IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL NO. 1716 of 2005
In
SPECIAL CIVIL APPLICATION NO. 7573 of 1999
With
LETTERS PATENT APPEAL NO. 1184 of 2008
In
SPECIAL CIVIL APPLICATION NO. 11314 of 2000
With
LETTERS PATENT APPEAL NO. 1764 of 2005
In
SPECIAL CIVIL APPLICATION NO. 10957 of 2000
With
LETTERS PATENT APPEAL NO. 1765 of 2005
In
SPECIAL CIVIL APPLICATION NO. 9874 of 2000
With
LETTERS PATENT APPEAL NO. 1766 of 2005
In
SPECIAL CIVIL APPLICATION NO. 10966 of 2000
With
LETTERS PATENT APPEAL NO. 1767 of 2005
In
SPECIAL CIVIL APPLICATION NO. 9878 of 2000
With
LETTERS PATENT APPEAL NO. 1768 of 2005
In
SPECIAL CIVIL APPLICATION NO. 9222 of 2000
With
LETTERS PATENT APPEAL NO. 1769 of 2005
In
SPECIAL CIVIL APPLICATION NO. 8066 of 1999
With
LETTERS PATENT APPEAL NO. 1770 of 2005
In
SPECIAL CIVIL APPLICATION NO. 8498 of 1999

With

LETTERS PATENT APPEAL NO. 279 of 2006

In

SPECIAL CIVIL APPLICATION NO. 8794 of 1999

With

LETTERS PATENT APPEAL NO. 280 of 2006

In

SPECIAL CIVIL APPLICATION NO. 9712 of 1999

With

LETTERS PATENT APPEAL NO. 281 of 2006

In

SPECIAL CIVIL APPLICATION NO. 8314 of 2003

With

LETTERS PATENT APPEAL NO. 282 of 2006

In

SPECIAL CIVIL APPLICATION NO. 8668 of 1999

With

LETTERS PATENT APPEAL NO. 1648 of 2009

In

SPECIAL CIVIL APPLICATION NO. 8637 of 2000

With

LETTERS PATENT APPEAL NO. 1186 of 2008

In

SPECIAL CIVIL APPLICATION NO. 8017 of 1999

With

LETTERS PATENT APPEAL NO. 609 of 2006

In

SPECIAL CIVIL APPLICATION NO. 12470 of 2004

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE A.G.URAIZEE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MARKETYARD COMMERCIAL CO-OP BANK LTD....Appellant(s)

Versus

STATE OF GUJARAT & 4....Respondent(s)

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Appearance:

In LPA No.1716/2005, 1764/2005 TO 1770/2005, 279/2006 TO 282/2006 & 1648/2009 :

MR SHALIN MEHTA, SENIOR ADVOCATE WITH MR BHARAT JANI AND MR ARCHIT P JANI, ADVOCATE for the Appellant(s) No. 1

MR KAMAL TRIVEDI, ADVOCATE GENERAL ASSISTED BY MS. SANGITA VISHEN, MR KKASHYAP PUJARA AND MR JK SHAH, ASST. GOVERNMENT PLEADERS for the Respondent(s) No. 1

MR BS HASURKAR, ADVOCATE for the Respondent(s) No. 4-5

RULE SERVED for the Respondent(s) No. 2 – 3

In LPA No.1184/2008, 1186/2008 & 609/2006 :

MR MK VAKHARIA for the Appellant(s) No. 1

MR KAMAL TRIVEDI, ADVOCATE GENERAL ASSISTED BY MS. SANGITA VISHEN, MR KKASHYAP PUJARA AND MR JK SHAH, ASST. GOVERNMENT PLEADERS for the Respondent(s) No. 1 – 2.2

MR BS HASURKAR, ADVOCATE for the Respondent(s) No. 4-5

NOTICE SERVED for the Respondent(s) No. 3, 5 – 6

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE A.G.URAIZEE

Date : 13/02/2014

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. Whether the State Government is justified in its refusal to indemnify the Cooperative Societies for the loss suffered on account of the inability of Gujarat Small Industries Corporation Ltd., a Government Company, to make payment of Non-convertible Redeemable Bonds issued by it is the question that has come up for consideration in the present group of appeals. This issue was decided against the appellants, original petitioners, by common judgment and order dated 05.10.2005 passed by the learned single Judge. As these appeals involve common questions on law and facts and also arise out of the same judgment, they are decided and disposed of by this common judgment.

2. The appellants herein are co-operative societies registered under the Gujarat Co-operative Societies Act, 1961 (hereinafter referred to as “the Act” for the sake of brevity). Under Section 71 of the Act, co-operative societies may invest or deposit its funds either in the central Bank or in State Bank of India or in Postal Savings or in investments as referred to in Section 71 of the Act. It is provided under sub-section 1(g) of Section 71 of the Act that approval of the Registrar, Co-operative Societies, is necessary in case the co-

operative society desires to invest or deposit its funds in any company, other than those referred in Section 71.

3. In 1997 the appellants, original petitioners, applied and were granted permission by the Registrar, Co-operative Societies, to make investments in a Government Company – Gujarat Small Industries Corporation Ltd., which has now gone under liquidation. Accordingly, the appellants made investments in the Government Company and unsecured non-convertible Redeemable Bonds were issued in their favour. However, on account of financial crunch, the said Government Company could not redeem the non-convertible Redeemable Bonds issued in favour of the appellants.

4. The main argument advanced on behalf of the appellants is that respondent-Gujarat Small Industries Corporation Ltd. is a State Public Sector Undertaking, owned and managed by the Government of Gujarat. It was in pursuance of the permission granted by Government of Gujarat u/s.71(1)(g) of the Act that investment was made in the Government Company. Therefore, the Government Company is an instrumentality of the State of Gujarat and it is the liability of the Government of Gujarat to make good any losses that may be suffered by its Company.

5. The appellants, original petitioners, had preferred the captioned writ petitions before the learned single Judge for indemnification of the loss suffered due to investments made in the Government Company in pursuance of the permission granted u/s.71(1)(g) of the Act.

