BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 30.10.2024

Pronounced on : 28.01.2025

CORAM

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P.(MD)No.12557 of 2017

M/s.The Indian Hume Pipe Co., Limited,
Rep. by its Deputy General Manager,
Mr.S.Arunachalam,
No.8, First Floor,
Gopalapuram,
Chennai - 600 006.

Vs.

1.The Managing Director,
TWAD Board,
No.31, Kamarajar Salai,
Chepauk, Chennai - 5.

2.The Chief Engineer,
TWAD Board, Southern Region,
Ganesh Nagar, Melur Road,
Madurai - 625 007.

3.The Executive Engineer,
TWAD Board, Madurai. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Mandamus, directing the respondents to disburse the amount payable to the petitioner towards price adjustment in terms of minutes of the meeting conducted by the respondent Board on 14.06.2016 and the report of the Committee dated 06.07.2016 and the consequential order of the 1st respondent in his proceedings Letter No.23217/Audit/2017 dated 20.04.2017 in respect of the work namely providing CWSS to 7 Town Panchayats (Sethur, Chettiarpatti, Mamsapuram, W.Pudupatti, Sundrapandiam, Watrap and S.Kodikulam) and 395 Rural habitations in Rajapalayam, Srivilliputhur and Watrap Unions in Virudhunagar District with river Thamirabarani as sources near Mukkudal within a time frame fixed by this Court.

For Petitioner : Mr.B.Saravanan
Senior Advocate
for Mr.D.Kirubakaran

For Respondents : Mr.Veera Kathiravan,
Additional Advocate General
Assisted by Mr. R.Satheesh
Standing Counsel

ORDER

The present Writ Petition is filed for issuance of a Writ of Mandamus, directing the respondents to disburse the amounts payable to the petitioner towards price adjustment, in terms of the Minutes of the meeting conducted by the respondent Board on 14.06.2016 and the consequential order of the 1st respondent vide proceedings No.23217/Audit /2017 dated 20.04.2017, with regard to the agreement entered between the respondent board and the petitioner in CER/TWAD/MDU/No.21/2011-12/dated 30.12.2011.

2. Brief facts:

a. The petitioner is engaged in the business of manufacturing, laying and joining pipelines in relation to infrastructure facilities, more particularly, drinking water supply projects, irrigation projects, sanitation and sewerage system.

b. The respondent board floated a tender for providing CWSS to seven Town Panchayats and 395 rural habitations in Rajapalayam, Srivilliputhur, Watrap Union in Virudhunagar District with river Thamirabarani as source near Mukkudal vide Agreement dated 30.12.2011. The petitioner was successful in that Tender process called by the respondent and awarded the above Contract.

c. The Contract was to be executed within a period of 18 months from the date of its commencement, i.e., 30.12.2011. In other words, in terms of the Contract, the work ought to be completed on or before 30.06.2013. The Contract was however completed only on 20.11.2014. There was a delay of close to 17 months.

d. The petitioner claimed price adjustment for the extended period by placing reliance on Clause 51 of the agreement between the petitioner and the respondent Board.

e. The petitioner would submit that the delay in execution of the contract was due to the following reasons, all of which according to the petitioner was attributable to the respondent viz.,

i) Delay in obtaining permission from National Highways Department.

ii) Land acquisition process.

iii) Change in design and scope of work by the respondent Board.

f. The petitioner made a representation to the 1st respondent vide letter dated 24.02.2016, requesting payment of price adjustment for the extended period.

g. Pursuant to the above representation the 1st respondent constituted a Committee to re-solve the issue relating to price escalation. The Committee comprised of Authorities from TWAD Board including Finance Director, Engineer Director, Chief Audit Officer, etc., and Officials from Indian Hume Pipeline Company which is the petitioner herein. The Committee convened a meeting on 14.06.2016.

h. The Committee in the meeting dated 14.06.2016, worked out the price adjustment proposal during the extended period i.e., 01.07.2013 to 31.08.2014 as under:

Total value of work done in the extended Period from 01.07.2013 to 31.08.2014	: 25.80,60,200/-
Value of work done in the extended period from 01.07.2013 to 31.08.2014 (admitted to the extended period up to 31.08.2014 as per CE/Madurai letter No.12920/F.CWSS to 7 TP/SDO II/CW/2014 Dated 10.12.2014)	: 24.18,95,251/-
Value of work done considered by price Adjustment in the extended period	: 21,20,00,670/-

i. Importantly, it was recorded that since the Contractor has agreed to the value of work done for price adjustment, there is no further dispute in this matter and the Committee has no further issues / disputes to be resolved since the Executive Engineer concerned and the Chief Engineer, (I/C) Madurai agreed to consider the decision / suggestion arrived at during the meeting dated 14.06.2016.

j. The petitioner vide letter dated 17.01.2017 addressed to the 1st respondent stated that despite the committee constituted by the 1st respondent and the petitioner having settled the issue with regard to price adjustment on 14.06.2016, the respondent is yet to pay the price adjustment to the petitioner in terms of the decision of the committee dated 14.06.2016.

k. The petitioner requested the 1st respondent yet again to resolve the matter or to refer to the Dispute Resolution Committee in terms of Clause 67 of the agreement by treating the issue as a dispute vide letter dated 17.01.2017.

l. The 1st respondent vide proceedings dated 20.04.2017, while recording that the Chief Engineer is the employer in respect of the projects in issue requested the Chief Engineer to instruct the concerned Executive Engineer to take action on the minutes dated 06.07.2016 while also directing the Chief Engineer to call for explanation from the Executive Engineer for non compliance of minutes and delay.

m. The 1st respondent vide letter dated 20.04.2017 informed the petitioner that instructions have been issued to the Chief Engineer Madurai to act on the minutes dated 14.06.2016.

n. Despite the same, the respondent Board has not paid the petitioner the price adjustment claimed nor the price adjustment agreed to by the Committee vide its decision taken in the meeting dated 14.06.2016 and report dated 06.07.2016.

o. In the circumstances, the present writ petition is filed praying for a writ of mandamus to direct the respondents to disburse the amount payable to the petitioner towards price adjustment in terms of minutes of the meeting conducted by the board on 14.06.2016 and the report dated 06.07.2016.

3. Case of the petitioner:

a. The learned Senior Advocate appearing on behalf of the petitioner would submit that the petitioner is entitled for price adjustment, during the extended period in terms of Clause 51 of the Agreement and Clause 4(1)(vii) of G.O.Ms.No.227 dated 23.11.2009.

b. The extension of time is only on account of the delay attributable to the respondent in relation to the land acquisition process, change in design and scope of work. That the petitioner was entitled to price adjustment in terms of Clause 51 of the agreement.

c. That in terms of report of the Committee dated 06.07.2016, though the petitioners had claimed price adjustment on the value of work done during the extended period to the extent of Rs.25,80,60,200/-, the respondent Board admitted that the value of the work done during the extended period was only to the extent of Rs.21,20,00,670/- and that the petitioner is entitled to price adjustment on the said amount, to which the petitioner was persuaded to agree by the Chief Engineer.

d. Despite the above admission, the petitioner was not paid the price adjustment for the value of the work done during the extended period even on the admitted claim of Rs.21,20,00,670/-, which according to the petitioner is an act of manifest arbitrariness, unfair and unreasonable, by the respondent which is an instrumentality of the State, thereby falling foul of Article 14 of the Constitution warranting interference. Reliance was placed upon the judgment of the Supreme Court in the case of *ABL International Ltd., and another,* reported *in (2004) 3 SCC 553*, to submit that if the State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the Court by way of writ petition under Article 226 of the Constitution by placing reliance upon the following paragraph of the said judgment:

> "***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.

e. The petitioner would also submit that the attempt by the respondent to state that there is a dispute cannot be sustained in the light of the above admission by the Committee which is recorded in the minutes dated 06.07.2016. The above judgment in ABL International was also relied in support of the proposition that merely because one of the party to the lis wants to dispute a fact it does not become a disputed fact.

