obligations incurred by them because parties seeking to bind the authorities have altered their position to their disadvantage or have acted to their detriment on the strength of the representations made by these authorities. The High Court thought that in such cases the obligation could sometimes be appropriately enforced on a Writ Petition even though the obligation was equitable only. We do not propose to express an opinion here on the question whether such an obligation could be enforced in proceedings under Article 226

of the Constitution now. It is enough to observe that the cases before us do not belong to this category.

14. The Patna High Court also distinguished cases which belong to the second category, such as *K.N. Guruswamy v. The State of Mysore* ; *D.F.O. South Kheri v. Ram Sanahi Singh* and *M/s Shri Krishna Gyanodaya sugar Ltd. v. The State of Bihar*, where the breach complained of was of a statutory obligation. It correctly pointed out that the cases before us do not belong to this class either.

15. It then, very rightly, held that the cases now before us should be placed in the third category where questions of pure alleged breaches of contract are involved. It held, upon the strength of *Umakant Saran v. The State of Bihar* and *Lekhraj Satramdas v. Deputy Custodian-cum-Managing Officer* and *B.K. Sinha v. State of Bihar*, that no writ or order can issue under Article 226 of the Constitution in such cases “to compel the authorities to remedy a breach of contract pure and simple”.

- d) In another judgement of the Hon’ble Supreme Court which according to me has a significant bearing in the matter is reported in **(2003) 10 SCC 733 (Federal Bank Ltd. vs. Sagar Thomas and Others)**, wherein the Hon’ble Supreme Court has held (SCC page 758 para 32)

“32. Merely because Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability or sound economic growth having due regard to the interests of the depositors etc. as provided under Section 5(c)(a) of the Banking Regulation Act does not mean that the private companies carrying on the business or commercial activity of banking, discharge any public function or public duty. These are all regulatory measures applicable to those carrying on commercial activity in banking and these companies are to act according to these provisions failing which certain consequences follow as indicated in the Act itself. As to the provision regarding acquisition of a banking company by the Government, it may be pointed out that any private property can be acquired by the Government in public interest. It is now a judicially accepted norm that private interest has to give way to the public interest. If a private property is acquired in public interest it does not mean that the party whose property is acquired is performing or discharging any function or duty of public character though it would be so for the acquiring authority.”

- e) Although, the bank in the instant case being United Bank of India, a “corresponding new bank”, constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and the provisions of the said Act lays down a pervasive control of the Central Government and the Reserve Bank of India (in short

RBI) in its functioning, I am inclined to borrow the language of the Hon'ble Supreme Court of India in Sagar Thomas (supra) though the same in respect of a private company carrying on banking business. The control of the Central Government and RBI over United Bank of India (now having been merged with Punjab National Bank) may bring it within the ambit of Article 12 of the Constitution of India but a contract entered into by such bank with its constituent while carrying on business or commercial activity of banking as in the instant case is a pure and simple contract without any statutory flavour. The RBI guidelines in the instant case operates in the interest of banking system or in the interest of monetary stability or sound economic growth having due regard to the interest of the depositors and does not incorporate any statutory flavour to the contract in hand. This brings such a contract like that in hand to the third category of cases specified in Radhakrishna Agarwal (supra). The breach alleged in such case like that in hand are that of contractual provisions pure and simple and no writ lies or order can be issued under Article 226 of the Constitution of India to compel the authorities to remedy such breach of contract. In the instant case, the writ petitioner is seeking release of the properties mortgaged to secure the loan on the ground of repayment of a substantial portion thereof. The prayer for release on being made to the bank has been rejected in 2016 which is under challenge in the writ petition filed in 2020 after about four years relying on a valuation

report of 2018. The breach complained of according to me falls in the third category of case as spelt out in Radhakrishna Agarwal (supra) and no writ lies or order can be made under Article 226 of the Constitution compelling the respondent bank to remedy the breach of contract pure and simple.

