

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 15th December, 2015

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W.P.(C) No.11621/2015

CCPL DEVELOPERS PVT. LTD. & ANR. Petitioners

Through: Mr. Parag P. Tripathi, Sr. Adv. with
Mr. Ashish Mohan and Mr. Mohit
Kumar, Advs.

Versus

GAIL (INDIA) LIMITED Respondent

Through: Mr. Arvind Nayar, Mr. Shashi Mohan
and Ms. Nanda Devi Deka, Advs.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.30820/2015 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

W.P.(C) No.11621/2015 & CM No.30819/2015 (for stay)

3. The petition seeks quashing of (i) Article 14 of the Gas Sales Agreement (GSA) dated 26th December, 2008 between the petitioner No.1 and the respondent GAIL (India) Limited on the ground of being onerous, arbitrary, illegal, *mala fide*, unreasonable, harsh and against public policy and thus void; and (ii) quashing of Article 19 of the said Agreement to the

extent that it does not provide for right of termination to the petitioners in the event of the petitioners being unable or unwilling to purchase / consume gas allocated by respondent particularly due to non-requirement, on the ground of being onerous, arbitrary, illegal, *mala fide*, unreasonable, harsh and against public policy and thus void.

4. It is the case of the petitioners:

(i) that the petitioners are engaged in the business of constructing and managing Shopping Complexes, Malls and other real estate and for the purposes of the various units in the East Delhi Mall, situated at plot No.1, Kaushambi, Ghaziabad, Uttar Pradesh were in need of Regenerated Liquefied Natural Gas (RLNG) as an alternate source for generation of electricity at the Mall during power cuts;

(ii) that the respondent at the relevant time was the only supplier of RLNG in the area where the aforesaid Mall is located and anyone, in the year 2004, if in need of RLNG, could enter into a contract for supply thereof with the respondent only; the respondent was thus then enjoying monopolistic position and had superior bargaining power;

(iii) that the petitioners accordingly approached the respondent and the respondent made the petitioners sign a standard form agreement dated 14th September, 2004 with the price stated therein being valid until 1st January, 2009 and a new agreement to be executed by 30th September, 2008;

(iv) that the respondent made the petitioners sign a new contract namely Gas Sale Agreement (GSA) dated 26th December, 2008 on the dotted lines; the terms and conditions mentioned in the said agreement were pre-determined by the respondent and are patently onerous and formulated without discussing or taking consent of the petitioners; the respondent even then was the only supplier of RLNG in the area where the Mall of the petitioners is located;

(v) that the entire contract nowhere provides for termination of the same by the petitioners as buyer in the event of the petitioners not willing to buy RLNG or having no further requirement for the same or if unable to run their business for any reason whatsoever;

(vi) that the provision in the agreement for payment by the petitioners for allocated RLNG despite non-consumption thereof is patently unfair, unreasonable, illegal, arbitrary and unjust and against public policy and violative of Article 14 of the Constitution of India;

(vii) that the petitioners now, because of the better availability of the power supply from the grid, have no further requirement for RLNG and their requirement for RLNG has thus substantially reduced;

(viii) that even till now only 60% of the units in the mall are occupied and the balance 40% are lying vacant;

(ix) that the petitioners vide communication dated 14th May, 2013 to the respondent informed of the aforesaid and requested the respondent not to charge the petitioners for the minimum quantity which the petitioners in the agreement had agreed to consume and / or pay for;

(x) that however inspite of repeated reminders of the petitioners, the respondent did not effect any change and has been demanding from the petitioners the price of minimum quantity of RLNG which the petitioners under the agreement aforesaid had agreed to pay for and has illegally and unauthorizedly invoked the Letter of Credit furnished by the petitioners in terms of the agreement aforesaid with the respondent;

(xi) that the petitioners challenged the said action of the respondent by filing OMP(I) No.117/2015 before this Court but which petition was dismissed vide order dated 27th March, 2015;

(xii) that thereafter negotiations were held between the parties and though a settlement was arrived at and the petitioners also paid the amounts in terms of settlement to the respondent but the respondent has continued to seek enforcement of the aforesaid Letter of Credit furnished by the petitioners, in a patently fraudulent and illegal manner;

(xiii) that the petitioners again filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 being OMP (I) No.573/2005 before this Court and vide interim order wherein the parties were directed to maintain *status quo* with respect to the Letter of Credit and the petitioners directed to revive the Letter of Credit;

