

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.Nos.97, 10109 & 295 of 2018

COMMON ORDER:

Since the contentions raised in these writ petitions are same and the issues that arise for consideration of this Court are also similar, this Court deems it appropriate to dispose of these writ petitions by way of this common order.

The facts and circumstances leading to filing of W.P.No.97 of 2018

2. In the tenders floated by the respondent authorities, the petitioner herein emerged as the lowest bidder for the work pertaining to "Investigation, Design, Execution and Construction of Second Tunnel with 9.2 M internal diameter for Pula Subbaiah Veligonda Project using Double Shield Tunnel Boring Machine i.e. from Kollam Vagu in foreshore of Srisaillam Reservoir upto Guntur-Kurnool Road to join into the Feeder Canal, including construction of Head Regulator, Approaches and Approach Channel Exit in Dornala Mandal, Prakasam District, Andhra Pradesh. The Superintendent Engineer, Construction Circle, Ongole, Prokasam District entered into Agreement No.10/2007-08, dated 21.06.2007 and the total value of the work being Rs.735.21 crores and the length of the Tunnel to be constructed by the petitioner being 18.838 Kms and the time for completion of the work being 60 months from the date of agreement i.e., by 20.06.2012 as per Clause 9.01 of the Instructions to the Bidders and Clause 24.1 of the General Conditions of Contract.

3. Initially, vide Memo No.15301/M&MI/R1/A1/2012, dated 20.07.2012, the State Government accorded permission to the Chief Engineer (Projects), Ongole/Second respondent herein to extend time up to 30.06.2014 and

subsequently vide Memo No.10604/Projects-II/2014, dated 26.07.2014 time for completion was extended till 30.06.2017. Thereafter, vide Memo No.589255/Projects-II/A1/2017-2 dated 27.10.2017, the State Government granted permission to the Chief Engineer to grant extension till 31.05.2019.

4. The Executive Engineer, VGP Division, Dornala vide Lr.No.EE/VGP/DNL/AEE/2000 M, dated 26.08.2017, requested the petitioner to gear up the progress of work within seven days from the date of receipt of the same and in response to the same, vide Ref.No.HCC-CPPL/HO/2017/61 dated 08.09.2017, petitioner herein submitted a reply to the Executive Engineer/fourth respondent herein. Thereafter, vide Proc.No.SE/CC(P)/OGL/DB/TO/ATO-R/W/20/1047 M, dated 09.12.2017, the Superintendent Engineer, Construction Area, Ongole/third respondent herein ordered deletion of part of the work from the contract of the petitioner ie., construction of Tunnel-II for a length of 8.037 Kms including Lining, Construction of Exit Channel and Link Canal and Exit of Velogonda Project Tunnels etc. Vide G.O.Ms.No.21, Water Resources (Projects-II) Department dated 22.03.2018, the State Government accorded permission to the Chief Engineer/Second respondent to delete the work from Kms.18.78 to recover Rs.0.34 crores from the petitioner and to sanction Rs.720.36 crores for the deleted work and to call for fresh tenders. Vide tender notification No.57/2017-18 dated 21.3.2018, the Superintending Engineer invited bids for the deleted portion. This writ petition, challenges the validity and the legal sustainability of the above proceedings.

The facts and circumstances leading to filing of W.P.No.10109 of 2018

5. In the tenders floated by the respondent authorities, the petitioner herein emerged as a lowest bidder for the work pertaining to the construction

