THE HIGH COURT OF MADHYA PRADESH
WP-10368-2020
Rajkmar Goyal Vs. Municipal Corporation Gwalior

Gwalior, Dated : 01.09.2020

Shri N.K. Gupta, Senior Counsel with Shri Sanjay Kumar Sharma, Counsel for the petitioner.

Shri Deepak Khot, Counsel for the respondent.

Heard finally through Video Conferencing.

This petition under Article 226 of the Constitution of India has been filed seeking the following relief:-

> "(i) That, the Respondent-Municipal Corporation may kindly be directed to make the payment to the petitioner against the work done by him in File Nos. 269/18x3/6, 270/18x3/6 & 271/18x3/6.
>
> (ii) That, the Respondent-Municipal Corporation be further directed to pay the interest to the petitioner for wrongly withholding the amount without any reason @ 14% per annum.
>
> (iii) Any other writ, order or direction as this Hon'ble Court may deems fit in the facts and circumstances of the case be granted to the petitioner. Costs be awarded."

It is the case of the petitioner that the Municipal Corporation, Gwalior decided to carry out the construction work (CC Floor and Drainage System) in Ward No. 65 Gokulpur, Ward No. 65, Shanti Nagar and in Indian Overseas Bank Colony, Gwalior and for that purpose, NITs were issued by the Municipal Corporation, Gwalior. The petitioner and other contractors submitted their tenders and since the tender submitted by the petitioner was the lowest, therefore, the same was accepted. An agreement was entered into between the

petitioner and the Municipal Corporation, Gwalior and the work order with regard to three construction works were issued, which haves been filed as Annexure P-1 [Collectively]. It is the case of the petitioner that before issuance of NITs, budget was worked out by the Municipal Corporation and it was found that budget is available for carrying out the construction work and, therefore, NITs were issued and the work order was issued. The petitioner thereafter completed his work within time frame work and the technical report was also submitted which was to the effect that work performed by the petitioner is up to the satisfaction of the authority and was in accordance with the specifications. Initially, the petitioner submitted the first bill in all the three cases and, thereafter, final bill was also submitted but it is the case of the petitioner that neither the first bill has been honoured nor the final bill has been honoured and till date, not a singly penny has been paid to the petitioner. It is further submitted that the petitioner applied for documents under the RTI to find out as to why the payment has not been made. Although the copies of the note-sheets have been supplied to the petitioner under the Right to Information Act, but no reason has been assigned as to why the payment has not been made. The note-sheet with regard to three different work orders have been placed as Annexures P-2, P-3 and P-4. By referring to the note-sheets Annexures P-2, P-3 and P-4,

it is submitted by the counsel for the petitioner that in all these three cases, it is specifically mentioned that the work which was done by the petitioner was in accordance with the specifications and a recommendation was made for releasing the amount. However, the Commissioner is sitting tight over the recommendation made by the authorities and the amount has not been paid. It is further submitted that since the budget was available with the respondent authority, therefore, they cannot withhold the amount on the ground that budget is not available. It is further submitted that the act of respondent of withholding the amount payable to the petitioner is violative of Article 19 of the Constitution of India because he has been deprived of his livelihood and due to shortage of fund, he is not in a position to take further contract.

The respondent has filed its return. It is submitted by the counsel for the respondent that one petition has been filed arising out of three different contracts, therefore, in the light of High Court Rules, single petition is not maintainable because provisions of Order 2 Rule 3 of CPC are applicable to writ petition also and, therefore, the petitioner should have filed three different writ petitions. Another preliminary objection of the respondent is that as per Clause 12 of the General Condition of Contract, there is a Dispute Resolution System and the petitioner was required to submit

his representation before the competent authority within 45 days of its first occurrence and dispute after 45 days can not be entertained. In case, if the dispute is decided by the competent authority, then the petitioner had a right to file an appeal within 45 days of such a decision. Thereafter, the petitioner could have approached the Madhyastham Adhikaran Tribunal under the provisions of Madhyastham Adhikaran Adhiniyam, 1983. It is submitted that in spite of the availability of alternative remedy, the petitioner has not availed the same and filed the present petition in order to over come the period of limitation and, therefore, the petition is liable to be dismissed on this ground also. It is further submitted that in the contractual matters, where the disputed question of facts are involved, then the writ petition is not maintainable. It is further submitted that the State Government had amended Rule 15-A of the M.P. Nagar Palika (Registration of Colonizer, Terms and Conditions) Rules 1998 (for brevity “Rules, 1998”), by which the provision for regularization of illegal colonies was introduced and as per the Scheme, 50% of the work was to be done out of the funds of the Institution and remaining 50% was required to be borne by the beneficiaries / inhabitants and the share of inhabitants was to be paid by the State Government. The validity of provision 15-A of the Rules, 1998 was challenged before this Court in the case of **Umesh**

