IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)
ITANAGAR BENCH

Writ Appeal No. 23 (AP) of 2017

1. The Union of India, represented by the Defence Secretary, Ministry of Defence, Government. of India, 104, South Block, New Delhi-110011.

2. The Secretary, Ministry of Transport and Highway (MORTH), Transport Bhawan, I-Parliament Street, New Delhi-110011.

3. The Regional Officer, Ministry of Road Transport and Highway (MORTH), Government. of India, First Floor, Campus of Chief Engineer (W), MOWB-II, Itanagar, Pin No. 79111.

4. The Secretary, Border Road Development Board (BRDB), Ministry of Defence (BR), Sena Bhawan, B-Wing, 4th Floor, New Delhi-110011.

5. The Director General, Border Roads, Seema Sadak Bhawan, Ring Road, Delhi Cantt., New Delhi-110010.

6. The Chief Engineer, Project Varktak,
C/o 99 APO, Tezpur-93-1716 (Assam), Pin- 931716.

7. The H.W, Chief Engineer, Project Pushpak,
C/o 99 APO, Pin No. 930017

8. The Commander, 763 BRTF (GREEF),
C/o 99 APO, Khirmu, Tawang, Arunachal Pradesh, Pin-930763

9. The OC, Contract, 117 RCC (GREEF),
C/o 99 APO, Lumla, Tawang, Arunachal Pradesh, Pin-930117

10. The Engineer-in-Charge, 117 RCC (GREEF),
C/o 99 APO, Lumla, Tawang, Arunachal Pradesh, Pin No. 930117.

11. The Supervisor JE, 117 RCC (GREEF),
C/o 99 APO, Lumla, Tawang, Arunachal Pradesh, Pin No. 930117.

12. Sri. J.S Ishar, present Chief Engineer,
Project Vartak, C/o 99 APO, Tezpur-931716.

13. Col. B. Srinivas, Former Officiating Chief Engineer,
Project Vartak, C/o. 99 APO, Tezpur-931716 (Assam), presently holding the post of Chief Engineer, Headquarter, Southern Command, Pune-411001.

……**Appellants**

-**Versus-**

M/s Puna Hinda, represented by its proprietor Shri Purna Hinda, aged about 48 years, son of late Puna Doley,C/o Times Video Library, Akash Deep, P.O. & P.S- Itanagar, Papumpare District , Arunachal Pradesh.

…….**Respondent**

- BEFORE-
HON'BLE MR. JUSTICE S.SERTO
HON'BLE MR. JUSTICE AJIT BORTHAKUR

For the Appellants	: Mr. S.Sarma, Adv.
For the respondent	. Mr. I. Choudhury, Sr. Adv. Mr. H. Obing, Adv.
Date of hearing	: **06-11-2017**
Date of judgment	: **17.11.2017**

JUDGMENT & ORDER
(CAV)

(S.Serto, J)

This is a writ appeal directed against the judgment and order passed by a Single Bench of this High Court on 04.08.2016 in W.P.(C) No. 523(AP) of 2015.

2. Heard Mr. S. Sarma, learned counsel for the appellants and also heard Mr. I. Choudhury, learned Sr. counsel for the respondent.

3. The facts and circumstances which led to the filing of this appal are ;

In pursuance to Notice Inviting Tender (in short, NIT), dated 22.10.2008, for construction and improvement of road from 26,800 km to 47,850 km in between Lumla and Tashigong under Special Accelerated

