

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.**

WRIT PETITION NO. 1413 OF 2017

Nirmal Software Services Pvt. Ltd.
A Company registered under the India Companies Act, 1956
having its registered office at S-48,
Bharatnagar, Amravati Road, Nagpur,
Through its Managing Director,
Dinesh Padmakar Pathak,
Age : 53 years, Occu. Service,
R/o. S-48, Bharatnagar, Amravati Road,
Nagpur. Petitioner...

Versus

1. Dr. Babasaheb Ambedkar Marathwada University,
Aurangabad, through its Registrar.
2. State of Maharashtra
Through Department of Education,
Mantralaya, Mumbai-32.
3. Balu Ananda Chopde,
Vice-Chancellor,
Dr. Babasaheb Ambedkar Marathwada University,
R/o. Official Bungalow of Vice-Chancellor,
Dr. Babasaheb Ambedkar Marathwada University Campus,
Aurangabad. Respondents...

.....
Mr Satyajit S. Bora, Advocate for the petitioner
Mr C. S. Kulkarni, AGP for respondent No. 2
Mr S. S. Thombre, Advocate for respondent No. 1 and 3
.....

**CORAM : PRASANNA B. VARALE &
MANISH PITALE, JJ.**

DATE : 18TH SEPTEMBER, 2018.

ORAL JUDGMENT (Per Prasanna B. Varale, J.) :-

1. Heard Mr Satyajit S. Bora, the learned counsel for the petitioner, Mr C. S. Kulkarni, the learned Assistant Government Pleader for respondent No. 2 and Mr S. S. Thombre, the learned counsel for respondents No. 1 and 3.

2. The petitioner is a private agency and it can be safely stated that the petitioner is a service provider agency. The petitioner challenges the communication issued by respondent - Dr. Babasaheb Ambedkar Marathwada University (hereinafter referred to as the “University” for the sake of brevity) dt. 18.05.2016, whereby the purchase order issued in favour of the petitioner is kept in abeyance. It is not in dispute that the petitioner entered into the Memorandum of Understanding (MoU) with respondent-University. The copy of MoU is placed on record. The said MoU between the parties is executed in the year 2012, and more particularly, on 20.10.2012. Perusal of the MoU clearly shows that, it includes a clause of arbitration and the same reads thus:

12 *ARBITRATION*

12.1 All and any disputes and claims arising out of or relating in any manner to this MOU or the breach, termination, non-performance, interpretation or validity

thereof, shall first be discussed in good faith by officers duly nominated for the purpose by each party, with a view to resolving the same.

12.2 All and any disputes and claims a aforesaid, which cannot be fully and satisfactorily resolved or settled by the parties as aforesaid, shall at the request of either party, be submitted at Aurangabad to arbitration. In such a case, a joint request by NSSPL and BAMU will be made to an eligible and competent person to ct as an Arbitrator. The appointment and the proceedings of arbitration will be subject to the provisions of Indian Arbitration & Conciliation Act, 1996 as amended from time to time. The cost of appointing the arbitrator shall be equally shared by the Parties herein.

3. Mr Bora, the learned counsel for the petitioner-Company, invited our attention to the various documents placed on record. Mr Bora, the learned counsel for the petitioner submitted that the petitioner developed a software on need basis and the issue was before the Management Council for consideration of handing over the complete software developed by the petitioner. There were suggestions and recommendations. Mr. Bora invited our attention to the meetings of the Management Council dt. 03.03.2016, 18.03.2016 and 23.03.2016 and submitted that the council members found the past performance of the petitioner satisfactory. Then Mr Bora invited our attention to the meetings of the Purchase Committee. The said committee was constituted under the Chairmanship of the Vice Chancellor and certain other professors, who were the members of the said committee. Resolution No. 3 was passed in the said meeting

whereby the Committee resolved to handover the IP rights in favour of the University. It will be useful to state that, in the meantime, the Deed of Amendment was executed between the parties on 07.04.2016. It would be again useful to refer to that, by the said Deed of Amendment, there was mutual agreement between the parties and same reads as under:

Both the parties mutually agree on 7th Day of April 2016 to amendment and change the said MoU and insert the following clause to the said MoU dated 20th Oct 2012 keeping the other terms and conditions unchanged. (emphasis supplied by us).

4. The clause no. 3.5 inserted in the MoU by way of Deed of Amendment in respect of the Intellectual Property Rights reads as follows:

3.5 Dr BAMU & NSSPL shall mutually decide, finalize and agree upon the Terms & Conditions including financial terms to handover the Intellectual Property Rights, Ownership Transfer to DR. BAMU as and when required and decided upon.

5. Our attention was also invited to a communication dt. 16.05.2016. It was submitted by Mr Bora that the software IPR with Source Code on Pen-drive was handed over to the official of the University namely the Director of B.C.U.D. It was further the submission of Mr Bora that, in view of the meeting of the Management Council, the decision of the Purchase Committee and communication dt. 16.05.2016, it was the reasonable expectation of

the petitioner that the respondent-University would place a purchase order with the petitioner and accordingly the petitioner would be entitled for his monetary benefits under the purchase order. But, to the surprise of the petitioner, the respondent – University, by communication dt. 18.05.2016, informed the petitioner that the subject purchase order is kept in abeyance till further orders. Learned counsel - Mr Bora vehemently submitted that, in the said communication, no reason is assigned for keeping the purchase order in abeyance. It was also the submission of Mr Bora that, the decision was taken unilaterally. He then submitted that a resolution was passed by the University and by the said resolution it was resolved to communicate the petitioner that the decision of purchasing the software is cancelled. He further submitted that, the decision of keeping the purchase order in abeyance was at the instance of the Vice Chancellor. He further submitted that the interference of the Vice-Chancellor is without any reason and sudden intervention of the Vice-Chancellor and an action of keeping the purchase order in abeyance is unsustainable.