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Kumar Bohare Vs. State of Madhya Pradesh and others (W.P. No. 10414/2018) and the Division Bench of this Court by order dated 03.06.2019 held that amended Rule 15-A of the Rules, 1998 is *ultra vires* the substantive provision of the Act, and all actions taken there upon were declared illegal and the competent authority of respective municipalities were directed to initiate action under Section 292E read with Section 292DA of the Act, 1956 and under Section 339E read with Section 339DA of the Act, 1961. It is submitted that since the provisions of amended Rule 15-A of the Rules, 1998 were declared *ultra vires*, therefore, the State Government has not provided its share of 50% of the total cost. Thus, the respondent could not release the amount.

Challenging the non-payment of the amount of work done by the petitioner, it is submitted by the counsel for the petitioner that neither in the NIT/agreement/work order, there was any provision that 50% of the expenses shall be borne by the State of Madhya Pradesh. If the State of Madhya Pradesh is not releasing its share, then it is a dispute between the respondent and the State and the petitioner cannot be made to suffer because there is no deficiency in the work executed by the petitioner and, thus, it cannot be said that there is a dispute between the petitioner and the respondent.

At this stage, it was pointed out by the Court that looking to

the controversy involved in this case, the State Government also appears to be a necessary party, therefore, the petitioner may consider of impleading the State Government as respondent. However, it was submitted by Shri N.K. Gupta, Senior Counsel that since the dispute is between the State and the respondent and the petitioner has nothing to do with the said dispute, therefore, the State Government is not a necessary party.

In order to substantiate his submission, counsel for the petitioner once again submitted that the fact that the State Government shall bear 50% of the cost was neither mentioned in the NIT nor in the work order, therefore, any subsequent development, which has taken place, cannot be taken note of for releasing the legitimate amount claimed by the petitioner. To buttress his contention, counsel for the petitioner has relied upon the judgments passed by the Supreme Court in the case of **Surya Constructions Vs. State of Uttar Pradesh and others** reported in **(2019) 16 SCC 794, Rajasthan State Electricity Board Vs. Union of India and others** reported in **(2008) 5 SCC 632, ABL International Ltd. and another Vs. Export Credit Guarantee Corporation of India Ltd. and others** reported in **(2004) 3 SCC 553** and order dated **09.10.2018** passed by a Division Bench of this Court in the case of **Municipal Corporation, Gwalior Vs. M/s Shree Ji Motors and**

another passed in **W.A. No. 1366/2018** arising out of the **order dated 07.09.2018** passed by a Coordinate Bench of this Court in **W.P. No. 19431/2017**. It is submitted that when there is no dispute with regard to the quality of work executed by the petitioner, then it cannot be said that there is a dispute warranting the petitioner to approach the alternative resolution system and thus the contention of the respondent that as per Clause 12 of the Agreement, the petitioner should have approached the Arbitrator or any other authority including the Madhyastham Adhikaran Tribunal does not apply to the facts of the case.

So far as the question of joinder of multiple causes of action is concerned, it is submitted that in the present petition, the respondent, the petitioner and the question of law is the same. There is no dispute with regard to the factual aspect of the matter. Even otherwise under Order 2 Rule 3 of CPC, a plaintiff can join multiple causes of action in a civil suit and, therefore, it cannot be said that the joinder of three different causes of action arising out of three different contract is bad in law. It is further submitted that even otherwise, if it is found that the petitioner should have filed different petition for each cause of action, then the petitioner is ready to pay additional two sets of Court Fee.

Per contra, counsel for the respondent has relied upon the

judgment passed by a Coordinate Bench of this Court in the case of **Pahelwan Singh and others Vs. Leela Bai and others** reported in **AIR 1998 MP 152** and judgment passed by the High Court of Kerala in the case of **Ebrahim Ismail Kunju and another Vs. Phasila Beevi** reported in **AIR 1991 Kerala 385** to substantiate his submissions that joinder of multiple causes of action in one writ petition is bad. It is submitted by the Counsel for the respondent, that the petitioner should have approached the dispute resolution system and the writ petition for enforcement of contractual obligations is not maintainable.

Heard the learned counsel for the parties.

