THE HIGH COURT OF JUDICATURE FOR MADHYA PRADESH, AT JABALPUR

(DIVISION BENCH)

WP-1874-2019

Alok Kumar Choubey …….. Petitioner

Vs.

State of Madhya Pradesh and others …… Respondents

Coram :

Hon'ble Mr. Justice Mohammad Rafiq, Chief Justice

Hon'ble Mr. Justice Prakash Shrivastava, Judge

Presence :

Mr. Shekhar Sharma, Advocate for the petitioner.

Mr. Swapnil Ganguly, Deputy Advocate General for the respondents-State.

Whether approved for reporting: **Yes**.

***Law Laid Down*:**

➔ Whether or not in a particular case the writ court should entertain a petition under Article 226/227 of the Constitution despite availability of alternative remedy, would always depend on the fact situation of a given case. Seven well recognized exceptions to the rule of alternative remedy for entertaining a writ petition under Article 226/227 of the Constitution are: **(i)** where the writ petition has been filed for enforcement of fundamental rights; **(ii)** where there has been violation of principle of natural justice; **(iii)** where the order of proceedings is wholly without jurisdiction; **(iv)** where the *vires* of any Act is under challenge; **(v)** where availing of alternative remedy subjects a person to very lengthy proceedings and unnecessary harassment; **(vi)** where the writ petition can be entertained despite alternative remedy if the question raised is purely legal one, there being no dispute on facts; & **(vii)** where State or its intermediary in a contractual matter acts against public good/interest unjustly, unfairly, unreasonably and arbitrarily.

➔ When the facts are not in dispute and it has been established to the satisfaction of the Court that the respondents have acted arbitrarily and contrary to the relevant stipulations in the agreement and the contract data, the alternative remedy of dispute resolution system by way of an application to the competent authority and thereafter to the appellate authority and then thereafter to the Arbitration Tribunal, in the facts of the present case, cannot be taken as an efficacious alternative remedy, particularly when Section 17 of the M.P. Madhyastham Adhikaran Adhiniyam, 1983 bars the Tribunal from granting any interim relief.

➔ The contract between the parties is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. - *Relied* - ***(2019) 19 SCC 9, Adani Power (Mundra) Limited vs. Gujarat Electricity Regulatory Commission and others***.

Significant paragraphs: **16, 17, 20 & 21.**

Hearing Convened through Video Conferencing.

O R D E R

(Passed on this 05th day of January, 2021)

Per: Mohammad Rafiq, CJ

This writ petition has been filed by Alok Kumar Choubey challenging validity of the order dated 22.12.2018 (Annexure-P/11), passed by the respondent No.5- Divisional Project Engineer, Public Works Department, Project Implementation Unit, Division Seoni, Seoni (M.P.), whereby the amount of performance guarantee (security) submitted by the petitioner for the work of construction of 100 Seater Chhatravas Building at Lakhnadon,

District Seoni including water supply, sanitary fittings and electrification etc. was forfeited.

2. Mr. Shekhar Sharma, learned counsel for the petitioner submits that the petitioner is a proprietorship Firm and is registered as a "C" class contractor with the respondent-Department. Being the successful bidder, the petitioner was awarded the work for construction of the aforesaid building and Letter of Acceptance (for short "LOA") was issued in his favour on 02.06.2014. According to the terms of LOA, the petitioner was required to execute the entire work within 13 months excluding the rainy season. The cost of work was Rs.129.50 Lac. An agreement was executed between the petitioner and the respondents. The time period for maintenance of the constructed work prescribed in the said agreement was two years from the date of completion of the work. Reference is made to Clause 18 of the agreement, Clause 18.1 whereof stipulates that the defect liability period of work in the contract shall be as per the contract data. It is contended that as per the stipulation contained in the contract data, the defect liability period in accordance with Clause 18.3 (GCC) read with its corresponding clause in contract data shall be of two years. The respondents have wrongly relied on Clause 29 of the agreement and the corresponding clause of the contract data and have treated the additional period of three months, beyond the period of two years, also as part of the defect liability period/maintenance guarantee period. Learned counsel argued that the period of two years would start from the date of completion of the work. In the present case, petitioner completed

