

(2010) 01 DEL CK 0244

In the Delhi High Court

Case No : Writ Petition (C) . No. 10617 of 2006

Mohd. Haroon

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 08-01-2010

Acts Referred:

Citation : (2010) 174 ECR 1 : (2010) 257 ELT 347

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Sanjay Jain, Navneet Panwar and Tani Sudan, for the Appellant; R.K. Joshi, for the Respondent

Judgement

Anil Kumar, J.—The petitioner who is an auction purchaser has sought quashing of the entire auction for the lot numbers 39 and 59 comprising 5 containers of HMS scrap held on 15.6.2005 and consequently refund of a sum of Rs. 19,17,760/- along with interest and Rs. 2,20,814/- along with interest on account of penalty and ground rent charges till 31st March, 2006 and another amount of Rs. 2,70,000/- paid by petitioner to the transporters whose trucks are lying at the bonded area since 3rd April, 2006.

2. Brief facts to comprehend the controversies are that the petitioner is in the business of trading in metal scrap in the name of M/s. Adil Tin Scrap Store, 462, Shahzada Bagh, Inderlok, Delhi-110035. On 30.5.2005, respondent No. 2 had published the auction notice dated 15.6.2005 (1/2005-2006) in the leading newspapers proposing to dispose of different materials including HMS contained in 30 containers by public auction on "As is where is" basis. In the auction notice neither the reserve price nor weight nor quantity was mentioned.

3. Pursuant to the auction notice petitioner paid the entry fee of Rs. 250/- and also deposited a refundable security of Rs. 20,000/- for participating in the auction. The dates of inspection of material at ICD, Tughlakabad were fixed on 10th, 13th and 14th June, 2005.

4. The petitioner contended that during the course of auction while inviting bids for the lots numbered at serial numbers 39 and 59 it was declared orally by the officials of the respondent No. 2 that lot number 39 contained 4 containers and lot No. 59 contained one container having approximately 19 tones of HMS scrap per container. Assertion of the petitioner is that relying on the representations and the details given by the respondent the petitioner formulated his bid and quoted an amount of Rs. 15,10,000/- for lot No. 39 and Rs. 34,000/- for lot No. 59. The bid of the petitioner was accepted and on acceptance of his bid petitioner tendered the advance of 30% amounting to Rs. 4,55,000/-.

5. According to the petitioner the respondents failed to complete the necessary formalities and hand over the goods to the petitioner entailing repudiation of the agreement and, therefore, a letter dated 11.8.2005 was sent to refund the part consideration already tendered by the petitioner. However, all the legitimate demands of the petitioner were thwarted by the officers of the respondent who being aware of the discrepancies in auction, directed the petitioner to desist from insisting on cancellation of auction and threatened with forfeiture of advance amount tendered by him. Consequently in order to salvage the situation and to minimize the loses the petitioner instead of seeking repudiation paid the balance payment within the extended time and also sought waiver of penal interest and ground rent and sent letter dated 18.10.2005.

6. The petitioner paid the entire amount, however, only 50% waiver of ground rent and penal interest was granted by the respondent and, therefore, petitioner approached the respondents on 3rd April, 2006 for obtaining delivery of goods and placed the trucks for transportation. When three containers bearing Nos. GATU 0409488, CPSU 1602659 and CPSU 5931249 were de-stuffed and goods were loaded on to the trucks the weight appeared to be less and on weighing the goods it transpired that the goods were far short of the quantity represented to him at the time of auction by the respondent. The three containers had only about 12,500, 12,500 and 8,500 kgs of HMS scrap which was cumulatively 40% short of the quantity declared/represented at the time of auction. The petitioner, therefore, declined de-stuffing of remaining two containers and to take delivery of de-stuffed goods loaded in the trucks and by letter dated 7.4.2006 sought permission to stuff back the goods into the containers to avoid the truck retention charges and other incidental cost until the settlement of the dispute which request was summarily rejected and the petitioner was directed to take the delivery of the goods.