6. Mr Thombre, the learned counsel appearing for University, by inviting our attention to the affidavit-in-reply vehemently submitted that the petition itself is not maintainable. It is stated in para 4 of the said affidavit-in-reply that there is a specific clause of

arbitration. It is further stated that, though purchase order was issued immediately, the same was kept in abeyance. Then Mr Thombre by inviting our attention to latter part of para 4 submitted that, the decision was taken keeping in view the interest of the University. It is stated in the affidavit-in-reply that, the University has decided to develop its own software and the University was of the opinion that instead of spending crores of rupees by purchasing a software module, it would be in the interest of University to develop the software on its own. Thus, Mr Thombre, the learned counsel for respondents No. 1 and 3 submitted that, the decision which was taken in the interest of University to save large amount of money cannot be termed with an allegation that the decision was arbitrary. Mr Thombre, thus submitted that, as the petitioner is having an efficacious alternate remedy to raise his grievance, if any in respect of monetary claims, and the petitioner, in such a situation, ought not to have approached this Court by filing the writ petition.

7. Mr Bora, the learned counsel, in support of his submission that filing of writ petition in this court is an efficacious remedy, relied on the judgments in the matter of Sunil Pannalal Banthia and Ors. Vs. City and Industrial Development Corpn. of Maharashtra Ltd. and Anr. reported in AIR 2007 SC 1529, Magma Agro Products Pvt. Vs. Maharashtra Industrial Development Corporation and Ors.

(Writ Petition No. 10014 of 2014, decided on 29.06.016) so also the judgment of this Court at Nagpur Bench in the case of **C-5 Facility and Security Services Vs. Bharat Sanchar Nigam Ltd.** reported in 2015(6) Mh.L.J. 647.

8. On considering the rival submissions and on perusal of the material on record, we are of the clear opinion that the petitioner is having an alternate and efficacious remedy of arbitration. Firstly, the MoU between the parties was amended and the amendment was only in respect of clause in relation to IP rights, whereas other terms and conditions arrived at between the parties were intact and remedy in the form of arbitration is available to the petitioner. The submission of Mr Bora relying on the judgment of the Apex Court in the matter of **Sunil Pannalal Banthia** (supra) that the petitioner committed no error in approaching this Court. We are not inclined to accept the submission of Mr Bora for the simple reason that it is settled position of law that though the petitioner can approach this Court invoking the extraordinary powers of this Court, but such invocation and powers would be in a limited sphere and such invocation of powers cannot be claimed as of right. If the judgment relied on by Mr Bora in the matter of **Sunil Pannalal Banthia** (supra) is considered, it clearly states about the distinguishing feature and that was a unilateral decision of a public authority in cancellation of allotment

of a plot to plot owner. It will be useful to refer to the relevant observations of the Apex Court and the same reads thus:

18. *Although, we were at one stage inclined to remit the matter to the High Court since the writ petition had not been considered on merits and had been dismissed on the existence of an alternate remedy by way of suit, after considering the submissions made on behalf of the respective parties, we have decided otherwise. We are inclined to accept Mr. Cama's submission that the facts of this appeal are different from those which have been earlier remitted to the High Court for re-consideration on merits and also for making a re-valuation. In the present appeal, we are only concerned with the question of law as to whether CIDCO had acted in excess of its jurisdiction and authority in cancelling the allotment made to the appellants on a unilaterally consideration that the allotment had been made in contravention of its rules and regulations and was thereby opposed to public policy and was illegal and void in terms of Section 23 of the Contract Act, 1872. No decision is required to be taken in the matter on facts, which could have merited an order of remand.*

9. Mr Bora also relied on the judgment of the Hon'ble Apex Court in the case of **Noble Resources Ltd. Vs. State of Orissa and Anr.** reported in **AIR 2007 SC 119**, wherein in para 11 it is observed thus:

11. *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.

10. In the present matter, the decision of the University is only in regard to keeping the purchase order in abeyance. It is not the case of the petitioner that the University subsequently issued some order in favour of some other candidates or agency. Even the judgment relied on by Mr Bora in the matter of **C-5 Facility and Security Services** (supra) is of no help to the petitioner though there cannot be any dispute on the proposition of law relied, but in the said judgment the Division Bench of this Court makes it very clear in para 14 that the powers in writ jurisdiction can be exercised by this Court in three contingencies, which are as follows:

- (i) where the Writ Petition seeks enforcement of any of the fundamental rights;
- (ii) where there is failure of principles of natural justice; or
- (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an act is challenged.

11. Insofar as first contingency is concerned, neither the submission of the petitioner that there is any infringement of the fundamental rights nor the third contingency is in picture. At the

most the petitioner's case only relate to second contingency. The submission of the counsel for the petitioner that, no opportunity of hearing was given to the petitioner and the decision taken and communicated to the petitioner was unilateral, but, as stated above the parties entered into an MoU. The MoU clearly refers to, that if any grievance is raised, same would be redressed through arbitration process. As such, we are of the opinion that this judgment is also of no help to the petitioner. Considering all these aspects, we are of the view that the petition is devoid of any merits and deserves to be dismissed. Accordingly, the petition is dismissed.

12. We further make it clear that, the petitioner is at liberty to avail of other remedies available to him under law, if so advised.

[MANISH PITALE]
JUDGE

[PRASANNA B. VARALE]
JUDGE