said work on 08.03.2016 and the respondent No.4- Divisional Project Engineer, PWD had issued a completion certificate in that behalf to the petitioner on 30.05.2016. No defect whatsoever was pointed out in the work executed by the petitioner during the aforesaid period of two years. As per the terms of the contract, the petitioner would be entitled to refund of the performance guarantee furnished for the maintenance of the work. When the petitioner vide letter dated 03.05.2018 requested the respondent No.5- Divisional Project Engineer, PWD for refund of the amount deposited towards the security and performance guarantee, the respondents by communication dated 25.05.2018 (Annexure-R/2) required the petitioner to rectify the mistake in the work as per the inspection report dated 24.05.2018 submitted by the concerned Project Engineer. Learned counsel submitted that the respondents have misinterpreted the stipulation given in the contract data in respect of Clause 29 of the agreement, which only provides that the performance guarantee (security) shall be valid up to three months beyond the completion of the defect liability period. That however does not have the effect of extending the defect liability period by additional three months over and above the period of two years.

3. Mr. Swapnil Ganguly, learned Deputy Advocate General appearing for the respondents-State opposed the petition by contending that the writ petition should not be entertained as the petitioner has got efficacious alternative remedy in view of Clause 12 of the agreement, which provides for a dispute resolution system. The petitioner has to first approach the

competent authority and, if the matter is not decided within 45 days, he can file appeal before the competent appellate authority within 30 days. If the grievance is still not redressed, he can approach Madhya Pradesh Arbitration Tribunal constituted under the provisions of Madhya Pradesh Madhaystam Adhikaran Adhiniyam, 1983 (for short "the Adhiniyam of 1983"). Learned Deputy Advocate General submitted that the petitioner does not automatically become entitle to get refund of the performance guarantee and security on expiry of maintenance period on 07.03.2018. Though the defect liability period/maintenance guarantee period for building work was two years after completion of work on 08.03.2016, but Clause 29 of the contract data makes it abundantly clear that the performance guarantee (security) shall be valid for a period of three months beyond the completion of defect liability period. Therefore, the performance guarantee/security, in this case shall remain valid till 07.06.2018 i.e., beyond three months from 07.03.2018. As the petitioner was duly communicated by letter dated 23.05.2018 to complete the maintenance work and rectify the mistake on the basis of the inspection report dated 24.05.2018, the respondents were not obliged to refund the performance guarantee/security to the petitioner.

4. We have given our anxious consideration to the rival contentions of the parties and perused the record.

5. It is significant to note here that the respondents by way of an application for taking subsequent events on record dated 05.11.2020 have

stated that the petitioner has deposited two FDRs bearing Nos. 736049 & 736031, amounting to Rs.6,30,000/- & Rs. 6,65,000/- on 07.12.2016 & 18.07.2018 respectively. The repair work amounting to Rs.3,01,055/- was done through Maa Narmada Construction and, therefore, the aforesaid amount was adjusted against the security/performance guarantee submitted by the petitioner. An amount of Rs.3,63,945/- has been disbursed to the petitioner vide Cheque No.523333 dated 23.01.2020 and the amount of Rs.6,30,000/- of the FDR No.736049 has already been refunded to the petitioner on 22.01.2020.

6. Dealing first of all the preliminary objection of the respondents that since the petitioner has got an efficacious alternative remedy in view of dispute resolution system provided under Clause 12 of the agreement, the writ petition ought not to be entertained, what is to be seen is whether such remedy can indeed said to be 'efficacious'. The word 'efficacious' is adjective according to grammar and its noun is 'efficacy', which is derived from Latin word '*efficacie*' which means capacity to produce results. Accordingly, the word 'efficacious' means able to produce the intended effect or result. The Gauhati High Court in ***Abdul Sammad vs. Executive Committee of the Marigaon Mahkuma Parishad***, **AIR 1981 Gau. 15**, held that it is well-known that the meaning of the term "efficacious" is "able to produce the intended result". The High Court negatived the preliminary objection raised by the respondents with regard to maintainability of the writ

petition, as its view was that the alternative remedy provided in that case was not likely to produce the intended result.

7. In ***Raja Anand v. State of Uttar Pradesh***, **AIR 1967 SC 1081**, relying upon the judgment in *White and Collins v. Minister of Health (1939) 2 KB 838*, the Supreme Court held that where the jurisdiction of an administrative authority depends upon a preliminary findings of facts, the High Court is entitled in a writ proceeding to determine upon its independent judgment whether or not the finding of facts is correct. In ***State of Madhya Pradesh v. D.K. Jadav***, **AIR 1968 SC 1186**, the apex Court again held that when the jurisdiction of an administrative authority depends on preliminary findings of fact, the High Court can go into the correctness of the same under Article 226.

