IN THE HIGH COURT OF MANIPUR
AT IMPHAL

W.A. No. 17 of 2019

Niraj Cement Structurals Ltd. in Joint Venture with M/S Manipur Tribal Development Corporation Ltd. (M/s NCSL-MTDCL(JV), Lamphelpat Imphal West, Manipur-795004 through its authorized signatory Shri Ngangbam Robert Singh, aged about 45 years, S/o (L) Ng. Meghachandra Singh of Singjamei Chingamathak Imphal West, Manipur-795001.

……. *Appellant*

- Versus –

1. Union of India represented by the Secretary, Ministry of External Affairs, Government of India, Jawaharlal Nehru Bhawan, New Delhi-110 001.
2. The Joint Secretary (DPA-III)
   Ministry of External Affairs, Room No. 3113, Jawaharlal Nehru Bhawan, New Delhi- 110 001.
3. Ircon Infrastructure & Service Ltd., through the Chief Executive Officer(CEO), C-4, District Center, Saket, P.O. & P.S. Saket, New Delhi – 110 017.
4. The Joint General Manager, Ircon Infrastructure & Service Ltd., C-4, District Center, Saket, P.O. & P.S. Saket, New Delhi-110 017.

…. *Respondents*

BEFORE
HON'BLE THE CHIEF JUSTICE MR. RAMALINGAM SUDHAKAR
HON'BLE MR. JUSTICE LANUSUNGKUM JAMIR

For the appellant	:	Mr. H.S. Paonam, Sr. Advocate. Mr. A. Arunkumar, Advocate
For respondent Nos. 1 & 2	:	Ms. Madhavi Divan, ASG Mr. S. Suresh, ASG;
For respondent Nos. 3 & 4	:	Mr. Abir Phukan, Advocate; Mr. I. Denning, Advocate.
Date of hearing	**:**	25.04.2019, 11.06.2019, 08.07.2019, 16.07.2019, 22.07.2019, 01.08.2019, 06.08.2019, 27.08.2019, 12.11.2019, 18.11.2019, 26.11.2019 04.12.2019, 16.12.2019, 17.12.2019, 20.01.2020, 21.01.2020, 27.01.2020, 28.01.2020, 03.02.2020,04.02.2020 05.02.2020, 12.02.2020, 02.3.2020, 03.03.2020. 14.08.2020 and 17.08.2020
Date of Order	**:**	**20.08.2020**

ORDER (CAV)

Ramalingam Sudhakar, CJ

"69 BRIDGES TO MYANMAR"

"THE DPR IS TECHNICALLY DEFECTIVE AND NOT VIABLE TO BUILD ONE BRIDGE. LEAVE ALONE 69. GIVE ME A CHANCE TO BUILD AFTER COURSE CORRECTION," PLEADS THE APPELLANT.

"IN THE IMPLEMENTATION OF A TRILATERAL HIGHWAY IN MYANMAR, THE BILATERAL CONTRACT HAS BECOME FUTILE AS THE APPELLANT WHO COULD NOT BEND ONE BRIDGE, CANNOT BE ENTRUSTED WITH BUILDING 69 BRIDGES," SAY THE RESPONDENTS.

"THE BRIDGE TO MYANMAR IS NOW A BRIDGE TOO LONG AND A BRIDGE TOO FAR AND TO WAIT ANY LONGER, WILL UNTIE THE TREATY," PLEADS THE UNION OF INDIA.

[1] The appellant Contractor invokes Article 226 of the Constitution of India pleading that the action of the respondent No. 1 & 2 to terminate the contract is arbitrary and contrary to the mandatory provisions of the Article of the Engineering Procurement and Construction (EPC, in short) Agreement dated 08.11.2017, namely, Article 23.1.2. The appellant also pleads that the Detailed Project Report (DPR, in short) is unworkable, making an emphatic allegation of inexactitude that is after the agreement is signed and the work had started. The appellant pleads that the respondents are at fault and the termination of contract is an attempt to cover up the inherent error in the Detailed Project Report (DPR)/ feasibility report. Respondents, on the other hand, specifically pleaded that the writ petition is not maintainable, it is an abuse of process of court, further the termination notice is perfectly in order

as per Article 23.1.2 of the Agreement. Further no cause of action has been pleaded in the writ petition and interim order was obtained by suppression of facts. Since no cause of action arose within the jurisdiction of this Court, the learned Single Judge was correct in dismissing the writ petition.

[2] In this case, the appeal was filed on 04.04.2019 and taken up for hearing on several dates. Thereafter, both the appellant's counsel and the respondents' counsel have been taking substantial time to argue the case. The last hearing was on 03.03.2020. Since it is a commercial litigation and at their instance, the Court gave enough leeway to either side to put forth their arguments. Finally, the arguments got almost concluded but due to COVID-19 pandemic, the all India lockdown came into force and the Bar categorically stated in writing that they do not want listing of regular old cases during this period and that only urgent motion cases should be taken up. However, on the direction of the Hon'ble Supreme Court, the respective counsels completed their argument on 14.8.2020 and 17.08.2020.

[3] On the various dates of hearing, Mr. H.S. Paonam, learned senior counsel assisted by Mr. A. Arunkumar appeared for the appellant, Ms Madhavi Divan, learned ASG assisted by Mr. S. Suresh, learned ASG appeared for respondent No. 1 & 2 and Mr. Abir Phukan and Mr. Irom Dening learned counsel appeared for respondent No. 3 & 4.

[4] In the course of hearing, it became evident that the writ petition was filed with limited number of documents to cut down the volume, they are Annexure-A/1 to A/15. The respondent No. 1 to 4 in their affidavit-in-opposition dated 14.01.2019 filed many documents omitted to be filed by writ petitioner, as Annexure– R/1 to R/17. In the rejoinder affidavit dated

30.01.2019, the writ petitioner filed two documents, Annexure-B/1 and B/2. An additional affidavit was filed by the writ petitioner dated 06.03.2019 enclosing new documents, Annexure-X1 and X2. These two documents are e-mails said to have been received by the writ petitioner.

In the writ appeal after several hearings, further documents were filed by both appellant and the respondents.

The following documents were filed on 02.03.2020 by respondents No.1 and 2 through Mr.S.Suresh, learned ASG. (1) Engineering Procurement and Construction (EPC) Agreement dated 08.11.2017(Volume-I), (2) Technical Bid(Volume-II), (3) Plan & Profile, General Arrangement Drawings (Volume-III) & (4) Environment Management Plan (EMP) (Enclosure to Addendum No. 02) (Volume-IV).

Similarly, Mr. H.S. Paonam, learned senior counsel for the appellant has submitted 'Compilation-A' (Annexure II of Schedule A of EPC Agreement) and 'Compilation-B' (Annexure III Schedule A of EPC Agreement) on 02.03.2020 only. Since a number of documents were filed on different occasions before the writ Court and were annexed loosely in the writ appeal in a disjointed manner at different pages without chronology and without a proper typed set, it caused great difficulty for the Court to proceed in the matter. Besides, most of the documents filed by the Appellant were found to be smudged and unreadable photocopies of the original documents. Some of them were incomplete. There was no cogency, consistency, clarity or legibility to marshal facts. Therefore, in the course of appeal, on 12.02.2020, the Court was constrained to issue direction that documents relied by either side should be re-set and filed as per chronology and clear

copies should be placed and by way of a typed set. Accordingly, the documents relied upon by the appellants and respondents before the writ Court were filed by way of a new comprehensive typed set by the appellant on 02.03.2020. On the basis of these documents, further hearing was taken up. It is also to be stated that respondents further pleaded that even in the new typed set, some documents are omitted.

[5] For the record, at the time of taking up the appeal on 25.04.2019, Mr. Abir Phukan, learned counsel appearing for the respondents sought for time till 09.05.2019 to file his objection to the interim relief sought for by the appellant by way of a reply affidavit. In the meanwhile, the respondents undertook to keep the matter in abeyance. That undertaking was not extended beyond a period as could be seen from the Court proceedings. An affidavit was filed by respondent No. 3 on 08.05.2019 in the appeal along with documents (R/3/1, R/3/2, R/3/3, R/3/4 & R/3/5). To this, the appellant filed rejoinder affidavit dated 03.06.2019. Thereafter, in the appeal, a reply affidavit dated 30.05.2019 was filed by respondent No. 1 & 2 along with documents E/1, E/2 &E/3 collectively, to which the appellant filed rejoinder reply affidavit dated 04.06.2019 along with Annexure-M1. Written submission on behalf of respondent No. 3 was filed earlier on 30.01.2020, Respondent No. 1 & 2 have taken time to file a written submission but they have not filed it so far, however, arguments have been addressed on all aspects. Hence, decision can be rendered without any further delay. In any event, final arguments were addressed by Ms Madhavi Divan, learned ASG along with Mr. S.Suresh, learned ASG for respondent Nos. 1 and 2 and Mr. Abir Phukan, learned counsel for the respondent No.3 and 4. Mr. H.S. Paonam, learned senior counsel appears for the appellant.

PRELUDE

[6] The advent of “perestroika”, eased the cold war status amongst nations and the principle of “glasnost” (openness) created a good ambience for international trade and related activities between various countries across the continents. The World Trade Organization gave an impetus to international trade by making member countries to agree upon removing the restrictions on imports and exports in respect of innumerable articles and commodities. A large number of articles, goods classified under the Harmonized System Of Nomenclature (HSN) were brought under Open General License (OGL). This resulted in active trade in commodities by way of import and export between member nations and fuelled the great change called ‘globalization’ and ‘liberalization’. This became a mantra for growth and development of many nations big and small.

In a related development, India opened its rural prowess and brought it to the mainstream with the creation of golden quadrilateral road connectivity and it has improved to a very great extent over this period of time. This further improved the movement of goods from one State to another. Farm produce reached value based market and it paved way for decentralization of industries. As a result, production increased, employment increased and it fuelled export and import by land, sea and air. The need to connect neighboring countries by road transport service so that movement of goods can be accelerated in a cost effective manner was visualized. To further this purpose, India undertook collaboration with neighboring countries

for maintaining and developing friendly and good neighbourly relationship and as a result, the Government of India signed the MOU on 29.08.2016 with the Republic of the Union of Myanmar for construction /upgradation of 69 bridges in the trilateral highway between **India, Myanmar and Thailand**. It required construction of 69 bridges with approach road **on Tamu-Kyigone-Kalewa Road (TKK)** for short. In February, 2014, the MS/ Ircon Infrastructure, respondent No. 3 a subsidiary of Ircon Limited was entrusted the work of preparing the feasibility report/Detailed Project Report and in December 2015, the respondent No. 3 was appointed as a Project Management Consultant (PMC) of this project. It is this project, which is the subject matter of the present litigation.

BRIEF FACTS OF THE CASE

[7] On the basis of a revised set of documents submitted on 02.03.2020, which is a compilation of documents submitted both by the appellant and the respondents, the documents will be identified as follows :- (Annexure-A, B & X) relates to appellant/ writ petitioner, Annexure-R series relates to respondents and new page number(s) are taken as reflected in the revised paper book dated 02.03.2020)

(i) 03.04.2017 (Annexure-A/1 to the writ petition, Page 1) :

- Notice inviting bid, NIT was floated inviting bid for construction of 69 bridges including approach roads as mentioned above under the Engineering, Procurement & Construction (EPC) mode. The entire NIT was uploaded on the website and intending bidders have to download and submit the same online. No other means was permitted.

(ii) 16.10.2017 (Annexure-X/1 to the Additional Affidavit of the petitioner, Page 2) :

- Letter of Acceptance (e-mail) was issued on the basis of bid submitted by e-mail. However, Annexure-A/2 to the writ petition is the original Letter of Acceptance (LOA) issued to Joint Venture Company, Niraj House Mumbai, Page 160 (Part II) of the Writ Appeal.

(iii) 08.11.2017 [Annexure-A/3 to the writ petition, Part-II of writ appeal wrongly stated as A/2 in new typed set, Page of 3-14) :

- Agreement was signed between the President of India through Ministry of External Affairs, India and M/s NCSL-MTDL JV [M/s. Niraj Cement Structurals Ltd. in JV with M/s. Manipur Tribal Development Corporation Ltd.] This was signed by M. Subbaraydu, Joint Secretary (DPA-III), Ministry of External Affairs and Mr. Athokpam Devendro Singh as authorized signatory of M/s NCSL-MTDL JV, Niraj House, Sunder Baug, Mumbai. and countersigned by authorized signatory of Ircon Infrastructures & Services Limited also showing Mumbai address.

(iv) 07.12.2017 (Annexure-R/13/2 of affidavit-in-opposition, Page 15-24) :

- review meeting was held in New Delhi.

(v) 28.03.2018 (Annexure-R/13/2 of affidavit-in-opposition, page 25-28) :

- review meeting was held in New Delhi.

(vi) 06.04.2018 (Annexure-A/10 of Writ Petition, page 29) :

- Mr. Manoj Agarwal has been deputed as Team Leader.

(vii) 10.04.2018 (Annexure-R/13/2 of affidavit-in-opposition, page 30-37):

- Minutes of Review Meeting No. 4 held at Tamu was communicated to the contractor.

(viii) 16.04.2018 (Annexure-R-13/2 of the affidavit-in-opposition, page 38-45):

- Minutes of Review Meeting No. 5 held at Tamu was communicated to the contractor.

(ix) 25.04.2018 (Annexure-R-13/1 of affidavit-in-opposition, page 46-48):

- Statement regarding availability of High Flood Level (HFL) Data with contractor since 25.04.2018.

(x) 26.04.2018 (Annexure/R/13/2 of affidavit-in-opposition, page 49-55) :

- Review Meeting was held at Embassy of India in Yangoon.

(xi) 28.04.2018 (Annexure/R/13/1 of affidavit-in-opposition, page 56-60) :

- The minutes of meeting No. 6 held at MOC office-Tamu and site.

(xii) 02.05.2018 (Annexure R/13/2 of affidavit-in-opposition, page 61-64):

- The minutes of Meeting No. 7 held at MOC office at Kalay.

(xiii) 11.05.2018 (Annexure R/5 of affidavit-in-opposition, page 65-84):

- First Show Cause Notice for termination of contract contending:
  - (a) non-availability of lead members
  - (b) non-submission of work programme as per clause 10.1.3 of EPC Agreement.
  - (c) Non-technical works of Diversion Roads
  - (d)&(e) Delay in submission of designs and drawings and other works – negligible progress
  - (f) Non-Submission of Quality Assurance Plan
  - (g) Non-Submission of Monthly Progress Report.
  - (h)Not Obtaining Applicable permit and registration of contractor in Myanmar.
  - (i) & (j) Slow mobilization of Manpower & Equipment
  - (k) Non-procurement of Insurance of Project

(l) Default of delay in appointment of Design Director and procurement of professional liability insurance.

(m) Non-sitting of Site laboratory

(n) Non-setting up/delay in establishing EPCC Camps.

(o) No Progress of Works

(p) No. action taken by Contractor inspite of repeated reminders for Termination.

(q) Non availability of funds / delay in applying for mobilization advance.

All these were supported by documents and Review Meeting letters etc. This show cause notice was issued to the appellant address at Niraj House, Sunder Baug, Near Deoner Bus Depo, Chembur, Mumbai.

(xiv) 21.05.2018 (Annexure –A/4 of the writ petition, page 85):

- The Contractor/appellant informed the Team Leader TKK Project about the inability to locate GPS pillars.

(xv) 25.05.2018 (Annexure –R/12 of affidavit-in-opposition, Page 86-89 filed as B/2 in the rejoinder affidavit of writ petition dated 30.01.2019):

- A comprehensive reply to the letter dated 21.05.2018 of the petitioner, along with technical article on accuracy of GPS and manner in which it should be approached.

(xvi) 28.05.2018 (Annexure-R/13/8 of affidavit-in-opposition, page 100-101):

- It is filed by respondents requesting inspection for sub soil investigation.

(xvii) 18.06.2018 (Annexure-R/6 of affidavit-in-opposition, page 102-105):

- The Notice granting 15 days time to the contractor/appellant/writ petitioner to make representation in terms of Clause No. 23.1.2 of EPC Agreement to show cause as to why the authorities should not

proceed to terminate the agreement in issue for construction of 69 bridges. This was issued to the appellant's address, Niraj House, Sunder Baug, Near Deoner Bus Depot, Chembur, at Mumbai. In it, Annexure-A is the Summary of Defaults made by the contractor in breach of the contract.

(xviii) On 25.06.2018 (Annexure-R/7 of affidavit-in-opposition, page 106-109):

- Review Meeting was held at New Delhi and recorded that the Review Meeting is without prejudice to the course of action to be deciding following the end of Termination Notice period of 15 days and the appellant was asked to submit reply to the Termination Notice.

(xix) 28.06.2018 (Annexure-R/13/9 of affidavit-in-opposition, page 110-113):

- The request for investigation of Bridge No. 2.

(xx) 10.07.2018 (Annexure-R/13/10 of affidavit-in-opposition, page 114-117):

- The request for inspection of subsoil investigation at Bridge No. 1

(xxi) 02.07.2018 (Annexure-B/1 to the rejoinder affidavit, page 118-122):

- Reply of the appellant/contractor to the Show Cause Notice dated 18.06.2018 [filed as Annexure-R/6 of the affidavit-in-opposition (Sl. No. xvii of this list)].

(xxii) 02.07.2018 (Annexure-R/13/5 of affidavit-in-opposition, Page 123-126):

- Letter of the appellant contractor informing that two separate agencies have been deployed on the same sector to fix anomalies in coordinates of control station.

(xxiii) 09.07.2018 (Annexure-R/15 of affidavit-in-opposition, page 127-133):

- Letter of the appellant contractor submitting 3(three)months plan.

(xxiv) 21.07.2018 (Annexure-R/13/6 of affidavit-in-opposition, page 134-135):

- Letter of AE informing that two more reference pillars were found intact.

(xxv) 11.08.2018 (Annexure-R/13/2 of affidavit-in-opposition, page 148-150):

- The minutes of Meeting No. 8.

(xxvi) 12.08.2018 (Annexure-R/13/2 of affidavit-in-opposition, page 151-153):

- The minutes of Meeting No. 9.

