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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.482/2022

1. SHAH TECHNICAL CONSULTANTS PVT. LTD., A Company incorporated under the Companies Act, 1956 and having its Registered office at 407, Raheja Centre, Plot No. 214, Nariman Point, Mumbai 400021, India. Represented in this petition by its Director The Petitioner no.2 herein, duly authorized vide board resolution dated 2th July 2022.

2. Mr. Prasana Shah, 52 years of age Director of Shah Technical Consultants Pvt Ltd., having his office at 407, Raheja Centre, Plot No. 214, Nariman Point, Mumbai 400021, India.

... Petitioners

Versus

1.THE PUBLIC WORKS DEPARTMENT Government Of Goa, Office of the Project Director, JICA ODA Loan Project (I.D. — P189 & Principal Chief Engineer), Public Works Department, Altinho, Panaji, Goa, 403001.

2. THE STATE OF GOA, Through its Chief Secretary, Secretariat, Porvorim - Bardez, Goa — 403521.

... Respondents

Mr V. Tulzapurkar, Senior Advocate with Mr Vishal Sawant, Advocate *for Petitioners*.

Mr D. Pangam, Advocate General with Ms Maria Correia, Additional Government Advocate *for the Respondent- State*.

CORAM: M. S. SONAK & BHARAT P. DESHPANDE, JJ.

Reserved on : 14th NOVEMBER 2022
Pronounced on: 16th NOVEMBER 2022

ORDER: (Per M. S. Sonak, J.)

1. Heard Mr V. Tulzapurkar, learned Senior Advocate, along with Mr Vishal Sawant for the Petitioners and Mr D. Pangam, learned Advocate General along with Ms Maria Correia, learned Additional Government Advocate for the Respondents.

2. The petitioners seek to enforce directions issued by the erstwhile Chief Minister, State of Goa, in a noting dated 05.02.2018 (Exh. O) to make payment of ₹21,30,72,298/- (Rupees Twenty One Crore, Thirty Lakhs, Seventy-Two Thousand, Two Hundred and Ninety-Eight Only) to petitioner no.1 and an amount of ₹1,68,95,800/- (Rupees One Crore, Sixty Eight Lakhs Ninety-Five Thousand Eight Hundred Only) to Nihon Suido Consultants Co. Ltd. along with interest @ 18% p.a. From 30.08.2019 till payment.

3. In short, the petitioners seek a mandamus to the State to pay them an amount of ₹21,30,72,298/- towards consultancy fees under a contract for project management consulting services dated 26.05.2009. The State incidentally entered into this contract with a consortium comprising Nihon Suido Consultants Co. Ltd., NJS Consultants Co. Ltd., The Louis Berger Group Inc. and the petitioner no.1.

4. The petitioners have pleaded that the original period of the contract was until 30.06.2014, but the same was extended up to 31.12.2015 vide an addendum dated 30.06.2014, explicitly stating that the services of petitioner no.1 will continue in accord with the terms and conditions of the contract. The petitioners contended that this period was extended to 30.06.2016 though the respondents raised a serious dispute on this aspect.

5. The petitioners have pleaded that though they raised invoices towards consultancy fees, an amount of ₹21,30,72,298/- remains to be paid to the petitioners, and an amount of ₹1,68,95,800/- remains to be paid to another consortium partner Nihon Suido Consultants Co. Ltd. The petitioners have not adequately explained the authority under which they claim the amount allegedly due to Nihon Suido Consultants Co. Ltd. or whether 'Nihon' had authorized the petitioners to institute this petition to recover the alleged dues of ₹1,68,95,800/-.

6. Mr Tulzapurkar's argument was based on the note in File No.3406/2016-PEC-PWD dated 05.02.2018, read with some subsequent notings. The primary noting dated 05.02.2018 made by the then Chief Minister, State of Goa, which is the fulcrum of the petitioners' case, reads as follows:-

" ***File No. 3406/2016-PEC/PWD***
Office of Chief Minister

I have gone through entire file. It appears that M/s. Shah Technical Consultants Pvt. Ltd. And M/s. Nihon Suido Consultants Co. Ltd. are not part of the criminal case that is being proceeded and it is only against M/s. Louis Berger Group Inc. (Refer Pg. 61/C). Further based on the information that is gathered charge sheet have been filed in the case. PWD may take confirmation from the crime branch that the above two companies are not charge sheeted as accused. Extension had been granted by Government of Goa up to 31.12.2015 to above two which is valid. Therefore subject to final confirmation of above two aspects (letter from crime branch and extension of validity up to 31.12.2015) we ma pay the consultants there dues, for all work up to 31.12.2015.

