Supreme Court of India Abl International Ltd. & Anr vs Export Credit Guarantee ... on 18 December, 2003 Author: S Hegde Bench: N.Santosh Hegde, B.P.Singh. CASE NO.: Appeal (civil) 5409 of 1998

PETITIONER: ABL International Ltd. & Anr.

RESPONDENT: Export Credit Guarantee Corportion Of India Limited & Ors.

DATE OF JUDGMENT: 18/12/2003

BENCH: N.Santosh Hegde & B.P.Singh.

JUDGMENT: J U D G M E N T SANTOSH HEGDE,J. One Rassik Woodworth Limited (4th respondent herein) entered into a contract with M/s.RVO Kazpishepromsyrio, a State- owned Corporation of Kazakhstan (referred to as the Kazak Corporation) for supply of 3,000 Metric Tons of tea. The said agreement was entered into on or about 26th August, 1993. As per the original agreement, the payment for such tea exported was to be made by the Kazak Corporation by barter of goods mentioned in the Schedule to the said agreement, within 120 days of the date of delivery by the exporter. The agreement also provided that such payment to be made by the Kazak Corporation is to be guaranteed by the Government of Kazakhstan. Clause 6 of the agreement which provided for the mode of payment by barter of goods by the Kazak Corporation came to be amended by an addendum on the very same day when the original agreement was executed. By the amended agreement, it was specifically provided that if the contract of barter of goods cannot be finalised for any reason then the Kazak Corporation was to pay to the exporter for the goods received by it in US Dollars within 120 days from the date of the delivery. Such payment was to be remitted by the Kazak Corporation to the bank account of the exporter at Delhi. This amended agreement also provided for a guarantee being given by the Ministry of Foreign Economic Relations of Kazakhstan for prompt payment of such consideration. The addendum specifically stated that the same was to form an integral part of the contract earlier entered between the parties on the same day viz. 26.8.1993. After the said contract was entered into by the 4th respondent with the Kazak Corporation, by an agreement of parties, the 4th respondent assigned a part of the said export contract to the first appellant herein on same terms. On a direction issued by the Reserve Bank of India to cover the risk arising out of the export of tea made by the appellants as per the said assigned contract, the appellants approached the Export Credit Guarantee Corporation of India Ltd. (the first respondent herein) on 23rd September, 1993 to insure the risk of payment of consideration that is involved in the said contract of export. On 30th September, 1993, after considerable correspondence between the parties, the first respondent issued a comprehensive risk policy effective from 23rd September, 1993 to 30th September, 1995 covering the risk. The Kazakhstan Government as required in the contract through its Ministry of Foreign Economic Relations also gave an irrevocable guarantee that in the event the Kazak Corporation for any reason whatsoever is unable to meet its obligation

of payment due under the contract, said Government would make the payment to the exporter in US dollars through remittance for tea delivered. It is the case of the appellant that the payment of consideration by barter of goods could not be finalised between the appellant and the Kazak Corporation, therefore, the said Corporation agreed to pay the consideration amount for the goods received by it in US dollars and also paid certain sums of money in US dollars as part payment but failed to pay the balance amount due under the contract. It is also the case of the appellant that even the Kazakhstan Government though admitted its liability to pay the balance of consideration amount did not fulfil its part of the guarantee given in the contract due to lack of funds. It is on the failure of the Kazakhstan Government to fulfil its guarantee the appellants made a claim on the first respondent which had covered the said risk of compensating the loss suffered by it by the non-payment of the consideration amount for the supply of tea made to the Kazak Corporation. The first respondent as per its letter dated 14.12.1994, however, repudiated the claim of the appellants stating that the appellants had changed the terms of the contract of payment without first consulting it, therefore, it had no obligation to compensate the appellants for the loss suffered by it. This alleged change of terms of the contract, according to the first respondent, was due to the fact that the appellants had rejected the barter offer made by the Kazak Corporation and had opted for cash payment in US dollars which, according to the first respondent was not the mode of payment contemplated in the contract between the exporter and the Kazak Corporation. On further correspondence between the appellants and the first respondent, the latter reiterated its right to repudiate the claim of the appellants by its second letter dated 26.5.1995 contending that the refusal of the barter offer by the appellants without first consulting it, amounts to a change in the mode of recovery of dues, hence, the loss suffered by such change in the mode of recovery took away the liability of the first respondent to pay for such loss. Having failed to persuade the first respondent to adhere to the contract of insurance between it and the appellant, the appellant filed a writ petition before a learned Single Judge of the Calcutta High Court, inter alia, praying for quashing of the letters of repudiation issued by the first respondent. It also consequentially prayed for a direction to the first respondent to make payment of the dues to it under the contract of insurance. The learned Single Judge after hearing the parties came to the conclusion that though the dispute between the parties arose out of a contract, the first respondent being a State for the purpose of Article 12, was bound by the terms of the contract, therefore, for such non-performance, a writ was maintainable and after considering the arguments of the parties in regard to the liability under the contract of insurance, allowed the writ petition and issued the writ and directions as prayed for by the appellants in the writ petition. In an appeal filed by the first respondent before the Appellate Bench of the same High Court, the said Bench reversed the findings of the learned Single Judge and held that the claim of the appellant involving disputed questions of fact cannot be adjudicated in a writ proceeding under Article 226 of the Constitution, hence, set aside the judgment of the learned Single Judge. In