7. Contention of the petitioner is that he has reasons to believe that the approximate weight of scrap (HMS) in five containers at the time of arrival at the inland container depot was approximately 19 metric tones which was reflected in the respective bills of lading and also the Import General Manifest. The petitioner does not have these documents and so he approached the custom authorities to know about the valuation of the goods put up for auction under RTI Act vide application dated 20.4.2006. However, the information was not provided as the

date of auction was wrongly mentioned as 30.5.2005. Even custom authorities refused to divulge any information and by letter dated 6.5.2006 respondents again called the petitioner to take delivery of the goods and by another letter dated 8.5.2006 the respondents again demanded the petitioner to take the goods which were auctioned on "as is where is" basis. The petitioner thereafter served legal notice. The assertion of the petitioner is that he is losing Rs. 5,000/- per day on account of ground rent and payment to the transporters besides brokerage and huge amount of capital invested in the goods. The action of the respondents is challenged inter alia on the grounds that the action of the respondents should be transparent in public offices and the respondents are liable to render information regarding the valuation of the goods. The respondent has knowingly and willfully given much inflated projection of the quantity of goods and deliberately failed to specify the quantity in the relevant auction notice which was though declared orally during the course of the auction. According to the petitioner the deliberate omission to mention the weight of the goods auctioned was in order to avoid the exposure of shortage that had occurred when the goods were in possession of the respondent.

8. The claim of the petitioner was resisted by the respondent and the reply was filed on behalf of respondent No. 2. It was asserted that the petitioner has suppressed the material facts. The auction notice categorically stipulated that the materials shall be sold on "As is where is basis" and opportunity to inspect the material was given to the petitioner who had inspected the material and had declared that he had "inspected the material upto his entire satisfaction". No reserve price nor the weight nor the quantity were declared and the petitioner after making the highest bid in the auction also deposited the consideration in terms of the auction, now wants to wriggle out of the contract. The respondent relied on the letter dated 6.9.2005 by the petitioner whereby he sought taking of delivery after one month on account of huge loss suffered by the petitioner in his absence. The letter dated 6.9.2005 of the petitioner is as under:

To,

The G.M. Commercial

TKD ICD,

Delhi.

Sub: Extension of period of taking delivery of lot No. 39 & 59 Auction dated 15.6.2005.

Respected Sir,

Reference to your letter dated 30.8.05 we are now not in a position to take the delivery due to huge loss in my business we want to take the delivery of the above lots after one month.

So, please grant me permission to take the delivery after one month.

Thanking you

Yours Sincerely

Haroon

(Adil Tin Store)

9. By another letter dated 26.12.2005 the petitioner again sought waiver of late payment and ground rent charges as the market of HMS was decreasing day by day. Considering the request of the petitioner the respondent waived 65% against due TSC and allowed full waiver of late payment of 2% monthly surcharge. The respondent No. 2 was categorical that for none of the items, the reserve price was mentioned nor the weight nor the quantities were mentioned, as the goods were to be auctioned on "As is where is basis". The petitioner after inspecting the goods on 14.6.2005 had also circulated that he had read and understood the terms and conditions of sale through auction which was held as per terms and conditions which were read and understood by the petitioner. Petitioner had paid full balance payment of Rs. 2,47,160/- inclusive of sales tax against lot No. 59 without payment of applicable late payment surcharge and the ground rent and no demand was made against lot No. 39. An amount of Rs. 7,74,472/- was deposited by the petitioner on 17.2.2006 towards lot No. 39 and the balance amount was paid on 18.2.2006 and an amount of Rs. 2,20,814/- paid towards ground rent and surcharge.

10. The allegation of the petitioner that the weight of the goods was orally disclosed at the time of auction was refuted by the respondent contending that no weight or quantity was disclosed nor any claim in that regard could be entertained. The respondent contended that they were entitled to fix the terms and conditions of the auction u/s 64 of the Sale of Goods Act which were fixed and the auction was held on those terms and conditions only. The goods for auctioned on "as is where is basis". Neither the reserve price was fixed nor the weight was disclosed. The bids were submitted by the petitioner after inspecting the goods and bid of the petitioner was accepted leading to a concluded contract between the parties. According to respondents, the petitioner is not entitled to modify, change or vary the terms of the agreement. Referring to Section 48 of Customs Act, it was pleaded that the goods were not auctioned under the provisions of said section as the said section has no application in the facts and circumstances of the case. Regarding notifications relied on by the petitioner, it is contended that those notifications were not applicable in respect of goods auctioned by the respondent and purchased by the petitioner. In the circumstances respondents contended that the petitioner is liable to remove the goods and the respondents are not liable either to refund the amount already paid by the petitioner nor are liable to refund any other amount claimed by him nor the respondents are liable to pay interest on the amounts claimed. The respondents also contended that petitioner cannot invoke the writ jurisdiction under Article 226 of Constitution of India for the purpose of altering the terms

and conditions of the contract or to seek cancellation of the same and claim punitive damages and the writ petition is wholly misconceived.