(xxvii) 10.10.2018 (Annexure-R/14 of affidavit-in-opposition, page 154-159): The status of work site as on 10.10.2018. Thereafter, there are some documents which is relevant to work site, which may not be relevant at the present, however, this documents were submitted by respondents, namely, (Annexure-R/14 of affidavit-in-opposition)

(xxviii) 02.11.2018 (Annexure-R/8 of affidavit-in-opposition, Page No. 183-198):

- The Show Cause why action should not be taken against the contractor including termination of contract for various default identified at serial No. (i)-(xvi) invoking clause 23.1.1 (A)(D)(E)(H)(J)(P)(Q) & (R) of the contract agreement. This document was filed by respondent and not by the petitioner.

(xxix) 23.11.2018 (Annexure-A/7 of writ petition, page 215-219):

- The reply to the show cause notice dated 02.11.2018.

In between, certain technical discussions/interactions and status of work namely, (Annexure-R/14) Page 207-213, Annexure-A/5 page 214). These are taken as matters of record which can be considered at appropriate stage if necessary.

(xxx) 26.11.2018 (Annexure-R/14 of affidavit-in-opposition, Page 220-229):

- The status of work on site as on 26.11.2018.

(xxxi) 26.11.2018 (Annexure-R/9 of affidavit-in-opposition, Page 230-234):

- The show cause notice granting 15 days time to make representation. "Summary of defaults made by the contractor in contract" is annexed as Annexure-A.

(xxxii) 11.12.2018 (Annexure-A/9 of writ petition, page 235-249):

- The reply to the show cause notice dated 26.11.2018 (Annexure-R/9).

(xxxiii) 17.12.2018 (Annexure-R/13/3 of affidavit-in-opposition Page 267-274):

- The detailed counter of reply by the respondent No. 3 to the contractor's stand taken in his reply dated 23.11.2018 (Anexure-A/7, page 215-219). This relates to the Show Cause Notice dated 02.11.2018 [(Annexure-R/8 of the Affidavit-in-opposition), Sl. No. (xxviii)]

(xxxiv) 21.12.2018 (Annexure-A/13 of the writ petition, page 277-278):

- The request by the Petitioner for encashment of Bank Guarantee .

(xxxv) 24.12.2018 (Annexure A/14 of the writ petition, page 279-290) :

Termination notice i.e., the termination of contract in terms of Article 23.1.2. of the Contract. (Addressed to *Niraj House, Sunder Baug, Near Deoner Bus Depot, Chembur, Mumbia-400088, Maharashtra, India*)

(xxxvi) 24.12.2018 (Annexure-X2 of the additional affidavit, page 291):

- The termination letter e-mailed to Contractor's address at Imphal.

[8] The two letters of the respondents dated 21.12.2018(Annexure-A/13), and 24.12.2018(Annexure-A/14), which are the subject matter of challenge in the writ petition being W.P. (C) No. 1219 of 2018, and it is pleaded as the cause for this litigation.

[A] Letter dated 21.12.2018: - ENCASHMENT OF BANK GUARANTEE

The encashment of Bank Guarantee has been made. Hence, the said letter is not reflected.

[B] Letter dated 24.12.2018:- TERMINATION OF CONTRACT(IMPUGNED)

- Annexure-A/14 of Writ Petition- page 279 & 280 of new typed set.

DPA-III/122/01/2018 *24 December, 2018*
M/s NCSL-MTDCL (JV)
[Mr. Niraj Cement Structurals Ltd. In Joint Venture with
M/s Manipur Tribal Development Corporation Ltd.]
Niraj House, Sunder Baug, Near Deoner Bus Depot, Chembur,
Mumbia-400088, Maharashtra, India.
Attn: Mr. Gulshan Chopra, Lead Member/Authorized Signatory

Sub: Constructions of 69 Bridges along with Approach Roads on the Tamu-Kyigone-Kalewa road Section from Km. 0.000 to Km. 149.700 of Trilateral Highway in Myanmar – Termination of Contract.

Ref: (i) EPC Contract Agreement dated 08 November 2017 between Ministry of External Affairs & M/s NCSL-MTDCL JV.

(ii) AE letter no. IrconISL/1019/MEA/TKK/2005 dated 02.11.2018

(iii) Contractor's letter no. NCSL/MTDC JV/TKK/Myanmar/101 dated 23.11.2018 (Received on 27.11.2018)

(iv) Authority letter no DPA-III/122/01/2018 dated 26.11.2018

(v) Contractor's letter no. Nil dated 11.12.2018

(vi) AE letter no. IrconISL/1019/MEA/TKK/2231 dated 20.12.2018

Sir,

With reference to above captioned priority Government of India's project in Myanmar, fifteen (15) days notice for termination of contract was served to Contractor vide this office letter no. DPA-III/122/01/2018 dated 26 November 2018 pursuant to Contractor's repeated failures since signing of EPC Agreement on 08 November 2017.

2. After reviewing the facts stated in show cause notice issued by Authority's Engineer, 15 days termination notice issued by Authority, your replies and response of Authority's Engineer there upon (enclosed) and all the facts, the Authority has decided to terminate the EPC Contract for the construction of 69 Bridges along with approach roads on the Tamu-Kyigone-Kalewa road Section from Km. 0.000 to Km. 149.700 of Trilateral Highway in Myanmar.

3. As already intimated to you, even after expiry of over 12 months period from date of commencement of works (Appointed Date), the progress of works is 'Nil' till date. You have inter alia, failed to mobilize fully at site, pre construction activities have not been completed, designs & drawings complying with the requirements of Contract has not been submitted and despite continuous and close monitoring & reviewing by all stakeholders, you have failed to cure the defaults/failures within the cure period. You have failed to achieve Project Milestone-I and II, as well as failed to proceed in accordance with clause 10.1 of the contract. Further, you have failed to ensure availability of Lead member as per contract, to execute the diversion works, not registering the JV in Myanmar in the correct JV share as per contract, stating incorrect JV share as per agreement, been slow to mobilise requisite manpower and equipment and delayed setting up of camps.

4. The numerous defaults and failures with respect to this contract have been informed to you on multiple occasions and ample opportunity has been

given to correct the defaults and put the project implementation back on track. Despite it and despite repetated reminders and notices, no progress of works and no satisfactory action have been taken by you. You have even failed to adhere to your submitted schedules or plans. Resultantly, owing to your continuous failures, this project of great public and international importance for the country taken up pursuant to a bilateral commitment of the Government of India to Government of Myanmar has been adversely affected.

5. In view of the above, please take notice that the contract stands terminated in terms of clause no. 23.1.2 thereof. Be informed that the balance works under the contract shall now be carried out independently without your participation and at your risk and cost. You as well as every member of JV individually or as a partnership firm/JV shall be debarred from participation in the tender process for executing the balance works. The performance security submitted by you shall also be encashed and the amount shall stand forfeited.

Yours sincerely

Sd/-

(Namgya Khampa)

Encls: Response of Authority's Engineer to Authority (MEA) No. IrconISL/ 1019 / MEA/TKK/2231 dated 20 December, 2018

[Enclosure to Annexure-R/14 of the Writ Petition

Page 281-290 (10 Pages) – list of defects:]

[Pages : 281-290

of New Typed set]

[9] Challenging the above communications, the appellant/petitioner rushed to this Court for the following reliefs :

> *"ii) issue a writ of certiorari for quashing and setting aside the impugned termination letter dt. 24-12-2018 (Annexure-A/14) and letter dt. 21-12-2018 (Annexure-A/13).*
>
> *iii) direct the respondent No. 1 to cause investigation into the practical viability of the DPR prepared by respondent No. 3 for execution of the project and fix responsibility;*
>
> *iv) in the interim, stay or suspend the operation of the impugned termination letter dt. 24-12-2018 (Annexure-A/14) and letter dt. 21-12-2018 (Annexure-A/13)."*

[10] In the writ petition, notice to the respondents was ordered and an interim order was passed. The respondents *inter alia* raised a preliminary objection on the maintainability of the writ petition filed before the High Court of

Manipur stating that it is contrary to the terms of the EPC agreement signed between the appellant/petitioner and the respondent authorities. Suppression of facts was also pleaded. In this regard, an affidavit of objection dated 14.01.2019 was filed by respondent No. 1, 2, 3 & 4. The relevant Articles of the Agreement which has been highlighted by the respondents to challenge the writ petition on maintainability along with the legal and factual plea has been summarized by the Single Judge in paragraph 4 of the judgment & order dated 29.03.2019 which reads as follows:-

> "[4] An affidavit-in-opposition on behalf of respondents was filed raising a preliminary objection as regards the maintainability of the writ petition praying that the writ petition should not be entertained by this Court and that it should be quashed as per the EPC agreement signed between the authority and the petitioner. As seen from the affidavit, there are three main grounds on the basis of which the issue of maintainability was raised by them. Firstly, the Hon'ble Courts in Delhi have got the exclusive jurisdiction to adjudicate the issue involved herein as per article 27.1 of the Contract Agreement and in view of the said article, this Court is not the appropriate court having the territorial jurisdiction to entertain the writ petition. Article 27.1 reads as under;
>
> > **"27.1.** This agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the Courts at Delhi shall have exclusive jurisdiction over matters arising out of or relating to this Agreement."
>
> Secondly, it is settled law that the disputes relating to the contract and its terms, cannot be agitated in a writ petition. This court is not the appropriate forum to adjudicate commercial disputes. Moreover, there exist an arbitration clause/ provision in the agreement for adjudication of the dispute. Thus, the Petitioner has got an alternate and efficacious remedy as per Article 26 of the EPC agreement. Since the petitioner has got efficacious remedy under Arbitration and Conciliation Act 1996, no injunction can be granted under Section 41(h) of the Specific Relief Act, 1963. The relevant clauses read as under.
>
> **"26.3.1** Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2 shall be finally decided by reference to arbitration in accordance with the rules of arbitration of the SOCIETY FOR AFFORDABLE REDRESSAL OF DISPUTES (SAROD).
>
> **26.3.3** The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 26 shall be final and binding on the Parties as from the date it is made, and the Contractor and the Authority agree and undertake to carry such Award without delay.
>
> **26.3.4** The Contractor and the Authority agree that an Award may be enforced against the Contractor and/or the Authority; as the case may be, and their respective assets whatever situated."
>
> Thirdly, no relief as prayed for by the petitioner in its writ petition can be granted under Section 14 read with Section 20 A of the Specific Relief

Act, 1963. Section 14 and 20 A of the Specific Relief Act, 1963 reads as under:

> **"Section 14 of the Specific Relief Act, 1963**
>
> Contracts not Specifically Enforceable-The following contracts cannot be specifically enforced namely:-
>
> **(a)** Where a party to the contract has obtained substituted performance of the contract in accordance with the provisions of Section 20.
>
> **(b)** A contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;
>
> **(c)** A contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and
>
> **(d)** A contract which is in its nature determinable.
>
> ***"Section 20A of the Specific Relief Act, 1963***
>
> ***Specific provisions for contract relating to infrastructure project-***
>
> *(1) No injunction shall be granted by a court in a suit under this Act involving a contract relating to an infrastructure project specified in the schedule, where granting injunction would cause impediment or delay in the progress or completion of such infrastructure project.*
>
> ***Explanation:-** for the purpose of this section and section 20-B and clause (ha) of section 41, the expression "infrastructure project" means the category of projects and infrastructure sub-sectors specified in the Schedule."*

[11] In response to respondents' affidavit-in-opposition dated 14.01.2019, the petitioner filed a rejoinder affidavit on 30.01.2019. Para 4 of the writ petitioner's rejoinder affidavit which is relevant for this case reads as follows :

> *"4. That, with reference to para 2 of the affidavit-in-opposition, deponent submits that **even though Court at Delhi had exclusive jurisdiction over matters arising out of or relating to the Agreement, deponent was compelled to approach the Hon'ble High Court of Manipur as the impugned termination letter dt. 24-12-2018 and letter dt-21-12-2018 was issued during the vacation of the Delhi High Court in malafide and there was a vacation Bench of this Court on 28-12-2018 considering the urgency for restraining the respondents from giving effect to the impugned termination letter which has violated valuable fundamental and other Constitutional rights of the deponent**, the above referred writ petition was filed invoking extra ordinary jurisdiction of this Hon'ble Court under Article 226 of the Constitution of India. Further, it is stated that the Constitution of India is Suprema Lex. The jurisdiction of the Constitution of India is sacrosanct. It is an extra ordinary jurisdiction. This jurisdiction under Article 226 of the constitution of India cannot be circumvented by an agreement or by any statute overriding the Constitutional provision. The Courts referred in the Agreement would apply to civil courts or tribunals exercising jurisdiction provided by Statute and would not extend to*

Constitutional remedy. Even statute cannot abrogate the jurisdiction of this Court under Article 226 of the Constitution of India, much less an agreement by the parties."

(emphasis supplied)

[12] Thereafter, the writ petitioner filed an additional affidavit dated 06.03.2019. This was filed in view of the specific objection taken in the reply affidavit dated 14.01.2019 filed by respondent No. 1, 2, 3 & 4 on maintainability of the writ petition and on merits as well, pleading that no cause of action arose within the jurisdiction of this Court.

Para Nos. 2, 3, 4, 5 & 6 of the additional affidavit of the appellant/petitioner dated 06/03/2019 read as follows:-

*"2. That, deponent begs to state that **letter of acceptance for award of contract in question was received by the petitioner via e-mail at the office of the Manipur Tribal Development Corporation Ltd**. Merely because the Government of India has issued the termination letter dated 24.12.2018 at Delhi would not ipso facto give territorial jurisdiction to Delhi Court although this letter has not been communicated to the petitioner at Delhi and has in fact been communicated to the petitioner at MTDC Office at Imphal.*

Annexure-X1 and X/2 are the true and correct copy of the letter of Acceptance and E-mail receipt about the communication of the termination order,

*3. That, the Hon'ble Supreme Court in a catena of cases has held that unless and until an order is communicated to a person, the order does not culminate into an executable order and that the decision becomes the decision only when it is communicated to the concerned person. A cause of action in law means that an enforceable right in law accrues. When a right accrues simultaneously a liability also arises against a person. If an enforceable right arises only on communication of the order, then, **a cause of action arises and is complete only when the communication of the order to the person concerned is complete. Therefore, in the present case, the cause of action arose at Imphal when the termination letter dt. 24-12-2018 was received at Imphal**.*

*4. That, it is also a fact that **one part of the Bridge No. 1 of the contract falls in the State of Manipur and as such, some part of cause of action can be said to have arisen in the State of Manipur. Therefore, since the termination of the contract also included the Bridge No. 1, the termination can be challenged in Imphal.***

5. That, it is stated that the Bank guarantee for performance of contract in question was also furnished in the Punjab National Bank,

Thangal Bazar, Imphal. ***Therefore, the petition challenging the termination order and the letter for withdrawal or encashment of the BG issued by the Bank from Imphal is maintainable before the Hon'ble High Court of Manipur.*** *Moreover, all the activities including all communications are made from Imphal and no part of the execution of the contract is done at Delhi or Mumbai, therefore, Hon'ble High Court of Manipur has jurisdiction to entertain the writ jurisdiction.*

6. That, it is also a fact that the petitioner is a Joint Venture and Manipur Tribal Development Corporation Ltd. Has 30% of the share. ***All the works relating to the execution of the contract are mainly performed from the office of the MTDC Ltd. at Imphal being closer to Myanmar*** *and no work relating to the contract is performed or executed at Delhi or Mumbai and as such, the cause of action arises at Imphal which is well within the territorial jurisdiction of this Hon'ble Court."*

(Emphasis supplied)

This is the writ petitioner's plea on cause of action after the writ petition was taken on file and an interim order granted earlier on 29.12.2019.

[13] In the writ petition, interim protection against the letter seeking encashment of bank guarantee as well as the termination notice dated 24.12.2018 was sought. On 29.12.2018, the termination notice dated 24.12.2018 was suspended and in so far the performance security is concerned, it was ordered that if it was already encashed, the order will have no application in relation to encashment. This interim order of the Single Judge was in force till dismissal of the writ petition.

[14] Since the issue of maintainability of the writ petition was agitated, the Court proceeded on one issue namely, whether cause of action wholly or in part arose within the territorial jurisdiction of this Court.

[15] The learned Single Judge while considering the various plea as above and the scope of Article 226 of the Constitution by referring to various

decisions of the Hon'ble Supreme Court refrained from forming any opinion on the plea of arbitrariness in the termination of the Contract, violation of Article 23.1.2 of the agreement, the provisions of Specific Relief Act, supersession of facts, disputed question of fact, etc. The Court however, rendered a finding only on the respondents' plea of no cause of action and dismissed the writ petition. The learned Single Judge on cause of action ruled as follows:-

> *"[11] On perusal of the decisions relied upon by the counsel appearing for the parties, it is seen that the question whether or not the cause of action wholly or in part has arisen within the territorial limits of any High Court, has to be decided in the light of the nature and character of the proceedings under Article 226 of the Constitution. Cause of action means every fact which is required to be proved by the plaintiff in order to support his right to the judgment. Whether a particular fact constitutes a cause of action or not must be decided on the basis of the facts and circumstances of each case. In order to constitute a part of cause of action, such fact ought to constitute a material, essential or integral part of cause of action. In the present case, it is not in dispute that a tender was floated vide NIT dated 03-04-2017 issued by IRCON, New Delhi for construction of 69 brides, along with approach roads, on Tamu-Kyigone- Kalewa Road in the territory of Myanmar. After the bids being opened, a letter of acceptance dated 16-10-2017 was issued in favour of the petitioner. An EPC was made on 08-11-2017 in New Delhi between the Ministry of External Affairs, Government of India, New Delhi, through its Joint Secretary and the petitioner. The right of way was handed over to the contractor on 10-11-2017 and the commencement date of the project was finalized as 28-11-2017 after submission of requisite performance bank guarantee by the contractor as per terms of the contract. The total period of construction as per the contract is 36 months from the date of commencement. A show cause notice dated 11-05-2018 was served upon the petitioner stating that the requisite steps were not taken by the petitioner to execute the work expeditiously; that there were failures to comply with the conditions and instructions and that there was no recognizable mobilization and planning to meet the contractual obligations. On 21-05-2018, the petitioner wrote a letter informing that there were some mismatching in the topographic survey done for bridge-I and also while conducting the measurements of coordinates. Being not satisfied with the reply, a notice of 15 days dated 18-06-2018 for termination of contract was issued to the petitioner as to why the authority should not proceed to terminate the contract, followed by a meeting held 25-06-2018 whereby the petitioner was required to submit a detailed three months working plan. After the expiry of three months, a cause notice dated 02-11-2018 was served on the petitioner on the allegation that the petitioner failed to comply with the notice/ reminders thereby showing no adequate progress of work and rectification of defaults. A reply dated 23-11-2018 was submitted by the*

petitioner which was received on 27-11-2018 and by then, the respondent had already issued a notice of 15 days dated 26-11-2018 pursuant to contractor's repeated failures. On 21-12-2018 a letter was addressed to the Manager, Punjab National Bank with a request to encash the bank guarantees on the ground that the petitioner has committed default in the due and faithful performance of its obligations under and in accordance with the agreement. The contract was terminated vide letter dated 24-12-2018 issued by the Joint Secretary, Ministry of External Affairs, Government of India. From the aforesaid facts, it is seen that not even a part of cause of action has arisen within the territorial limits of this court. The NIT was issued in Delhi; the agreement was signed in Delhi and the work is to be executed in Myanmar. The offices of the respondents are located in Delhi from where the letters/ notices are sent by the respondents. The mere fact that e-mail is, either sent from or received at Imphal, will not constitute a part of the cause of action because it is neither a material, essential nor an integral part of the cause of action, as has been held by the Hon"ble Supreme Court in ONGC Vs. Utpal Kumar Basu case. In other words, there is no any fact, as contended by the counsel appearing for the petitioner, which can be said to be a material, essential or integral part constituting a part of cause of action. Considering the overall facts and circumstances of the present case, this court is of the view that the instant writ petition is not maintainable for want of jurisdiction of this court and therefore, there is no need of considering the other grounds.