Rural Development Programme (SARDP), the respondent by submitting his tender paper bidded for the work. The authorities accepted his bid amount of Rs. 31,87,58,950/- vide letter dated 01.05.2009, issued by the competent authority of the respondents. Accordingly, the work order was issued on 15.07.2009. The same was followed with execution of an agreement by the parties. The construction of the road as per the contract consisted of 3 parts i.e. formation works, permanent works and surfacing. As per clause-18 of the Special Conditions of Contract, 3 catergories of measurement were to be done. The first measurement is to be done before commencement of the work jointly by the parties to assess the rough total formation works to be executed for preparation and payment of running bill. The second measurement is be done during the course of construction of the road for the purpose of releasing the RAR bills restricting the measurement and bills within the allocated amount and the third or final measurement/joint measurement is to be done after completion of the total formation works. The contract work was executed in full. Accordingly, the final joint measurement was carried out by both the parties. As per the terms of the contract, deviation over 10% of the estimated amount are to be regularised under orders of the Engineer-in-Charge in consultation with the Ministry concerned i.e. the Ministry of Shipping, Road Transport & Highway. Accordingly, the Officer-in-Charge (Contract) issued the letter dated 24.10.2013, to the 763 Headquarters BRFT for final measurement of the work done by the respondent. Accordingly, the joint measurement by a team consisting of the Officer-in-Charge (Contract), Engineer-in-Charge, Supervisor-in-Charge who are the competent authorities for doing the same and the respondent's team conducted the survey. As per the measurement the amount due to be paid to the petitioner was Rs. 31,57,16,134/-. Though the report was submitted to the Chief Engineer (the appellant No.6) who is the authority to forward the same to the Ministry concerned he did not forward the same. Instead of sending report of the joint measurement carried out by both the parties to the

Ministry concerned, the appellant No.6 constituted a Board of Officers to conduct a re-survey/measurement of the excess deviation in respect of the completed formation works. However, the officers who were members of the Board constituted by the appellant No.6 gave their observation that there was nothing for the Board of the Officers to examine, and it was not possible to ascertain the deviation after 5 monsoons had passed. This observation was given in the letter dated 17.04.2015, addressed to the Chief Engineer (appellant No.6). They also mentioned in the same letter that the measurement was carried out by the Engineer-in-Charge and Officer-in-Charge (Contract). Therefore, it was now for him i.e. the appellant No.6 to take the decision on the report of the final joint survey/measurement. The appellant No.6 did not pay heed to the advice of the Board of Officers instead sent another revised estimate/DPR amounting to Rs. 4944.74 lakhs to the appellant No.5.

Being aggrieved by such act of omission and commission of the respondent No.5, the respondent approached this Court by filing W.P.(C) No. 523(AP) of 2015, praying for quashing and setting aside the letter dated 17.10.2015, issue by the appellant No. 6, to the appellant No.5, and to also issued a direction directing the appellants to make payment as per the revised estimate/DPR prepared and submitted on the basis of the final joint survey/measurement report.

The case of the respondent in that writ petition was that the appellants/respondents by not paying his bill for the work done as per the agreement while paying the bill of others who were similarly situated have violated his right under Article 14 of the Constitution of India. And the respondents are bound to pay his pending bills as he had carried out the contract work and the measurement for the same has been carried out jointly as provided under the terms of the contract. The appellants opposed the writ petition mainly on the ground that there was arbitration clause in the agreement, therefore, without exhausting that alternative means of resolving the dispute between them, the respondent/petitioner

could not have approach the High Court by filing the writ petition. The learned Single Judge after hearing the parties came to the following conclusion;

"16. I have heard the learned counsels appearing for the parties.

To decide the issue at hand, certain extracts of the special conditions of contract and letters will have to be incorporated herein.

Clause 19.1.13(b) of the Deviation order, Amendment to Contract' is extracted, as under;

> ***(b) Command CEs are also authorized to approve any excess over the deviation limits mentioned in para 19.1.1 above to the extent of 10% on contracts concluded by zonal/project CEs in consultation with PCDA/CDA. Cases involving excess of deviation limit over 10 % shall be regularised under orders of the E-in-C in consultation with Ministry of Defence (Finance)".***

As per the above, it is clear that cases involving excess of deviation limit over 10%, has to be regularised under the orders of the Engineer-in-Charge in consultation with the Ministry of Defence.

Clause 18(i), (iii) and (v) of the special conditions of work, are reproduced below, for better appreciation of the matter;

> ***"(i) Before commencement of the work, the contractor along with the rep of Department/Engineer-in-Charge/OC Contract, shall carry out detailed joint survey with total station.***
>
> ***(iii) After completion of formation cutting, joint survey to be carried out with the help of Total Station. L and X section should be prepared at interval of 20 mtrs.***
>
> ***(v) Records of the above survey details duly signed by rep of contractor, Engineer-in-Charge and OC Contract be maintained by the Contractor and copy of same be forwarded to OC contract and commander, TF''.***

17. As per clause 27 of the special conditions of contract, measurements pertaining to the work under the contract, were to be recorded in the measurement book by the Engineer-in-Charge and in case of discrepancies, in arriving at work done details, the decision of the accepting authority would be final. Clause 28 states that the Engineer-in-Charge shall exercise the control over the quality of materials and works done.

