

**IN THE HIGH COURT OF TELANGANA AT HYDERABAD**

**WRIT PETITION No.35956 OF 2015**

**Between:**

M/s S.K.Swamy and Company

**... Petitioner**

**And**

Union of India & others

**... Respondents**

**JUDGMENT PRONOUNCED ON: 03.06.2024**

**THE HON'BLE MRS. JUSTICE SUREPALLI NANDA**

1. Whether Reporters of Local newspapers : Yes  
may be allowed to see the Judgment?
2. Whether the copies of judgment may be : Yes  
marked to Law Reporters/Journals?
3. Whether Their Lordships wish to : Yes  
see the fair copy of the Judgment?

---

**MRS. JUSTICE SUREPALLI NANDA**

**IN THE HIGH COURT OF TELANGANA AT HYDERABAD**

**WRIT PETITION No.35956 OF 2015**

% 03.06.2024

Between:

# M/s S.K.Swamy and Company

... **Petitioner**

**And**

\$ Union of India & others

... **Respondents**

< **Gist:**

> **Head Note:**

! Counsel for the Petitioner : Sri A.Sudershan Reddy

^Counsel for Respondent No.1: Dy. Solicitor General of India

^Counsel for Respondent Nos.2 &3: Smt Anjali Agarwal

**? Cases Referred:**

1. (2021) 2 ALT (SC) 149
2. (2015) 9 SCC 433
3. (2021) 6 SCC 771
4. 2023 SCC online SC 214

**HON'BLE MRS. JUSTICE SUREPALLI NANDA****WRIT PETITION No.35956 OF 2015****ORDER:**

Heard Sri A. Sudershan Reddy, the learned Senior designate counsel appearing on behalf of the Petitioner, the learned Deputy Solicitor General of India appearing on behalf of respondent No.1 and Smt. Anjali Agarwal appearing on behalf of respondent Nos.2 and 3.

**2. The petitioner approached the Court seeking prayer as under:**

".....to pass an order, direction or Writ particularly one in the nature of WRIT OF MANDAMUS declaring the action of the Respondent Nos 1 to 3 in depriving and denying the Petitioner's Constitutional rights by withholding the amounts due and payable to the Petitioner inspite of approval of Chief Engineer/Competent Authority i.e., respondent No.2 and also as recommended by pre-arbitration committee in relation to claims 2 and 4 in respect of completed works under agreement No.46/CAO/C/SC/2010, dated 15-09-2010 as arbitrary, illegal and unconstitutional and consequently direct the Respondents to release the Petitioner's amounts forthwith and pass such other order or orders....."

**3. PERUSED THE RECORD :**

**A) The approval dated 30.03.2011 of the Chief Engineer/Competent Authority i.e., Respondent No.2, in favour of the Petitioner, reads as under:**

Approval of Chief Admn. Officer/Con/SC is hereby communicated for the variation to a net and gross value of Rs.12,44,85,096.85Ps. Variation statement is sent herewith, in duplicate, alongwith rate analysis for verification and early return.

The subject work was awarded to M/s. S.K.Swamy & Co.Bangalore at an agreement value of Rs.8,36,88,936.85 Ps.

Dy.CE/C/GTL has submitted First variation vide letter dated 18-03-2011(P-178)

Dy. CE/C has mentioned in the letter that during execution it is necessitated to operate one additional NS item extra over item No.1 & 2 of Schedule-A for cutting rock and scooping out the debris outside the area to enable to complete the box pushing. Accordingly the variation statement is submitted duly proposing additional NS item for extra over for box pushing hard rock strata for a quantity of 2.875 Sqm per RM with a rate of Rs.14,325/- amounting to Rs.4,11,84,375/- which works out to gross excess of 49.12% over the agreement value.

As per the details of rate for additional NS item submitted by Dy.CE/.C,

Rate for R M-Rs.6,73,000(Agt.No.11/Dy.CE/CN/MAS/2009, dated 06.04.2009)

Box size 5.50 x 3.66m=20.13 Sqm per RM

Rate for Sq m per R M=6,73,000/20.13=33,432.69

Rate for Sq.m per R M for item No.1 & 2

Of Schedule-A of the same Agt. = 19,107.73

Difference in Rate 14,324.95 or Say

Rs.14,325 Sq.m per R M

However, CAO/C has approved this proposal for a quantity 3840 Sqm pr RM with a rate of Rs10,624/- vide N-8. Therefore the details for additional NS item will be as below:

SI No	Description of item	Qty	Rate	Unit	Amount in Rs.	Remarks
1	Extra over item No.1&2 of Schedule-A for cutting rock by approved methods such as chemical disintegration of rock by any other approved method and scooping out the debris out side the area with all contractors materials, labour, tools, plant and machinery all lead lift and lift ect., complete as directed by the Engineer-in-Charge	3840	10,624.00	Sq.m.per R.M	4,07,96,160.00	While executing of thrust bed, the front face of box pushing encountered with full of rock which cannot be removed by ordinary blasting under the traffic

Financial implications:

Original Agt.Value Rs.8,36,88,936.85  
Value of one addl.N.S.item Rs.4,07,96,160.00  
Net & Gross value Rs.12,44,85,096.85  
Net & Gross excess and percentage Rs.4,07,96,160.00 (i.e.48.75%)  
Negotiations required for one addl NS item Rs.4,07,96,160.00  
Dy.CE/C has certified that there is no vitiation due to variation, since no savings occurred vide letter date 18.03.2011 (F-178).

Administrative approval of CE/C is required to the First variation in terms of item no.9 of part A of SOP 2009, to process further with Finance for concurrence. Since the overall excess is exceeded beyond 25% of agt.value, it shall be brought to the notice of CAO/C in terms of CAO/C's circular No.20/09, dated 07.12.09

**B) The recommendations of the Pre-Arbitration Committee dated 09.01.2014 in relation to Claims 2 and 4 in respect of completed works under agreement No.46/CAO/C/SC/ 2010, dated 15.09.2010, read as under:**

<b>Claim No.</b>	<b>Details leading to Recommendations</b>	<b>Amount recommended in Rs.</b>
2	<p><b>Earth work excavation - from ground level to bed/top level of the thrust bed earthwork (i.e.) excluding earthwork for thrust bed done</b></p> <p><b>a. Earth work in All Soils (AS) 815.772 M3 x 101 x (-10) = Rs. 74,153.67</b></p> <p><b>b. RNRB 562.490 m3 x144 x (-10) = Rs. 72,898.70</b></p> <p><b>c. Hard Rock =5513.193 M3 x 187 x(-10) =Rs.9,27,870.38</b>      <b>Total (a+b+c)= Rs.10,74,922.75</b></p> <p>The Quantity of earthwork has been certified by AXEN/GTL vide letter dt 26.12.13 is as per the site records and measurement book. Rates adopted are with -10% taken from Schedule B of this agreement.</p>	<p>Amount claimed Rs.26,48,430/-</p> <p>Amount recommended Rs. 10.74.922.75/-</p>
4	<p><b>Pending settlement and payment of a rate for Additional item of work i.e. specialized technique Box pushing in Hard Rock by etc. Quantity 3,840 x Rs.10,624.07 per Sqm/RM</b></p>	<p>Amount claimed Rs.4,07,96,429</p> <p>Amount recommended Rs. 4,07,96,160</p>

	<p>The Claimant has claimed a sum of Rs.4,07,96,429/- for this item. The main contention of the Claimant is that there exists no scooping activity, no specialized methodology of working like chemical disintegration like chiseling/chipping, etc., for working under hard rock conditions, as well as the rates quoted by the Contractor does not cater to these type of working. The Pre Arbitration Committee, spent the maximum time on this claim. Based on all the records placed before the Pre Arbitration Committee, both by the Contractor and AXEN/GTL (Department), and as per the conditions of agreement/site this claim is justified. The amount claimed is based on approved variation by the Chief Engineer and Chief Administrative Officer. The rate for additional NS item with Rs. 10,624.07 per Sq M/RM for box pushing in hard rock strata has been worked out after detailed analysis and has administrative approval of CAO Dt.16.03.11 and has been accepted by the agency who previously demanded Rs.41,034 per Sq M/RM. The actual quantity of work done using additional NS has been worked out by the AXEN(who was in charge during the execution of this work) vide letter dt.26.12.13.</p> <p>3840 Sq M/RM x 10,624 = Rs.4,07,96,160.</p> <p>1.The Claim made is in accordance, to both the Special Conditions- 9.0 and 9.1 additional items at page 14 of the agreement as well as SCC and Specifications- 3.0- 1.0 at page 8 of the agreement. It is categorically stated the Chief Engineer's decision would be final and binding on all issues of specifications.</p> <p>2. GCC-39, 43(1)</p>	

C) The legal opinion dated 27.01.2014.

