

THE HON'BLE SRI JUSTICE S.V.BHATT

WRIT PETITION No.33179 of 2017

ORDER:

Heard Sri S.M.Subhan for petitioner, the Assistant Government Pleader (Social Welfare) for 1st respondent and Sri Abu Akram for 2nd respondent.

The circumstances relevant for disposal of writ petition are as follows:-

The petitioner entered into an agreement for providing catering services for the academic year 2017-18 in the Schools established and run by 2nd respondent. The agreement is for the academic year 2017-18. In terms of the agreement, the 2nd respondent issued work order, dated 12.06.2017 in favour of petitioner. Petitioner alleges satisfactory discharge of contractual obligation and the 2nd respondent by accepting the mode and manner of obligation by petitioner, on 21.09.2017 issued proceedings according administrative sanction for an amount of Rs.64,34,489/-. While the matter stood thus, through the order impugned in the writ petition, the catering agreement between the petitioner and the 2nd respondent is cancelled. Hence, the writ petition.

Sri Subhan vehemently contends that the cancellation order dated 25.09.2017 is illegal and contrary to clause '12' of the agreement dated 01.08.2017 between the parties. According to

him, nothing, as agreed between the parties, was communicated to petitioner before cancellation and therefore, the order of cancellation is illegal and without jurisdiction.

Sri Abu Akram objects to the maintainability of writ petition under Article 226 of the Constitution of India and further contends that the 2nd respondent, having regard to exceptional circumstance in providing food to students, has taken the decision to cancel the agreement dated 01.08.2017. The agreement provides for arbitration. The 2nd respondent has already taken the consent of Hon'ble Mr. Justice P.L.N. Sharma (retired) to enter into and resolve the dispute between parties. As all the issues are now subject matter before the Hon'ble Arbitrator, he prays for dismissing the writ petition.

The maintainability of writ petition vis-à-vis contractual obligations is again the subject matter in *JOSHI TECHNOLOGIES INTERNATIONAL INC v. UNION OF INDIA AND OTHERS*¹, wherein the Hon'ble Supreme Court held as follows:-

67) Insofar as the argument of the respondents in the said case that writ petition on contractual matter was not maintainable unless it is shown that the authority performs a public function or discharges a public duty, is concerned, it was answered in the following manner:

“22. We do not think the above judgment in *VST Industries Ltd. (supra)* supports the argument of the learned counsel on the question of maintainability of the present writ petition. It is to be noted that *VST Industries*

¹ (2015) 7 SCC 728

Ltd. against whom the writ petition was filed was not a State or an instrumentality of a State as contemplated under Article 12 of the Constitution, hence, in the normal course, no writ Civil Appeal No. 6929 of 2012 Page 57 of 66 Page 58 could have been issued against the said industry. But it was the contention of the writ petitioner in that case that the said industry was obligated under the concerned statute to perform certain public functions, failure to do so would give rise to a complaint under Article 226 against a private body. While considering such argument, this Court held that when an authority has to perform a public function or a public duty if there is a failure a writ petition under Article 226 of the Constitution is maintainable. In the instant case, as to the fact that the respondent is an instrumentality of a State, there is no dispute but the question is: was first respondent discharging a public duty or a public function while repudiating the claim of the appellants arising out of a contract? Answer to this question, in our opinion, is found in the judgment of this Court in the case of *Kumari Shri Lekha Vidyarthi & Ors. vs. State of U.P. & Ors.* [1991] (1) SCC 212] wherein this Court held: "The impact of every State action is also on public interest. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters." 23. 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."

68) The Court thereafter summarized the legal position in the Civil Appeal No. 6929 of 2012 Page 58 of 66 Page 59 following manner: "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, Mumbai & Ors. [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 Civil Appeal No. 6929 of 2012 Page 59 of 66 Page 60 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: (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 legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to the Civil Appeal No. 6929 of 2012 Page 60 of 66 Page 61 contracts entered into by the State/public Authority with private parties, can be summarized as under: (i) At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness. (ii) State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations. (iii) 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. (iv) Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred. (v) Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or Civil Appeal No. 6929 of 2012 Page 61 of 66 Page 62 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 license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business. (vi) 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. (vii) 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. (viii) 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 Civil Appeal No. 6929 of 2012 Page 62 of 66 Page 63 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. (ix) 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. 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. Civil Appeal No. 6929 of 2012 Page 63 of 66 Page 64 (x) 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. (xi) 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.

The contention of the petitioner is that the respondents have not followed the procedure prescribed for terminating the contract.

This Court, without expressing a final view on the matter, for the present, is of the view that not only the objection now pointed out in the writ petition, but also any other step ancillary or incidental in discharge of respective obligations can be raised before the Forum agreed between the parties, ought not to take up parallel consideration by this Court and by the Arbitral Tribunal.

The writ petition is dismissed as not maintainable and the dismissal of the writ petition is not to be treated as this Court expressing a view or finding on the case of petitioner herein. The petitioner, if so advised, can raise all objections in the dispute now presented for arbitration for resolution. No order as to costs.

Miscellaneous petitions, if any, pending, shall stand closed.

S. V. BHATT, J

Dt: 02-11-2017
Prv