18. Perusal of the letter dated 24.10.2013 issued by the Officer-in-Charge(contract) and addressed to the Headquarters, 763 BRTF, is to the effect that the final joint survey/measurement report of the deviation of the contract work after completion of the formation cutting, consisted of (i) Officer-in-Charge (Contract) (ii) Engineer-in-Charge (iii) Supervisor-in-Charge, (iv) Contractor (petitioner) and (v) contractor's survey team, with total station.

The said letter dated 24.10.2013 was also forwarded to the Chief Engineer (respondent No.6).

19. On perusal of letter dated 12.01.2015 issued by the Executive Engineer (Civil), for Chief Engineer (respondent No. 6), and which is addressed to the respondent No. 5, I find that the resolution passed in the meeting conducted by the officials of the Boarder Road Organisation (BRO) is that the final joint survey/measurement report was agreed, in general.

20. The letter dated 08.06.2013 issued by the respondent No. 5(DGBR) to the respondent No.6(Chief Engineer) states at paragraph No. 4(b) (d), as follows;

> ***"(b) From the correspondence, it is seen that "Final Joint Survey" was carried out with the permission of CE(P) Vartak. Please refer your letter No. 80914/L-T/26.80 to 47.85/114/E8 dated 19th Aug, 2013.***
>
> ***(d) CE(P) Vartak had also submitted that Revised DPR was prepared by BRTF and forwarded to HQ CE(P) Vartak during Feb. 2014 for additional work on account of formation, cutting for further processing to MORTH for getting revised approval".***

The above letter dated 08.06.2015 issued by the respondent No.5 clearly goes to show that the revised estimate/DPR has been prepared on the basis of the final joint survey/measurement report dated 24.10.2013 in respect of the contract work.

21. On perusal of the letter dated 26.06.2015, issued by the respondent No.6, and which is addressed to the respondent No.5, the respondent No.6 has given two options of deviation and in the second option, the respondent No.5 has held that extra formation cutting may be given as per actual measurement though it has not given anything in respect of extra widening of curves.

In this respect, it may be stated that the question of extra widening of curves as provided in clause 2.9.7 of the special conditions of contract

pertains to the Hill Road Manual (IRC), SP-48-1998), which was to be followed by the contractor while working in hilly terrain.

22. This court is not going into the technical aspect fo the case inasmuch as the only issue to be decided here is as to whether the revised estimate should have been made on the basis of final joint survey/measurement report or on some other basis.

23. Mr. Ratan, learned CGC, was asked by this court as to whether the respondent No.6 had made the 2nd revised estimate/DPR in respect of the contract work for an amount of Rs. 4944.74 lakhs on the basis of any final joint survey/measurement report dated 24.10.2015.

Learned CGC submits that the respondent No.6 had not made the revised estimate/DPR for the contract work amounting to Rs. 4944.74 lakhs on the basis of any final joint survey/measurement report.

24. The question of having a fresh final joint survey/measurement report can also not be now considered due to the fact that the view of the Board of Officers in the letter dated 17.04.2015 made in response to the convening order, stated that as 5(five) monsoons had passed from the date of completion of the formation cutting works, there was nothing to examine by the Board of Officers.

The long and short of the Board of Officers Resolution was that they could not have a fresh final joint survey/measurement report in view of the long lapse of time.

The Board of Officers has also stated, as reflected in the letter dated 17.04.2015, that "At this stage, actual work done can only be ascertained from the measurement recorded in Measurement Book (MB) by Engineer-in-Charge/Officer-in-Charge (Contract)."

25. In view of the reasons stated above, this court finds that the 2nd revised estimate/DPR made by the respondent No.6(Chief Engineer) amounting to Rs. 4944.74 lakh, was made in the absence of any materials to make the 2nd revised estimate/DPR.

26. The various clauses of the special conditions of contract, mentioned above, clearly goes to show that certain procedures have to be followed while making the final joint survey/measurement report.

