A PAULMECH INFRASTRUCTURE PRIVATE LIMITED

v.

THE STATE OF ORISSA & ORS.

(Civil Appeal No. 6023 of 2021)

B OCTOBER 04, 2021

[M. R. SHAH AND A. S. BOPANNA, JJ.]

Lease: *Lease agreement – Execution of – On facts, lease agreement to be entered into between UAHCL and appellant pursuant to the compliance of the Letter of Intent (LOI) – In terms* C *of the LOI, the appellant was to pay Rs 9.34 crore within the stipulated period, however, the appellant failed to do so – Also full payment not made within the extended period and also subsequent to the extended period – Decision by UAHCL to terminate the LOI – Writ petition by the appellant seeking quashing of the said letter to* D *terminate LOI – High Court held that the disputed questions of fact involved could not be gone into in the writ jurisdiction and relegated the parties to an appropriate forum – On appeal, held: Appellant having failed to adhere to the terms indicated in the LOI and the payment required thereunder not being made even within the* E *extended period, the decision of UAHCL to terminate the LOI is justified – Thus, termination of LOI is upheld – Directions sought to execute the lease agreement does not arise – As regards the refund of the amount paid, the word employed is not "forfeiture", thus, the amount payable towards the advance lease rentals and the other advance payments provided in the LOI, cannot be forfeited if there* F *is default in complying with the term – Amount of Rs.4.41 crores paid within the stipulated period, cannot be forfeited – It is an amount which would be available for accounting – More so, due to the conduct of the appellant, UAHCL was unable to utilise the property but on the other hand had to incur expenses and suffered* G *actual loss – In the interest of justice, UAHCL permitted to retain the amount paid within the time frame – Liberty granted to the appellant to file suit seeking recovery ofthe said amount – Amount paid after the extended date cannot be retained by UAHCL since it would amount to unjust enrichment – Issuance of direction to UAHCL to refund the said amount deposited by the appellant.*

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Disposing of the appeal, the Court

HELD: 1.1 Admittedly the appellant was not ready with the amount to make the payment within the timeframe contemplated under Clause 2 of LOI. The appellant, through their letter dated 04.02.2010 requested UAHCL that they be allowed to pay 50% of the bid money by 19.02.2010 which would include all the components indicated in Clause 2 of LOI and not just the upfront component. The rest of the money was undertaken to be paid by 15.04.2010. UAHCL through their reply dated 12.02.2010 allowed the same as a special case. The appellant once again through their letter dated 17.11.2010 requested for extension of time for payment of Rs.4.93 crore. UAHCL again extended the time till 15.12.2010. Despite indulgence shown by UAHCL the appellant did not make the balance payment before 15.12.2010. Instead, the sum of Rs.4.11 crore was paid subsequent thereto. [Para 12, 13][1050-C-E]

1.2 The submission of the appellant that UAHCL having received the said payment cannot at this stage contend that the payment was not made within the time stipulated, cannot be accepted. UAHCL is a corporation which has different departments and as such the remittance made being accepted in itself cannot be taken as an act to condone the delay caused by the appellant in complying with the terms of the LOI so as to alter the terms of contract. There is no material on record that subsequent to 15.12.2010, there is any positive act on behalf of UAHCL to either extend the time for payment or for having expressly condoned the delay and having accepted the payment so as to regularise the transaction. This is relevant more so in the context that at an earlier point as against the time stipulated for payment under the LOI specific correspondence was exchanged between the parties and the time had been expressly extended prior to the time fixed earlier having expired. In such situation, when admittedly the balance payment had not been made prior to 15.12.2010, unless the appellant had obtained express extension from UAHCL mere tendering the payment and the same having been accepted cannot be construed as a positive act to alter the contract. [Para 14][1050-F-H; 1051-A-B]

