

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
(Appellate Side)

M.A.T. 1200 of 2022
+
IA No: C.A.N. 1 of 2022

Union of India & Ors.
Vs.
M/s. M.K. Basu & Ors.

With

M.A.T. 1206 of 2022
+
IA No: C.A.N. 1 of 2022

Union of India & Ors.
Vs.
M/s. M. K. Basu & Ors.

Before: The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Apurba Sinha Ray

For the Appellant In : Mr. Sandip Kumar Bhattacharyya, Adv.
M.A.T. 1200 of 2022

For the Appellant In : Mr. Sauvik Nandy, Adv.
M.A.T. 1206 of 2022

For the respondents/ writ : Mr. Debojyoti Basu, Adv.
petitioners. Mr. Supratim Dhar, Adv.
Mr. Tirupati Mukherjee, Adv.

CAV On : 30.09.2022
Judgment on : 11.01.2023

Apurba Sinha Ray, J. :-

1. By a common judgment dated 24.06.2022 the Learned Single Judge has disposed of four Writ Petitions being WPA 7505 of 2022 With WPA 7509 of 2022 With WPA 7511 of 2022 With WPA 7514 of 2022). Two appeals filed against the said judgment are also being disposed of by the instant common judgment.

2. (Re: Hospital Road Lake, Petrol Pump Lake and Office Road Lake)

a) The writ petitioners have entered into an agreement with Chittaranjan Locomotive Works (CLW in short) for performance of the works of “cleaning and fishing rights of the hospital road lake, petrol pump lake and office road lake” vide agreement being No. CE/B/17/2019-2020 dated 27.08.2019 for a period of three years with a provision for extension of licence period for one or two years more, on payment of licence fees. Due to intervention of the Covid-19 Pandemic, the writ petitioner’s business had suffered losses and for which requests were made from the side of the writ petitioners to the respondent for reducing license fees or to extend the payment schedule but the respondent railway authorities did not pay any heed to such requests of

the writ petitioners, though the said authorities granted various benefits of welfare waiver scheme to some business houses who were similarly situated with the writ petitioners. It is also alleged that as per the agreement being No. CE/B/17/2019-2020 dated 27.08.2019 entered between the writ petitioners and the respondents and also as per the letter of acceptance dated 26.02.2019, initial period of license was stated to be three years, with a provision for extension of the contract for a further period of one or two years as per clause 40 the Special Specification and Special Conditions of Contract. It is also the case of the writ petitioners that there was no impediment anywhere in the said agreement that such provision for extension of the contract period will depend upon any concurrence of the respondent authorities. Respondent authorities have no unilateral power to refuse or deny the extension of tender period in favour of the writ petitioners. As the respondent railway authorities did not extend the period of license as per the said agreement, and as the respondent authorities floated fresh tender, the writ petitioners moved this Court in its writ jurisdiction, and the present appellant and other respondents in the writ petition raised objection with regard to the maintainability of the writ application. According to the appellants/respondents in the writ petition,

clause no. 63 of Indian Railways Standard General Conditions of Contract provides for arbitration for settlement of disputes arising out of or in connection with the contract, but the same has not been availed of by the writ petitioners and further the dispute between the private parties and the State has arisen out of a commercial contract and as such there was no element of public law for invoking Article 226 of the Constitution of India.

b) After hearing the learned counsel of the parties, the Learned Single Judge has upheld the point of maintainability of the writ petition on the basis of several judicial decisions. The Learned Single Judge has specifically stated that the writ petitions are held to be maintainable and with regard to the merits, the matter needs to be heard upon exchange of affidavits.

3. The learned Counsel for the appellant in MAT 1200/2022, Mr. Sandip Kumar Bhattacharyya has challenged the above impugned judgment on several grounds:

First, the Hon'ble Single Judge merely referred to the principles of law, without coming to any findings that the Appellants herein had acted arbitrarily.

Secondly, the entire issue could have been decided on the undisputed documentary evidences forming part of the writ petition.

Thirdly, the appellants laid emphasis on the issue of "eo nomine", meaning that whenever an issue of malice / mala-fide/arbitrariness is claimed, one has to name the persons involved personally and not merely make offices party respondents, and in this regard the learned Counsel submitted the decision of the Hon'ble Apex Court as reported in **(2003) 4 Supreme Court Cases 289** [In re: Federation of Railway Officers Association and others Vs. Union of India] in support of his contention that allegations regarding mala fides cannot be vaguely made and it must be specific and clear.

Fourthly, though an Arbitration clause forms a part of the Tender document, at no point of time any dispute has been raised for adjudication/trial thereunder;

Fifthly, the decisions relied upon by the Appellants before the Learned Single Judge, were neither discussed nor distinguished and merely it was observed that the same would be considered at the time of final hearing of the writ petition.