Before considering the question as to whether the petition is bad due to multiple joinder of causes of action or not, this Court think it appropriate to find out as to whether there is any dispute between the petitioner and the respondent and whether the petitioner has an efficacious and alternative remedy of approaching the Dispute Resolution System.

The respondent has filed a copy of the General Conditions of Contract and Clause 12 of the said General Conditions of Contract reads as under:-

> **"12. Dispute Resolution System**
> 12.1 No dispute can be raised except before the Competent Authority Superintending engineer of

> Devision in writing giving full description and grounds of dispute. It is clarified that merely recording protest while accepting measurement and/or payment shall not be taken as raising a dispute.
>
> 12.2 No dispute can be raised after 45 days of its first occurrence. Any dispute raised after expiry of 45 days of its first occurrence shall not be entertained and the Employer shall not be liable for claims arising out of such dispute.
>
> 12.3 The Competent Authority shall decide the matter within 45 days.
>
> 12.4 Appeal against the order of the Competent Authority can be preferred within 30 days to the Appellate Authority as defined in the Contract Data. The Appellate Authority shall decide the dispute within 45 days.
>
> 12.5 Appeal against the order of the Appellate Authority can be preferred before the Madhya Pradesh Arbitration Tribunal constituted under Madhya Pradesh *Madhyastham Adhikaran Adhiniyam, 1983*.
>
> 12.6 The Contractor shall have to continue execution of the Works with due diligence notwithstanding pendency of a dispute before any authority or forum."

Thus, one thing is clear that when there is a dispute, then the Contractor has an alternative and efficacious remedy, which is provided under the General Conditions of Contract.

The controversy in the present case lies in a narrow compass.

It is the case of the petitioner that neither in the NIT nor in the agreement nor in the work order, it was mentioned that half of the expenses shall be borne by the State Government and if the State Government has refused to release its share, then at the most, it can be a dispute between the respondent and the State and since the petitioner is a stranger / foreigner to the said dispute, therefore, the

petitioner is not required to explore the Dispute Resolution System as provided under Clause 12 of the General Conditions of Contract.

Considered the submissions made by the counsel for the petitioner.

The State Government had floated the Scheme for the regularization of the illegal colonies. The said Scheme has been filed by the respondent as Annexure R-1.

Rule 15-A of the Rules, 1998 was amended which reads as under:-

> **"In Rule 15-A,-**
>
> (1) for the figure and word "31st December, 2012", the figures and word "31st December, 2016" shall be substituted.
> (2) for the word "unauthorized" wherever it occurs in this rule, the word "illegal" shall be substituted.
> (3) for sub-rule (1), the following sub-rule shall be substituted, namely:-
>
> > (1) Notwithstanding anything contained in these rules, the illegal colonies that came in to existence up 31st December, 2016 on other than Government land and such land of Development Authority which is in its ownership, shall be registered subject to the following conditions".
>
> (4) in sub-rule (1),-
> (a) for clause (iii), the following clause shall be substituted, namely:-
> > (iii) such illegal colonies where at least 10% houses have been constructed, identifying them, action of regularization shall be taken within 30 days notifying publicly, and management of remaining unsold land shall be done in accordance with rule 15 of these

rules.

On the date of publication of these amendments in the Gazette, land(s) of illegal colonies being regularized should be in private ownership as per the revenue department and a copy of notification should be availed to the concerning Revenue Officer/Development Officer/Town and Country Planning Department to give necessary opinion/objections within prescribed time limit, further action of regularization of illegal colonies shall not be obstructed.

(b) in clause (iv), for the words "master plan", the words "development plan" shall be substituted.
(c) for clause (v), the following clause shall be substituted, namely:-

"(v)(1) After issuance of Notification under clause (iii), the competent authority shall be cause to be prepared the estimate and layout within 30 days for the development work including for the basic amenities of illegal colonies, on which the competent authority shall be invite a meeting within 15 days and discuss with the inhabitants concerned and colonizer providing them an opportunity, after considering their suggestion, if any, finalize the estimate and layout as per rule 7A within 15 days. The amount of expenditure to be incurred for preparing the layout shall be fixed not exceeding 10% of the development charges and the same shall be included in the development charges.

(2) For the purpose of this work, the Departmental ISSR, the Madhya Pradesh Land Development Rules, 2012, Development Plan, standard and rates of the Madhya Pradesh State Electricity Supply Company (MPSESC) and Collector Guide lines rules effective on the date of publication of amendments with upto date shall be recognized.

(3) Amount of property tax, building permission fees and composition fees etc. received from the inhabitants of the illegal colonies for the purpose of

regularization shall be utilized in the development works of concerning colonies.