No.W.Con.29/A/267/LAW/LO.4, reads as under :

The recommendations of the Pre-arbitration Committee dated 09.01.2014 have been examined. Out of the 10 claims submitted to the Pre-arbitration Committee, the Committee made recommendations in respect of 7 claims of the 7 recommendations, the Committee recommended nil amount with respect to claims 1,5,7 and 9, while recommended accruals to be arrived and paid by respondent with reference to claim no.10, ie payment of final bill, PVC, SD & PG. So far as claims No.2 & 4 are concerned, Rs.10,74,922/- recommended instead of a claim of ₹26,48,430/- towards claim no.2 i.e., earth work excavation-from ground level to bed/top level of thrust bed and Rs.4,07,96,160/- towards claim no.4 i.e payment of a rate for additional item of work.

**In the instant case, there was no dispute as to the operation of the additional works under claims 2 & 4, and the same has got completed by the agency. Section 70 of the Contract Act, 1872 stipulates that where a person lawfully does anything for another person for a sum, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of. After due negotiations, the Chief Engineer fixed the rate for the additional NS items which is binding on both the parties in terms of Cl.39 of GCC. The claimant cannot demand more than what has been fixed by the Chief Engineer. So far as claim no.2 is concerned,**



**Committee recommended, the rate as per Schedule-B of the agreement. The recommendations of the Pre-arbitration Committee are based on the approved variations in terms of Cl.39 and 43 of GCC and agreement. Since the Pre-arbitration Committee recommended what has already been accepted in terms of GCC towards claim 4, under terms of agreement at scheduled rates towards claim no.2. and as accrued towards claim no. 10, it is opined that there are no legal grounds to interfere with the same.**

**D) Para Nos.17 and 18 of the counter affidavit filed on behalf of Respondent Nos.1 to 3, read as follows :**

17. In reply to para 17 of the affidavit, it has been stated that the present writ is being limited to the recommended claims of 2 and 4 in the orders passed by the pre arbitration committee dated 09.01.2014. But in this regard it is to inform that as per sub-clause no.1.2 of Special Conditions of the agreement, the agency should seek reference to arbitration to settle the disputes ONLY ONCE, subject to the condition mentioned below. The condition of the agreement is reproduced hereunder for immediate reference;

"The provisions of clause 63 and 64 of the General Conditions of contract will be applicable only for settlement of claims/disputes, for values less than or equal to 20% of

the original value (excluding the cost of materials supplied free by Railways) of the contract or 20% of the actual value of the work done (excluding the value of the work rejected) under the contract, whichever is less. When claims/disputes are of value more than 20% of the value of the original contract or 20% of the value of the actual work done under the contract, whichever is less, the contractor will not be entitled to seek such disputes/claims for reference to arbitration and the provisions of clause 63 and 64 of the General Conditions of contract will not be applicable for referring the disputes to be settled through arbitration. **As such it is further to inform that the agreement value of the work is Rs.8,36,88,936.85 and the value of actual work done is Rs.9,12,05,536.34 and value of actual claims submitted by the agency for claim Nos.2&4 is Rs.4,37,39,129/- and the present claim is more than 20% of agreement value.**

**18. In reply to para 18 of the affidavit, as stated earlier the recommendations of the Pre-arbitration committee are itself null and void and the claims made by the Petitioner come under the purview of Excepted Matters as per special contract conditions and specifications no.3.0 & 9.0 read with its sub clauses and as such the same is beyond Arbitrable issue or domain of Civil Courts.**

**4. The case of the petitioner, in brief, as per the averments made by the petitioner in the affidavit filed by the petitioner in support of the present writ petition, is as under:**

i) It is the specific case of the Petitioner that the Petitioner is a reputed civil contractor in the field of civil works for decades and in response to tender published by the 1<sup>st</sup> Respondent for execution of civil work (deposit work), the Petitioner submitted his tender and the Petitioner became a successful bidder and the contract was awarded by the 2<sup>nd</sup> Respondent to the Petitioner vide letter dated 04.06.2010 and consequently Petitioner and Respondent entered into an Agreement dated 15.09.2010 bearing No.46/CAO/C/SC/2010. It is further the case of the Petitioner that the Petitioner did additional/extra item of work which is not contemplated in the tender and the Petitioner had to do box pushing in rocky area. Petitioner vide letter dated 14.12.2010 and 15.12.2010 requested for payment in accordance to special conditions of contract No.9.0 and its sub-clauses. In pursuance to the correspondence between the Petitioner and Respondents for settlement of the payments for the extra work executed by **the Petitioner in the project in question, the 2<sup>nd</sup> Respondent had intimated constitution**

of a Pre-Arbitration Committee to the Petitioner through letter dated 17.10.2013.