[12] For the reasons stated hereinabove, the instant writ petition is dismissed as not maintainable, with no order as to costs and the interim order granted by this court stands vacated. It is open to the petitioner to approach the appropriate forum for redressal of its grievances in accordance with law."

[16] The interim order granted by the Court was vacated and liberty was granted to the petitioner/appellant to approach the appropriate forum. As a result, the present writ appeal has been filed by the unsuccessful writ petitioner.

In the course of hearing of the appeal, the appellant, inter-alia, pleaded arbitrariness and violation of mandatory provision of Article 23.1.2 as the cause for filing the writ petition and also pleaded part of cause of action arose within the jurisdiction of this Court. The appellant refers to the Article 23.1.2 of the agreement and pleads that its mandatory clause is violated. Once appellant/writ petitioner pitches on one clause/Article of the Agreement, he will be naturally bound by other clauses/Articles of the

Agreement unless he pleads otherwise. It does not appear to be so. Appellant's counsel pointed out errors in the Detailed Project Report-DPR/Feasibility Report, from writ documents and on the basis of documents contained in the reply affidavit of Respondents No. 1 to 4 dated 14.01.2019. They are annexure R/1 to R/17.

The respondents while primarily pleading on the preliminary objection and maintainability of the writ petition referred to the various Articles of the Agreement, documents like review meetings, show cause notices, etc. to state that there was no arbitrariness in the respondents' approach in so far termination is concerned. It was specifically pleaded in para No.28 of the reply affidavit that there is no breach of Article 23.1.2. The repeated and series of correspondences were highlighted to show that Appellant did not show any progress and therefore, several show cause notices were issued and despite reply and undertaking to start work, no progress was shown or made. Finally, respondents were forced to take a call for termination. In the light of the pleadings submitted both on preliminary issue and on the merits, we are inclined to address all the issue appropriately and render a decision peremptorily as indicated by the Hon'ble Supreme Court.

[17] We shall first address the issue raised by the appellant /writ petitioner when he approached the writ court for the relief of setting aside the impugned order dated 24.12.2018 (Annexure-A/14) of the writ petition.

[18] The appellant /writ petitioner who was awarded the contract for construction of 69 Bridges including the approach roads on the **Tamu-Kyigone-Kalewa Road (TKK)** for short, suffered termination of the contract

by impugned proceeding dated 24.11.2018 (Annexure-A/14). According to the writ petitioner, it is contrary to Article 23.1.2 of the agreement dated 08.11.2017 (Annexure-A/3, Page 3-14 in the new typed set). Article 23 relating to termination becomes very relevant and appropriate because the appellant / writ petitioner invokes this clause of the Agreement to challenge the action of the respondents in the termination of the contract pleading that it is contrary to Article 23.1.2 and that respondents have not followed the mandatory provision of Article 23.1.2. Hence, it is an arbitrary action. The respondents without taking note of the work done by the appellant, have arbitrarily exercised such power to victimize the contractor for no fault of his. This plea of the petitioner has been explicitly stated in para 10, 14 & 15 of the writ petition, which read as follows :-

> ***[10]*** *That, it is stated that while issuing the show cause notice,* ***the Authority has not followed clause 23.1.2, whereunder it is provided*** *that the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Contractor, provided that before issuing the Termination Notice, the Authority shall by a notice inform the Contractor of its intention to issue such Termination Notice and grant 15 (Fifteen) days to the Contractor to make a representation, and may after the expiry of such 15(Fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice. Prior to the issuance of* ***show cause notice for termination of contract, no notice was served informing the contractor of its intention to issue termination notice by granting 15 days time to make a representation by the Authority. Therefore, the show cause for termination of contract as well as the termination of contract is not sustainable in the eyes of law as the same has been issued without following the mandatory provision of clause 23.1.2 referred above.”***
>
> ***[14]*** *That, it is respectfully submitted that so far 70% of the survey and setting up of reference pillars has been completed and therefore, it may not be proper to terminate the contract and appoint a new contractor who in turn has to start the survey and other works afresh from the beginning which will not be feasible for early completion of the work. From the very beginning, contractor has been furnishing monthly Progress Report. Therefore, terminating a contract without affording timely cooperation and appointing new contractor* ***will amount to arbitrary exercise of power to victimize the contractor for no fault of it.***

> ***[15]*** *That, it is respectfully submitted that it is settled principle of law that an act required to be done in a particular manner should be done in that manner or the act should not be done in any other manner. In the present case, the show cause notice for termination of contract was not preceded by a notice informing about the intention to issue show cause for termination.*
>
> ***(emphasis supplied)***

This has been denied by the respondent No. 1 to 4 in their affidavit-in-opposition dated 14.01.2019 and replied in Para 28 as follows:-

> ***"[28]*** *That, with reference to the averment made in para No. 10 of the writ petition, the respondents denied the whole allegation stated therein. It is submitted that the Respondents have followed the clause 23.1.2 and under the clause 23.1.2 of the agreement, 15 days' time to petitioner was given before serving termination letter as evident from the 15 days' notice of termination issued on dated 26.11.2018 as placed at Annexure-R/9 and Termination Letter issued on 24.12.2018 as placed at Annexure-R/10.*
> *Thus, there is no fault on the part of the Respondents in passing termination order of the EPC Contract. Therefore, the allegations of the petitioner is false, misleading and incorrect and hence, liable to quash on this count alone."*

[19] In the light of pleadings of appellant and respondents No.1 to 4 as above, the first issue is whether there was violation of the mandatory provision of Article 23.1.2 of the EPC agreement and further did the respondents act in an arbitrary manner and cancel the contract and victimize the contractor/appellant. Article 23.1.1 and 23.1.2 read as follows:-

> **"Article 23.1 Termination for Contractor Default**
>
> **Article 23.1.1**
>
> ***23.1.1*** *Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Contractor fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Contractor shall be deemed to be in default of this Agreement (the "Contractor Default"), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure. The defaults referred to herein shall include:*
>
> *(a) the Contractor fails to provide, extend or replenish, as the case may be, the Performance Security in accordance with this Agreement;*
> *(b) subsequent to the replenishment or furnishing of fresh Performance Security in accordance with Clause 7.3, the Contractor fails to cure,*

within a Cure Period of 30 (thirty) days, the Contractor Default for which the whole or part of the Performance Security was appropriated;

(c) the Contractor does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule-J, subject to any Time Extension, and continues to be in default for 45 (forty five) days;

(d) the Contractor abandons or manifests intention to abandon the construction or Maintenance of the Project without the prior written consent of the Authority;

(e) the Contractor fails to proceed with the Works in accordance with the provisions of Clause 10.1 or stops Works and/or the Maintenance for 30 (thirty) days without reflecting the same in the current programme and such stoppage has not been authorised by the Authority's Engineer;

(f) the Project Completion Date does not occur within the period specified in Schedule-J for the Scheduled Completion Date, or any extension thereof;

(g) failure to complete the Punch List items within the periods stipulated therefore in Clause 12.2.1;

(h) the Contractor fails to rectify any Defect, the non rectification of which shall have a Material Adverse Effect on the Project, within the time specified in this Agreement or as directed by the Authority's Engineer;

(i) the Contractor subcontracts the Works or any part thereof in violation of this Agreement or assigns any part of the Works or the Maintenance without the prior approval of the Authority;

(j) the Contractor creates any Encumbrance in breach of this Agreement;

(k) an execution levied on any of the assets of the Contractor has caused a Material Adverse Effect ;

(l) the Contractor is adjudged bankrupt or insolvent, or if a trustee or receiver is appointed for the Contractor or for the whole or material part of its assets that has a material bearing on the Project;

(m) the Contractor has been, or is in the process of being liquidated, dissolved, wound-up, amalgamated or reconstituted in a manner that would cause, in the reasonable opinion of the Authority, a Material Adverse Effect;

(n) a resolution for winding up of the Contractor is passed, or any petition for winding up of the Contractor is admitted by a court of competent jurisdiction and a provisional liquidator or receiver is appointed and such order has not been set aside within 90 (ninety) days of the date thereof or the Contractor is ordered to be wound up by court except for the purpose of amalgamation or reconstruction; provided that, as part of such amalgamation or reconstruction, the entire property, assets and undertaking of the Contractor are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Contractor under this Agreement; and provided that:

(i) the amalgamated or reconstructed entity has the capability and experience necessary for the performance of its obligations under this Agreement; and

(ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and has a credit worthiness at least as good as that of the Contractor as at the Appointed Date;

(o) any representation or warranty of the Contractor herein contained which is, as of the date hereof, found to be materially false or the Contractor is at any time hereafter found to be in breach thereof;

(p) the Contractor submits to the Authority any statement, notice or other document, in written or electronic form, which has a material effect on the Authority's rights, obligations or interests and which is false in material particulars;

(q) the Contractor has failed to fulfill any obligation, for which failure Termination has been specified in this Agreement; or

(r) the Contractor commits a default in complying with any other provision of this Agreement if such a default causes a Material Adverse Effect on the Project or on the Authority.

Article 23.1.2

23.1.2 Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Contractor Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Contractor; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Contractor of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Contractor to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice."

Appellant's plea is that the above Article is violated as stated in para No.10 of the writ petition extracted in para No.18 of this order.

Referring to Article 23.1.1 which deals with the defaults, it is pointed out by Ms. Madhavi Diwan, learned ASG that several show cause notices were issued with annexures setting out in details the default committed by the contractor in violation of the conditions, specifications, timeline specified in various Articles of the Agreement dated 08.11.2017. The show cause notices are (a) Annexure-R/5 dated 11.05.2018, (b) Annexure-R/6 dated 18.06.2018 (c) Annexure-R/8 dated 02.11.2018, and (d) Annexure-R/9 dated 26.11.2018. The contractor filed reply to some in time and others belatedly. The imputation as could be seen from the show cause notices and reminders is that the defaults, (i.e.) non-compliance of various Articles of the Agreement are numerous and very adversely impacting the project which is

of great importance between Republic of India and Republic of the Union of Myanmar. She pleaded that in view of prolonged inaction and non starter, Article 23.1.2 was invoked and it became inevitable. The procedure has been followed as required and there is no question of violation of the said Article and consequently, no arbitrariness.

[20] Article 23.1.2 provides that the authority, Ministry of Home Affairs, Government of India, without prejudice to other rights or remedies under Agreement dated 08.11.2017 in a case of default by the contractor, will be entitled to terminate the agreement by issuing a termination notice. Provided before issuing the termination notice as above, the authority shall by way of a notice inform the contractor of its intention to issue such termination notice and grant 15 days to the contractor to make a representation. It further provides that the authority may, after expiry of such 15 days, whether or not it is in receipt of a representation by the contractor, issue a termination notice. In this case, as observed earlier, 15 days notice dated 26.11.2018 (Annexure-R/9 of the Affidavit-in-opposition and A/8 of the writ petition) was issued. Thereafter, a reply was filed by the appellant contractor on 11.12.2018 (Annexure-A/9). Thereafter, the agreement is terminated by termination notice dated 24.11.2018(Annexure-A/14) which is the impugned in the writ petition.

[21] Article 23.1.2 speaks of two stages. In the event of the authority deciding to terminate the agreement, the authority has to:-

(a) Issue the first notice indicating the authority's intention to terminate the agreement. In this notice, 15 days time is to be given to the contractor with an opportunity to reply to the notice.

(b) If a reply is submitted within 15 days of first notice or no reply is received, then the authority may proceed to terminate the agreement by way of termination notice. If not satisfied.

This appears to be the plain and simple intent behind Article 23.1.2. If both the steps are complied, then the requirement of Article 23.1.2 is complete. Nothing more is required or contemplated.

[22] The appellant's plea appears to be that there should be a first notice and after receiving reply, the second notice should be issued and only thereafter, the contract can be terminated by another order. Prima-facie, this appears to be a misconception and misreading of Article 23.1.2 of the Agreement.

The key words are termination by issuing the termination notice. However, before issuing the termination notice, the authority is bound to give a 15 days' notice simpliciter informing the contractor of the authorities' intention to terminate the Agreement. Thereafter, subject to reply, the authority can issue the termination notice in relation to the Agreement. There is no requirement for passing any further order. The termination notice is final. The word termination notice is really the termination of the contract. No other construction is possible. This has been apparently misconstrued by the appellant/writ petitioner, and probably lead him to plead that the mandatory provision has not been followed. Therefore, *prima facie* this appears to be

the misconception on the part of the appellant/writ petitioner. The language and meaning of Article 23.1.2 has to be understood on its plain terms and intent. We, therefore, *prima facie* hold that Article23.1.2 was not breached by respondents No.1 and 2 and the said plea is rejected.

[23] The plea of violation of mandatory provision of Article 23.1.2 appears to be inherently misconceived interpretation but the appellant / writ petitioner has invited himself to its interpretation in a petition of Article 226 of the Constitution leaving us no choice but to render a ruling on it. In any event, the appellant can freely make such submission before the competent forum as provided in the agreement. Needless to state that in the earlier show cause notice details of the inaction, delay, lethargy in execution of the contract has been highlighted extensively. In fact, the appellant/writ petitioner has also replied to the earlier show cause notice. It is, therefore, clear that the final decision of issuing the termination notice dated 24.11.2018 was not taken in haste or in an arbitrary manner. The number of notices, review meetings, clarifications given by the respondents makes it amply clear that they have cautioned the appellant time and again to take steps to complete the project. However, the appellant has been taking a stand that the DPR/Feasibility Report itself is inherently at fault and several other data are erroneous and incorrect. On this, we will address in the later part of the judgment. Since the authority has proceeded in the terms of the articles of the agreement, the appellant's plea for interference by invoking Article 226 appears to be a misplaced. This Court would not have ventured into the interpretation of Article of the agreement as above but we were forced to rule on the above as Appellant invoked the plea of Fundamental Rights and arbitrariness vehemently on the basis of Article 23.1.2 of the Agreement. The

respondents also denied such allegations with equal proportion. We are conscious of the fact that writ Courts normally does not enter into the arena of interpretation of the terms of contract. In **M/s Radhakrishna Agarwal and Others Vs. State of Bihar and Others: (1997) 3 SCC 457**. In **Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others: (2000) 6 SCC** 293, the Hon'ble Supreme Court was of the view that interpretation and implementation of a clause in the contract cannot be subject matter of a writ petition. It further held that the fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied, namely, principles of law of contract. The contract between the parties is; in the realm of private law. It is not statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. In **Joshi Technologies International Inc. vs. Union of India: (2015) 7 SCC 728,** certain principles have been laid in this regard in para 69. It however, does not enure to the cause of the appellant. The appellant/writ petitioner relied heavily on the case of **Maharashtra Chess Association Vs. Union of India; & Ors. : Civil Appeal No. 5654 of 2019 @ Special Leave Petition (C) No. 29040 of 2018** to plead arbitrariness and that respondents' action is in violation of fundamental rights, hence, Article 226 can be invoked. The senior counsel pleads that in the scope of project, there are defects, errors in the data. The arbitrariness in the respondents conduct of termination of the Agreement to protect the defective survey and data provided in the feasibility report/DPR is apparent.

Therefore, this Court should consider all factors holistically as adumbrated by the Supreme Court in the **Maharashtra Chess Association** case **(Supra).**

[24] A reasonable sequitur to the above conclusion is that the appellant who primarily pitched the writ petition on the interpretation of Article 23.1.2 of the Agreement cannot resile from the other parts of the agreement particularly the article relating to ouster of jurisdiction of the courts in case of dispute and article relating to arbitration. Before we proceed further in the matter on the applicability of the various articles of the agreement, it is trite that a contract or an agreement should be read as a whole. If a party relies upon one part of the agreement, such party is equally bound by the other parts of the agreement unless there is an intention to the contrary. In a recent decision of the Hon'ble Supreme Court in **Hammad Ahmed vs. Abdul Majeed & ors.** reported in **(2019) 14 SCC 1,** the principle of interpretation on a document was analysed in the following manner at para No.45:-

> *"45. The well-known principle of interpretation of document is that one line cannot be taken out of context. It is a cumulative reading of entire document which would lead to one conclusion or the other. Some of the judgments relevant for determining as to the principle of interpretation of documents are delineated hereinafter. One of the judgments relating to the interpretation of documents is Delhi Development Authority v. Durga Chand Kaushish : (1973) 2 SCC 825. It was held that the meaning of the document or of a particular part of it is to be sought for in the document itself. The Court held as under:-*
>
> > *"19. Both sides have relied upon certain passages in Odgers' "Construction of Deeds and Statutes" (5th ed. 1967). There (at pages 28-29), the First General Rule of Interpretation formulated is: "The meaning of the document or of a particular part of it is therefore to be sought for in the document itself". That is, undoubtedly, the primary rule of construction to which Sections 90 to 94 of the Indian Evidence Act give statutory recognition and effect, with certain exceptions contained in Sections 95 to 98 of the Act. Of course, "the document" means "the document" read as a whole and not piecemeal.*
> >
> > *20. The rule stated above follows logically from the Literal Rule of Construction which, unless its application produces absurd*

results, must be resorted to first. This is clear from the following passages cited in Odgers' short book under the First Rule of Interpretation set out above:

*** *** ***
*** *** ***"

Similarly, in the **Export Credit Guarantee Corpn. Of India Ltd. vs. Garg Sons International** reported in **(2014) 1 SCC 686,** Hon'ble Supreme Court held that contract must be read as a whole and every attempt should be made to harmonize the terms thereof keeping in mind the rule of *contra proferentem*.