the course of its judgment the Appellate Bench also incidentally came to the conclusion that the first respondent had not committed any violation of the clauses or the terms of the insurance contract. On the contrary, it observed that as per proviso (d) to Clause (xi) of the said insurance contract, by refusing to accept the barter of goods, the first appellant had violated the terms of the contract disentitling it to raise any claim on the first respondent. It is against this order of the Appellate Bench of the Calcutta High Court that the appellants are before us. In this appeal, Dr. A.M. Singhvi, learned senior counsel for the appellants contended that the High Court though noted that the writ petition involved disputed questions of fact has not identified any such disputed questions of fact which disentitled the appellants from seeking reliefs in a writ petition. He also submitted that assuming that some disputed questions did arise for consideration in the writ petition, that itself would not bar the High Court under Article 226 of the Constitution from examining such questions of fact. He further submitted that in the present case, the terms of the contract between the exporter and the Kazak Corporation on one hand and the contract of insurance between the appellants and the first respondent on the other being crystal clear, there was no question of any difficulty in interpretation of the said terms of the contracts and all necessary facts required for the interpretation of the said clauses of the insurance and export contracts being admitted, the Appellate Bench of the High Court was in error in coming to the conclusion that the writ petition involved such disputed questions of facts which the High Court could not decide in the writ petition. He also contended that the observations of the High Court in the course of its judgment that the appellants had violated the terms of the export contract or the insurance contract, is ex facie erroneous. He submitted that this is because of the fact that the Appellate Bench did not properly appreciate the relevant clauses of the said contracts. He also contended that proviso (d) to Clause (xi) of the insurance contract had no bearing whatsoever on the facts of this case. Learned counsel then pointed out that the basis of the repudiation as could be seen from the two letters of the first respondent was that prior permission of the said respondent was not taken before making a change in the terms of the export contract. According to the learned counsel, this foundation of repudiation of the claim is based on a presumption that there was any such requirement either in law or in the contracts to have a prior consultation with the first respondent while making a claim to receive cash consideration from the exporter. It was argued that apart from the fact that there was no change in the terms of the contract as indicated in the letters of repudiation, the assumption of the first respondent that it had to be consulted while making any such demand on the Kazak Corporation is wholly baseless. Learned counsel pointed out from the terms of the contracts, what the appellants had insured with the first respondent was not their goods. On the contrary, they had actually insured the non-payment of consideration which under the terms of contract, was either by barter or by cash. Therefore, it was not open to the first respondent to repudiate the appellants' claim on the ground that the mode of barter payment was changed without consulting it and that the

contract of insurance did not cover the risk of payment in US $. According to the learned counsel for the appellants, none of the terms of the contracts, be it the export contract or the insurance contract, gives any room for multiple interpretation nor requires any evidence being led. According to said learned counsel, all that the writ court had to decide was whether the appellant should adhere only to receive consideration by barter of goods or it is also entitled to demand the consideration by cash in US $ and whether non-payment of such consideration is covered by the contract of insurance or not which, according to learned counsel, can be decided by examining the terms of the contracts without having to take recourse to any external aid. Ms. Indira Jaising, learned senior counsel appearing for the first respondent submitted that on facts and circumstances of this case, a writ petition was not maintainable nor can it be construed as an appropriate remedy. She pointed out that the subject matter is a dispute arising out of a contract and is not a matter falling under the purview of Administrative Law. According to her, the doctrine of fairness and reasonableness applies only in the exercise of statutory or administrative actions of a State and not in the exercise of a contractual obligation and issues arising out of contractual matters will have to be decided on the basis of the law of contract and not on the basis of the administrative law. It was her argument that at the most in matters involving statutory contracts where action of the State involves a public duty, a writ may lie but in the instant case, the contract was neither a statutory contract nor the duty of the first respondent under the contract had any public law element involved in it. According to the learned counsel, this contract was a negotiated contract and not a standard form contract. She also supported the finding of the Appellate Bench of the High Court that the facts involved in the case are all disputed facts requiring evidence to be led, therefore, the appropriate remedy could only be a suit. Hence, the impugned judgment did not call for any interference. As could be seen from the arguments addressed in this appeal and as also from the divergent views of the two courts below one of the questions that falls for our consideration is whether a writ petition under Article 226 of the Constitution of India is maintainable to enforce a contractual obligation of the State or its instrumentality, by an aggrieved party. In our opinion this question is no more res integra and is settled by a large number of judicial pronouncements of this Court. In K.N. Guruswamy Vs. The State of Mysore and others. [1955 (1) SCR 305] this Court held: "The next question is whether the appellant can complain of this by way of a writ. In our opinion, he could have done so in an ordinary case. The appellant is interested in these contracts and has a right under the laws of the State to receive the same treatment and be given the same chance as anybody else. ..... We would therefore in the ordinary course have given the appellant the writ he seeks. But owing to the time which this matter has taken to reach us (a consequence for which the appellant is in no way to blame, for he has done all he could to have an early hearing), there is barely a fortnight of the contract left to go. ..... A writ would therefore be ineffective and as it is not our practice to issue meaningless writs we must