1.3 No doubt, the appellants relied on the communication dated 13.04.2011 addressed by the General Manager, UAHCL indicating therein that the issue of offering VRS to all the employees unwilling to join the new management was a consideration and the VRS amount will have to be paid by the appellant to UAHCL. Apart from the reason assigned by the High Court to indicate that the same cannot be treated in favour of the appellant, the said letter does not indicate that the discussion in that regard was after indicating to the appellant that the delay in payment of the upfront amount has been condoned and accepted. If at all the said aspect relating to VRS of the employees was also mutually agreed and, in that context, if UAHCL had proceeded to condone the delay and enter into the lease agreement it is only in such circumstance the exchange of correspondence in that regard would have assumed relevance. If that be the position, when admittedly the appellant was required to make the agreed payments within the timeframe indicated under LOI and the appellants themselves being unable to comply with the requirement, though having secured extensions on two occasions cannot turn around to contend otherwise at this juncture. Despite the extended period having come to an end on 15.12.2010, the appellant not having made the full payment within the said date cannot at this stage contend to have complied with the terms so as to seek a direction to UAHCL to execute the lease agreement. In fact, the High Court having examined the material on record has also arrived at such conclusion. Notwithstanding such conclusion reached by the High Court, ultimately it arrived at the decision that in view of the disputed questions to be resolved between the parties, the same cannot be gone into in writ jurisdiction. [Para 15, 16][1051-B-G]

1.4 On facts, the High Court arrived at the conclusion that such disputed questions of fact cannot be resolved in the writ petition of the instant nature. Therefore, in the instant facts, the High Court has not dismissed the writ petition on maintainability but having taken note of the issue involved was of the opinion that the submission urged would necessitate the requirement of recording evidence and therefore relegated the parties to an appropriate forum. To that extent, though the observations made

by the High Court are taken note of, keeping in view the nature of the considerations made, the prayers which were sought in the amended writ petition were required to be conclusively answered by the High Court on the aspect as to whether the decision of UAHCL to terminate the LOI dated was justified and the requirement for resolution of the dispute by an appropriate forum ought to have been left open only to the incidental aspect which may require appropriate evidence to be tendered and adjudication to be made by an appropriate forum. [Para 17][1052-F-H; 1053-A]

1.5 Having noted that the appellant had failed to adhere to the terms indicated in the LOI and the payment required thereunder not being made even within the extended period, the Board of Directors of UAHCL were justified in deciding to terminate the LOI through their letter dated 10.12.2013. In fact, the prayer seeking calculation of interest on the amount deposited and such amount is being sought to be adjusted towards the balance payments would in itself indicate that even to the knowledge of the appellant, the entire payments had not been made even as on the date of the filing the writ petition. In such circumstance, when the LOI has been rightly terminated, the directions sought in the writ petition to execute the lease agreement pertaining to 'Hotel Nilanchal Ashok', Puri does not arise and the prayers in that regard are liable to be rejected. [Para 18][1053-B-D]

1.6 A close perusal of the phrase employed in the LOI would indicate the one-time payment made upfront is shown as "non-refundable" and such payment is towards execution of the Operating Lease Agreement. If that be the position, the terms of LOI is clear that the said payment is towards the lease rentals and is the upfront payment which becomes a part of the lease transaction and therefore not refundable only if the lease agreement comes into operation and not otherwise. The word employed is not "forfeiture", therefore, the amount payable towards the advance lease rentals and the other advance payments provided in clause 2 of the LOI, cannot be forfeited if there is default in complying with the term and entering into the lease agreement, going by the stipulations contained in the LOI

A **governing the parties. That apart, the amount was required to be paid, latest by the extended date i.e., 15.12.2010. The very termination of the LOI is for the reason that the entire payment was not made even within the timeframe. The cause for termination of LOI occurred on 15.12.2010. Hence the amount**
B **paid after the extended date, in any event cannot be retained by UAHCL as otherwise it will amount to unjust enrichment. Therefore, it is liable to be refunded. Even with regard to the amount of Rs.4.41 crores which was paid on 07.02.2010, since the same cannot be forfeited it is an amount which will be available for accounting. In a normal circumstance, a direction was required**
C **to be issued to refund the said amount also. [Para 20][1053-F-H; 1054-A-C]**

