# Joshi Technologies International Inc vs Union Of India & Ors on 14 May, 2015

## Equivalent citations: 2015 AIR SCW 3609, 2015 (7) SCC 728, 2015 (4) ADR 498, AIR 2015 SC (SUPP) 1889, (2015) 4 MAD LJ 739, (2015) 6 SCALE 632, AIR 2015 SC (CIVIL) 1986

## Author: A.K. Sikri

## Bench: Rohinton Fali Nariman, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6929 OF 2012

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| JOSHI TECHNOLOGIES INTERNATIONAL INC. | .....APPELLANT(S) | |
| VERSUS | | |
| UNION OF INDIA & ORS. | .....RESPONDENT(S) | |

J U D G M E N T

A.K. SIKRI, J.

Present appeal impugnes the judgment and order dated 28.05.2012 passed by the High Court of Delhi, thereby dismissing the writ petition which was filed by the appellant. It so happened that the appellant had entered into two contracts dated 20.02.1995 with the Union of India, through Ministry of Petroleum and Natural Gas (MoPNG) in the year 1992 relating to exploration of certain oil fields which the Union of India had selected in Gujarat and other States. These contracts were on production sharing basis for Dholka and Wavel Oil Fields respectively. It started the production after entering into the contract and filed its income tax return on the income generated from the aforesaid production. In the returns, the appellant claimed benefit of Section 42 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). Section 42 is a special provision for deductions in the case of business for prospecting, etc. for mineral oil. It provides for certain additional allowances as are specified in the agreement, details thereof would be taken note of hereinafter. We may, however, point out here itself that such allowances, as stipulated in the Section, are to be specifically mentioned in the agreement as well, which is entered into with the Central Government and it is also necessary that such an agreement has been laid on the Table of each House of Parliament.

The Income Tax Authorities extended the benefit of granting deductions under the aforesaid provisions from the year 2001-02 (assessment years onwards) when the appellant commenced commercial production in the aforesaid two oil fields. However, while making assessment for the Assessment Year 2005-06, the Assessing Officer observed that there were no such provisions made in the Agreements which were signed between the Central Government and the appellant and in the absence of such stipulation in the agreement, the appellant was not entitled to the benefit of deductions under Section 42 of the Act. Realising that the Agreements did not contain such a provision, the appellant wrote to the MoPNG stating that though there was such an arrangement agreed to as per the understanding between the two parties, non-inclusion thereof was an inadvertent omission in the Contracts that were signed. The MoPNG wrote to Ministry of Finance (MoF) accepting the aforesaid omissions and requested the MoF to give clarification in this behalf. As no clarification came from the MoF, the Assessing Officer disallowed the claim for deduction under Section 42(1)(b) and 42(1)(c) of the Act. At this stage, the appellant preferred writ petition under Article 226 of the Constitution of India in the High Court of Delhi with the following prayers.

"Therefore it is most respectfully prayed that this Hon'ble Court may be pleased to issue:-

> (I) A writ, direction or order declaring that the petitioner is entitled, in respect of the two Production Sharing Contracts dated 20.02.1995 executed with the petitioner for the Dholka and Wavel Oil Fields in Gujarat, to the benefit of the said deductions (set forth in Article 16 of the MPSC and reproduced in Annexure P1) under Section 42 of the Income-Tax Act, 1961, from the date of these Production Sharing Contracts, as has been stated and declared by the respondent no. 1 (i.e., the Ministry of Petroleum and Natural Gas) in several of its communications; and that the petitioner is entitled to the said Deductions on the same footing as all other contractors who have executed PSCs with the Union of India;
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> (ii) A writ, order or direction in the nature of certiorari quashing the impugned order dated 31.12.2007 issued by Respondent No. 1; the notice dated 28.03.2008 for re-opening of the petitioner's income-tax assessments for the Assessment Years 2001-2002; 2002-2003 and 2003-2004 and the notice dated 01.05.2008 for re-opening the assessment for the Assessment Year 2004- 05; and
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> (iii) Such other writ order or direction as this Hon'ble Court may deem just and proper in the circumstances of the case and in the interest of justice, be passed in favour of the petitioner." This writ petition which has been dismissed by the High Court vide impugned judgment dated 28.05.2012 holding that the appellant is not entitled to any deductions under Section 42 of the Act in the absence of stipulations to this effect in the Contracts signed between the parties. This decision is the subject matter of challenge before us in the present appeal.

Now, the facts in detail:

> The Union of India ("UOI"), through the MoPNG, issued a Notice Inviting Tenders in August 1992 ("1992 NIT"), along with a Model Production Sharing Contract ("MPSC"), for "Development of Oil and Gas Fields" from various companies in relation to some selected oil fields in Gujarat and other States. Article 16 of the above-mentioned MPSC contained a specific provision, which provided certain financial benefits and deductions in relation to taxes etc. that would be allowed to contractors/developers, as per the requirements of Section 42 of the Act. The MoF by its Office Memorandum dated 18.06.1992, raised an issue that Section 293-A of the Act would not apply to contracts of the nature mentioned above, and that benefits under the special provisions of Section 42 of the Act would not be available to foreign companies, such as the appellant, which enter into such contracts with the Central Government. The MoPNG by its Office Memorandum, dated 22.06.1992 ("OM") referred the issue to the Ministry of Law, Justice and Company Affairs specifically seeking its opinion on applicability of Section 42 and Section 293-A of the Act to the 1992 NIT and the MPSC.

The Ministry of Law gave its opinion dated 21.07.1992 to the effect that benefit of both Section 293A and Section 42 should be extended to foreign companies in order to make their participation in these oil fields viable. The appellant (along with its erstwhile joint venture partner Larsen and Toubro Ltd., whose stake was also subsequently acquired by the appellant) submitted its bid dated 29.03.1993 in response to the 1992 NIT. The appellant was allotted the Dholka abnd Wavel Oil Fields in Gujarat near Ahmedabad, by the MoPNG. Two production sharing contracts, each dated 20.02.1995, were executed by the appellant with the MoPNG for Dholka and Wavel Oil Fields, respectively (the "Two PSCs"). According to the appellant, since no amendments to Article 16 of MPSC had been suggested nor contemplated b y the Union of India, it was (and is) the belief and legitimate expectation of the appellant that all the benefits, financial or otherwise, offered in Article 16 of the MPSC to the prospective bidders were duly included in the above two PSCs.

From 2001 the appellant commenced commercial production from the Dholka and Wavel Oil Fields (delayed on account of the UOI's delay in handling over the fields) and availed the benefits of Section 42 Deductions provided in Article 16 of the MPSC, which were duly allowed by the concerned Income Tax Officer at Ahmedabad. The UOI's share of petroleum profit was also determined in accordance with the assumption that, and on the consideration that the appellant was entitled to the benefit of the Section 42 deductions and the UOI consequently also enjoyed a larger quantum as petroleum profits that it otherwise would have. The accounts and calculations of the appellant claiming the Section 42 deductions and passing on the benefit to the UOI in the form of an increased quantum of petroleum profit in terms of the two PSCs , were duly audited and approved by the MoPNG's government auditors.

While the things proceeded in the aforesaid manner, it so happened in the case of some other Production Sharing Contracts, which did not specifically contain the fiscal benefits and the deduction envisaged by Article 16 of the MPSC, the Income Tax Authorities questioned the basis on which such assesses had claimed deduction/ allowances under Section 42. This move of the Income Tax Authorities prompted the MoPNG to write OM dated 17.06.2005 to the MoF, Department of

Revenue to clarify to the relevant Income-Tax Authorities that the provisions of Section 42 of the Income-Tax Act would be applicable to all PSCs, including those thirteen (13) PSCs executed by the Union of India, which did not expressly contain these provisions, for the purpose of computing profits and gains, after allowing the Section 42 deductions. The appellant's two PSCs are among these thirteen (13) PSCs referred to by the MoPNG in this Office Memorandum. The OM noted that it would not be equitable and fair if Section 42 deductions were denied in respect of these 13 PSCs.