(xiv) that aggrieved from the direction for revival of the Letter of Credit, the petitioners filed an appeal being FAO (OS) No.611/2015 but which was dismissed as not pressed on 4th November, 2015;

(xv) that upon the dismissal of the appeal, Canara Bank being the banker of the petitioners and which had at the instance of the petitioners furnished the Letter of Credit, for renewing the Letter of Credit asked the petitioners to furnish 100% margin money;

(xvi) that the petitioners made an application in OMP(I) No.573/2015 *supra* for impleadment of Canara Bank and a

direction was issued to Canara Bank to renew / revive the bank guarantee;

(xvii) that the proceedings in the said OMP are still pending;

(xviii) that the respondent being a State within the meaning of Article 12 of the Constitution of India is liable to act fairly even in contractual matters and cannot ask the petitioners to pay for the gas which has not been consumed by the petitioners.

5. The senior counsel for the petitioners has been heard.
6. It has been enquired from the senior counsel for the petitioners whether not the dispute between the parties is purely contractual, without any public law element therein and if that be so, how is the public law remedy of a writ petition under Article 226 of the Constitution of India available to the petitioners particularly when the petitioners, in relation to the same disputes, have also invoked the arbitration clause in the agreement between the parties. Attention of the senior counsel for the petitioners has been invited to the dicta of the Supreme Court in ***Joshi Technologies International Inc. Vs. Union of India*** (2015) 7 SCC 728

dealing not only with the aspect of maintainability of writ petitions in contractual matters but also with the aspect of variation / rectification of contracts, as the petitioners in the present case also are seeking. It has further been enquired, whether not the real relief which the petitioners are claiming by way of this writ petition is a restraint against the respondent from encashment of the bank guarantee furnished by the petitioners in favour of the respondent inasmuch as the monetary claims under the agreement of the respondent against the petitioners otherwise raised can always be disputed by the petitioners and will have to be enforced by the respondent either before the Civil Court or in arbitration.

7. The senior counsel for the petitioners of course has contended that the availability of the alternative remedy of arbitration under the contractual clause cannot be a ground to defeat the writ petition under Article 226 of the Constitution of India if otherwise maintainable. It is contended that if the respondent which qualifies as a State, in contractual matters also, acts arbitrarily and unfairly, a writ petition would be maintainable. A compilation of judgments is handed over though

reference during the hearing is made only to paras 23 and 24 of ***Life Insurance Corporation of India Vs. Rajiv Khosla*** 186(2012) DLT 266 (DB) to contend that the Division Bench of this Court therein in writ jurisdiction held the clauses in the insurance policy to be unfair and to ***Japan Travel Services Vs. All Nippon Airways Co. Ltd.*** MANU/DE/2953/2009 to contend that an arbitrator being a creature of an agreement cannot strike down any clause in the agreement as unfair, unreasonable and unjust.

8. I am unable to agree.

9. The claim of the petitioners in the writ petition is based on contract and as aforesaid is essentially an attempt to restrain the respondent from encashing the bank guarantee. Else, the respondent, to enforce its monetary claims under the agreement will have to resort to proceedings for recovery thereof either in a suit or in arbitration and the petitioners can defend the said claims on all grounds as are urged in this petition. Supreme Court in ***Joshi Technologies International Inc.*** supra after review of host of earlier judgments on the subject *inter alia* held as under:

“68. The Court thereafter summarized the legal position in the following manner: (*ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd.* (2004) 3 SCC 553 paras 27-28)

“27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition:

- (a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.
- (b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.
- (c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: *Whirlpool Corporation Vs. Registrar of Trade Marks*, [1998 (8) SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction.”

69. The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, can refuse to exercise. It also follows that under the following circumstances, “normally”, the Court would not exercise such a discretion:
- 69.1. The Court may not examine the issue unless the action has some public law character attached to it.
- 69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.
- 69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.
- 69.4. Money claims *per se* particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.
70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarized as under:
- 70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.
- 70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

- 70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross- examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.
- 70.4. Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.
- 70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.
- 70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.
- 70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

- 70.8. If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.
- 70.9. The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.
- 70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.”

[Emphasis added]

10. The contract entered into by the petitioners with the respondent contains an arbitration clause and which has also been invoked by the petitioners. The Supreme Court, in the dicta aforesaid has clearly held that in such cases writ petitions are not to be entertained. Not only so, the issue arising for adjudication has no public law character attached to it. In fact, the senior counsel for the petitioners has not even attempted to argue so. Further, as aforesaid, the real claim in the writ petition is but to thwart encashment of bank guarantee furnished under a contract. The contract between the parties is strictly in the realm of private law.