- f) In a subsequent judgement of the Hon'ble Supreme Court reported in (2006) 10 SCC 236 (Noble Resources Ltd vs. State of Orissa & Anr.) Radhakrishna Agarwal (supra) and ABL International (supra) (cited by the petitioner) were considered. In Noble Resources Ltd. (supra) the Hon'ble Supreme Court after considering various authorities has brought a distinction between non-statutory contract and a statutory contract. A further distinction is also made between performance of statutory duty or dealing of a public matter by a State and its commercial activities. The Hon'ble Supreme Court then went on to hold that contractual matters are, thus, ordinarily beyond the realm of judicial review. The application of judicial review in such cases, are, however, very limited. Judicial review according to the said judgement is permissible when mala fide or ulterior motive is attributed. The Court has to bear in mind while considering the scope of judicial review so far it relates to the exercise of contractual powers by Government bodies that the principle of judicial review is to prevent arbitrariness or favouritism. The Court has to see whether interference is needed for larger public interest or that power has

been exercised for any collateral proposition. The Supreme Court has also held in *Noble Resources* (Supra) that existence of disputed question of fact or availability of an alternative remedy by itself would not decline the High Court in exercising its jurisdiction under Article 226 of the Constitution of India.

- g) In another judgement reported ***in (2015) 9 SCC 433 State of Kerala and others vs. M.K. Jose***, the Hon'ble Supreme Court has considered several authorities including ***ABL International Ltd.*** (Supra) and ***Noble Resources Ltd.*** (Supra) to find out in which type of case judicial review relating to contracts entered by the Government are called for.
- h) In *M.K. Jose* (Supra) while approving the views taken in *ABL International* (supra), wherein legal principles as to maintainability of writ petition was considered, the Hon'ble Supreme Court quoted with approval the following See SCC Page 443 paragraph 17:

17. In *ABL Internatinal Ltd. v. Export Credit Guarantee Corpn. Of India Ltd.*, a two-Judge Bench after referring to various judgments as well as the pronouncement in *Gunwant Kaur* and *Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council*, has held thus: (*ABL International case*, SCC pp. 568-69 & 572, paras 19 & 27)

“ 19. Therefor, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a

dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of *Gunwant Kaur* this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

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 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.”

While laying down the principle, the Court sounded a word of caution as under: (*ABL International case*, SCC p. 572, para 28)

“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*.) 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.”

- i) The Hon’ble Supreme Court in *M.K. Jose (Supra)* has further held See SCC Page 444 paragraph 18:

“**18.** It is appropriate to state here that in the said case, the Court granted the relief as the facts were absolutely clear from the documentary evidence brought which pertain to interpretation of certain clauses of contract of insurance. In that

context, the Court opined: (*ABL International Ltd. case*, SCC p. 578, para 51)

“51. ... The terms of the insurance contract which were agreed between the parties were after the terms of the contract between the exporter and the importer were executed which included the addendum, therefore, without hesitation we must proceed on the basis that the first respondent issued the insurance policy knowing very well that there was more than one mode of payment of consideration and it had insured failure of all the modes of payment of consideration. From the correspondence as well as from the terms of the policy, it is noticed that existence of only two conditions has been made as a condition precedent for making the first respondent Corporation liable to pay for the insured risk, that is: (i) there should be a default on the part of the Kazak Corporation to pay for the goods received; and (ii) there should be a failure on the part of the Kazakhstan Government to fulfil their guarantee.”

And it eventually held: (SCC pp. 578-79, para 51)

“51. ... We have come to the conclusion that the amended Clause 6 of the agreement between the exporter and the importer on the face of it does not give room for a second or another construction than the one already accepted by us. We have also noted that reliance placed on sub-clause (d) of the proviso to the insurance contract by the Appellate Bench is also misplaced which is clear from the language of the said clause

itself. Therefore, in our opinion, it does not require any external aid, much less any oral evidence to interpret the above clause. Merely because the first respondent wants to dispute this fact, in our opinion, it does not become a disputed fact. If such objection as to disputed questions or interpretations is raised in a writ petition, in our opinion, the courts can very well go into the same and decide that objection if facts permit the same as in this case.”

- j) The Hon’ble Supreme Court in M.K. Jose (Supra) quoted with approval the following findings in Noble Resources Ltd. (supra) See SCC page 445 paragraph 19.