As regards services provided after 31.12.2015, separate file may be submitted for advice of Law Department and Ld. Advocate General. Approval/

concurrence of Finance Department is required as the payment is done by Government of Goa, not as per original plan of things. Cabinet approval however may not be essential. However F.D. may decide on the aspects considering the peculiar situation. May accordingly move for F.D. approval.

(Manohar Parrikar)
Chief Minister
05.02.2018

Pr. C.E. (PWD)"

7. Based on the above noting, the Superintendent of Police (Crime Branch) was requested to confirm whether M/s. NSC and M/s. STC are part of the Criminal Case and whether they are charge-sheeted as accused persons in the said case.

8. By a noting dated 10.05.2018, the Project Director noted that a reply was received from the Superintendent of Police (Crime Branch) vide his letter dated 03.04.2018 stating that Shah Technical Consultants Pvt. Ltd. (Petitioner No.1) and Nihon Suido Consultants Co. Ltd. are not accused in Criminal Case – Crime Branch P.S., Crime No.93/2015 under Section 120-B of the Indian Penal Code and Sections 7, 8, 9 and 13 of the Prevention of Corruption Act, 1986 (JICA Case).

9. Mr Tulzapurkar submits that the noting dated 05.02.2018 was nothing but an express direction from the erstwhile Chief Minister to pay the consultant's dues for all work up to 31.12.2015 subject to the final confirmation about petitioner no.1 and Nihon Suido Consultants Co. Ltd. not being charge-sheeted as accused persons in the case against the Louis Berger Group Inc. and the extension being granted by the Government of Goa up to 31.12.2015. He submits that since there was no dispute or rather since there was confirmation that petitioner no.1 and Nihon Suido Consultants Co. Ltd. were not accused in the criminal case and further, there was an extension granted up to 31.12.2015, the State, had no defence whatsoever to resist the payment of consultancy fees as claimed by the petitioners.

10. Mr Tulzapurkar relied upon ***ABL International Ltd. & Anr. vs. Export Credit Guarantee Corporation of India Ltd. & Ors.***[1] and ***Unitech Limited & Ors. vs. Telangana State Industrial Infrastructure Corporation (TSIIC) & Ors.***[2] to submit that there is no bar to the entertainment of a petition under Article 226 of the Constitution of India, even in a contractual matter or even where the contract has an arbitration clause for resolution of disputes. He submits that no disputed

1 *(2004) 3 SCC 553*

2 *2021 SCC OnLine (SC) 99*

questions of fact are involved, and the State cannot renege upon the express directions of its erstwhile Chief Minister, as reflected in the note dated 05.02.2018. He submits that the non-payment of the consultancy fees as claimed amounts to arbitrariness and unreasonableness, which is antithetical to Article 14 of the Constitution of India. Mr Tulzapurkar submits that this petition must be entertained and a writ of mandamus issued to the respondents for payment of the consultancy fees under the contract for project management consultancy services dated 26.05.2009.

11. Learned Advocate General submitted that no petition could be based on mere noting in the file given the law in ***Shanti Sports Club & Anr. vs. Union of India & Ors.***[3]. He submitted that the noting in the file never culminated into any Government decision in terms of Article 166 of the Constitution of India. Further, there was no communication of such a decision to the petitioners. He further submitted that this was a case of a non-statutory contract that admittedly contained an arbitration clause for the resolution of contractual disputes. Therefore, he presents that a petition for recovery of monies simpliciter should not be entertained in such circumstances.