11. Moreover, the petitioners in effect are seeking amendment / rectification of the contract entered into with the respondent. The said contract was entered into first on 14th September, 2004 and renewed on 26th December, 2008. The petitioners have throughout been aware of the terms and conditions thereof and at no time objected thereto. A question

would arise whether the Court can order the contract to be rectified / amended. The said aspect also has been dealt with in *Joshi Technologies International Inc.* supra as under:

“54. As noted above, the contention of the Respondent is that PSCs are in the nature of a contract agreed to between the two independent contracting parties. It is also mentioned that before the signing of the PSCs, the approval of Cabinet is obtained which reflects that the PSC as submitted to the Cabinet has the approval of one of the contracting parties, namely, Government of India in this case. When it is signed by the other party it means that it has the approval of both the parties. Therefore, a contracting party cannot claim to be oblivious of the provisions of the law or the contents of the contract at the time of signing and, therefore, later on cannot seek retrospective amendment as a matter of right when no such right is conferred under the contract. Even the doctrine of fairness and reasonableness applies only in the exercise of statutory or administrative actions of the State and not in the exercise of contractual obligation and issues arising out of contractual matters are to be decided on the basis of law of contract and not on the basis of the administrative law. No doubt, under certain situations, even in respect of contract with the State relief can be granted Under Article 226. We would, thus, be dealing with this aspect in some detail.

55. Law in this aspect has developed through catena of judgments of this Court and from the reading of these judgments it would follow that in pure contractual matters extraordinary remedy of writ Under Article 226 or Article 32 of the Constitution cannot be invoked. However, in a limited sphere such remedies are available only when the non-Government contracting party is able to demonstrate that its a public law remedy which such party seeks to invoke, in contradistinction to the private law remedy simpliciter under the contract. Some of the case law to bring home this cardinal principle is taken note of hereinafter.

72. As pointed out earlier as well, the contract in question was signed after the approval of the Cabinet was obtained. In the said contract, there was no clause pertaining to Section 42 of the Act. The Appellant is presumed to have knowledge of the legal provision, namely, in the absence of such a clause, special allowances under Section 42 would be impermissible. Still it signed the contract without such a clause, with open eyes. No doubt, the Appellant claimed these deductions in its income tax returns and it was even allowed these deductions by the Income Tax Authorities. Further, no doubt, on this premise, it shared the profits with the Government as well. However, this conduct of the appellant or even the respondents, was outside the scope of the contract and that by itself may not give any right to the appellant to claim a relief in the nature of mandamus to direct the Government to incorporate such a clause in the contract, in the face of the specific provisions in the contract to the contrary as noted above, particularly, Article 32 thereof. It was purely a contractual matter with no element of public law involved thereunder.”

[Emphasis added]

12. Mention may also be made of order dated 18th March, 2015 of the Supreme Court in Civil Appeal No.3053/2015 arising out of SLP (C) no.15689/2011 titled ***National Highways Authority of India Vs. MEIL-EDB LLC (JV)*** wherein the view taken by the Division Bench of this Court in judgment dated 10th March, 2011 in W.P.(C) No.8418/2010 titled ***M/s. Madhucon Projects Ltd Vs. National Highways Authority of India*** was for consideration. The Division Bench of this Court, in writ jurisdiction, had interfered with the action of the National Highways Authority of India (NHAI) of forfeiture of Bid Security reasoning that such forfeiture by way

of damages, by invocation of Bank Guarantee, could not be effected without the NHAI proving the damages. The Supreme Court held:

“We are confronted with a situation when there is a contract between the parties, duly signed by the Respondent which restricts forfeiture of 5% of the value of the Bid Security ostensibly not by way of a penalty. Of course, as is to be expected, the Respondent disagrees and on the contrary submits that the deduction / forfeiture is in terrorem and is punitive in nature. A Writ Court may at least as a temporary or preliminary view decide whether the damages imposed by an Authority amenable to writ jurisdiction such as NHAI indubitably are punitive or not, but it should abjure from going into the minute calculation. That controversy should be left to the Civil Court to decide, i.e. whether the deduction / forfeiture, in the present instance of 5% of the value of the Bid Security is punitive or otherwise. We think that the course that commends itself to us is to relegate the parties to the Civil Courts to determine whether any damages had been suffered by the National Highways Authority of India and if so whether the deduction of 5% was a fair pre-estimate or was punitive in nature. Since the parties have been bona fide prosecuting writ proceedings in the event of the plaintiff seeks enlargement / extension of time for filing of a Suit, the Courts in seisin will keep all the circumstances in view before passing an order.”