The respondent No.6 cannot chose to ignore the procedure laid down and given a finding or come to any conclusion in the absence of any materials for his 2nd revised estimate/DPR. It is settled law that all administrative actions must be informed by reasons.

27. The facts also show that it is not feasible to have a fresh final joint survey/measurement report in view of the long lapse of time.

There is nothing on record to show that there is any discrepancy in the measurement made by the Engineer-in-Charge in his measurement book and/or with the officer-in-charge(contract).

Besides the above, the present case is not relatable to any technical aspect of the matter but only with respect to as to whether the final joint survey/measurement report dated 24.10.2013 will apply for payment of excess deviation cost to the petitioner.

28. Petitioner's counsel has drawn the attention of this Court to 2(two) letters, dated 04.12.2014, and 12.12.2014, issued by the Superintending Engineer & RO(MORT&H), Itanagar, to the DGBR (respondent No.5) and the present petitioner, respectively. Relevant extracts of the said 2(two) letters, dated 04.12.2014, and 12.12.2014, issued by the Superintending Engineer & Ro (MORTH & H), Itanagar, are reproduced hereunder;

> ***"No.SARDP-NE/Lumla-Tashingong/ARP-PKG-BRO/2014/RO-Ita/1350-55, Dated 04.12.2014.***
>
> ***Please refer to this office letter Dated 10.11.2014 ref.(i) on the above mentioned subject vide which you were asked to submit the Revised Estimate/Revised DPR to this Ministry within 20 days, although it has already passed 20 days but this office has not yet received any documents in this regard. So, it is to remind you to expedite the submission of Revised Estimate/Revised DPR to this office after observing all norms prescribed by MoRTH.***
>
> ***In case of any clarification regarding prescribed norms of MoRTH for revised DPR, you may consult to this Ministry/office".***
>
> _____
>
> ***"No. SARDP-NE/Lumla-Tashingong/ARP_PKG-BRO/2014/RO-Ita/1350-55, Dated 12.12.2014.***
>
> ***With reference to your letter dated 12.12.2014 ref. (i) on the above mentioned subject, it is to inform you that as Joint Survey was carried out between you and the Department/BRO official at ground for the geometric design & curve improvement on various curves of the road as per Hill road Manual of IRC-48-1998 Specification and as all these work executed and has been***

accepted & documented by both parties manually and signed on following survey documents as produced before me;

I. Book-4 (page 1-43) Base Plan for Geometric design showing horizontal curve,
II. Book- 5 (page 1-211) Cross Section drawing and
III. Book-6 (page 1-30) Earth work quantity.

The claims of works of geometric design made by you are admissible and payable by the Department.

This is for your kind information and further necessary action please.

29. The arbitration clause mentioned in the special conditions of contract has as its heading, as follows; ***Appointment of Arbitrator-(applicable only for contract agreements to be executed between BRO and a public enterprise of India****).*

A perusal of the above clearly shows that the said clause if not applicable in the present case in as much as the petitioner, herein, is a private individual.

With regard to second arbitration clause, which is a part of the general conditions of contract, I find that the said clause can be made applicable to the present case at hand. However, the respondent authorities have not made any pleading that the arbitration clause mentioned in the general conditions of contract, is applicable to the present case, at hand. In fact, the respondents have also not annexed the copy of the arbitration clause, incorporated in the General Conditions of Contract in their affidavit.

In the event, the Apex Court in the case of ***Union of India V. Tantia Construction Pvt. Ltd****. reported in* ***(2011) 5 SCC 697*** *has held that it is now well established that an alternative remedy is not an absolute bar the invocation of the writ jurisdiction of the High Court or the Supreme Court and that, without exhausting such alternative remedy, a writ petition would not be maintainable.*

30. In respect of letter dated 29.10.2013 issued by the Superintending Engineer (Civil), Commander, which states that letter dated 24.10.2013 pertaining to the final joint survey/measurement report is not approved by the competent authority and was cancelled, I find that subsequent to the said letter dated 29.01.2013, the respondent No.2(Secretary, MoRTH, New Delhi) in his letter dated 08.06.2015, had submitted that a revised estimate/DPR was prepared in respect of additional work.