8. The Supreme Court in ***Salonah Tea Co. Ltd. and Others v. Superintendent of Taxes, Nowgong and Others*** - **(1988) 1 SCC 401**, held that normally in a case where tax or money has been realized without the authority of law, there is in such cases concomitant duty to refund the realization as a corollary of the constitutional inhibition that should be respected unless it causes injustice or loss in any specific case or violates any specific provision of law. If the tax was collected without authority of law, the respondents had no authority to retain the money and were liable to refund the same, held the Supreme Court. It held that in an application under Article 226 of the Constitution, the Court has power to direct refund,

however, courts have made a distinction between those cases where a claimant approaches a High Court seeking relief of obtaining refund only and those where refund is sought as a consequential relief after striking down of the order of assessment etc. A petition solely praying for issue of a writ of mandamus directing the State to refund the money allegedly collected by the State of tax is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against authority which had illegally collected the money as a tax. In ***Godavari Sugar Mills Limited vs. State of Maharashtra & others*** reported in **(2011) 2 SCC 439**, also it was held by the Supreme Court that there is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment.

9. The judgment of the Supreme Court in ***Whirlpool Corporation vs. Registrar of Trade Marks***, reported in **(1998) 8 SCC 1**, is the landmark decision on the question of maintainability of writ petition despite availability of alternative remedy. In that case too, it was held by the Supreme Court that under Article 226 of the Constitution, the High Court having regard to the facts of the case, has discretion to entertain or not to entertain a writ petition. The High Court has imposed upon itself certain restrictions, one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction, but the alternative remedy has been consistently held by the Supreme Court not

to operate as a bar in at least four contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or where the vires of an Act is challenged.

In ***Whirlpools Corporation (supra)***, the Supreme Court followed its earlier two Constitution Bench judgments in ***A.V. Venkateswaran, Collector of Customs v. Ramchand Sobhraj Wadhwani-*** **AIR 1961 SC 1506** and ***Calcutta Discount Co. Ltd. v. ITO, Companies Distt. -*** **AIR 1961 SC 372**.

In ***A.V. Venkateswaran, Collector of Customs (supra)***, the Supreme Court held as under :-

> "The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual fact which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus preeminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."

In ***Calcutta Discount Co. Ltd. (supra)***, the Supreme Court held as under:

> "Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a

> fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against the Income Tax Officer acting without jurisdiction under Section 34, Income Tax Act."

10. The Supreme Court in ***Union of India and Another v. State of Haryana and Another*** - **(2000) 10 SCC 482**, has added one more exception to the rule of alternative remedy, namely, the writ petition can be entertained despite alternative remedy if the question raised is purely legal one, there being no dispute on facts.

11. In ***Verigamto Naveen vs. Govt. of A.P. and others***, reported in **(2001) 8 SCC 344**, the Supreme Court held that the freedom of the Government to enter into business with anybody it likes is subject to the condition of reasonableness and fair play as well as public interest. It was further held that after entering into a contract, in cancelling the contract, which is subject to terms of the statutory provisions, it cannot be said that the matter falls purely in a contractual field and therefore, it cannot be held that since the matter arises purely on contract, interference under Article 226 of the Constitution is not called for.

12. In ***State of Tripura v. Manoranjan Chakraborty***, **(2001) 10 SCC 740**, the Apex Court held that if gross injustice is done and it can be shown that

for good reason the Court should interfere, then notwithstanding the alternative remedy which may be available by way of appeal or revision, a Writ Court can in an appropriate case exercise its jurisdiction to do substantial justice.

13. In ***State of H.P. And Others v. Gujarat Ambuja Cement Limited and Another*** - **AIR 2005 SC 3936**, the Supreme Court while considering the objection of alternative remedy to filing of writ petition under Article 226 of the Constitution, held that despite existence of alternative remedy, it is within the discretion of the High Court to grant relief under Article 226 of the Constitution. But normally the High Court should not interfere if there is efficacious alternative remedy is available. If somebody approaches the High Court without availing alternative remedy provided, the High Court should ensure that he has made out a strong case that there exists good ground to invoke the extraordinary jurisdiction. Following observations of the Supreme Court are reproduced herein for the facility of reference :-

> "Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in L. Hirday Narain v. Income Tax Officer, Bareilly, AIR (1971) SC 33 that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be

> ordinarily unjustifiable for the High Court to dismiss the same on the ground of non exhaustion of statutory remedies; unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition."