11. The petitioner has relied on Ram Chandra Singh Vs. Savitri Devi and Others, ; ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, and M/s. M.K. Shah Engineers and Contractors Vs. State of Madhya Pradesh, . Reliance has also been placed on Radhakrishna Agarwal and Others Vs. State of Bihar and Others, and Ram Chandra Singh Vs. Savitri Devi and Others,

12. Per contra the learned Counsel for the respondent has referred to In Orissa Agro Industries Corporation Ltd. and Others Vs. Bharati Industries and Others, ; State of Punjab Vs. Dial Chand Gian Chand and Company, ; State of Haryana and Others Vs. Lal Chand and Others, ; Assistant Excise Commissioner and Others Vs. Issac Peter and Others, ; Tata Cellular Vs. Union of India, ; Consolidated Coffee Ltd. and Another Vs. Coffee Board, Bangalore, ; Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, , T.N Electricity Board v. N Raju Reddiar AIR 1966 SC 2025; State of Haryana and Others Vs. Lal Chand and Others, ; Steel Authority of India Ltd. v. National Union Water Front Workers (2001) 7 SCC 63 and Asst. Excise Commissioner v. Issac Peter (1994) 4 SCC 125 in support of pleas and contentions on behalf of the respondent.

13. The learned Counsel for the parties were heard at length and writ petition, reply and the documents and the judgments relied on by the parties have been perused. It may not be necessary to refer to all the precedents relied on by the parties as the ratio of one case cannot be mechanically applied to another case without having regard to the fact situation and circumstances obtaining in two cases as was held by the Supreme Court in Rafiq v. State 1980 SCC (CrL.) 946. The ratio of any decision must be understood in the background of the facts of that case. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It must be remembered that a decision is only an authority for what it actually decides. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. The Supreme Court in Bharat Petroleum Corporation Ltd and Anr. v. N.R. Vairamani and Anr. AIR 2004 SC 778 had also held that a decision cannot be relied on without considering the factual situation. In the same judgment the Supreme Court also observed:

Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret

words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

14. In the light of the proposition of the Supreme Court, let's consider some of the precedents relied on by the parties. The petitioner has relied on ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, holding that disputed questions of fact can be considered in an appropriate case and the writ Court has jurisdiction to entertain such a writ petition and there is no absolute power in regard thereto. The Apex Court had held that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a Court in the exercise of its jurisdiction under Article 226 of the Constitution, but there is no absolute rule that in all cases involving disputed questions of fact, the parties should be relegated to a Civil suit. Relying on Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others, it was held that if the facts required, oral evidence can be taken and consequently in an appropriate case the writ Court will have jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact. However in ABL International Ltd (supra) the point involved was the interpretation of contract without any external aid. In fact no detailed disputed questions of facts were involved.

15. In State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd., , the Apex Court had held in para 7 as under:

7. In our view, it is apparent that the order passed by the High Court is, on the face of it, illegal and erroneous. It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter-affidavits, but that would hardly be a ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the appellants would justify breach of contract by the respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs.

16. From the above it is apparent that normally if a writ involves serious disputed questions of fact which requires consideration of evidence which is not on record then it will not be entertained by a Court in the exercise of its jurisdiction under Article 226 of the Constitution of India, however, this does not lay down an absolute rule. In a petition under Article 226 of the Constitution of India the High Court has jurisdiction to try issues both of fact and law and High Court is not

deprived of its jurisdiction as the discretion is with the High Court, which is to be exercised on sound judicial principles. When a writ petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken and on that account if the High Court is of the view that the disputes may not be appropriately tried in a writ petition, the High Court may decline to try such petition. The petitioner has also placed reliance on *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, where the division of types of cases in which breaches of obligation by the State or its agent can be set up as detailed by the Patna High Court was approved by the Apex Court. The types of cases of breaches were stated as follows:

- i) Whether the petitioner makes a grievance of breach of promise on the part of the State in cases where on the assurance or promise made by the State he has acted to his breach or predicament, but the agreement is short of a contract within the meaning of Article 226 of the Constitution;
- ii) Where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Act or rules framed there under and the petitioner alleges a breach on the part of the State;
- iii) Where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract and the petitioner complains about breach of such contract by the State.