Sixthly, the appellants' submissions with regard to its obligations under Article 14 of the Constitution of India, as per decision reported in (2012) 10 Supreme Court Cases 1 [In re: Special Reference No.1 of 2012], were not addressed at the time of passing the impugned order.

Seventhly, ignoring the aforesaid aspects, the new tender dated 06.05.2022 has been stayed by the Hon'ble Single Judge.

Eighthly, the Learned Single Judge did not take into consideration the latest decision of the Hon'ble Apex Court as reported at (2022) 6 Supreme Court Cases 127 [In re: N. G. Projects Limited Vs. Vinod Kumar Jain with Others] where it is clearly held, "the writ court should refrain from imposing its decision on the employer as to whether or not to accept the bid of a tenderer..... If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract."

4. (Re: The main lake in Chittaranjan Township)

a) The Principal Engineer, Chittaranjan Locomotive Works (CLW in short), Indian Railways, invited an open tender for fishing right to the main

lake in Chittaranjan Township and the writ petitioner/respondent No. 1 namely M/s. M.K. Basu was the only participant and after necessary compliance of the tender processes, letter of acceptance was issued for fishing right to the main lake in CLW Township on 21.12.2018 at a cost of Rs. 53,99,587/- against tender value of Rs. 1,68,73,709 in favour of the said M/s. M.K. Basu. The validity period of contract was for three years i.e. on and from 21.12.2018 to 20.12.2021. The said agreement contains clause no. 40 wherein it is provided that the letter of acceptance, as referred above, is for three years along with a provision for extension of the tender for a further period of one or two years.

b) By a letter dated 29.11.2021, the writ petitioner/respondent No. 1 sought for extension of agreement for a further period of two years as per the said clause no. 40 as referred above. As the present appellants, being the Union of India and Railway Authorities did not allow such request of the respondent no. 1/writ petitioner, the writ petitioner moved the relevant writ application and the present appellant and other respondents have raised objection with regard to the maintainability of the writ application. According to appellant, clause no. 63 of Indian Railways Standard General Conditions of Contract provides for arbitration for settlement of disputes

arising out of or in connection with the contract, which has not been availed of by the writ petitioner and also on the ground that disputes between the private parties and the State were arisen out of a commercial contract and there was no element of public law for invoking Article 226 of the Constitution of India.

c) After hearing the learned Counsels of the parties, the Learned Single Judge has upheld the point of maintainability of the writ petitions on the basis of several judicial decisions in the aforesaid common judgment. The Learned Single Judge has specifically stated that the writ petitions are held to be maintainable, and with regard to the merits, the Learned Judge holds that the matter needs to be heard upon exchange of affidavits.

5. Being aggrieved and dissatisfied with the said order dated 24.06.2022, the present appeal has been preferred by the Union of India on the grounds, inter alia, that the Learned Single Judge has failed to consider that the subject matter of the instant dispute involved between the parties is commercial in nature and the writ petitioner/ respondent No. 1 has failed to comply with the contractual obligation in the matter of depositing licence fees as per the contract dated 25.08.2019, that the scope of judicial review by entertaining the writ petition in a contractual field under Article 226 of

the Constitution of India is very limited, that the Learned Single Judge has further failed to appreciate that this is not a case of termination, that there is no pleading in the writ petitions on the issue of arbitrariness, malafide or malice as allegedly shown by the respondent authorities during the contractual period, that the Learned Single Judge has also failed to appreciate that the railway authorities being the government agencies have right to float a fresh tender from the market for the public interest and the Court/Tribunal should not interfere in the process of tender and thus injunction should not have been granted to the writ petitioner till its disposal, that the Learned Judge did not consider the fact that the writ petitioners were not restrained from participating in the fresh public auction initiated by the railway authorities, that the impugned judgment has recorded that the petitioner's prayer for extension of lease was outrightly turned down by the authorities, but, in fact, the prayer for extension was not outrightly turned down by the authority as would be evident from the letter dated 06.12.2021, whereby the railway authorities informed the contractor that their application for further extension could be considered after negotiation, if railways found themselves as beneficiaries, but the writ petitioner/contractor did not turn up before the railway authorities for

further negotiation, that the Learned Single Judge while delivering the Judgment and Order dated 24.06.2022 has failed to appreciate the cause espoused by the writ petitioner in recalling the tender notice and extending the privilege of continuing with the fishing to the petitioner is in itself a request to the authority to indulge in an act of discrimination in violation of Article 14 of the Constitution of India.

