THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Writ Petition No.27979 of 2008

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ORDER:

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This writ petition under Article 226 of the Constitution of India is filed seeking the following relief/s:

> '…**to issue a writ, order or direction more particularly one in the nature of Writ of Mandamus in declaring the 2nd respondent's action of passing the C.R.No.512 dated 29.09.2008 and subsequent notice Roc.3024/95-F2, dated - 12-2008 as arbitrary, contrary to law, unjust, illegal, in violation of principles of natural justice, in violation of Articles 21 and 300-A of the Constitution of India, set aside the same and consequently direct the 2nd and 3rd respondents not to take possession of the land to an extent of Ac.5.28 cents of land in Sy.No.D.61-1 of Ramchandrapuram Agraharam, Etukuru road, Guntur, Guntur district and pass such other order…**'
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> **[Reproduced verbatim]**

2. I have heard the submissions of the learned senior counsel for the writ petitioner and the learned Additional Advocate General appearing for the respondents. I have perused the material record.

3. The facts necessary for consideration, in brief, are as follows:

The 2nd respondent-Guntur Municipal Corporation intended to have an appropriate disposal mechanism of the industrial and domestic waste in the City of Guntur keeping in view the Municipal Solid Waste Management and Handling Rules, 2000 which were issued by the Government pursuant to the directions of the Ministry of Environment of Forest. Under the said Rules either the Corporation or an operator of a facility in that regard shall make arrangements for setting up waste processing and disposal facility including land fills in order to comply with the implementation of the programme. The 2nd respondent, therefore, took up the programme for the collection of municipal solid waste and had taken steps for prohibition of littering of municipal solid waste in the municipal corporation area. The 2nd respondent had also called for tenders. In response to the tenders called for by the 2nd respondent, three companies/concerns had filed tenders. The tender of the writ petitioner was accepted. The 2nd respondent had obtained permission from the Government of Andhra Pradesh *vide* G.O.Rt.No.51 MA dated 18.01.2001 and a resolution was passed by the Municipal Council in C.R.No.201/2001 dated 27.01.2001 and thereafter the writ petitioner had entered into an agreement dated 09.02.2001 with the 2nd respondent. The writ petitioner had initiated steps for starting the project to supplement the available resources for disposal of the municipal solid waste generated in and around the Corporation area and to make the same available to private entrepreneurs for manufacture of Refuse Derived Fuel pellets (RDF pellets) and co-products. The writ petitioner had agreed to take daily 270 metric tonnes of garbage. Further, the 2nd respondent also agreed to supply to the writ petitioner 281.40 Metric tonnes of garbage at a charge of Rs.10/- per metric tonne on the condition that the garbage has to be removed by the writ petitioner at its expenses. In furtherance of the purpose that is to be achieved, the land admeasuring Ac.5.28 cents situate in S.No.61-1 of Ramachandrapura agraharam, Etukuru road, Guntur District was given on lease for a period of 30 years by the 2nd respondent to the writ petitioner for the establishment of the above project on an annual rent equivalent to 5% of the value of the land as per the statistics of the Registration department as per G.O.Ms.No.51 MA dated 18.01.2001 and C.R.No.201 dated 27.01.2001 of the 2nd respondent. As per the agreement, the writ petitioner has to deposit Rs.2,00,000/- towards EMD and has to pay the rent in four quarterly instalments viz., in January, April, July and October every year. The 2nd respondent Corporation and the writ petitioner had also entered into a lease deed in respect of the aforementioned land. The said parties have further entered into another agreement dated 14.12.2004. As per the agreed terms, the Director (Technical) of the writ petitioner company had agreed to pay 50% of the expenses incurred by the Corporation for removing the Babul trees, levelling up the land, constructing the platform, laying out the approach road and making the land fit for use by the writ petitioner. The Corporation had removed the Babul trees and levelled up the land and formed the metal approach road by spending certain amounts and incurring certain expenditure. While so, the 2nd respondent Corporation had got registered notices issued to the writ petitioner company on 10.12.2005 and 18.04.2006 *inter alia* stating that the writ petitioner did not make a deposit of Rs.2,00,000/- towards EMD and that inspite of the Corporation spending an amount of about Rs.9.00 Lakhs for providing an approach road to the machinery and other facilities, the writ petitioner company did not show any progress in the work for the last 7 years and also failed to pay the rents due to the Corporation despite asking to pay the rents and to start the work. The Corporation had issued a notice in ROC. 3024/95-F2 dated -12-2008 further *inter alia* stating that there is imminent danger to the public health apart from the breach of public welfare activity because of the negligence on the part of the writ petitioner; and had accordingly levied an amount of Rs.10,00,000/- as penalty as per the terms of the agreement between the parties for violation of the terms of the agreement and the resolution of the Corporation. In the said notice, it is also stated that if the penal amount is not paid within 7 days action would be taken against the writ petitioner company in accordance with law. The said notice is now impugned in this writ petition.