(4) The urban bodies, if necessary may receive the amount from the scheme financed by the Central or State Government under the terms and conditions mentioned in the schemes, development of these notified colonies and issuance or permission of the plot holder shall not be stopped because of incomplete development work and even the regularization work particularly the building permission work shall be executed by organizing the camps in zone/ward levels.

(d) for sub-clause (vi), the following sub-clause shall be substituted, namely:-

"(vi) (1) Public facilities such as water, electricity and sewage shall be regularized after receiving the service charge from the inhabitants of colonies notified under clause
(iii), like other legal colonies. No additional charges shall be charged for these.

(2) Such colonies where more than 70% inhabitants of lower income group reside, 20% of development amount shall be charged from inhabitants of the colony and remaining 80% amount shall be borne by the body concerned and other than these colonies, 50% development amount shall be taken from inhabitants of the colonies and 50% amount shall be borne by the concerned body. The amount of the public participation scheme/fund of parliamentarian/legislature fund shall be deemed to be the amount in the amount deposited by the inhabitant and the cost of the water, sewage and electricity shall not be included in the amount received from the inhabitants.

(3) As per the law, if there is no open land for public amenities in the lay out prepared for the total area of the colony, the competent authority shall make an estimate of the cost of such required open land and recover one and half times from the colonizer.

Provided that action of regularization of building/plot shall not be affected if required amount

is not recovered from colonizer or delay in recovery.

(4) The competent authority shall ensure necessary action under rule 15(c) and subclause (vi) of clause (iii) against the persons constructing illegal colonies.

(e) sub-clause (viii B) shall be omitted.

(f) in sub-clause (x) for brackets and letter "¼x½" the brackets and letter ¼.k½ shall be substituted.

(5) For sub-rule (2), the following sub-rule shall be substituted, namely:-

"(2) If any illegal colony is constructed after 31st December, 2016 the competent authority shall take action to remove it considering it as illegal construction."

Rule 15-A(1)(4) provides that the work can be done from the amount received from the Schemes financed by the Central or State Government under the terms and conditions mentioned in the Scheme and Rule 15-A(D)(2) provides that the amount of public participation scheme / fund of parlimentarian / lagislatature fund shall be deemed to be the amount in the amount deposited by the inhabitant and the cost of water, sewage and electricity shall not be included in the amount received from the inhabitants. Therefore, it is clear that it was provided in the Rules, 1998 itself that the amount of the public participation scheme / fund of parlimentarian / legislature fund shall be deemed to be the amount in the amount deposited by the inhabitant. Thus, it is clear that so far as the 50% share of the inhabitant is concerned, the amount of public participation scheme / fund of parlimentarian / legislature fund shall be deemed to be the

share of inhabitant. The defence of the petitioner is that since this clause was not made a part of the NIT / Agreement / Work Order, therefore, this clause is not binding on the petitioner cannot be accepted. Once the Rules are Published in the official Gazette and are made available by circulation, sale etc, then it is presumed that it has been made known to all the citizens of the country / State.

The Supreme Court in the case of **CCE v. New Tobacco Co.,** reported in **(1998) 8 SCC 250** has held as under :

> **7.** In *State of M.P.* v. *Shri Ram Ragubir Prasad Agarwal* while interpreting the word "publish" in Section 3(2) of M.P. Prathamik, Middle School Tatha Madhyamik Shiksha (Pathya Pustakon Sambandhi Vyavastha) Adhiniyam, this Court observed that: (SCC p. 695, para 21)
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> > "In our view, the purpose of Section 3 animates the meaning of the expression 'publish'. 'Publication' is 'the act of publishing anything; offering it to public notice, or rendering it accessible to public scrutiny … an advising of the public; a making known of something to them for a purpose'. Logomachic exercises need not detain us because the obvious legislative object is to ensure that when the Board lays down the 'syllabi' it must publish 'the same' so that when the stage of prescribing textbooks according to such syllabi arrives, both the publishers and the State Government and even the educationists among the public may have some precise conception about the relevant syllabi to enable Government to decide upon suitable textbooks from the private market or compiled under Section 5 by the State Government itself. In our view, therefore, 'publication' to the educational world is the connotation of the expression. Even the student and the teaching community may have to know what the relevant syllabus for a subject is, which means wider publicity than minimal communication to the departmental officialdom."