6. We have heard Mr. Shalin Mehta learned senior advocate appearing with learned advocate Mr. Bharat Jani for the appellants in the first group of appeals. He has made the following submissions;

(I) The Gujarat Small Industries Corporation Limited is a fully owned Government of Gujarat Company. The Government of Gujarat, through its Finance and Industries Department, appoints the Chairman and Managing Director for running the affairs of the respondent-Company. The Government has full pervasive control over the respondent-Company and manages its finances since the Company is largely involved in the activity of disbursing funds to small entrepreneurs with the intention of achieving rapid industrial development in the State. Therefore, the respondent-Company is an instrumentality of the State so as to come within the purview of 'State' under Article 12 of the Constitution and any act or omission on the part of the Company would impliedly tantamount to be an act or omission on the part of the State Government.

(II) The appellants have invested huge amounts by way of Redeemable Bonds in the respondent-Company and when the State Government had encouraged the co-operative banks to see that the scheme floated by the respondent-Company is fully subscribed, it is the bounden duty of the State Government to ensure that co-operative banks established for the welfare and benefit of members and for doing banking activity do not suffer.

(III) It was submitted that privity of contract was not necessary for making good the loss suffered by the appellants and that for any civil wrong committed by a Government agency similar to that of respondent-Company, a writ would be maintainable. The respondent-Company is a Public Sector Undertaking owned and managed by the Government of Gujarat. Therefore, writ would lie since there is a breach of statutory duty. However, the learned single Judge did not appreciate the above aspects of the case and refused to entertain the petition. It was submitted that the State Government had made payments to several agencies and that the respondent-Company had given an assurance that their dues would be cleared no soon as the funds demanded from the State Government is received.

6.1 In support of the submissions, Mr. Mehta learned senior counsel has placed reliance upon the following decisions;

(I) **Achutrao Haribhau Khodwa v. State of Maharashtra, AIR 1996 SC 2377**, particularly, on the observations made in para-11, which reads as under;

> "11. The High Court observed that the government cannot be held liable in tort for tortuous acts committed in a hospital maintained by it because it considered that maintaining and running a hospital was an exercise of the State's sovereign power. We do not think that this conclusion is correct. Running a hospital is a welfare activity undertaken by the Government but it is not an exclusion function or activity of the Government so as to be classified as one which could be regarded as being in exercise of its sovereign power. In Kasturi Lal case itself, in the passage which has been quoted

herein above, this Court noticed that in pursuit of the welfare ideal the Government may enter into many commercial and other activities which have no relation to the traditional concept of Governmental activity in exercise of sovereign power. Just as running of passenger buses for the benefit of general public is not a sovereign function, similarly the running of a hospital, where the members of the general public can come for treatment, cannot also be regarded as being an activity having a sovereign character. This being so, the State would be vicariously liable for the damages which may become payable on account of negligence of its doctors or other employees."

(II) **Shree Baidyanath Ayurved Bhawan Pvt. Limited v. State of Bihar, AIR 1996 SC 2829**, particularly, on the observations made in para-5, which reads as under;

"5. In Suganmal v. State of Madhya Pradesh, AIR 1965 SC 1740 : 1965 56 ITR 84, a Constitution Bench applied its mind to the precise question and held that though the High Courts had the power to pass any appropriate order in the exercise of powers conferred under Art.226, a writ petition solely paying for the issue of a writ of mandamus directing the State to refund monies was not ordinarily maintainable for the reasons that a claim for such refund could be made in a suit against the authority which had illegally collected the money as a tax. The Court held :-

> "..... that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right".

(Emphasis supplied)

It was reiterated :

> "..... that normally petitions solely praying for the

> refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the Civil Court for claiming the amount and it is open to the State to raise all possible defences to claim, defences which cannot, in most cases, be appropriately raised and considered in th exercise of writ jurisdiction"."

(III) **Hindustan Petroleum Corporation Limited v. Dolly Das, 1999 (4) SCC 450**, particularly, on the observations made in paras – 7 & 9, which reads as under;

> "7. In the absence of constitutional or statutory rights being involved a writ proceeding would not lie to enforce contractual obligations even if it is sought to be enforced against the State or to avoid contractual liability arising thereto. In the absence of any statutory right Art. 226 cannot be availed to claim any money in respect of breach of contract or tort or otherwise. In the present case, the appellants have sought to exercise their powers under Section 7 of the Act and, therefore, though the other consequences may be contractual in nature, the exercise of the right being under a statute, it cannot be said that the respondent could not approach the writ Court.
>
> 9. We may now advert to the contention that the writ remedy is not appropriate in this case. Where interpretation of a contract arises in relation to immovable property and in working such contract or relief thereof or any other fall out thereto may have the effect of giving rise to an action in tort or for damages, the appropriate remedy would be a civil suit. But if the facts pleaded before the court are of such nature which do not involve any complicated questions of fact needing elaborate investigation of the same, the High Court could also exercise writ jurisdiction under Art. 226 of the Constitution in such matters. There can be no hard and fast rule in such matters. When the High Court has chosen to exercise its power under Art. 226 of the Constitution we

cannot say that the discretion exercised in entertaining the petition is wrong."

(IV) **Chairman, Railway Board v. Chandrima Das, AIR 2000 SC 988**, particularly, on the observations made in paras – 9 & 11, which reads as under;

"9. Various aspects of the Public Law filed were considered. It was found that though initially a petition under Art. 226 of the Constitution relating to contractual matters was held not to lie, the law underwent a change by subsequent decisions and it was noticed that even though the petition may relate essentially to a contractual matter, it would still be amenable to the writ jurisdiction of the High Court under Art. 226. The Public Law remedies have also been extended to the realm of tort. This Court, in its various decisions, has entertained petitions under Art. 32 of the Constitution on a number of occasions and has awarded compensation to the petitioners who had suffered personal injuries at the hands of the officers of the Govt...

11. Having regard to what has been stated above, the contention that Smt. Hanuffa Khatoon should have approached the civil court for damages and the matter should not have been considered in a petition under Art. 226 of the Constitution, cannot be accepted. Where public functionaries are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law."

(V) **Bharat Sanchar Nigam Ltd. and Another v. Union of India and Others, (2006) 3 SCC 01** particularly, on the observations made in paras – 19 to 22, which reads as under;

"20. The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why the courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate Bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a Bench of superior strength or in some cases to a Bench of superior jurisdiction.