of “Pula Subbaiah Veligonda Project” – Tunnel-1 – Package-1 – Construction of a Tunnel including Construction of Head Regulator and approach Channel of Veligonda Project in Prakasam district. The Superintending Engineer, Ongole, Prakasam district entered into Agreement No.VGP/2005-06 dated 20.8.2005 and the total value of the work being Rs.624.60 crores and the time for completion being 36 months from the date of agreement. Initially vide Memo No.28411/Maj.Irr.II/A2/2006-6 dated 29.9.2008 and subsequently vide Memos dated 11.7.2011, 20.7.2012, 26.7.2014 and 27.10.2017, the Respondent authorities extended time for completion of work and eventually, the Respondents granted extension till 31.8.2018. Vide memo dated 21.4.2017, a part of the work was deleted. By way of letters bearing No.EE/VGP/DNL/AEE dated 26.8.2017 and Lr.No.EE/VGP/DNL/AEE/T1/2017 dated 23.11.2017, the Executive Engineer, VGP Division, Dornala requested the petitioner herein to gear-up the work. In response to the same, petitioner herein on 8.9.2017 submitted a reply to the Executive Engineer, Dornala. Thereafter, vide proceedings No.SE/CC(P)/OGL/DB/TO/ATO-R/W/20/1047M dated 9.12.2017, the Superintending Engineer, Construction Circle, Ongole ordered deletion of part of the work from the contract of the petitioner herein i.e. “Construction of Tunnel-I works from Ch 15.200 Km for a length of 3.600 Km including lining with 0.30 m thick segments etc. Vide G.O.Ms.No.21 Water Resources (Projects-II) Department dated 22.3.2018, the State Government accorded permission to the Chief Engineer to delete the said work from the petitioner’s contract and to call for fresh tenders. Vide tender notification No.57/2017-18 dated 21.3.2018, the Superintending Engineer invited bids for the deleted portion. This writ petition, challenges the validity and the legal sustainability of the above proceedings.

The facts and circumstances leading to filing of W.P.No.295 of 2018

6. In this writ petition also, Proceedings No.SE/CC(P)/OGL/DB/TO/ATO-R/W/20/1047M dated 9.12.2017 which are impugned in W.P.No.10109 of 2018 are under challenge to the extent of taking over machinery. According to the petitioner, it is a Consortium/Association of Persons (AOP) formed for the purpose of executing the construction work in respect of Tunnel No.1. It is further stated that the State Government approved allotment of 50% of the work in respect of Tunnel No.1 to the petitioner herein vide Memo dated 9.5.2008. It is further stated that the equipment and machinery including Tunnel Boring Machine (TBM) is owned absolutely and exclusively by the petitioner and the asset value of the petitioner's machinery which includes TBM and its accessories other plant and machinery etc., is Rs.250 crores. The other facts mentioned above in respect of W.P.No.10109 of 2018 hold good in this writ petition also.

7. Counter affidavits deposed by the Superintendent Engineer is filed, denying the allegations and averments made in the affidavits filed in support of the writ petition and in the direction of justifying the impugned action and a reply is also filed by the writ petitioner.

8. Heard Sri C.V.Mohan Reddy, learned Senior Counsel, representing Sri Karthik Pavan Kumar, learned counsel for the writ petitioner in W.P.No.97 of 2018, Sri D.Prakash Reddy, learned Senior Counsel, representing Sri Avinash Desai, learned counsel for the petitioner in W.P.No.10109 of 2018 and Sri R.Raghunandan, learned Senior Counsel representing Sri J.N.Bhushan, learned counsel for the petitioner in W.P.No.295 of 2018 and the learned Advocate General for the State of Andhra Pradesh for the respondents apart from perusing the material available before the Court.

9. Submissions/contentions of learned Senior Advocates appearing for writ petitioners

(1) No prior notice to show-cause, after the State Government granted extension vide Memo dated 27.10.2017 was issued to the petitioners and the said action on the part of the respondent authorities is a patent violation of the principles of natural justice.

(2) The explanations dated 08.09.2017 submitted by the petitioners in response to the notices dated 26.08.2017 and 23.11.2017 issued by the Executive Engineer were not at all considered, as such impugned action is a result of total non-application of mind.

(3) Even before the orders of the State Government vide G.O.Ms.No.21, dated 22.03.2018 according permission to the Chief Engineer to delete the work, the Superintendent Engineer/third respondent herein passed the impugned orders on 09.12.2017, as such, the said order is without jurisdiction and the State Government has no jurisdiction to rectify such an order passed by the Superintendent Engineer.

(4) In view of the observations of the Chief Engineer as reflected in G.O.Ms.No.649, dated 03.10.2015 that there was no delay on the part of the petitioner, the impugned action is untenable and unsustainable.