"9. *** *** ***

The contract must be read as a whole and every attempt should be made to harmonize the terms thereof, keeping in mind that the rule of contra proferentem does not apply in case of commercial contract, for the reason that a clause in a commercial contract is bilateral and has mutually been agreed upon."

In **Administrator of the Specified Undertaking of the Unit Trust of India & ors. vs. Garware Polyester Ltd.** reported in **(2015) 10 SCC 682,** the Hon'ble Supreme Court followed the case of Delhi Development Authority's case to reiterate this position. The Hon'ble Supreme Court in the case of **P.K.Mohan Ram vs. B.N.Ananthachary & ors.** reported in **(2010) 4 SCC 161** held that on a general principle, document should be read as a whole.

In the light of the above, the writ petitioner having relied upon Article 4.1.2 and Article 6.1 in the writ petition, in the subsequent hearing before this Court in this appeal upon other articles of the agreement, it is clear that appellant falls back on some Articles of the agreement dated 8.11.2017 to plead arbitrariness in the issue of the termination order. If that

be so, the entire Agreement dated 8.11.2017 and other clauses namely, Articles of the agreement will have to be equally applied to consider whether a case has been made out by the petitioner to invoke writ jurisdiction of this Court. This will be in line with the decision of the Hon'ble Supreme Court in **Maharashtra Chess Association** case (supra).We now proceed to consider the maintainability of writ petition which is being argued by the respondents' counsel and refuted by appellant.

OUSTER CLAUSE ON JURISDICTION

[25] In response to the writ petition, a detailed affidavit-in-opposition was filed by respondent No. 1, 2, 3 & 4 on 14.01.2019 raising the following preliminary objections :

The first one relates to Article 27.1 of the Agreement which provides that the Agreement should be construed and interpreted in accordance with and governed by the laws of India, and the Courts at Delhi shall have exclusive jurisdiction over the matters arising out of or relating to this Agreement. Therefore, the appellant/writ petitioner knocking the writ court at High Court of Manipur is in violation of this Article 27.1 and it reads as follows :-

> ***"27.1 Governing law and jurisdiction***
> *This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the Courts at Delhi shall have exclusive jurisdiction over matters arising out of or relating to this Agreement."*

It is a specific plea of the respondents that in terms of the above Article, both the appellant and respondents had consciously agreed to confer jurisdiction on the Courts at Delhi. However, Para 4 of the rejoinder affidavit dated 30.01.2019 filed by the writ petitioner, states as follows :-

> *"4. That, with reference to para 2 of the affidavit-in–opposition, deponent submits that even though Court at Delhi had exclusive jurisdiction over matters arising out of or relating to the Agreement deponent was compelled to approach the Hon'ble High Court of Manipur as the impugned termination letter dt. 24-12-2018 and letter dt. 21-12-2018 was issued during the vacation of the Delhi High Court in malafide and there was a vacation Bench of his Court on 28-12-2018 considering the urgency for restraining the respondents form giving effect to the impugned termination letter which has violated valuable fundamental and other Constitutional rights of the deponent, the above referred writ petition was filed invoking extraordinary jurisdiction of this Hon'ble Court under Article 226 of the Constitution of India. Further, it is stated that the Constitution of India is Suprema Lex. The jurisdiction of the Constitution of India is sacrosanct. It is an extraordinary jurisdiction. This jurisdiction under Article 226 of the Constitution of India cannot be circumvented by an agreement or by any statute overriding the Constitutional provision. The Courts referred in the Agreement would apply to civil courts or tribunals exercising jurisdiction provided by Statute and would not extend to Constitutional remedy. Even statute cannot abrogate the jurisdiction of this Court under Article 226 of the Constitution of India, much less an agreement by the parties."*

[26] This fact pleaded by the appellant/ writ petitioner is stated to be a clear case of forum shopping and factually incorrect pleading only to take interim protection from this Court knowing fully well that as per the Agreement (Article 27), the Courts at Delhi alone has jurisdiction. According to the respondents, this statement is incorrect because the Delhi High Court, by its notification dated 28.12.2018, was holding vacation Court. In this regard, the respondents refer to Annexure-E/2 of reply affidavit dated 30.05.2019 filed by respondent No. 1 & 2 in the writ appeal.

Therefore, the pleading that the Delhi High Court was on vacation appears to be a deliberate attempt to avoid the Courts at Delhi and seek indulgence of this Court. On this fact, we have no hesitation to hold that this contention of respondent is correct.

[27] Be that as it may, since it is purely commercial contract for construction of 69 Bridges and the parties are bound by the terms of the contract and both the parties are bound by the various Articles of the contract. Article 27 provides for exclusive jurisdiction of Courts in Delhi in matters arising out of or relating to the Agreement. On this issue, the Hon'ble Supreme Court has time and again held that in a commercial contract of this nature, even if two Courts have jurisdiction or likely to have overlapping jurisdiction, the parties can by the agreement confer exclusive jurisdiction on one Court. The Hon'ble Supreme Court in the case of **Swastik Gases (P) Ltd. Vs. Indian Oil Corporation Ltd.; (2013) 9 SCC 32** considered the entire gamut of cases and held that conferring jurisdiction on one Court in such a contract is binding on the parties. In that case, the question that arose for consideration is as follows:-

> *"2. The above question arises in this way. The IBP Company Limited, which has now merged with the respondent-Indian Oil Corporation Limited, hereinafter referred to as 'the company', was engaged in the business of storage, distribution of petroleum products and also manufacturing and marketing of various types of lubricating oils, grease, fluid and coolants. The company was interested to promote and augment its sales of lubricants and other products and was desirous of appointing consignment agents. The appellant, M/s. Swastik Gases Private Limited, mainly deals in storage, distribution of petroleum products including lubricating oils in Rajasthan and its registered office is situated at Jaipur. An agreement was entered into between the appellant and the company on 13.10.2002 whereby the appellant was appointed the company's consignment agent for marketing lubricants at Jaipur (Rajasthan). There is divergent stand of the parties in respect of the place of signing the agreement. The company's case is that the agreement has been signed at Kolkata while the appellant's stand is that it was signed at Jaipur.*
>
> *3. In or about November, 2003, disputes arose between the parties as huge quantity of stock of lubricants could not be sold by the appellant. The appellant requested the company to either liquidate the stock or take back the stock and make payment thereof to the appellant. The parties met several times but the disputes could not be resolved amicably. On 16.07.2007, the appellant sent a notice to the company claiming a sum of Rs.18,72,332/- under diverse heads with a request to the company to*

make payment of the above amount failing which it was stated that the appellant would pursue appropriate legal action against the company.

4. Thereafter, on 25.08.2008 another notice was sent by the appellant to the company invoking arbitration clause wherein name of a retired Judge of the High Court was proposed as the appellant's arbitrator. The company was requested to name their arbitrator within thirty days failing which it was stated that the appellant would have no option but to proceed under Section 11 of the 1996 Act. The company did not nominate its arbitrator within thirty days of receipt of the notice dated 25.08.2008 which led to the appellant making an application under Section 11 of the 1996 Act in the Rajasthan High Court for the appointment of arbitrator in respect of the disputes arising out of the above agreement. "

5. The company contested the application made by the appellant, inter alia, by raising a plea of lack of territorial jurisdiction of the Rajasthan High Court in the matter. The plea of the company was that the agreement has been made subject to jurisdiction of the courts at Kolkata and, therefore, Rajasthan High Court lacks the territorial jurisdiction in dealing with the application under Section 11."

The jurisdiction clause is contained at para No.8 is as follows:-

"8. The jurisdiction clause 18 in the agreement is as follows:

"18. Jurisdiction The Agreement shall be subject to jurisdiction of the courts at Kolkata. "

[28] The contention of the appellant in **Swastik Gases (P) Ltd. (supra)** is at para No.9:-

"9. The contention of the learned counsel for the appellant is that even though clause 18 confers jurisdiction to entertain disputes inter se parties at Kolkata, it does not specifically bar jurisdiction of courts at Jaipur where also part of the cause of action has arisen. It is the submission of the learned counsel that except execution of the agreement, which was done at Kolkata, though it was signed at Jaipur, all other necessary bundle of facts forming 'cause of action' have arisen at Jaipur. This is for the reason that:

(i) The regional office of the respondent – company is situate at Jaipur;
(ii) the agreement was signed at Jaipur;
(iii) the consignment agency functioned from Jaipur;
(iv) all stock of lubricants was delivered by the company to the appellant at Jaipur;

(v) all sales transactions took place at Jaipur;
(vi) the godown, showroom and office of the appellant were all situated in Jaipur;
(vii) various meetings were held between the parties at Jaipur;
(viii) the company agreed to lift the stock and make payment in lieu thereof at a meeting held at Jaipur and
(ix) the disputes arose at Jaipur.

The learned counsel for the appellant would submit that since part of the cause of action has arisen within the jurisdiction of the courts at Jaipur and clause 18 does not expressly oust the jurisdiction of other courts, Rajasthan High Court had territorial jurisdiction to try and entertain the petition under Section 11 of the 1996 Act. He vehemently contended that clause 18 of the agreement cannot be construed as an ouster clause because the words like, 'alone', 'only', 'exclusive' and 'exclusive jurisdiction' have not been used in the clause."

[29] The view of the respondents before the Hon'ble Supreme Court in **Swastik Gases (P) Ltd. (supra)** is as follows at para No.10:-

"10. On the other hand, the learned Additional Solicitor General for the company stoutly defended the view of the designate Judge that from clause 18 of the agreement, it was apparent that the parties intended to exclude jurisdiction of all courts other than the courts at Kolkata."

[30] The Hon'ble Supreme Court relying upon the cases of the Hon'ble Supreme Court in **Hakum Singh vs. Gammon (India) Ltd. (1971) 1 SCC 286,; Globe Transport (Corpn.) Triveni Engg. Work, (1983) 4 SCC 707 and A.B.C. Laminart (P) Ltd. Vs. A.P.Agencies, (1989) 2 SCC 163,** took the following view at para No.31, 32 33, 34 as below:-

"31. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in Jaipur and, therefore, Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator under Section 11. Having regard to Section 11(12)(b) and Section 2(e) of the 1996 Act read with Section 20(c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of clause 18 of the

agreement, the jurisdiction of Chief Justice of the Rajasthan High Court has been excluded.

32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like 'alone', 'only', 'exclusive' or 'exclusive jurisdiction' have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties - by having clause 18 in the agreement – is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim expressio unius est exclusio alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.

33. The above view finds support from the decisions of this Court in Hakam Singh4, A.B.C. Laminart1, R.S.D.V. Finance6, Angile Insulations7, Shriram City8, Hanil Era Textiles9 and Balaji Coke13.

34. In view of the above, we answer the question in the affirmative and hold that the impugned order does not suffer from any error of law. Civil appeal is, accordingly, dismissed with no order as to costs. The appellant shall be at liberty to pursue its remedy under Section 11 of the 1996 Act in the Calcutta High Court."

1: ABC Laminart (P) Ltd. vs. A.P.Agenciesl (1989) 2 SCC 163
4 : Hakam Singh v.Gammon (India) Ltd. ; (1971) 1 SCC 286
6: R.S.D.V. Finance Co.(P) Ltd. vs.Shree Vallabh Glass Works Ltd. (1993) 2 SCC 130
7. Angile Insulations vs. Davy Ashmore India Ltd. (1995) 4 SCC 153
8. Shriram City Union Finance Corpn. Ltd. v. Rama Mishra , (2002) 9 SCC 613,
9. Hanil Era Textiles Ltd. vs. Puromatic Filters (P) Ltd. (2004) 4 SCC 671
13. Balaji Coke Industry (P) Ltd. vs. Maa Bhagwati Coke Gujarat (P) Ltd. (2009) 9 SCC 403

[31] Justice Madan B.Lokur, concurring with the majority decision, reaffirmed the legal position in the following manner at para No. 36 to 58:-

> *"36. The clause in the agreement that is sought to be interpreted reads as follows:-*
>
> *"The agreement shall be subject to jurisdiction of the Courts at Kolkata."*
>
> *37. In my opinion, the very existence of the exclusion of jurisdiction clause in the agreement would be rendered meaningless were it not given its natural and plain meaning. The use of words like "only", "exclusively", "alone" and so on are not necessary to convey the intention of the parties in an exclusion of jurisdiction clause of an agreement. Therefore, I agree with the conclusion that jurisdiction in the subject matter of the proceedings vested, by agreement, only in the Courts in Kolkata.*
>
> *38. The facts of the case have been detailed by my learned Brother and it is not necessary to repeat them.*
>
> *39. Reference has been made to several decisions rendered by this Court and I propose to briefly advert to them.*
>
> ***One set of decisions:***
>
> *40. There is really no difficulty in interpreting the exclusion clause in the first set of decisions. The clause in these decisions generally uses the word "alone" and, therefore, it is quite obvious that the parties have, by agreement, excluded the jurisdiction of courts - other than those mentioned in the agreement. These decisions, along with the relevant clause, are as follows:*
>
> *40.1. Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286:*
>
> *"I… '13. Notwithstanding the place where the work under this contract is to be executed, it is mutually understood and agreed by and between the parties hereto that this Contract shall be deemed to have been entered into by the parties concerned in the city of Bombay and the court of law in the city of Bombay alone shall have jurisdiction to adjudicate thereon." (emphasis given)*
>
> *It was held that only the courts in Bombay and not Varanasi had jurisdiction over the subject matter of dispute.*
>
> *40.2. Globe Transport Corpn. v. Triveni Engg. Works, (1983) 4 SCC 707:*
>
> *"2……The Court in Jaipur City alone shall have jurisdiction in respect of all claims and matters arising (sic) under the consignment or of the goods entrusted for transportation." (emphasis given) It was held that only the courts in Jaipur and not Allahabad had jurisdiction over the subject matter of dispute."*
>
> *40.3. Angile Insulations v. Davy Ashmore India Ltd., (1995) 4 SCC 153:*

"5. This work order is issued subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, fall within the jurisdiction of the above court only." (emphasis given)

It was held that only the courts in Karnataka and not Dhanbad had jurisdiction over the subject matter of dispute.

40.4. New Moga Transport Co. v. United India Insurance Co. Ltd., (2004) 4 SCC 677:

"5. ….The court at head office city [Udaipur] shall only be the jurisdiction in respect of all claims and matters arising under the consignment at the goods entrusted for transport." (emphasis given)

It was held that only the courts in Udaipur and not Barnala had jurisdiction over the subject matter of dispute.

40.5. Shree Subhlaxmi Fabrics (P) Ltd. v. Chand Mal Baradia, (2005) 10 SCC 704:

"3……Dispute under this contract shall be decided by the court of Bombay and no other courts." (emphasis given)

It was held that only the courts in Bombay and not Calcutta had jurisdiction over the subject matter of dispute.

40.6. Rajasthan State Electricity Board v. Universal Petrol Chemicals Limited, (2009) 3 SCC 107:

"The contract shall for all purposes be construed according to the laws of India and subject to jurisdiction only at Jaipur in Rajasthan courts only." (emphasis given)

It was held that only the courts in Jaipur and not Calcutta had jurisdiction over the subject matter of dispute.

40.7. A.V.M. Sales Corporation v. Anuradha Chemicals Private Limited, (2012) 2 SCC 315: -

"Any dispute arising out of this agreement will be subject to Calcutta jurisdiction only." (emphasis given)

It was held that only the courts in Calcutta and not Vijaywada had jurisdiction over the subject matter of dispute.

41. The exclusion clause in the above cases is explicit and presents no difficulty in understanding or appreciation.

Another set of decisions:

42. In the second set of decisions, the exclusion clause is not specific or explicit in as much as words like "only", "alone" or "exclusively" and so on have not been used. This has apparently presented some difficulty in appreciation.

43. In A.B.C. Laminart v. A.P. Agencies, (1989) 2 SCC 163 the relevant clause read as follows:

"3…….Any dispute arising out of this sale shall be subject to Kaira jurisdiction."

44. Despite the aforesaid clause, proceedings were initiated by the respondent in Salem (Tamil Nadu). The appellant challenged the jurisdiction of the Court at Salem to entertain the proceedings since the parties had agreed that all disputes shall be subject to the jurisdiction of the Courts in Kaira (Gujarat). The Trial Court upheld the objection but that was set aside in appeal by the Madras High Court which held that the Courts in Salem had the jurisdiction to entertain the proceedings.

45. The Civil Appeal filed by the appellant challenging the decision of the Madras High Court was dismissed by this Court thereby affirming the jurisdiction of the Court in Salem notwithstanding the exclusion clause. While doing so, this Court held that when a certain jurisdiction is specified in a contract, an intention to exclude all others from its operation may be inferred; the exclusion clause has to be properly construed and the maxim "expressio unius est exclusio alterius" (expression of one is the exclusion of another) may be applied. Looking then to the facts and circumstances of the case, this Court held that the jurisdiction of Courts other than in Kaira were not clearly, unambiguously and explicitly excluded and therefore, the Court at Salem had jurisdiction to entertain the proceedings.