8. Following this judgment the Madras High Court in *Asia Tobacco Co. Ltd.* v. *Union of India* held that in such cases the effective date is the date of knowledge and not the date of the Official Gazette. The relevant observations made in para 14 of the said judgment are as under:

> "The mere printing of the Official Gazette containing the relevant notification and without making the same available for circulation and putting it on sale to the public will not amount to the 'notification' within the meaning of Rule 8(1) of the Rules. The intendment of the notification in the Official Gazette is that in the case of either grant or withdrawal of exemption the public must come to know of the same. 'Notify' even according to ordinary dictionary meaning would be 'to take note of, observe; to make known, publish, proclaim; to announce; to give notice to; to inform'. It would be a mockery of the rule to state that it would suffice the purpose of the notification if the notification is merely printed in the Official Gazette, without making the same available for circulation to the public or putting it on sale to the public. … Neither the date of the notification nor the date of printing, nor the date of Gazette counts for 'notification' within the meaning of the rule, but only the date when the public gets notified in the sense, the Gazette concerned is made available to the public. The date of release of the publication is the decisive date to make the notification effective. Printing the Official Gazette and stacking them without releasing to the public would not amount to notification at all. … The respondents are taking up a stand that the petitioner is expected to be aware of the Withdrawal Notification and that the words 'publish in Official Gazette' and the words 'put up for sale to public' are not synonymous and offering for sale to public is a subsequent step which cannot be imported into the Act, and the respondents are expressing similar stands. They could not be of any avail at all to the respondents to get out of the legal implications flowing from want of due notification, as exemplified above. Printing the notification in the Official Gazette, without making it available for circulation to the public concerned, or placing it for sale to the said public, would certainly not satisfy the

idea of notification in the legal sense."

9. The same view was taken by the Bombay High Court in *GTC Industries Ltd.* v. *Union of India* and by the Delhi High Court in *Universal Cans and Containers Ltd.* v. *Union of India*.

10. The following observations made in the case of *B.K. Srinivasan* v. *State of Karnataka* also support the view that we are taking: (SCC p. 672, para 15)

> "Whether law is viewed from the standpoint of the 'conscientious good man' seeking to abide by the law or from the standpoint of Justice Holmes's 'unconscientious bad man' seeking to avoid the law, law must be known, that is to say, it must be so made it can be known."

11. Our attention was also drawn to the decisions of this Court in *Pankaj Jain Agencies* v. *Union of India* and *I.T.C. Ltd.* v. *CCE* but they are not helpful in deciding the question that arises in these cases.

12. We hold that a Central Excise notification can be said to have been published, except when it is provided otherwise, when it is so issued as to make it known to the public. It would be a proper publication if it is published in such a manner that persons can, if they are so interested, acquaint themselves with its contents. If publication is through a Gazette then mere printing of it in the Gazette would not be enough. Unless the Gazette containing the notification is made available to the public, the notification cannot be said to have been duly published.

It is not the case of the petitioner, that although the amended Rule 15-A of Rules, 1998 were published in the official Gazette, but the Official Gazette was made not available to the general public. Thus, it is clear that after the amended provisions of Rule 15-A of Rules, 1998 were published in the Official Gazette on 19-5-1997, the petitioner is presumed to be aware of the said provisions of law.

Once there was a Rule i.e., Rule 15-A(D)(2) of Rules, 1998

that the amount of inhabitant would include the amount of public participation scheme / fund of parliamentarian / legislature fund then it was not necessary for the respondent to incorporate the said provision in the NIT/ Agreement/ Work Order. It is not the case of the petitioner that the work order was issued after the provision of amended Section 15-A of the Rules, 1998 were declared *ultra vires*. This Court by order dated 03.06.2019 passed in W.P. No. 10414/2018 had declared the amended Rule 15-A of the Rules 1998 as *ultra vires,* whereas the NITs were issued much prior to that and even the work was also completed prior to the judgment passed by the Division Bench of this Court.

It is the case of the petitioner that he had completed his work in the year 2018 itself and the Commissioner did not make the payment. At the relevant time, the amended provision of Rule 15-A of the Rules 1998 were in force and, therefore, the State Government was under obligation to comply the provision of Rule 15-A(1)(4) and Rule 15-A(D)(2) of Rules, 1998.

Considered the submission. Once the amended provision of Rule 15-A of the Rules, 1998 have been declared *ultra vires* and all the actions taken under this Rule have been declared illegal, then this Court cannnot compel the State Govt. to deposit its share of 50% and it cannot be said that there is no dispute between the petitioner,

respondent and the State Government. Since the petitioner was already aware of the amended provisions of Rule 15-A of the Rules, 1998, therefore, he cannot express his ignorance about the provision of said Rules.