3.1 To complete the narration of facts, it is also necessary to refer to the following further undisputed facts.

Alleging that the writ petitioner did not pay the aforementioned amounts to the 2nd respondent Corporation, the Corporation brought a suit in OS.No.73 of 2007 against the writ petitioner on the file of the Court of the learned Additional District Judge, Guntur for recovery of EMD, arrears of rent and 50% of the costs of the construction of the platform and CC road etcetera i.e., a total sum of Rs.39,55,239/- with interest and costs. The said suit was resisted by the defendant by filing a written statement. In that suit, the civil Court framed the following issues: '*1. Whether the plaintiff is entitled to claim Rs.2,00,000/- from the defendant towards EMD amount as prayed for? (2)*

Whether the defendant is liable to pay a sum of Rs.31,05,489/- towards damages for use and occupation of plaint schedule property from 9-2-2001 till the date of filing the suit? (3) Whether the plaintiff is entitled to claim Rs.4,99,500/- towards 50% of costs of platform and laying of approach road and levelling up the land and removal of Babul trees in the plaint schedule property? (4) Whether the plaintiff handed over possession of the land to the defendant only in the year 2004 and whether the plaintiff is entitled to claim any lease amount prior to 2004? (5) To what relief?' The trial court while answering issues 1, 3 and 4 had held that the Corporation is not entitled to forfeit the EMD which was already deposited by the writ petitioner. However, while answering issue no.2 partly in favour of the Corporation, the civil court held that the writ petitioner is liable to pay Rs.20,64,046/- and awarded interest at 6% per annum from the date of the suit till date of realisation on the said sum. In the first appeal preferred by the writ petitioner before this Court, this Court granted interim order of stay as follows: '**There shall be interim stay subject to the condition of the petitioner depositing a sum of Rs.9.00 lakhs (Rupees Nine Lakhs only) and costs within a period of eight weeks from today. On such deposit, the respondent is permitted to withdraw the same without furnishing any security.**' However, the writ petitioner did not comply with the said directions/conditions in the said orders of this court.

