

CASE NO.:
Appeal (civil) 7337 of 2004

PETITIONER:
Mrs. Sanjana M. Wig

RESPONDENT:
Hindustan Petro Corporation Ltd.

DATE OF JUDGMENT: 15/09/2005

BENCH:
S.B. Sinha & C.K. Thakker

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

The scope and ambit of judicial review vis-à-vis availability of alternative remedy is in question in this appeal which arises out of a judgment and order dated 29.04.2004 passed by a Division Bench of the High Court of Bombay in Writ Petition No.830 of 2004 whereby and whereunder the writ petition filed by the Appellant herein was dismissed in limine.

The Appellant herein and one Smt. Bimladevi T. Obhan, who were partners in 'M/s Tilak Automobiles' and the Respondent herein entered into a dealership agreement. Admittedly the said agreement was terminated by the Respondent herein by a notice dated 19.03.2004 in terms of Clause 55 of the said agreement which reads thus :

"55. Notwithstanding anything to the contrary herein contained, the Corporation shall be at liberty to terminate this Agreement forthwith upon or at any time after the happening of any of the following, namely :-

(A) If the Dealer shall commit a breach of any of the covenants and stipulations contained in the Agreement, and fail to remedy such breach within four days of the receipt of a written notice from the Corporation in that regard;

(B) Upon

(i) The death or adjudication as insolvent of the Dealer, if he be an individual;

(ii) The dissolution of the partnership of the dealers firm or the death or adjudication as insolvent of any partner of the firm if the Dealer be a firm.

(iii) The liquidation, whether voluntary or otherwise or the passing of an effective resolution for the winding up, if the dealer be a company or a co-operative society."

According to the Respondent, the said agreement came to an end on the death of the said Bimladevi. However, the dealership was allowed to continue having regard to a representation made by the Appellant herein that the firm had certain outstandings in the market which were in danger of

becoming unrecoverable, 'if the supplies were suddenly stopped'. The Respondent agreed to continue supplies to the Appellant on purely ad hoc basis.

The Respondent alleging violation of various conditions of the said agreement, namely, (1) low sales volume of the dealership; (2) sales performance; (3) dry outs at the outlet; and (4) no active interest/participation in operation of the dealership, issued a show cause notice dated 20.12.2002 as to why suitable action should not be taken for gross violation of clauses 9, 42, 44 and 55(a) of the said dealership agreement dated 09.02.2000.

A further notice was issued to the Appellant by the Respondent on 7.11.2003 drawing its attention to the defaults made by her and warned that any future default would be viewed seriously and very stringent action will be taken. Thereafter, allegedly a further default occurred and, thus, on the grounds stated in the notice dated 20.12.2002 as also on the ground of default, the agreement was terminated in terms of a notice dated 19.03.2004.

The Appellant contended that on 19.03.2004 itself at about 5.00 p.m. , the staff members of the Respondent along with the police authority forcibly entered the premises of the partnership firm and while handing over the said notice, the staff members thereof were forcibly ousted from the business premises.

The writ petition filed by the Appellant herein, as noticed hereinbefore, was dismissed in limine by the impugned order.

Mr. Uday Umesh Lalit, the learned Senior Counsel appearing on behalf of the Appellant, at the outset drew our attention to the subsequent events which took place, namely, that referral of the disputes and differences between the parties were referred to an arbitrator on 07.06.2004 and consequent passing of a consent award by him which reads as under :

"In terms of statement of settlement dated December 15, 2004, I pass the award as follows :

5.1 Net payable amount of Rs.431416.39 as agreed to by both the parties plus interest of Rs.33170/- from 1.4.04 till 31.12.04 aggregating to Rs.464586/- shall be paid by the Respondent to the Claimant.

5.2 In view of the financial difficulties of the Respondent, the above amounts shall be paid in 5 installments with the first installment commencing in the first week of Jan. 05 and the last installment to be paid in the last week of March 05.

5.3 Interest at the rate of 12% per annum will be payable for any default i.e. amount outstanding to be paid as 31st March, 05 by the Respondent to the Claimant.

5.4 All the claims of both the Claimant and the respondent which are contrary to or other than the aforesaid terms of settlement are rejected.

5.5 The award is given without prejudice to any rights and contentions in respect of Special Leave Petition pending with the Hon'ble Supreme Court."

Mr. Lalit would contend that the High Court committed a manifest error in dismissing the said writ petition in limine on the premise that there

existed an arbitration clause in the agreement, without considering the question that the arbitrator had no jurisdiction to pass an award in relation to the said second prayer made by the Appellant herein, namely, restoration of possession to her by the Respondent.