21. In our opinion, the preliminary objection raised by the State of U.P. therefore, rests on a faulty premise. The contention of the appellant-petitioners in these matters is not that the decision in State of U.P. v. Union of India for that assessment year should be set aside but that it should be overruled as an authority or precedent. Therefore, the decisions in Devilal v. STO and in Hurra v. Hurra are not germane.

22. A decision can be set aside in the same lis on a prayer for review or an application for recall or under Article 32 in the peculiar circumstances mentioned in Hurra v. Hurra. As we have said, overruling of a decision takes place in a subsequent lis where the precedential value of the decision is called in question. No one can dispute that in our judicial system it is open to a Court of superior jurisdiction or strength before which a decision of a Bench of lower strength

> is cited as an authority, to overrule it. This overruling would not operate to upset the binding nature of the decision on the parties to an earlier lis in that lis, for whom the principle of res judicata would continue to operate. But in tax cases relating to a subsequent year involving the same issue as an earlier year, the court can differ from the view expressed if the case is distinguishable or per incuriam. The decision in State of U.P. v. Union of India related to the year 1988. Admittedly, the present dispute relates to a subsequent period. Here a coordinate Bench has referred the matter to a larger Bench. This Bench being of superior strength, we can, if we so find, declare that the earlier decision does not represent the law. None of the decisions cited by the State of U.P. Are authorities for the proposition that we cannot, in the circumstances of this case, do so. This preliminary objection of the State of U.P. is therefore rejected."

7. Mr. Mehul Vakharia learned counsel appearing on behalf of the appellants in the other group of appeals, over and above the submissions canvassed by learned senior advocate Mr. Shalin Mehta, submitted that writ against the State or an instrumentality of a State, arising out of a contractual obligation, is maintainable. He drew our attention to the Memorandum of Association (M.o.A.) of the respondent-Company, particularly, to the clause relating to "indemnity" and submitted that it is the duty of the respondent-Company to indemnify all loss, damages, expenses or costs out of the funds of the Company.

7.1 In support of his submissions, learned counsel Mr. Vakharia has placed reliance upon the following decisions;

(I) **The A.P. State Road Transport Corporation by its Chief**

Executive Officer, Hyderabad v. The Income-tax Officer, B 1 B-Ward, Hyderabad and another, AIR 1964 SC 1486, particularly, the observations made in paras – 18 to 19, which reads as under;

> "17. Reading the three clauses together, one consideration emerges beyond all doubt and that is that the property as well as the income in respect of which exemption is claimed under cl. (1) must be the property and income of the State, and so the same question faces us again: is the income derived by the appellant from its transport activities the income of the State? It a trade or business is carried on by the State departmentally and income is derived from it, there would be no difficulty in holding that the said income is the incomes of the State. If a trade or business is carried on by a State through its agents appointed exclusively for that purpose and the agents carry it on entirely on behalf of the State and not on their own account there would be no difficulty in holding that the income made from such trade or business is the income of the State. But difficulties arise when we are dealing with trade or business carried on by a corporation established by a State by issuing a notification under the relevant provisions of the Act. The corporation, though statutory, has a personality of its own and this personality is distinct from that of the State or other shareholders. It cannot be said that a shareholder owns the property of the corporation or carries on the business with which the corporation is concerned. The doctrine that a corporation has a separate legal entity of its own is so firmly rooted in our notions derived from common law that it is hardly necessary to deal with it elaborately; and so, prima facie, the income derived by the appellant from its trading activity cannot be claimed by the State which is one of the shareholders of the corporation.
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> 18. It may that the statute under which a notification has been issued constituting the appellant corporation may provide expressly or by necessary implication that the income derived by the corporation from its trading activity would be the income of the State. The doctrine of the separate entity or

personality of the corporation is always subject to the exceptions which statutes may create and if there is a statutory provision which clearly indicates that despite the concept of the separate personality of the corporation, the trade carried on by it belongs to the shareholders who brought the corporation into existence and the income received from the said trade likewise belongs to them, that would be another matter. It would then be possible to hold that as a result of the specific statutory provisions the income received from the trade carried on by the corporation belongs to the shareholders who have constituted the said corporation, and so, we must look to the Act to determine whether the income in the present case can be said to be the income of the State of Andhra Pradesh.

19. In this connection, we may usefully refer to the observations made by Lord Denning in Tamlin v. Hannaford, (1950) 1 KB 18 : " In the eye of the law," said Lord Denning " the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of King. It is, of course, a public authority and its purposes no doubt are public purposes, but it is not a government department nor do its powers fall within the province of Government."These observations tend to show that a trading activity carried on by the corporation is not a trading activity carried on by the State departmentally, nor is it a trading activity carried on by a State through its agents appointed in that behalf."

(II) **ABL International Ltd. and Another v. Export Credit Guarantee Corporation Of India Ltd. and Others, (2004) 3 SCC 553**, particularly, the observations made in paras – 24, 27 & 28, which reads as under;

"24. It is clear from the above two objects of the company that apart from the fact that the company is wholly a Government owned company it discharges the functions of the Government and acts as an agent of the Government even when it gives guarantees and it has a responsibility to discharge such functions in the national interest. In this background it will be futile to contend that the actions of the first respondent impugned in the writ petition do not have a touch of public function or discharge of a public duty. Therefore, this argument of the first respondent must also fail.

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."

8. Mr. Kamal Trivedi learned Advocate General made the following submissions;

(I) The State Government had never asked the appellants to invest in the respondent-Company. It was submitted that the appellants had made the investments at their own volition and that the State Government came into picture only because necessary approval was required before making investments in Companies other than those specified in Section 71 of the Act. Merely recommending the institution in which the appellants could invest their funds fetches no liability on the State Government.

(II) There is no privity of contract between the appellants and State Government. Therefore, the appellants do not have any enforceable right against the State Government for recovery of the loss. As the liability is arising out of the contract between the appellants and respondent-Company, the State Government cannot at all be made liable to make good the loss suffered by the appellants.

(III) The Memorandum of Association (M.o.A.) of the respondent-Company reveals that its liability is limited. In fact, payment to employees under the Voluntary Retirement Scheme was released

from the State renewal fund, vide order dated 30.11.1999. Therefore, the appellants have no right whatsoever, much less any fundamental or legal right, to recovery the amount from the State Government.