4. In this backdrop of facts, the case of the writ petitioner is this:

The lease of the land, which was initially granted for a period of 30 years is extendable for further period on the agreed terms and conditions. The petitioner had remitted EMD of Rs.2,00,000/- on 08.02.2001. Due to various reasons, the erection and commencement of project got delayed. The project was erected by the year 2003. By now the project is being run without any problems. The corporation issued a legal notice dated 11.08.2003 calling upon the writ petitioner to commence the project. A reply was sent explaining various problems and giving assertions that the project will be commenced as expeditiously as possible. The corporation did not mention about the non payment of EMD in the said notice. It is admitted that the writ petitioner company paid the EMD and it is also stated that if the petitioner company does not take up the erection of the project the same will be forfeited. In the civil suit also the trial court had held that Rs.2,00,000/- was deposited towards EMD. The officials of the 2nd respondent corporation along with the officials of the 3rd respondent/Municipal Health Officer threatened the Managing Director of the writ petitioner company and their men and had tried to evict the petitioner company from the project site. When a confrontation was made by seeking the reason for such forceful eviction it was stated that the 2nd respondent had passed a resolution dated 29.09.2008 ordering the writ petitioner company to pay Rs.10,00,000/-; and it was further stated that the notice which was impugned in the writ petition was issued cancelling the agreement and lease and further directing the 3rd respondent/Municipal Health Officer to take possession of the project. They had further stated that the writ petitioner company has to pay Rs.10,00,000/- towards fine. The 2nd respondent corporation had not issued any notice to the writ petitioner before passing a resolution dated 29.09.2008. The writ petitioner having made efforts secured the notice of the corporation after much difficulty. The allegations in the notice are that no EMD was paid and that the costs towards approach road and the amount due towards the royalty amount for garbage were not paid. The writ petitioner had paid the EMD. It was brought to the notice of the Corporation that the land which was allotted to the writ petitioner was a dump yard without any value and the fact that prices have gone up is not applicable to the writ petitioner; and the writ petitioner had promised to pay the lease rent as per the rate that was existing in 2001. The writ petitioner had also brought to their notice that he made a representation to the State to waive off the royalty amount that has to be paid at the rate of 10% per metric tonne of solid waste and that the said representation is pending with the Government for consideration. The action of the 2nd respondent in passing the resolution dated 29.09.2008 unilaterally cancelling the lease and in further directing the 3rd respondent to take possession of the site and the petitioner to pay the penalty is arbitrary and contrary to law. There are number of employees directly and indirectly involved in the functioning of the petitioner company and it is the only source of livelihood for the employees of the company. The action of the corporation in issuing the notice impugned is in violation of Articles 21 and 300-A of the Constitution of India. Hence the writ petition is filed.

5. Apart from the facts which are stated in the introductory portion of the order and the terms and conditions, which are agreed upon between the parties and which are reduced into writing in the agreements entered into between the parties, the specific case of the 2nd respondent corporation is as follows: "The writ petitioner company did not make a deposit of Rs.2,00,000/- towards EMD and also did not pay the rents and also the royalty at 10% per metric tonne of garbage and did not lift garbage at its own costs from the locality as directed by the municipal corporation. The writ petitioner did not complete the project within the period of 18 months from the date of allotment. Therefore, the 2nd respondent Corporation has become entitled to forfeit the EMD. The 2nd respondent corporation is constrained to issue legal notice to the writ petitioner, in the facts and circumstances, that is, (i) for non payment of EMD, (ii) for non payment of 50% of the expenses incurred by the 2nd respondent for making the land fit for the use by the writ petitioner company, (iii) for non establishment of dust proof electra precipitator system, binders and wet garbage processing facility at the factory site inspite of long lapse of time, (iv) for non submission of daily and weekly reports and also Calorific value of the pellets and transport vouchers of the pellets from Guntur to Vijayawada even after lapse of 18 months which was mentioned in the agreement, (v) in view of the complaints by several organisations and civil suits filed against the 2nd respondent Corporation complaining about the indiscriminate disposal of garbage in low laying areas situated around the city, (vi) the petitions filed before the District Legal Services Authority, Guntur, and (vii) several instructions of A.P Pollution Control Board regarding solid waste disposal. On account of the writ petitioner's failure to issue a reply and non implementation of the terms and conditions of the agreements between the parties and its further conduct in infringement of the terms and conditions of the agreement, the 2nd respondent corporation had issued further notices intimating the petitioner that the Corporation will take appropriate steps for recovery of damages, costs of construction etcetera from the petitioner. In fact, the writ petitioner issued a reply dated 24.04.2006 stating that there is no wilful and intentional breach of contract on the part of the petitioner and making a request for further time. Though the Corporation had waited all along with the hope that the writ petitioner would amicably implement the agreement, the petitioner has not chosen to do so. On account of the default of the petitioner to receive municipal solid waste, the people living in the Corporation limits area have been facing enormous health hazards. The machinery of the writ petitioner company is situated in the 2nd respondent's site since 09.02.2001 onwards. Hence, this writ petitioner is liable to pay the rents as per the terms of the lease agreement and the arrears work out to more than Rs.31 lakhs towards rent of the land. The petitioner has to pay damages also besides 50% of the expenses incurred by the municipal corporation. Therefore, the civil suit was filed. For all the aforesaid reasons, the impugned notice was issued after passing a resolution by the corporation. The civil suit was decreed. In the first appeal conditional stay orders were granted directing to pay Rs.9 lakhs and costs within 8 weeks from the date of the said order, but even that amount was not paid or deposited as directed by this Court. Having retained possession of the land and having not taken steps to fulfil the conditions, the petitioner had filed this writ petition. The petitioner had not complied with the interim orders passed by this court in the first appeal. The 2nd respondent being the local authority concerned with sanitary and hygienic conditions in the Corporation area has itself undertaken the work of disposal of the garbage at its own risk, but is unable to dispose of the same in a scientific manner in view of the lapses on the part of the writ petitioner. In the circumstances, the New and Renewable Energy Development Corporation of A.P limited, which is a body dealing with municipal solid waste HAD issued a tender notice dated 10.09.2015 for selection of development partners for setting up municipal solid waste and waste to energy processing plants in AP. The petitioner filed W.P.38218 of