dismiss this appeal and leave the appellant content with an enunciation of the law." It is clear from the above observations of this Court in the said case though a writ was not issued on the facts of that case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief. This judgment in K.N. Guruswamy Vs. The State of Mysore and others was followed subsequently by this Court in the case of The D.F.O, South Kheri & Ors. Vs. Ram Sanehi Singh [1971 (3) SCC 864] wherein this Court held: "By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in K.N. Guruswamy's case (supra), there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power." (Emphasis supplied) In the case of Gujarat State Financial Corporation Vs M/s. Lotus Hotels Pvt. Ltd. [1983 (3) SCC 379] this Court following an earlier judgment in R.D. Shetty Vs. International Airport Authority of India [1979 (3) SCC 489] held: "The instrumentality of the State which would be 'other authority' under Article 12 cannot commit breach of a solemn undertaking to the prejudice of the other party which acted on that undertaking or promise and put itself in a disadvantageous position. The appellant Corporation, created under the State Financial Corporation Act, falls within the expression of 'other authority' in Article 12 and if it backs out from such a promise, it cannot be said that the only remedy for the aggrieved party would be suing for damages for breach and that it could not compel the Corporation for specific performance of the contract under Article 226." The learned counsel appearing for the first respondent however, submitted that this Court has taken a different view in the case of Life Insurance Corporation of India Vs. Escorts Ltd. & Ors. [1986 (1) SCC 264] wherein this Court held: "If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of

a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the company, like any other shareholder." (Emphasis supplied). We do not think this Court in the above case has, in any manner, departed from the view expressed in the earlier judgments in the case cited hereinabove. This Court in the case of Life Insurance Corporation of India (Supra) proceeded on the facts of that case and held that a relief by way of a writ petition may not ordinarily be an appropriate remedy. This judgment does not lay down that as a rule in matters of contract the court's jurisdiction under Article 226 of the Constitution is ousted. On the contrary, the use of the words "court may not ordinarily examine it unless the action has some public law character attached to it" itself indicates that in a given case, on the existence of the required factual matrix a remedy under Article 226 of the Constitution will be available. The learned counsel then relied on another judgment of this Court in the case of State of U.P. & Ors. Vs. Bridge & Roof Company (India) Ltd. [1996 (6) SCC 22] wherein this Court held: "Further, the contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration. The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226." This judgment again, in our opinion, does not help the first respondent in the argument advanced on its behalf that in contractual matters remedy under Article 226 of the Constitution does not lie. It is seen from the above extract that in that case because of an arbitration clause in the contract, the court refused to invoke the remedy under Article 226 of the Constitution. We have specifically inquired from the parties to the present appeal before us and we have been told that there is no such arbitration clause in the contract in question. It is well known that if the parties to a dispute had agreed to settle their dispute by arbitration and if there is an agreement in that regard, the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration unless of course both the parties to the dispute agree on another mode of dispute resolution. Since that is not the case in the instant appeal, the observations of this Court in the said case of Bridge & Roof Co. (supra) is of no assistance to the first respondent in its contention that in contractual matters, writ petition is not maintainable. The learned counsel then contending that this Court will not entertain a writ petition involving disputed questions of fact relied on a judgment of this Court in the case of State of Bihar & Ors. Vs. Jain Plastics and Chemicals Ltd. [2002 (1) SCC 216] wherein this Court held : "In our view, it is apparent that the order passed by the High Court is, on the face of it, illegal and erroneous. It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter affidavits, but