(IV) The present proceedings are nothing but a suit for recovery of money based upon non-convertible redeemable bonds in the nature of Promissory Notes issued by the respondent-Company. The respondent-Company is neither an instrumentality of the State nor is insulated by the State Government. Therefore, loss that may have been suffered by the appellants by making investments in the respondent-Company has to be borne by the appellants themselves.

8.1 In support of his submissions, learned Advocate General has placed reliance upon the following decisions;

(I) **World Tel Inc. And Another v. Union of India And Others**, **(2001) 10 SCC 513** wherein, in para-2, it is observed as under;

> "2. The petitioner made a claim for refund of a sum of eight-three-and-odd lakhs of rupees together with interest at the rate of 21% p.a. payable by Doordarshan. The writ petition filed by the petitioner under Article 226 was dismissed by a Division Bench of the High Court of Delhi by entering into the merits of the rival contentions. In our view, the High Court ought not to have entered upon findings on the contentious issues in a proceeding under Article 226 of the Constitution. Instead the parties should have been directed to a civil court so that the hotly disputed issues could have been resolved in a civil litigation. The claim made is basically one arising from contractual obligations. Time and again this Court has said that such disputes should not be

resolved through the summary proceedings conducted under Article 226 of the Constitution. We, therefore, vacate all such findings made against the appellant in the impugned judgment."

(II) **Director of Settlements, A.P. And Others v. M.R. Apparao And Another**, **(2002) 4 SCC 638** wherein, in para-17, it is observed as under;

"17. Coming to the third question, which is more important from the point of consideration of the High Court's power for issuance of mandamus, it appears that the Constitution empowers the High Court to issue writs, directions or orders in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the rights conferred by Part III and for any other purpose under Article 226 of the Constitution of India. It is, therefore essentially, a power upon the High Court for issuance of high prerogative writs for enforcement of fundamental rights as well as non-fundamental or ordinary legal rights, which may come within the expression "for any other purpose". The powers of the High Courts under Article 226 though are discretionary and no limits can be placed upon their discretion, they must be exercised along with recognised lines and subject to certain self-imposed limitations. The expression "for any other purpose" in Article 226, makes the jurisdiction of the High Courts more extensive but yet the Courts must exercise the same with certain restraints and within some parameters. One of the conditions for exercising power under Article 226 for issuances of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some some activity

on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by a statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition (Kalyan Singh v. State of U.P.). The duty that may be enjoined by mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law. When the aforesaid principle is applied to the case in hand, the so-called right of the respondents, depending upon the conclusion that the Amendment Act is constitutionally invalid and therefore, the right to get interim payment will continue till the final decision of the Board of Revenue, cannot be sustained when the Supreme Court itself has upheld the constitutional validity of the Amendment Act in Venkatagiri case on 06.02.1986 in Civil Appeals No.398 and 1385 of 1972 and further declared in the said appeals that interim payments are payable till determination is made by the Director under Section 39(1). The High Court in exercise of power of issuance of mandamus could not have said anything contrary to that on the ground that the earlier judgment in favour of the respondents became final, not being challenged. The impugned mandamus issued by the Division Bench of the Andhra Pradesh High Court in the teeth of the declaration made by the Supreme Court as to the constitutionality of the Amendment Act would be an exercise of power and jurisdiction when the respondents did not have the subsisting legally enforceable right under the very Act itself. In the aforesaid circumstances, we have no hesitation to come to the conclusion that the High Court committed serious error in issuing the mandamus in question for enforcement of the so-called right which never subsisted on the date, the Court

issued the mandamus in view of the decision of this Court in Venkatagiri case. In our view, therefore, the said conclusion of the High Court must be held to be erroneous."

(III) **Adityapur Industrial Area Development Authority v. Union of India And Others**, **(2006) 5 SCC 100**, particularly, on the observations made in paras – 14 to 17, 21 & 22, which reads as under;

"14. In 1964 (7) SCR 17 : Andhra Pradesh State Road Transport Corporation v. Income Tax Officer and Anr., the question arose as to whether the income derived from trading activity by the Andhra Pradesh Road Transport Corporation established under the Road Transport Corporation Act, 1950 was not the income of the State of Andhra Pradesh within the meaning of Article 289 (1) of the Constitution and hence exempted from Union taxation. This Court considered the scheme of Article 289 and observed as follows :-

"The scheme of Art. 289 appears to be that ordinarily the income derived by a State both from governmental and non-governmental or commercial activities shall be immune from income-tax levied by the Union, provided, of course, the income in question can be said to be the income of the State. This general proposition flows from cl. (1).

Clause (2) then provides an exception and authorises the Union to impose a tax in respect of the income derived by the Government of a State from trade or business carried on by it, or on its behalf; that is to say, the income from trade or business carried on by the Government of a State or on its behalf which would not have been taxable under cl. (1), can be taxed, provided a law is made by Parliament in that behalf. If clause (1) had stood by itself, it may not have been easy to include within its purview income derived by a State from

> commercial activities, but since cl. (2), in terms, empowers the Parliament to make a law levying a tax on commercial activities carried on by or on behalf of a State, the conclusion is inescapable that these activities were deemed to have been included in cl. (1) and that alone can be the justification for the words in which cl. (2) has been adopted by the Constitution. It is plain that cl. (2) proceeds on the basis that but for its provision, the trading activity which is covered by it would have claimed exemption from Union taxation under cl. (1). That is the result of reading cls. (1) and (2) together.
>
> Clause (3) then empowers the Parliament to declare by law that any trade or business would be taken out of the purview of cl. (2) and restored to the area covered by cl. (1) by declaring that the said trade or business is incidental to the ordinary functions of government. In other words, cl. (3) is an exception to the exception prescribed by cl. (2). Whatever trade or business is declared to be incidental to the ordinary functions of government, would cease to be governed by cl. (2) and would then be exempt from Union taxation. That, broadly stated, appears to be the result of the scheme adopted by the three clauses of Art. 289".