f. That the respondent Board has in a different but similar work awarded to the petitioner adjusted and deducted from the bills raised by the petitioner for the value of the work done and such adjustment was apparently done on the basis of the current indices relevant to the quarter in which the work was done. In other words, it is the case of the petitioner that the respondent Board had applied the Clause relating to price adjustment when it was beneficial to the Board, i.e., the Board being required to pay a price / sum lesser than what is agreed /contracted upon. It was thus submitted that the Board cannot refuse to apply the price adjustment mechanism in the present case merely because the

Board may have to pay a greater sum than what was agreed upon, for such act would be hit by the doctrine of approbate and reprobate. In support thereof reliance was sought to be placed on the judgment of the Supreme Court in *Union of India and others vs. N.Murugesan and others* reported *in (2022) 2 SCC 25.*

4. Case of the respondents:

a. The learned Additional Advocate General appearing for the respondents has raised a preliminary objection that the Writ Petition ought not to be entertained inasmuch as the issues raised is in the realm of contract, thus outside the ken of judicial review under Article 226 of the Constitution of India.

b. The petitioner ought to have approached the Dispute Redressal Committee in terms of clause 67(a) of the contract and in the event of non settlement of the dispute by the Redressal Committee, the dispute shall have to be settled/ resolved by the competent Court having jurisdiction.

c. That unlike what is stated by the petitioner, the extension of time was granted not only on account of change in design, change in scope of work and land acquisition process, but the extension was also in view of reasons attributable to the petitioner / contractor and reliance was placed on the proceedings granting extension.

d. The issues raised in the writ petition give rise to examination of disputed questions of fact, which this Court while exercising its discretionary remedy under Article 226 would normally not examine, afortiorari in the present case, where in the dispute revolves around rights and obligations arising out of contracts.

5. Heard both sides and perused the materials on record.

6. On considering the submissions of both sides I am of the view that the relief prayed for in the present writ petition cannot be granted for the following reasons viz.,

<u>A. Disputed questions of fact involved – Court to exercise restraint under Article 226:</u>

6.1. While there can be no quarrel over the proposition that merely because a party to the lis choses to state that there are disputed facts, it does not *ipso facto* result in existence of disputed facts. However, on examination of the documents placed before this Court as a whole it does appear that there are certain facts / areas where there seems to be serious disputes on facts between the parties. While the petitioner submits that the delay was solely attributable to the respondent, however a perusal of the orders of extension appears to indicate that the petitioner also contributed to the delay as would be evident from the following communications viz.,

a) Communication dated 12.06.2014

The above communication while recommending the extension of time for the above work on request by the petitioner / contractor upto 31.08.2014 it was recorded that the petitioner / contractor was imposed with a find of Rs.25,000/- for slow progress. The relevant portion reads as under:

Sl.No.	Reason already mentioned	Specific recommendation and report of the issue
5.	*Considering the physical progress of work so far achieved, for completion of balance work the extension of lime as requested by the contractor up to 31.07.2014 may be considered*	*Necessary show cause notice issued to the contractor as per clause 41 of agreement towards invoking LD for the unfinished portion of work vide Lo ir no 03614/FCWSS to 7TPts /JDO/2014 dt 3.6.2014. Further failure in maintaining required rale of progress and for slow progress, the contractor was fined with Rs 25000/ vide this office ir, no:10614/ FCWSS to 7TPts/JDO/2014 dt10.6.2014.*

..... In the above circumstances, I recommend the Extension of time for the above work as requested by the contractor up to 31.08.2014. Hence, I request that the extension of time for the above work up 31.08.2014 may be considered and approval may be please be accorded.

b) Communication dated 04.12.2014

While granting extension on the request made by the petitioner / contractor it was found that the extension is being granted without any financial commitment to the Board, while also imposing a fine of Rs.10,000/- due to delay. The relevant portion of which reads as under:

“ The entire work was awarded to the contractor M/s.IHP & CO Ltd Mumbai vide Chief Engineer's Madurai agreement in the reference

third cited for an amount of Rs.109.37 crores.

.....