46. In R.S.D.V. Finance Co. (P) Ltd. v. Shree Vallabh Glass Works Ltd., (1993) 2 SCC 130, the exclusion clause read as follows : -

"Subject to Anand jurisdiction."

47. Proceedings were initiated by the appellant in the Ordinary Original Civil Jurisdiction of the Bombay High Court. The respondent questioned the jurisdiction of the Bombay High Court in view of the exclusion clause. The learned Single Judge held that the Bombay High Court had

jurisdiction to entertain the proceedings. However, the Division Bench of the High Court took the view that the Bombay High Court had no jurisdiction in the matter and accordingly dismissed the proceedings. In appeal, this Court noted in paragraph 9 of the Report that the endorsement "Subject to Anand jurisdiction" had been made unilaterally by the respondent. Accordingly, there was no agreement between the parties to exclude the jurisdiction of the Bombay High Court. Clearly, this decision turned on its own special facts.

48. In Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd., (2004) 4 SCC 671 the exclusion clause read as follows:

> *"3.1……Any legal proceeding arising out of the order shall be subject to the jurisdiction of the courts in Mumbai."*

49. On a dispute having arisen, proceedings were instituted by the respondent in the Courts in Delhi. This was objected to by the - appellant but neither the Additional District Judge, Delhi nor the Delhi High Court accepted the contention of the appellant that the Courts in Delhi had no territorial jurisdiction in the matter. In appeal, this Court referred to A.B.C. Laminart and after considering the facts and circumstances of the case inferred that the jurisdiction of all other Courts except the Courts in Mumbai was excluded. This inference was drawn from the fact that the purchase order was placed by the appellant at Mumbai and was accepted by the respondent at Mumbai. The advance payment was made by the respondent at Mumbai and as per the case of the respondent itself the final payment was to be made at Mumbai.

50. In Balaji Coke Industry Private Limited v. Maa Bhagwati Coke Gujarat Private Limited, (2009) 9 SCC 403, the exclusion clause read as follows:

> *"4…….In case of any dispute or difference arising between the parties hereto or any claim or thing herein contained or the construction thereof or as to any matter in any way connected with or arising out of these presents or the operation thereof or the rights, duties or liabilities of either party thereof, then and in every such case the matter, differences or disputes shall be referred to an arbitrator in Kolkata, West Bengal, India in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996,*

or any other enactment or statutory modifications thereof for the time being in force. The place of arbitration shall be Kolkata."

51. Notwithstanding the aforesaid clause, proceedings were instituted by the respondent against the appellant in Bhavnagar (Gujarat). The petitioner in this Court then moved a Transfer Petition under Article 139-A(2) of the Constitution of India for transfer of the proceedings to Kolkata. While allowing the Transfer Petition, this Court drew an inference, as postulated in A.B.C. Laminart that the intention of the parties was to exclude the jurisdiction of Courts other than those in Kolkata.

52. Finally, in Shriram City Union Finance Corporation Ltd. v. Rama Mishra, (2002) 9 SCC 613, the exclusion clause read as follows:

> *"Subject to the provisions of clause 32 above it is expressly agreed by and between the parties hereinabove that any suit, application and/or any other legal proceedings with regard to any matter, claims, differences and for disputes arising out of this agreement shall be filed and referred to the courts in Calcutta for the purpose of jurisdiction."*

53. Proceedings were initiated by the respondent in Bhubaneswar (Odisha). An objection was taken by the appellant that the Court in Bhubaneswar had no jurisdiction to entertain the proceedings. However, the objection was not accepted by the Trial Judge, Bhubaneswar. In appeal, the District Judge accepted the contention - of the appellant that only the Courts in Kolkata had jurisdiction in the matter. In a Civil Revision Petition filed before the Orissa High Court by the respondent, the order passed by the Trial Court was affirmed with the result that it was held that notwithstanding the exclusion clause, the Civil Judge, Bhubaneswar (Odisha) had jurisdiction to entertain the proceedings.

54. In the Civil Appeal filed by the appellant in this Court, it was held that the exclusion clause left no room for doubt that the parties expressly agreed that legal proceedings shall be instituted only in the Courts in Kolkata. It was also held that the parties had agreed that the Courts in Kolkata "alone" would have jurisdiction in the matter and therefore, the Civil Court, Bhubaneswar ought not to have entertained the proceedings. A reading of the exclusion clause shows that it does not use the word "alone" but it was read into the clause by this Court as an inference drawn

on the facts of the case, in line with the decision rendered in A.B.C. Laminart and the relief declined in A.B.C. Laminart was granted in this case.

55. It will be seen from the above decisions that except in A.B.C. Laminart where this Court declined to exclude the jurisdiction of the Courts in Salem, in all other similar cases an inference was - drawn (explicitly or implicitly) that the parties intended the implementation of the exclusion clause as it reads notwithstanding the absence of the words "only", "alone" or "exclusively" and the like. The reason for this is quite obvious. The parties would not have included the ouster clause in their agreement were it not to carry any meaning at all. The very fact that the ouster clause is included in the agreement between the parties conveys their clear intention to exclude the jurisdiction of Courts other than those mentioned in the concerned clause. Conversely, if the parties had intended that all Courts where the cause of action or a part thereof had arisen would continue to have jurisdiction over the dispute, the exclusion clause would not have found a place in the agreement between the parties.

(emphasis supplied)

56. It is not necessary to refer to the decisions rendered by this Court in Harshad Chimanlal Modi v. DLF Universal Limited, (2005) 7 SCC 791 and InterGlobe Aviation Limited v. N. Satchidanand, (2011) 7 SCC 463 since they deal with an issue that does not at all arise in this case. In this context it may only be mentioned that the appellant in the present case did not dispute that a part of the cause of action arose in Kolkata, as observed by my learned Brother Justice Lodha.

Conclusion:

57. For the reasons mentioned above, I agree with my learned Brother that in the jurisdiction clause of an agreement, the absence of words like "alone", "only", "exclusive" or "exclusive jurisdiction" is neither decisive nor does it make any material difference in deciding the jurisdiction of a court. The very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute. In the present case,

only the Courts in Kolkata had jurisdiction to entertain the disputes between the parties.

58. The Civil Appeal is dismissed, as proposed, leaving the appellant to pursue its remedy in Kolkata."

(emphasis supplied)

[32] On this aspect, Mr. H.S. Paonam, learned senior counsel appearing for the appellant/writ petitioner relied upon the decision of the Hon'ble Supreme Court in the case of **Maharashtra Chess Association Vs. Union of India; & Ors. : Civil Appeal No. 5654 of 2019 @ Special Leave Petition (C) No. 29040 of 2018** pleaded that in view of arbitrariness in the conduct of the respondents and the termination in violation of the mandatory nature of Article 23.1.2, writ petition under Article 226 of the Constitution is maintainable. Only on the basis of Article 27 of the Agreement, writ petition cannot be dismissed. In that case, the issue is whether a private agreement between the appellant and respondent No. 2 therein, in the form of the Constitution and Bye Laws of respondent No. 2, can the exclusive jurisdiction be conferred on the Courts at Chennai, and oust the writ jurisdiction of the Bombay High Court. Clause 21 of the Constitution and Bye Laws of the second respondent is as follows :

"21. Legal Course

(i) The Federation shall sue and or be sued only in the name of the Hon. Secretary of the Federation.

(ii) Any Suits/Legal actions against the Federation shall be instituted only in the Courts at Chennai, where the Registered Office of All India Chess Federation is situated or at the place where the Secretariat of the All India Chess Federation is functioning."

[33] The appellant, **Maharashtra Chess Association,** before the Hon'ble Supreme Court filed the writ petition before the Bombay High Court for relief under Article 226 of the Constitution. On a preliminary objection raised by the respondents, the Bombay High Court referring to the Clause 21, declined the relief. On appeal, the Hon'ble Supreme Court, as to the scope of the High Court in exercise of writ jurisdiction, observed as follows:-

> *"13 While the powers the High Court may exercise under its writ jurisdiction are not subject to strict legal principles, two clear principles emerge with respect to when a High Court's writ jurisdiction may be engaged. First, the decision of the High Court to entertain or not entertain a particular action under its writ jurisdiction is fundamentally discretionary. Secondly, limitations placed on the court's decision to exercise or refuse to exercise its writ jurisdiction are self- imposed. It is a well settled principle that the writ jurisdiction of a High Court cannot be completely excluded by statute. If a High Court is tasked with being the final recourse to upholding the rule of law within its territorial jurisdiction, it must necessarily have the power to examine any case before it and make a determination of whether or not its writ jurisdiction is engaged. Judicial review under Article 226 is an intrinsic feature of the basic structure of the Constitution."*
>
> ***(emphasis supplied)***

[34] The Hon'ble Supreme Court also held that the decision as to whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the high Court on the examination of the facts and circumstances of the particular case.-

> *"18. This argument of the second Respondent is misconceived. The existence of an alternate remedy, whether adequate or not, does not alter the fundamentally discretionary nature of the High Court's writ jurisdiction and therefore does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court. The decision whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case."*
>
> ***(emphasis supplied)***

"21. The mere existence of alternate forums where the aggrieved party may secure relief does not create a legal bar on a High Court to exercise its writ jurisdiction. It is a factor to be taken into consideration by the High Court amongst several factors. Thus, the mere fact that the High Court at Madras is capable of granting adequate relief to the Appellant does not create a legal bar on the Bombay High Court exercising its writ jurisdiction in the present matter.

22 This brings us to the question of whether Clause 21 itself creates a legal bar on the Bombay High Court exercising its writ jurisdiction. As discussed above, the writ jurisdiction of the High Court is fundamentally discretionary. Even the existence of an alternate adequate remedy is merely an additional factor to be taken into consideration by the High Court in deciding whether or not to exercise its writ jurisdiction. This is in marked contradistinction to the jurisdiction of a civil court which is governed by statute.[14] ***In exercising its discretion to entertain a particular case under Article 226, a High Court may take into consideration various factors including the nature of the injustice that is alleged by the petitioner, whether or not an alternate remedy exists, or whether the facts raise a question of constitutional interpretation. These factors are not exhaustive and we do not propose to enumerate what factors should or should not be taken into consideration. It is sufficient for the present purposes to say that the High Court must take a holistic view of the facts as submitted in the writ petition and make a determination on the facts and circumstances of each unique case."***

14 : Section 9. Courts to try Civil suits unless barred – The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

(emphasis supplied)

[35] It further held that one of the determining factor to be taken into by the Court to say that it has jurisdiction or not should be on the basis of the examination of facts holistically. The case of **Aligarh Muslim University vs. Vinay Engineering (1994) 4 SCC 710** was referred and opined as follows:-

"23. At this juncture it is worth discussing the decision of this Court in ***Aligarh Muslim University v Vinay Engineering : (1994) 4 SCC 710.*** *In that case, the contract between the parties contained a clause conferring jurisdiction on the courts at Aligarh. When the High Court of Calcutta exercised its writ jurisdiction over the matter, this Court held:*

2. We are surprised, not a little, that the High Court of Calcutta should have exercised jurisdiction in a case where it had absolutely no jurisdiction. The contracts in question were executed at Aligarh, the construction

> *work was to be carried out at Aligarh, even the contracts provided that in the event of dispute the Aligarh Court alone will have jurisdiction. The arbitrator was from Aligarh and was to function there. Merely because the respondent was a Calcutta-based firm, the High Court of Calcutta seems to have exercised jurisdiction where it had none by adopting a queer line of reasoning. We are constrained to say that this is a case of abuse of jurisdiction and we feel that the respondent deliberately moved the Calcutta High Court ignoring the fact that no part of the cause of action had arisen within the jurisdiction of that Court. It clearly shows that the litigation filed in the Calcutta High Court was thoroughly unsustainable."*
>
> *24. The court examined the facts holistically, noting that the contract was executed and to be performed in Aligarh, and the arbitrator was to function at Aligarh. It did consider that the contract conferred jurisdiction on the courts at Aligarh, but this was one factor amongst several considered by the court in determining that the High Court of Calcutta did not have jurisdiction."*
>
> *(emphasis supplied)*

[36] It is therefore clear that the Hon'ble Supreme Court in the **Maharashtra Chess Association's** case **(Supra)** held that it is for the High Court to take into consideration all relevant aspects of the disputes on the peculiar factual matrix of the case and the High Court may exercise jurisdiction under Article 226 of the Constitution of India or may decline to exercise such jurisdiction on the principle of forum non conveniens in an appropriate case and it held as follows :-

> *"26 It is certainly open to the High Court to take into consideration the fact that the Appellant and the second Respondent consented to resolve all their legal disputes before the courts at Chennai. However, this can be a factor within the broader factual matrix of the case. The High Court may decline to exercise jurisdiction under Article 226 invoking the principle of forum non conveniens in an appropriate case. The High Court must look at the case of the Appellant holistically and make a determination as to whether it would be proper to exercise its writ jurisdiction. We do not express an opinion as to what factors should be considered by the High Court in the present case, nor the corresponding gravity*

that should be accorded to such factors. Such principles are well known to the High Court and it is not for this Court to interfere in the discretion of the High Court in determining when to engage its writ jurisdiction unless exercised arbitrarily or erroneously. The sole and absolute reliance by the Bombay High Court on Clause 21 of the Constitution and Bye Laws to determine that its jurisdiction under Article 226 is ousted is however one such instance."

(emphasis supplied)

[37] Tested on the principle laid down by the Apex Court in **Maharashtra Chess Association's** case **(Supra)** and in the light of the Article 27 of the Contract and the decisions of the Hon'ble Supreme Court in the case of **Swastik Gases (P) Ltd. (supra)** on the binding nature of the contract mutually agreed to by both parties and for the reasons that we have already enumerated as to why the relief sought for by the petitioner could not be granted on the plea of arbitrariness, we have no hesitation to hold that the relief sought for by the appellant invoking jurisdiction of this Court under Article 226 cannot be granted on this ground also.

We hold that in terms of Article 27 of Contract, exclusive jurisdiction is with the Courts in Delhi. Appellant has conveniently omitted to refer to Article 27 of Contract in the writ petition and failed to furnish many documents for obvious reasons. The objection of the Respondent Nos. 1 to 4 is correct and affirmed. The several decisions relied upon by learned senior counsel for the appellant on the scope of Article 226 in a case of arbitrariness has no implication in the facts of the present case rather it militates against the appellant in the facts of the present case.

In the case of **Noble Resources Ltd.vs State of Orissa and another**, reported in **(2006) 10 SCC 236,** the Supreme Court held as follows in Para 15, 18, 27

> *"15. It is trite that if an action on the part of the State is violative of the equality clause contained in Article14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Article 14 of the Constitution. While exercising contractual powers also, the government bodies may be subjected to judicial review in order to prevent arbitrariness or favouritism on their part. Indisputably, inherent limitations exist, but it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter.*
>
> *18. It may, however, be true that where serious disputed questions of fact are raised requiring appreciation of evidence, and, thus, for determination thereof, examination of witnesses would be necessary; it may not be convenient to decide the dispute in a proceeding under Article 226 of the Constitution of India.*
>
> *27. Contractual matters are, thus, not beyond the realm of judicial review. Its application may, however, be limited.*
>
> **(emphasis supplied)**

This decision relied upon by the appellant also does not further the case of the appellant.

ARBITRATION

[38] The Article 26.3 of the Agreement provides for Arbitration, which reads as follows :-

> ***"Article 26.3 Arbitration***
>
> ***26.3.1*** *Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally decided by reference to arbitration in accordance with the rules of arbitration of the SOCIETY FOR AFFORDABLE REDRESSAL OF DISPUTES (SAROD)*
>
> ***26.3.2*** *Deleted*
>
> ***26.3.3*** *The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 26 shall be final and binding on the Parties as from*

the date it is made, and the Contractor and the Authority agree and undertake to carry out such Award without delay.

26.3.4. *The Contractor and the Authority agree that an Award may be enforced against the Contractor and /or the Authority, as the case may be, and their respective assets wherever situated.*

26.3.5 *This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.*

26.3.6. *In the event the Party against whom the Award has been granted challenges the other Party for any reason in a court of lay, it shall make an interim payment to the other Party for an amount equal to 75% (seventy five per cent) of the Award, pending final settlement of the Dispute. The aforesaid amount shall be paid forthwith upon furnishing an irrevocable Bank Guarantee for a sum equal to 120 % (one hundred and twenty per cent) of the aforesaid amount. Upon final settlement of the Dispute, the aforesaid interim payment shall be adjusted and any balance amount due to be paid or returned, as the case may be, shall be paid or returned with interest calculated at the rate of 10% (ten per cent) per annum from the date of interim payment to the date of final settlement of such balance."*

[39] It is admitted that the appellant/ writ petitioner has concealed this Article 26.3, but the respondents have raised it as a preliminary objection. In the course of argument, it is contended by the respondents the Article relating to Arbitration has to be mandatorily followed. More so, in a contract of this nature, Ms. Madhavi Divan, learned ASG relied upon the decision in the case of **Sundaram Finance Limited and Another Vs. T. Thankam reported in (2015) 14 SCC 444.**

"8. Once there is an agreement between the parties to refer the disputes or differences arising out of the agreement to arbitration, and in case either party, ignoring the terms of the agreement, approaches the civil court and the other party, in terms of the Section 8 of the Arbitration Act, moves the court for referring the parties to arbitration before the first statement on the substance of the dispute is filed, in view of the peremptory language of Section 8 of the Arbitration Act, it is obligatory for

the court to refer the parties to arbitration in terms of the agreement, as held by this Court in P. Anand Gajapathi Raju and others v. P.V.G. Raju.

9. The position was further explained in Hindustan Petroleum Corporation Limited v. Pinkcity Midway Petroleums. To quote: (SCC pp. 510-11, para 14)

> *"14. This Court in the case of P. Anand Gajapathi Raju v. P.V.G. Raju has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the instant case the existence [pic]of an arbitral clause in the Agreement is accepted by both the parties as also by the courts below but the applicability thereof is disputed by the respondent and the said dispute is accepted by the courts below. Be that as it may, at the cost of repetition, we may again state that the existence of the arbitration clause is admitted. If that be so, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration."*

10. In Magma Leasing and Finance Ltd. v. Potluri Madhvilata [(2009) 10 SCC 103],, the position has been restated holding that no option is left to the court, once the pre-requisite conditions of Section 8 are fully satisfied.

