

DOES THE EXISTENCE OF AN ALTERNATE REMEDY OPERATE AS A BAR TO THE MAINTAINABILITY OF A JUDICIAL REVIEW? ESSENTIAL TAKEAWAYS FROM RECENT JUDGMENTS

AUTHORS

Amitava Majumdar (Raja), Managing Partner
Rishabh Saxena, Principal Associate

Introduction:

There may be situations in a dispute wherein the litigant may face the conundrum as to whether it should proceed with the available alternate statutory remedy or exercise its right by filing a judicial review/writ petition. In the realm of commercial contracts bearing arbitration clauses a litigant while considering the available options is often hit by the debate wherein it has to opt for either arbitration or writ remedies under Article 226 of the Constitution of India. This conundrum is exacerbated in view of the settled principle that existence of alternate remedies is not an absolute bar to exercise writ jurisdiction (*Magadh Sugar & Energy Ltd., v. State of Bihar and Ors., 2021 SCC Online SC 801*). The Constitution of India empowers the High Courts in India to issue appropriate writs for the protection of the fundamental rights and other legal rights. The writ jurisdiction of the High Courts is discretionary and is limited by the principle of exhaustion of equal and efficacious alternate statutory remedies. While as a general principle, exhaustion of equal and efficacious alternate statutory remedies is mandatory, there are certain exceptions and the High Courts do entertain writs and adjudicate matters basis principles which are mentioned hereinbelow.

Present position in India

The Supreme Court of India (“SC”) in its recent judgment of 1st February 2023 while holding that the order passed by the revisional authority suffers from patent illegality also held that a writ petition under Article 226 cannot be dismissed merely on the ground of existence of alternate remedy without putting the same through the rigours of the exceptions which exist pursuant to several judicial precedents (*M/s Godrej Sara Lee Ltd., v. The Excise and Taxation Officer Cum-Assessing Authority & Ors., Civil Appeal No. 5393 of 2010*). The SC while holding that alternative remedy does not operate as an absolute bar to the maintainability of a writ petition also provided distinction between “maintainability” and “entertainability”. The SC made reference to and discussed the cases which previously set out the grounds basis which a writ court would be justified in entertaining a writ petition despite the party approaching it not having availed the alternative remedy provided by the statute (*Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors., (1998) 8 SCC 1*) (“**Whirlpool Case**”). The SC made reference to the exceptions provided in the *Whirlpool Case* wherein, the following principles were laid down (i) whether or not the writ petition seeks enforcement of any fundamental rights, (ii) whether or not there is violation of principles of natural justice, (iii) whether or not the order or the proceedings are wholly without jurisdiction and (iv) whether or not the vires of an Act is challenged.



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Lawyers for
Shipping & Trade

12th Floor,
Sakhar Bhavan,
230, Nariman
Point, Mumbai

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Other precedents and recent cases

Similarly, the SC in another recent judgment summarized the principles governing the exercise of writ jurisdiction by the High Court while there exists an alternate remedy. (*Radha Krishan Industries v. State of Himachal Pradesh., 2021 SCC Online SC 334*) These principles were based on the previous precedents and state that:

- 1.the power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;
- 2.the High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;
- 3.exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution, (b) there has been a violation of the principles of natural justice, (c) the vires of a legislation is challenged, and (d) the order or proceedings are wholly without jurisdiction;
- 4.when a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and
- 5.in cases where there are disputed questions of facts, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view not readily be interfered with.

The test that is to be applied is whether the rights of the parties before the court can be determined without reference to the factual scenario. Accordingly, the SC found that the dispute in the present case involves determination of rights by reference to law and therefore held that the High Court would have jurisdiction to hear the matter and that the writ petition is maintainable. The other significant cases which provide for same principles and requires mentioning are *inter alia, The State of Maharashtra and Ors. V. Greatship (India) Limited Civil Appeal No. 4956 of 2022, United Bank of India v. Satyawati Tondon and Ors. (2010) 8 SCC 110, Titaghur Paper Mills Co. Ltd., v. State of Orissa (1983)2 SCC 443, Harbanslal Sahni v. Indian Oil Corporation Ltd (2003) 2 SCC 107.*

In another recent judgment, the Hon'ble Gujarat High Court (*FSL-10 PTE LTD. v. Commissioner of Customs, R/Special Civil Application No. 3843 of 2022*) allowed the writ petition filed by the owners of a vessel under 226 of the Constitution of India for release of a vessel which was detained by the customs authorities. The Hon'ble High Court held that while further investigation may continue, however, the cargo basis which the vessel was initially detained was not prohibited as was proved by a lab report. Therefore, the Hon'ble High Court directed the customs authorities to release the vessel while exercising powers conferred under the writ.