(5) If the petitioner in W.P.No.97 of 2018 is permitted to complete the work, the subject deleted work can be completed at the cost of 574.05 crores and if not the Government is required to shell down 720 crores for which the first respondent State Government granted administrative sanction vide notification dated 21.03.2018 and the said action is not in the interest of the public also.

(6) The action of the respondents in seeking to take over the machinery of the petitioner is without jurisdiction and not authorised under APDSS or the conditions of the Agreement.

(7) Once the Government granted extension by way of Memo dated 27.10.2017, the earlier proceedings of the subordinate authorities are of no consequence.

(8) The Superintendent Engineer has no jurisdiction to pass the impugned order and as per Clause 60 (C) of APDSS, Executive Engineer alone is competent and there is a patent violation of Clause 61 of APDSS also.

To bolster his submissions and contentions, learned Senior Counsel take the support of the Judgments of the Hon'ble Apex Court in *KISAN SAHKARI CHINI MILLS LIMITED AND OTHERS v. VARDAN LINKERS AND OTHERS*¹, *ABL. INTERNATIONAL LTD. AND ANOTHER v. EXPORT CREDIT GUARANTEE CORPORATION OF INDIA LTD AND OTHERS*², *FOOD CORPORATION OF INDIA AND ANR v. M/S. SEIL LTD. AND ORS*³, *ZONAL MANAGER, CENTRAL BANK OF INDIA v. DEVI ISPAT LIMITED AND OTHERS*⁴, *STATE BANK OF ORISSA AND ANOTHER v. MAMATA MOHANTY*⁵, *EAST* AND the judgment of the Bombay High Court in *WEST INSURANCE CO. LTD., v. MRS.KAMALA JAYANTILAL MEHTA*⁶ and the judgment of this Court in W.P.No.4672 of 2017.

¹ (2008) 12 SCC 500

² (2004) 3 SCC 553

³ AIR 2008 SC 1101

⁴ (2010) 11 SCC 186

⁵ (2011) 3 SCC 436

⁶ AIR 1956 BOM 537

10. Submissions/contentions of the learned Advocate General:

(1) There is no illegality nor there exists any procedural infirmity in the impugned action and in the absence of the same, the impugned action is not amenable for any judicial review under Article 226 of the Constitution of India.

(2) In view of abnormal delay on the part of the petitioner in execution of the work, the respondents are perfectly justified in resorting to the impugned action of deleting parts of the works with an intention to complete the work expeditiously in public interest.

(3) As per Condition No.11 of the Instructions to Bidders, all promotions/clearance/approvals are to be processed and obtained by the firm only on its own and as an agency the department will initiate proposals and the department is a facilitating agency. Therefore, the delay in obtaining clearance from the Ministry of Environment and Forests cannot be attributed to the department and the petitioner alone is solely responsible for the same.

(4) The disputed questions of facts cannot be gone into under Article 226 of the Constitution of India and appropriate forum for the petitioner is a competent civil Court under Clause 23 of the General Conditions of Contract.

(5) As per Clause 111 General Conditions of Contract, the contractor accepted all difficulties in execution of work, as such, the justification sought to be offered by the petitioner herein cannot be accepted.

(6) As per Clause 1.1 of the Instructions to the Bidders the employer in the instant case is the Superintendent Engineer and as per Clause 26.2 r/w Clause 60 of APDSS, it is open for the Superintendent Engineer to take action.

(7) The contention of the petitioners that the explanation was not taken into consideration by the respondents cannot be accepted in view of the reasons assigned in the order dated 09.12.2017.

(8) After prolonged correspondence only the respondent authorities ordered deletion of a part of the work and earlier on a number of occasions the respondent authorities periodically requested the petitioner herein to gear up the work and to complete the same.

(9) The contract value includes cost of the machinery, as such the contention that the machinery cannot be taken over cannot be sustained.