3 *(2009) 15 SCC 705*

12. The learned Advocate General further submitted that there is a serious dispute about the contract extension up to 30.06.2016. He points out that most of the claims raised by the petitioners proceeded on this premise which the respondents seriously dispute. He submits that the petitioners have placed on record no order in support of this claim of extension. Further, the learned Advocate General submitted that the issue of whether the respondents have breached any of its contractual obligations would depend upon the evidence, and it is a well-established principle of law that where the dispute revolves around the questions of fact, normally, no petition under Article 226 of the Constitution of India should be entertained.

13. Learned Advocate General also submitted that though the petitioners claim for consultancy fees for the period from June 2014 to June 2016, this petition was instituted only on 04.08.2022. Therefore, he submitted that there is a gross delay which is unexplained by the petitioners.

14. Learned Advocate General also submitted that there was no arbitrariness or unreasonableness involved, and the petitioners have not even alleged any breach of their fundamental rights. Accordingly, he offered that the petitioners have no *locus standi* to seek any relief on behalf of Nihon Suido Consultants Co. Ltd.

He denied that the report dated 30.08.2019 admits any payments due to the petitioners. Learned Advocate General relied on ***Goldwin Healthcare Pvt. Ltd. & Anr. vs. State of Goa***[4] and the decisions referred to in the said Order.

15. Mr Tulzapurkar rejoined to submit that there was correspondence to show that the petitioners' consultancy services were accepted post-December, 2015. Therefore, the respondents were not justified in contending that there was no extension up to June 2016. He submitted that most of the learned Advocate General's contentions had been answered in *ABL International Ltd. (supra)* and *Unitech Limited (supra)*.

16. The rival contentions now fall for our determination.

17. The petitioners' entire case is based on the noting dated 05.02.2018 referred to above and its interpretation of the same. However, even if we were to proceed based upon the petitioners' interpretation of the noting, we cannot be oblivious of the legal status of notings/opinions recorded in official files by the Government Officers/Ministers as explained by the Hon'ble Supreme Court in *Shanti Sports Club (supra)* and other decisions on the subject.

4 *Writ Petition No.7/2022 (F) decided on 23.02.2022*

18. In *Shanti Sports Club (Supra)*, the petitioners had contended that the note dated 08.06.1999 recorded by the then Minister for Urban Development must be treated as a decision of the Government to withdraw from the acquisition of land in question in terms of Section 48(1) of the Land Acquisition Act, 1894, even in the absence of any formal notification to that effect. However, this contention was turned down by the Hon'ble Supreme Court, relying *inter alia* on the provisions of Articles 77 and 166 of the Constitution of India.

19. The Hon'ble Supreme Court explained that all executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of the State concerned, as the case may be under Articles 77(1) and 166(1) of the Constitution. This means that unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order on behalf of the Government.

20. Further, the Hon'ble Supreme Court explained that a noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents an expression of opinion by a particular individual. By no stretch of the imagination, such noting can be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles 77(1) and (2) or Articles 166(1) and (2). The noting in the file or even a decision gets culminated into an order affecting the right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2). A noting or even a decision recorded in the file can always be reviewed/ reversed/overruled or overturned, and the Court cannot take cognizance of the earlier noting or decision to exercise the power of judicial review.

21. The Hon'ble Supreme Court also referred to its earlier decisions in ***State of Punjab vs. Sodhi Sukhdev Singh***[5]***, Bachhittar Singh vs. State of Punjab***[6]***, State of Bihar vs. Kripalu Shankar***[7]***, Rajasthan Housing Board vs. Shri Kishan***[8]***, Sethi Auto Service Station vs. DDA***[9], amongst others. All these decisions hold that no cause of action could be based merely on

5 *AIR 1961 SC 493*
6 *AIR 1963 SC 395*
7 *(1987) 3 SCC 34*
8 *(1993) 2 SCC 84*
9 *(2009) 1 SCC 180*

notings in a file that have not culminated into a Government decision as contemplated by Article 77 or 166 of the Constitution of India and communicated to the party concerned. These decisions hold that merely writing something in the file does not amount to an order. Before something amounts to an order of the State Government, two things are necessary. First, the Order has to be expressed in the name of the Governor as required by Article 166(1), and then it has to be communicated. Until this is done, the State cannot be held to be bound by the so-called notings. The Court noted that the business of the State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. The Constitution, therefore, requires a particular mode or manner in which such decisions can be taken and given effect to. Thus, in all these cases, relief based upon notings in a Government file was declined.