1.7 UAHCL submitted that due to the conduct of the appellant in not paying the amount within time and completing the lease agreement formalities and thereafter involving UAHCL
D **in litigation and taking benefit of the status quo order, UAHCL was unable to utilise the property but on the other hand had to incur expenses. On this aspect, prima facie it is seen that the lease transaction ought to have been entered into before 19.02.2010. However, in the whole process itself more than 10**
E **months had elapsed. Soon thereafter the appellant had filed the writ petition before the High Court and the matter has been pending before one forum or the other for nearly a decade during which time the property could not be utilised nor expenses could be frozen. Even if that be so, it would not be appropriate for this Court to hazard a guess with regard to the actual loss that would**
F **have been suffered by UAHCL. At the same time, when this prima facie aspect is noticed it would also not be appropriate for this Court to direct UAHCL to refund the amount to the extent of Rs.4.41 crore which was paid within the timeframe and allow UAHCL to thereafter initiate recovery process. On the other**
G **hand, it would be in the interest of justice to permit UAHCL to retain the amount and grant liberty to the appellant to file an appropriately constituted civil suit seeking recovery of the said amount. [Para 21][1054-D-G]**

1.8 The order passed by High Court is modified. In that view, the prayer of the appellant to quash the letter terminating
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the letter of LOI is rejected. Consequently, the termination of LOI is upheld. However, UAHCL is directed to refund the amounts deposited by the appellant after the extended date in all amounting to Rs.4.11 crores within the stipulated period. The appellant is reserved liberty to file a civil suit for recovery of Rs.4.41 crores paid to UAHCL. [Para 22][1055-B-D]

Unitech Ltd. and Others vs. Telangana State Industrial Infrastructure Corporation **2021 (2) SCALE 653;** *Arya Vyasa Sabha v. Commissioner of Hindu Charitable & Religious Institutions & Endowments* **AIR 1976 SC 475;** *DLF Housing Construction Private Ltd. Vs. Delhi Municipal Corporation* **AIR 1976 SC 386;** *National Textile Corporation Ltd. vs. Haribox Swalram* **AIR 2004 SCC 1998 : [2004] 3 SCR 738;** *Dwarka Prasad v. B.D. Agarwal* **AIR 2003 SC 2686 : [2003] 1 Suppl. SCR 336;** *Defence Enclave Residents' Society v. State of U.P.* AIR **2004 SC 4877 – Referred to.**

Case Law Reference

2021 (2) SCALE 653	**referred to**	**Para 16**
AIR 1976 SC 475	**referred to**	**Para 17**
AIR 1976 SC 386	**referred to**	**Para 17**
[2004] 3 SCR 738	**referred to**	**Para 17**
[2003] 1 Suppl. SCR 336	**referred to**	**Para 17**
AIR 2004 SC 4877	**referred to**	**Para 17**

CIVIL APPELLATE JURISDICTION: Civil Appeal No.6023 of 2021.

From the Judgment and Order dated 09.03.2017 of the High Court of Orissa at Cuttack in W.P. (C) No.23103 of 2013.

Sanjay Bansal, Ms. Swati Bansal, Ms. Vaishali Gupta, G. K. Bansal, Advs. for the Appellant.

Ashok K. Gupta, Sr. Adv., Abhishek Gupta, Farrukh Rasheed, Ms. Ikshita Singh, Kapil Raghav, Gaurav Sharma, Som Raj Choudhury, Advs. for the Respondents.

A The Judgment of the Court was delivered by

A. S. BOPANNA, J.

1. The appellant is before this Court assailing the order dated 09.03.2017 passed by the High Court of Orissa at Cuttack, in W.P.(C) No.23103/2013. By the said order the High Court was of the opinion B that the disputed questions of fact involved in the petition cannot be gone into in the writ jurisdiction. Accordingly, the prayer made in the petition was not entertained and the appellant was relegated to approach the appropriate forum available for redressal of its grievance. The appellant, therefore being aggrieved is before this Court.