6. The learned Counsel, Mr. Souvik Nandy, appearing for the appellant/Union of India in MAT 1206 of 2022 has submitted that since the awarding of the contract it has been observed that the writ petitioner/contractor has been constantly violating the terms and conditions of the contract from time to time and the contractor has also failed to maintain the payment schedule as mentioned in clause 38 of the said agreement dated 25.08.2019. By efflux of time, the agreement has come to an end on 20.12.2021 and no further extension was granted by the railway authority on the said agreement. By a letter dated 29.12.2021, the writ petitioner sought for an extension of agreement for a further period of two years as per the agreement clause no. 43 which was never considered by the appellant. The extension of license period beyond three years is not automatic but subject to fulfilment of clause no. 38 and other clauses of the

agreement. It is not a matter of right of the writ petitioner to get the extension of the license period. It is also argued on behalf of the learned counsel of the appellant that the writ petitioner never took the point of any malafidness or arbitrary actions on the part of the present appellant with the appropriate pleadings. According to him, mere use of some words like 'malafide' in the pleadings does not establish the case of malafide, rather it is much easier to use those words than to prove the same. The learned Counsel of the appellant has also pointed out that by a letter dated 06.12.2021, the appellant duly informed the writ petitioner/contractor that the railway authority is not interested to extend the license period for further course, but their application for extension could be considered after negotiation, if the railway authorities found him as beneficiary but the contractor did not bother to negotiate with the Railway during the subsistence of the period of contract ending on 20.12.2021. Moreover, after the agreement period was over, the writ petitioner by a letter dated 17.05.2022 addressed to the Chief Engineer CLW, Chittaranjan, had expressed their desire to get the completion certificate with regard to LOA No. CE/E/22/2018-2019. It is revealed from the said documents that the present writ petitioner sought extension of time after expiry of the license

period and the same shows their ill motive because the government authority cannot wait till indefinite period for a fresh tender and they were compelled to issue notice inviting tender (NIT) dated 04.04.2022 for cleaning and fishing right of the main lake in Chittaranjan Township for a period of three years on yearly license basis. The Learned Single Judge should not have granted stay on the fresh tender process. The learned counsel for the appellant has further argued that writ petitioner's only object is to get the stay order on the fresh tender because the estimated cost of fishing right of the lake is Rs. 1,68,00,000/- is higher than the accepted rate of Rs. 53,99,587/- i.e. the writ petitioner's rate is 60% (sixty percent) below of the estimated cost. The learned Counsel has also pointed out that the contractor/writ petitioner did not care for hampering of business of railway, pecuniary loss, hardship in nation's progress due to non-payment of license fee in time. The appellant relied on the following legal authorities:

- (i) (1996) 6 SCC 22 (Para 16, 17, 20, 21) (State of UP Versus Bridge & Roof).
- (ii) (2000) 6 SCC 293 (para 10, 11) (Kerala State of Electricity Board & Anr. Versus Kurien E. Kalathil & Ors.)

(iii)(1981) 3 SCC 238 (para 8, 9) (Divisional Forest Officer Versus Biswanath Tea Co. Ltd.)

(iv)(2007) 14 SCC 517 (para – 22) (Jagadish Mandal Versus State of Odisha & Ors.)

(v) (2017) 4 SCC 170 (para – 8 to 10) (JSW Infrastructure Ltd Versus Kakinada Sea Ports Ltd.)

(vi)(2020) 16 SCC 759 (para – 50, 51, 52) Bharat Coking Ltd. Versus AMR Dev Prabha & Ors.)

(vii) (2021) 10 SCC 690 (Para 24) (Union of India Versus Puna Hinda)

7. The learned Advocate for the respondent in both the appeals, Mr. Debojyoti Basu, has vehemently argued that the Constitutional power of High Court under Article 226 is superlative one and it cannot be abrogated by any authority. The power of High Court under Article 226 of the Constitution is not only for enforcement of any of rights conferred under part III, but also for any other purpose. Under Article 226 of the Constitution, it is the duty of the High Court to ensure that rule of law shall prevail and that fundamental as well as legal rights of every citizen are protected and should not be prejudiced by an arbitrary and unreasonable

act of the State. Neither presence of any alternative remedy nor a contractual clause can take away discretionary powers and authority of the High Court under Article 226 of the Constitution. It is settled that even in contractual obligations, the High Court has powers to exercise jurisdiction in an appropriate case under Article 226 of the Constitution. The learned Counsel has referred to the decision reported in (2020) 13 SCC 285 paragraphs 9, 10, 11, 13, 14, 16, 17, 19, 23 and 26. The learned Counsel has also pointed out that the presence of arbitration clause in an agreement between the parties cannot oust the jurisdiction of the High Court under Article 226 of the Constitution. According to him, it is a settled law that no subordinate legislation can supersede any of constitutional powers of High Court or Supreme Court. The learned Counsel has referred to the decision reported in (2021) 6 SCC 15 [paragraphs 66, 67, 68] in support of his contention that there is no rule of law that the High Court should not entertain any writ petition when an alternative remedy is available to a party or when there is an arbitration clause in the relevant agreement between the parties. It is always a matter of discretion of the High Court under Article 226 of the Constitution and in appropriate cases the High Court can entertain writ petition even there is an alternative remedy and such power of