This clearly goes to show that the said letter dated 29.10.2013, allegedly, cancelling the final joint survey/measurement report, was never acted upon. It is also not the case of the respondents that the same was ever communicated to the petitioner or the respondent No.2.

31. In any event, the respondent No.6, who is the accepting authority, and who was to have cancelled the final joint survey/measurement report dated 24.10.2015, in his letter dated 26.06.2015, addressed to the DGBR (respondent No.5), has not made any mention of the letter dated 29.10.2013 which states that final joint survey/measurement report dated 24.10.2013 was not approved and had cancelled. This gives rise to a suspicion that the letter dated 29.10.2013 is fabricated and an after thought.

Also the Superintending Engineer (Civil), Commander, who had issued the letter dated 29.10.2013 is not a competent authority to issue the said letter dated 29.10.2013 and the respondents have also not provided any other document or record to show that the final joint survey/measurement report dated 24.10.2013 had been cancelled by the respondent No.6, despite the voluminous documents submitted in the court.

32. In view of the above reasons, I am of the considered view that final joint survey/measurement report dated 24.10.2013 has been taken into consideration for making the revised estimate/DPR and the same should be sent by the respondents No. 5 and 6 to the respondent No.2, who, shall thereafter, consider the same and pass necessary orders, for releasing the deviation amount, in question, as per law to the petitioner.

In view of the fact that the final joint survey/measurement report had been made on 24.10.2013, the entire exercise should be completed by the respondent authorities within a period of 4(four) months from the date of receipt of a certified copy of this order.

32. With the above direction, this writ petition stands allowed".

4. Mr. S. Sarma, learned counsel for the appellants right from the beginning submitted that since there was arbitration clause in the contract agreement, the respondent should have first taken recourse to such alternative remedy. He also submitted that even at this stage, if he is willing to refer the same the appeallants/respondents are willing to appoint an arbitrator so that the dispute can be resolved at the earliest. The learned counsel also submitted that since there was arbitration clause, the learned Single Judge should not have dismissed the case instead the parties should have been directed to approach an arbitrator

for resolution of their dispute. Therefore, the impugned judgment and order deserves to be quashed and set aside.

In support of his submission, the learned counsel cited the judgment of this High Court passed in the case of **C. Lawbei** –versus**- Mara Autonomous District Council & Another** reported in **(2013) 3 GLR 47**, contents of paragraphs-13, 14 & 15 which are specifically referred to are reproduce here below:-

> *"13. In that connection, my attention has also been drawn to the decision of the Hon'ble Supreme Court in the case of State of Bihar and Ors. v. Jain Plastics and Chemicals Ltd., (2002) 1 SCC 216, wherein their lordships held as follows:*
>
> *"3. Settled law writ is not the remedy for enforcing contractual obligations, it is to be reiterated that writ petition under article 226 is not the proper proceedings for adjudicating such disputes. Under the law, it was open to the respondent to approach the court of competent jurisdiction for appropriate relief for breach of contract. It is a settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226."*
>
> *14. On hearing the learned counsel for the parties and on going through the pleadings and the relevant documents, I am of the opinion that it is an appropriate case where the petitioner ought to have approached the arbitrator first to have the dispute between the parties herein adjudicated. Since, the petitioner did not act in the terms and conditions contains in agreement dated 8.11.2010, this court has no other option but to dismiss the proceeding with a direction to approach the arbitrator as indicated in the agreement above.*
>
> *15. In view of above, I find it necessary to direct the petitioner to approach the Chief Executive Member, MADC, the arbitrator, named in the agreement aforementioned to have the matter adjudicated by him or any other person nominated by him in the terms and conditions contains in the agreement dated 8.11.2010. On being so approached, the Chief Executive Member, MADC would enable the parties to place their respective cases before it and thereafter, on hearing the parties and doing other needful in accordance with law, the arbitrator will dispose of the matter at the earliest preferably within a period of six months from the date of receipt of this order".*

The learned counsel also cited the judgment of the Hon'ble Supreme Court passed in the case of **M/s Sundaram Fiancé Limited and Another** –versus- **T. Thankam** in Civil Appeal No. 2079/2015 (arising out of SLP (C) No. 20140/2014), particularly paragprahs-10 & 15 of the judgment. The same are reproduced here below;-