ii) It is further the case of the Petitioner that the Pre-Arbitration Committee had given its recommendations through a detailed order dated 09.01.2014 and recommended in favour of the Petitioner with regard to the claims 2 and 4. In so far as claim No.2 is concerned the Petitioner's claim had been reduced from Rs.26,48,430/- to Rs.10,74,922.75 and in so far as claim No.4 is concerned the Committee has accepted and recommended for payment of full claim as claimed by the Petitioner i.e., Rs.4,07,96,429/- and the Committee made a clear recommendation with regard to the 4<sup>th</sup> claim for an amount of Rs.4,07,96,160/- and the Petitioner made a demand vide letter dated 04.11.2014 for the release of the said amounts as per the recommendations of the Pre-Arbitration Committee, dated 09.01.2014.

iii) It is further the case of the Petitioner that the Petitioner secured the legal opinion given by the Law Officer under the RTI Act, dated 05.08.2014 wherein it has been clearly observed that in view of the fact that the Petitioner executed 2 additional works

with the approval of the concerned C.E., and the rates and variations have been accepted and approved by the C.E. and C.A.O., in conformity with the provisions of GCC the Petitioner had to be paid for the additional works executed.

iv) It is further the case of the Petitioner that the Competent Authority had approved for the variation to a net and gross value of Rs.12,44,85,096.85 paisa and the said details are evidenced in the material documents dated 21.03.2011 and 30.03.2011 filed by the petitioner in support of the present writ petition.

v) In spite of repeated requests made by the Petitioner the Respondents No.1 to 3 deprived and denied the Petitioner's constitutional rights by withholding the amounts due and payable to the Petitioner, in spite of the approval of the Chief Engineer/Competent Authority i.e., Respondent No.2 dated 30.03.2011 vide Proceedings No.W.Con.148/A/CTL/Box push/3936, for which the Petitioner addressed representation dated 04.11.2014 to the General Manager, South Central Railway, Rail Niyalam, Secunderabad, and requested for arrangement and payment towards/additional item of work done relating to box pushing in hard rock and thereafter no action has

been initiated. Aggrieved by the same, the present Writ Petition has been filed by the petitioner.

**5. Para Nos. 7 & 8 of the reply affidavit filed by the Petitioner, read as under :**

In reply to para 7, I submit that the GAD (General arrangement drawings) relating to the subject contract work does not reflect the actual site conditions, and presence of hard rock beneath the earth. It is also pertinent to mention that sometimes the actual site conditions would change from GAD, and in such circumstances the work shall be treated as additional/new work and a separate rate has to be arrived at and shall be paid, as per Cl.9.1 & 9.2 of Special Conditions of Contract.

**a) I submit that the claim in the writ petition is relating to additional/new items which cropped up during the course of execution of work originally mentioned in the schedules of the Agreement dt. 15/10/2010, and the same were brought to the notice of the Respondents, which were admitted, enquired, ascertained the rates from other regions, negotiated, approved by the competent authorities (Chief Engineer and Chief Administrative Officer, whose approval/orders is final and binding on both parties to the Agreement, as per Cl.3 of the Special Conditions of Contract annexed to the Agreement dt. 15/10/2010), and a variation statement relating to the additional/new items of work, which are the**

**claims in the present writ petition, was drafted and amount arrived at in the said variation statement was agreed/accepted/approved by both the parties i.e., the Petitioner and the Respondent.**

b) I submit that it is the discretion of the Respondents whether to entrust the additional/new work to the petitioner or to any third party contractor as per Cl.9.1 of the Special Conditions of Contract. The claims in the writ petition are for additional/new items of work, which were notified to the Respondents, during the progress of the original agreement works, and that had it been not additional/new items of work, the Respondents ought to have taken steps at that point of time itself, but the Respondents did not do so, they also satisfied that they are additional/new items of works, and rates are to be arrived at, and accordingly they have ascertained the same from Southern Railways, Chennai, for such work (Box pushing in hard rock with specialised skill/experience) as the South Central Railways had not dealt with similar work in similar site conditions. Unless the additional/new items of work in the writ petition are entrusted, the Petitioner cannot proceed to execute the original items of works of the original agreement dt.15/10/2010, therefore the Respondents entrusted the works claimed in the writ petition.

c) I submit that it is incorrect to state on the part of the Respondents that the claim of the Petitioner is malafide,

claiming extra money and is not tenable, and the same is denied.