Since the entire dispute pertains to deductions under Section 42 of the Act, at this stage we reproduce the said provisions hereunder:

> "42. Special provision for deductions in the case of business for prospecting, etc., for mineral oil.—[(1)] For the purpose of computing the profits or gains of any business consisting of the prospecting for or extraction or production of mineral oils in relation to which the Central Government has entered into an agreement with any person for the association or participation 90[of the Central Government or any person authorised by it in such business] (which agreement has been laid on the Table of each House of Parliament), there shall be made in lieu of, or in addition to, the allowances admissible under this Act, such allowances as are specified in the agreement in relation—
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> (a) to expenditure by way of infructuous or abortive exploration expenses in respect of any area surrendered prior to the beginning of commercial production by the assessee;
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> (b) after the beginning of commercial production, to expenditure incurred by the assessee, whether before or after such commercial production, in respect of drilling or exploration activities or services or in respect of physical assets used in that connection, except assets on which allowance for depreciation is admissible under Section 32:
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> [Provided that in relation to any agreement entered into after the 31st day of March, 1981, this clause shall have effect subject to the modification that the words and figures "except assets on which allowance for depreciation is admissible under Section 32" had been omitted; and]
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> (c) to the depletion of mineral oil in the mining area in respect of the assessment year relevant to the previous year in which commercial production is begun and for such succeeding year or years as may be specified in the agreement;

and such allowances shall be computed and made in the manner specified in the agreement, the other provisions of this Act being deemed for this purpose to have been modified to the extent necessary to give effect to the terms of the agreement:

[(2) Where the business of the assessee consisting of the prospecting for or extraction or production of petroleum and natural gas is transferred wholly or partly or any interest in such business is transferred in accordance with the agreement referred to in sub-section (1), subject to the provisions of the said agreement and where the proceeds of the transfer (so far as they consist of capital sums)—

(a) are less than the expenditure incurred remaining unallowed, a deduction equal to such expenditure remaining unallowed, as reduced by the proceeds of transfer, shall be allowed in respect of the previous year in which such business or interest, as the case may be, is transferred;

(b) exceed the amount of the expenditure incurred remaining unallowed, so much of the excess as does not exceed the difference between the expenditure incurred in connection with the business or to obtain interest therein and the amount of such expenditure remaining unallowed, shall be chargeable to income-tax as profits and gains of the business in the previous year in which the business or interest therein, whether wholly or partly, had been transferred:

Provided that in a case where the provisions of this clause do not apply, the deduction to be allowed for expenditure incurred remaining unallowed shall be arrived at by subtracting the proceeds of transfer (so far as they consist of capital sums) from the expenditure remaining unallowed.

Explanation.—Where the business or interest in such business is transferred in a previous year in which such business carried on by the assessee is no longer in existence, the provisions of this clause shall apply as if the business is in existence in that previous year;

(c) are not less than the amount of the expenditure incurred remaining unallowed, no deduction for such expenditure shall be allowed in respect of the previous year in which the business or interest in such business is transferred or in respect of any subsequent year or years:

[Provided that where in a scheme of amalgamation or demerger, the amalgamating or the demerged company sells or otherwise transfers the business to the amalgamated or the resulting company (being an Indian company), the provisions of this sub-section—

(i) shall not apply in the case of the amalgamating or the demerged company; and

(ii) shall, as far as may be, apply to the amalgamated or the resulting company as they would have applied to the amalgamating or the demerged company if the latter had not transferred the business or interest in the business.] [Explanation.—For the purposes of this section, "mineral oil"

includes petroleum and natural gas.]" Meanwhile, the Income-Tax Officer, Ward I(3) (hereinafter referred to as the "ITO Wd I (3)) issued a notice dated 09.06.2006 under Section 143 (2) of the Income Tax Act to the appellant for the Assessment Year 2005-2006 and asked the appellant to justify its claim for the Section 42 deductions. The ITO Wd I(3) also issued another notice to the appellant under Section 142(1) of the Income-Tax Act, seeking various details and data relevant to the said Assessment Year. The case was later transferred to the Assistant Director of Income-Tax (International Taxation), Ahmedabad ("ADIT"). The ADIT also raised the question of applicability of the Section 42 deductions to the two PSCs executed by the appellant for the reason that such a clause was not specifically included in these two PSCs.

A Joint Secretary of the MoPNG vide his communication dated 11.04.2007 wrote to the MoF specifically admitting that in 11 PSCs, a reference to Section 42 deductions had been omitted by oversight. It was also stated that contracts signed in respect of other fields at the same time contained the provision for Section 42 deductions. It was specifically stated that "Petroleum operations are a high risk business and it may not be equitable and fair if companies are not allowed to claim allowances for their expenditure. Besides it would be difficult to justify different standards for different PSCs signed under one regime." (emphasis supplied). A clarification was also sought from the MoF to the revenue authorities that the Section 42 deductions should be uniformly granted irrespective of whether the PSCs contained the relevant clause or not. It is pertinent to note that in this letter, the appellant was listed by the MoPNG as having the provision for Section 42 deductions in its two PSCs, which though factually incorrect, again underscores the bona fide belief of the UOI through the MoPNG that the appellant had been granted the Section 42 deductions in respect of its two PSCs.

However, MoF did not issue any such clarification. In the absence of such a clarification from the Ministry of Finance, the ADIT disallowed appellant's claim for deduction under Section 42(1)(b) and Section 42(1)(c) of the Income Tax Act, made in the appellant's Income-Tax Return for the Assessment Year 2005-2006, on the ground that a specific reference to the Section 42 deduction has not been made3 expressly in the two PSCs (hereinafter the "ADIT's Order"). As a result, the ADIT issued a demand notice under Section 156 of the Income Tax Act to the appellant, demanding payment of Rs. 1,24,45,509.00 (rupees one crore twenty four lakhs forty five thousand five hundred and nine only) by way of additional tax, interest and penalty. The appellant preferred an appeal against the ADIT's order before the relevant Commissioner of Income Tax (Appeals) in Ahmedabad and deposited the sum of Rs.40,00,000/- (rupees forty lakhs only), as required by ADIT, while himself staying the demand raised by Assessment Order. This appeal has been dismissed by the Commissioner of Income Tax (Appeals) and a further appeal is now pending before the Income Tax Appellate Tribunal.

In the meanwhile, on 24.12.2007, the appellant required the Union of India, through the MoPNG and the MoF, to issue an appropriate clarification/amendment with respect to the two PSCs executed with the appellant, taking a stance that it was always the intention of the Union of India, at all stages, to give the benefits of Section 42 Deductions of the Income Tax Act, read with Article 16 of the MPSC, to all the entities who had entered into PSCs with it, including the appellant with the plea that the non-inclusion of this provision in the two PSCs signed with the appellant was a clerical error/oversight. This was followed by reminder dated 19.3.2008 again requesting the Union of India, through the MoPNG and the MoF, to issue an appropriate clarification/amendment with respect o the two PSCs executed with the appellant.

No such clarification came forward. On the other hand, the ADIT issued notice dated 28.3.2008 to the appellant under Section 148 of the Income Tax Act for reopening the appellant's Income Tax Returns for the Assessment Years 2001-2002, 2002-2003, 2003-2004 and 2004-2005. At this juncture, the Secretary, MoPNG, wrote communication dated 28.04.2008 to the MoF pointing about the said accidental omissions again in the contract. The MoF was, accordingly, requested to extend the benefits of Section 42 Deductions to the 13 PSCs (including the appellant's two PSCs) in line with all other signed PSCs.