14. In ***Zonal Manager, Central Bank of India vs. Devi Ispat Limited,*** **(2010) 11 SCC 186**, the Supreme Court held that writ of mandamus can be issued even in contractual matters and in paragraph- 28 of the said judgment, the apex Court held as under:-

> "28. It is clear that (a) in the contract if there is a clause for arbitration, normally, a writ court should not invoke its jurisdiction; (b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and (c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution of India in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power. In the light of the legal position, writ petition is maintainable even in contractual matters, in the circumstances mentioned in the earlier paragraphs."

15. In ***Joshi Technologies International Inc. v. Union of India and Others***, reported in **(2015) 7 SCC 728**, the Supreme Court held that the State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discrimination. If the facts of such case 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.

16. Seven well recognized exceptions to the rule of alternative remedy, which can be culled out from the afore-discussed judgments of the Supreme Court for entertaining a writ petition under Article 226/227 of the Constitution, can be summarized thus: **(i)** where the writ petition has been filed for enforcement of fundamental rights; **(ii)** where there has been violation of principle of natural justice; **(iii)** where the order of proceedings is wholly without jurisdiction; **(iv)** where the *vires* of any Act is under challenge; **(v)** where availing of alternative remedy subjects a person to very lengthy proceedings and unnecessary harassment; **(vi)** where the writ petition can be entertained despite alternative remedy if the question raised is purely legal one, there being no dispute on facts; and **(vii)** where State or its intermediary in a contractual matter acts against public good/interest unjustly, unfairly, unreasonably and arbitrarily. Despite afore-noted exceptions, especially fifth and seventh of the above, whether or not in a particular case the writ court should entertain a petition under Article 226/227 of the Constitution of India rather than requiring the petitioner to avail alternative remedy, would always depend on the facts situation of a given case, upon the petitioner making out a strong case. If it is shown that the facts of the case are not disputed and the Government or its instrumentality has been found acting unjustly, unfairly and unreasonably even in regard to its contractual obligations, the High Court would be

justified in entertaining the writ petition despite availability of alternative remedy.

17. In view of what has been discussed above, the question is no longer *res integra* that if instrumentality of the State acts contrary to the public good, public interest unfairly, unjustly, unreasonably, discriminatory and violative of Article 14 of the Constitution of India in its contractual or statutory obligation, the writ petition would be maintainable.

18. It is not in dispute that the defect liability period/maintenance guarantee period is two years from the date of completion of the work. This period shall commence on 08.03.2016 and come to end on 07.03.2018. The question that arises for consideration in the present case is whether by virtue of what has been stated in the contract data in respect of Clause 29, the defect liability period/maintenance guarantee period shall stand extended by further three months? In order to correctly appreciate the stipulation contained in relevant clauses of the agreement and the corresponding clauses of the contract data, it would be appropriate to reproduce Clauses 18 and 29 of the agreement and the contract data, which read as under:

"**CLAUSE 18 OF THE AGREEMENT**

18. Correction of Defects noticed during the Defect Liability Period

18.1 The Defect Liability Period of work in the contract shall be as per the Contract Data.

18.2 The Contractor shall promptly rectify all defects pointed out by the Engineer well before the end of the Defect Liability Period.

The Defect Liability Period shall automatically stand extended until the defect is rectified.

18.3 If the Contractor has not corrected a Defect pertaining to the Defect Liability Period to the satisfaction of the Engineer, within the time specified by the Engineer, the Engineer will assess the cost of having the Defect corrected, and the cost of correction of the Defect shall be recovered from the Performance Security or any amount due or that may become due to the contractor and other available securities.

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CLAUSE 29 OF THE AGREEMENT

29. Performance Security

The Contractor shall have to submit performance security and additional performance security, if any, as specified in the Bid Data Sheet at the time of signing of the contract. The contractor shall have to ensure that such performance security and additional performance security, if any, remains valid for the period as specified in the Contract Data.