that would hardly be a ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the appellants would justify breach of contract by the respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs." A perusal of this judgment though shows that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a court in the exercise of its jurisdiction under Article 226 of the Constitution of India. This decision again, in our opinion, does not lay down an absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit. In this view of ours, we are supported by a judgment of this Court in the case of Smt. Gunwant Kaur & Ors. vs. Municipal Committee, Bhatinda and Ors. [1969 (3) SCC 769] where dealing with such a situation of disputed questions of fact in a writ petition this Court held : "The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit in reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the

petition and called for an affidavit in reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit." The above judgment of Smt. Gunwant Kaur (supra) finds support from another judgment of this Court in the case of Century Spinning and Manufacturing Company Ltd. & Anr. vs. The Ulhasnagar Municipal Council & Anr. [1970 (1) SCC 582] wherein this Court held : "Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary." This observation of the Court was made while negating a contention advanced on behalf of the respondent-Municipality which contended that the petition filed by the appellant- company therein apparently raised questions of fact which argument of the Municipality was accepted by the High Court holding that such disputed question of fact cannot be tried in the exercise of the extraordinary jurisdiction under Article 226 of the Constitution. But this Court held otherwise. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Smt.Gunwant Kaur (supra), this Court even went to the extent of holding that in a writ petition, if facts required, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and or involves some disputed questions of fact. The learned counsel for the respondent then placed reliance on a judgment of this Court in the case of VST Industries Ltd. vs. VST Industries Workers' Union & Anr. [2001 (1) SCC 298]. In the said case, this Court held : "In Anadi Mukta case this Court examined the various aspects and the distinction between an authority and a person and after analysis of the decisions referred in that regard came to the conclusion that it is only in the circumstances when the authority or the person performs a public function or discharges a public duty that Article 226 of the Constitution can be invoked. In the present case, the appellant is engaged in the manufacture and sale of cigarettes. Manufacture and sale of cigarettes will not involve any public function." Placing reliance on the observations of this Court in the said case, learned counsel contended unless the action challenged in the writ petition pertains to the discharge of a public function or public duty by an authority, the courts will not entertain a writ petition which does not involve the performance of said public function or public duty. Learned counsel argued in the instant case while repudiating the contract, the first respondent was not discharging any public function or public duty. We do not think the above judgment in VST Industries Ltd. (supra) supports the argument of the learned counsel on the question of maintainability of the present writ petition. It is to be noted that VST Industries Ltd. against whom the writ petition was filed was not a State or an instrumentality of a State as contemplated under

Article 12 of the Constitution, hence, in the normal course, no writ could have been issued against the said industry. But it was the contention of the writ petitioner in that case that the said industry was obligated under the concerned statute to perform certain public functions, failure to do so would give rise to a complaint under Article 226 against a private body. While considering such argument, this Court held that when an authority has to perform a public function or a public duty if there is a failure a writ petition under Article 226 of the Constitution is maintainable. In the instant case, as to the fact that the respondent is an instrumentality of a State, there is no dispute but the question is: Was first respondent discharging a public duty or a public function while repudiating the claim of the appellants arising out of a contract ? Answer to this question, in our opinion, is found in the judgment of this Court in the case of Kumari ShriLekha Vidyarthi & Ors. vs. State of U.P.& Ors. [1991 (1) SCC 212] wherein this Court held : "The impact of every State action is also on public interest. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters." It is clear from the above observations of this Court, once State or an instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14 then we have no hesitation that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent. In this context, we may note that though the first respondent is a company registered under the Companies Act, it is wholly owned by the Government of India. The total subscribed share capital of this company is 2,50,000 shares out of which 2,49,998 shares are held by the President of India while one each share is held by the Joint Secretary, Ministry of Commerce and Industry and Officer on Special Duty, Ministry of Commerce and Industry respectively. The objects enumerated in the Memorandum of Association of the first respondent at Para 10 states : "To undertake such functions as may be entrusted to it by Government from time to time, including grant of credits and guarantees in foreign currency for the purpose of facilitating the import of raw materials and semi-finished goods for manufacture or processing goods for export." Para 11 of the said object reads thus : "To act as agent of the Government, or with the sanction of the Government on its own account, to give the guarantees, undertake such responsibilities and discharge such functions as are considered by the Government as necessary in national interest." It is clear from the above two objects of the company that apart from the fact that the company is wholly a Government owned company it discharges the functions of the Government and acts as an agent of the Government even when it gives guarantees and it

