

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No.911 of 2015 (O&M)

Date of decision: July 09, 2015

M/s Agros Impex (I) Pvt. Ltd. & others Petitioners

Versus

State of Punjab & another Respondents

**CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MRS. JUSTICE LISA GILL**

Present: Mr. Akshay Bhan, Senior Advocate with
Mr. Baljeet Singh & Mr. Amandeep Singh Talwar, Advocates,
for the petitioners.
Mr. Vinod S. Bhardwaj, Additional Advocate General, Punjab.

HEMANT GUPTA, J.

Challenge in the present writ petition is to an order dated 06.01.2015 (Annexure P-1), whereby contract for affixation of High Security Registration Plates was terminated for the violations said to have been committed by the Concessionaire i.e. the petitioners. The Concessionaires were further debarred for minimum five years from participating in any bidding process to be conducted by the State of Punjab to manufacture, sell, distribute or affix High Security Registration Plates in the State of Punjab.

The said order of termination was proceeded by a show cause notice dated 08.12.2014 (Annexure P-18) which in turn make reference of continued violation and dis-obedience of the directions issued by the Office of

State Transport Commissioner to the petitioners. The petitioners were instructed to start the office and workshop at each sub division level within 15 days and to start affixing security plates, failing which serious note of the violation shall be taken and no hesitation will be shown to cancel the agreement executed with the petitioners.

The petitioners were earlier issued notices on 14.05.2014 (Annexure P-6); 01.08.2014 (Annexure P-12); 20.08.2014 (Annexure P-14) and 08.09.2014 (Annexure P-16) calling upon the petitioners to set up facility of affixing of Security plates at the sub-division level and also communicated the complaints about the snap locks.

The concession agreement between the parties dated 21.11.2011 (Annexure P-2) contains a dispute resolution mechanism including suspension and termination of the agreement. The relevant clauses read as under:

“7.4.1 Save where expressly stated to the contrary in this Agreement, any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to this Agreement and so notified in writing by either Party to the other (the “Dispute”) in the first instance shall be attempted to be resolved amicably in accordance with the conciliation procedure set forth herein below. Provided that the Party claiming dispute resolution shall issue a notice in writing of at least thirty (30) days to the other Party informing it of its intention of initiating dispute resolution procedure.

7.4.2 In the event of any dispute between the Parties, such Dispute shall be referred to the State Transport Commissioner of the State Government and the Chairman of the Board of Directors of the Concessionaire, for amicable settlement. Upon such reference, the said two persons shall meet not later than 7 (seven) days of the date of such request to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the said period or the Dispute is not amicably settled within 15 (fifteen) days of such meeting between the said two persons,

either Party may refer the dispute to arbitration in accordance with the provisions of Clause 7.5.

7.4.3 If the Dispute is not resolved as evidenced by the signing of the written terms of settlement within 30 (thirty) working days of the aforesaid notice in writing, or such longer period as may be mutually agreed by the Parties, then the provisions of Clause 7.5 shall apply.

7.5 Arbitration

7.5.1 Any Dispute which is not resolved amicably as provided herein above shall be finally decided by reference to arbitration by a Board of Arbitrators, appointed pursuant to Clause 7.5.2 below. Such arbitration shall be held in accordance with the Rules of Arbitration of the Indian Council of Arbitration and shall be subject to the provisions of the Indian Arbitration and Conciliation Act 1996 and any amendments thereto.

7.5.2 There shall be a Board of three arbitrators of whom each party shall select one and the third arbitrator shall be appointed in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

7.5.7 This Agreement and rights and obligations of the Parties shall remain in full force and effect pending the Award in any arbitration proceeding hereunder.”