As, in the meantime, the ADIT was going ahead with the proceedings pursuant to the notice under Section 148 of the Act deciding to reopen the assessment of the appellant in respect of assessment years 2001-02 to 2004- 05, the appellant sent one more representation dated 23.06.2008 on the same lines on which it had been making the similar representations earlier. No positive response was, however, received. Exasperated, the appellant approached the High Court by way of writ petition under Article 226 of the Constitution. Counter affidavits to the writ petition was filed by the respondent – Authorities taking preliminary objection pertaining to territorial jurisdiction of the High Court of Delhi and also raising the ground of alternate remedies available in the law in the form of appeal before the ITAT which had already been preferred by the appellant. Rejoinder thereto was filed by the appellant. Thereafter, another counter affidavit on merits was filed by the respondent no. 1. In this counter affidavit, stand was taken by the respondents that MPSC would not apply to appellant's two PSCs. The appellant filed rejoinder to this counter affidavit controverting the stand which was taken by the respondent. Thereafter, the respondent filed another supplementary affidavit stating that MoF had not concurred with the proposal to extend the benefit of deductions under Section 42 of the Act vide MoF O.M. dated 11.11.2009. Short affidavits were also filed by MoF as well as ADIT taking the position that the appellant was not entitled to benefit of Section 42 of the Act. Rejoinder to these short affidavits was filed by the appellant. Rejoinder was also filed to the supplementary affidavit which has been filed by respondent no. 1. The appellant also filed additional affidavit dated 28.02.2012 giving details of other small sized discovered oil fields PSCs, who were awarded contracts under 1992 NIT,

submitting that they were identical to the appellant and in their case clause was inserted giving benefit under Section 42 of the Act. It was pleaded that since they were identically situated as the appellant herein, denying such a benefit to the appellant amounted to hostile discrimination. By another affidavit filed by the appellant, it also tried to demonstrate that respondent no. 1 had accepted the calculation of petroleum profits on the assumption that the deduction under Section 42 was available to the appellant; otherwise the appellant would have enjoyed increased profits . It was, thus, sought to be demonstrated that even while profit sharing, shares were calculated keeping in view the deductions under Section 42 of the Act thereby giving better and increased profit sharing to the Government as well. The matter was ultimately heard by the High Court which has dismissed the writ petition by passing detailed judgment on 28.05.2012. Before we come to the arguments of the appellant challenging the correctness of this judgment, it may be appropriate to take note of reasons which have been given by the High Court in support of the view it has taken. IMPUGNED JUDGMENT The High Court took note of the basic and primary contention of the appellant which was that there was a clear understanding between the MoPNG and the appellant that in the contract to be signed between the parties benefits under Section 42 of the Act would be admissible. The NIT issued by the Government was based on this basic understanding but due to inadvertent oversight and error on the part of the MoPNG the contract, which was ultimately signed, omitted to include such a clause. Therefore, on account of mistake of the Ministry, which even it admitted in its communications when the dispute regarding admissibility of deduction under Section 42 of the Act arose, the appellant should not be allowed to suffer. More so, when it was not responsible for the said error.

It may be pertinent to point out that the High Court did not accept the preliminary objections raised by the respondent and after repelling the same, it adverted to the subject matter of the writ petitions. On the merits of the issue involved, the High Court formulated two questions . These are:

"(1) Whether benefit under Section 42 of the Act was envisaged in the 1992 NIT and in the PSCs, but due to oversight or mistake, the same was not included and mentioned in the written contract, and if so, the effect thereof?

(2) If the question is decided in favour of the appellant, the second aspect is whether a direction can be issued for grant of benefit under Section 42 of the Act to the appellant, with a further direction that the contract should be laid before the Parliament after incorporating the said clause?" Dealing with the first question, High Court rejected the plea of the appellant that 1992 NIT included and referred to the MPSC as incorrect. It is pointed out that the 1992 NIT did not refer to the MPSC and did not stipulate that MPSC shall form part of the tender documents. It is further stated by the High Court that in 1992 NII, there was no reference to MPSC or that the terms and conditions of the MPSC shall be included in, or be a part of, the PSCs. It is

> also observed that there is no document or clause in the bid given by the appellant under the 1992 NIT to the effect that the MPSC or clause 16.2 of the same would be applicable and should be a part of the PSCs. In the tender submitted by the appellant there was no specific stipulation to include any clause with regard to the benefit under Section 42 of the Act. The High Court has further observed that written contracts were signed between the appellant and MoPNG in the name of President on
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> 20.,02.1995. Clause 15 of these contracts which pertain to "Taxes, Royalties, Rentals, Customs duties etc." though mentions about the applicability of fiscal, there is no reference to Section 42 of the Act in this Clause.

The High Court further pointed out that there was no letter or correspondence written by the appellant from 1995 onwards stating that non- inclusion of Section 42 benefit was due to oversight. Insofar as three letters written by the MoPNG, namely, letters dated 17-06-2005, 11-04-2007 and 28-04-2008 are concerned wherein this Ministry admitted that there was an unintentional lapse and omission in not incorporating the provision of admissible deduction under Section 42 of the Act, the High Court has brushed aside these communications as inter-ministerial correspondence. These letters were apparently written on the request of the appellant or NIKO Resources Limited. It is further mentioned that these are not contemporaneous letters written at the time when PSCs were signed. The High Court has also commented that though in these letters it is mentioned that Section 42 deductions were omitted by "oversight" in fact there was no such oversight in as much as the MoPNG itself in its counter affidavit has specifically stated that no such benefit was envisaged, considered or granted at the time when the PSCs were negotiated and awarded. Averments made in this behalf in the counter affidavit filed by the MoPNG are extensively quoted. To verify this position, the High Court also examined and went through the original files relating to preparation and finalisation of tender documents and made following remarks in this behalf.

"In order to verify and examine the correct factual position, we had asked the respondent Ministry of Petroleum and oversight in as much as the MoPNG itself in its counter affidavit has specifically stated that no such benefit was envisaged, considered or granted at the time Natural Gas to produce the original files relating to preparation and finalization of tender documents. They were produced before us on 21st February, 2012. We examined the original records and found that under the terms and conditions, as well as in the notes, no benefit under Section 42 of the Act was envisaged or was required to be granted. We also recorded the statement of the learned Additional Solicitor General that the three letters mentioned above were factually incorrect and, therefore, no legal right on the basis of the letters accrues/arises. Thus, no statement or promise, that advantage under Section 42 would be available to the successful bidder, was promised or made." Insofar as plea of discrimination between 13 PSCs (which included the appellant), who are not given the benefit of Section 42 of the Act vis-a- vis other PSCs where such a benefit has been extended, the High Court has accepted the explanation put forth by the respondents to the effect that these 13 PSCs formed a different class in as much as their contract was in respect of small oil fields which had already been discovered and, therefore, the risk factor was less. On the other hand, other PSCs were in respect of undiscovered oil fields and for this reason benefit under Section 42 had been granted to them.

On the aforesaid reasoning, the High Court concluded that appellant was fully aware of Clause 16.2 of MPSC which specifically makes reference to benefit under Section 42 of the Act, but did not advert to and refer to the same in their tender bid and did not ask for this benefit. Therefore, it was not possible to accept the contention of the appellant that benefit under Section 42 of the Act was inadvertently missed out, or due to an act of oversight, not included in the contract. On this finding, the High Court chose not to examine the second issue. Post by it in para 9 of the impugned judgment and noted by us above.

We would also like to mention that in the penultimate para, the High Court has expressed its displeasure and anguish over the averments made by respondent no. 1 in the additional affidavit dated 23-03-2012 where respondent no. 1 even denied the fact that petroleum profits were not shared between the Government and the appellant after making the calculations with reference to benefit under Section 42 of the Act. In letter dated 11.11.2009 written by the MoF, Department of Revenue this fact is specifically admitted and, therefore, respondent no. 1 should have been careful in making such averments in the said additional affidavit which were contrary to the record, even if it was uncomfortable to respondent no.