the High Court has been upheld by the Hon'ble Supreme Court in several judicial decisions excepting the cases when the findings are unreasonable or perverse from the side of the High Court. In this regard the learned Counsel has cited decisions reported in 2019 SCC OnLine SC 1117, [paragraphs 143], AIR 1969 SC 1321 [paragraph 7], AIR 1966 SC 197 [paragraph 15].

The learned Counsel has further submitted that it is trite law that unless reasonings for entertaining a writ petition are found to be palpably unsound or irrational or are shown vulnerable, no interference is called for from the higher forum. In this regard the learned Counsel has referred to the decisions reported in (1977) 2 SCC 724 paragraph 4; AIR 1967 SC 81 paragraphs 23, 24; (2005) 8 SCC 264, paragraphs 11, 16, and 17; (2005) 6 SCC 499 paragraphs 17. According to learned Counsel, even in case of contractual claims, writ petition is maintainable whenever it is found that the actions of the respondents are arbitrary and unreasonable. The decisions reported in (2020) 16 SCC 276 paragraph 33, (2020) 19 SCC 241, paragraphs 9 to 14; JT 2003 (10) SCC 300, paragraphs 53 and 54; 2017 (2) CHN CAL 352, paragraphs 3, 4, 5, 6 and 10; (2010) 11 SCC 186 paragraphs 20, 21 have been cited. The learned Counsel of the writ petitioner/respondent no. 1 in this appeal has argued that the appellant having

accepted the clause 40 in the contract cannot refuse to act in terms thereof, particularly when such clause in its nature is omnibus, that is, when the petitioner applied for extension, the appellant, being the railway authorities, was contractually bound to accept the same. The writ petitioner/respondent No. 1 has relied upon the following documents:-

- a) The extant instruction note dated May 4, 2022 as filed by the appellants before Hon'ble Single Judge in support of their purported stand(s) and of impugned decision(s) that are being questioned in the writ petitioner(s).
- b) A chart showing calculation in each case regarding the payment(s) to be made by the writ petitioners/respondents for the fourth and fifth year for all lakes covered under four writ petitions.

8. Moreover, the learned counsel of the respondents of the present appeal has further submitted that the judgments cited by the learned counsels of the appellant are distinguishable from the facts of the present case and further, the proposition of law as propounded by the said decisions has no manner of application in the present case.

9. The learned counsel has also pointed out that a judgment may not be followed in a given case if the said judgment contains some distinguishing

features. Little differences in facts or additional facts may make a lot of differences to the precedential value of a decision. The learned Counsel has relied on a decision reported in (2011) 7 SCC 639.

10. After perusal of the judgment under appeal, it appears that the Learned Single Judge has disposed of the issue of maintainability raised by the Railway Authorities and the Union of India. According to the Learned Single Judge, though in contractual or commercial matters the Court must exercise utmost restraint in exercising power of judicial review but intervention of the Court under Article 226 of the Constitution is justified when there are allegations of arbitrariness, irrationalities, malafide or bias levelled against the authorities. According to the Learned Single Judge, the settled principle of law is that when an alternative mode of settlement of dispute is provided in the contract, the High Court should refuse to exercise discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement. However, the Learned Single Judge has also observed that in the writ petition the decision making process of the respondents in refusing to extend the license period of the petitioners for another two years in terms of clause 40 of the contract agreement, has been challenged on the ground of arbitrariness, malafide and malice, and it is

trite law that the State or its instrumentalities cannot act arbitrarily in dealing with private parties. The Learned Single Judge has further opined that despite the fact that the matter undoubtedly pertains to contractual obligation between the parties, the allegation of arbitrariness, malafide and malice can be dealt with by the Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. According to the Learned Single Judge, the said proposition of law has been endorsed by the Hon'ble Supreme Court in the authorities in **ABL International Limited & Anr. Vs. Export Credit Guarantee Corporation of India & Ors.** reported in **JT 2003 (10) SC 300**, **Popatrao Vyankatrao Patil Vs. The State of Maharashtra and Ors.** reported in **(2020) 19 SCC 241**, **Indsil Hydro Power and Manganese Limited Vs. State of Kerala and Ors.** reported in **(2020) 16 SCC 276**. The Learned Single Judge has also quoted the observation of the Hon'ble Supreme Court which was made in U.P.Power Transmission case to the effect that "the High Court may entertain a writ petition notwithstanding the availability of an alternative remedy, particularly where the writ petition seeks enforcement of a fundamental right, secondly where there is failure of principles of natural justice or thirdly where the impugned orders or proceedings are wholly without jurisdiction or fourthly when the

vires of an Act is under challenge.” Thereafter the Learned Single Judge holds that the writ petitions are maintainable in their present forms and may be dealt with by the Court on merits.