C 2. The respondent No.1-State of Odisha had granted the lease of the property in question in favour of the respondent No.5-Utkal Ashok Hotel Corporation Limited (for short 'UAHCL') for 99 years under the document dated 24.01.1989. UAHCL was, in that view, running an establishment in the name and style 'Hotel Nilachal Ashok' in the said premises at Puri. The same being unviable was closed down with the D approval of Board of Directors in the year 2004. Thereafter, UAHCL decided to lease out the same for a period of 40 years. Tender was floated in the year 2009. The appellant was one among the tenderers who participated in the process and being the highest bidder was considered. Accordingly, the Letter of Intent (for short 'LOI') dated E 19.01.2010 was issued in favour of the appellant delineating the terms to be complied pursuant to which the lease agreement was to be signed.

3. Among the other conditions which were to form part of the lease agreement, even before executing the lease agreement the requirement was for the appellant to pay a sum of Rs.9.34 crores to F UAHCL within 30 days, of which Rs.8.82 crores was towards non-refundable amount which was to be paid upfront; the security deposit of Rs.26 lakhs and the advance minimum guaranteed annual lease premium for the first year of Rs.26 lakhs was also to be paid.

4. On payment of the said amount the lease was to be executed and the other conditions would come into operation. The appellant who G was unable to pay the amount within the time stipulated, requested the UAHCL that they be permitted to deposit a part of the amount i.e., Rs.4.41 crores on 19.09.2010 and the balance amount by 15.04.2010 which was favourably considered by UAHCL through their communication dated 12.02.2010. Such indulgence was shown as special H case. The appellant accordingly deposited a portion of upfront amount

to the tune of Rs.4.41 crores on 18.02.2010, but the balance amount was not deposited within the extended time stipulated i.e., before 15.04.2010. In that view, the lease agreement could not be executed. However, in view of the request from the appellant, UAHCL through their communication dated 25.11.2010 once again acceded to the request permitting the appellant to pay the balance amount before 15.12.2010.

5. The appellant thereafter paid (i) the sum of Rs.2 crores on 28.12.2010, (ii) sum of Rs.1.41 crores on 29.12.2010 and (iii) the sum of Rs.70 lakhs on 07.01.2011. Such payment, according to the appellant constitutes the payment which was required to be made as per the LOI. However, the time gap which had ensued had created a position wherein the grievance of the employees was to be addressed and they were to be given the benefit of voluntary retirement. Since the LOI dated 19.01.2010 had also provided for regulating the manner in which the employees are to be treated during the lease period and had provided the liberty to offer voluntary retirement, the UAHCL required the appellant to bear the liability towards the same. The same did not reach a finality and in the meanwhile the Board of Directors of UAHCL took the decision to terminate the LOI dated 19.01.2010 since the appellant had failed to comply with clause 2 thereof, which required the payment of Rs.9.34 crores within 30 days of issuance of LOI.

6. Even prior to communication of the decision on 10.12.2013, the appellant filed the special writ petition before the High Court on 01.10.2013 wherein a prayer was sought to direct UAHCL to execute the lease agreement pursuant to the terms agreed under LOI dated 19.01.2010 and accept the balance amount along with interest for delayed payment. During the pendency of the writ petition the prayer was amended and the appellant sought for quashing the letter dated 10.12.2013 whereby UAHCL decided to terminate the LOI. UAHCL had filed their objection statement opposing the writ petition including contending therein with regard to the maintainability of the writ petition in a contractual matter. The learned Division Bench of the High Court having taken note of the rival contentions and the dispute involved for adjudication, was of the opinion that the disputed questions are best left to be resolved before the appropriate forum. The appellant is assailing the said order.

7. We have heard Mr. Sanjay Bansal, learned counsel appearing for the appellant, Mr. Ashok Kumar Gupta, learned senior counsel appearing for UAHCL and perused the appeal papers.