13. From the aforesaid also it follows that a final decision with respect to the contractual rights of the parties is not permissible in writ jurisdiction.

14. Not only so, the pleas on the basis of which the petitioners claim the relief would require adjudication of i) whether the respondent at the relevant time was enjoying a monopolistic position; in this regard it would also have

to be considered what other sources of energy besides RLNG were available to the petitioners for generating power; ii) whether the parties were unequal in bargaining power; iii) whether or not any negotiations took place between the parties; iv) whether any of the terms of the contract are onerous to the petitioners; v) whether the non-requirement now of the petitioners of RLNG is on commercial considerations or otherwise; vi) whether the agreement between the parties is specifically enforceable by the respondent as is contended by the petitioners, and all of which are factual controversies and adjudication whereof can only be by giving an opportunity to the parties to lead evidence and cross-examine the witnesses of each other and for which also a writ petition is not the appropriate remedy.

15. Supreme Court in *R.L. Kalathia & Co. Vs. State of Gujarat* (2011) 2 SCC 400 has reiterated that if a party which has executed a discharge agreement or discharge voucher alleges that the execution of such discharge agreement or discharge voucher was on account of fraud, coercion or undue influence practiced by the other party and thus the said agreement / voucher is void and cannot be acted upon, raises a disputed question of fact and to establish which an opportunity to lead evidence has to be given and merely

on the basis of such agreement / discharge voucher, the claim cannot be summarily dismissed. The same is the position here.

16. No merit is also found in the contention of the senior counsel for the petitioners that the relief as sought in this petition, of certain clauses of the contract entered into by the petitioners with the respondent being void on the ground of being onerous, arbitrary, illegal, unreasonable, unjust and against the public policy, does not lie before the Arbitrator for the reason of the Arbitrator being a creature of the same contract. The said contention is in negation of Section 16(1)(b) of the Arbitration and Conciliation Act, 1996 which provides that the Arbitral Tribunal may rule on any objection with respect to the existence or validity of the arbitration agreement and for that purpose a decision by the Arbitral Tribunal that the contract is null and void shall not entail *ipso-jure* the invalidity of the arbitration clause.

17. Supreme Court in ***Reva Electric Car Co. (P) Ltd. Vs. Green Mobil*** (2012) 2 SCC 93, in exercise of jurisdiction under Section 11(4) and (6) of the Arbitration Act, held that the arbitration clause which forms part of the contract has to be treated as an agreement independent of the other terms of the contract and to ensure that there is no misunderstanding, Section

16(1)(b) of the Act further provides that even if the Tribunal concludes that the contract is null and void, it should not result as a matter of law in any automatic invalidation of the arbitration clause. The said principle was recently reiterated in *Ashapura Mine-Chem Limited Vs. Gujarat Mineral Development Corporation* (2015) 8 SCC 193. I am therefore with respect unable to agree with the observation to the contrary in *Japan Travel Services* supra.

18. As far as reliance by the petitioners on *Life Insurance Corporation of India* supra is concerned, all that was held therein was that an unfair and irrational clause in a contract is amenable to judicial review. In the facts of that case, finding that insurance is a social security measure and holding that it should be consistent with constitutional animation and conscience of socio-economic justice enshrined in the Constitution, public law remedy was deemed appropriate. However, in *United India Insurance Company Ltd. Vs. Manubhai Dharmasinhbhai Gajera* (2008) 10 SCC 404 on which reliance was placed by the Division Bench, it was specifically recorded that in that case existence of jurisdiction of power of judicial review to strike down a clause in the contract was not in question and it was clarified that

same would have no application for the purpose of modification, alterations and additions of a term of the contract and that each case must be considered on its own facts. Here, as aforesaid, the real motive behind this petition is to seek restraint against encashment of Bank Guarantee which appears to have been already invoked. I have recently in ***GAIL (India) Ltd. Vs. Petroleum and Natural Gas Regulatory Board*** MANU/DE/3603/2015 dealt in detail with the aspect of maintainability of writ petition for interfering with Bank Guarantee and held the same to be not maintainable. Need is not felt to reiterate the reasoning here.

19. There is thus no merit in the petition.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

DECEMBER 15, 2015

bs/gsr

(corrected and released on 12th January, 2016)