[40] Then, she also pleaded that arbitration survives after termination by placing reliance upon the decision of Hon'ble Supreme Court in the case of **National Agricultural Coop. Marketing Federation India Ltd. Vs. Gains Trading Ltd : (2007) 5 SCC 692.** Para 6 reads as follows :

"6. Respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. [Vide : Heymen vs. Darwins Ltd - 1942 (1) All ER 337, Union of India vs. Kishori Lal Gupta & Bros. - AIR

1959 SC 1362 and The Naihati Jute Mills Ltd. vs. Khyaliram Jagannath - AIR 1968 SC 522]. This position is now statutorily recognized. Sub-section (1) of section 16 of the Act makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract, has to be treated as an agreement independent of the other terms of the contract; and a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. The first contention is, therefore, liable to be rejected."

Mr. Abir Phukan, learned counsel appearing for respondent No. 3 & 4 referring to the decision of Hon'ble Supreme Court in the case of **M/s Ankur Filling Station Vs. Hindustan Petroleum Corporation Limited. : Civil Appeal No. 10855 of 2018** pleaded that arbitrator can grant relief if there is a pleading to that effect.

"5. On the arguments advanced on behalf of the respondents that there may not be an absolute bar for the learned Arbitrator to grant restoration in the given facts of a case and the relief to be afforded in the award would depend on the surrounding circumstances we do not consider it necessary to proceed to answer the larger question of law arising which can only be cone by a larger bench of five Hon'ble Judges in view of the decisions rendered in ***Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others [(1991) 1 SCC 533]*** *and* ***E. Venkatakrishna Vs. Indian Oil Corporation and Another [(2000) 7 SCC 764].***

6. So far as the present case is concerned, we leave it open for the appellant to invoke the arbitration clause even at this stage. In such an event, it will be open for the learned Arbitrator to take a decision in the matter in accordance with law. It will, naturally, be open for both the parties to raise all legal issues and contentions as may be available to them in law."

[41] In this case, the appellant/writ petitioner does not deny the arbitration clause. He has, however, suppressed it of which we will deal with in the later part of the judgment. He has filed this writ petition only on the plea of violation of fundamental rights and arbitrariness on the part of the respondents by issuing the impugned termination notice. We have held

against the appellant on this issue. On the perusal of the scope of the contract and the various Articles to which the parties have signed, it is clear that in case of dispute arising out of the terms of the contract, the remedy is only by way of arbitration. We have no hesitation to hold that suppression of arbitration clause in the agreement is a deliberate attempt to override the same. Hence, on this ground, the objection of the respondents is sustained and the writ petition / appeal is liable to be rejected on this ground as well.

CAUSE OF ACTION

[42] The Learned Single Judge dismissed the writ petition on the plea that there was no cause of action within the jurisdiction of this Court. It will be necessary to point out that we concur with the view taken by the learned Single Judge, which has been already extracted above at para [15] of this judgment.

[43] It is, however, to be noticed that on the plea of no cause of action, in the affidavit dated 06.03.2019, two emails, X-1 and X-2 are filed to say that the appellant received the same at Manipur and therefore, part of cause of action arose in Manipur. These e-mails are in addition to the hard copy of the letter of acceptance sent to the Head Office at Niraj House, Sunderbaug, Chembur, Mumbai. Similarly, the impugned termination letter also has been sent to the Head Office at Mumbai only.

Appellant pleads that even though, the cause of action is not pleaded in the writ petition, the fact that they filed affidavit dated 06.03.2019 explaining the cause of action in detail was taken on record by the Court. The relief should not be declined as all the subsequent affidavit should be treated as part and parcel of the writ petition. In this regard, reliance is placed on the

decision of the Hon'ble Supreme Court in the case of **Mahila Ramkali Devi and Others Vs. Nandram (dead) through Legal Representatives and Others : (2015) 13 SCC 132.** He further submitted that the e-mail in respect of Letter of Acceptance (Annexure-X1) and e-mail for termination of agreement (Annexure-X2) were received at Manipur. It will be deemed to be service on the appellant/writ petitioner because the order becomes effective only after it is communicated. Therefore, this Court has got jurisdiction. In this regard, he relied upon the decision of **M/s P.R. Transport Agency v. Union of India** : **AIR 2006 Allahabad 23**.

> *"8. Anticipating the difficulties likely to arise from this, the Information Technology Act, 2000 in Section 13(3) provides as follows :-*
>
> > *(3) Save as otherwise agreed to between the originator and the addressee, an electronic records is deemed to be dispatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business."*
>
> *9. Thus, the acceptance of the tender, communicated by the respondents to the petitioner by e-mail, will be deemed to be received by the petitioner at Varanasi-Chandauli, which are the only two places where the petitioner has his place of business.*
>
> *10. In view of the facts mentioned in the supplementary affidavit, read with Information Technology Act, the acceptance having been received by the petitioner at Chandauli / Varanasi, the contract became complete by receipt of such acceptance at Varanasi/ Chandauli, both of which places are within the territorial jurisdiction of this Court. Therefore, a part of the cause of action having arisen in U.P., this Court has territorial jurisdiction to entertain the writ petition. However, it has to be examined under the 'ouster' Clause (No. 10.5) of the tender agreement has the effect of excluding the wit jurisdiction of this Court."*

[44] This was vehemently opposed by Ms. Madhavi Divan, learned ASG stating that the facts on that case may not be fully applicable to the facts of the present case. She referred to Article 27.13 relating to Notices and Article 1.5.2 of the Agreement stating that the Contractor shall ensure that

each member of the Consortium shall be bound by any decision, communication, notice, action or inaction of the Lead Member on any matter related to this Agreement.

The lead Member is M/s Niraj Cement Structurals Ltd. (NCSL) having its registered office at Niraj House, Sunder Baug, Near Deonar Bus Depot, Chembur, Mumbai - 400088 as per the Power of Attorney (which is at Page 250-255 of Volume-I of the EPC Agreement submitted by respondent No. 1 & 2 on 02.03.2020). They have been informed in respect of the Letter of Acceptance and termination. A copy is marked to the Joint Venture partner at Manipur. It will not give rise to cause of action.

[45] In the light of the above, Ms. Madhavi Divan, learned ASG referred to Section 13(3) and 13(5) of the Information Technology Act, 2000. Section 13 (3) and 13 (5) reads as follows:-

> "13. Time and place of dispatch and receipt of electronic record. -
>
> *** ***
>
> *** ***
>
> (3) Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be dispatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.
>
> (5) For the purposes of this section,-
>
> (a) if the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;
>
> (b) if the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;
>
> (c) "usual place of residence", in relation to a body corporate, means the place where it is registered."

A reading of the above makes it clear that the service is deemed to be received at the place where the addressee has his place of business. The principal place of business shall be the place of business. In this case,

the Lead Member is M/s Niraj Cement Structurals Ltd. (NCSL) having its registered office at Niraj House, Sunder Baug, Near Deonar Bus Depot, Chembur, Mumbai – 400088, principal place of business and they have been served with the Letter of Acceptance (Annexure-A/2) and the Termination Letter (Annexure-A/14). The said emails will have no consequences in the above factual scenario. It has to be noticed that the emails have been marked as copy as per the instruction given in the earlier correspondences. It does not, therefore, become an integral part of the cause of action considering the nature of agreement and the intent of the parties before and after signing of Joint Venture Agreement.

In this regard, it will be useful to refer to the decision of the Hon'ble Supreme Court in the case of **Union of India and Others vs. Adani Exports Ltd. and Another : (2002) 1 SCC 567**. In that case, the respondents, Adani Exports sought the benefit of Passbook Scheme in terms of para 54 of the Import Export Policy introduced w.e.f. 1.4.1995. The High Court at Ahmedabad granted relief to the respondents rejecting the Union of India's plea that the High Court of Gujarat at Ahmedabad had no territorial jurisdiction. The respondents therein pleaded in para 16 of the civil application (Article 226) that the respondent carry on business of import and export from Ahmedabad, the orders for export and import are placed from and were executed at Ahmedabad, the documents and payments for export and import are sent/made at Ahmedabad. The Supreme Court, after considering the scope of the writ petition and the nature of relief sought for, upheld the objection of the Union of India referring to the decision of **Oil and Natural Gas Commission v. Utpal Kumar Basu :(1994) 4 SCC 711.** As in

the present case, in the case of Union of India vs. Adani Exports Ltd, the petitioner pleaded that the Bank Guarantee and bond was issued in favour of the appellant Union of India from Ahmedabad. Therefore, the part of the cause of action arose at Ahmedabad. Referring to para 16 of the civil application of Adani Exports Ltd., the Hon'ble Supreme Court rejected it as not germane to the relief sought for in the writ petition. The Hon'ble Supreme Court also held that the plea of Bank Guarantee and Bond having been executed at Ahmedabad will have no direct nexus or bearing on the disputes involved in the application. It held at para 16, 17 and 19 as follows :-

> *"16. It is clear from the above constitutional provision that a High Court can exercise the jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises. This provision in the Constitution has come up for consideration in a number of cases before this Court. In this regard, it would suffice for us to refer to the observations of this Court in the case of* ***Oil and Natural Gas Commission v. Utpal Kumar Basu : (1994) 4 SCC 711,*** *wherein it was held* ***:***
>
> > *"Under Article 226 a High Court can exercise the power to issue directions, orders or writs for the enforcement of any of the fundamental rights conferred by Part III of the Constitution or for any other purpose if the cause of action, wholly or in part, had arisen within the territories in relation to which it exercises jurisdiction, notwithstanding that the seat of the Government or authority or the residence of the person against whom the direction, order or writ is issued is not within the said territories. The expression 'cause of action' means that bundle of facts which the petitioner must prove, if traversed, to entitle him to a judgment in his favour by the court. Therefore, in determining the objection of lack of territorial jurisdiction the court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. Thus the question of territorial jurisdiction must be decided on the facts pleaded in the petition, the truth or otherwise of the averments made in the petition being immaterial."*
>
> *17. It is seen from the above that in order to confer jurisdiction on a High Court to entertain a writ petition or a special civil application as in this case, the High Court must be satisfied from the entire facts pleaded in support of the cause of action that those facts do constitute a cause so as to empower the court to decide a dispute which has, at*

least in part, arisen within its jurisdiction. It is clear from the above judgment that each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance within the lis that is involved in the case. Facts which have no bearing with the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned. If we apply this principle then we see that none of the facts pleaded in para 16 of the petition, in our opinion, falls into the category of bundle of facts which would constitute a cause of action giving rise to a dispute which could confer territorial jurisdiction on the courts at Ahmedabad.

19. ..... In the case of ONGC [(1994) 4 SCC 711], this court negatived the contentions advanced on behalf of the respondents therein that either the acquisition of knowledge made through media at a particular place or owning and having an office or property or reseeding at a particular place, receiving of a fax message at a particular place, receiving telephone calls and maintaining statements of accounts of business, printing of letterheads indicating branch offices of the firm, booking of orders from a particular place are not the factors which would give rise to either wholly or in part cause of action conferring territorial jurisdiction to courts. In the said case, this Court also held that the mere service of notice is not a fact giving rise to a cause of action unless such notice is an integral part of the cause of action."

[46] In the present case also, one of the fact the appellant is clutching upon is the enforcement of the Bank Guarantee at Manipur. As observed by the Hon'ble Supreme Court, the Bank Guarantee has no relevance in so far as merit of the termination is concerned. The enforcement of Bank Guarantee is incidental.. If this plea is taken, then if the Bank Guarantee was issued from any other place, then such place or State should also be conferred with the jurisdiction stating that the Bank Guarantee was issued from that particular place or State.

[47] We also take note of the fact that at the time of taking interim order, the writ petition was filed without a single whisper, pleading cause of action stating that this Court has got jurisdiction to hear the case. This

becomes even more relevant in the light of the Decision of **Union of India and Others vs. Adani Exports Ltd. and Another : (2002) 1 SCC 567** and **Oil and Natural Gas Commission v. Utpal Kumar Basu :(1994) 4 SCC 711,** where emphasis is made on facts pleaded in the writ petition truth or otherwise of the averments made in the petition being immaterial. The subsequent affidavit dated 06.03.2019 is only to cover up the lapses on the part of the appellant and his failure to plead the cause of action at the first instance when interim order was taken.

[48] As to whether, the Bridge No. 1 falls within the State of Manipur or in the International Border is a question of fact. While it is pleaded by the appellant/writ petitioner that the Bridge No. 1 falls in the State of Manipur, when he was asked on the basis and on which document he relies upon such a statement, the appellant counsel, after verification, could not point out anywhere in the agreement that the Bridge No. 1 falls in the State of Manipur. On the other hand, as rightly pointed out by the respondents, for the Trilateral Highway between **India, Myanmar and Thailand** it requires construction of 69 bridges with approach road **on Tamu-Kyigone-Kalewa Road (TKK)**. It does not speak about Manipur. The respondent No. 1 & 2 also referred to the Volume I, II, III and IV of the EPC Agreement document sets filed on 02.03.2020 showing various technical parameters. Nowhere it is indicated that Bridge No. 1 falls in the State of Manipur. The only reference if at all is in relation to the rates applicable if there is a change of scope in terms of Article 13. In this case, there is absolutely no document on change of scope contemplated at any point of time. Therefore the plea of Bridge No. 1 falls in the State of Manipur has no basis. Mere statement of affidavit

would not suffice. Therefore, this contention also, does not appear to be correct.

[49] It is also to be noticed that the agreement clearly provides that the interaction will be with lead member and the power of attorney has been issued showing the Lead Member as M/s Niraj Cement Structurals Ltd(NCSL) having its registered office at Niraj House, Sunderbaug, Near Deonar Bus Depot, Chembur, Mumbai. All the correspondents in this case have been primarily addressed to the Lead Member at Mumbai Head Office. Therefore, the finding of Learned Single Judge on this issue appears to be absolutely correct. We approve the said findings. Learned Single Judge has gone into all relevant aspects including case laws to rule that no cause of action arises within the jurisdiction of this Court. We do not intend to add any further.

SUPPRESSION OF FACTS

[50] Another important issue that needs to be addressed for declining the relief sought for by the appellant/writ petitioner is the plea on suppression of facts.

Ms. Madhavi Divan, learned ASG pointed out that suppression of facts disentitled the writ petitioner from any relief. The writ petition should have been dismissed on this ground also because a number of relevant clauses of agreement dated 08.11.2017 have been suppressed. Further documents, correspondences, minutes of meetings have been suppressed. To support this plea, it was pointed out that important Articles of the Agreement dated 08.11.2017 have been omitted. To cite a few, Article 26.3,

Arbitration, Article 27, Jurisdiction of Courts in case of dispute, Article 6, Disclaimer and many more. The role of the contractor specified in Article 3 was not cited. On the contrary, the appellant/writ petitioner has relied upon Article 4 and Article 23 alone and he has deliberately omitted to refer to other Articles. Ms. Madhavi Divan, learned ASG as undertaken in the earlier hearing dated 14.08.2020 stated that the appellant/writ petitioner has omitted and suppressed so many documents while filing the writ petition. They are the following :-

(i) 07.12.2017 (Annexure-R/13/2 of affidavit-in-opposition, page 15-24) :

- Review meeting was held in New Delhi.

(ii) 28.03.2018 (Annexure-R/13/2 of affidavit-in-opposition, page 25-28) :

- Review meeting was held in New Delhi.

(iii) 10.04.2018 (Annexure-R/13/2 of affidavit-in-opposition, page 30-37):

- Minutes of Review Meeting No. 4 held at Tamu was communicated to the contractor.

(iv) 16.04.2018 (Annexure-R-13/2 of the affidavit-in-opposition, page 38-45):

- Minutes of Review Meeting No. 5 held at Tamu was communicated to the contractor.

(v) 25.04.2018 (Annexure-R-13/1 of affidavit-in-opposition, page 46-48):

- Statement regarding availability of High Flood Level (HFL) Data with contractor since 25.04.2018.

(vi) 26.04.2018 (Annexure/R/13/12 of affidavit-in-opposition, page 49-55) :

- Review Meeting was held at Embassy of India in Yangoon.

(vii) 28.04.2018 (Annexure/R/13/1 of affidavit-in-opposition, page 56-60) :

- The minutes of meeting No. 6 held at MOC office-Tamu and site.

(viii) 02.05.2018 (Annexure R/13/2 of affidavit-in-opposition, page 61-64):

- The minutes of Meeting No. 7 held at MOC office at Kalay.

(ix) 11.05.2018 (Annexure R/5 of affidavit-in-opposition, page 65-84):

- First Show Cause Notice for termination of contract :

(x) 25.05.2018 (Annexure –R/12 of affidavit-in-opposition and Annexure B/2 of the rejoinder affidavit, Page 86-89):

- A comprehensive reply to the letter dated 21.05.2018 of the petitioner, along with technical article on accuracy of GPS and manner in which it should be approached.

(xi) 28.05.2018 (Annexure-R/13/8 of affidavit-in-opposition, page 100-101):

- It is filed by respondents requesting inspection for sub soil investigation.

(xii) 18.06.2018 (Annexure-R/6 of affidavit-in-opposition, page 102-105):

- 15 days' notice for termination of contract was issued.

(xiii) 25.06.2018 (Annexure-R/7 of affidavit-in-opposition, page 106-109):

- Minutes of Review Meeting on Construction of 69 Bridges and approach road.

(xiv) 28.06.2018 (Annexure-R/13/9 of affidavit-in-opposition, page 110-113):

- The request for investigation regarding Borehole of Bridge No. 2 for Soil Survey Investigation.

(xv) 10.07.2018 (Annexure-R/13/10 of affidavit-in-opposition, page 114-117):

- The request for inspection of subsoil investigation at Bridge No. 1

(xvi) 02.07.2018 (Annexure-R/13/5 of affidavit-in-opposition, Page 123-126):

- Letter of the appellant contractor informing that two separate agencies have been deployed on the same sector to fix anomalies in coordinates of control station.

(xvii) 09.07.2018 (Annexure-R/15 of affidavit-in-opposition, page 127-133):

- Letter of the appellant contractor submitting 3(three) months plan.

(xviii) 21.07.2018 (Annexure-R/13/6 of affidavit-in-opposition, page 134-135):

- Letter of AE informing that two more reference pillars were found intact.