17. Relying on *Orissa Agro Industries Corporation Ltd. and Others Vs. Bharati Industries and Others*, the learned Counsel for the respondents, Mr. Joshi challenged the efficacy of a writ jurisdiction, as the writ petition involves disputed questions of fact. In the said case the dispute was about the valuation of articles left by the petitioner and it was held that the valuation of the goods left will involve complicated question of fact and the material requires thorough proof on factual aspects and in the circumstances the High Court ought not to have entertained the writ petition. The Apex Court was of the view that whether or not the High Court should exercise jurisdiction under Article 226 of the Constitution would largely depend upon the nature of the dispute and if the dispute cannot be resolved without going into the factual controversy the High Court should not entertain the writ petition. The question whether the action of the opposite party in the writ petition amounted to breach of contractual obligation ultimately depends on the facts and would require material evidence to be scrutinized and in such a case writ jurisdiction should not be exercised. The Apex Court had also referred to the case of *Radha Krishna Aggarwal (Supra)* holding that where the contract entered into between the State and the person aggrieved is non statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract and in exercise of executive power of the State, no writ order should be issued under Article 226 to compel the authorities to remedy a breach of contract pure and simple especially when factual disputes are involved.

18. With these guiding principles let us consider the disputes involved in the present writ petition. The case of the petitioner is that under the statutory provisions of the Customs Act and the notifications issued the weight of the consignment which was auctioned on "As is where is" basis ought to have been declared and in fact as per the petitioner before the auction the weight was disclosed orally to be 19 metric tones. According to Sh. Jain, learned Counsel for the petitioner in the valuation got done by the respondent, which is also based on the bill of entry, the weight is about 20.1. The weight of four containers is about 20.574 metric tons whereas the weight of one container bearing No. GATU 0409488 is about 20.10 metric tones. His plea is that the various documents including valuation reports containing the weight of the containers which were auctioned were not made public and consequently there was no way for the petitioner to know the weight of the container. Since the petitioner was given the weight as 19 metric tons which was disclosed to him before the auction which is quite approximately near to the weight mentioned in the documents, the natural inference is that the weight was disclosed to the petitioner before the auction and he participated in the auction on the promise that the container holds about 19 metric tons of scrap on "As is Where is" basis.

19. According to the petitioners the imported goods lying unclear are classified into two categories viz, a) goods confiscated under the Customs Act, 1962 and (b) goods not confiscated but lying unclear/unclaimed. Goods of category (a) are disposed of by the Customs Department through the disposal units of the department and it is their responsibility. However, the goods in category (b) are disposed of by the custodian who has to make a list of the imported goods which lay unclear/unclaimed for more than 45 days and then has to send the list of such goods to the customs on monthly basis. Relying on the circulars of the customs it was contended that the list which is sent of the unclear imported goods should contain complete particulars such as airways bill number, description of goods, weight, name of the consignee/consignor etc and the valuation of the goods should be done by a committee consisting of a representative of the custodian, Government approved valuers and a representative of the customs for working out the reserve prices of the consignment to be auctioned.

20. The Assistant Commissioner on the receipt of the list of such goods which have not been cleared for more than 45 days has to scrutinize the list and withdraw certain categories of goods for the proposes of sales. Reliance has been placed by the petitioner on the board's circular No. 7/2004-CUS dated 28.1.2004 which prescribes the procedure for disposal of unclear/unclaimed cargo landed upto 31st March, 2003. The said circular was further extended for disposal of the goods upto 30th April, 2004 by circular No. 35/2004-CUS dated 20th May, 2004. By such circular the time was extended from 30th April, 2004 to 31st December, 2004.