In support of his submissions and contentions, learned Advocate General places reliance on the judgments of the Hon'ble Apex Court in *JOSHI TECHNOLOGIES INTERNATIONAL INC v. UNION OF INDIA AND OTHERS*⁷, *STATE OF KERALA AND OTHERS v. M.K.JOSE*⁸, *SYNDICATE BANK v.R.VEERANNA AND OTHERS*⁹, *STATE OF GUJARAT AND OTHERS v. MEGHJI PETHRAJ SHAH CHARITABLE TRUST AND OTHERS*¹⁰, *PURAVANKARA PROJECTS LTD. v. HOTEL VENUS INTERNATIONAL AND OTHERS*¹¹.

11. The sum and substance of the case of the petitioners in these writ petitions, as advocated by the learned Senior Advocates representing the counsel for the petitioners, is that the impugned action on the part of the respondent authorities in deleting a part of the works from the works contracts allotted to the petitioners is highly illegal, arbitrary, unreasonable, without jurisdiction and violative of the principles of natural justice and contrary to the material available on record.

⁷ (2015) 7 SCC 728

⁸ (2015) 9 SCC 433

⁹ (2003) 2 SCC 15

¹⁰ (1994) 3 SCC 552

¹¹ (2007) 10 SCC 33

12. On the contrary, the case of the respondents, as advocated by the learned Advocate General for the State of A.P appearing for the respondents, is that there is no illegality nor there exists any procedural infirmity in the impugned action and in the absence of the same, the questioned action is not amenable for any judicial review under Article 226 of the Constitution of India and that the writ petition is not maintainable as the subject matter is a contractual matter; that despite a number of opportunities given, the petitioners herein did not accelerate the works and as the subject works are the prioritised works, the authorities are perfectly justified in resorting to the impugned action of deletion of part of the works.

13. Since there is a preliminary objection from the respondents about the maintainability of the writ petitions, this Court deems it appropriate and apposite to deal with and answer the said issue first in the light of the facts and circumstances of the case and the principles and para-meters laid down in various judgments sought to be pressed into service by the learned counsel for both the sides before going into other aspects of the matter.

14. In W.P.No.4672 of 2017, while dealing with the issue pertaining to termination of contract by a subordinate authority during the currency of the extension granted by the State Government, this Court entertained the writ petition and found fault with the impugned action.

15. In the case of *ZONAL MANAGER, CENTRAL BANK OF INDIA (supra 4)*, the Hon'ble Apex Court ruled at paragraph 28 that if the instrumentality of the State acts contrary to public good, public interest, unfairly, unjustly, unreasonably, discriminatorily and in violation of Article 14 of the Constitution of India, the writ petition is maintainable in contractual matters also and the Writ Court can exercise its jurisdiction.

16. In the case of *FOOD CORPORATION OF INDIA AND ANR (supra 3)*, the Hon'ble Apex Court had taken the same view in favour of the maintainability of the writ petition.

17. In the case of *ABL. INTERNATIONAL LTD. AND ANOTHER (supra 2)*, the Hon'ble Apex Court at paragraphs 27, 28 and 53 held as under:

“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 v. Registrar of Trade Marks, Mumbai and Ors.* :AIR1999SC22 . 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.

52. On the basis of the above conclusion of ours, the question still remains why should we grant the reliefs sought for by the

appellant in a writ petition when a suitable efficacious alternate remedy is available by way of a suit. The answer to this question in our opinion, lies squarely in the decision of this Court in the case of Shri Lekha Vidyarthi (supra) wherein this court held :

"The requirement of Article [14](#) should extend even in the sphere of contractual matters for regulating the conduct of the State activity. Applicability of Article [14](#) to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, the State cannot thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article [14](#) in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more. The personality of the State, requiring regulation of its conduct in all spheres by requirement of Article [14](#), does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirement of Article [14](#) and contractual obligations are alien concepts, which cannot co-exist. The Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. Therefore, total exclusion of Article [14](#) - non-arbitrariness which is basic to rule of law from State actions in contractual field is not justified. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals. x xx

Unlike the private parties the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. 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. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes tailing 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. However, to the extent challenge is made on the ground of violation of Article [14](#) by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article [14](#). To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article [14](#) of non-arbitrariness at the hands of the State in any of its actions.