**8. In reply to para 8, the schedule of works carried by the Petitioner is not in all kinds of soil, it is in hard rock, therefore it is an additional/new item of work, which was approved/entrusted by the competent authority to the Petitioner. The additional works/new items of works were explicitly negotiated and entrusted to the Petitioner, and now the Respondents cannot turn around and say that they are not agreeable for payment. There is no delay on the part of the Petitioner contractor, the delay occurred on the part of the Respondents in taking decisions, ascertaining the rates, entrusting the work to the Petitioner. Having taken all the decisions and approvals from the competent authority, the Respondents are estopped from saying that they are not agreeable for the claims of the Petitioner. Such a denial is contrary to the internal correspondence of the Respondents dt.13/06/2011 (Annexure-18) obtained under RTI.**

**6. DISCUSSION AND CONCLUSION:**

**A. A bare perusal of material on record clearly indicates that the claim of the Petitioner is approved by the competent authority vide notings and final approval dated 30.03.2011 which the Petitioner had obtained under the**



**RTI Act and the same had been filed by the petitioner as material document in support of the affidavit filed by the Petitioner in the present writ petition.**

B. A bare perusal of the report of the Pre-Arbitration Committee dated 09.01.2014 (referred to and extracted above) very clearly indicates that the Pre-Arbitration Committee made specific observations in favour of the Petitioner and recommended for payment with regard to claims 2 and 4, though the claim of No.2 of the Petitioner had been reduced from Rs.26,48,430/-, the Committee however, accepted and recommended for payment of full claim with regard to the 4<sup>th</sup> claim of the Petitioner for an amount of Rs.4,07,96,160/-. **It is relevant to note here that it is the 2<sup>nd</sup> Respondent who had in fact intimated constitution of the said Pre-Arbitration Committee to the Petitioner through his letter dated 17.10.2013 and therefore the Respondent having initiated and agreed for Pre-Arbitration cannot turn back and state in the counter affidavit at para Nos. 17 and 18 that the recommendations of the Pre-Arbitration Committee itself are null and void.**

**C. A bare perusal of the record also indicates that it is an admitted fact as borne on record that the Petitioner completed the work and the same is evidenced from the letter dated 17.01.2013 of Deputy Chief Engineer (Const) SC Railway. A bare perusal of the correspondence dated 30.03.2011 secured by the Petitioner under the RTI Act, clearly indicates that there is an approval of the competent authority for the amounts payable for the extra work done by the Petitioner with regard to claims 2 and 4. A bare perusal of legal opinion dated 27.01.2014 clearly indicates an observation in favour of the Petitioner that since the Pre-Arbitration Committee recommended what has already been accepted in terms of GCC towards claim No.4 under terms of agreement at scheduled rates towards claim No.2, the Respondents cannot interfere with the same since there are no legal grounds to interfere.**

**D. This Court opines that the pleas put-forth by the learned counsel appearing on behalf of Respondents No.1 to 3 that the present writ petition is not maintainable, is not tenable in view of the facts being admitted by the**

Respondent Authority as borne on record which is evident on perusal of the following documents :

i) Letter dated 17.01.2013 of the Deputy Chief Engineer (Const.) SC Railway which is a work completion certificate, certifying that the Petitioner had completed the work in all aspects.

ii) Letter dated 30.03.2011 secured by the Petitioner under the RTI Act and a bare perusal of the same indicates that the 1<sup>st</sup> Respondent accepted the value of the extra work through a correspondence dated 30.03.2011.

iii) The 2<sup>nd</sup> Respondent had intimated constitution of Pre-Arbitration Committee to the Petitioner through letter dated 17.10.2013.

iv) The recommendations of the Pre-Arbitration Committee dated 09.01.2014 in favour of the Petitioner.

v) The Legal Opinion dated 27.01.2014 and 05.08.2014, with observations in favour of the Petitioner.

vi) The approval dated 30.03.2011 of the competent authority in favour of the Petitioner.