21. According to the petitioner the root cause of the problem is compulsion by

Concor, respondent No. 2 to lift the containers despite the quantity of scrap being 40 to 50% less than the projected/representative weight. Assertion of the petitioner is that the respondent No. 2 knew and ought to have known the weight of the scrap in the containers as the procedure for selling the goods had been crystallized in circular No. 7/2004 dated 28th January, 2004 brought out by the Ministry of Finance, Department of Revenue, Central Board of Excise and Custom. Referring to circular No. 7/2004 it is also asserted by the petitioner that the said circular shall prevail in case of inconsistency between the said circular or any other circulars. The alleged finality to the procedure stipulated in Circular No. 7/2004 is further augmented relying on circular No. 50/2005 which according to the petitioner makes clear that the procedure detailed in Circular No. 7/2004 is a permanent measure without any modification and consequently the auction of the material could not be based on the whims and fancies of the public warehouses holding the auction.

22. In the circumstances the learned Counsel very vociferously contended that the respondents ought to have followed the procedure established by law which is in terms of Circular No. 7/2004 and if one has to follow that, the inferential answer or deductive answer would be that the weight of the scrap in the containers could not be less than 19-20 metric tons per container which the respondent No. 2 knew since the IGM must have duly disclosed the weight. Though the weight of each container disclosed in IGM is subject to reasonable limits of approximation however, this deviation will also have to be within the limit of the weight indicated in IGM u/s 116 of the Act because, if the quantity unloaded is short, the carrier of the goods is liable for penalty for mis-declaration and u/s 45(3) of the Act, the respondent No. 2 himself is liable to pay duties, if the goods are pilfered after unloading from its custody. In the circumstances, it has been emphatically contended on behalf of the learned Counsel for the petitioner that the respondent No. 2 could not be unaware of the quantity of goods as indicated in IGM nor respondent No. 2 could allow the goods to be pilfered from its custody and before working out the reserve price the weight ought to have been taken into consideration by respondent No. 2.

23. The plea of the respondent that the weight was not disclosed and was not required to be disclosed is countered by the petitioner by relying on some other tender notice documents where the respondents did disclose the weight of the material to be auctioned at the time of the tender notice itself. One of the pleas for adjudication in the circumstances will be that if the respondent had disclosed the weight of the goods in other tender notices, were they liable to disclose even in this case of the petitioner also where tenders were filed by the petitioner. What would be the ramification of not disclosing the weight in the facts and circumstances would also require adjudication which will depend on various disputed questions of facts. The petitioner has also allegedly raised a presumption that in case the weight was not disclosed by the respondent, then it is to be presumed that it was known to the respondent and the plea of the petitioner that the weight was orally communicated to the petitioner should be accepted. This

plea of the petitioner is countered by the respondents by specifically contending that the auction on June 15, 2005 was conducted by SMG B.T. Pvt. Ltd and in the circumstances the plea of the petitioner that the officials of the respondents had disclosed the weight of containers orally to the petitioner is not justified and is factually incorrect. In the circumstances only during trial of these disputed facts an inference can be drawn whether the weight of consignment was communicated orally to the petitioner or not. Though the auction was conducted by SMG B.T. Pvt. Ltd, however, the presence of the official cannot be ruled out merely on account of the auction done by another agency. But this cannot be established merely on the basis of the documents produced along with the writ petition and the averments made therein.

24. The petitioner has also asserted that since the respondent No. 2 has filed selective documents of tender not containing the disclosure about the weight and since the respondent is not in a position to deny some of the documents of other tenders filed by the petitioner which cannot be denied by the respondent No. 2, therefore, in such circumstances if there are gaps in the explanation given by the respondent, the same are to be filled by applying the principles of presumptions in ordinary course.