A 8. The learned counsel for the appellant would contend that the action of UAHCL to cancel the LOI and retain the amount paid thereunder is not justified. In an attempt to fortify his submission, the learned counsel has referred to LOI dated 19.01.2010 with reference to clause 2, to point out that the upfront amount payable within 30 days though not paid within the time stipulated therein, the appellant had sought extension of B time to pay which was agreed to by the communication dated 04.02.2010 and extended by the communication dated 25.11.2010. Though the time agreed thereunder is up to15.12.2010, the amount paid by the appellant on 28.12.2010 (Rs.2 crores), 29.12.2010 (Rs.1.41 crores) and 07.11.2011 (Rs.70 lakhs) had been accepted without demur and as such the upfront C payment of Rs.8.82 crores as required had been paid. In that view, the lease agreement was required to be executed. It is contended, though that was position, UAHCL instead of executing the lease agreement had through the communication dated 13.04.2011 raised the issue of the appellant having to bear the total liability on account of providing voluntary retirement to the employees which was as per the decision of the Board D of UAHCL due to insistence of the State Government, though it was not a condition in the LOI nor could have been included in the lease agreement. It is pointed out that clause 11 of the LOI though provided for regulating the manner in which the employees are to be maintained had indicated that the appellant shall not retrench them but the liberty E was for the appellant to consider VRS. As such it could not be imposed on the appellant is the contention. In such circumstance, it is contended by the learned counsel that the appellant having made the payment was entitled for the lease agreement to be executed in their favour. Hence the termination being bad, be set aside and the UAHCL be directed to execute the lease agreement is his submission.

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9. The learned counsel for UAHCL would on the other hand contend that the LOI was issued in favour of the appellant after the tender process and as such the terms of the LOI was required to be complied. Despite the payment of Rs.9.34 crores required to be made within 30 days, the appellant had failed to comply with the same. It is G true that as per the request of the appellant the time was extended, but it was only a concession as a special case. Even as per the extension granted the payment was required to be made by 15.12.2010. But, even as per the admitted case of the appellant the payment towards the balance of the upfront amount was made only on 28.12.2010, 29.12.2010 and H 07.01.2011 which was subsequent to the date till which extension was

provided. That apart, since the requirement is to pay Rs.9.34 crores within the time stipulated, the security deposit and advance minimum guaranteed annual lease premium amount was also required to be paid within the time stipulated but had not been paid. As such the appellant cannot contend that they have performed their obligation so as to assail the termination of LOI and seek execution of the lease agreement. In that view, while justifying the termination it is also contended that the upfront amount of Rs.8.82 crores being one-time non-refundable amount, it is within the powers of UAHCL to retain the same. Alternatively, it is contended that UAHCL was forced to incur idle expenses towards maintenance and the benefits payable to the employees without getting returns as the lease had not materialised due to the default committed by the appellant. In this regard, roughly an amount of Rs.4.5 crores has been incurred by UAHCL which in any event, the appellant is liable to reimburse. In that view, the learned counsel seeks that the appeal be dismissed.

10. In the light of the contentions put forth, it is seen that the lease agreement was to be entered into between the parties pursuant to the terms depicted in LOI and on compliance of the initial obligations set out therein. The present dispute relates to the initial payment that was required to be made by the appellant within the time frame set out in the LOI and non-adherence to which has resulted in termination of LOI. Clause 2 of the LOI provides for the same, which reads as hereunder: -

"2. You shall execute the Operating Lease Agreement within 30 days of the issue of LOI and pay an amount of Rs.9.34 crore within these 30 days as per following details

i. One-time non-refundable upfront payment of Rs.8.82 crore.

ii. Security Deposit (Rs.26.00 lakh) as per article iv.

iii. Advance Minimum Guaranteed Annual Lease Premium for the first year (Rs.26.00 lakh) as per annex-ix-Financial Bid."

11. A perusal of the same indicates that the appellant was obliged to pay an amount of Rs.9.34 crore within 30 days from 19.01.2010 and execute the Operating Lease Agreement. Towards the said amount, a sum of Rs. 8.82 crore was payable upfront as an one-time non-refundable amount. Though the learned counsel for the appellant sought to contend that the Minimum Guaranteed Annual Lease Premium and Security deposit of Rs. 26 lakh each are to be paid subsequently when the lease

A is executed, in our view it cannot be considered to be loose ended. Since Clause 2 refers to Rs.9.34 crore which is payable in 30 days and that includes the said amount of Advance Annual Premium and Security deposit, the entire amount was payable within 30 days. And the Lease Agreement was simultaneously executable. It only means that the same should be paid and the formality of execution of Lease Agreement also should be completed in the said 30 days and the payment to be made includes the upfront amount of Rs.8.82 crore.