15. Reading these three Clauses together this Court held that the property as well as the income in respect of which exemption is claimed under Clause (1) must be the property and income of the State, and thus the crucial question to be answered is: "Is the income derived by the State from its transport activities the income of the State"? It was observed that if a trade or business is carried on by a State departmentally or through its agents appointed exclusively for that purpose, there would be no difficulty in holding that the income made from such trade or business is the income of the State. Difficulties arise when one is dealing with trade or business carried on by a Corporation established by a State by issuing a Notification under the relevant provisions of the Act. In this context, the Court observed:

> ".....The corporation, though statutory, has a personality of its own and this personality is distinct from that of the State or other shareholders. It cannot be said that a shareholder owns the property of the corporation or carries on the business with which the corporation is concerned. The doctrine that a corporation has a separate legal entity of its own is so firmly rooted in our notions derived from common law that it is hardly necessary to deal with it elaborately; and so, prima facie, the income derived by the appellant from its trading activity cannot be claimed by the State which is one of the shareholders of the corporation".

16. This Court considered the scheme of the Act under which the State Corporation was constituted and held :-

> "..... The main point which we are examining at this stage is: is the income derived by the appellant from its trading activity, income of the State under Art. 289 (1). In our opinion, the answer to this question must be in the negative. Far from making any provision which would make the income of the Corporation the income of the State, all the relevant provisions emphatically bring out the separate personality of the Corporation and proceed on the basis that the trading activity is run by the Corporation and the profit and loss of the Corporation. There is no provision in the Act which has attempted to lift the veil from the face of the Corporation and thereby enable the shareholders to claim that despite the form which the organization has taken, it is the shareholders who run the trade and who can claim the income coming from it as their own. Section 28 which provides for the payment of interest clearly brings out the duality between the Corporation on the one hand and the State and Central Governments on the other. Take for instance the case of super-session of the Corporation authorized by S. 38. Section 38 (2) (c) emphatically brings out the fact that the property really vests in the corporation, because it provides that during the period of super-session, it shall

> vest in the State Government..... Therefore, we are satisfied that the income derived by the appellant from its trading activity cannot be said to be the income of the State under Art. 289 (1), and if that is so, the facts that the trading activity carried on by the appellant may be covered by Art. 289 (2), does not really assist the appellant's case. Even if a trading activity falls under Cl. (2) of Art. 289, it can sustain a claim for exemption from Union taxation only if it is shown that the income derived from the said trading activity is the income of the State. That is how ultimately, the crux of the problem is to determine whether the income in question is the income of the State and on this vital test, the appellant fails".

17. Considerable reliance was placed on the principles laid down in the aforesaid decision by learned counsel appearing for the Union of India. He submitted that having regard to the provisions of the Act under which the appellant/Authority is established, the same conclusion may be reached. In particular, emphasizing the fact that as in Andhra Pradesh Road Transport Corporation case, so in the instant case as well, Section 17 of the Act provides that upon dissolution of the appellant/Authority, the properties, funds and dues realizable by the Authority along with its liabilities shall devolve upon the State Government. Impliedly, therefore, such properties, funds and dues vest in the Authority till its dissolution, and only thereafter it vests in the State Government. He also referred to various other provisions of the Act and submitted that there was nothing in the Act which attempted to lift the veil from the face of the Corporation. Even though the Authority was created under an Act of the Legislature, it was still an Authority which had a distinct personality of its own, having perpetual succession and a common seal, with powers to acquire, hold and dispose of property, and to contract, and could sue and be sued in its own name. Shri Venugopal, on the other hand, tried to distinguish the judgment on the ground that the Andhra Pradesh Road Transport Corporation is being run on business lines, and a Corporation that runs on business lines is

distinguishable and different from a Corporation which is not run on those lines. Even if such a distinction is drawn, that will not have the effect of making the income of the Corporation the income of the State Government having regard to the other features noticed above.

21. Learned counsel for the Union of India also relied upon two decisions reported in (1999) 6 SCC 74 Food Corporation of India v. Municipal Committee, Jalalabad and Anr. and (1999) 6 SCC 78 Board of Trustees for the Visakhapatnam Port Trust v. State of A.P. and Ors. and submitted that this Court has consistently taken the view that a Corporation having the attributes of a Company must be held to be distinct from the Central Government, and not eligible for exemption from taxation under Article 285.The High Court also in its impugned judgment and order has referred to several decisions of this Court wherein this Court dealing with cases arising under Article 285 of the Constitution of India, which exempts properties of the Union from State taxation, took a similar view. We may usefully refer to the cases reported in: AIR 1999 SC 2573 Food Corporation of India v. Municipal Committee, Jalalabad and Anr., (1995) 5 SCC 251 Municipal Commissioner of Dum Dum Municipality and Ors. v. Indian Tourism Development Corporation and Ors., 1994 Supp (3) SCC 316 Central Warehousing Corporation v. Municipal Corporation and AIR 1982 SC 697 Western Coalfields Ltd. v. Special Area Development Authority, Korba and Anr. and Bharat Aluminium Company Ltd. v. Special Area Development Authority, Korba and Ors.

22. Having considered all aspects of the matter we hold that the High Court is right in concluding that the appellant/Authority could not claim exemption from Union taxation under Article 289 (1) of the Constitution of India. The impugned notice issued by the Income Tax Authorities was, therefore, valid and legal and could not be successfully challenged in the writ petition. Accordingly, this appeal is dismissed but without any order as to costs.

(IV) **Rajasthan State Industrial Development and Investment**

Corporation And Another v. Diamond & Gem Development Corporation Limited And Another, **(2013) 5 SCC 470**, particularly, on the observations made in paras – 19 to 21, which reads as under;

> "19. There can be no dispute to the settled legal proposition that matters/disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction under Article 226 of the Constitution. Thus, writ court cannot be a forum to seek any relief based on terms and conditions incorporated in the agreement by the parties. (Vide: Bareilly Development Authority & Anr. v. Ajay Pal Singh & Ors., AIR 1989 SC 1076; and State of U.P. & Ors. v. Bridge & Roof Co. (India) Ltd., AIR 1996 SC 3515).
>
> 20. In Kerala State Electricity Board & Anr. v. Kurien E. Kalathil & Ors., AIR 2000 SC 2573, this Court held that a writ cannot lie to resolve a disputed question of fact, particularly to interpret the disputed terms of a contract observing as under : (SCC pp. 298-299, paras 10-11)
>
> > "10. ...The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. ….If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract…..
> >
> > 11. ...The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract…. The contractor should have relegated to other remedies."