In view of the fact that the amended provisions of Rule 15-A of Rules, 1998 were declared ultra vires, and the work was got done by the respondents in execution of a Scheme formulated by the State Govt., then this Court is of the considered opinion, that the State Govt. is a necessary party. Because it is for the State to come out with some modality to deal with such a situation, and no effective decree/order can be passed in absence of the State Government. Now the question for consideration is that whether this petition suffers from non-joinder of necessary party?

It is well settled principle of law that a suit cannot be dismissed on the ground of non-joinder of necessary party, unless and until an opportunity is given to the plaintiff to implead the necessary party. If the plaintiff refuses or fails to implead the necessary party and decides to move further with the suit, then he do so at his own risk and under this circumstance, he has to face the adverse consequences. In the present case, during the course of arguments, this Court had given an opportunity to the Petitioner's Counsel to implead the State Govt., but the Counsel for the Petitioner refused to implead the State

on the ground that it is a dispute between the State and the respondents. As this Court has already come to a conclusion that in view of Section 15-A(d)(2)of Rules, 1998, , the 50% share of the total expenses was that of inhabitants and public participation scheme / fund of parlimentarian / legislature fund was to be deemed to be the amount in the amount deposited by the inhabitant, therefore, the petitioner cannot claim that unless and until such a provision is made a part of NIT/work order/Agreement, he is not bound by the Rules, Under these circumstances, this Court is of the considered opinion, that this petition suffers from non-joinder of necessary party and is liable to be dismissed on the said ground also.

Under these circumstances, this Court is of the considered opinion that there is a dispute between the petitioner and the respondent.

Now the question for consideration is that whether a writ under Article 226 of the Constitution of India is maintainable for enforcement of contractual obligations or the party to the Contract must resort to the alternative dispute resolution system.

It is well established principle of law that a writ filed under Article 226 of the Constitution of India cannot be thrown straight away by holding that it has been filed for enforcement of contractual obligations. In a case of interpretation of law with consequential

relief of payment of amount, or where the liability has been specifically admitted by the respondents, etc. the High Court may entertain the writ petition in contractual matters.

The Supreme Court in the case of **LIC of India v. Asha Goel,** reported in **(2001) 2 SCC 160,** has held as under :

> 10. Article 226 of the Constitution confers extraordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of the fundamental rights or for any other purpose. It is wide and expansive. The Constitution does not place any fetter on exercise of the extraordinary jurisdiction. It is left to the discretion of the High Court. Therefore, it cannot be laid down as a general proposition of law that in no case the High Court can entertain a writ petition under Article 226 of the Constitution to enforce a claim under a life insurance policy. It is neither possible nor proper to enumerate exhaustively the circumstances in which such a claim can or cannot be enforced by filing a writ petition. The determination of the question depends on consideration of several factors like, whether a writ petitioner is merely attempting to enforce his/her contractual rights or the case raises important questions of law and constitutional issues, the nature of the dispute raised; the nature of inquiry necessary for determination of the dispute etc. The matter is to be considered in the facts and circumstances of each case. While the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution cannot be denied altogether, courts must bear in mind the self-imposed restriction consistently followed by High Courts all these years after the constitutional power came into existence in not entertaining writ petitions filed for enforcement of purely contractual rights and obligations which involve disputed questions of facts. The courts have consistently taken the view that in a case where for determination of the dispute raised, it is necessary to inquire into facts for determination of which it may become necessary to record oral evidence a proceeding under Article 226 of the Constitution, is not the appropriate forum. The position is also well settled that

> if the contract entered between the parties provide an alternate forum for resolution of disputes arising from the contract, then the parties should approach the forum agreed by them and the High Court in writ jurisdiction should not permit them to bypass the agreed forum of dispute resolution. At the cost of repetition it may be stated that in the above discussions we have only indicated some of the circumstances in which the High Court have declined to entertain petitions filed under Article 226 of the Constitution for enforcement of contractual rights and obligation; the discussions are not intended to be exhaustive. This Court from time to time disapproved of a High Court entertaining a petition under Article 226 of the Constitution in matters of enforcement of contractual rights and obligation particularly where the claim by one party is contested by the other and adjudication of the dispute requires inquiry into facts. We may notice a few such cases; *Mohd. Hanif* v. *State of Assam*; *Banchhanidhi Rath* v. *State of Orissa*; *Rukmanibai Gupta* v. *Collector, Jabalpur*; *Food Corpn. of India* v. *Jagannath Dutta* and *State of H.P.* v. *Raja Mahendra Pal*.