25. This plea of the petitioner seems to be without any rationale. If an explanation has not been given by the respondent and if some presumption has to be drawn, such a presumption shall be rebuttable and the respondent shall be entitled to rebut the same. Merely on the basis of such gaps as has been projected by the petitioner, it will not be appropriate to cancel the agreement between the parties and to award damages to the petitioner and to absolve petitioner of his liability under the agreement. For the reasons as has been expounded by the petitioner as to why the weight should have been disclosed to the bidders for a commodity like scrap where weight is the essence and where the respondent knows the approximate weight on the basis of IGM and if in the auction actual weight is found to be 40 to 50% less than the weight indicated in the IGM, then why the auction be not quashed, are such disputes which cannot be adjudicated without recording cogent evidence in respect of pleas and counter pleas. Though there is no presumption in favor of the petitioner and against the respondent as has been drawn by the petitioner, however even such presumption as are sought to be drawn by the petitioner, cannot be conclusive. The presumption as has been sought to be drawn by the petitioner shall be rebuttable and the respondent shall be entitled to rebut the same. On the basis of the probability that in the circumstances the version propounded by the petitioner should be believed that the weight was disclosed and later on the weight was found to be less, it will not be justifiable and appropriate to cancel the contract or to award damages to the petitioner against the respondent and absolve petitioner completely of his liability under the agreement, especially in view of the plea taken by the respondent that in the letter of 7th April, 2006 it was stated that the goods are half in containers and half loaded in truck but the quantity of goods found in the containers was not given and it was only later on

the plea was raised that goods were less than what was disclosed orally. It has been categorically pleaded that the plea of the weight of the goods being less was not taken contemporaneously. The version of the respondent is also being justified that the goods were received by the shipping line on the basis of weight disclosed by the shipper and not the weight given after actual weighing and in the circumstances there is a possibility of goods being short shipped by the exporter. The respondents have also contended that out of 113 containers auctioned on June 15, 2005 out of which 30 were for HMS, the shortage is complained only in case of petitioner and by no one else. In the circumstances, the respondents have also relied on the letter dated 6th September, 2005 of the petitioner categorically stipulating that the petitioner is not in a position to take the delivery due to huge loss suffered by him in the business as the price of scrap had fallen. In the circumstances, merely on the basis of the averments made in the petition and considering the replies given by the respondent it will not be safe to adjudicate the pleas and contentions of the parties in exercise of its jurisdiction under Article 226 of the Constitution of India by this Court.

26. Though in case of ABL International Ltd and Anr v. Export Credit Corporation of India Ltd (Supra) it was held that questions of fact can be considered in exercise of jurisdiction under Article 226 of the Constitution of India, however, what is to be seen is that in ABL International Ltd and another. as already referred to hereinabove, the only question was about examining the terms of the contract without having to take recourse to any external aid. The dispute in the said case was whether ABL International Ltd should have adhered only to receive consideration by barter of goods or was also entitled to demand the consideration by cash in US dollars and whether non payment of such consideration was governed by the contract of insurance or not. In these circumstances the Court had interpreted the terms of the contract without any external aid and had exercised the jurisdiction in the writ petition. In contradistinction the present writ petition raises substantial disputes of facts. The petitioner has rather raised presumptions some of which do not arise in law, however, the presumptions as has been raised by the petitioner shall also be rebuttable and it is not the mere interpretation of a policy or circulars of customs or of contract without any external aid.

27. The petitioner is not only seeking interpretation of the contract but is also invoking variation of the terms of the contract which is resisted by the respondent invoking Sections 91 and 92 of the Evidence Act. The respondent has relied on Tamil Nadu Electricity Board and another Vs. N. Raju Reddiar and another, holding that once a contract is reduced to writing, by operation of Section 91 of the Evidence Act, it is not open to any of the parties to seek to prove the terms of the contract with reference to some oral or other documentary evidence to find out the intention of the parties. u/s 92 of the Evidence Act where a written instrument appears to contain the whole terms of the contract then the parties to the contract are not entitled to lead oral evidence to ascertain the terms of the contract.

28. It is now well established that to qualify for an order or decree which concludes one or another issue, the averments and the pleas should be unconditional and unambiguous. Such admissions cannot be and should not be allowed to be inferential admission as it may be possible to have different inferences and the Court should not deduce an admission as a result of interpretive exercise. The substantial plea of the petitioner is based on the submission relying on the circulars and other facts pleaded that the weight ought to have been disclosed by the respondent and in fact the weight of the containers was disclosed by its officials orally. This plea has been consistently denied by the respondent by contending that weight was not disclosed in the tender notice nor it was obligatory on the respondent to declare the weight of the goods to be auctioned as per Section 48 of the Customs Act. The dispute on the basis of the pleas and contentions of the parties is also whether the auction of the goods was covered by Section 48 of the Customs Act or not as the respondent is very categorical in contending that Section 48 has no application to the facts and circumstances of the case. The respondent has countered to the extent by contending that even if it is assumed that in case Section 48 of the Customs Act was applicable, that section does not mandates that the respondent was obligated to mention the weight of the cargos to the auctioneer. According to the respondent goods in lot No. 39 arrived during July, 2004 whereas goods in lot No. 59 had arrived on 20th September, 2004 and none of the notifications relied on and referred to by the petitioners had applied to the goods arrived during the said period. Referring to circulars dated 17th October, 1997 and 13th January, 2000, it has been rather contended that it was not mandatory pursuant to such notification to declare the weight of the goods.