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CONTRACT DATA

GCC Clause	Particulars	Data
18	Defect Liability Period	(C) For **Building** works – 2 years To execute, complete and maintain works in accordance with agreement and special conditions of contract (SGC) after issue of physical completion certificate as per "Annexure-U" **Note**: in accordance with clause 18.3 (GCC), the Engineer in Charge shall intimate the contractor about the cost assessed for making good the defects and if the contractor has not corrected defects, action for correction of defects shall be taken by the Engineer in Charge as below : (a) Deploy departmental labour and material

		or (b) Engage a contractor by issuing a work order at contract rate/SOR rate or (c) Sanction supplementary work in an existing agreement to a contractor for zonal works or similar other work or (d) Invite open tender or (e) Combination of above
29	Performance guarantee (Security) shall be valid up to	**Three months beyond** the completion of Defect Liability period (Maintenance Guarantee Period)"

19. Clause 18.1 of the agreement provides that the defect liability period of work in the contract shall be as per the contract data. The corresponding Clause 18 in the contract data provides that the defect liability period would be of two years. It is not disputed even by the respondents that the defect liability period is only of two years from the date of completion of the work. Clause 18.2 of the agreement provides that the Contractor shall promptly rectify all defects pointed out by the Engineer well before the end of the defect liability period. However, additionally it provides that the defect liability period shall automatically stand extended until the defect is rectified. It is in this context that the contract data in respect of Clause 29 has provided that performance guarantee/security shall be valid up to three months beyond the completion of the defect liability period. This is because that if any defect has been pointed out during the currency of the defect liability period and if despite that, the Contractor has not removed the defect,

the defect liability period shall automatically extended until the defect is rectified. In order to safeguard against such an eventuality, Clause 29 in contract data provides that the performance guarantee/security shall extended for further three months, beyond the competition of the defect liability period. The very fact that the contract data in the relevant Clause 29 has provided that the performance guarantee/security shall be valid up to three months **beyond the completion of the defect liability period (maintenance guarantee period)**, implies that the period of two years has been accepted as a defect liability period and it is only after this period that the performance guarantee/security has been taken to be extended for a further period of three months. Given the fact that there is no dispute about the defect liability period being of two years, the respondents on the basis of what has been stated in the contract data are not justified to claim that the additional period of three months would also be part of the defect liability period.

20. The Supreme Court in ***Adani Power (Mundra) Limited vs. Gujarat Electricity Regulatory Commission and others***, reported in **(2019) 19 SCC 9,** after considering the plethora of case-laws, held that the contract between the parties is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, howsoever reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms

of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely.

21. In the facts of the case, action of the respondents in withholding the amount of the performance guarantee (security) of the petitioner is held to be arbitrary and unreasonable, being violative of Article 14 of the Constitution of India. The respondents are therefore not justified in withholding the amount of performance guarantee (security) deposited by the petitioner and then insisting upon the petitioner to invoke arbitration clause rather than invoking writ jurisdiction of this Court under Article 226 of the Constitution of India. When the facts are not in dispute and it has been established to the satisfaction of this Court that the respondents have acted arbitrarily and contrary to the relevant stipulations in the agreement and the contract data, the availability of alternative remedy, in the facts of the present case, cannot justify rejection of the present writ petition on the spacious plea of alternative remedy. The alternative remedy of dispute resolution system by way of an application to the competent authority and thereafter to the appellate authority and then thereafter to the Arbitration Tribunal, in the facts of the present case, cannot be taken as an efficacious alternative remedy, particularly when Section 17 of the Adhiniyam of 1983 bars the Tribunal from granting any interim relief. In the facts of the present case, requiring the petitioner to go through the process of dispute resolution system provided for under Clause 12 of the agreement, would amount to subjecting him to lengthy proceedings without there being any remedy of

interim relief, inasmuch as the question raised in the present writ petition is purely legal one, based on interpretation of Clause 29 of the Contract Data and the impugned action of the respondent is totally against the public good, being highly unjust, unfair, unreasonable and arbitrary. Clauses v, vi & vii of the exceptions to the rule of alternative remedy, as enumerated in Para-16 above, are therefore clearly attracted in the present case.

22. In view of the above, the present writ petition deserves to succeed and is hereby **allowed**. The respondents are directed to refund the entire amount of performance guarantee (security), after adjusting the amount already paid to the petitioner, together with interest @ 6% per annum from the date petitioner first demanded the refund i.e. from 03.05.2018, till the date of actual refund, both on the amount already paid and now due to be paid, for the period such amount was unduly withheld by the respondents. The compliance of the present order shall be made within three months from the date of production of copy of this order before the respondents.

(MOHAMMAD RAFIQ)
CHIEF JUSTICE

(PRAKASH SHRIVASTAVA)
JUDGE

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