> *"10. Once there is an agreement between the parties to refer the disputes or differences arising out of the agreement to arbitration, and in case either party, ignoring the terms of the agreement, approaches the civil court and the other party, in terms of the Section 8 of the Arbitration Act, moves the court for referring the parties to arbitration before the first statement on the substance of the dispute is filed, in view of the peremptory language of Section 8 of the Arbitration Act, it is obligatory for the court to refer the parties to arbitration in terms of the agreement, as held by this Court in P. Anand Gajapathi Raju and others v. P.V.G. Raju (Dead) and others*
>
> *15. Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statue, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law - generalia specialibus non derogant. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court".*

Further, Mr. S. Sarma, learned counsel for the appellants cited the decision of the Hon'ble Supreme Court passed in the case of **State of Bihar and Others** –versus- **Jain Plastics and Chemicals Ltd**., reported in **(2002) 1 SCC 216**, contents of paragraph-3 which was specifically cited are reproduced here below;-

> *"3. Settled law writ is not the remedy for enforcing contractual obligations. It is to be reiterated that writ petition under Article 226 is not the proper proceeding for adjudicating such disputes. Under the law, it was open to the respondent to approach the Court of competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to*

> *pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the Court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226".*

5. Mr. I. Choudhury, learned Sr. counsel submitted that the power of the High Court under Article 226 of the Constitution of India is discretionary power, therefore, the High Court is not bar from admitting and disposing such disputes where the claim of the petitioners are based on violation of their fundamental rights and civil rights even if arbitration clause exist in the agreements of the parties. The learned counsel further submitted that at the appellate stage plea of availability of alternative remedy cannot be entertained. Further, he also submitted that the appellants has failed to point out any good ground of appeal in this case, therefore, the same deserves to be dismissed.

Mr. I. Choudhury lastly, submitted that even if the matter is referred to arbitration it would not be fair and effective because as per the submission of the appellants/respondents the arbitration has to be referred to an arbitrator chosen by them.

In support of his submission given above, the learned counsel cited the following judgments passed by the Hon'ble Supreme Court in the cases of;-

(i) **Whirlpool Corporation** –versus- **Registrar of Trade Marks, Mumbai and Others** reported in **(1998) 8 SCC 1**, para-14 & 15.

> *"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose."*
>
> *15. Under Article 226 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. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High*

Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of fornices whirlpool we would rely or some old decisions of the evolutionary era of the constitutional law as they still hold the field".

(ii) **First Income Tax Officer, Salem** –versus- **Short Brothers (P) Ltd**. reported in **AIR 1967 SC 81 (V 54 C 12)**, para-3.

"*3. It was submitted on behalf of the Income-tax Officer that the High Court in entertaining the petition in its extra- ordinary jurisdiction under Art. 226 of the Constitution, bypassed* ***the machinery of assessment and rectification of*** *orders of assessment prescribed by the Indian Income-tax Act which is both adequate and efficacious. But the High Court has under Art. 226 of the Constitution jurisdiction to issue to any person or authority within the territories in relation to which it exercises jurisdiction, directions, orders, or writs in the nature, amongst others of mandamus, prohibition and certiorari for the enforcement of any of the rights conferred by Part III and for any other purpose. It is true that normally the High Court will not entertain a petition in exercise of its jurisdiction under Art. 226 of the Constitution when the party claiming relief has an alternative remedy which is adequate and 'efficacious. The question, however, is one of discretion of the High Court and not of its jurisdiction, and if the High Court in exercise of its discretion thought that the case was one in which its jurisdiction may be permitted to be invoked, this Court would normally not interfere with the exercise of that discretion".*

(iii) **State of H.P. and Others** –versus- **Gujarat Ambuja Cement Ltd. and Another** reported in **(2005) 6 SCC 499**, para- 22.