22. Therefore, in the present case, the petitioners' claim for consultancy fees, which is entirely based only upon the notings in the file, cannot be entertained, even if we were to proceed on the basis that the petitioners' interpretation of such notings is correct.

23. There is no dispute that the payments claimed by the petitioners are under a non-statutory contract dated 26.05.2009 between the State and a consortium of companies, of which petitioner no.1 is one of the companies engaged in imparting consultancy services. There is also no dispute that this contract dated 26.05.2009 contains any arbitration clause for resolving disputes that may arise between the parties.

24. In *ABL International Ltd. (supra),* the respondent – Export Credit Guarantee Corporation, relied on the ***State of Uttar Pradesh vs. Bridge & Roof Co. (I) Ltd.***[10] where it was held that when the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy, provided in the contract itself, is a good ground for the Court to decline to exercise its extraordinary jurisdiction under Article 226.

25. The Hon'ble Supreme Court distinguished *Bridge & Roof Co. (I) Ltd.(supra)* at para 14 by observing thus:-

> *"**14.** This judgment again, in our opinion, does not help the first respondent in the argument advanced on its behalf that in contractual matters remedy under Article 226 of the Constitution does not lie. It is seen from the above extract that in that case because of an arbitration clause in the*

10 *(1996) 6 SCC 22*

> *contract, the Court refused to invoke the remedy under Article 226 of the Constitution.* ***We have specifically inquired from the parties to the present appeal before us and we have been told that there is no such arbitration clause in the contract in question. It is well known that if the parties to a dispute had agreed to settle their dispute by arbitration and if there is an agreement in that regard, the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration, unless of course both the parties to the dispute agree on another mode of dispute resolution.*** *Since that is not the case in the instant appeal, the observations of this Court in the said case of Bridge & Roof Co. are of no assistance to the first respondent in its contention that in contractual matters, writ petition is not maintainable."*

26. Since, in the present case, there is no dispute about the existence of an arbitration clause in the contract, the law in *Bridge & Roof Co. (I) Ltd. (supra)* will apply even going by the observations in para 14 of *ABL International Ltd. (supra)*. The basis for distinguishing the cited decision is absent, and there is no good reason not to follow the binding precedent in *Bridge & Roof Co. (I) Ltd. (Supra).*

27. In *ABL International Ltd. (supra)*, several decisions were cited to the effect that writ jurisdiction under Article 226 would not be exercised in case of purely non-statutory contracts involving no public element or discharge of a public duty or a public function. The Hon'ble Supreme Court accepted this proposition but, on facts, found that the respondent – Export Credit Guarantee Corporation of India, was not only a wholly Government-owned company but it discharged a public duty and its functions were public functions. Therefore, a writ petition could always be entertained if there was any unreasonableness or arbitrariness in discharge of public duties or public functions. However, in the present case, no attempt was made to demonstrate the existence of any public duty or the discharge of any public function. This is yet another reason to distinguish *ABL International Ltd. (supra)*.

28. No doubt, *Unitech Ltd. (supra)* holds that jurisdiction under Article 226 can be invoked in contractual matters even where a contract contains an arbitration clause subject to well-settled parameters. In this case, the Court found that the respondent-Telangana State Industrial Infrastructure Corporation, had accepted crores of rupees on the promise of allotment of land. But no such land could be allotted for reasons attributable to the Corporation. In these circumstances, the Hon'ble Supreme Court directed the refund of the amounts paid. However, even in this decision, the Hon'ble Supreme Court held that in determining whether jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly, eschew disputed questions of fact which would depend on evidentiary determination requiring a trial. The Hon'ble Supreme Court approved the exercise of jurisdiction by the Single Judge and the Division Bench of the Andhra Pradesh High Court because the foundational representation of the contract had failed. TSIIC, a state instrumentality, had not just reneged on its contractual obligation but hoarded the refund of the principal and interest on the consideration that Unitech paid over a decade ago. The TSIIC did not even dispute the entitlement of Unitech to refund its principal. Such facts are not present in the case at hand. Therefore, based upon *Unitech Ltd. (supra)*, this petition cannot be entertained.