1. Mr. Ganesh, learned senior counsel appearing for the appellant submitted that the High Court had failed to appreciate and cognise the basic issue which had arisen in the instant case about the admissibility of the benefit of Section 42 of the Act in respect of two production sharing contracts (PSCs) between the appellant and the Government. He submitted that the claim for the benefit of the aforesaid provision was predicated on the following grounds:

> (a) The Ministry of Petroleum & Natural Gas (MoPNG) had invited bids for the said oilfields on the basis of a Model Production Sharing Contract (MPSC) which specifically and unequivocally provided that the benefit of Section 42 would be granted.
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> (b) The appellant's bids for the said two oilfields were clearly and indisputably submitted on the footing that the MPSC would govern the contract between the parties. In fact, in its bid, the appellant only referred to those clauses of the MPSC which the appellant wanted to be slightly modified, to which the Government had no objection. Thus, the appellant's bids were on the basis of the MPSC which provided the benefit of Section 42.
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> (c) Respondent no. 1 itself admitted that the contract was entered into, keeping in view the stipulations/terms contained in the MPSC and, therefore, MPSC had to be read into the contract. It was also argued that these facts were specifically confirmed by respondent no. 1 itself in its three letters dated 17-06-2005, 11-04-2007 and 28-04-2008.
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> (d) It was, thus, argued that as held in the case of Godhra Electricity Co. Ltd. And Another v. State of Gujarat[1], it is the mutual understanding of the parties to a contract which determines the construction that the court will place on it and this

principle squarely applied in the present case.

(e) The accounts of the venture were drawn up on the footing that the deductions under Sect5ion 42 were available and that, accordingly, the Income Tax liability would stand reduced. On this footing, a significantly higher amount was computed as the profit share payable to the Government of India under the PSC, which was received by the Government year after year.

(f) The reference made by MoPNG to the Ministry of Law in June/ July 1992 and the written opinion given by the Ministry of Law also by themselves clearly established that the intention of the Government from the very beginning was to grant the benefit of Section 42.

(g) The I.T. Department itself granted the deductions under Section 42 for several years right upto Assessment Year 2004-05 and then suddenly and unaccountably changed its mind and turned a somersault.

(h) The benefit of Section 42 was, in fact, granted to several other small-sized discovered oilfields. The appellant had filed an additional affidavit dated 28.02.2012 giving particulars of at least 11 other small-

sized discovered oilfields to which benefit of Section 42 was given. Even though the contents of the affidavit remained untraversed, the same has been completely disregarded by the High Court." Relying on the aforesaid material on which Mr. Ganesh laid great emphasis, his plea was that the High Court did not consider the aforesaid aspects in its right perspective and arrived at a wrong finding that the appellant did not ask for the benefit of Section 42 of the Act.

He further submitted that strong reliance was placed by the High Court on the contents of a file which was produced by respondent no. 1 relating to the preparation of tender documents. However, this file was not shown to the appellant or its counsel and the appellant was, thus, denied any opportunity of dealing with the same. He pointed out that the appellant had specifically filed an application dated 28-02-2012 praying that the Court should not consider the contents of the said file or alternatively the copies of the documents in the file be supplied to the counsel of the appellant. On this application, the Court had made observation on 12.03- 2012 to the effect that it was not going to place any reliance on the contents of the file and with these observations the application was dismissed. However, in the impugned judgment, the High Court has rested its conclusion on the basis of some contents in the file. He further submitted that the Court should not have disregarded the letters of the respondent no. 1 on the ground that they were not contemporaneous letters. His submission was that right upto the year 2005, the benefit of Section 42 was extended to the appellant and, therefore, there was no occasion for the appellant to approach respondent no. 1 to ask for such a clarification. He further submitted that reliance placed by the High Court on certain paras of the counter affidavit of respondent no. 1 was totally erroneous as such a stand taken in the counter affidavit was contrary to the letters which were addressed by the respondent no. 1 itself to the MoF but according to him, the manner in which the plea of discrimination was dealt with by the

High Court was also erroneous ignoring the specific plea taken by the appellant in its additional affidavit dated 28-02-2012 giving particulars of a number of small-sized oil fields to which Section 42 benefit was given and the Government had not controverted those averments. He submitted that apart from the plea, 13 oil fields (which included the appellant) all other oil fields, whether large, medium or small sized, and whether discovered or exploratory, were given the benefit of Section 42 of the Act. Therefore, the respondents had acted in a grossly arbitrary and discriminatory manner. Last submission of Mr. Ganesh was that the issue regarding Mandamus to be issued to the respondents for amending the contract and including the clause for granting the benefit of Section 42 of the Act was not even gone into, though, it was specifically argued. He further submitted that when the other contracting parties, namely, MoPNG specifically admitted that this provision was left our inadvertently, the Court should have given a direction for amendment of the Contract. In order to support his submission that such a direction can be issued by the High Court in exercise of its powers under Article 226 of the Constitution, he referred to the following judgments:

(i) K.N. Guruswamy Vs. State of Mysore[2]

(ii) GSFC Vs. Lotus Hotels Ltd.[3]

(iii) Kumari Shrilekha Vidyarthi Vs. State of U.P.[4]

(iv) ABL International Ltd. Vs. Export Credit Guarantee Corpn.[5] Mr. Arijit Prasad, Advocate, who appeared for all the respondents countered the aforesaid submissions emphatically and passionately. He argued that insofar as income tax department is concerned it could extend the benefit of deductions admissible under Section 42 of the Act only when the assessee, namely, the appellant in the instant case, fulfilled the conditions for such deductions stipulated in that Section. For this purpose, the income tax authorities were supposed to look into the PSCs only and as far as the contracts between the Government and the appellant are concerned, admittedly there was no such stipulation therein. Nor these contracts were placed before both the House of Parliament. Therefore, the order of the Assessing Authorities in tune with legal provisions. He further submitted that in any case the appeal of the appellant was pending before the ITAT and it was for the ITAT to go into the submissions made by the appellants on the admissibility of deduction under Section 42 of the Act.

In respect of the three letters which were written by the respondent no. 1, his submission was that no reliance could have been placed on those letters and the matter had to be examined on the basis of record. The High Court had, for this purpose, examined the original files on the basis of which it was clearly found that the averments made in the three letters ware not born out of records.

He also made detailed submissions to support the findings of the High Court that there was no inadvertent omission in failing to make any stipulation with regard to extending the benefits of Section 42 of the Act and on the contrary insofar as the appellant and 12 other similar parties are concerned, there was a deliberate decision not to extend such a benefit. He also argued that in any case plea of discrimination could not be taken in the matters of contract in private law field.

Reacting to the relief of mandamus sought by the appellant seeking directions against Respondent No. 1 to amend the contract, his plea was that such a prayer, in the realm of contractual relationship between the parties, was inadmissible. He pleaded that PSCs are in the nature of contract agreed to be between two independent contracting parties and each of the PSCs are distinct from the other and is not a copy of MPSC. He also pointed out that before signing the PSC, the approval of the Cabinet is obtained, which reflects that the PSCs as submitted to the Cabinet, has the approval of one of the contracting party, i.e. Government of India. Therefore, the appellant could not claim to be oblivious of the provisions of law or the contents of the contract at the time of signing and was precluded from seeking retrospective amendment as a matter of right when no such right is conferred under the contract. In support of his submission that 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 that the 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, he referred to and relied upon the judgments in Pradeep Kumar Sharma v. U.P. Finance Corporation[6] and A.B.L. International Limited (supra). From the reading of the writ petition filed in the High Court, the impugned judgment rendered by the High Court thereupon, and also having regard to the arguments advanced before us which have already been taken note of, it is apparent that the fulcrum of the issue, which has to be focused and to be answered, pertains to the benefit of the deductions permissible under Section 42 of the Act. In fact, as is clear from the prayers made by the appellant in the writ petition, the very first direction which the appellant sought was to declare that the appellant is entitled to such deductions in terms of the two PSCs dated 20-02-1995. Incidental issues, while deciding the aforesaid primary issue, which arises relate to the construction of the terms of the said PSCs and also the nature of the contracts which the parties intended to. Another issue relates to the jurisdiction of the High Court under Article 226 of the Constitution to pass Mandamus for amending the PSCs. All these issues are formulated in the precise form hereunder:

> (i) Whether in terms of the provisions contained in two Production Sharing Contracts (PSCs) dated 20-02-1995 executed between the appellant and the Central Government, appellant is entitled to the special allowances stipulated under Section 42 of the Act?
>
> (ii) Whether Model Production Sharing Contract (MPSC) can be read as part of and incorporated in the PSCs?
>
> (iii) Whether there was any intention between the contracting parties, namely, the MoPNG and the appellant for giving benefit of deductions under Section 42 of the Act?
>
> (iv) If so, whether non-inclusion of such a provision in the contract can be treated as accidental and unintentional omission.
>
> (v) If the answer to question no. (iv) is in the affirmative, whether mandamus can be issued by the Court to the parties to amend the contract and incorporate provisions to

this effect?