11. Holding the writ petitions as maintainable, the Learned Single Judge has kept the broad questions, raised in the writ petitions, open to be decided on merits after hearing the writ petitions as a whole.

12. Therefore from the above, the points for consideration in these appeals are deduced hereinbelow:-

- i) Can a writ court entertain application under 226 of the Constitution when the subject matter involves contractual obligations between the State and the private individual?
- ii) Can a concerned private individual straightway move a writ application under Article 226 of the Constitution, particularly when there is an alternative remedy available as per the agreement between the parties?
- iii) Has the Learned Single Judge committed any error in holding that writ applications filed by the respondents are maintainable?

Decision with Reasons:-

13. The Learned Single Judge, in short, has come to the conclusion that although there is a provision for alternative remedy, and further the disputes have arisen out of contractual obligations of the parties, the writ Court can entertain the relevant writ petitions under Article 226 of the Constitution on the ground of violation of fundamental rights at the instance of the appellant and also on the ground that allegations of arbitrariness, irrationalities, malafide or bias are present in the dealings of the railway authorities/ Union of India in relation to the writ petitioners/respondents of this appeal.

14. If we peruse the case laws cited from the side of the appellants we shall find that in **Kerala State Electricity Board & Anr. Vs. Kurien E. Kalathil & Ors.** reported in **(2000) 6 SCC 293**, the Hon'ble Supreme Court has been pleased to hold that a contract would not become statutory, simply because it is for construction of a public utility and it has been awarded by a statutory body. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principle of law of contract. The

fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied.

15. In **Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd.** reported in **(1981) 3 SCC 238**, the Supreme Court has held that ordinarily where a breach of contract is complained of, a party complaining of such breach may sue for specific performance of contract, if contract is capable of being specifically performed or the party may sue for damages. Such a suit would ordinarily be cognizable by the civil court. The High Court in its extraordinary jurisdiction would not entertain a petition either for specific performance of contract or for recovering damages. A right to relief flowing from a contract has to be claimed in a Civil Court where a suit for specific performance of contract or for damages could be filed. This is so well settled that no authority is needed. The Hon'ble Supreme Court has also observed that in **Har Shankar VS. Deputy Excise and Taxation Commissioner** reported in **(1975) 1 SCC 737**, "those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied

upon those from powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force”.

16. In State of U.P. and Ors. Vs. Bridge and Roof Company (India) Ltd.

reported in **(1996) 6 SCC 22**, the Hon’ble Supreme Court has been pleased to observe that the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, maybe, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-government under the contract, and if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matter which cannot be agitated in or adjudicated upon in a writ petition. In **Jagdish Mandal Vs. State of Orissa and Ors.** reported in **(2007) 14 SCC 517** the Hon’ble Supreme Court has clearly stated that judicial review of

administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision are 'sound' and when the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, court will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. It is also held in the said decision that court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:-

- i) Whether the process adopted or decision made by authority is malafide or intended to favour someone;

ii) Whether the process adopted or decision made is so arbitrary and irrational that the court can say; “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.

iii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226.

17. In **Union of India and Ors. Vs. Puna Hinda** reported in **(2021) 10 SCC 690** the Hon’ble Supreme Court holds that though the jurisdiction of the High Court is wide but in respect of pure contractual matters in the field of private law, having no statutory flavour, are better adjudicated upon by the forum agreed to by the parties.

18. In **N.G. Projects Limited Vs. Vindo Kumar Jail and Ors.** reported in **(2022) 6 SCC 127** the Hon’ble Supreme Court has been pleased to hold that if the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the

State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.

19. In Federation of Railway Officers Association and Ors. Vs. Union of India reported in **(2003) 4 SCC 289** the Hon'ble Division Bench observed that the submission of the Learned Senior Advocate Prashant Bhushan that allegations regarding mala fides cannot be vaguely made and it must be specific and clear. Unless full details are given as to place, time or date, it would be very difficult for anyone to deny the same.

20. In (2012) 10 SCC 1 the Hon'ble Supreme Court has been pleased to observed that from a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without pointing out a constitutional infirmity as McDowell case has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious,

unbiased without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India.