53. From the above, it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual constitutional or statutory obligations, it really acts contrary to The constitutional guarantee found in Article [14](#) of the Constitution. Thus if we apply the above principle of applicability of Article [14](#) to the facts of this case, then we notice that the first respondent being an instrumentality of State and a monopoly body had to be approached by the appellants by compulsion to cover its export risk. The policy of insurance covering the risk of the appellants was issued by the first respondent after seeking all required information and after receiving huge sums of money as premium exceeding Rs. 16 lacs. On facts we have found that the terms of the policy does not give room to any ambiguity as to the risk covered by the first respondent. We are also of the considered opinion that the liability of the first respondent under the policy arose when the default of the exporter occurred and thereafter when Kazakhstan Government failed to fulfil its guarantee. There is no allegation that the contracts in question were obtained either by fraud or by misrepresentation. In such tactual situation, we are of the opinion,

the facts of this case do not and should not inhibit the High Court, or this Court from granting the relief sought for by the petitioner.”

18. In the case of *UNION OF INDIA AND OTHERS v. TANTIA CONSTRUCTION PRIVATE LIMITED*¹², the Hon'ble Apex Court held that the Constitutional powers vested in the High Courts and the Supreme Court cannot be fettered by any alternative remedy and the injustice whenever and wherever, it takes place, has to be struck down as an anathema to the Rule of Law and the provisions of the Constitution and the Apex Court confirmed the view of the High Court in favour of maintainability of the writ petition.

19. In the case of *UTTAR PRADESH STATE BRIDGE CONSTRUCTION CORPORATION LIMITED v. BANGALORE DEVELOPMENT AUTHORITY AND ORS*¹³, a Division Bench of Karnataka High Court at paragraphs 30, 31, 61 and 62 held as follows:

“30. Since the respondent is an instrumentality of the State, it was bound to observe the obligation cast on it by virtue of Article 14 of the Constitution, even in regard to contractual matters. In the case of Kumari Shrilekha Vidyarthi, by the learned Senior Counsel Sri Shantharaju for the appellant, the Apex Court dealing with the requirement of Article 14 in the sphere of contract entered into by the State, has laid down the following proposition of law:

"The requirement of Article 14 should extend even in the sphere of contractual matters for regulating the conduct of the State activity. Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, the State cannot thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed herein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract

¹² (2011) 5 SCC 697

¹³ 2005 (3) ARBLR254 (Kar)

without anything more. The personality of the State, requiring regulation of its conduct in all spheres by requirement of Article [14](#), does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirement of Article [14](#) and contractual obligations are alien concepts, which cannot co-exist. The Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the preamble. Therefore, total exclusion of Article [14](#)-non-arbitrariness which is basic to rule of law from State actions in contractual field is not justified".

It was observed by the Apex Court in the above case as under:

"28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article [14](#) and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public elements for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article [14](#).

xxx xxx xxx".

36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims

or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you every so high, the laws are above you'. This is what men in power must remember, always".

31. If we test the action of the respondent-BDA in the light of the above said decision as regards the State action even in the field of contractual matters, as laid down by the Apex Court, the inescapable and inevitable conclusion to be drawn in the instant case is that, the respondent having agreed to all the changes and suggestions made by the appellant-Corporation, and having given its approval by letter dated 15-2-2005, could not have turned around and stabbed the appellant-Corporation by withdrawing all the concessions and issuing notice of termination of contract even without offering reasonable opportunity to the appellant to put in its say in the matter. There is substance in the appellant's contention that nothing but arbitrariness is writ large in the action of the respondent in withdrawing the concession and rescinding the contract. Hence, having regard to the totality of the circumstances of the case, in the light of the correspondence between the parties, we are of the considered opinion that the learned Single Judge, having rightly taken the view that the action of the respondent appears to be arbitrary and may not stand the test of scrutiny under Article 14 of the Constitution, erred in holding that there is no arbitrariness in the action of the respondent-BDA. With due respect, we say that the learned Single Judge committed an error in taking the contrary stand, when on the face of it, the action of the respondent amounts to nothing but arbitrariness writ large and unfair and cannot be termed as just and consequently violative of Article 14 of the Constitution. Therefore, we respectfully disagree with the view taken by the learned Single Judge that there is no arbitrariness in the action taken by the respondent. Hence, we have no hesitation in answering point No. 1 in the affirmative.