In answer to the plea of the Respondents No.1 to 3 on the maintainability of the present writ petition, this

Court opines that the present writ petition is maintainable in the light of the observations of the Apex Court in the judgments referred to and extracted below.

7. The Division Bench of the Apex Court in a judgment dated 20.04.2021 reported in (2021) 6 SCC 771 in M/s. Radhakrishnan Industries Vs. State of Himachal Pradesh, referred to Whirlpool Corporation Vs. Registrar of Trade Marks (reported in (1998) 8 SCC 1) and further the said view had been reiterated by a Full Bench of the Apex Court (3 Judges) in a judgment reported in (2021) SCC Online SC page 801 in Magadh Sugar and Energy Limited Vs. State of Bihar and Others dated 24.09.2021 and in the said judgment it is observed as under :

*28. The principles of law which emerge are that:*

*(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;*

*(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;*

- (iii) **Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution;** (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;
- (iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;
- (v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and
- (vii) **In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.**"

This Court opines that the facts of the present case and the material on record clearly indicates that the present case falls under Clause (i), iii (a), and (vii).

8. The Division Bench of Apex Court in the judgment dated 02.03.2023 reported in 2023 SCC Online SC 214 in Hornbill Consultant Vs. State of Punjab & Others at Para 8 observed as under :

Para 8 : It is, no doubt, correct that in contractual matters, the High Courts do not like to exercise jurisdiction under Article 226 of the Constitution of India, even though this power is plenary in nature and not limited by any provision of the Constitution of India; as normally, when disputed questions of fact arise, adjudication in a civil court is more appropriate, just and fair. Nevertheless, this is not an absolute rule; more so in cases when the orders passed by the government authorities are arbitrary, unfair or unreasonable and where the facts are not in dispute and are easily ascertainable. We are, in view of the lapse of time, inclined to allow the appeal in order to prevent any further rounds of litigation between the parties when the facts on record are crystal clear and do not require a detailed review. The aspect of arbitrary and erratic conduct on the part of the respondents has been addressed and elucidated earlier".

9. The Division Apex Court in the judgment dated 17.02.2021 reported in 2021 (2) ALT (SC) 149 in Civil Appeal No.317 of 2021 in Unitech Ltd., & Others Vs. Telangana State Industrial Infrastructure Corporation (TSIIC) & Others, at para Nos. 32 and 33 observed as under :

32. Much of the ground which was sought to be canvassed in the course of the pleadings is now subsumed in the submissions which have been urged before this Court on behalf of the State of Telangana and TSIIC. As we have noted earlier, during the course of the hearing, learned Senior Counsel appearing on behalf of the State of Telangana and TSIIC informed the Court that the entitlement of Unitech to seek a refund is not questioned nor is the availability of the land for carrying out the project being placed in issue. Learned Senior Counsel also did not agitate the ground that a remedy for the recovery of moneys arising out a contractual matter cannot be availed of under Article 226 of the Constitution. However, to clear the ground, **it is necessary to postulate that recourse to the jurisdiction under Article 226 of the Constitution is not excluded altogether in a contractual matter. A public law remedy is available for enforcing legal rights subject to well-settled parameters.**

33. A two judge Bench of this Court in ABL International Ltd. v. Export Credit Guarantee Corporation of India [ABL

International] analyzed a long line of precedent of this Court to conclude that writs under Article 226 are maintainable for asserting contractual rights against the state, or its instrumentalities, as defined under Article 12 of the Indian Constitution. Speaking through Justice N Santosh Hegde, the Court held:

“27. ...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.”

This exposition has been followed by this Court, and has been adopted by three judge Bench decisions of this Court in *State of UP v. Sudhir Kumar and Popatrao Vynkatrao Patil v. State of Maharashtra*. The decision in *ABL International*, cautions that the plenary power under Article 226 must be used with circumspection when other remedies have been provided by the contract. But as a statement of principle, the jurisdiction under Article 226 is not excluded in contractual matters.

Article 23.1 of the Development Agreement in the present case mandates the parties to resolve their disputes through an arbitration. However, the presence of an arbitration clause within a contract between a state instrumentality and a private party has not acted as an absolute bar to availing remedies under Article 226. If the



state instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers of the Article 226 of the Constitution would lie. This principle was recognized in *ABL International*:

“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* [(1998) 8 SCC 1] .) 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.” (emphasis supplied).