29. The respondent-State has raised a serious dispute about the contract extension beyond 31.12.2015. The noting, which is the mainstay of the petitioners' case, if construed holistically, might refer to the processing of the petitioners' claims provided there was an extension to the contract and the petitioners were not prosecuted as accused persons in the criminal prosecution under the Prevention of Corruption Act. The noting speaks about the payment of consultant's dues without any quantification of such dues. In such circumstances, on behalf of the Respondents, the affiant rightly contends that the adjudication of petitioners' claims would involve adjudication into the disputed questions of fact.

30. At this stage, it is not for us to decide one way or the other on the merits of rival contentions. The only reason why we have adverted to the rival contentions is to point out that the respondents' contentions, at least *prima facie*, cannot be said to fall in the realm of arbitrariness or unfairness, thereby compelling the petitioners to invoke public law remedy or obliging us to exercise such public law remedy at their behest.

31. In ***Joshi Technologies International Inc. vs. Union of India & Ors.***[11], the Hon'ble Supreme Court, after examining a series of precedents on this issue, including the precedent in *ABL International Ltd. (supra),* has held that principles in the said precedents have to be understood in the context of the discussion that preceded the same. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition, even in contractual matters, where there are disputed questions of fact or even when a monetary claim is raised. But, at the same time, discretion lies with the High Court, which it can refuse to exercise under certain circumstances. It also follows that under the following

11 *(2015) 7 SCC 728*

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 made of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration;
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> 69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination;
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> 69.4. Money claims *per se* particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.
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> 70. 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:
>
> 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 practice 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 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 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 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.

70.9. 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. The 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.

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.

32. In the present case, as pointed out by us earlier, no case of public law character or failure to discharge public duties was even attempted to be made out by the petitioners. Even the allegations of arbitrariness or unfairness were faint-hearted. The entire case was based on the noting dated 05.02.2018 in the Government file. The legal status of such noting is discussed earlier. Further, as noted earlier, it is not as if any clear case of arbitrariness or unfairness is made out. Admittedly, there is an arbitration clause in the contract upon which the petitioners seek recovery of consultancy fees. However, disputed questions of fact are involved that cannot be effectively adjudicated only by adverting to the affidavits or interpreting the clauses of the agreement as they stand.

33. Therefore, applying the principles in *Joshi Technologies International Inc. (supra)*, we do not think this is a fit case to exercise our discretion and entertain the present petition under Article 226 of the Constitution of India.

34. In similar circumstances and after considering the decisions in *ABL International Ltd. (supra)*, *Unitech Ltd. (supra)*, *Bridge & Roof Co. (I) Ltd.(supra) and Joshi Technologies International Inc. (supra)*, we had declined to entertain Writ Petition No.7/2022 (F) where the relief was for recovery of specific amounts under a non-statutory contract. Accordingly, even the Special Leave to Appeal (C) No.4370 of 2022 against this decision was dismissed as withdrawn by Order dated 28.03.2022.

35. For all the reasons mentioned above, we decline to entertain the present petition, not because the same is not maintainable but because the petitioners have not established the circumstances necessary for invoking our extraordinary jurisdiction. Instead, this is a case where the State has demonstrated that exercising our extraordinary jurisdiction at the behest of the present petitioners would not be appropriate considering the above-quoted parameters from *Joshi Technologies (Supra)*. Therefore, we dismiss this petition without any order for costs.

36. Though we have dismissed this petition, we clarify that we have not adjudicated on the rival disputes, and the observations, if any, are for the limited purpose of deciding whether we should exercise our jurisdiction and entertain this petition. Therefore, if the parties ultimately resort to ordinary remedies available, such disputes will have to be resolved without being influenced by the observations in this Order.

BHARAT P. DESHPANDE, J. **M. S. SONAK, J.**

SUCHITRA NANDAN SINGBAL Digitally signed by SUCHITRA NANDAN SINGBAL Date: 2022.11.16 12:26:02 +05'30'