has a responsibility to discharge such functions in the national interest. In this background it will be futile to contend that the actions of the first respondent impugned in the writ petition do not have a touch of public function or discharge of a public duty. Therefore, this argument of the first respondent must also fail. The learned counsel for the respondent then contended that though the principal prayer in the writ petition is for quashing the letters of repudiation by the first respondent, in fact the writ petition is one for a 'money claim' which cannot be granted in a writ petition under Article 226 of the Constitution of India. In our opinion, this argument of the learned counsel also cannot be accepted in its absolute terms. This court in the case of U.P.Pollution Control Board & Ors. vs. Kanoria Industrial Ltd. & Anr. [2001 (2) SCC 549] while dealing with the question of refund of money in a writ petition after discussing the earlier case law on this subject held : "In the para extracted above, in a similar situation as arising in the present cases relating to the very question of refund, while answering the said question affirmatively, this Court pointed out that the courts have made distinction between those cases where a claimant approached a High Court seeking relief of obtaining refund only and those where refund was sought as a consequential relief after striking down of the order of assessment, etc. In these cases also the claims made for refund in the writ petitions were consequent upon declaration of law made by this Court. Hence, the High Court committed no error in entertaining the writ petitions. In support of the submission that a writ petition seeking mandamus for mere refund of money was not maintainable, the decision in Suganmal Vs. State of M.P. was cited. In AIR para 6 of the said judgment, it is stated that -"We are of the opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax". Again in AIR para 9, the Court held:"We, therefore, hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction." The judgment cannot be read as laying down the law that no writ petition at all can be entertained where claim is made for only refund of money consequent upon declaration of law that levy and collection of tax/cess as unconstitutional or without the authority of law. It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, in the cases on hand where facts are not in dispute, collection of money as cess was itself without the authority of law; no case of undue enrichment was made out

and the amount of cess was paid under protest; the writ petitions were filed within a reasonable time from the date of the declaration that the law under which tax/cess was collected was unconstitutional. There is no good reason to deny a relief of refund to the citizens in such cases on the principles of public interest and equity in the light of the cases cited above. However, it must not be understood that in all cases where collection of cess, levy or tax is held to be unconstitutional or invalid, the refund should necessarily follow. We wish to add that even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case." Therefore, this objection must also fail because in a given case it is open to the writ court to give such monetary relief also. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition :- (a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable. (b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule. (c) A writ petition involving a consequential relief of monetary claim is also maintainable. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors. [1998 (8) SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction. It is in the above understanding of law, we will now consider the facts of the present case to find out whether the appellants are entitled to relief or not as prayed for in the writ petition filed by them. While considering this issue, it has to be noted at the outset itself that the first respondent is an instrumentality of State for the purpose of Article 12 of the Constitution is not disputed and rightly too. It is also not disputed that the first respondent is a monopoly Corporation in its field. The fact that the appellant to the extent covered by the contract of insurance had agreed to insure the risk of non payment of its consideration for the tea exported to the Kazak Corporation is also not disputed; The fact that the appellant has exported 8.70 lakh kilograms of tea to Kazakhstan between 8th and 30th October, 1993 is also not disputed. The fact that the Kazak Corporation did not pay the consideration for the tea received by it in cash in US dollars is also not disputed. The fact that the Kazakhstan Government stood as a guarantor for prompt payment for

the goods received by the Kazak Corporation and that the said Government failed to honour its guarantee is also not disputed. The fact that the Reserve Bank of India permitted the appellant to receive cash consideration in the form of US $ instead of barter payment is also not disputed. What is disputed is the obligation of the first respondent to cover the risk of non-payment of consideration by cash in US currency on the ground that the risk covered by the first respondent is a risk arising out of non-supply of goods by the barter method only. In our opinion, this limited area of dispute can be settled by looking into the terms of the contract of insurance as well as the export contract, and the same does not require consideration of any oral evidence or any other documentary evidence other than what is already on record. The claim of the contesting parties will stand or fall on the terms of the contracts, interpretation of which, as stated above, does not require any external aid. Therefore, we will now consider the relevant clauses of the contracts in the background of the admitted facts recorded hereinabove. The contract of insurance between the appellant and the respondent is primarily based on the contract between the exporter and the Kazak Corporation. The relevant clause in regard to payment for the tea exported is found in the principal contract at Clause 6 which reads thus : "The payment of delivered goods shall be made by barter exchange of goods within 120 days from the date of delivery being affected by the Seller. Plus interest for the period of non-payment 15% per year. The above terms will be covered by a guarantee for payment by the Ministry of Foreign Economic Relations of Kazakhstan. For Barter exchange of goods Buyer presently has available for offer goods as per supplement N2 to the present contract." This clause came to be amended on the very day when the contract was signed by the exporter and the Kazak Corporation by an addendum, i.e., on 26.8.1993 itself. The addendum which formed an integral part of the original contract reads thus : "In case the payment terms as per clause 6 of the Contract No.1-B/9-14/93 dated 26.8.1993 are not possible that is to say if this contract for barter supply of goods cannot be finalised for any reason or if delivery shipment under such a contract is not made within the stipulated period, then the buyer shall pay the seller for delivered goods in US Dollars within 120 days from the date of delivery being effected by the seller. This payment to be made through remittance by the buyer of the contractual amount of delivered tea, plus interest 15% per year to the Bank Account of the seller at Canara Bank, Janpath, New Delhi, India. The above payment will be guaranteed by the Ministry of Foreign Economic Relations of Kazakhstan." If we read the original Clause 6 and the addendum together, it is crystal clear that for some reason or the other the parties agreed to amend original Clause 6 by the addendum which amendment brought about a significant change in the mode of payment of consideration. In the original Clause 6, it is seen that the Kazak Corporation agreed to pay for the delivered tea by barter of goods. This sole mode of consideration came to be altered by the addendum by which parties agreed if the payment of consideration by barter of goods cannot be finalised for any reason, the buyer that is the Kazak Corporation agreed to make the said payment in US $ within the stipulated period of 120