21. In Bharat Coking Coal Limited and Ors. Vs. Amr Dev Prabha and Ors. reported in **(2020) 16 SCC 759** the Hon'ble Supreme Court has observed that the scope of judicial review in tenders has been explored in-depth in a catena of cases. It is settled that constitutional courts are concerned only with lawfulness of a decision, and not its soundness. Phrased differently, the courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon. However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills.

22. In JSW Infrastructure Limited And Anr. Vs. Kakinada Seaports Limited and Ors. reported in **(2017) 4 SCC 170** the Hon'ble Supreme Court

has been pleased to hold that if the administrative action suffers from malafides or intention to favour someone or arbitrariness or perversity, only then the Constitutional Court can interfere with the decision making process of the administrative authority; otherwise the Court should not interfere or review the decision taken by the administrative body.

23. To counter the above contentions of the learned counsels of the appellants, the learned counsel of the respondents in both the appeals has referred to several case laws. In **Indsil Hydro Power and Manganese Limited Vs. State of Kerala and Ors.** reported in **(2020) 16 SCC 276** it **has been** laid down that it is now a settled principle of law that the exercise of writ jurisdiction under Article 226 is not excluded in matters pertaining to contract. The States and its agencies are duty bound to act in a manner which is fair and transparent and cannot act arbitrarily in dealings with private parties. This must particularly be the governing principle where the State as a measure of encouraging industrialisation invites the participation of private Industries to respond to the policy initiative of the State.

24. In **Popatrrao Vyankatrao Patil Vs. State of Maharashtra and Ors.** reported in **(2020) 19 SSC 241** the Hon'ble Supreme Court has been please to observe, even if there are disputed questions of fact which fall for

consideration but if they do not require elaborate evidence to be adduced, the High Court is not precluded from entertaining a petition under Article 226 of the Constitution. However, such a plenary power has to be exercised by the High Court in exceptional circumstances. The High Court would be justified in exercising such a power to the exclusion of other available remedies only when it finds that the action of the State or its instrumentality is arbitrary and unreasonable and, as such, violative of Article 14 of the Constitution of India. It is also laid down therein that 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.

25. In ABL International Ltd. & Anr. Vs. Export Credit Guarantee Corporation of India Limited & Ors. reported in **JT 2003 (10) SC 300** the Hon'ble Supreme Court has been pleased to observe that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably in its contractual, constitutional or

statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution.

26. In **Jayanti Paul Vs. Kolkata Metropolitan Development Authority** reported in **2017(2) CHN (CAL) 352**, this Court has observed that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity, contrary to the professed ideals in the Preamble. Thus, total exclusion of Article 14 in contractual matters is not permissible in our Constitutional scheme.

27. The learned Counsel for the respondents has also pointed out that even if there is an alternative remedy stipulated in the relevant contract between the parties that does not take away the jurisdiction of the Hon'ble High Court under Article 226 of the Constitution. In this regard the learned Counsel of the respondent No. 1 has cited several judicial decisions.

28. In **Maharashtra Chess Association Vs. Union of India and Ors.** reported in **(2020) 13 SSC 285** the Hon'ble Supreme Court has specifically mentioned that the writ jurisdiction of the High Court is fundamentally discretionary. Even the existence of an alternate adequate remedy is merely an additional factor to be taken into consideration by the High Court in deciding whether or not to exercise its writ jurisdiction. This is in marked

contradiction to the jurisdiction of a civil court which is governed by the statute. In exercising its discretion to entertain a particular case under Article 226, a High Court may take into consideration various factors including the nature of injustice that is alleged by the petitioner, whether or not an alternate remedy exists, or whether the facts raise a question of constitutional interpretation. These factors are not exhaustive and it is not necessary to enumerate what factors should or should not be taken into consideration. The High Court must take a holistic view of the facts as submitted in the writ petition and make a determination on the facts and circumstances of each unique case.

29. In Uttar Pradesh Power Transmission Corporation Limited and Another Vs. CG Power and Industrial Solutions Limited and Another reported in **(2021) 6 SSC 15** the Hon'ble Supreme Court has been pleased to hold that the existence of an arbitration clause does not debar the court from entertaining a writ petition. It is well settled that availability of an alternative remedy does not prohibit the High Court from entertaining a writ petition in an appropriate case. The High Court may entertain writ petition, notwithstanding the availability of an alternative remedy.

30. In State of Rajasthan and Ors. Vs. Lord Northbrook and Ors.

reported in **2019 SSC OnLine SC 1117**, after quoting several judicial decisions, the Hon'ble Supreme Court has been pleased to observe that there is no rule of law that High Court should not entertain a writ petition when an alternative remedy is available to a party. It is always a matter of discretion of the court and if the discretion has been exercised by the High Court not unreasonably or perversely, it is settled practice of the Supreme Court not to interfere with the exercise of discretion by the High Court.