We would now proceed to answer these questions seriatum. Answer to question No. (i) – First and foremost aspect which has to be kept in mind while answering this issue is that the Income Tax Authorities while making assessment of income of any assessee have to apply the provisions of the Income Tax Act and make assessment accordingly. Translating this as general proposition contextually, what we intend to convey is that the Assessing Officer is supposed to focus on Section 42 of the Act on the basis of which he is to decide as to whether deductions mentioned in the said provision are admissible to the assessee who is claiming those deductions. In other words, the Assessing Officer is supposed to find out as to whether the assessee fulfills the eligibility conditions in the said provision to be entitled to such deductions. We have already reproduced the language of Section 42, which deals with special provisions of deductions in the case of business for prospecting, etc. for mineral oil. Since, the appellant herein, in its income tax returns for the assessment year in question, i.e., Assessment Year 2005-06, had claimed the deductions mentioned in Section 42(1)(b) and (c) of the Act, we should take note of the nature of these deductions. Section 42(1)(b) provides for deductions of expenditure incurred in respect of drilling or exploration activities or services or in respect of physical assets used in that connection, except for those assets on which allowance for depreciation is admissible under Section 32. Section 42(1)(c) speaks of allowances pertaining to the depletion of mineral oil in the mining area. In order to be eligible to the deductions, certain conditions are stipulated in this very section which have to be satisfied by the assessees. As is clear from the reading of this Section, these conditions are as under:

(a) it grants such special allowances to those assessees who carry on business in association with the Central Government or with any person authorized by it;

(b) business should relate to prospecting for, extracting or producing mineral oils, petroleum or natural gas;

(c) there has to be an agreement in writing between the Central Government and the assessees in this behalf;

(d) it is also a requirement that such an agreement has been laid on the Table of each House of Parliament;

(e) the allowances which are claimed are to be necessarily specified in the agreement entered into between the two contracting parties; and

(f) allowances are to be computed and made in the manner specified in the agreement.

From the nature of allowances specified in this provision, it is clear that such allowances are otherwise inadmissible on general principles, for e.g. allowances relating to diminution or exhaustion of wasting capital assets or allowances in respect of expenditure which would be regarded as on capital account on the ground that it brings an asset of enduring benefit into

existence or constitutes initial expenditure incurred in setting up the profit earning machinery in motion. It is for this reason this Section itself clarifies that the provisions of this Act would be deemed to have been modified to the extent necessary to give effect to the terms of the agreement, as otherwise, the other provisions of the Act specifically deny such deductions. A fortiorari, the PSC entered into between the parties becomes an independent accounting regime and its provisions prevail over generally accepted principles of accounting that are used for ascertaining taxable income (See – Commissioner of Income Tax, Dehradun & Anr. v. Enron Oil and Gas India Limited[7]). Thus, by virtue of this Section, it is the PSC which governs the field as without it, such deductions are not permissible under the Act. IF PSC also does not contain any stipulation providing for such allowances, the Assessing Officer would be unable to give the benefit of these deductions to the assesee.

We would also like to point out, at this juncture itself, that this Court held in CIT v. Enron Expat Service Inc.[8] that the mere fact that the assessee had offered to pay tax under Section 44 (BB) of the Act in some of the earlier years will not operate as an estoppel to claim the benefit of Double Taxation Avoidance Agreement (DTAA), where the assessee operates under the same PSC which was before the Court. While holding so, the Court had followed its earlier judgment in the case of Enron Oil and Gas India Limited (Supra).

In the present case, it is an admitted fact that conditions mentioned in Section 42 of the Act are not fulfilled. In the two PSCs, no provision is made for making admissible the aforesaid allowances to the assessee. It is obvious that the Assessing Officer could not have granted these allowances/deductions to the assessee in the absence of such stipulations, a mandatory requirement, in the PSCs.

The appellant is conscious of this position. It is for this reason the attempt of the appellant was to read the provisions of MPSC into the agreement. That bring us to the second issue.

Answer to question no. (ii) - Endeavour of Mr. Ganesh, on this aspect, was to show that the bids were invited on the basis of terms stated in the MPSC which specifically mentioned about deductions under Section 42 of the Act. He also endeavored to demonstrate that thee appellant had submitted its bid keeping in view such a categorical stipulation in the MPSC. He also pointed out that on MPSC, opinion of Law Ministry was solicited vide Memo dated 22-06-1992 and that the Ministry of Law gave its opinion dated 21-07- 1997 opining that benefit of both Sections 293(A) and Section 42 of the Act should be extended to the foreign companies in order to make their participation in these oil fields viable. As per the appellant, it was also made abundantly clear by the Ministry of Law that it was in relation to “foreign companies to be engaged in exploration, development and production of oil ion small sized oil and gas fields under the proposed Production Sharing Contract”, thus, drawing no distinction between fields to be explored and those already discovered and also making specific reference to the MPSC. Taking sustenance from the aforesaid material, a passionate plea was made by Mr. Ganesh to read the provisions of Section 42 contained in MPSC, as opined by the Ministry of Law, into the PSCs which were ultimately signed between the parties.

In order to appreciate this argument, we shall have to traverse through the PSCs dated 20-02-1995 which were ultimately signed between the Government and the appellant. We would like to mention here that when this argument was being advanced by the learned senior counsel for the appellant the Court asked him to produce the copy of PSCs, which were otherwise not brought on the record as the Court wanted to find out as to whether there was any such intention expressed in the agreement, namely, to incorporate the provisions of MPSC or the correspondence exchanged between the parties earlier to the signing of this agreement. On our asking, the appellant has placed on record the copy of these PSCs. On going through the same, we find that intention expressed is just to the contrary. It is rather made crystal clear in the agreement that this agreement is the sole repository of the terms on which it is signed and nothing else would be looked into for this purpose. It is so reflected in the following clauses in the agreement:

> "(5) The Government has agreed to enter into this Contract with the Companies with respect to the area referred to in Appendices A & B of this Contract on the terms and conditions herein set forth." Article 1 – In this Contract, unless the context requires otherwise, the following terms shall have the meaning ascribed to the then hereunder:
>
> xxx xxx xxx
>
> Article 1.18 "Contract" means this agreement and the Appendices mentioned herein and attached hereto and made an integral part hereof and any amendments made thereto pursuant to the terms hereof.
>
> Article 32 - ENTIRE AGREEMENT, AMENDMENTS, WAIVER AND MISCELLANEOUS 32.1 This Contract supersedes and replaces any previous agreement of understanding between the Parties, whether oral or written, on the subject matter hereof, prior to the Effective Date of this Contract.
>
> 32.2 This Contract shall not be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all the Parties, which shall state the date upon which the amendment or modification shall become effective.
>
> 32.3 No waiver by any Party of any one or more obligations or defaults by any other Party in the performance of this Contract shall operate or be construed as a waiver of any other obligations or defaults whether of a like or of a different character.
>
> 32.4 The provisions of this Contract shall inure to the benefit of and be binding upon the Parties and their permitted assigns and successors in interest.
>
> 32.5 In the event of any conflict between any provisions in the main body of this Contract and any provision in the Appendices, the provision in the main body shall prevail.

> 32.6 The headings of this Contract are for convenience of reference only and shall not be taken into account in interpreting the terms of this Contract." Intention behind the aforesaid clauses is more than apparent, namely, not to look into any other document or correspondence which took place between the parties prior to the signing of this agreement. Not only this, even the so-called "understanding" between the parties is to be ignored as well. It is, therefore, impermissible for the appellant to take the aid of MPSC or the clauses contained therein while construing the terms of PSCs.