"The contractor has again requested this office vide his letter in the reference ninth and tenth cited above to recommend the extension of time for completion of above work up to 31.03.2014 by stating various reasons for delay in completion of works and the same was recommended vide this office letter

1) Execution of substituted, additional items and additional quantities of work besides the item of works mentioned in the agreement dully getting site order then and there

2) Execution of pipeline work in narrow with traffic areas

The extension of time (01.09.2014 to 20.11.2014) as submitted and recommended by the Executive Engineer was granted by the superintending Engineer by considering the following

1. No financial commitment to TWAD Board,

2. Imposed fine of Rs 10000/- at the time of grant of extension of time by the Superintending Engineer on the part of delay and not keeping the action plan Programme schedule for target and completion by contractor

3. No further grant of extension of time

The copy of Executive Engineer's and Superintending Engineer's letter in the reference first and second cited are enclosed for reference please."

The above extracts thus appear to indicate that the case of the petitioner that the delay was solely attributable to the respondents may not be beyond the realm of dispute.

6.2. Yet another reason which prompts me to believe that even the petitioner was not clear in its mind that the dispute stood resolved with the Committee meeting and the decision taken and recorded in the minutes on 06.07.2016, is in view of the fact that the petitioner while addressing a letter dated 17.01.2017 i.e., subsequent to the minutes of the meeting, while requesting for making the payment towards price adjustment in terms of the meeting dated 06.07.2016, had requested the 1st Respondent to resolve the matter or to treat the matter as a dispute and refer to the Dispute Redressal Committee in terms of Clause 67, the relevant portion is extracted hereunder:

> "*In view of above, we once again request your good self to resolve the matter at your earliest or else this matter may please be treated as dispute and referred to Dispute Redressal Committee as per agreement clause no. 67 of General Conditions of Contract in order to resolve the dispute.*"

6.3.On reading of the above communications the following position emerges :

a. The petitioner itself recognizes existence of a dispute and thus requests the respondent to resolve.

b. The committee which examined the issue, is not the Dispute Redressal Committee contemplated under clause 67.

c. Recognition by the petitioner that the Dispute Redressal Committee is the appropriate forum/body in terms of the agreement to resolve the dispute/issues arising out of the contract.

6.4. It may also be relevant to note that a final bill was issued by the respondent subsequent to the filing of the writ petition dated 05.07.2017 and duly acknowledged by the petitioner.

6.5**.** On the above facts it appears to me that a reasonable mind would infer that both the parties to the lis recognize and acknowledge the existence of a dispute relating to price adjustment.

6.6. If there are disputed questions of fact it is trite law that this Court would exercise restraint in entertaining the writ petition more so in matters falling within the realm of contract. In this regard it may be relevant to refer to the following judgments:

(i) *State of Bihar and others v. Jain Plastics and Chemicals Ltd.*, reported in (2002) 1 SCC 216:

> ***"3.*** *Settled law — writ is not the remedy for enforcing contractual obligations. It is to be reiterated that writ petition under Article 226 is not the proper proceedings for adjudicating such disputes. Under the law, it was open to the respondent to approach the court of competent jurisdiction for appropriate relief for breach of contract....*
>
> **.....**
>
> ***7.*** *In our view, it is apparent that the order passed by the High Court is, on the face of it, illegal and erroneous. It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter-affidavits, but that would hardly be a ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the appellants would justify breach of contract by the respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs."*

(ii) *Orissa Agro Industries Corpn. Ltd. and others v. Bharati Industries* and others, reported in (2005) 12 SCC 725:

> ***"7.*** *...Where a complicated question of fact is involved and the matter requires thorough proof on factual aspects, the High Court should not entertain the writ petition.. .As noted above, the writ petition was primarily founded on allegation of breach of contract. Question whether the action of the opposite party in the writ petition amounted to*

breach of contractual obligation ultimately depends on facts and would require material evidence to be scrutinised and in such a case writ jurisdiction should not be exercised. (See State of Bihar v. Jain Plastics & Chemicals Ltd. [(2002) 1 SCC 216])

8. *In a catena of cases this Court has held that where the dispute revolves round questions of fact, the matter ought not to be entertained under Article 226 of the Constitution. [See State Bank of India v. State Bank of India Canteen Employees' Union [(1998) 5 SCC 74 : 1998 SCC (L&S) 1270] and Chairman, Grid Corpn. of Orissa Ltd. (GRIDCO) v. Sukamani Das [(1999) 7 SCC 298] .]*

...