"24. If, as was noted in Ram and Shyam Co. v. State of Haryana and Ors. AIR (1985) SC 1147 the appeal is from "Caeser to Caeser's wife" the existence of alternative remedy would be a mirage and an exercise in futility. In the instant case the writ petitioners had indicated the reasons as to why they thought that the alternative remedy would not be efficacious. Though the High Court did not go into that plea relating to bias in detail, yet it felt that alternative remedy would not be a bar to entertain the writ petition. Since the High Court has elaborately dealt with the question as to why the statutory remedy available was not efficacious, it would not be proper for this Court to consider the question again. When the High Court had entertained a writ

petition notwithstanding existence of an alternative remedy this Court while dealing with the matter in an appeal should not permit the question to be raised unless the High Court's reasoning for entertaining the writ petition is found to be palpably unsound and irrational. Similar view was expressed by this Court in First Income-Tax Officer, Salem v. M/s. Short Brothers (P) Ltd., [1966] 3 SCR 84 and State of U.P. and Ors. v. M/s. Indian Hume Pipe Co. Ltd., [1977] 2 SCC 724. That being the position, we do not consider the High Court's judgment to be vulnerable on the ground that alternative remedy was not availed. There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition".

(iv) **Ram Barai Singh and Company** –versus- **State of Bihar and Others** reported in **(2015) 13 SCC 592**, para- 11 & 12.

"11. In our view, a constitutional remedy by way of writ petition is always available to an aggrieved party and an arbitration clause in an agreement between the parties cannot ipso facto render a writ petition "not maintainable" as wrongly held by the Division Bench. Availability of alternative remedy is definitely a permissible ground for refusal by a writ court to exercise its jurisdiction in appropriate cases. But once the respondents had not objected to entertainment of the writ petition on ground of availability of alternative remedy, the final judgment rendered on merits cannot be faulted and set aside only on noticing by the Division Bench that an alternative remedy by way of arbitration clause could have been resorted to.

12. In our view, learned counsel for the appellant has made out a case for setting aside the order under appeal both on the facts noticed above which show that there was no existing agreement because the work had been completed and payment had already been made long back and also on the question of law raised in this appeal that a constitutional remedy through a writ petition cannot be held to be not available and not maintainable on account of an alternative remedy. It is for the writ court to consider whether in an appropriate case, writ petitioner should be relegated to avail alternative remedy or not. But once writ petition is heard at length and decided against one or the other party on merits, such a decision/order cannot be held to be

bad in law only on the ground that writ petition was not maintainable due to availability of alternative remedy".

(v) **Tractor & Farm Equipment Ltd.** –versus- **Secretary to the Government of Assam Department of Agriculture & Others** reported in **(2004) 1 GLT 117**, para- 26.

"26. While dealing with the present appeal, one has to bear in mind that a writ appeal is really not a statutory appeal preferred against the judgment and order of an inferior to the superior Court. The appeal inter se in a High Court from one Court to another is really an appeal from one coordinate Bench to another co- ordinate Bench and it is for this reason that a writ cannot be issued by one Bench of the High Court to another Bench of the High Court nor can even the Supreme Court issue writ to a High Court. Thus, unlike an appeal, in general, a writ appeal is an appeal on principle and that is why, unlike an appeal, in an ordinary sense, such as a criminal appeal, where the whole evidence on record is examined anew by the appellate Court, what is really examined, in a writ appeal, is the legality and validity of the Judgment and/ or order of the Single Judge and it can be set aside or should be set aside only when there is a patent error on the face of the record or the judgment is against the established or settled principle of law. If two views are possible and a view, which is reasonable and logical, has been adopted by a Single Judge, the other view, howsoever appealing such a view may be to the Division Bench, it is the view adopted by the single Judge, which should, normally, be allowed to prevail. Hence, the impugned judgment of the learned Single Judge cannot be completely ignored and this Court has to consider the judgment and order in its proper perspective and if this Bench, sitting as an appellate Bench, is of the view that the decision has been arrived at by the learned Single Judge without any material error of fact or law, then , the judgment, in question, should be allowed to prevail. The reference made, in this regard, by Mr. Dutta to the case of Ramendra Nath, Dey (2001 (1) Gauhati Lr 94) (supra) is not misplaced".

6. Now coming to the impugned judgment, it has been pointed out by the learned Single Judge that the issue to be decided is as to whether the final joint survey/measurement report of the formation cutting work done by the respondent in respect of construction and improvement of road from 26.8000 km to 47.850 km in between Lumla to Tashigong under SARDP should be applied for making the revised estimate/DPR as per the Clause-19.1.13(b) of the "Deviation order, Amendment to Contract". We

agree with the learned Single Judge that, that is indeed the core issue to be decided in the dispute.