2015 questioning the said tender notice insofar as its interest over the Vijayawada and Guntur municipal solId waste. The same is pending. The pendency of this instant writ petition is not referred to in the above said writ petition. The petitioner is indifferent to take any progressive steps. Hence the writ petition is liable for dismissal.

6. The learned counsel for both the parties while canvassing the respective pleaded cases have drawn the attention of this court to the terms and conditions of the agreements, the execution of which is undisputed. The learned senior counsel for the petitioner while drawing the attention of this court to the material documents contended that the writ petitioner company has established the project, though belatedly due to various unavoidable circumstances, and that it had successfully run the project for quite a number of years and that the documents like the demands/bills/receipts towards electricity consumption charges, the documents showing the meter readings issued by the A.P Transco, the gate passes showing the transportation of Fluff over a considerable period, the laboratory records like fuel analysis reports and the document showing transportation of Fluff from Guntur to Vijayawada, where the writ petitioner company is having another unit for generation of electricity from the RDF pellets, would show that the project was run for some time. He would also draw the attention of this court to the copies of the annual reports of the company for the years 2003-04, 2004-05, 2005-06 and 2006-07 and the figures therein regarding income from sale of power generated.

7. On the other hand, the learned Additional Advocate General while drawing the attention of the Court to the fact that the civil suit filed for recovery of arrears of rent and 50% of costs and expenditure incurred by the 2nd respondent corporation for making the land leased out to the writ petitioner fit for establishing the project was decreed by a competent civil court and that the writ petitioner even did not pay the Rs.9.00 Lakhs which was directed to be deposited by this court while granting conditional stay in the first appeal suit would further submit that, at the hearing, arguments were advanced on behalf of the writ petitioner to the effect that the Corporation and others are responsible for the delay in the commencement of the project while in-fact no such averments were made in the affidavit filed in support of the writ petition and that it is only stated in the said affidavit that only due to various reasons the erection and commencement of the project got delayed. He would further submit that in reply to the notices complaining that the project was not commenced, the writ petitioner had only sought time but did not commence the project and that even as per the averments in the writ petition the petitioner had only pleaded that he had made a representation to the State Government to waive off the royalty and that the petitioner had only sought time in regard to the payment of the lease amount by stating that the company had faced huge financial crisis and made a promise to pay the amount after duly resolving the dispute with regard to the penalty amount that was being levied upon the writ petitioner.