Therefore, it was not even open to the Income Tax Authorities to go beyond the stipulations contained in the PSCs while making the assessment and had to exclusively remain within the provisions of the Agreement. On that touchstone, the Assessing Officer had no option but to deny the benefit of deductions/allowances claimed by the appellant in its income tax returns filed for the Assessment Year 2005-06. This bring us to the next question. Answer to question no. (iii) - We have already noted that Article 32.2 categorically provides that this Contract shall not be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all the parties, which shall state the date upon which the amendment or modification shall become effective. In continuation to what has been observed by us while answering point no. (ii) above, it becomes apparent that the question of any intention to the contrary between the parties does not arise. It is because of the reason that Article 32 of the Agreement specifically supersedes any understanding between the parties prior to the effective date of this contract.

The matter is, however, compounded by certain acts of respondent no. 1 and made complex to some extent by the Income Tax Authorities in giving benefit of these allowances/deductions under Section 42 of the Act to the appellant under these very PSCs in respect of earlier assessment years. Further, this very state of affairs continued for few years insofar as giving such a benefit by the Income Tax Authorities is concerned it may not pose a serious problem. We have already held above that on proper construction of the provisions of Section 42 of the Act and application of these provisions to the instant case, the appellant was not entitled to any such deductions under the PSCs. Thus, when in law no such deduction was permissible as per the PSCs in the present form, even if such deduction was given wrongly in the earlier years that would not amount to a wrong act on the part of the Income Tax Authorities and, therefore, would not enure to the benefit of the appellant in the Assessment Year in question as well. The appellant cannot say that merely because this benefit is extended in the previous years; albeit wrongly, this wrong act should continue to perpetuate. There is no estoppel against law. We have taken note of the judgment of this Court in Enron Expat Service Inc. (Supra) where the assessee had offered to pay tax under Section 44(BB) of the Act in the earlier years wrongly and the Court held that it would not operate as an estoppel to claim the benefit of DTAA for the Assessment Year in question when it was found that the assessee was otherwise entitled to it. Same principle applies, though it is a converse situation where assessee has not offered to pay tax wrongly [which was the situation in Enron Expat Service Inc. (Supra)] and instead the tax authorities have extended the benefit wrongly to the assessee.

With this, we come to more crucial aspect, namely, the three letters written by the MoPNG in response to the appellant's communications seeking its clarification. Undoubtedly, in these three letters the MoPNG has accepted that intention between the parties was to give the benefit of

allowances under Section 42 of the Act to the appellant herein. So much so, the MoPNG even requested the MoF to give its nod for amending the contract by incorporating such a provision which was allegedly left out inadvertently.

Our first remark is that the approach of the High Court in dealing with this aspect may not be entirely correct. In the first instance, it has embarked upon the issue as to whether such an omission was by way of "oversight" or it was unintentional. While undertaking this enquiry, it has side tracked the language of the three letters and instead gone by the stand taken in the counter affidavit filed by respondent no. 1 where, in para 4 of the counter affidavit, respondent no. 1 pleaded to the contrary. Clearly, the said stand taken in the counter affidavit filed in the High Court was contrary to the contents of the three letters dated 17.06.2005, 11.04.2007 and 28.04.2008. Significantly, respondent no. 1 neither disowned those letters nor tried to explain away those letters. No plea was raised to the effect that the person who wrote those letters was not authorized to do so or he had taken the said stand in the letters which was contrary to the records. No doubt, the High Court has observed that it had looked into original record in order to verify and examine the correct factual position. However, as demonstrated by Mr. Ganesh, on an application made by the appellant in the High Court for giving the copies of such records, the High Court had observed that those records would not be seen nut ultimately relied upon these records. We do not know whether the High Court is correct in its conclusion as to whether the contents of the three letters are contrary to records and the averments made in para 4 of the counter affidavit are in conformity with the records, in as much as these records have not been produced for our perusal. However, on going through the terms of the PSCs it becomes apparent that such an exercise is not even required.

It is stated at the cost of repetition that Article 32 of the contract supersedes any understanding between the parties. Thus, even if it is presumed that there was an understanding between the parties before entering into an agreement to the effect that benefit of Section 42 deduction shall be extended to the appellant, that understanding vanished into thin air with the execution of the two PSCs. Now, for all intent and purpose, it is only the PSCs signed between the parties, which can be looked into. We answer this question accordingly.

Undoubtedly, the appellant is also conscious of such a limitation and is aware of the fact that unless there is a clear stipulation in the PSCs for grant of benefit of special allowances under Section 42 of the Act, it would be difficult, nay impossible, for the appellant to sail through. It is for this reason Mr. Ganesh, learned senior counsel for the appellant made a fervent plea that respondents be directed to carry out the amendment in the contract to include stipulation with regard to Section 42 as well. That bring us to the next question about the permissibility of such a prayer.

Answer to question no. (iv) & (v) – These issues have three facets, namely:

(i) Whether there is a prayer to this effect in the writ petition?

(ii) If it was intended to give such a benefit before entering into the agreement, whether this intention gives any right to the appellant to seek an amendment?

(iii) Whether the Court has the power to issue Mandamus or direction to the Government?

We have reproduced the prayers made in the writ petition. Obviously, no prayer for issuance of Writ of Mandamus or direction of this nature is specifically made. Prayer clause shows that there are two prayers made in the writ petition. First relates to directing the Authorities to grant benefit under Section 42 of the Act in terms of PSCs dated 22.02.1995, i.e. it is confined within the scope of the said contracts. Though, the appellant wants that while construing these contracts MPSCs and other several communications between the parties should be looked into and given effect to. We have already held that all such communications would be extraneous and it is only the terms of PSCs dated 20.02.1995 which can be looked into. Second prayer aims at seeking quashing of orders dated 31.12.2007 and notices dated 28.03.2008 and 01.05.2008 vide which income tax assessments for Assessment Years 2001-02, 2002-03, 2003-04; AND 2004-05 respectively are sought to be re-opened.

Mr. Ganesh, however, submitted that such a prayer should be culled out from prayer no. (iii) which is residual in nature. Ordinarily, it would be difficult to read into this prayer clause a relief of substantive nature of issuing the writ of mandamus. However, we find that there are specific averments to this effect in the body of the writ petition as well as in the grounds. More pertinently this relief was specifically pressed and argued in the High Court which was even entertained by the High Court without any objections from the respondent to the contrary. Therefore, we are inclined to examine the plea on merits, though reluctantly.

Let us presume that there was such an intention. In fact, it is so stated in the three letters dated 17-06-2005, 11-04-2007 and 28-04-2008 which are written by MoPNG and not disowned by it. Still such an intention would not make any difference and for this purpose we again revert back to Article 32 which has already been reproduced above. Not only prior understanding between the parties stood superseded as mentioned in Article 32.1, Article 32.2 which is crucial to answer this question, bars any amendment, modification etc. to the said contract except by an instrument in writing signed by all the parties. Thus, unless respondents agree to amend, modify or varied/supplemented the terms of the contract, no right accrues to the appellant in this behalf.

We have to keep in mind that the contract in question is governed by the provisions of Article 299 of the Constitution. These are formal contracts made in the exercise of the Executive power of the Union (or of a State, as the case may be) and are made on behalf of the President (or by the Governor, as the case may be). Further, these contracts are to be made by such persons and in such a manner as the President or the Governor may direct or authorize. Thus, when a particular contract is entered into, its novation has to be on fulfillment of all procedural requirements. No doubt, there is an exception to this principle, viz. even in the absence of a contract according to the requirements of Article 299 of the Constitution, doctrine of promissory estoppel can still be invoked against the Government. However, no such case is pleaded by the appellant. To dilate upon the aforesaid proposition further, we take along third facet of this issue as, to some extent, they are over-lapping. Fact remains that even when MoPNG requested MoF for giving consent to amend the contract, no such authorisation came from MoF. Whether, in such a case, can the Court issue a Mandamus?