> 21. It is evident from the above, that generally the court should not exercise its writ jurisdiction to enforce the contractual obligation. The primary purpose of a writ of mandamus, is to protect and establish rights and to impose a corresponding imperative duty existing in law. It is designed to promote justice (ex debito justiceiae). The grant or refusal of the writ is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or to establish a legal right, but to enforce one that is already established. While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, inter-alia, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal."

9. Mr. BS Hasurkar learned counsel for respondent-Company submitted that the Company has gone into liquidation and that Official Liquidator has been appointed by this Court vide judgment and order dated 16.05.2008 passed in Company Petition No.146/2006. He submitted that no reliefs have been claimed against the respondent-Company and adopts the submissions canvassed by the learned Advocate General.

10. We have heard learned counsel for both the sides. We have carefully gone through the impugned judgment rendered by the learned single Judge as also the documents on record and the decisions relied upon by both the sides.

11. Before we advert to the merits of the case, it would be fruitful

to discuss some excerpts from the case as it would give us a better insight into the *lis* on hand. By order dated 18.11.1997 passed by the Agriculture and Cooperation Department, Government of Gujarat, permission was accorded to the District Central Cooperative Banks and Urban Cooperative Banks of the State to invest their surplus funds up to 10% of their deposits in non-convertible Redeemable Bonds of the respondent-Company subject to the conditions and safety measures laid down by the Reserve Bank of India. The provision regarding investments made by such Co-operative Societies is governed by Section 71 of the Act. For ready reference, Section 71 of the Act is reproduced hereunder;

"**71. Investments of funds :-**

1. A society may invest, or deposit its fund,-

(a) in a Central Bank, or the State Co-operative Bank,
(b) in the State Bank of India,
(c) in the Postal Savings Bank,
(d) in any of the securities specified in section 20 of the Indian Trusts Act, 1882.
(e) in shares, or security bonds, or debentures, issued by any other society with limited liability, or
(f) in a Scheduled co-operative bank as defined in clause (2) of Section 2 of the Reserve Bank of India Act, 1934 and having its registered office within the State or in any nationalized bank,
(ff) in any land or building-
(i) where the money in a building fund established by a society is sufficient for the purpose, or
(ii) where the money in such a fund is insufficient for the purpose or where a society has not established such fund, with the previous sanction of the Registrar:
Provided that the Registrar shall endeavour

> to decide the question as to previous sanction be given or not, within ninety days of the receipt of an application for such sanction,
>
> (g) in any corporation owned or controlled by the Government of Gujarat and other Scheduled Banks not covered under clause (f), with the prior approval of the State Government subject to such terms and conditions as may be prescribed in this behalf :
>
> Provided that in the case of the State Co-operative Bank, the Central Co-operative Banks and the Primary Agricultural Credit Co-operative Societies, the Reserve Bank of India may issue further guidelines restricting or enlarging the scope of investment in any institutions approved for the purpose under this section."
>
> [emphasis supplied]

12. Section 71(1)(g) of the Act mandates that if a co-operative society is desirous to make investments in any corporation owned or controlled by the Government of Gujarat and other Scheduled Banks not covered under clause (f), then prior approval of the State Government is necessary.

13. A bare reading of the above proviso makes it clear that the role of the State Government is limited to the extent of arriving at a satisfaction in the form of granting approval to a co-operative society desirous of making investments in bodies other than those specified in Section 71 of the Act. For making investments in bodies other than those specified in sub-clause (g) of Clause-1, the co-operative society is not required to obtain prior approval of the State Government.

14. The intent of the Legislature is clear that co-operative societies, who are desirous to make investments in bodies other than those specified in sub-clauses (a) to (f) of Section 71, make investments only in well regulated bodies and not in spurious companies. Therefore, the role of State Government is limited to the extent of acting as a watch-dog for investments that are proposed to be made by co-operative societies in bodies other than those specified in sub-clauses (a) to (f) of Section 71. In compliance of the provision of Section 71(1)(g) of Act, the appellants herein applied and were granted permission by the State Government to make investments in the respondent-Company. In pursuance of the permission granted by the State Government, the appellants subscribed for the Bonds of the respondent-Company.

15. The Bond issued by the respondent-Company is titled as under;

"SHORT TERM BOND
UNSECURED NON-CONVERTIBLE BONDS
IN THE NATUE OF PROMISSORY NOTES"

It is categorically stated in the bond document that the Bond is in the nature of "Promissory Notes" and that it is "Unsecured". It shall be redeemed at the end of 17 months and 29 days from the date of allotment and that the respondent-Company, at its discretion, may redeem it at an early date but not before one year from the date of allotment. A short-term bond can be understood to

be an investment with maturity of less than five years. It can be used as a "parking place" for cash that won't be necessary for another two to three years. These type of bonds, by virtue of their location on the lower-risk end of the risk-and-return spectrum, offer low yields and they are classified as "unsecured". The case on hand also pertains to unsecured Bonds.

16. It is stated in the bond document that the Bonds are in the nature of "promissory notes". The term "promissory note" can be understood to be "a signed document containing a written promise to pay a certain sum of money to a specified person or the bearer at a specified date or on demand". It is not in dispute that the said "promissory notes" were issued in favour of the appellants by the respondent-Company. The appellants were very much aware of the fact that the investments made by them in "short term bonds" was in the nature of "promissory notes" and also "unsecured". It was not that the appellants were kept in the dark by respondent-Company or that they were lured to invest their funds on some ambiguous premise. The appellants had made the investments after going through the documents, including the risk factors stated in the Bond document. It was made know to them that the financial position of the Company was weak and that the said Scheme was floated in order to raise money. Having invested their funds after perusing the terms and conditions, it does not lie in the mouth of the appellants to now contend that they had bona fide belief that the respondent-Company was fully owned by the Government of Gujarat.