61. Having regard to the totality of the circumstances in the cases on hand, we are at a loss to understand as to why the respondent, being an instrumentality of the State, did not think of the consequences of its action and its impact on the public at large, leave alone the escalation of the cost due to raise in price of materials. Every action of the State and its instrumentalities should

be aimed at securing the welfare of the people and as 'Jeremy Bentham' has put it, the object of every action of the State should be to secure maximum happiness of the maximum number of people. Seen in this light, the respondent, by its own arbitrary and unreasonable stand, has terminated the contracts during midstream and this has resulted in great inconvenience being caused to the public.

62. The work that is entrusted to the appellant-Corporation is not something which every Tom, Dick and Harry can do, but it requires specialised knowledge and expertise which skills are to be found in the appellant-construction company and hence, the respondent ought to have thought over the impending consequences of its action. Suffice to say that changing the contractor in matters like this, is not like changing the clothes.”

20. Coming to the judgments cited by the learned Advocate General. In the case of *PRABHA ARORA AND ANOTHER v. BRIJ MOHINI ANAND AND OTHERS*¹⁴, the issue that fell consideration before the Hon'ble Apex Court was with regard to an alteration/modification of the terms of contract and the Apex Court held that the doctrine of fairness cannot be invoked to amend, alter or vary the express terms of the contract between the parties and that the tender terms are contractual and it is the privilege of the Government which invites its tenders and the Courts do not have the jurisdiction to judge on as to how the tender terms to be framed. In the considered opinion of this Court, the said decision of the Hon'ble Apex Court would not render any assistance to the case of the respondents in the absence of such contingencies of said nature in the present case.

¹⁴ (2017) 10 SCC 53

21. In the case of *STATE OF GUJARAT AND OTHERS v. MEGHJI PETHRAJ SHAH CHARITABLE TRUST AND OTHERS*¹⁵, the Hon'ble Apex Court at paragraph 22, held as under:

"22. We are unable to see any substance in the argument that the termination of arrangement without observing the principle of natural justice (audi alteram partem) is void. The termination is not a quasi-judicial act by any stretch of imagination; hence it was not necessary to observe the principles of natural justice. It is not also an executive or administrative act to attract the duty to act fairly. It was - as has been repeatedly urged by Sri Ramaswamy - a matter governed by a contract/agreement between the parties. If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, e.g., where the matter is governed by a non-statutory contract. Be that as it may, in view of our opinion on the main question, it is not necessary to pursue this reasoning further."

22. In the case of *STATE OF KERALA AND OTHERS v. M.K.JOSE*¹⁶, the Hon'ble Apex Court at paragraphs 12 to 14 held as under:

"12. As the factual narration would reveal, the Respondent has been invoking the jurisdiction of the High Court Under Article 226 of the Constitution on various occasions challenging every action which pertain to extension of time, denial of revised estimate by the State Government and many other facets of that nature and the High Court, we must say, has been generously passing orders for consideration by the appropriate authority, for grant of opportunity of being heard to the contractor and to consider his representation in accordance with law. This kind of orders in a contractual matter, in our considered view, is ill-conceived. They not only convert the controversy to a disturbing labyrinth, but encourage frivolous litigation. The competent authority might have mentioned that more than 50% work remained to be done but that should not have prompted the Appellate Bench hearing the intra-court appeal to appoint a Commission of two Advocates and

¹⁵ (1994) 3 SCC 552

¹⁶ (2015) 9 SCC 433

granting them liberty to take assistance of a competent Engineer. As the report would show, the Commission of two Advocates have taken assistance of a retired Assistant Executive Engineer and submitted the report. Though, learned Counsel for the State had not objected to the same, yet we really fail to fathom how a writ jurisdiction can be extended to cause a roving enquiry through a Commission and rely on the facts collected without granting opportunity to the State to file objections to the same and in the ultimate eventuate, cancel the order of termination of contract. What precisely was the quantum of work done and whether there had been a breach by the owner or the contractor, are required to be gone into by the appropriate legal forum.