At the outset, learned Additional Advocate General, Punjab has raised an argument that the dispute between the parties are required to be adjudicated upon through an arbitrator in terms of arbitration clause contained in the agreement executed between the parties. It is further argued that the contract of affixation of high security registration plates is a contract of providing personal services; therefore, even in the case of breach of contract, though there is none, the remedy of the petitioners is to seek damages. It is sought to be argued that in the event, order Annexure P-1 is interfered by this Court, the consequence would be enforcement of a contract of personal services of affixation of high security registration plates, which contract cannot be supervised by Court. Thus, even if, there is any violation of an agreement, the

remedy of the petitioners is to seek resolution of dispute through an arbitrator to claim damages in accordance with law.

Learned counsel for the petitioners controverted the arguments raised and argued that the arbitration clause does not bar the jurisdiction of this Court. Since the action of the State is arbitrary, therefore, such arbitrary action of the State warrants interference in exercise of the writ jurisdiction of this Court. Reliance is placed upon the order passed by Hon'ble Supreme Court in case of Union of India & others Vs. Tania Construction Pvt. Ltd. (2011) 5 SCC 697.

We have heard learned counsel for the parties and find that the petitioners should invoke the alternative remedy provided under the agreement between the parties.

The argument of learned counsel for the petitioners is that the petitioners are not seeking enforcement of the agreement, but challenging the legality and validity of the order, therefore, this Court may examine the impugned order and if it found that such order does not satisfy the test of reasonable on the touchstone of Article 14, this Court will not permit such an order to stand. The consequences after setting aside of such order are not to be examined by this Court at this stage.

The question as to what extent this Court will interfere in the matters relating to breach of contract in exercise of the writ jurisdiction is not *res integra*. The action of the State has to be fair, reasonable, transparent and in non-discriminatory manner. The parameters, which can be taken into consideration, before the grant of contract are not necessarily the same in the case of breach of contract. In the cases of breach of contract, the Court can

interfere with the order passed, if there is a public law element. In a judgment reported as Life Insurance Corporation of India Vs. Escorts Ltd. & others (1986) 1 SCC 264, the Hon'ble Supreme Court held that if the action of the State is related to contractual obligations, the Court may not ordinarily examine it unless the action has some public law character attached to it. Whether the action is in public law, the same is required to be examined with reference to the action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. The Court held to the following effect:

“102. For example, if the action of the State is political or sovereign in character, the court will keep away from it. The court will not debate academic matters or concern itself with the intricacies of trade and commerce. If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the Company like any other shareholder.”

In LIC of India & another Vs. Consumer Education & Research Centre & others (1995) 5 SCC 482, the conditions for availing a life insurance policy were assailed as arbitrary and discriminatory violating Articles 14 & 19(1)(g) and right to life in Article 21 of the Constitution by an instrumentality of the State. The Court held that action of the Life Insurance Corporation bears public character with an imprint of public interest element in their offers with terms and conditions mentioned in the appropriate table inviting the public to enter into contract of life insurance. It is not a pure and simple private law dispute without any insignia of public element. Thus, the Court held that the writ petition is maintainable to test the validity of the conditions laid in Table 58 of the term policy. It was observed to the following effect:

“27. In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest.”

In another judgment reported as Noble Resources Ltd. Vs. State of Orissa & another (2006) 10 SCC 236, the parties entered into a contract to supply different grades of iron ore. The Court noticed the distinction between a matter, which is at the threshold of a contract and a breach of contract, when it held to the following effect:

“15. It is trite that if an action on the part of the State is violative the equality clause contained in Article 14 of the Constitution of India, a writ

petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Article 14 of the Constitution. While exercising contractual powers also, the government bodies may be subjected to judicial review in order to prevent arbitrariness or favouritism on its part. Indisputably, inherent limitations exist, but it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter.

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28. Although terms of the invitation to tender may not be open to judicial scrutiny, but the courts can scrutinize the award of contract by the Government or its agencies in exercise of their power of judicial review to prevent arbitrariness or favouritism. [See Directorate of Education and Others v. Educomp Datamatics Ltd. and Others (2004) 4 SCC 19]. However, the court may refuse to exercise its jurisdiction, if it does not involve any public interest.