12. In that backdrop it is necessary to examine the manner in which the things have proceeded after issue of LOI. Admittedly the appellant was not ready with the amount to make the payment within the timeframe contemplated under Clause 2 of LOI. The appellant, through their letter dated 04.02.2010 requested UAHCL that they be allowed to pay 50% of the bid money by 19.02.2010 which in our view will include all the components indicated in Clause 2 of LOI and not just the upfront component. The rest of the money was undertaken to be paid by 15.04.2010. UAHCL through their reply dated 12.02.2010 allowed the same as a special case. The appellant once again through their letter dated 17.11.2010 requested for extension of time for payment of Rs.4.93 crore. UAHCL again extended the time till 15.12.2010.

13. Despite such indulgence shown by UAHCL the appellant did not make the balance payment before 15.12.2010. Instead, the sum of Rs.4.11 crore was paid subsequent thereto and that too, in instalments of Rs. 2 crores on 28.12.2010; Rs.1.41 crore on 29.12.2010 and Rs.70 lakhs on 07.01.2011.

14. Though the learned counsel for the appellant seeks to contend that UAHCL having received the said payment cannot at this stage contend that the payment was not made within the time stipulated, we are unable to accept such contention. UAHCL is a corporation which has different departments and as such the remittance made being accepted in itself cannot be taken as an act to condone the delay caused by the appellant in complying with the terms of the LOI so as to alter the terms of contract. There is no material on record that subsequent to 15.12.2010, there is any positive act on behalf of UAHCL to either extend the time for payment or for having expressly condoned the delay and having accepted the payment so as to regularise the transaction. This is relevant more so in the context that at an earlier point as against the time stipulated for payment under the LOI specific correspondence was

exchanged between the parties and the time had been expressly extended prior to the time fixed earlier having expired. In such situation, when admittedly the balance payment had not been made prior to 15.12.2010, unless the appellant had obtained express extension from UAHCL mere tendering the payment and the same having been accepted cannot be construed as a positive act to alter the contract.

15. No doubt, the appellants have relied on the communication dated 13.04.2011 addressed by the General Manager, UAHCL indicating therein that the issue of offering VRS to all the employees unwilling to join the new management was a consideration and the VRS amount will have to be paid by the appellant to UAHCL. Apart from the reason assigned by the High Court to indicate that the same cannot be treated in favour of the appellant, the said letter does not indicate that the discussion in that regard was after indicating to the appellant that the delay in payment of the upfront amount has been condoned and accepted. If at all the said aspect relating to VRS of the employees was also mutually agreed and, in that context, if UAHCL had proceeded to condone the delay and enter into the lease agreement it is only in such circumstance the exchange of correspondence in that regard would have assumed relevance. If that be the position, when admittedly the appellant was required to make the agreed payments within the timeframe indicated under LOI dated 09.01.2010 and the appellants themselves being unable to comply with the requirement, though having secured extensions on two occasions cannot turn around to contend otherwise at this juncture. Despite the extended period having come to an end on 15.12.2010, the appellant not having made the full payment within the said date cannot at this stage contend to have complied with the terms so as to seek a direction to UAHCL to execute the lease agreement. In fact, the High Court having examined the material on record has also arrived at such conclusion.