29. Another plea raised by the respondent is that at the time of seeking the permission from the custom authorities vide letters dated 14th January, 2005 and 27th January, 2005 it was not obligated on the respondent to disclose the weight at the time of auction.

30. Though in some cases even in a writ petition the Court can exercise the jurisdiction in exercise of its writ jurisdiction, however, the Apex Court in *Hari Shankar* (supra) had held at paras 21 and 22 as under:

21. Analysing the situation here, a concluded contract must be held to have come into existence between the parties. The appellants have displayed ingenuity in their search for invalidating circumstances but a writ petition is not an appropriate remedy for impeaching contractual obligations.

22. The writ jurisdiction of High Courts under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred.

31. In *State of Punjab Vs. Dial Chand Gian Chand and Company*, in para 9 the Supreme Court had held as under:

9. The High Court also did not appreciate that writ petition was filed by a licensee who participated in the auction with wide eyes open and on untenable plea

wanted to wriggle out of the bargain. In this connection, one can advantageously refer to decision of the Constitution Bench of this Court in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, at p. 266 AIR 1975 SC 1121 at p. 1126 wherein it has been held that the writ jurisdiction of the High Courts under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred.

The High Court could not have converted writ petition into a suit for recovery of damages and that too without recording a finding that there was any breach of contract. We are satisfied that the High Court was in error in granting the relief. (para 10 page 747)

32. Similarly, in *Orissa Agro Industries Corporation Ltd. and Others Vs. Bharati Industries and Others*, it was held that no writ, order can be issued under Article 226 to compel the authorities to provide a remedy for breach of contract. In the instant case the disputes related to the disputed questions of fact and were not dealt with in the writ petition. In *State of Haryana and Others Vs. Lal Chand and Others*, it was held that persons who offer their bids at an auction to vent country liquor with full knowledge of the terms and conditions attached thereto, cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids by a petition under Article 226 of the Constitution. Regarding the contracts entered into pursuant to public auction by floating of tenders or by negotiations, in *Assistant Excise Commissioner and Others Vs. Issac Peter and Others*, the Supreme Court had held that there is no compulsion on anyone to enter into these contracts. It is voluntary on both sides and there can be no question of the said bar being involved in such contracts and the moral rights and liabilities of the parties are covered by the terms of the contracts which may be statutory in some cases, however, the law relating to the contracts should prevail.

33. In the case of the petitioner the disputes raised by the petitioner are not restricted to decision making process as according to the petitioner the weight ought to have also been disclosed. In *Tata Cellular Vs. Union of India*, it was held that the principle of judicial review would apply only to the decision making process and not the merits of the decision itself as the Court does not sit as an appellate authority while exercising power of review. In *Consolidated Coffee Ltd. and Another Vs. Coffee Board, Bangalore*, it was held that only when a clear intention is non deducible from the terms and conditions that other factors such as the course of dealings and conduct of the parties assume relevance. The Courts approach while considering whether any averment or omission to traverse any material allegation amounts to an admission, it cannot be myopic. It is off necessity, taken into consideration the implication which may arise from a party urging one contention or the other, on the basis of existing materials.

34. In the totality of facts and circumstances and for the foregoing reasons this Court is not inclined to exercise its jurisdiction to adjudicate the questions of fact, of course disputed question of law as well raised by the parties as they also

depend on the disputed question of facts. Consequently, the reliefs as claimed by the petitioner are declined in the present writ petition. The writ petition is disposed of with these observations, however, the parties shall be free to raise and to get their disputes adjudicated in the appropriate forums. Considering the facts and circumstances the parties are also left to bear their own cost.