The learned counsel would submit that a public law remedy cannot be held to be not available to a person aggrieved only on the ground of existence of an arbitration clause; although fundamental right at the hands of the State is alleged to have been breached. It was further submitted that from the chain of events, it would appear that the Respondent had condoned the lapses on the part of the Appellant in the matter of alleged violations of the conditions of the agreement and only insisted on payment of the alleged dues in terms of its notice dated 07.11.2003. It was urged that in terms of clause 9, the Appellant was entitled to three months' notice. In support of his aforementioned contentions, Mr. Lalit placed strong reliance on *E. Venkatarishna vs. Indian Oil Corporation and Another* [(2000) 7 SCC 764], *Indian Oil Corporation Ltd. vs. Amritsar Gas Service and Others* [(1991) 1 SCC 533], *Harbanslal Sahnia and Another vs. Indian Oil Corporation Ltd. and Another* (2003) 2 SCC 107]; and *State of H.P. and Others vs. Gujarat Ambuja Cement Ltd. and Another* [2005 AIR SCW 3727]

Mr. L. Nageshwara Rao, the learned Senior Counsel appearing for the Respondent, on the other hand, would contend that as the High Court exercises a discretionary jurisdiction under Article 226 of the Constitution of India; refusal to entertain a writ petition on the ground of existence of an alternative remedy should not be interfered with by this Court. The learned counsel submitted that the agreement having stood terminated by reason of the death of one of the partners, the petitioner was not entitled to claim any right of property in the premises in question and in that view of the matter this Court should not interfere with the impugned order. Mr. Nageshwara Rao, in this behalf, placed strong reliance on *The State of Uttar Pradesh vs. Mohammad Nooh* [1958 SCR 595]; *A.V. Venkateswaran, Collector of Customs, Bombay vs. Ramchand Sobhraj Wadhvani and Another* [1962 (1) SCR 753]; *State of U.P. and Others vs. Bridge & Roof Company (India) Ltd.* [(1996) 6 SCC 22]; *Seth Chand Ratan vs. Pandit Durga Prasad (D) By Lrs. and Others* [(2003) 5 SCC 399]; and *Asgar S. Patel and Others vs. Union of India and Others* [(2000) 5 SCC 311].

The principal question which arises for consideration is as to whether a discretionary jurisdiction would be refused to be exercised solely on the ground of existence of an alternative remedy which is more efficacious. Ordinarily, when a dispute between the parties requires adjudication of disputed question of facts wherefor the parties are required to lead evidence both oral and documentary which can be determined by a domestic forum chosen by the parties, the Court may not entertain a writ application. [See *M/s Titagarh Paper Mills Ltd. vs. Orissa State Electricity Board and Another* [(1975) 2 SCC 436] and *M/s Bisra Stone Lime Co. Ltd. etc. vs. Orissa State Electricity Board and Another* [AIR 1976 SC 127]

However, access to justice by way of public law remedy would not be denied when a lis involves public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief.

A Division Bench of this Court in *ABL International Ltd. & Anr. vs. Export Credit Guarantee Corporation of India Limited & Ors.* [JT 2003 (10) SC 300], observed that in certain cases even a disputed question of fact can be gone into by the court entertaining a petition under Article 226 of the Constitution of India, holding :

"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."

In Harbanslal Sahnia (supra), Lahoti, J, (as His Lordship then was), relied upon Whirlpool Corporation vs. Registrar of Trade Marks [(1998) 8 SCC 1] observing that in an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies : (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

We may, however, notice that the Bench did not notice the earlier decisions in M/s Titagarh Paper Mill Ltd. (supra) and M/s Bisra Stone Lime Co. Ltd. (supra). However, there cannot be any doubt whatsoever that the question as to when such a discretionary jurisdiction is to be exercised or refused to be exercised by the High Court has to be determined having regard to the facts and circumstances of each case wherefor, no hard and fast rule can be laid down.

A three-Judge Bench of this Court in Gujarat Ambuja Cement Ltd. (supra), referring to Harbanslal Sahnia, (supra) held :

"\005There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

25. 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 may be true that in a given case when an action of the party is de'hors the terms and conditions contained in an agreement as also beyond the scope and ambit of domestic forum created therefor, the writ petition may be held to be maintainable; but indisputably therefor such a case has to be made out. It may also be true, as has been held by this Court in Amritsar

Gas Service (supra) and E. Venkatakrishna (supra), that the arbitrator may not have the requisite jurisdiction to direct restoration of distributorship having regard to the provisions contained in Section 14 of the Specific Relief Act, 1963; but while entertaining a writ petition even in such a case, the court may not lose sight of the fact that if a serious disputed question of fact is involved arising out of a contract qua contract, ordinarily a writ petition would not be entertained. A writ petition, however, will be entertained when it involves a public law character or involves a question arising out of public law functions on the part of the respondent.

But in a case of this nature, while exercising a plenary jurisdiction, we must take the supervening circumstances into consideration. The parties admittedly invoked the arbitration agreement before the arbitrator. They entered into a settlement. Pursuant to or in furtherance of the said settlement, the Appellant herein was to pay a sum of Rs.4,64,586/- unto the Respondent in five installments with interest. The Appellant herein for violation of the terms of contract presumably prayed for award of damages but no reference thereto has been made in the award. In any event such claim of damages could have been made before the Arbitrator on the ground of alleged breach of contract.

We are further of opinion that in this matter no case has been made out for grant of a relief of restoration of the dealership. The contract stood terminated on the death of the Appellant's partner. No case of novation of contract has been made out. It is also not the case of the parties that any other or further agreement between the parties came into being. The arrangement was an ad hoc one. The Appellant did not derive any legal right to continue the business for an indefinite period. Moreover, she allegedly violated the terms of the contract.

It may be true that the said award has been made without prejudice to the interest of the parties in this appeal; but keeping in view the admitted fact that the Appellant committed a default in payment of dues towards supplies made and having regard to the fact that the dealership agreement has come to an end, we are of the opinion that it is not a fit case where we would set aside the impugned order of the High Court and direct it to dispose of the writ petition afresh.

For the reasons aforementioned, there is no merit in this Appeal which is dismissed accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.