16. Notwithstanding such conclusion reached by the High Court, ultimately it has arrived at the decision that in view of the disputed questions to be resolved between the parties, the same cannot be gone into in writ jurisdiction. The learned counsel for the appellant in that view has placed reliance to the case in ***Unitech Ltd. and Others vs. Telangana State Industrial Infrastructure Corporation (TSICC and Ors.)*** 2021 (2) SCALE 653, the decision to which one of us (Mr. Justice M.R. Shah) is a member on the Bench, with specific reference to para 32 thereof, which reads as hereunder:

A "32. Much of the ground which was sought to be canvassed in the course of the pleadings is now subsumed in the submissions which have been urged before this Court on behalf of the State of Telangana and TSIIC. As we have noted earlier, during the course of the hearing, learned Senior Counsel appearing on behalf of the State of Telangana and TSIIC informed the Court that the entitlement of Unitech to seek a refund is not questioned nor is the availability of the land for carrying out the project being placed in issue. Learned Senior Counsel also did not agitate the ground that a remedy for the recovery of moneys arising out a contractual matter cannot be availed of under Article 226 of the Constitution. However, to clear the ground, it is necessary to postulate that recourse to the jurisdiction under Article 226 of the Constitution is not excluded altogether in a contractual matter. A public law remedy is available for enforcing legal rights subject to well-settled parameters."

D 17. Having noted the said decision, a reference to the order passed by the High Court would indicate that the High Court though having referred to the decisions in ***Arya Vyasa Sabha v. Commissioner of Hindu Charitable & Religious Institutions & Endowments***, AIR 1976 SC 475, ***DLF Housing Construction Private Ltd. Vs. Delhi Municipal Corporation*** AIR 1976 SC 386, ***National Textile Corporation Ltd. vs. Haribox Swalram*** AIR 2004 SCC 1998 , ***Dwarka Prasad v. B.D. Agarwal***, AIR 2003 SC 2686, and ***Defence Enclave Residents' Society v. State of U.P.*** AIR 2004 SC 4877 to note the limitations while considering a writ petition under Article 226 of the Constitution of India has in that view taken note of the fact situation arising in the instant case. It is on facts that the High Court has arrived at the conclusion that such disputed questions of fact cannot be resolved in the writ petition of the present nature. Therefore, in the present facts, the High Court has not dismissed the writ petition on maintainability but having taken note of the issue involved was of the opinion that the contentions urged would necessitate the requirement of recording evidence and therefore relegated the parties to an appropriate forum. To that extent, though we take note of the observations made by the High Court, keeping in view the nature of the considerations made, the prayers which were sought in the amended writ petition were required to be conclusively answered by the High Court on the aspect as to whether the decision of UAHCL to terminate the LOI dated 19.01.2010 was justified and the requirement

for resolution of the dispute by an appropriate forum ought to have been left open only to the incidental aspect which may require appropriate evidence to be tendered and adjudication to be made by an appropriate forum.

18. Keeping these aspects in view, having noted that the appellant had failed to adhere to the terms indicated in the LOI dated 19.01.2010 and the payment required thereunder not being made even within the extended period, the Board of Directors of UAHCL were justified in deciding to terminate the LOI through their letter dated 10.12.2013. In fact, the prayer no. 3 seeking calculation of interest on the amount deposited and such amount is being sought to be adjusted towards the balance payments would in itself indicate that even to the knowledge of the appellant, the entire payments had not been made even as on the date of the filing the writ petition. In such circumstance, when the LOI has been rightly terminated, the directions sought in the writ petition to execute the lease agreement pertaining to 'Hotel Nilanchal Ashok', Puri does not arise and the prayers in that regard are liable to be rejected.

19. Having arrived at the above conclusion, the next aspect which would engage our attention is as to the manner in which the amount paid by the appellant is to be treated. The learned counsel for UAHCL would contend that the LOI provides that the one-time upfront amount to be paid is non-refundable, in that view, it is contended that the said amount is not liable to be refunded. Even otherwise due to the delay caused by the appellant and having obtained the status-quo order from the court by litigating with regard to the subject matter UAHCL have been prevented from otherwise utilising the property which has caused loss to them and the said amount would be adjustable towards the same is his contention.