days of the delivery by the exporter. This addendum replaced the original clause (6) and from the language of the addendum it is clear that the amended clause (6) became an integral part of the original contract in the place of the original clause (6). The language of addendum clearly shows that the payment of consideration by barter supply of goods was no more the sole mode of consideration and if for any reason whatsoever such payment by barter did not materialise between the parties then the payment had to be made in cash in US
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this is also the understanding of the Government of Kazakhstan which guaranteed the payment of such consideration which is evident from the letter of the Ministry of Foreign Economic Relations of the Republic of Kazakhstan dated 18th March, 1994. In the said letter the said Government while admitting the default in payment of consideration in clear terms stated: "But some difficulties related to introduction of the national currency, execution of primary internal payments between enterprises and budgetary deficit prevented the Kazak Party from timely repaying of the credit." It is clear that the first respondent insured the risk of non- payment arising out of the above said contract between the exporter and the Kazak Corporation which included the amended Clause (6). It is also clear that the first respondent while issuing the policy of insurance did know that payment of consideration by Kazak Corporation could be by two modes (a) by barter (b) by cash and non payment of consideration by either mode was to be covered by the said contract of insurance. It is also an admitted fact that the Kazak Corporation did offer only some goods and not all items included in the schedule to the appellants initially as a barter payment, but on evaluation made by the appellants, they were not acceptable to the appellants. Therefore, payment of consideration by barter of goods could not be finalised as contemplated in amended clause (6) of the export contract and in lieu of the same, the Kazak Corporation agreed to pay in US $ and in fact did make part payment of the same in US
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Default clause appears to be unequivocal". Thereafter the learned Single Judge having perused the various correspondence between the parties and noticing the fact that the Kazakhstan Government also admitted its failure to comply with its guarantee came to the conclusion that there was nothing on record to show that the appellants under the contract of insurance was liable to consult the first respondent as regards its right to reject the payment by barter for any reason whatsoever. On such interpretation of the clauses of the contracts, the learned Judge felt that it was an appropriate case in which a writ should be issued as prayed for by the petitioner and accordingly allowed the petition. In appeal, the Appellate Bench took somewhat a restricted view of the power of the High Court to entertain a writ petition under Article 226 of the Constitution of India and came to the conclusion that the petition involved