Therefore, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary

determination requiring a trial. **But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked.** The jurisdiction under Article 226 was rightly invoked by the Single Judge and the Division Bench of the Andhra Pradesh in this case, when the foundational representation of the contract has failed. TSIIC, a state instrumentality, has not just reneged on its contractual obligation, but hoarded the refund of the principal and interest on the consideration that was paid by Unitech over a decade ago. It does not dispute the entitlement of Unitech to the refund of its principal.

**10. The Apex Court in the judgement dated 14.08.2015 reported in (2015) 9 SCC 433 in State of Kerala & Others Vs. M.K. Jose at Para Nos. 16 and 17 observed as follows :**

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: -

"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 added]

**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 \(supra\)](#) and [Century Spg. And Mfg. Co. Ltd. v. Ulhasnagar Municipal Council](#), has held thus:-**

“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: -

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](#)[11].) **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".**

**11. Taking into consideration the entire material on record, referred to at sub para D of para No.3 of the present judgment, this Court opines that the pleas put-forth by the Respondent Nos.1 to 3 in the counter affidavit are untenable and hence rejected. This Court opines that the judgements relied upon by the learned counsel**

appearing on behalf of Respondent Nos.2 and 3, do not apply to the facts of the present case.

12. Taking into consideration :

i) Section 70 of the Contract Act, 1872 which clearly stipulates that where a person lawfully does anything for another person for a sum, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect thereof,

ii) The aforesaid facts and circumstances of the case,

iii) Duly considering the entire material on record which is clearly in favour of the Petitioner as discussed at Para-D of the present judgment i.e:-

a) Letter dated 17.01.2013 of the Deputy Chief Engineer (Const.) SC Railway which is a work completion certificate, certifying that the Petitioner had completed the work in all aspects.

b) Letter dated 30.03.2011 secured by the Petitioner under the RTI Act and a bare perusal of the same indicates that the 1<sup>st</sup> Respondent accepted the value of the extra work through a correspondence dated 30.03.2011.

**c) The 2<sup>nd</sup> Respondent had intimated constitution of Pre-Arbitration Committee to the Petitioner through letter dated 17.10.2013.**

**d) The recommendations of the Pre-Arbitration Committee dated 09.01.2014 in favour of the Petitioner.**

**e) The Legal Opinion dated 27.01.2014 and 05.08.2014, with observations in favour of the Petitioner.**

**f) The approval dated 30.03.2011 of the competent authority in favour of the Petitioner.**

**iv) The view and the observations of the Apex Court in following judgments (referred to and extracted above),**

**a) Unitech Ltd., & Others Vs. Telangana State Industrial Infrastructure Corporation (TSIIC) & Others, reported in 2021 (2) ALT (SC) 149 in Civil Appeal No.317 of 2021, dated 17.02.2021.**

**b) State of Kerala & Others Vs. M.K. Jose reported in (2015) 9 SCC 433, dated 14.08.2015.**

**c) M/s. Radhakrishnan Industries Vs. State of Himachal Pradesh reported in (2021) 6 SCC 771, dated 20.04.2021.**

**d) Hornbill Consultant Vs. State of Punjab & Others reported in 2023 SCC Online SC 214, dated 02.03.2023**

**v) The averments made in the counter affidavit filed on behalf of the Respondent Nos.1 to 3,**

**vi) Duly considering the submissions made by all the learned counsel on record,**

**The Writ Petition is allowed and the Respondent Nos.1 to 3 are directed to consider the representation of the Petitioner dated 04.11.2014 for release of the Petitioner's amounts due and payable to the Petitioner as recommended by the Pre-Arbitration Committee vide its recommendations dated 09.01.2014 in relation to Claims 2 and 4 in respect of completed work under agreement No.46/CAO/C/SC/2010, dated 15.09.2010 as approved by the competent authority i.e., the 2<sup>nd</sup> Respondent herein vide approval dated 30.03.2011 within a period of four (04) weeks from the date of receipt of the copy of the order in accordance to law, in conformity with principles of natural justice by providing a reasonable opportunity of personal hearing to the petitioner and duly communicate the decision on petitioner's representation, dated**



**04.11.2024 to the petitioner. However, there shall be no order as to costs.**

Miscellaneous petitions, if any, pending in this Writ Petition, shall stand closed.

---

**MRS. JUSTICE SUREPALLI NANDA**

Date: 03.06.2024

**Note:** L.R.Copy to be marked  
(B/o) yvkr/*ktm*