The learned Single Judge after referring to the provisions of Clause 18(i), (iii) and (v) of the special conditions of work and the report of the joint survey undertaken by a team constituted of competent persons authorized by the said clause came to the conclusion that the measurement of the work done was carried out as per the agreement between the parties and the special conditions of contract, therefore, the same has to be accepted by the appellants. We have no reason to disagree with that conclusion of the learned Single Judge, more so, because the appellants have failed to make out a case to come to such conclusion opposed to the same.

We have gone through the relevant documents referred to by the learned counsels and we do not find any reason to disagree with the findings and the conclusion of the learned Single Judge. In fact, there is no dispute on the fact that the final measurement of the work done by the respondent was carried out jointly by the team constituted of authorised persons from the side of the appellants and a team of the respondent. The only thing pointed out by the appellants' learned counsel is that it is the respondent No.6 who is the authority to accept the measurement submitted by such team and it is only after when he is satisfied that the revised DPR would be prepared and sent for final approval.

It appears from the judgment that the respondent No.6 had constituted a board of officers to re-examine the report of the final joint survey/final measurement but the same officers have given their opinion that it was not possible to do the same after 5 monsoons had passed. We share the same view of the board of officers constituted by the respondent No.6 in view of the fact that the work carried out was on the hills where landslides normally happened quite frequently during the monsoons which can cause changes in the overall scenario of the work

done. If the respondent No.6 was not satisfied with the report of the join survey/measurement team he should have immediately ordered for re-survey or re-examination of the report, but by having slept over the same for a long time he cannot now say that he disagree with such survey report and a fresh survey has to be undertaken. It must not be forgotten that the joint survey was done by authorised officers of their own and not at the choice of the respondent. We believe that there must be a way of verifying the report of the team if the respondent No.6 or the higher authorities are not satisfied but taking into consideration the nature of the work entrusted to the respondent such verification should have been done at the right time. It appears that the respondent No.6 had woken up a little too late and for that the respondent cannot be made to suffer. Therefore, we are fully in agreement with the conclusion drawn by the learned Single Judge.

It also appears from the judgment that the respondent No.6 has submitted a DPR which was not based on the report of the joint survey/measurement for the same reason stated above, such DPR prepared by the respondent No.6 cannot be accepted. If such DPR is accepted it would be unfair and unjust because it is not based on the ground realities, therefore, likely to cause huge loss to the respondent.

7. Now coming to the availability of the alternative remedy, here also we find no reason good enough from the submissions of the learned counsel for the appellants which would make us to disagree with the opinion of the learned Single Judge. The learned Single Judge had taken the view that availability of alternative remedy is not an absolute bar in invoking writ jurisdiction of the High Court or the Supreme Court. We have no alternative view on that because the law on that has been settled by the Hon'ble Supreme Court in catena of cases including the ones cited by the learned counsel for the respondent. In fact, when a High Court in exercise of its discretion decided to invoke writ jurisdiction in such cases even the Supreme Court would normally not interfere as

stated in the second case cited by the learned counsel for the respondent i.e. in the case of *First Income Tax Officer, Salem –versus- Short Brothers (P) Ltd*. reported in *AIR 1967 SC 81 (V 54 C 12)*. Therefore, when a co-ordinate Bench of this High Court has invoked the writ jurisdiction by exercising the discretionary power we would naturally not interfere with such decision specially when there is no compelling reason to do so. Therefore, we are of the view that the plea of availability of alternative remedy in the general term of agreement of contract has become a stale plea at this stage.

In summing up, the respondent, as per the contract agreement has completed the work and as per the contract agreement measurement of the same has been carried out by people who are authorised that too officers of appellants themselves. Therefore, to disagree with their measurement and DPR prepared based on the same would not be just and fair specially at a late stage. Further, to re-survey/re-measure the work done after 5 monsoons had passed would be impracticable as stated by the board of officers appointed by the respondent No.6 who are also officers of the appellants themselves. Therefore, the only option left for the appellants/respondents is to approve the DPR prepared and submit on the basis of the final joint survey/measurement report and pay the pending bills of the respondent.

We find no merit in the appeal hence, it is dismissed. No order as to cost.

JUDGE **JUDGE**

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