10. *In National Highways Authority of India v. Ganga Enterprises [(2003) 7 SCC 410] it was observed by this Court that the question whether the writ petition was maintainable in a claim arising out of a breach of contract should be answered first by the High Court as it would go to the root of the matter. The writ petitioner had displayed ingenuity in its search for invalidating circumstances; but a writ petition is not an appropriate remedy for impeaching contractual obligations. (See Har Shankar v. Dy. Excise and Taxation Commr. [(1975) 1 SCC 737 : AIR 1975 SC 1121] and Divisional Forest Officer v. Bishwanath Tea Co. Ltd. [(1981) 3 SCC 238 : AIR 1981 SC 1368])*

11. *In Radhakrishna Agarwal v. State of Bihar [(1977) 3 SCC 457 : AIR 1977 SC 1496] the types of cases in which breaches of alleged obligation by the State or its agents can be set up were enumerated. The third category, indicated is 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 in exercise of executive power of the State. The present case is covered by the said category. No writ order can be issued under Article 226 to compel the authorities to remedy a breach of contract; pure and simple. It is more so when factual disputes are involved.*

B. Internal dispute mechanism – to be exhausted:

6.7. While it is the case of the petitioner that the Chief Engineer is the employer authorised by the respondent Board to execute the contract and the Managing Director vide letter dated 20.04.2017 had directed the employer to make the payment in terms of the minutes of the meeting dated 06.07.2016, it is thus not open to the Board to now take a contrary stand. However, the learned Additional Advocate General would submit that once the contract provides for a Dispute Resolution Mechanism the same must be exhausted. It is the terms of the contract which are binding on the parties and neither admission or statement of the 1st respondent nor that of the 2nd respondent would have any binding effect. It is submitted that the committee was constituted by the 1st respondent comprising of TWAD Board including Finance Director, Engineer Director, Chief Audit Officer, etc. Clause 67 of the agreement provides for Dispute Redressal Committee for settlement of disputes. Importantly, the Dispute Resolution Committee is to be headed by the Managing Director as could be seen by from Clause 67 of the agreement:

"*67.Settlement of disputes*

67. a. Dispute Redressal Committee

In order to ensure a dispute Redressal mechanism, a Committee *headed by the Managing Director / Joint Managing Director and consisting of Engineering Director, TWAD Board and Engineering Director, CMWSS Board as Member, will comprise the " Dispute Redressal Committee" for each package in order to resolve any disputes between the Employer / Engineer - incharge concerned and the contractor*

67.b.Jurisdiction of Court In the event of non settlement of any dispute by the Dispute Redressal Committee arising between the parties hereto in respect of any matter comprised in the contract, the same shall be settled by a competent court having jurisdiction over the place where the contract is awarded and agreement is concluded and by no other court."

6.8. However, the committee which examined the issue was not headed by the Managing Director / Joint Managing Director nor did it include Engineering Director CMWSS Board as member. Instead the committee comprised of the following members:

K.Muthukumaraswamy	Finance Director, TWAD Board
K. Perumal	Engineering Director, TWAD Board
G. Krishnan	Chief Audit Officer, TWAD Board
T: Sampath	Joint Chief Engineer (PM), TWAD Board
K. Murugesan	Joint Chief Engineer (O&M), TWAD Board
R. Pandiarasu	Accounts Officer, TWAD Board, Head Office
L. Subramanian	Chief Engineer (i/c.), TWAD Board, Madurai

S. Murugadhas	Superintending Engineer, T.V. Circle, Kovilpatti
A. Ramachandran	Superintending Engineer, T.K. Circle, Tirunelveli
N. Rajasekar	Executive Engineer (a/c), Project Division, Rajapalayam
E. Palaniappan	Executive Engineer, Project Division, Virdhunagar
P. Arumugaswamy	Assistant Accounts Officer, Project Dn., Rajapalayam
R. Indra Gandhi	Assistant Accounts Officer, Internal Audit Wing, Madurai
S. Arunachalam	Dy. General Manager, Indian Hume Pipe Co. Ltd.,
R. Jeyaganesh	Project Manager, Indian Hume Pipe Co. Ltd.,
N.R. Balaji	Project Manager, Indian Hume Pipe Co. Ltd.,
C. Sridharan	Senior Manager, Indian Hume Pipe Co. Ltd.,