13. A writ court should ordinarily not entertain a writ petition, if there is a breach of contract involving disputed questions of fact. The present case clearly indicates that the factual disputes are involved. In *State of Bihar v. Jain Plastics and Chemicals Ltd.* : (2002) 1 SCC 216, a two-Judge Bench reiterating the exercise of power Under Article 226 of the Constitution in respect of enforcement of contractual obligations has stated:

It is to be reiterated that writ petition Under Article 226 is not the proper proceedings for adjudicating such disputes. Under the law, it was open to the Respondent to approach the court of competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion Under Article 226.

In the said case, it has been further observed:

It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter-affidavits, but that would hardly be a ground for exercise of extraordinary jurisdiction Under Article 226 of the Constitution in case of alleged breach of contract.

Whether the alleged non-supply of road permits by the Appellants would justify breach of contract by the Respondent would depend

upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs.

14. In *National Highways Authority of India v. Ganga Enterprises* : (2003) 7 SCC 410, the Respondent therein had filed a writ petition before the High Court for refund of the amount. The High Court posed two questions, namely, (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition is maintainable in a claim arising out of breach of contract. While dealing with the said issue, this Court opined that:

It is settled law that disputes relating to contracts cannot be agitated Under Article 226 of the Constitution of India. It has been so held in the cases of *Kerala SEB v. Kurien E. Kalathil* : (2000) 6 SCC 293, *State of U.P. v. Bridge and Roof Company (India) Ltd.* : (1996) 6 SCC 22 and *Bareilly Development Authority v. Ajai Pal Singh*: (1989) 2 SCC 116. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr. Dave, however, relied upon the cases of *Verigamto Naveen v. Govt. of A.P.* : (2001) 8 SCC 344 and *Harinder Singh Arora v. Union of India* : (1986) 3 SCC 247. These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed.”²⁰. In the above said judgment, the Hon’ble Apex court found fault with the order of the High Court directing appointment of Commissioner.

23. In the case of *JOSHI TECHNOLOGIES INTERNATIONAL INC (supra 7)*, the Hon’ble Apex Court at paragraphs 54, 56, 69 and 70, held as follows:

“54. Let us presume that there was such an intention. In fact, it is so stated in the three letters dated 17-06-2005, 11-04-2007 and 28-04-2008 which are written by MoPNG and not disowned by it. Still such an intention would not make any difference and for this purpose we again revert back to Article 32 which has already been reproduced above. Not only prior understanding between the parties stood superseded as mentioned in Article 32.1, Article 32.2 which is crucial to answer this question, bars any amendment, modification etc. to the said contract except by an instrument in writing signed by all the parties. Thus, unless Respondents agree to amend, modify or varied/supplemented the terms of the contract, no right accrues to the Appellant in this behalf.

56. 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.”

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:

(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 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 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 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.

(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.”

24. It is very much evident from a reading of the above said judgment that paragraph 70 (vii) would come to the rescue of the petitioners herein on the facts of the case. A reading of the above said judgments further would make it abundantly clear that there is no absolute bar on the maintainability of the writ petition in the contractual matters also.