disputed questions of fact, hence, there being an alternate remedy by way of a suit allowed the appeal setting aside the judgment as also the relief granted by the trial court. In the course of its judgment the appellate bench also placed reliance on sub-clause (d) of the proviso to clause (xi) found in the contract of insurance which reads thus:"PROVISOS PROVIDED ALWAYS THAT the Corporation shall not be liable for any loss: x x x x x (d) Which arises due to the failure or refusal on the part of the buyer to accept the goods and/or to pay for them due to his claim that he is justified in withholding payment of the contract price or the gross invoice value of the said goods or any part thereof by reason of any payment, credit, set-off or counter-claim and/or due to his claim that, for any other reason, he is excused from performing his obligations under the contract, unless, except where the Corporation agrees in writing to the contrary, the insured has, for the amount of his loss, obtained by legal proceedings in a competent court of law in the country of the buyer a final judgment enforceable against him." (emphasis supplied) According to the Appellate Bench as per this proviso in the insurance contract, the first respondent was not liable for any loss which arises due to the failure or refusal on the part of the appellants to accept goods offered by the buyer. Though this interpretation of the said proviso to the insurance clause made by the Appellate Bench is not a conclusive finding, we think it appropriate to deal with this view expressed by the Appellate Bench since we intend to dispose of this appeal on merits. Having examined the said sub-clause in the proviso of the insurance policy, in our opinion, the reliance placed by the appellate bench of the High Court on this clause is wholly misplaced. The proviso especially the one in sub-clause (d) deals with the risks arising due to the failure or refusal on the part of the buyer to accept the goods and/or to pay for them due to his claim that he is justified in withholding payment of the contract price or the gross invoice value of the said goods for the reason mentioned therein. This clause pertains to the defence that may be put forth by the buyer (in this case the Kazak Corporation) as to its refusal to pay the consideration on the grounds enumerated in the said sub-clause. This is not a clause which indemnifies the insurance company from its liability to cover risk when the importer fails to pay for the consideration for the goods received by it on grounds of its financial inability. Therefore the reliance placed by the High Court on this sub-clause to the proviso in the insurance contract, as stated above, is misplaced. The learned counsel appearing for the appellants in this appeal contended that the one and the only stand taken by the appellants in their two letters of repudiation is that the appellants have changed the mode of receipt of consideration without consulting the first respondent which ground according to the learned counsel is not one of the conditions of the insurance contract. He further submitted that an imposition of a condition of that nature requiring a prior consultation would be beyond the terms of the insurance contract, therefore, impermissible. While learned counsel appearing for the first respondent Corporation contended that the ground of repudiation is not so much the lack of prior consultation but, according to learned counsel, is that the first respondent was not liable to pay for the loss suffered by the

exporter by agreeing to accept the consideration in cash because that mode of consideration was not covered by the risk insured by the respondent. According to the learned counsel, one and the only mode of payment of consideration covered by the said respondent is by barter of goods. Therefore, even though in the letters of repudiation the prior consultation before change in the mode of consideration is pointed out as one of the grounds, the same is not the primary ground. From the terms of the contract, we have noticed in Clause (6) as amended by the addendum, consideration by way of barter of goods is not the sole consideration. The said clause contemplates alternate modes of payment of consideration one of them being by barter of goods and the other by cash payment in US $. The terms of the insurance contract which was agreed between the parties were after the terms of the contract between the exporter and the importer were executed which included the addendum, therefore, without hesitation we must proceed on the basis that the first respondent issued the insurance policy knowing very well that there was more than one mode of payment of consideration and it had insured failure of all the modes of payment of consideration. From the correspondence as well as from the terms of the policy, it is noticed that existence of only two conditions have been made as a condition precedent for making the first respondent Corporation liable to pay for the insured risk, that is, (i) there should be a default on the part of the Kazak Corporation to pay for the goods received; and (ii) there should be a failure on the part of the Kazakhstan Government to fulfil their guarantee. This is clear from the terms of the insurance contract read with the letter of the first respondent dated 8th September, 1993 wherein at Clause 3A, it is stated : "Our liability will arise only after default has been established on the guarantee of the Ministry." From the above, it is clear both the grounds as put forth by the learned counsel for the respondent before us as well as in the two letters of repudiation issued by the first respondent are unsustainable. In our opinion, the first respondent insured the export risk of the appellants in regard to the non payment of the consideration for the tea exported whether it arose from the non fulfillment of the barter clause or for the non fulfillment of the cash payment clause. The argument advanced on behalf of the respondent that the appellants refused to accept the barter by goods offered by the first respondent which amounted to a default under the contract on the part of the appellants has no legs to stand in view of the clear language of the amended Clause 6 of the agreement which as noted above states that the obligation of the buyer, namely, Kazak Corporation to pay for the goods received by it in US $ arises when payment by barter fails for "any reason whatever". The use of the words "any reason whatever" in the said amended clause includes the reasons of refusal by the appellants to accept the goods offered in barter. On the face of the said language of amended clause, there could be no room for two opinions at all in regard to the liability of the first respondent to pay for the loss suffered by the appellants even in cases where payment by barter fails at the instance of the appellant. The learned counsel for the respondent contended for a correct interpretation of this amended clause and the other clauses of the contracts i.e. the contract of export and the contract of insurance