As noted above, the contention of the respondent is that PSCs are in the nature of a contract agreed to between the two independent contracting parties. It is also mentioned that before the signing of the PSCs, the approval of Cabinet is obtained which reflects that the PSC as submitted to the Cabinet has the approval of one of the contracting parties, namely, Government of India in this case. When it is signed by the other party it means that it has the approval of both the parties. Therefore, a contracting party cannot claim to be oblivious of the provisions of the law or the contents of the contract at the time of signing and, therefore, later on cannot seek retrospective amendment as a matter of right when no such right is conferred under the contract. Even the doctrine of fairness and reasonableness applies only in the exercise of statutory or administrative actions of the State and not in the exercise of contractual obligation and issues arising out of contractual matters are to be decided on the basis of law of contract and not on the basis of the administrative law. No doubt, under certain situations, even in respect of contract with the State relief can be granted under Article 226. We would, thus, be dealing with this aspect in some detail.

Law in this aspect has developed through catena of judgments of this Court and from the reading of these judgments it would follow that in pure contractual matters extraordinary remedy of writ under Article 226 or Article 32 of the Constitution cannot be invoked. However, in a limited sphere such remedies are available only when the non-Government contracting party is able to demonstrate that its a public law remedy which such party seeks to invoke, in contradistinction to the private law remedy simplicitor under the contract. Some of the case law to bring home this cardinal principle is taken note of hereinafter.

Significantly, in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors. v. R. Rudani & Ors.[9] as well, this Court made it clear that if the rights are purely of private character, no mandamus can be issued. Thus, even if the respondent is a 'State', other condition which has to be satisfied for issuance of a writ of mandamus is the public duty. In a matter of private character or purely contractual field, no such public duty element is involved and, thus, mandamus will not lie.

First case which needs to be referred is Bareilly Development Authority Vs. Ajai Pal Singh and others[10]. That was the case where Appellate Authority had undertaken construction of dwelling units for people belonging to different income groups and the cost at which such flats were to be allotted to the allottees. However, it was mentioned that the cost stated was only estimated cost and subject to increase or decrease according to rise or fall in the price at the time of completion of property. The authority increased the cost and monthly installment rates which it demanded from the allottees were almost doubled and cost and rates of installments initially stated in the brochure. Respondents/allottees filed writ petition challenging the same and in this context question of maintainability of the writ petition arose. High Court, relying upon the judgment of the Supreme Court in the case of Ramana Dayaram Shetty Vs. Airport Authority of India[11] allowed the writ petition by observing as under :-

> "It has not been disputed that the contesting opposite party is included within the term `other authority' mentioned under Article 12 of the constitution. Therefore, the contesting opposite parties cannot be permitted to act arbitrarily with the principle

which meets the test of reason and relevance. Where an authority appears acting unreasonably, this court is not powerless and a writ of mandamus can be issued for performing its duty free from arbitrariness or unreasonableness." In appeal filed by the Authority, this Court, on facts, noted that the respondents had applied for registration only by acceptance of terms and conditions contained in the brochure. Moreover, subsequently letter was written by the Authority about the enhancement of the cost of the houses/flats as well as increase in monthly installments. Rate of yearly interest requesting allottees to give their written acceptance and the respondents except respondent No.4 had sent their written acceptance and it was on the basis of the written acceptance that name of first respondent was included in the draw and he was successful in getting allotment of a particular house. The court observed that respondents were under no obligation to seek allotment of house/ flats even if they had registered themselves. Notwithstanding, the voluntarily registered themselves as applicants only after fully understanding the terms and conditions of the brochure including relating to variance in prices. On the basis of these facts, this Court observed that the aforesaid observations of the High Court relying upon Ramana Dayaram Shetty case were not correct. Thus observed the Court, speaking through Ratnavel Pandian. J.:

"The finding in our view, is not correct in the light of the facts and circumstances of this case because in Ramana Daya Shetty case, there was no concluded contract as in this case. Even conceding that the BDA has the trappings of a state or would be comprehended in 'other authority' for the purpose of Article 12 of the constitution, while determining price of the houses/flats constructed by it and the rate of monthly installments to be paid, the Authority or its agent after entering into the field of ordinary contract acts purely in its executive capacity. Thereafter the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter se. In this sphere they can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority (i.e. BDA in this case) in the said contractual field.

22. There is a line of decisions where the contract entered into between the state and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple Radhakrishna Agarwal Vs. State of Bihar (Supra), Premi Bhai Parmar Vs. Delhi Development Authority and DFO Vs. Biswanath Tea Company Ltd."

Next case of relevance is the Divisional Forest officer Vs. Bishwanath Tea Co. Ltd.[12] In that case respondents took on lease certain land from the Government. Initially, period of lease was 15 years. The lease was to be extended for cultivation and raising tea garden and was subject to condition set out in the Lease Agreement and generally to Assam Land & Revenue Regulation and Rules made

thereunder. Respondent Company approached appellant seeking permission to cut 7000 cub.ft. of timber. Appellant took the stand that as the timber was required for a particular use which was not within the Grant, full royalty will be payable on timber so cut and removed. Respondent company paid the amount of royalty under protest and filed writ petition under Article 226 of the Constitution in the High Court alleging that upon a true construction of the relevant clauses of the Grant as also proviso to Rule 37 of the Settlement Rules, it was entitled to cut and remove timber without payment of royalty and, therefore, the recovery of royalty being unsupported by law, the appellant was liable to refund the same. A preliminary objection was taken by the appellant to the maintainability of the writ petition on the ground that claim of the respondent flows from terms of lease and such contractual rights and obligations can only he enforced in a civil court. This preliminary objection was overruled by the High Court which proceeded to hear the matter and allowed writ petition of the respondent company. In appeal by the appellant to this Court, the decision of the High Court was reversed holding that writ as not maintainable. Following observations may usefully be quoted:-

> "8. It is undoubtedly true that High Court can entertain in its extraordinary jurisdiction a petition to issue any of the prerogative writs for any other purpose. But such writ can be issued where there is executive action unsupported by law or even in respect of corporation there is a denial of equality before law or equal protection of law. The Corporation can also file a writ petition for enforcement of a right under a statute. As pointed out earlier, the respondent company was merely trying to enforce a contractual obligation. To clear the ground let it be stated that obligation to pay royalty for timber cut and felled and removed is prescribed by the relevant regulations, the validity of regulations is not challenged. Therefore, the demand for royalty is supported by law. What the respondent claims is an exception that in view of a certain term in the indenture of lease, to writ, Clause 2, the appellant is not entitled to demand and collect royalty from the respondent. This is nothing but enforcement of a term of a contract of lease. Hence, the question whether such contractual obligation can be enforced by the High Court in its writ jurisdiction.
>
> 9. Ordinarily, where a breach of contract is complained of, a party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed, or the party may sue for damages. Such a suit would ordinarily be cognizable by the Civil Court. The High Court in its extraordinary jurisdiction would entertain a petition either for specific performance of contract or for recovering damages. A right to relief flowing from a contract has to be claimed in a Civil Court where a suit for specific performance of contract or for damages could be filed....".

The question came up for consideration again in the case of Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. and others[13]. In that case, State of U.P. had issued Government order dated 6.2.1990 whereby appointments of all Government Counsels (Civil, Criminal, Revenue) in all the Districts of the State of U.P. were terminated w.e.f. 28.2.1990, irrespective of the fact whether the term of the incumbents had expired or was subsisting. Validity of this G.D. was challenged by many of these

Government Counsels whose appointments were terminated and one of the issues to be determined by the court was as to whether writ petition was maintainable challenging this G.D., as according to the Respondent State the appointment of these Government Counsel was purely contractual and writ petition to enforce the contract was not maintainable. After noticing this argument of the respondents, the Supreme Court formulated the question to be decided in the said case, in the following words:

> "The learned Additional Advocate General did not dispute that if Art. 14 of the Constitution of India is attracted to this case all State actions, the impugned circular would be liable to be quashed if it suffers from the vice of arbitrariness. However, his argument is that there is no such vice. In the ultimate analysis, it is the challenge of arbitrariness which the circular must challenge of arbitrariness withstand in order to survive. This really is the main point evolved for decision by us in the present case".