6.9. Further the members who were present during the meeting were the following:

K.Muthukumaraswamy	Finance Director, TWAD Board
K. Perumal	Engineering Director, TWAD Board
G. Krishnan	Chief Audit Officer, TWAD Board
T: Sampath	Joint Chief Engineer (PM), TWAD Board
K. Murugesan	Joint Chief Engineer (O&M), TWAD Board
R. Pandiarasu	Accounts Officer, TWAD Board

6.10. It was thus submitted that the committee which met on 14.06.2016 to resolve the issue relating to price escalation vide proceeding dated 06.07.2016, was not the Committee contemplated in terms of Clause 67 of the agreement, inasmuch as the Constitution of the committee convened on 14.06.2016 was different from that which was contemplated under Clause 67 of the agreement. In this regard it may be relevant to note that when the contract provides for a Dispute Redressal Committee and also sets out the Constitution of such Committee the same must be strictly adhered to. Once an instrument / Contract requires a decision to be taken by a committee it looks to the collective wisdom of the Committee which cannot be replaced by the opinion or decision of the Chariman of such committee or a committee constituted by the Chairman comprising of members different from that of the committee contemplated under the said instrument. Any such decision would be hit by the doctrine of Coram Non-Judice. In this regard it may be relevant to refer to a Division Bench of this Court in the case of *P. Balamurugan v. District Level Vigilance (Community Verification) Committee,* reported in *2011 SCC OnLine Mad 1133*, wherein while examining an order passed by the "District Level Vigilance Committee" as to the genuineness of the community certificate it was found that the District Collector was absent at the time of enquiry, though the District level Vigilance Committee is required to be headed by the District Collector while passing orders on genuineness of community certificates. It may also be relevant to note that a committee is a body distinct from its Chariman / President/ Head / Members. The Chariman, President/ Head / Members cannot substitute a committee. The relevant portion of the said judgment is extracted hereunder :

> "**7.** *Therefore, we are not in a position to ignore the contention raised by the Petitioners with respect to the absence of the District Collector at the time of enquiry. Since the Petitioners have produced the documents evidencing the non-participation of the District Collector during the course of enquiry, we are inclined to set aside the entire order. The Committee consisted only two members, as the Sub-Collector was not competent to conduct the proceedings. Accordingly, we set aside the impugned order and the matter is remitted to the District Level Vigilance Committee for fresh consideration. It is open to the Petitioners to produce documents before the committee to substantiate their contention that they belonged to Hindu-Panan community. Since the matter is of the year 2008, the District Level Vigilance Committee is directed to consider the issue as early as possible and preferably within a period of two months from the date of receipt or production of a copy of this order.*"

c) Approbate and Reprobate:

6.11. Though the petitioner would submit that the action of the respondent authorities in not applying the Clauses relating to price adjustments in particular Clause 51.1(i) and (ii) read with Clause 4 (1) (vii) of G.O.Ms.No. 227 dated 23.11.2009, while applying the said Clauses to similar contracts / works awarded to the petitioner when it resulted in paying a lower sum than that agreed upon would be hit by the doctrine of Approbate and Reprobate. It appears that there is a fundamental fallacy in the above contention inasmuch as admittedly the petitioner had entered into different works / agreement and thus the conduct under one agreement cannot be the basis for applying the above doctrine with regard to another agreement which admittedly deals with distinct subject matters. On the other hand it appears to me that the petitioner intending to rely upon and take advantage of 51.1 (i) and (ii) of the agreement would also have to comply with Clause 67, lest the contention of the petitioner would be hit by the Doctrine of Approbate and Reprobate. In this regard it may be relevant to the judgment of the Supreme Court in the case of *Union of India and others v. N. Murugesan and others*, reported in (2022) 2 SCC 25:

Approbate and reprobate

> ***26.*** *These phrases are borrowed from the Scots law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction."*

d) Writ not to be entertained – If contracts provide for resolution / dispute by Dispute Resolution Mechanism:

6.12. It is also equally important to note that Supreme Court in the judgment *IB Valley Transport, Vijay Laxmi (P) Ltd. v. Mahanadi Coalfields Ltd.*, reported in (2014) 10 SCC 630, held that once the contract provides for Dispute Resolution Mechanism, the same ought to be exhausted in this regard it may be relevant to refer to as under :

> *"11. We find some justification in the stand taken by the respondents. No doubt, in its representation dated 29-8-2013 the*

*appellant stated that the value of **Po** of wage compensation formula (Clause 37.06) has not been incorporated in the above office order correctly and the rate of minimum wages as on the last date of submission of tender was 23-12-2008. On this basis, request is made to revise the calculations and communicate the same to the appellant. However, it is not stated that dispute has arisen on that account and it should be resolved in terms of Clause 12. <u>Clause 12 of NIT-514 reads as under:</u>*

"It is incumbent upon the contractor to avoid litigation and disputes during the course of execution. However, if a dispute takes place between the contractor and the department, efforts shall be made first to settle the disputes at the company level.

The contractor should make request in writing to the Engineer Incharge for settlement of such disputes/claims within 30 days arising of the cause of dispute/claim, failing which no dispute/claim of the contractor shall be entertained by the company.

If differences still persists, the settlement of the disputes with government agencies shall be dealt with as per guidelines issued by the Ministry of Finance, Government of India in this regard. In case of parties other than government agencies, the redressal of the dispute may be sought in the court of law within the jurisdiction of the District Court/the High Court where the work will be executed."

After extracting the above mechanism to resolve disputes under the contract considered by the Supreme Court, it went on to hold that any dispute would have to be resolved by exhausting the remedy agreed to by the contracting parties. The following portions would make the above position clear.

12. It is manifest that representation dated 29-8-2013 in no way attempts to invoke the mechanism provided in Clause 12 for the settlement of dispute. The respondents in the counter-affidavit have categorically stated that vide letter dated 28-6-2013, the Staff Officer (Mining) BG had given the details of methodology for calculation of wage compensation and, therefore, clarification was given.

13. It is clear from the above that a dispute has arisen about the methodology for calculation of wage compensation. In such circumstance, as per Clause 12, the appellant was supposed to write to the Engineer Incharge for resolving the dispute. Pertinently, communication dated 29-8-2013 is addressed to the Staff Officer (Mining). Therefore, by no stretch of imagination, can it be said that the appellant availed the departmental remedy provided under Clause 12, before filing the writ petition.

14. <u>Having regard to the aforesaid facts, we dispose of this appeal by directing the appellant to exhaust the remedy under Clause 12 by requesting the Engineer Incharge to resolve the dispute before taking recourse to any suitable legal remedy</u>. No costs."

Applying the above reasoning of the Supreme Court, it appears that the Dispute Resolution Mechanism which is agreed under the contract as a mechanism for resolution of disputes must be exhausted.

e) Court to exercise restraint in matters falling within the realm of contract:

6.13. Yet another reason which prompts me to think that the writ petition ought not to be entertained is in view of the fact that there are disputed questions of fact as seen supra. It is trite law that a mandamus would lie one when there is a statutory duty cast on a statutory body and a failure to discharge the statutory obligation. Enforcement of terms of contract through a writ of mandamus also appears doubtful. In this regard it may be relevant to refer to the following judgments:

(i) *Bihar Eastern Gangetic Fishermen Coop. Society Ltd. v. Sipahi Singh,* reported in (1977) 4 SCC 145 :