29. Although the scope of judicial review or the development of law in this field has been noticed hereinbefore particularly in the light of the decision of this Court in ABL International Ltd. vs. Export Credit Guarantee Corporation of India Ltd. (2004) 3 SCC 553, each case, however, must be decided on its own facts. Public interest as noticed hereinbefore, may be one of the factors to exercise power of judicial review. In a case where a public law element is involved, judicial review may be permissible. [See Binny Ltd. and Another v. V. Sadasivan and Others [(2005) 6 SCC 657] and G.B. Mahajan and Others v. Jalgaon Municipal Council and Others [(1991) 3 SCC 91].

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43. Ordinarily, a specific performance of contract would not be enforced by issuing a writ of or in the nature of mandamus, particularly when keeping in view the provisions of the Specific Relief Act, 1963 damages may be an adequate remedy for breach of contract.”

In Godavari Sugar Mills Limited Vs. State of Maharashtra & others (2011) 2 SCC 439, the writ petition was found to be for recovery of money, but the Hon'ble Supreme Court held as under:

“8. The observations in Suganmal Vs. State of M.P. AIR 1965 SC 1740 related to a claim for refund of tax and have to be understood with reference to the nature of the claim made therein. The decision in Suganmal's case (supra) has been explained and distinguished in several subsequent cases, including in U.P. Pollution Control Board Vs. Kanoria Industrial Ltd. (22001) 2 SCC 549 and ABL International ltd. Vs. Export Credit Guarantee Corporation of India Ltd. (2004) 3 SCC 553. The legal position becomes clear when the decision in Suganman's case (supra) is read with the other decisions of this Court on the issue, referred to below:

(i) Normally, a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of a contract or a tort to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. But an order for payment of money may be made in a writ proceedings, in enforcement of statutory functions of the State or its officers. (Vide Burmah Construction Co. Vs. State of Orissa AIR 1962 SC 1320).

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In Tantia Construction Pvt. Ltd.'s case (supra), a judgment referred to by the learned counsel for the petitioners, the respondent-Contractor was called upon to execute enlarged extended quantity of works in respect of contract of rail over-bridge. The Court examined; as to whether there was a valid contract or not. The findings of the Court in para 27 have to be read in the context of the controversy arising for the decision of the Court. It would be apparent from the following finding:

“25. In our view, the Respondent Company has satisfactorily explained their position regarding their offer being confined only to the balance

work of the original Tender and not to the extended work. The delay occasioned in starting the work was not on account of any fault or lapses on the part of the Respondent Company, but on account of the fact that the project design of the work to be undertaken could not be completed and ultimately involved change in the design itself. The Respondent Company appears to have agreed to complete the varied work of Tender No.76 of 06-07 which variation had been occasioned on account of the change in the design as against the entire work covering both the first and second Tenders. To proceed on the basis that the Respondent Company was willing to undertake the entire work at the old rates was an error of judgment and the termination of the contract in relation to Tender No.76 of 06-07 on the basis of said supposition was unjustified and was rightly set aside by the learned Single Judge of the High Court, which order was affirmed by the Division Bench.

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27. Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution. We endorse the view of the High Court that notwithstanding the provisions relating to the Arbitration Clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the Writ Petition filed on behalf of the Respondent Company.”

In the present case, the contract for affixation of High Security Registration Plates has been terminated on account of following four violations:

- “1. As per the report of District Transport Officer, Ludhiana all type of registration plates so fitted for each class of vehicle as a new set

or as replacement were fitted without using Snap Locks. Snap lock is an important feature of the security of HSRP Plates and without snap locks whole system has been vitiated. This act by Concessionaire is in violation of The Motor Vehicles (New High Security Registration Places) Order, 2001. This act of Concessionaire is also in violation of the Government of India Notification No.S.O.2091(E) dated 16.09.2011.