The Supreme Court in the case of **Binny Ltd. v. V. Sadasivan** reported in **(2005) 6 SCC 657** has held as under :

> **10.** The writ of mandamus lies to secure the performance of a public or a statutory duty. The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities. Originally, the writ of mandamus was merely an administrative order from the Sovereign to subordinates. In England, in early times, it was made generally available through the Court of King's Bench, when the 665Central Government had little administrative machinery of its own. Early decisions show that there was free use of the writ for the enforcement of public duties of all kinds, for instance against inferior tribunals which refused to exercise their jurisdiction or against municipal corporations which did not duly hold elections, meetings, and so forth. In modern times, the mandamus is used to enforce statutory duties of

public authorities. The courts always retained the discretion to withhold the remedy where it would not be in the interest of justice to grant it. It is also to be noticed that the statutory duty imposed on the public authorities may not be of discretionary character. A distinction had always been drawn between the public duties enforceable by mandamus that are statutory and duties arising merely from contract. Contractual duties are enforceable as matters of private law by ordinary contractual remedies such as damages, injunction, specific performance and declaration. In the *Administrative Law* (9th Edn.) by Sir William Wade and Christopher Forsyth (Oxford University Press) at p. 621, the following opinion is expressed:

> "A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies. This difference is brought out by the relief granted in cases of ultra vires. If for example a minister or a licensing authority acts contrary to the principles of natural justice, certiorari and mandamus are standard remedies. But if a trade union disciplinary committee acts in the same way, these remedies are inapplicable: the rights of its members depend upon their contract of membership, and are to be protected by declaration and injunction, which accordingly are the remedies employed in such cases."

The Supreme Court in the case of **State of Kerala Vs. M.K. Jose** reported in **(2015) 9 SCC 433** has held as under :

> **13.** A writ court should ordinarily not entertain a writ petition, if there is a breach of contract involving disputed questions of fact. The present case clearly indicates that the factual disputes are involved.

14. In *State of Bihar* v. *Jain Plastics and Chemicals Ltd.*, a two-Judge Bench reiterating the exercise of power under Article 226 of the Constitution in respect of enforcement of contractual obligations has stated: (SCC p. 217, para 3)

> "*3*. … 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. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226."

In the said case, it has been further observed: (SCC p. 218, para 7)

> "*7*. … 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."

15. In *National Highways Authority of India* v. *Ganga Enterprises*, the respondent therein had filed a writ petition before the High Court for refund of the amount. The High Court posed two questions, namely, (*a*) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (*b*) whether the writ petition is maintainable in a claim arising out of

breach of contract. While dealing with the said issue, this Court opined that: (SCC p. 415, para 6)

> "*6*. … It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in *Kerala SEB* v. *Kurien E. Kalathil*, *State of U.P.* v. *Bridge & Roof Co. (India) Ltd.* and *Bareilly Development Authority* v. *Ajai Pal Singh*. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr Dave, however, relied upon the cases of *Verigamto Naveen* v. *State of A.P.* and *Harminder Singh Arora* v. *Union of India*. These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed."

16. Having referred to the aforesaid decisions, it is obligatory on our part to refer to two other authorities of this Court where it has been opined that under what circumstances a disputed question of fact can be gone into. In *Gunwant Kaur* v. *Municipal Committee, Bhatinda*, it has been held thus: (SCC p. 774, paras 14-16)

> "*14*. The High Court observed that they will not determine disputed question of fact in a writ petition. *But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State*. The High Court, however, proceeded to dismiss the petition in limine. *The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined*. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. *Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles*. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not

appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit."

(emphasis supplied)

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

"*19*. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of *Gunwant Kaur* this Court even went to the extent of holding that in a writ petition, if the facts require, even oral

> evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.
>
> * * *

27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

> (*a*) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.
>
> (*b*) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.
>
> (*c*) A writ petition involving a consequential relief of monetary claim is also maintainable."

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

> "*28*. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whirlpool Corpn.* v. *Registrar of Trade Marks*.) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

THE HIGH COURT OF MADHYA PRADESH
WP-10368-2020
Rajkmar Goyal Vs. Municipal Corporation Gwalior

The Supreme Court in the case of **Joshi Technologies International Inc. v. Union of India** reported in **(2015) 7 SCC 728** has held as under :

> **69.** The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following 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 mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.
>
> **69.3.** If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.
>
> **69.4.** Money claims *per se* particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.
>
> **70.** Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised 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 practise

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 the 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 it 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 the 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 Constitution of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with the 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 the 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.