between the parties there is need for oral evidence being led without which a proper interpretation of this clause is not possible, therefore, it is fit case in which the appellants should be directed to approach the Civil Court to establish its claim. We find no force in this argument. We have come to the conclusion that the amended Clause 6 of the agreement between the exporter and the importer on the face of it does not give room for a second or another construction than the one already accepted by us. We have also noted that reliance placed on sub-clause (d) of the proviso to the insurance contract by the Appellate Bench is also misplaced which is clear from the language of the said clause itself. Therefore, in our opinion, it does not require any external aid much less any oral evidence to interpret the above clause. Merely because the first respondent wants to dispute this fact, in our opinion, it does not become a disputed fact. If such objection as to disputed questions or interpretations are raised in a writ petition, in our opinion, the courts can very well go into the same and decide that objection if facts permit the same as in this case. We have already noted the decisions of this court which in clear terms have laid down that mere existence of disputed questions of fact ipso facto does not prevent a writ court from determining the disputed questions of fact. (See: Gunwant Kaur (supra)). On the basis of the above conclusion of ours, the question still remains why should we grant the reliefs sought for by the appellant in a writ petition when a suitable efficacious alternate remedy is available by way of a suit. The answer to this question in our opinion, lies squarely in the decision of this Court in the case of ShriLekha Vidyarthi (supra) wherein this court held : "The requirement of Article 14 should extend even in the sphere of contractual matters for regulating the conduct of the State activity. Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, the State cannot thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more. The personality of the State, requiring regulation of its conduct in all spheres by requirement of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirement of Article 14 and contractual obligations are alien concepts, which cannot co-exist. The Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. Therefore, total exclusion of Article 14 - non- arbitrariness which is basic to rule of law - from State actions in contractual field is not justified. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals. x x x Unlike the private parties the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good

and in public interest. The impact of every State action is also on public interest. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non- arbitrariness at the hands of the State in any of its actions. x x x" From the above, it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution. Thus if we apply the above principle of applicability of Article 14 to the facts of this case, then we notice that the first respondent being an instrumentality of State and a monopoly body had to be approached by the appellants by compulsion to cover its export risk. The policy of insurance covering the risk of the appellants was issued by the first respondent after seeking all required information and after receiving huge sums of money as premium exceeding Rs.16 lacs. On facts we have found that the terms of the policy does not give room to any ambiguity as to the risk covered by the first respondent. We are also of the considered opinion that the liability of the first respondent under the policy arose when the default of the exporter occurred and thereafter when Kazakhstan Government failed to fulfil its guarantee. There is no allegation that the contracts in question were obtained either by fraud or by misrepresentation. In such factual situation, we are of the opinion, the facts of this case do not and should not inhibit the High Court or this Court from granting the relief sought for by the petitioner. Apart from the above reasons given by us to interfere with the judgment of the Appellate Bench of the High Court, we have one other good reason - why we should not drive the appellants to a suit. The claim of the appellants was rejected by the respondent in the year 1994. The respondent challenged the basis of rejection by way of a writ petition in the year 1996. The objection as to the maintainability of

the petition was rejected by the High Court by its judgment dated 15.5.1997. We are now in the end of year 2003. We at this distance of time and stage of litigation, do not think it proper to relegate the parties to a suit. To direct the appellants to approach a civil court at this stage would be doing injustice to the appellants. In this view of ours, we are supported by a number of decisions of this court like in Shambhu Prasad Agarwal & Ors. vs. Bhola Ram Agarwal (2000 9 SCC 714), wherein this Court though noticed the fact that the appellants had an alternate remedy for issuance of a letter of administration it refused to dismiss the appeal on the grounds - "Since considerable time has elapsed the interest of justice demands that the proceeding should come to an end as early as possible and that the appeal should not be dismissed merely on highly technical ground". In Dr.Bal Krishna Agarwal vs. State of U.P. & Ors. (1995 (1) SCC 614) this Court held : "Having regard to the aforesaid facts and circumstances, we are of the view that the High Court was not right in dismissing the writ petition of the appellant on the ground of availability of an alternate remedy under Section 68 of the Act especially when the writ petition that was filed in 1988 had already been admitted and was pending in the High Court for the past more than 5 years. Since the question that is raised involves a pure question of law and even if the matter is referred to the Chancellor under Section 68 of the Act it is bound to be agitated in the court by the party aggrieved by the order of the Chancellor, we are of the view that this was not a case where the High Court should have non-suited, the appellant on the ground of availability of an alternative remedy. We, therefore, propose to go into the merits of the question regarding inter se seniority of the appellant and Respondents 4 and 5. We may, in this context, mention that Respondent 4 has already retired in January 1994." Similar is the view taken by the Court in the case of Kerala State Electricity Board & Anr. vs. Kurien E.Kalathil and Ors. (2000 6 SCC 293) and also in VST Industries Ltd. (supra). For the reasons stated herein above, we think the appellate bench of the High Court was not justified in reversing the judgment of the learned Single Judge. For the reasons stated above, the impugned judgment of the appellate bench of the High Court is set aside and that of the learned Single Judge is restored. The appeal is allowed with costs.