2. In spite of repeated directions to Concessionaire vide letter No.STC-P(P-2)/11984 dated 14.05.2014, order No.STC-P(P-2)/20507 dated 16.07.2014, letter No.STC-P(P-2)/22020-41 dated 01.08.2014 and a notice vide letter No.STC-P(P-2)/37271 dated 08.12.2014 to open affixation Stations at each Sub-Division Level, Concessionaire has failed to open all such Affixation Stations.
3. As per Para 3.1(i) under Chapter-III OBLIGATIONS AND UNDERTAKINGS of Concession Agreement, Concessionaire failed to provide reports on regular basis after the date of agreement and appointed date of agreement in the form and manner set forth in agreement and prescribed by State Government from time to time. Accordingly, as per Schedule E of Concessionaire agreement, Concessionaire failed to provide till date all reporting and record requirements stated in para 2(c), 2(e) & other reports under Para 3 and particularly Monthly Operation Report (MOR).
4. The Concessionaire has failed in this obligation as per the Concessionaire agreement to affix the all existing registered vehicles with the new High Security Registration Plates within two years of launch of this Scheme, as the 39.54 lakh existing registered vehicles stated in request for proposal document, are still remained to be affixed with HSRP.”

The argument of the learned counsel for the petitioners is that the show cause notice was pertaining to non-affixation of High Security Registration Places at the Sub Division level, therefore, the order passed is on

grounds other than mentioned in the show cause notice, therefore, it violates the principle of natural justice.

The show cause notice does mention about the previous notices issued to the petitioners. Some of the notices are inter alia in respect of snap locks and of affixation Stations at Sub Division level. The affixation of High Security Registration Plates is in larger public interest. There is dispute regarding adherence of the terms of the agreement. We find that since the larger public interest of affixation of High Security Registration Plates is in doll-drums, we feel that it is not a case, where this Court should interfere in the order of termination of contract. The civil consequences arising from alleged termination of the contract can be claimed by the petitioners by way of alternative dispute settlement mechanism agreed between the parties. The consequences of setting aside of the order of termination of the contract would be that the petitioners would be a valid contractor and, thus, entitled to affix High Security Registration Plates. The direct consequences of setting aside of the order is to grant specific performance of the agreement, which we refrain ourselves from exercising powers in exercise of writ jurisdiction of this Court.

A Division Bench of this Court of which one of us (Hemant Gupta, J.) was a member in CWP No.2032 of 2006 titled 'Pollution Control Committee, Amritsar Vs. Municipal Corporation, Amritsar & others' decided on 23.07.2013, challenging the termination of contract of processing and disposal of municipal solid waste, has examined the scope of writ Court in the contractual matters. Considering the various judgments, the Bench held to the following effect:

“34. The reading of the aforesaid judgments would lead to the conclusion that the powers of the Writ Court are plenary in nature and in exercise of such power, the Court can embark an inquiry into the

disputed questions of facts as well, but whether such powers should be exercised or not is one of the discretion. The Power of judicial review in the matter of awarding contract conferred by Article 14 is wide, which enjoins the public authority to act fairly, reasonably by excluding irrationality and arbitrariness. But the power of judicial review in a concluded contract is limited and is not all pervasive as in the matter of awarding of contract. The Writ Court in exercise of judicial review can intervene even in respect of concluded contracts if the contract is statutory contract or there is a public law element in it.”

In view of the above discussion and the fact that larger public interest of affixation of High Security Registration Plates is in peril, we do not wish to interfere with the impugned order in exercise of writ jurisdiction of this Court, leaving the petitioners to avail its remedy in accordance with law. We are of the opinion that high security registration plates should be affixed, but the continuing dispute about the execution of contract will delay the obligation of the State of affixation of these plates. Therefore, the public law does not warrant any interference in the writ jurisdiction of this Court.

Consequently, the present writ petition is dismissed.

(HEMANT GUPTA)
JUDGE

(LISA GILL)
JUDGE

July 09, 2015
Jt/Vimal