31. In AIR 1996 Supreme Court 197 the Hon'ble Supreme Court has been pleased to lay down that the existence of an effective remedy does not oust the jurisdiction of the High Court, but it is only one of the circumstances that the court should take into consideration in exercising its discretionary jurisdiction under Article 226 of the Constitution of India.

32. In AIR 1965 Supreme Court 1321 it has been observed by the Hon'ble Supreme Court that though the High Court would not ordinarily entertain a petition under Article 226 of the Constitution where an alternate remedy is open to an aggrieved party but the High Court has the jurisdiction to grant relief to such a party if it thinks proper to do so in the circumstances of the case.

33. The learned Counsel has also submitted several other case laws reported in **(1977) 2 SSC 724, (2005) 6 SSC 499, (2005) 8 SCC 264, AIR 1967 SC 81, (2010) 11 SCC 186** in support of his contention.

34. From the above discussion and also after considering the oral submission of the counsel of the parties it transpires that the impugned judgment was challenged mainly on the grounds, that in spite of having alternative remedy as per the relevant contract between the parties, the learned Single Judge did not consider the relevant judgments cited by the appellant and the Learned Single Judge holds that the writ court can entertain the plea of the writ petitioner in spite of having such alternative remedy. The judgment was also challenged on the score that the writ jurisdiction of the Court was unnecessarily widened up by the Learned Single Judge to deal with disputes arising out of contractual obligations of the parties in a writ petition which is, according to the learned Counsels of the appellants opposed to the law of the land.

35. After going through the relevant judgements, we cannot single out the judgment under appeal on the score that the scope of writ jurisdiction has been widened by the Learned Single Judge, since at present, the law of our country is in favour of such expansion or broadening of scope of writ

jurisdiction on certain grounds; particularly in the circumstances where the contract is concluded between the State and private parties.

36. The judicial decisions referred to by the appellants are appropriate to show that when there is an alternative remedy, the Court should not interfere with disputes arising out of contractual obligation, but must relegate the parties to such alternative remedy. But it is further true that the judicial decisions referred to by the writ petitioner/respondent No. 1 show that the State is being regarded as the guardian of all concerned; whether it is in respect of private individuals or public entities. The decisions in support of the writ petitioner suggest that the State action should conform to the constitutional principles of equality, non-arbitrariness etc. The said judicial decisions also support that the High Court has the discretion to decide what matter should be entertained or what matter should not be entertained under its writ jurisdiction and if such discretion is exercised with reasons, and is not perverse, then there is very little scope for questioning such exercise of discretionary power by the High Court in its writ jurisdiction. The said judicial decisions cited by the writ petitioner/respondents of the appeal also support that even the factual aspects of a case can be considered by the High Court in its direction if it

finds the same is necessary for the interest of justice. Furthermore, the High Court can record/take evidence to a limited extent to ascertain the impugned facts in its writ jurisdiction.

37. Therefore, as the relevant judicial decisions have disclosed that the State should not be allowed to take up technical issue to get rid of the rigors of law, we do think that by holding the writ petition to be maintainable, the Learned Single Judge has exercised her discretion on certain acceptable grounds. As the writ applications prima facie disclosed alleged step-motherly attitude towards the writ petitioners at the instance of the appellants, and further as there are allegations of arbitrariness, malafides on the part of the railway authorities, the Learned Single Judge has decided to entertain such writ petitions, which cannot be termed as unreasonable or perverse. Entertaining a writ petition by the High Court under Article 226 does not mean that the plea against the writ petitioners/respondents of this appeal for non-cooperation in the matters of payment of licence fees, late submission of applications for extension of the period of lease by the said writ petitioners/respondents, prejudice to the public interest due to the alleged activities of the writ petitioner/ respondent No. 1 etc. will not be

considered by the Learned Single Judge at the time of final disposal of the same.

38. In fine, as the impugned order is neither unreasonable nor perverse, and as the Learned Single Judge is within her discretion as per the law laid down in the relevant judicial decisions discussed above, we are not inclined to interfere with the impugned judgment passed by the Learned Single Judge.

Arijit Banerjee, J.:

1. I have had the advantage of reading the detailed judgment of my learned Brother. I completely agree with the reasons recorded and conclusion reached by my Brother. However, I take this opportunity to add a few paragraphs.

2. The writ petitioners have challenged refusal on the part of the Union of India/ Railways to extend the validity of contracts awarded to them granting them cleaning and fishing rights in respect of certain lakes. They contend that upon the initial period of the contract expiring by efflux of time, as per

terms and conditions of the contract, it was incumbent upon the Union of India (UOI)/ Railways to extend the validity of the contracts for one or two years. The writ petitioners have alleged discrimination and arbitrary action on the part of the authorities.