8. Relegating the question of maintainability of the writ petition to a later stage, it is necessary to deal first with the merits of the *lis* on the assumption that the writ petition is maintainable. From the facts and the submissions, it emerges that *prima facie* the dispute in regard to the amount due towards EMD, arrears of rent, 50% costs etcetera is a complex question of fact and over such factual controversy a competent civil Court which had seisin over the matter had already passed a decree and judgment partly decreeing the claim of the 2nd respondent Corporation. The first appeal is pending before this court and the writ petitioner company could not even pay Rs.9 Lakhs as per the condition imposed by this court while granting stay. Therefore, this Court need not further dilate on the said factual aspects. Since 2006 even according to the case of the petitioner, the project is not running. No valid reasons are forthcoming in the writ petition for not running the project. In the reply notice to the notices issued by the corporation, a request was made for some more time and it was stated that there is no wilful and intentional breach of contract on the part of the writ petitioner. *Prima facie* as per the findings and decree of the civil court a huge sum of Rs.20,64,046/- is payable. The writ petitioner company is not even in a position to pay a part of it. The grievance of the 2nd respondent Corporation is that on account of lapses on the part of the writ petitioner company and its failure to implement the terms and conditions of the agreements, the Corporation being the local authority concerned with the sanitary and hygienic conditions has itself undertaken the task of disposal of the garbage at its own risk but it is not able to dispose of the garbage in a scientific manner as required under solid waste management Rules. It is its further case that the New and Renewable Energy Development Corporation of A.P limited, which is a body dealing with solid waste management, had issued a tender notice dated 10.09.2015 for selection of development partners for setting up municipal solid waste and waste to energy processing facility/plants in Andhra Pradesh. The petitioner had already filed WP.No.38218 of 2015 questioning the said tender notice. The writ petitioner had not mentioned about the present writ petition in the aforementioned writ petition. Be that as it may.

8.1 As already noted, since several years (2006 or so), the writ petitioner is not running the project and the work under the project has come to a stand still. Neither the garbage is not being lifted/cleared nor 50% of the cost payable towards the expenditure incurred by the Corporation for making the land fit for use by the writ petitioner was paid nor was the annual rent equivalent to 5% of the value of the land was paid. Even the amount due towards the royalty in regard to garbage was not being paid from the inception. The petitioner had admittedly sought waiver of the royalty admittedly due and payable and the Government have not yet granted any such waiver as sought for by the writ petitioner. Thus, a huge amount in several lakhs of rupees was due and payable by the writ petitioner to the Corporation. Already, the trial Court decreed the suit partly in favour of the Corporation against the writ petitioner for a sum of Rs.20,64,046/- with subsequent interest and costs. The said decree and judgment though under challenge in the first appeal suit in AS.(SR).No.1420 of 2011, the writ petitioner admittedly did not pay Rs.9.00 Lakhs and costs within a period of eight weeks as directed in the orders of stay granted by this Court in ASMP.No.297 of 2011 filed in the said first appeal suit. The petitioner is *prima facie* not in a position to pay the amounts due. The petitioner having filed the writ petition in the year 2008 did not pursue any of its requests including the request for waiver of royalty and did not take any steps for restarting the project work which was stalled in the year 2006 and had woken up when the New & Renewable Energy Development Corporation of Andhra Pradesh Limited, issued a tender notice dated 10.09.2015 for selection of development partners for setting up municipal solid waste and waste to energy processing facility/plants in Andhra Pradesh and filed a writ petition in WP.No.38218 of 2015 questioning the said tender notice. Now the question is - whether the writ petitioner, in the facts and circumstances of the case, is entitled to seek indulgence of this court to grant a writ order as prayed for which is an equitable relief. The law is well settled that he who comes to equity must do equity and that he who comes to equity must come with clean hands. The petitioner had kept quiet for several years since the filing of this writ petition and is now showing interest in the project and is now further inclined to amicably settle the matter by seeking an opportunity to continue the project work on assignment of the same to him on fresh/revised terms and is intending to interdict the tender process, which is subject matter of the other writ proceeding. The legal maxim *vigilantibus et non domienntibus jura subveniunt* means the law helps those who are alert and not those who sleep on their rights. Delay defeats equities. The writ petitioner, which is *prima facie* liable to pay a huge sum of money to the Corporation which is an instrumentality of the State and which is not prepared to pay any part of the amount including the sum of Rs.9.00 Lakhs as per the conditional orders of stay granted in the first appeal suit filed by the writ petitioner, in the well considered view of this Court, is not entitled to seek the equitable relief by invoking the jurisdiction of this Court under Article 226 of the Constitution of India. Accordingly, this Court holds that the writ petition is not having merit and is liable for dismissal.