17. It was urged that since the respondent-Company was a government company, the Government of Gujarat was liable to indemnify the loss suffered by the appellants on account of the inability of the respondent-Company to make payment and for that purpose, no privity of contract was required between the appellants and the Government of Gujarat. We are unable to agree with the above submission canvassed on behalf of the appellants. In this case, the "promissory notes" were issued by the respondent-Company in favour of the appellants and not by the Government of Gujarat. The Gujarat Small Industries Corporation Limited (now under liquidation), which has issued the "short term bonds" in question, was created as a Company under the Companies Act, 1956. We examined the test laid down by Supreme Court in **R.D. Shetty Vs. The International Airport Authority of India, AIR 1979 SC 1628** and **Ajay Hasia Vs. Khalid Mujib, AIR 1981 SC 487**. The following factors were culled out for determination whether the respondent-Company (G.S.I.C.L.) can be said to be an instrumentality or an agency of the Government:-

(i) If the major share capital of the Company is held by the Government, it would go a long way towards indicating that the Company is an instrumentality or an agency of the `State'.

(ii) If the financial assistance of the State Government is so much to meet almost the entire expenditure of the Company, it would afford some indication of the Company being impregnated with Governmental character.

(iii) Whether the Company enjoys monopoly status as conferred to the `State' or protected by the `State'.

(iv) Whether deep and pervasive control of the `State' exists over the Company.

(v) If the function of the Company is of public importance and closely related to the Governmental function; and

(vi) If one or other Department of the `State' is transferred to the Company.

We also referred to other decisions of Supreme Court in **Somprakash Vs. Union of India, AIR 1981 SC 212** and **Tekraj Vasandi @ K.L. Basandhi vs. Union of India, AIR 1988 SC 469**. In **Tekraj Vasandi @ K.L. Basandhi** (supra), the Apex Court was examining whether Institute of Constitutional and Parliamentary Studies registered under the Societies Registration Act could be regarded as an agency or instrumentality of the `State' so as to come within the purview of `State' under Article 12 of the Constitution.

18. It appears from the record that the Government of Gujarat has subscribed only a part of the share-capital of the respondent-Company and not the entire share-capital. Even if the entire share-capital was invested by the Government, the share-holder has merely an interest in the respondent-Company and the Government

share cannot be made liable in the properties of the respondent-Company, which is a separate personality. The Government of Gujarat had never issued any direction to the appellants to invest their surplus funds in the Scheme floated by the respondent-Company. It had only given them permission to make such investments. If the respondent-Company had been fully owned by the Government, then the Company itself, incorporated under The Companies Act, 1956, would have a corporate personality of its own, distinct from the Government. The Chairman of the respondent-Company is not a Government servant but a private individual.

19. We find that except certain percentage of shares being purchased by the Government of Gujarat, there is no other financial assistance given by the State to the Company. The Company has no monopoly status in the supply of materials and related products to small industries, which was also not the monopoly of the `State'. Such products were also being manufactured by private sector companies in India apart from public sector undertakings and the `State' has no monopoly in respect thereof. Thus, it can be seen that there was no pervasive `State' control over the Company. Though some part of the shares were held by the Government of Gujarat, there was no other control, except presence of few Directors, who were nominated by the Government.

20. Having noticed the above aspects, we find that respondent-G.S.I.C.L. has been constituted under the Companies Act and not by any State Act. The Government of Gujarat has no role in the matter

of functioning of the Company. It does not exercise any financial, functional or administrative control over the Company. Acquisition of shares and other matters pertaining to management and affairs of the Company are governed under the Companies Act. The business and other activities of the Company are purely commercial in nature. It does not perform any public function nor any public duty. The Company does not carry on any business for the benefit of public. Thus, the cumulative effect together shows that respondent-Gujarat Small Industries Corporation Limited (now under liquidation) is not an instrumentality of the 'State'. It cannot be defined as a 'State' under Article 12 of the Constitution of India nor an instrumentality or authority of the State and therefore, would not be amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India.

21. Even if we presume that writ would lie, the case of the appellants would not stand for the reason that the dispute relates to contract. It is a settled proposition that matters / disputes relating to contract cannot be agitated nor the terms of contract can be enforced through writ jurisdiction under Article 226 of the Constitution. A writ Court cannot be a forum to seek any relief based on terms and conditions incorporated in the agreement between the parties since the contract between the parties is in the realm of private law and not a statutory contract. Such disputes are a matter for adjudication by a civil court. The primary purpose of a writ of mandamus is to protect and establish rights and to impose a corresponding imperative duty existing in law. The writ cannot be granted unless it is established that there is an existing legal right

of the applicant or an existing duty of the respondent. The writ does not lie to create or to establish a legal right but to enforce one that is already established.

22. In *Achutrao Haribhau Khodwa (supra)* relied upon by learned counsel for the appellants, the State of Maharashtra was held to be vicariously liable for the damages that became payable on account of the negligence of the Doctors and other employees working in a Government Hospital. In that case, running of a Government Hospital was considered to be a welfare activity undertaken by the Government and not an exclusive function or activity of the Government so as to be classified as one which could be regarded as being in exercise of its sovereign power. In the present case, the appellants have sought indemnification of the loss sustained by them from the Government on the premise that the respondent-Company was an instrumentality of the State. We have discussed earlier that the respondent-Company could not be said to be an instrumentality of the State. There was no privity of contract between the Government and the appellants. Therefore, the said decision will not be of any help to the appellants.

23. By placing reliance upon the decision in *Shree Baidyanath Ayurved Bhawan Pvt. Limited (supra)*, the appellants have tried to make out a case that writ petition for refund of monies was maintainable. However, we do not agree with the said submission for the simple reason that in the present case, for the reasons discussed in the foregoing paragraphs, the respondent-Company

cannot be defined as a 'State' under Article 12 of the Constitution of India and therefore, it will not be amenable to the writ jurisdiction of this Court. Apart from that, in that case, the relief of obtaining a refund was sought as a relief consequential upon the striking down of an order of assessment and not as the main relief, just like the one on hand. If the money claim in the present case would have been of such a consequential nature, then the decision would have been helpful to the appellants, however, that being not the case, we are afraid that the said decision would not come to the rescue of the appellant. In the said decision, the Apex Court carved out an exception in matters involving consequential relief of money claim and held that writ petition was maintainable.

24. In *Hindustan Petroleum Corporation Ltd.'s (supra)*, the Apex Court held that High Court could exercise writ jurisdiction under Article 226 of the Constitution if the facts pleaded before the Court are of such nature which do not involve any complicated questions of fact needing elaborate investigation of the same. The said decision will also not be helpful to the appellants since the respondent-Company is not amenable to the writ jurisdiction of this Court as it could not be said to be a 'State' under Article 12 of the Constitution.