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Pertinent issues and scenarios

These cases are some examples of scenarios wherein the disputes were mostly taxation related but it is worth mentioning that in cases wherein:

- The issue relates to the scope of judicial review for an action by the state in matters arising from statutory and non-statutory contracts?
- The issue relates to whether or not presence of an arbitration clause within a contract between state instrumentality and a private party will act as an absolute bar to availing remedies under Article 226?

Parties having contractual and/or commercial disputes with public body or an agency of the state can file a writ petition before the High Court against the state or its instrumentalities to assert their contractual rights. The Bombay High Court has held that writ petitions against state and its instrumentalities arising out of a contractual obligation are maintainable (*ABL International Ltd. v. Export Credit Guarantee Corporation of India, (2005) 10 SCC 495*). The Hon'ble High Court also held that a writ petition involving consequential relief of monetary claim is also maintainable. Therefore, should the state instrumentalities violate their constitutional mandate to act fairly and reasonably, reliefs under Article 226 are maintainable. However, much will depend on the facts of every case, and the court will decide on a case-to-case basis with respect to whether invocation or recourse to public law remedy is justifiable or not.

Of course, it would be for the party to prove that the state or its instrumentalities acted arbitrarily and the same may be done by proving the following i.e., **(i)** that the action is uninformed by reason, **(ii)** there is no discernable reason on which it is based, and **(iii)** action is contrary to the prescribed mode of exercise of the power. Once these are shown then the burden of proof shifts on the state to revert and disclose material along with reasons to justify its action. In cases where prima facie arbitrariness is made out, and the State is unable to show that the decision is an informed action which is reasonable then the action of the state must perish as arbitrary (*Kumari Shrilekha Vidyarthi v. State of Uttar Pradesh, (1991) 1 SCC 212*).

Even existence of an arbitration clause does not debar the High Court from entertaining a writ petition. The High Court may entertain a writ petition notwithstanding the availability of an alternate remedy in cases as per the principles laid down in the *Whirlpool Case*. The writ jurisdiction of the High Court under Article 226 is discretionary and the High Courts usually refrain from entertaining a writ petition which involves adjudication of disputed questions of fact as these require analysis of evidence. (*Uttar Pradesh Power Transmission Corporation Limited and Another v. CG Power and Industrial Solutions Limited and Another., (2021) 6 SCC 15*) Considering the position as laid down through numerous cases, a Division Bench of the Bombay High Court has recently consolidated the principles and stated that existence of a contract does not by itself oust the jurisdiction of a court under Article 226 of the Constitution of India and in appropriate cases a writ petition against states or its instrumentalities is maintainable even when there exists an arbitration agreement (*Maha Active Engineers India Pvt. Ltd. v. Maharashtra State Electricity Transmission Co. Ltd., 2022 SCC Online Bom 59*).

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Further, the Supreme Court of India has also recently held that “*mere fact that relief is sought under a contract which is not statutory, will not entitle the State in a case by itself to ward off scrutiny of its action or inaction under the contract, if the complaining party is able to establish that the action/inaction is arbitrary*” (*M.P. Power Management Company Limited, Jabalpur v. M/s. Sky Power Southeast Solar India Pvt. Ltd., 2022 SCC Online SC 1591*).

Conclusion

Basis the catena of judgments dealing with issues involving commercial contracts having state instrumentalities and bearing arbitration clauses, the principles which can be culled out that would have a bearing while determining whether the writ will be entertained or not are:

1. Whether or not the dispute involves public law and a determination is required *in rem*;
2. Whether or not the alternate forum would be in a position to grant appropriate remedy; and
3. Whether or not the matter involves the interpretation of contract which is within the domain of an arbitrator.

Broadly speaking, existence of an arbitration clause or a dispute resolution clause or the fact that the contract in question is purely a commercial contract, will not act as an absolute bar to invocation of a judicial review before the courts in India.



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