20. On taking note of the contention, a close perusal of the phrase employed in the LOI would indicate the one-time payment made upfront is shown as "non-refundable" and such payment is towards execution of the Operating Lease Agreement. If that be the position, the terms of LOI is clear that the said payment is towards the lease rentals and is the upfront payment which becomes a part of the lease transaction and therefore not refundable only if the lease agreement comes into operation and not otherwise. The word employed is not "forfeiture", therefore, the amount payable towards the advance lease rentals and the other advance payments provided in clause 2 of the LOI, cannot be forfeited if there is default in complying with the term and entering into the lease agreement,

going by the stipulations contained in the LOI governing the parties herein. That apart, as noted, the amount was required to be paid, latest by the extended date i.e., 15.10.2010. The very termination of the LOI is for the reason that the entire payment was not made even within the timeframe. The cause for termination of LOI occurred on 15.10.2010. Hence the amount paid on 28.12.2010 (Rs.2 crores), 29.12.2010 (Rs.1.41crores) and 7.01.2011 (Rs. 70 lakhs) being clearly made after the said date in any event cannot be retained by UAHCL as otherwise it will amount to unjust enrichment. Therefore, it is liable to be refunded. Even with regard to the amount of Rs.4.41 crores which was paid on 07.02.2010, since we have held that the same cannot be forfeited it is an amount which will be available for accounting. In a normal circumstance, a direction was required to be issued to refund the said amount also.

21. However, as noted it is the contention on behalf of UAHCL that due to the conduct of the appellant in not paying the amount within time and completing the lease agreement formalities and thereafter involving UAHCL in litigation and taking benefit of the *status quo* order, UAHCL was unable to utilise the property but on the other hand had to incur expenses. On this aspect, *prima facie* it is seen that the lease transaction ought to have been entered into before 19.02.2010. It is on account of the difficulty expressed by the appellant, the time for payment of upfront amount was extended ultimately up to 15.12.2010, in which process itself more than 10 months had elapsed. Soon thereafter the appellant had filed the writ petition before the High Court and the matter has been pending before one forum or the other for nearly a decade during which time the property could not be utilised nor expenses could be frozen. Even if that be so, it would not be appropriate for this Court to hazard a guess with regard to the actual loss that would have been suffered by UAHCL. At the same time, when this *prima facie* aspect is noticed it would also not be appropriate for this Court to direct UAHCL to refund the amount to the extent of Rs.4.41 crore which was paid within the timeframe and allow UAHCL to thereafter initiate recovery process. On the other hand, it would be in the interest of justice to permit UAHCL to retain the amount and grant liberty to the appellant to file an appropriately constituted civil suit seeking recovery of the said amount. In the said proceedings it would be open for UAHCL to put forth the contention to set off the amount towards the loss suffered by them or to seek for counter claim if any further amount is due. In such proceedings it would be open for the competent civil court to independently consider

that aspect of the matter on its own merits for which we have not expressed any opinion on merits relating to that aspect. Even with regard to the claim of interest, if any, by the appellant that aspect is also kept open to be adjudicated in the civil suit. The pendency of the suit shall not be an impediment for UAHCL to deal with the property or to re-tender the same in any manner.

22. In the light of the above we pass the following order:-

(i) The order dated 09.03.2017 passed by High Court of Orissa at Cuttack in W.P.(C) No.23103/2013 stands modified.

(ii) In that view, the prayer of the appellant to quash the letter dated 10.12.2013 terminating the letter of LOI dated 19.01.2010 stands rejected. Consequently, the termination of LOI dated 19.01.2010 is upheld. However, UAHCL is directed to refund the amounts deposited by the appellant on 28.12.2010 (Rs.2 crores), on 29.12.2010 (Rs.1.41 crores) and on 07.01.2011 (Rs.70 lakhs), in all amounting to Rs.4.11 crores within four weeks from this day.

(iii) The appellant is reserved liberty to file a civil suit for recovery of Rs.4.41 crores paid to UAHCL on 17.02.2010 subject to the observations made above and all contentions of the parties in that regard are left open.

(iv) In view of the above conclusions and disposal of the appeal, the amount of Rs.3 crores deposited by the appellant before this Court, which is kept in fixed deposit shall be refunded to the appellant with accrued interest thereon.

(v) The appeal is disposed of accordingly with no order as to costs.

(vi) Pending application, if any, shall stand disposed of.

Nidhi Jain Appeal disposed of.