25. In *Chairman, Railway Board's (supra)*, the Apex Court held that though the petition may relate essentially to a contractual matter, it would still be amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution. Though the principle rendered in the said decision is good on law, it would not

apply to the case on hand since in the present case, there was no contract between the appellants and the State Government.

26. The State Government is in the picture only for the reason that the appellants had to seek prior approval of the State Government u/s.71(1)(g) of the Act before making investments in bodies similar to the respondent-Company. The State Government had never asked the appellants to make investments in the respondent-Company. The appellants had made the investments voluntarily, after satisfying themselves with the terms and conditions of the Scheme floated by the respondent-Company. Merely because the prior approval of the State Government was necessary and the respondent-Company was a Government-owned Company, the State Government could not be saddled with the liability to indemnify the losses sustained by the appellants. There was no contractual relationship between the State Government and the appellants. In the absence of any such contractual relationship between the two, the State Government cannot be held liable to make good the losses sustained by the appellants on account of making investments in the respondent-Company, particularly, after having made investments with eyes wide open. The transaction of investments in unsecured non-convertible bonds in the nature of promissory notes is between the appellants and respondent-Company. There is no tripartite agreement between the appellants, respondent-Company and the State Government. The State Government has simply accorded sanction u/s.71(1)(g) of the Act permitting the appellants to invest their surplus funds up to 10% of their deposits in bonds floated by the respondent-Company. It is

explicitly clear that there is no privity of contract between the appellants, respondent-Company and the State Government. The act on the part of State Government of granting permission to the appellants to invest their surplus funds in the bonds floated by the respondent-Company can, by no stretch of imagination, be construed to having the effect of indemnifying the losses suffered by the appellants for making investments in the bonds issued by the respondent-Company. For the same reasons, the decisions in *The Andhra Pradesh State Road Transport Corporation by its Chief Executive Officer's* and *ABL International Ltd.* cases (supra) relied upon by learned counsel Mr. Vakharia would not apply to the facts of the present case.

27. There can be no dispute to the settled legal proposition that matters / disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction under Article 226 of the Constitution. The Writ Court cannot be a forum to seek any relief based on the terms and conditions incorporation in the agreement by the parties. It is a matter for adjudication by a civil court. The primary purpose of a writ of mandamus is to protect and establish rights and to impose a corresponding imperative duty existing in law. The writ cannot be granted unless it is established that there is an existing legal right of the appellants or an existing duty of the respondents. Writ does not lie to create or to establish a legal right but to enforce one that is already established. The appellants have no legal right to seek indemnification for their losses from the State Government as there

was no such agreement / contract between the two. Further, the State Government was also not duty bound to make good such loss sustained by the appellants, as if it was within its sovereign duty.

28. In the recent decision in *Rajasthan State Industrial Development and Investment Corporation's (supra)*, the Apex Court held that discretion must be exercised by the Court on grounds of public policy, public interest and public good. The writ is equitable in nature and thus, its issuance is governed by equitable principles. Refusal of relief must be for reasons which would led to injustice.

29. Having considered the facts of the case and the decisions relied upon by both the sides, this Court is of the opinion that the appellants have failed to satisfy that they have a legal right to the performance of a legal duty by the State Government. We do not find that the State Government was imposed with the duty to indemnify the appellants under the Constitution, any Statute, common law or under any Rules or Orders having the force of law. The State Government has never guaranteed any repayment of debentures invested in the respondent-Company under the provisions of the *Gujarat State Guarantees Act, 1963*. If the State Government had extended any guarantee, then it would have been under the provisions of the above Act. The respondent-Company had raised the funds by way of issuing "Unsecured" Non-convertible Debentures in the nature of "Promissory Notes", which the Bond Certificates itself shows. Therefore, under no circumstances, it could be said that the State Government had given "guarantee" for

indemnification of any losses. We also could not find that the appellants had the legal right to seek indemnification of their losses by the State Government. Further, the respondent-Company (now under liquidation), though owned by the Government of Gujarat, was neither a 'State' under Article 12 of the Constitution nor its instrumentality.

30. In the Memorandum of Association of the respondent-Company, the clause relating to "*Indemnity*" reads as under;

> "114. Subject to the provisions of the Act, every Director, and other officer or servant of the Company shall be indemnified by the Company against and it shall be the duty of the Directors out of the funds of the Company to pay all costs, losses, damages and expenses which any such officer or servant may incur or become liable to by reason of any contract entered into or act or thing done by him as such Director or other officer or servant or in any way in the discharge of his duties including travelling expenses, and in particular and so as not to limit the generality of the foregoing provisions against all liabilities incurred by him as such Director or other officer, or servant in defending any proceedings whether civil or criminal in which judgment is given in his favour or in which he is acquitted or in connection with any application under the Act in which relief is granted by the Court."

30.1 The above Clause speaks nothing about the role of the State

Government much less any role about indemnification of any loss that may be suffered by any entity on account of making investments in the respondent-Company. It only speaks about the loss that may be suffered by the Directors, Officers and servants of the Company by reason of any contract entered into or act or thing done by such Director or Officer or servant or in any way in the discharge of the duties and the role of Directors. Before making the investments, the appellants should have inquired about the financial position and the working of the respondent-Company and thereafter, should have taken a sound decision regarding investing their surplus funds in bonds or not. However, for their failure to carry out such exercise, the State Government could not be held responsible. The respondent-Company is already wound up and Official Liquidator has been appointed by this Court vide judgment and order dated 16.05.2008 passed in Company Petition No. 146/2006.

31. Keeping in mind the above aspects of the case, we come to the conclusion that the appellants have no right whatsoever to seek indemnification of their losses from the State Government and hence, we do no find any reasons to entertain the present group of appeals.

32. For the foregoing reasons, the appeals are rejected. The Bench could have imposed cost upon the appellants considering the fact that several suits for recovery have been filed by the appellants and are pending before the concerned Civil Courts. But, being in an already bad financial condition, this Court does not want to burden

the appellant-Cooperative Societies with the liability of cost for the ill-advice of its office bearers to file the litigations before this Court.

(K.S.JHAVERI, J.)

(A.G.URAIZEE,J)

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