(xix) 25.07.2018 (Annexure-R/13/17 of affidavit-in-opposition, page 136-147):

- Request for inspection regarding checking alignment survey of Bridge No. 3 & 44

(xx) 11.08.2018 (Annexure-R/13/2 of affidavit-in-opposition, page 148-150):

- The minutes of Meeting No. 8.

(xxi) 12.08.2018 (Annexure-R/13/2 of affidavit-in-opposition, page 151-153):

- The minutes of Meeting No. 9.

(xxii) 10.10.2018 (Annexure-R/14 of affidavit-in-opposition, page 154-159): - The status of work site as on 10.10.2018.

(xxiii) 21.10.2018 (Annexure-R/14 of affidavit-in-opposition, page 171-176):

- The status of work site as on 21.10.2018.

(xxiv) 29.10.2018 (Annexure –R/14 of affidavit-in-opposition, Page 177-182):

- Status of work site as on 29.10.2018.

(xxv) 02.11.2018 (Annexure-R/8 of affidavit-in-opposition, Page No. 183-198):

- Show cause for termination of contract.

(xxvi) 12.11.2018 (Annexure-R/14 of affidavit-in-opposition, Page 199-206):

- The status of work on site as on 12.11.2018.

(xxvii) 20.11.2018 (Annexure-R/14 of affidavit-in-opposition, page 207-213):

- The status of work on site as on 20.11.2018.

(xxviii) 26.11.2018 (Annexure-R/14 of affidavit-in-opposition, Page 220-229):

- The status of work on site as on 26.11.2018.

(xxix) 28.11.2018 (Annexure-R/13/11 of affidavit-in-opposition, page 250): - Drawing of culvert and diversion was submitted.

(xxx) 05.12.2018 (Annexure-R/14 of affidavit-in-opposition, page 251-261):

- The status of work site as on 05.12.2018.

(xxxi) 06.12.2017 (Annexure-R/17 of affidavit-in-opposition, page 262-263):

- Arrangement of Permission of Survey Instrument, other equipment & vehicles of entry was requested AE to Ministry of Construction, Myanmar.

(xxxii) 13.12.2017 (Annexure-R/17 of affidavit-in-opposition, page 264-266):

- Request for Borer entry pass was made by the Contractor.

(xxxiii) 17.12.2018 (Annexure-R/13/3 of affidavit-in-opposition Page 267-274):

- Counter reply to Contractors reply to Show Cause Notice.

These are vital and relevant documents which are the run up to the termination.

[51] Therefore, it is a serious lapse on the part of the appellant/writ petitioner to come to this Court with unclean hands suppressing vital documents. These documents are relevant to establish that the plea of arbitrariness is baseless. The suppression is made with mala fide intention to stall the project by approaching this Court knowing fully well that no cause of action arose within the jurisdiction of this Court and this Court had no territorial jurisdiction. Therefore, this Court should not show any indulgence and the writ petition was rightly dismissed and the appeal also deserves to be dismissed.

The same plea was taken up by Mr. Abir Phukan, learned counsel appearing for respondent No. 3 & 4. The respondents pleaded that these documents are within the knowledge of the appellant/writ petitioner. He was aware of the various correspondences and documents and yet they were deliberately omitted and few documents are relied. The respondents point out that these documents are relating to the technical aspects of the

case. While on one hand, the appellant/writ petitioner states serious error in the DPR, GPS, HFL on the basis of selective documents, he failed to file documents which were served on contractor by way of replies of respondents to refute contractor's wild and vague allegations. Even the DPR which is stated to be inherently defective, has not been placed before this Court as Annexures of documents. Therefore, the conduct of the appellant/writ petitioner in suppressing material facts and documents, deserves to be seriously viewed and the writ appeal deserves to be dismissed on this ground also.

[52] The Supreme Court in the case of **K.D.Sharma vs Steel Authorities Of India Ltd.& ors., (2008) 12 SCC 481, para No.34 and 38,** held as follows :-

> *"34. The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the Writ Court must come with clean hands, put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim."*
>
> *"38. The above principles have been accepted in our legal system also. As per settled law, the party who invokes the extraordinary jurisdiction of this Court under Article 32 or of a High Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot be allowed to play `hide and seek' or to `pick and choose' the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of Writ Courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because, "the Court knows law but not facts".*

In the case of **S.P.Chengalvaraya Naidu vs. Jagannath** reported in **(1994) 1 SCC 1** , the Hon'ble Supreme Court held in para No.6 as under:-

> *"6. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ex. B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the appellants- defendants could have easily produced the certified registered copy of Ex. B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."*

In this regard, Mr. H.S.Paonam, learned senior counsel for the appellant relies upon the case of **SJS Business Enterprises (P) Ltd. vs State of Bihar** reported in **(2004) 7 SCC 166:** in which the Hon'ble Supreme Court held in para 13 & 14 as follows:

> *"13. As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the Courts to deter a litigant from busing the process of Court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the Court, whatever view the Court may have taken. Thus hen the liability to Income Tax was questioned by an applicant on the ground of her non residence, the fact that she had purchased and was maintaining a house in the country was held to be a material fact the suppression of which disentitled her from the relief claimed. Again when in earlier proceedings before this Court, the appellant had undertaken that it would not carry on the manufacture of liquor at its distillery and the proceedings before this Court were concluded on that basis, a subsequent writ petition for renewal of the licence to manufacture liquor at the same distillery before the High Court*

was held to have been initiated for oblique and ulterior purposes and the interim order passed by the High Court in such subsequent application was set aside by this Court. Similarly, a challenge to an order fixing the price was rejected because the petitioners had suppressed the fact that an agreement had been entered into between the petitioners and the Government relating to the fixation of price and that the impugned order had been replaced by another order.

14. Assuming that the explanation given by the appellant that the suit had been filed by one of the Directors of the Company without the knowledge of the Director who almost simultaneously approached the High Court under Article 226 is unbelievable, the question still remains whether the filing of the suit can be said to be a fact material to the disposal of the writ petition on merits. We think not. The existence of an adequate or suitable alternative remedy available to a litigant is merely a factor which a Court entertaining an application under Article 226 will consider for exercising the discretion to issue a writ under Article 226 . But the existence of such remedy does not impinge upon the jurisdiction of the High Court to deal with the matter itself if it is in a position to do so on the basis of the affidavits filed. If however a party has already availed of the alternative remedy while invoking the jurisdiction under Article 226, it would not be appropriate for the Court to entertain the writ petition. The Rule is based on public policy but the motivating factor is the existence of a parallel jurisdiction in another Court. But this Court has also held in C. B. Gosain Bhan V. State of Orissa 14 STC 766= 1963 (2) SCR 879 that even when an alternative remedy has been availed of by a party but not pursued that the party could prosecute proceedings under Article 226 for the same relief. This Court has also held that that when a party has already moved the High Court under Article 226 and failed to obtain relief and then moved an application under Article 32 before this Court for the same relief, normally the Court will not entertain the application under Article 32. But where in the parallel jurisdiction, the order is not a speaking one or the matter has been disposed of on some other ground, this Court has, in a suitable case, entertained the application under Article 32 . Instead of dismissing the writ petition on the ground that the alternative remedy had been availed of the Court may call upon the party to elect whether it will proceed with the alternative remedy or with the application under Article 226. Therefore the fact that a suit had already been filed by the appellant was not such a fact the suppression of which could have affected the final disposal of the writ petition on merits."

(emphasis supplied)

In that decision of **SJS Business Enterprises (P) Ltd. vs State of Bihar** (supra), it has been clearly held by the Hon'ble Supreme Court that if the suppression is material for the consideration of the Court, then, the general rule on suppression of facts by litigant disqualifies such litigant from obtaining any relief. In this case, the appellant/ writ petitioner with full knowledge has failed to furnish the entire set of documents. The writ

petitioner has filed it selectively and added further document later on. He has suppressed important Articles of the contract Agreement which disentitles him from approaching this Court. Further prayer No. (iii) of the writ petition relates to a plea to order investigation in respect of error in the DPR. That document also has not been placed before the Court. A perusal of various documents suppressed reveals that several defaults happened over a period of time. There was no progress and notices were issued. This will establish contractor's inability to perform. By suppression of the documents, Appellant/writ petitioner has attempted to conceal the real cause behind the termination of the contract. There is no justification to withhold notices, minutes of meetings etc. In fact, the concise statement of default is summarized in the annexure to the last show cause notice and it is also extracted to show the whole picture at a glance (para 60 of this judgment). Therefore, the question of hearing the appellant/writ petitioner in respect of a relief in respect of document which is not on record does not arise. Therefore, the objection raised by the respondent that the petitioner/appellant should be non suited on the ground of suppression of material facts is sustained.

DISPUTED QUESTION OF FACTS : TECHNICAL DEFECTS IN DPR

[53] The next contention of the appellant/writ petitioner is that appellant/contractor suffered various difficulties in execution of the contract due to fault on the part of the respondents, error in DPR / Feasibility report, etc. He refers to Para 6 of the writ petition and it reads as follows :-

> ***"[6]*** *That, after signing of the contract, petitioner came to know that there are many variations in the date furnished in the tender documents*

like in the reference pillars of the bridge, HFL, sub soil conditions, survey alignment details and sub soil investigations as a result, design work got substantially delayed against the wishes of the petitioner. Accordingly, the petitioner approached the Authority Engineer and was informed about the discrepancy in the topographic survey done for Bridge No. 1 using the newly established GPS pillars near the bridge and the coordinates of center line coordinates provided to the petitioner vide letter dt. 210-5-2018. Likewise, request was also made for initiating process for data collection of HFL marking on all the bridges jointly with IRCON and MOC team and also for the plan profile survey of all major bridges so that alignment design work can be started vide e-mail dt. 21-8-2018."
Annexur-A/4 and A/5 are true and correct copy of the letter dt. 21-8-2018.

[54] Overlooking these discrepancies, the show cause notice has been issued. Despite reply submitted, in an arbitrary manner action was taken to terminate the contract and that too without following the mandatory provisions of Article 23.1.2 of the EPC Agreement. In para 8, more details of the discrepancies are referred to by the appellant/ writ petitioner and these relate to High Flood Level Data. Similarly, reason for delay has been stated in para 12 of the writ petition, which is relevant and extracted below :

"[12] That, it is respectfully submitted that one of the main reason for delay in the execution of the work was discrepancies in the scope of work, in the data furnished along with the tender documents like in the reference pillars of the bridge, HFL (High Flood Level), sub soil conditions, survey alignment details and sub soil investigations which is not attributable to the contractor but to the authority. Inspite of repeated request to hold a joint survey, the authority has not given full co-operation to the contractor to rectify the discrepancies at tan early date. As a result of such non cooperation from the ends of the Authority, the work could not be executed smoothly. Therefore, terminating the contract due to the fault of the Authority in preparing the DPR lacks rationality and the same is liable to be interfered with from the ends of justice. It is reliable learnt that the DPR for the project has been prepared at the table without actually visiting the work site and conducting necessary survey on the basis of data available for the year 2013 and the whole exercise of terminating the contract has been taken up to cover up the defect in preparation of the DPR by the Authority Engineer."5

[55] From a reading of the above, it is clear that the petitioner is on the principle taking a stand that there is defect in the preparation of DPR / feasibility report by the authority engineer and therefore, while execution of the contract, many difficulties arose which were explained to the authority but without correcting the same, they proceed to issue notice to terminate the contract with malafide intention and in an arbitrary manner terminated the contract. This appears to be the sum and substance of the second contention of the appellant/writ petitioner's relief before the writ court. He relied on Article 4.1 and 6.1 of the EPC agreement, which read as follows :-

"Article 4.1. Obligation of the Authority

"4.1.2 The Authority shall be responsible for the correctness of the Scope of the Project, Project Facilities, Specifications and Standards and the criteria for testing of the completed Works."

Article 6.1 Disclaimer

6.1.1 The Contractor acknowledges that prior to the execution of this Agreement, the Contractor has, after a complete and careful examination, made an independent evaluation of the Request for Qualification, Request for Proposal, Scope of the Project, Specifications and Standards of design, construction and maintenance, Site, local conditions, physical qualities of ground, subsoil and geology, traffic volumes, suitability and availability of access routes to the Site and all information provided by the Authority or obtained, procured or gathered otherwise, and has determined to its satisfaction the accuracy or otherwise thereof and the nature and extent of difficulties, risks and hazards as are likely to arise or may be faced by it in the course of performance of its obligations hereunder. Save as provided in Clause 4.1.2 and Clause 5.2, the Authority makes no representation whatsoever, express, implicit or otherwise, regarding the accuracy, adequacy, correctness, reliability and/or completeness of any assessment, assumptions, statement or information provided by it and the Contractor confirms that it shall have no claim whatsoever against the Authority in this regard.

6.1.2 The Contractor acknowledges and hereby accepts to have satisfied itself as to the correctness and sufficiency of the Contract Price.

6.1.3 The Contractor acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in Clause 6.1.1 above and hereby acknowledges and agrees that the Authority shall not be liable for the same in any manner whatsoever to the Contractor, or any person

claiming through or under any of them, and shall not lead to any adjustment of Contract Price or Scheduled Completion Date.

6.1.4 The Parties agree that any mistake or error in or relating to any of the matters set forth in Clause 6.1.1 above shall not vitiate this Agreement, or render it voidable.

6.1.5 In the event that either Party becomes aware of any mistake or error relating to any of the matters set forth in Clause 6.1.1 above, that Party shall immediately notify the other Party, specifying the mistake or error.

6.1.6 Except as otherwise provided in this Agreement, all risks relating to the Project shall be borne by the Contractor; and the Authority shall not be liable in any manner for such risks or the consequences thereof."

Whether the DPR is inherently defective, (i.e.) whether the data provided by the respondents are erroneous at the first instance and therefore, the respondents were at fault and that is the reason for the delay in the project. What is the scope or applicability of DPR / feasibility report, becomes relevant.

[56] Ms. Madhavi Diwa, learned ASG relied upon the Agreement dated 08.11.2017 and refers to Article 2, Scope of the Project.

"2.1. Scope of the Project

Under this Agreement, the scope of the Project (the "Scope of the Project") shall mean and include

a) Construction of the Project on the Site set forth in Schedule-A and as specified in Schedule-B together with provision of Project Facilities as specified in Schedule –C and in conformity with the Specifications and Standards set forth in Schedule-D:"

Schedule A, B, C and D are the details of the scope of the project and are part of the Agreement. Schedule A is page Nos. 121 to 135. Schedule B is page Nos. 136 to 178. Schedule C is page Nos. 179 to 180. Schedule D is page No.181 of Volume-1 filed by Mr. S.Suresh, learned ASG.

As per Article 4.1.2, the obligation of the authority is in respect of the four items referable to Schedule A to D of the Article 2 stated supra. This

is part of the agreement signed by both parties. Article 6.1 is the disclaimer. Article 6.1.1 speaks about the contractor's role to examine carefully by way of independent evaluation of various factors like Request for Qualification, Request for Proposal, Scope of the Project, etc. and satisfy himself of the accuracy or otherwise thereof, difficulty, risk hazard in course of the performance of the contract etc. Except as provided in Clause 4.1.2, the authority makes no representation whatsoever, express or implicit or otherwise regarding the accuracy, correctness , reliability or and/or completeness, of any assessment, assumptions, statement information provided by it and that the contractor confirms that he shall have no claims whatsoever against the Authority in this regard.

It means that in terms of Article 2, Scope of project, namely, Schedule A, B, C and D is alone relevant and binding. On all other aspects, the contractor has to fully satisfies himself on every aspects of the contract for its execution. The contractor acknowledges the scope of the project prior to execution of the agreement in Article 6. In this regard, it was rightly pointed out that Notice Inviting Bid/Technical Bid dated 03.4.2017, in Section 2, instruction to the intending bidder reads as follows:-

> "2.1.3. **The Feasibility Report/ Detailed Project Report of the Project is being provided only as a preliminary reference document by way of assistance to the Bidders** who are expected to carry out their own surveys, investigations and other detailed examination of the Project before submitting their Bids. Nothing contained in the Feasibility Report/ Detailed Project Report shall be binding on the Authority nor confer any right on the Bidders, and the Authority shall have no liability whatsoever in relation to or arising out of any or all contents of the Feasibility Report/ Detailed Project Report."
>
> **(emphasis supplied)**

This makes the whole issue clear that DPR/Feasibility Report is only a preliminary reference document for the assistance of the bidder and

the contractor/bidder is expected to carry out its own enquiry, investigation, etc. The instruction is very clear that it has no binding effect. In any event, the lead member, Niraj Cement Structurals Ltd. at Mumbai as well as the Manipur Tribal Development Corporation by their letter submitting the technical bid dated 8.8.2017 which is found at (page No.237 to 240, Niraj Cement Structurals Ltd. at Mumbai) and (Manipur Tribal Development Corporation at page No.241 to 244), have clearly stated in the following manner:-

"Niraj Cement Structurals Ltd.

APPENDIX IA
LETTER COMPRISING THE TECHNICAL BID
(Refer Clause 2.1.5, 2.11 and 3.1.6)

Joint Secretary (DPA-III)
Ministry of External Affairs,
Jawaharlal Nehru Bhawan,
23-D, Janpath, New Delhi-110001.
Sub: BID for "Construction of 69 Bridges including Approach Roads on the Tamu-Kyigone-Kalewa road section from km 0.00 to km 149.70 of the Trilateral Highway to Myanmar to be executed on EPC Mode"

Dear Sir,

With reference to your RFP document dated 03/04/2017, I/we, having examined the Bidding documents and understood their contents, hereby submit my/our BID for the aforesaid Project. The BID is unconditional and unqualified.

…. ….

…. …..

19. I/We have studied all the Bidding documents carefully and also surveyed the project and the traffic. We understand that except to the extent as expressly set forth in the Agreement, we shall have no claim, right or title arising out of any documents or information provided to us by the Authority or in respect of any matter arising out or relating to the Bidding Process including the award of Agreement.

…. ….

…. ….