The Court then examined the nature of appointment of the Government counsel in the Districts with reference to the various legal provisions including legal Remembrance Manual and Section 24 Code of Criminal procedure as well as decision of Supreme Court in which character of engagement of a Government counsel was considered. After analyzing these provisions and case law, the Supreme Court concluded in the following manner, describing the nature of appointment of District Government counsel:

> "17. We are, therefore, unable to accept the argument of the Ld. Addl. Advocate General that the appointment of District Government Counsel by the State Government is only a professional engagement like that between a private client and his lawyer, or that it is purely contractual with no public element attaching to it, which may be terminated at any time at the sweet will of the Government excluding judicial review. We have already indicated the presence of public element attached to the 'office' or post of District Government Counsel of every category covered by the impugned circular. This is sufficient to attract Article 14 of the Constitution and bring the question of validity of the impugned circular within the scope of judicial review.
>
> 18. The scope of judicial review permissible in the present case, does not require any elaborate consideration since even the minimum permitted scope of judicial review on the ground of arbitrariness or unreasonableness or irrationality, once Art. 14 is attracted, is sufficient to invalidate the impugned circular as indicated later. We need not, Therefore, deal at length with the scope of judicial review permissible in such cases since several nuances of that ticklish question do not arise for consideration in the present case.
>
> 19. Even otherwise and sans the element so obvious in these appointment and its concomitants viewed as purely contractual matters after the appointment is made, also attract Art. 14 and exclude arbitrariness permitting judicial review of the impugned state action. This aspect is dealt with hereafter.

> 20. Even apart from the premises that 'office' or post of D.G.Cs. has a public element which alone is sufficient to attract the power of judicial review for testing validity of the impugned circular on the anvil of Art.

14, we are also clearly of the view that this power is available even without that element on the premise that after initial appointment, the matter is purely contractual. Applicability of Art. 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, can it be said that the State can thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Art. 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 ? We have no hesitation in saying that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Art. 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 requirements of Art. 14 and contractual obligations are alien concepts, which cannot co- exist.

21. The preamble of the Constitution of India resolves to secure to all its citizens Justice, social economic and political: and Equality of status and opportunity. Every State action must be aimed at achieving this goal. Part IV of the Constitution contains 'Directive principles of State Policy' which are fundamental in the governance of the country and are aimed at securing social and economic freedoms by appropriate State action which is complementary to individual fundamental rights guaranteed in part III for protection against excesses of State action, to realise the vision in the preamble. This being the philosophy of the constitution, can it be said that it contemplates exclusion of Art. 14 non arbitrariness which is basic to rule of law from State actions is contractual field when all actions of the State are meant fore public good and expected to be fair and just ? we have no doubt that 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. In our opinion, it would be alien to the Constitutional scheme to accept the argument of exclusion of Art. 14 in contractual matters. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. This is more so when the modern t rend is also to examine the unreasonableness of a term in such contractual where the bargaining power is unequal so that these are not negotiated contracts but standard from contracts between unequal.

22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas 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. This factor alone is sufficient to import at least the minimum requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different mater that the scope of judicial review in respect of disputes 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 Art. 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 Art. 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 Art. 14 of non- arbitrariness at the hands of the State in any of its actions.

xx xx xx

34. In our opinion, the wide sweep of Art. 14 undoubtedly takes within its fold the impugned circular issued by the State of U.P. in exercise of its executive power, irrespective of the precise nature of appointment of the Government counsel in the districts and the other rights, contractual or statutory, which the appointees may have. It is for this reason that we base our decision on the ground that independent of any statutory right, available to the appointments, and assuming for the purpose of this case that the rights flow only from the contract of appointment, the impugned circular, issued in exercise of the executive power of the State, must satisfy Art. 14 of the Constitution and if it is shown to be arbitrary, it must be struck down. However, we have referred to certain provisions relating to initial appointment, termination or renewal of tenure to indicate that the action is controlled at least by settled guidelines, followed by the State of U.P. for a long time. This too is relevant for deciding the question of arbitrariness alleged in the present case"

> Similarly, in State of Gujarat v. M.P. Shah Charitable Trust[14], this Court reiterated the principles that if the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, for example, where the matter is governed by a non-statutory contract.
>
> At this stage, we would like to discuss at length the judgment of this Court in ABL International Ltd. (supra), on which strong reliance is placed upon by the counsel for both the parties. In that case, various earlier judgments right from the year 1954 were taken note of. One such judgment which the Department in support of their case had referred to was the decision of Apex Court in case LIC of India v. Escorts Ltd.[15] wherein the Court had held that ordinarily in matter relating to contractual obligations, the Court would not examine it unless the action has some public law character attached to it. The following passage from the said judgment was relied upon by the respondents:
>
> “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."

This Court dealt with this judgment in the following manner:

"We do not think 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."

Insofar as the argument of the respondents in the said case that writ petition on contractual matter was not maintainable unless it is shown that the authority performs a public function or discharges a public duty, is concerned, it was answered in the following manner:

"22. 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 Shri Lekha 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."
>
> 23. 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."

The Court thereafter summarized the legal position in the following manner:

> "27. 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.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: Whirlpool 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."

The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, can refuse to exercise. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:

(a) the Court may not examine the issue unless the action has some public law character attached to it.

(b) 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.

(c) If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

(d) Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

Further legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to the contracts entered into by the State/public Authority with private parties, can be summarized as under:

(i) At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

(ii) State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

(iii) 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.

(iv) Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.

(v) Writ petition was not maintainable to avoid contractual obligation.

Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

(vi) Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

(vii) Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

(viii) If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.

(ix) The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

(x) Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

(xi) 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.

Keeping in mind the aforesaid principles and after considering the arguments of respective parties, we are of the view that on the facts of the present case, it is not a fit case where the High Court should have exercised discretionary jurisdiction under Article 226 of the Constitution. First, the matter is in the realm of pure contract. It is not a case where any statutory contract is awarded.

As pointed out earlier as well, the contract in question was signed after the approval of Cabinet was obtained. In the said contract, there was no clause pertaining to Section 42 of the Act. The appellant is presumed to have knowledge of the legal provision, namely, in the absence of such a clause, special allowances under Section 42 would impermissible. Still it signed the contract without such a clause, with open eyes. No doubt, the appellant claimed these deductions in its income tax returns and it was even allowed these deductions by the Income Tax Authorities. Further, no doubt, on this premise, it shared the profits with the Government as well. However, this conduct of the appellant or even the respondents, was outside the scope of the contract and that by itself may not give any right to the appellant to claim a relief in the nature of Mandamus to direct the Government to incorporate such a clause in the contract, in the face of the specific provisions in the contract to the contrary as noted above, particularly, Article 32 thereof. It was purely a contractual matter with no element of public law involved thereunder.

Having considered the matter in the aforesaid prospective, we come to the irresistible conclusion that the appellant is not entitled to the relief claimed. Though it may be somewhat harsh on the appellant when it availed the benefit of Section 42 for few years and acted on the understanding that such a benefit would be given to it, but we have no option but to hold that PSCs did not provide for this benefit to be given to the appellant and the contract can be amended only if both the parties agree to do so, and not otherwise. Therefore, we are constrained to dismiss the appeal for the reasons given above.

There shall, however, be no orders as to costs.

.....J. (A.K. SIKRI) .....J. (ROHINTON FALI NARIMAN) NEW DELHI;

MAY 14, 2015.

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[1] (1975) 1 SCC 199 [2] 1955 (1) SCR 305 [3] (1983) 3 SCC 379 [4] (1991) 1 SCC 212 [5] (2004) 3 SCC 553 [6] (2012) 100 SCC 424 [7] (2008) 15 SCC 33 [8] (2010) 327 ITR 626 [9] (1989) 2 SCC 691 [10] [1989] 1 SCR 743 [11] (1979) IILLJ 217 SC [12] [1981] 3 SCR 662 [13] AIR 1991 SC 537 [14] (194) 3 SCC 552 [15] (1986) 1 SCC 264