> "*15. Re: Contention 3: This contention is also well founded and must prevail. There is abundant authority in favour of the proposition that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunals and officers exercising public functions within the limit of their jurisdiction. It follows, therefore, that in order that mandamus may issue to compel the*

authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance. (See Lekhraj Satramdas Lalvani v. Deputy Custodian-cum-Managing Officer [AIR 1966 SC 334 : (1966) 1 SCR 120 : (1966) 1 SCJ 24] , Rai Shivendra Bahadur Dr v. Governing Body of the Nalanda College [AIR 1962 SC 1210 : 1962 Supp 2 SCR 144 : (1962) 1 LLJ 247] and Umakant Saran Dr v. State of Bihar [(1973) 1 SCC 485 : AIR 1973 SC 964]). In the instant case, it has not been shown by Respondent 1 that there is any statute or rule having the force of law which casts a duty on Respondents 2 to 4 which they failed to perform. <u>All that is sought to be enforced is an obligation flowing from a contract which, as already indicated, is also not binding and enforceable. Accordingly, we are clearly of the opinion that Respondent 1 was not entitled to apply for grant of a writ of mandamus under Article 226 of the Constitution and the High Court was not competent to issue the same.</u>"

(ii) *State of J&K v. Ghulam Mohd. Dar*, reported in (2004) 12 SCC 327 :

"3. It is not disputed that the contract agreement entered into by and between the parties contains an arbitration agreement. Furthermore, the respondent herein filed the aforementioned writ petition for enforcing a contract qua contract. Although an objection has been taken as regards the maintainability of the writ petition by the appellant herein, the same unfortunately has not been considered by the High Court. <u>It is well settled that writ of or in the nature of mandamus</u>

would not ordinarily issue for enforcing the terms and conditions of a contract qua contract. A writ of mandamus would issue when a question involving public law character arises for consideration. It is also well settled that the High Court would not entertain a writ petition involving disputed questions of fact.

(iii) *Lekhraj Sathramdas Lalvani v. N.M. Shah*, reported in 1965 SCC OnLine SC 8 :

"*5. In our opinion, the order of the Deputy Custodian — P-13 and P-16 — removing the appellant from the management of the business is not vitiated by any illegality. But even on the assumption that the order of the Deputy Custodian terminating the management of the appellant is illegal, the appellant is not entitled to move the High Court for grant of a writ in the nature of mandamus under Article 226 of the Constitution. The reason is that a writ of mandamus may be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge that statutory obligation. The chief function of the writ is to compel the performance of public duties prescribed by statute and to keep the subordinate tribunals and officers exercising public functions within the limits of their jurisdictions. In the present case, the appointment of the appellant as a Manager by the Custodian by virtue of his power under Section 10(2)(b) of the 1950 Act is contractual in its nature and there is no statutory obligation a between him and the appellant. In our opinion, any duty or* *obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Article 226 of the Constitution.*

(iv) National Textile Corpn. Ltd. v. Haribox Swalram, reported in (2004) 9 SCC 786 :

> *" 17. ..... It is well settled that in order that a mandamus be issued to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance. The present is a case of pure and simple business contract. The writ petitioners have no statutory right nor is any statutory duty cast upon the appellants whose performance may be legally enforced. No writ of mandamus can, therefore, be issued as prayed by the writ petitioners."*

7. For all the above reasons, this Court is not inclined to entertain the writ petition. However, liberty is granted to the petitioner to approach the Dispute Resolution Mechanism to redress its grievance, which was agreed to by the Respondents. As a matter of fact, when the matter was listed on 28.01.2025 under the caption "for pronouncing orders", it was submitted by the learned counsel for the Respondents that if the dispute resolution mechanism is not in place, the same will be constituted within a period of 4 weeks from the date of

receipt of a copy of this order and the dispute will be resolved expeditiously, if the petitioner were to approach the Dispute Resolution Committee.

8. Accordingly, the writ petition stands disposed of. No costs.

28.01.2025

NCC:yes/no
Index:yes/no
Internet:yes/no
SPP

To:
1.The Managing Director,
TWAD Board,
No.31, Kamarajar Salai,
Chepauk,
Chennai - 5.

2.The Chief Engineer,
TWAD Board,
Southern Region,
Ganesh Nagar,
Melur Road,
Madurai - 625 007.

3.The Executive Engineer,
TWAD Board,
Madurai.

MOHAMMED SHAFFIQ, J.

spp

Pre-delivery order in

W.P.(MD)Nos.12557 of 2017

28.01.2025