Yours faithfully,
Sd/-
(Signature, name and designation
Of the Authorised signatory)"

Date: 8.8.17
Place : Delhi

This is identical in respect of both the joint ventures partners. For reasons best known to the appellant, as rightly pointed out by Ms. Madhavi Divan, learned ASG, these document was not disclosed as part of the writ petition. The reason is obvious because the appellant is trying to make out a case where there is none stating that DPR/Feasibility Report is faulty and has been prepared without actually visiting the work site or without survey and therefore, the termination of contract is to cover up the defect in the preparation of DPR. The technical plea of defect in DPR/ Feasibility Report is taken without reference to the Agreement. The parties are bound by Article 2, Scope of Work and its Annexures A, B, C and D alone. It has all the relevant details and does not deal with DPR/Feasibility Report. This plea, therefore, is error apparent on the face of record. The appellant's plea of various defects, errors etc. are therefore a misconceived and untenable plea. A plea without substance or merit has to be rejected *in limine.*

The appellant/contractor has also suppressed Article 10 which deals with design and construction of the project. The relevant portion is as follows:-

> " 10. 1. Obligation prior to commencement of Works.
>
> 10.1.1 Within 20 (twenty) days of the Appointed Date, the Contractor shall
>
> (a) …. ….
>
> (b) appoint a design director (the Design Director) who will head the Contractor's design unit and shall be responsible for surveys, investigation, collection of data, and preparation of preliminary and detailed design;
>
> 10.2. Design and Drawings
>
> 10.2.1 Design and Drawings shall be developed in conformity with the Specifications and Standards set forth in Schedule-D. In the event, the Contractor requires any relaxation in design standards due to

> restricted Right of Way in any section, the alternative design criteria for such section shall be provided for review of the Authority's Engineer."
>
> 10.3. Construction of the Project
> 10.3.1 The Contractor shall construct the Project as specified in Schedule-B and Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D. The Contractor shall be responsible for the correct positioning of all parts of the Works, and shall rectify any error in the positions, levels, dimensions or alignment of the Works. The 1096th (one thousand and ninety sixth) day from the Appointed Date shall be the scheduled completion date (the Scheduled Completion Date") and the Contractor agrees and undertakes that the construction shall be completed on or before the Scheduled Completion Date, including any extension thereof."

[57] A reading of the Article 10 makes it clear that it is role of the contractor through the design Director for survey, investigation, collection of data and preparation of preliminary and detail design. Article 10.2 deals with design and drawing of the Director on the basis of the specifications and standard set forth in Schedule-D. Nowhere in the Article of the Agreement, there is mention of the applicability of DPR/Feasibility Report. The appellant/contractor, with eyes wide open, had signed the agreement on the scope of the project (i.e.), Article 2 which contains Schedule A,B, C and D.

A cursory perusal of the Schedule A, B, C and D gives various details on the scope of the project. It contains specifications, basic design and drawing and all relevant data required for the project. The appellant, if he felt that the scope of the project is incorrect or faulty, could have avoided the bid itself. On the contrary, after submitting the technical bid and after signing the contract, the contractor throws the blame on the DPR/Feasibility Report which, to say the least, has no relevance and in any event, was not placed before the Court. The DPR loses its relevance after the contract is signed. We have already observed that in terms of Section 2 of the Technical bid, DPR /

feasibility report is only for reference and has no binding effect. The actual design drawing has to be done by the contractor on the basis of the Scope of Project - Article 2. Without doing his part in terms of the agreement, a strange plea alleging fault in DPR/Feasibility Report and GPS / HFL data is raised. We have no hesitation to hold that this plea of the appellant is not only fallacious on the face of the record but a convoluted plea to plead arbitrariness.

[58] Assuming for a moment that the allegation of error in technical specification data etc. is required to be considered, the question is whether this Court in exercise of power under Article 226 can go into various issues raised by the appellant/writ petitioner to test the veracity of the defects in the DPR, GPS, HFL data, etc. The appellant/writ petitioner, consistently takes a plea that there are several errors in the DPR, GPS positions, HFL data etc. and despite series of inspection, review meeting, they could not proceed with the project because of non-cooperation from the respondents or their subordinates. In this regard, appellant's counsel referred to certain discrepancies like GPS coordinates, high flood level, data, etc. On the other hand, respondent Nos. 1 and 2 as well as respondents No.3 and 4, M/s IRCON and their technical people have in no uncertain terms rejected these allegations by various documents which were filed by them in support of the reply affidavit dated 14.01.2019. It will be pertinent to point out that the appellant/ writ petitioner having received this communication before filing of the writ petition and knowing its content, has deliberately not referred to it and has failed to annex those documents in support of the writ petition

because it goes against their claim and it will be fatal to appellant/writ petitioner's case. From the records produced by the respondents, it is pleaded that the technical aspects on which the appellant/writ petitioner pleads error or fault is imaginary. All the letters of the contractors were replied to by the technical team of 3rd respondent. As an example, the reply letter dated 25.5.2018 is relevant and it needs some discussion as it is highly technical.

[59] In Annexure-A/4 dated 21.05.2018, the appellant/writ petitioner informs the authority by a short letter about the contractor's inability to locate GPS Pillars. This is one issue raised in the writ petition. The respondents have responded by reply letter dated 25.05.2018 (Annexure-R/12 page 86-89 of new typed set). This was omitted to be furnished by the appellant/writ petitioner at the first instance but produced later on. A reading of Annexure-R/12 makes is clear that the stand of the respondent seems to be exactly opposite to what the appellant/writ petitioner's states. For clarity, the relevant para Nos. 1, 2, 2.ii, 2.iv & 5 of the respondents reply are extracted as follows :

> *"1. Since commencement of the survey work you have maintained that some internal verification is under progress from your side and that you will inform regarding joint venture to AE.*
>
> *It is quite amusing that after 5 months of handing over the RoW, you are informing that you could not find most of the GPS reference pillars installed during DPR survey.*
>
> *As soon as this was known to AE, a joint inspection was carried out with you and it was found that many of the GPS (DPR) pillars are still intake. (refer attached Annexure-A)*
>
> *As such, it can be concluded that your contention of missing DPR GPS reference pillars and internal survey work done so far not based on the factual site position.*

You will appreciate that GPS reference pillars present during survey at Bridge no. 1 undertaken by you on Jan 5, 2018. Why adequate steps have not been taken to preserve/transfer the DPR GPS references.

2. Regarding the issue highlighted, the followings are also noted for your information.

(ii) These types of problems occur many a times and they cannot be resolved as the source of error can be many. To name with few, the first one is being different instrument used. During DPR Geomax Zenith 20 was used with post processing software doing an observation of more than 8 hrs on the base. Here, you are using a Trimble which have its own source of errors. The antenna is different, the receiver is different, the orbital phase is different, the PDOP and GDOP values are different, Masking angel will be different and so is the time of observation.

(iv) Other few sources of errors would be Satellite clock, Receiver clock, ionosphere delays, satellite orbit, multipath etc.etc.

5. It is not out of place to mention that AE has insisted and maintained that DPR GPS reference pillars should be used to initiate survey and establish base/s and proceed with traversing. However, you have chosen to go for establishment for a new base for reasons best known to you. Moreover, the base established by you has not been checked/ verified with respect to an established survey of India pillar or any other such permanent benchmark."

(emphasis supplied)

It is clear that the contractor failed to save data in time. The authority has also enclosed technical papers to help the contractor. This was conveniently omitted. The reply clearly establishes that the technical aspect pleaded is a highly disputed question of fact and seriously denied by respondents. According to this reply, it appears to be a serious lapse on the contractor. Even the High Flood Level Data dispute raised is denied by respondents vehemently. It is rightly pleaded that the contractor is trying to deflect the issue to avoid exposing his inability to perform the contract.

[60] We have discussed the above issue as one example to show that the allegation of the appellant cannot be taken on face value in the light

of a specific stand taken by the respondents that the appellant is incapable of performance of the contract. Similarly, a reading of various documents filed by respondents which were specifically omitted by the appellant/writ petitioner reveal that in several meetings, the authorities have implored upon the appellant/writ petitioner to show involvement and speed in execution on various parameters. There are several Review Meetings submitted by the respondents in R/13/2, its dates are 07.12.2017, 28.03.2018, 10.04.2018, 16.04.2018, 26.04.2018, 28.04.2018, 02.05.2018, 25.06.2018, 11.02.2018, 12.08.2018 and in addition to that the first show cause notice issued at the earliest point of time on 11.05.2018 (R/5) was not filed as part of the writ petition by the appellant/writ petitioner. 15 days notice for termination of contract which was issued on 18.06.2018 (R/6) was also not furnished by the appellant/writ petitioner. It contains extensive details of default on the part of the contractor. Thereafter, the 15 days show cause notice dated 26.11.2018 (R/9)/ (A/8) for termination in terms of Article 23.1.2 of the EPC Agreement was issued. The same is very relevant and contains full summary of defaults and it is as follows :-

"Annexure-A

SUMMARY OF DEFAULTS MADE BY THE CONTRACTOR IN CONTRACT

Sl. No.	Description of default	Reference to Contract Clause	Contractual Date of Compliance	Actual Date of Compliance	Slippage /Delay in compliance as on 30.10.2018
1.	Non-availability of Lead Member	1.5.2, 10.1.1(a) & Para no.6 at Page 260 of	Immediately with signing of	Not complied till date	337 days

		EPC agreement	agreement		
2.	Non-submission of Work Programme	10.1.3	27.12.17	Submitted on 08.09.18 & was found to be erroneous & impractical, the same has been informed to EPCC on 24.09.18	308 days
3.	Non execution of Diversion Roads/Maintenance of existing bridges	9.1, 10.1.3, 10.4.1, 10.4.2, 11.3, 11.13.2, 11.17 & 16.1.2	27.12.17	Not complied till date	308 days
4.	Delay in submission of Design & Drawings due to delay in commencement in survey works & geotech investigations	3.1.1, 10.1.1(b) & 10.2.4(f)	By end of December i.e. 30.12.17 (As per submission made by Contractor in meeting held on 07.12.17)	No design & drawing submitted till date with complete site survey & investigation details. No method statement for survey & geotech investigation submitted till date.	304 days
5.	Non-Submission of Quality Assurance Plan	10.1.3 (Part-I) & 11.2.2	27.12.2017	Submitted on 22.09.18 but many items (i.e. WMM, Bituminous) are not included in the QAP	308 days
6.	Non-submission of Monthly Progress Report	11.7	Every Month w.e.f. Appointed date i.e. 28.11.2017	First MPR submitted on 09.07.18 for June'18. However, same was found to be incorrect & incomplete. Till date, a Complete & Correct MPR not submitted.	294 days
7.	Not obtaining Applicable permits and registration in Myanmar	3.1.17 (a) & Schedule-F at Page 189	15.12.2017 (As per submission made by Contractor in meeting held on 07.12.17)	Informed in meeting held on 17.07.18 that only Temporary registration has been obtained which is valid till 28.11.2018	320 days
8.	Slow Mobilization of Manpower &	10.1.3(Part-I)	27.12.2017	Key members Not Mobilized till date.	308 days

	Equipment			Contractor's project head (Sr. PD) deployed in second week of July'18 left project site within two weeks never to return back. New Sr.PD joined project in last of Sept.'18 but is constrained to visit project on daily pass basis from Moreh border (due to non-availability of valid passport) which has restrictions on limited working time (say from 10 am to 4pm) and having access to only initial few kms from Moreh. Only on 22.10.18, Contractor has provided his passport details for arranging entry Visa. Other key members not yet mobilized.	
9.	Non-Procurement of Insurance of Project	20.1.1, 20.3.1 & c) Schedule-P	07.12.2017	Not complied till date	328 days
10.	Delay in Appointment of Design Director	10.1.1(b)	17.12.2017	18.06.18 Earlier design director appointed by Contractor in Jan' 2018 had been removed.	184 days
11.	Non-Procurement of Professional Liability Insurance	20.1.6	27.12.2017	Not complied till date	308 days
12.	Non-Setting up of Site Laboratory	11.2.3	27.12.2017	Temporary laboratory set up at Camp at Km 4 on 02.07.18 Even this temporary site laboratory is not fully functional and is having facility of only	308 days

				few tests. Some of equipment are not even installed and calibrated.	
13.	Non-Setting up/delay in establishing EPCC Camp	11.2.3	By end of Dec.' 17 i.e. 30.12.17 (As per submission made by Contractor in meeting held on 07.12.17)	Only office & residential accommodation at camp at Km 4 completed by end of March, 18. Camp for setting up of plants, yards, laboratory etc. is yet to be set up.	305 days
14.	No progress of works	Clause 2 of Schedule-J	26.05.2018 (Milestone-I to achieve in 180 days)	Nil Progress achieved till date.	158 days
15.	No action taken by Contractor Inspite of repeated reminders of Termination	23.1	Intimated on 24.01.18 for termination due to non-compliances of action points/targets finalized in meeting held on 07.12.17	Most of points Not complied till date	280 days
16.	Delay in Submission of Performance Security	7.1.	17.11.2017	In two Parts (25.01.18 & 05.02.18)	81 days
17.	Delay in appointing Safety & Proof Consultant	10.1.5 & 10.2.2	15.01.18 (As per submission made by Contractor in meeting held on 07.12.17)	17.04.18	93 days

The facts as above expose the incapability of the appellant/writ petitioner in various counts. The case of the appellant is bereft of merit and the allegations are self serving to override the contractor's faults. The

objection of the respondents is crystal clear and it stares on the face of the records.

[61] Therefore, it is clear that on number of occasions, the authority has been informing the appellant /contractor of the various defaults, lapses on his part. In fact, a reading of all the show cause notice shows that the details of default or inaction appear to be extensive on several counts. But the Court is not inclined to go into those details because all those allegations and counter allegations are in the realm of disputed facts.

In the case of **Joshi Technologies International Inc. vs. Union of India & ors.** reported in **(2015) 7 SCC 728,** the Hon'ble Supreme Court held at **para Nos. 69.2, 69.3 and 70.3** as follows:-

> "69. *** ****
>
> *** ****
>
> 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 made 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.**
>
> **** ****
>
> **** ****
>
> 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 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 court can direct the aggrieved party to resort to alternate remedy of civil suit etc."
>
> ***(emphasis supplied)***

It followed the principles laid down in **ABL International Ltd. vs. Export Credit Guarantee Corporation Ltd; (2004) 3 SC 353.**

In such situation, this Court has no hesitation to hold that the writ petition is not an appropriate remedy to adjudicate various disputes raised which are highly technical and requires leading of oral and documentary evidence by either side. Therefore, the allegation of error in the DPR/feasibility report, GPS pillar/HFL data, non-cooperation and arbitrariness on the part of the respondents is *prima facie* a self serving plea and devoid of merits. Furthermore, Court will not go into such detail aspects which are highly technical in nature. The Court is not competent to assess as to whether GPS coordinates, High Flood Level data, etc. are correct or incorrect. It is a matter to be decided by technical persons. It cannot be resolved based on an allegation in affidavit which is emphatically refuted in the reply affidavit supported by documents of the respondents. On the contrary, the fault is consistently attributed to the appellant. Therefore, in a scope of work which is highly technical and where the issues raised are in the realm of disputes, a writ Court will refrain. The Hon'ble Supreme Court in the case of **Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) vs. CSEPDL-TRISHE CONSORTIUM** reported in **(2017) 4 SCC 318** in a case of rejection of the tender held as follows :-

> "36. …….. At this juncture we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review."

[62] A reading of all the documents filed by both the appellant and respondents, make it clear that there is absolutely no scope for resolution of this dispute in writ jurisdiction. Hence, on this count also, the relief is declined.

[63] Ms. Madhavi Divan, learned ASG referred to some documents of the Indian Ambassador at Myanmar and also letters of Myanmar Government highlighting the importance of the Project in relation to the bilateral treaty and to keep the friendly atmosphere between the two nations intact. It is stated that copy of the said documents have been furnished to the appellant's counsel at time of hearing before the Hon'ble Supreme Court. She further pleaded that in the nature of infrastructure project, the Court should be loath to entertain petitions of this nature and grant interim relief. She relied upon Section 14(d) and 20A of the Specific Relief Act, 1963, which read as follows :-

> ***"14. Contracts not specifically enforceable*** *:- The following contracts cannot be specifically enforced, namely:-*
>
> ***(d)*** *a contract which is in it nature determinable.*
>
> ***20 A. Special provisions for contract relating to infrastructure project.—***
>
> *(1) No injunction shall be granted by a court in a suit under this Act involving a contract relating to an infrastructure project specified in the Schedule, where granting injunction would cause impediment or delay in the progress or completion of such infrastructure project.*
>
> *Explanation.—For the purposes of this section, section 20B and clause (ha) of section 41, the expression "infrastructure project" means the category of projects and infrastructure Sub-Sectors specified in the Schedule.*
>
> *(2) The Central Government may, depending upon the requirement for development of infrastructure projects, and if it considers necessary or*

expedient to do so, by notification in the Official Gazette, amend the Schedule relating to any Category of projects or Infrastructure Sub-Sectors.

(3) Every notification issued under this Act by the Central Government shall be laid, as soon as may be after it is issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or both Houses agree that the notification should not be made, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification."

A reading of the above makes it clear that in respect of infrastructure project like the present one, there is a specific bar in respect of suits before a Civil Court. We have perused the communications referred by Ms. Madhavi Divan, learned ASG. All these factors also need to be taken into consideration because in a project of this kind, the intention behind amendment to Specific Relief Act, 1963 in Section 20A becomes relevant and important. Its intention is to protect infrastructure projects. While deciding the appeal, we have considered all the above aspects as a whole.

RESULT

We have considered the case of the appellant/writ petitioner on the plea of arbitrariness on the facts pleaded and also the objection of the respondents and after having considered all the issues holistically, on the principles enumerated by the Hon'ble Supreme Court in the case of **Maharashtra Chess Association (Supra)** including the principle of forum non conveniens and for all the reasons that we have recorded above in the

earlier part of this judgment, we hold that no case is made out for a relief under Article 226 of the Constitution of India. The objections of the respondent No. 1, 2, 3 & 4 on the merits and on the maintainability of the writ petition on all aspects are sustained. We uphold the order of the learned Single Judge.

In the result, we dismiss the writ appeal. No order as to costs.

JUDGE CHIEF JUSTICE

FR/NFR

Opendro / Sandeep