9.1 Before parting with the case it is necessary to deal with the contention in regard to maintainability of the writ petition and it is necessary to state that the learned Additional Advocate General contended that since complex factual controversy is raised in the writ petition and as such a controversy has to be resolved by examining the disputed factual aspect in detail, the writ petition is not maintainable and the proper forum is a civil Court and the proper remedy is a civil remedy. While answering the said contention, the learned counsel for writ petitioner relied upon the following decisions:

Firstly: In **Tata Cellular v. Union of India**[1] the relevant findings to which the attention of this Court is drawn are as follows:

> **It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.**
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> **Judicial quest in administrative matters has been to find that right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.**
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> **The duty of the court is to confine itself to the question of legality. Its concern should be:**
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> **1. Whether a decision-making authority exceeded its powers?**
>
> **2. committed an error of law**
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> **3. committed a breach of the rules of natural justice**
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> **4. reached a decision which no reasonable tribunal would have reached or**
>
> **5. abused its powers.**
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> **94. Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case, shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :**
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> **(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.**
>
> **(ii) Irrationality, namely, Wednesbury unreasonableness, (iii) Procedural impropriety.**
>
> **95. The above are only the broad grounds but it does not rule out additional of further grounds in courts of time. As a matter of fact,**

in R v. Secretary of State for the Home Department exparte Blind [1991] 1 AC 696 Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of nature and degree which requires its intervention".

Secondly: In **Godavari Sugar Mills Limited v. State of Maharashtra and others**[2] it was held that 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; and that 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 proceeding, in enforcement of the statutory functions of the State or its officers; and that a writ of Mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which a party claims a right; and that the aggrieved party seeking the refund has to approach the civil Court for claiming the amount, though the High Courts have the power to pass appropriate orders in exercise of the power conferred under Article 226 for payment of money; and that where the *lis* has a public law character or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of public law remedy under Article 226 of the Constitution will not be denied.

Thirdly: In Joshi Technology International INC v. Union of India and others[3] the Supreme Court, while holding that 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, had held that at the same time the discretion lies with the High Court which under certain circumstances can refuse to exercise such discretion**.** The Supreme Court also held that it also follows that under the following circumstances, ‘normally’, the court would not exercise such discretion:

> **(a) the Court may not examine the issue unless the action has some public law character attached to it.**
>
> **(b) 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.

(c) If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

(d) 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 the 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 practise 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 of the Constitution 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 the 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 of the Constitution 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 it 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 the 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 the 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.

Fourthly: In **ABL International Limited v Export Credit Guarantee Corporation of India Limited**[4] the Supreme Court having referred to earlier decisions had held as follows:

'It is clear from the above observations of this Court, once State or an instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14 then we have no hesitation that a writ court can

issue suitable directions to set right the arbitrary actions of the first respondent.'

Fifthly: In the decision in **State of Kerala & Ors v. M. K. Jose**[5]**,** the Supreme Court while referring to its earlier decision in **ABL International Ltd.** Wherein the following legal principles as to the maintainability of the writ petition as against a State or instrumentality of the State in cases arising out of a contractual obligation are noted:

> **(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 fact 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.**

While referring to the above principles, a reference was also made by the Court to the word of caution that was sounded, which is as under:

> **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* v. *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.**

In this cited decision, while referring to various authorities on the aspect under what circumstances in respect of contractual claim or challenge to violation of contract can be entertained by a writ Court, the Supreme Court had held that the interpretation of the terms of the contract of insurance depends upon facts of each case.

9.2 Following the ratios and having regard to the facts of the instant case, this Court finds that there are disputed questions of fact in the case on hand, and the adjudication of the *lis* requires entering into the realm of disputed questions of fact; therefore, this Court accordingly holds that the writ petition is not maintainable in view of the facts peculiar to this case and in view of the fact that a civil suit has already been filed and decreed and that this Court is having seisin over the matter in the first appeal suit pending on the file of this Court.

10. In the result, the Writ Petition is dismissed. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this writ petition shall stand closed.

M. SEETHARAMA MURTI, J

29th February 2016
Vjl

[1] 1994 (6) SCC 651
[2] (2011) 2 SCC 439
[3] (2015) 7 SCC 728
[4] (2004) 3 SCC 553
[5] (2015) 9 SCC 433