71. Keeping in mind the aforesaid principles and after considering the arguments of the respective parties, we are of the view that on the facts of the present case, it is not a fit case where the High Court should have exercised discretionary jurisdiction under Article 226 of the

> Constitution. First, the matter is in the realm of pure contract. It is not a case where any statutory contract is awarded.

The Supreme Court in the case of **Surya Construction (Supra)** has held as under :

> **3.** It is clear, therefore, from the aforesaid order dated 22-3-2014 that there is no dispute as to the amount that has to be paid to the appellant. Despite this, when the appellant knocked at the doors of the High Court in a writ petition being Writ Civil No. 25216 of 2014, the impugned judgment dated 2-5-2014 [*Surya Construction* v. *State of U.P.*, 2014 SCC OnLine All 6071] dismissed the writ petition stating that disputed questions of fact arise and that the amount due arises out of a contract. We are afraid the High Court was wholly incorrect inasmuch as there was no disputed question of fact. On the contrary, the amount payable to the appellant is wholly undisputed. Equally, it is well settled that where the State behaves arbitrarily, even in the realm of contract, the High Court could interfere under Article 226 of the Constitution of India (*ABL International Ltd.* v. *Export Credit Guarantee Corpn. of India Ltd.* [*ABL International Ltd.* v. *Export Credit Guarantee Corpn. of India Ltd.*, (2004) 3 SCC 553])

If the facts and circumstancs of the present case are considered, then it is clear that in view of the amended provisions of Rule 15-A of Rules, 1998, a Scheme was floated by the State Govt. for regularization of illegal colonies and accordingly, the respondents were asked to carry on the development work in the illegal colonies resulting in invitation of NITs. As already pointed out, the respondent was also required to arrange 50% of the total expenses and the rest of the 50% expenses were to be borne by the inhabitants

and the amount of the public participation scheme / fund of parlimentarian / legislature fund was deemed to be the amount in the amount deposited by the inhabitant. However, after the declaration of amended provisions of Rule 15-A of Rules, 1998 as *ultra vires*, the State Govt. also could not release its share. Under these circumstances, this Court is of the considered opinion, that there exists a dispute between the Petitioner and the respondent and accordingly he should have approached the Dispute Resolution System as provided in Clause 12 of the General Conditions of Contract.

It is next contended by the counsel for the petitioner that so far as the question of limitation is concerned, the petitioner was never informed about the reasons for not making the payment, therefore, no cause of action had arisen, thus, the petitioner could not approach the Dispute Resolution System as provided under Clause 12 of the General Conditions of Contract.

Considered the submissions made by the counsel for the petitioner.

The petitioner has filed the copies of the note-sheet prepared by the respondent in all three different cases. The relevant part of note-sheet which was prepared in Case No. 271/18x3/6 is at page 59 of the writ petition. This document has been filed by the petitioner

after obtaining under the Right to Information Act and the relevant part of this note-sheet reads as under:-

> ''50 % राशि कालोनी रहवासियों से जमा कराये। (कार्यवाही –जानकारी शाखा)
>
> नस्ती RAD परीक्षणार्थ।
>
> हस्ताक्षर
>
> 8/10/18
>
> उपरोक्त टीप अनुसार निराकरण पश्चात प्रकरण प्रस्तुत किया जावे।
>
> हस्ताक्षर
>
> 9/10/19''

After the note-sheet was obtained by the petitioner under the Right to Information Act, he had come to know that there is an audit objection that 50% of the share of inhabitant should be deposited and only thereafter the further proceedings for releasing the amount can be taken. Although the date of receipt of this note-sheet under the Right to Information Act is not clear but this petition was filed on 27.03.2020, therefore, it is clear that atleast on 23.07.2020, the petitioner was aware of the reason due to which his payment has been withheld but instead of approaching the Dispute Resolution System, he has approached this Court. Whether the dispute of the petitioner has become barred by limitation or not is a disputed question of fact, which cannot be decided by this Court while exercising power under Article 226 of the Constitution of India. Since this Court has already

come to a conclusion that there is a dispute between the petitioner and respondent and the petitioner has an efficacious remedy of approaching the Dispute Resolution System as provided under Clause 12 of the General Conditions of Contract, therefore, this petition is dismissed with liberty to the petitioner that if he so desires, then he can avail the alternative remedy, which is available to him. If any dispute is raised by the petitioner as provided under Clause 12 of the General Conditions of Contract, then the authority shall be well within its right to consider the question of limitation after taking into consideration, the date of supply of documents under the Right to Information Act.

With aforesaid observations, the petition fails and is hereby **dismissed.**

(G.S. Ahluwalia)
Judge

Abhi