19. In this regard, a reference to *Noble Resources Ltd. vs. State of Orissa* would be seemly. The two-Judge Bench referred to *ABL International Dwarkadas Marfatia & Sons v. Port of Bombay*, *Mahabir Auto Stores v. Indian Oil Corpn.* and *Jamshed Hormusji Wadia v. Port of Mumbai* and opined thus: (*Noble Resources case*, SCC p. 246 para 29)

“29. Although the scope of judicial review or the development of law in this field has been noticed hereinbefore particularly in the light of the decision of this Court in *ABL International Ltd.* each case, however, must be decided on its own facts. Public interest as noticed hereinbefore, may be one of the factors to exercise the power of judicial review. In a case where a public law

element is involved, judicial review may be permissible. (See *Binny Ltd. v. V. Sadasivan* and *G.B. Mahajan v. Jalgaon Municipal Council.*)”

Thereafter, the Court in *Noble Resources case*, proceeded to analyse the facts and came to hold that certain serious disputed questions of facts have arisen for determination and such disputes ordinarily could not have been entertained by the High Court in exercise of its power of judicial review and ultimately the appeal was dismissed.”

- k) Applying the ratio as laid down in the several Supreme Court judgements, referred to hereinabove, to the case in hand, I find that the sanction letter dated 5th September, 2005 issued by the respondent bank and accepted by the petitioners amounts to a non-statutory contract. It also falls within the third category of cases referred to in *M/s Radhakrishna Agarwal (supra)*. The mortgage being a consolidated one along with valuation relied upon gives rise to disputed questions of fact and is not dependent on the interpretation of the clauses of contract alone. Any documentary evidence that may be brought through affidavits will also not improve the situation to enable the writ court to decide the issues raised. The judgement in *ABL International (supra)* therefor lays no assistance to the petitioner in the facts of the instant case. In that view of the matter, following the ratio laid down in *M/s Radhakrishna Agarwal (supra)* no writ of order can be issued under Article 226 of the

Constitution of India in such cases to compel “the authority to remedy a breach of contract pure and simple” is an accepted proposition. The writ petition, therefor, is not maintainable.

- l) The contract between the respondent-bank and the petitioner clearly and unambiguously reveals that the petitioner after voluntarily accepting the conditions imposed by the respondent-bank have entered into the realm of concluded contract, pure and simple. The petitioner can only claim the right conferred upon it by the said contract and bound by the terms of the contract unless some statute steps in and confers some special statutory obligations on the part of the bank in the contractual field. The contract between the petitioner and the respondent-bank so far as the issue of release of mortgage upon repayment of a portion of the aggregate loan does not include any statutory terms and/or conditions. The petitioner’s remedy, if any lies for redemption of mortgage and not by filing writ petition seeking release of mortgage properties under the contract.
- m) I have also considered the subject ‘contract’ from another angle. In the light of the ratio laid down in ABL International (Supra) assuming without admitting that the valuation of the mortgaged properties done by the Bank in 2018 relied upon by the petitioner to be a disputed question of fact and that a Civil proceeding is the alternative remedy available to the petitioner to redress his grievances does not create an impediment in exercising the writ jurisdiction, then also my answer will be the same as the contract in question is non-statutory

in nature wherein remedy for a breach of contract pure and simple has been sought for. There is no public interest element involved in the matter, no case to attract the provisions of Article 14 of the Constitution of India has also been made out. There is no mala fide or ulterior motive attributed to the bank which can compel interference under judicial review. The rejection to release the mortgaged properties does not involve any favouritism for which interference is required to prevent arbitrariness in the instant case. The bank has only said that unless the entire loan is repaid, the mortgage cannot be released. This does not mean that the bank has acted mala fide or with an ulterior motive. It has only conveyed its view on an appreciation of the contract between itself and the petitioner. Merely because the respondent bank acts in compliance with the Reserve Bank of India (RBI Guidelines) as held in Sagar Thomas (supra), the respondent petitioner though may be a nationalized bank, cannot be said to have failed in discharging any public function or public duty while carrying on business or commercial activity of Bank. Even if, a writ petition is maintainable against the respondent bank then also the facts of the instant case does not permit interference in the matter by this Court in exercise of its jurisdiction under Article 226.

7. Conclusion.

The writ petition therefor, fails and the same is dismissed on the ground of maintainability as discussed above, however, without any order as to costs.

The petitioners will, however, be free to avail any other remedy that may be available to them in law on the selfsame cause as I have not gone into the merits of the matter save as required for adjudicating the maintainability point.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis after compliance with all necessary formalities.

(Arindam Mukherjee, J.)