3. A preliminary point of maintainability of the writ petitions was raised by learned Advocates for UOI / Railways before the learned Single Judge on two grounds:- firstly, each contract between the parties contains an arbitration clause for resolution of disputes between the parties touching the contract. It was argued before the learned Judge that in view of existence of such alternative efficacious remedy, the writ Court should not entertain the writ petition. Secondly, the disputes between the parties arise out of or in relation to a commercial contract. It has been contended that disputes arising out of contracts cannot be decided by the writ Court.

4. The learned Single Judge took up the point of maintainability of the writ petitions as a preliminary point. The learned Judge held that availability of an alternative remedy is not an absolute bar to the maintainability of a writ

petition. It is a self-imposed restriction that the writ Court has put on itself.

It is purely a matter of discretion of the writ Court whether or not to entertain a writ application in spite of an alternative remedy being available to the writ petitioner. The learned Judge came to the conclusion that in view of the nature of the allegations in the writ petition, the arbitration clause in the subject contract is not a bar to maintainability of the writ petition. The learned Judge referred to various decisions of the Hon'ble Supreme Court which have been discussed by my learned Brother and hence I refrain from doing the same.

5. To my mind, the decision of the learned Judge on the point of an alternative remedy standing in the way of maintainability of the writ petition, is unexceptionable. Indeed, it is purely within the discretion of the writ Court as to whether or not to entertain an application under Article 226 of the Constitution in spite of an alternative remedy being open to the writ petitioner. No doubt such discretion has to be exercised judiciously and not arbitrarily, unreasonably or capriciously. Normally, a Writ Court declines to

exercise jurisdiction if an alternative effective remedy is available to the petitioner. However, in certain circumstances, some of which are indicated in the case of ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & Ors. reported at (1998) 8 SCC 1***, like breach of principles of natural justice, jurisdictional error, etc, the Writ Court may decide to exercise its power of judicial review although an alternative remedy may exist. So long as such decision is not perverse, the same does not warrant interference.

6. The learned Judge also rejected the argument of the appellant herein that the writ Court cannot adjudicate upon contractual disputes. As I understand the law to be presently, it is true that generally disputes arising out of commercial contracts are not entertained by the Writ Court. The writ Court is reluctant to issue high prerogative writs like mandamus, certiorari or prohibition in connection with disputes between parties which are of a civil nature. Such disputes are better and more effectively adjudicable by a Civil forum upon conducting a full fledged trial. However, where the contract

has a statutory flavour, i.e., the State or other Authority within the meaning of Article 12 of the Constitution, has entered into the contract in discharge of a statutory duty or function, the writ courts more readily entertain disputes arising in relation to such contracts. One must bear in mind that the State being a party to a contract does not *ipso facto* make it a statutory contract. However, disputes arising in relation to such contracts with a statutory hue also may not be entertained by the writ Court if the disputes are factual in nature and complex enough to make such disputes unsuitable for adjudication in a summary proceeding before the writ Court. In such cases, the writ Court may relegate the petitioner to a civil suit.

7. There is no absolute bar to the writ Court entertaining contractual disputes. Where the Court finds that though the disputes emanate from a contract, the nature thereof is such that the same can be adjudicated upon on affidavits without holding a trial on evidence, nothing stands in the way of the Court to entertain a writ application. Indeed, it will be within the power of the Writ Court even to record evidence if the Court is of the opinion

that in a particular case it is necessary to do so to do complete justice to the parties.

8. The Hon'ble Supreme Court has time without numbers pronounced that the power of the High Court under Article 226 of the Constitution is plenary in nature. For the ends of justice any order can be passed by the writ Court. The Power under Article 226 of the Constitution is very wide. It is for the writ Court to decide whether or not it shall exercise such jurisdiction in the facts of a particular case. So long as the decision of the writ Court to exercise or not to exercise writ jurisdiction in a particular factual matrix is not *arbitrary* or *Wednesbury unreasonable* or perverse the same would not call for interference.

9. Generally speaking, a Division Bench of a High Court hearing intra-Court appeal against an order of a Single Judge, would not interfere with the impugned order only because it may have a view which is different from that of the Single Judge. If the view of the Single Judge is a plausible one, the same would not warrant interference. In the present case, the learned Single

Judge has exercised discretion to entertain the writ petition by rejecting the point of non-maintainability of the writ petition and has directed exchange of affidavits so that the writ petitions can be decided on merits. The order impugned is a well-reasoned order supported by various judicial precedents of the highest court of the land. I am unable to find any arbitrariness, perversity or unreasonableness in the impugned order. Accordingly, I agree with my learned Brother that both the appeals and the connected applications should be dismissed without any order as to costs.

10. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.

(APURBA SINHA RAY, J.)

(ARIJIT BANERJEE, J.)