25. In this context, it may also be appropriate to refer to the judgments in the case of *MEKASTER TRADING CORPORATION v. UNION OF INDIA (UOI) AND ORS*¹⁷, the Delhi High Court, at paragraphs 28 to 33, held as follows:

“28. After elaborate statement of law on the point, let us apply the same to the facts of this case. The proposition that impugned order, which visits the petitioner with civil and/or evil consequences had to be supported by reasons, was not even

¹⁷ 106 (2003) DL TS73

contested by the respondents. The argument proceeded on the basis that such an order had to be a speaking order. While petitioner contended that the impugned order was not speaking, this was stoutly disputed by the respondents and the learned Additional Solicitor General contended that impugned order was a reasoned order. It is for this reason that to test this argument, I have stated elaborately contents of the show cause notice, the main defense of the petitioner in their twin replies and the impugned order to blacklist. No doubt, in the show cause notice detailed statement of imputation and breaches on the part of M/s. Barin as well as the petitioner are made. However, the replies of the petitioner are equally elaborate and petitioner sought to explain its version in an attempt to meet each others allegation contained in the show cause notice and thereby contending that petitioner was not at fault and proposed action was not warranted. Whether the contention raised by the petitioners in their replies are considered and addressed, is the main question? Perusal of the impugned order shows that after making recital of the events which transpired after the show cause notice, i.e. filing of replies by the petitioner, giving of hearings to both parties who explained their respective cases, the penultimate para records that case has been examined and heard and the sum and substance of the allegation made against the petitioner was that petitioner could not fulfill its contractual obligation as Indian agent and replies submitted by the petitioner as well as oral representation made by them during hearing of the case have not been found convincing. All the arguments of the petitioners are brushed aside by the following utterances "the reply submitted by them vide their letters dated 18.8.2001 and 6.2.2002 and oral representation by them during hearing of the case on 4.3.2002 have not been found convincing. The available evidence does not reveal that the firm has fulfilled its contractual obligations."

29. Passing the order in such a slip shod manner which has the serious effect of blacklisting the petitioner for a long period of 5 years is certainly not act of good administration.

30. It is abundantly clear that the aforesaid summation cannot be called as "reasons" in support of the order. It can, at best, be termed as conclusion. Apart from this conclusion there is nothing in the order to indicate any supportive reason. Thus, there is no

indication in the order as to what are the elements which persuaded the competent authority to reject the contentions of the petitioner. The requirement that the reasons must meet the substance of the principle argument that the competent authority was required to consider is clearly lacking. No link between the material on which conclusions are based and the actual conclusion drawn is based, is found. If that has remained at the back of the mind of the authority passing the order, and has not surfaced on the records of the case, the ingredients of a reasoned order are not met. Reading of such an order would naturally not satisfy the aggrieved party's desire to know as to why decision was reached and what was the justification in rejecting his point of view. It would harbour the feeling that the authority proceeded with the matter with closed mind, whatever is stated in the show cause notice is final and giving of opportunity to show cause was empty formality as the defense was rejected summarily by labelling the same as 'not convincing'. It has to be emphasised that reasons for a decision are distinct from the conclusions recorded in the order. Apart from repeating that the petitioner had not fulfilled its contractual obligation as Indian Agent which was stated in the show cause notice (may be in detail), what was required was to at least indicate in a concise manner as to why the defense of the petitioner was unconvincing.

31. The Supreme Court in [State of Gujarat v. P. Raghav](#), quashed the order of the Municipal Commissioner, almost in identical circumstances, on the ground that he did not give any reason for his conclusion. That was a case where the Collector had passed order dated 2.7.1960 granting permission to the respondent to use some land in Survey No. 417 for non-agricultural purposes. The Municipal Committee challenged that order by approaching the Commissioner and requesting the Commissioner to exercise powers under Section 211 of the Bombay Land Revenue Code, 1879. The Commissioner noted the objections of the Municipality and after reciting the objections and the arguments of the learned counsel for the petitioner and after inspecting the site, observed:-

" From this inspection the contentions of the Municipality as to the existence of the various roads as well as the nature of the Kharaba land have been proved beyond doubt.

In the light of the above arguments as well as the site inspection and the papers of the case, I set aside the order of the Collector granting N.A. Permission. I consider, on weighing all evidence cited above, that the land does not belong to Shri Raghav Natha."

This was the order which was challenged by the respondent by filing writ petition in the High Court which was allowed and one of the grounds taken was that the order was without any reasons. State of Gujarat appealed to the Supreme Court. Dismissing the appeal the Apex Court observed as under:-

"13. We are also of the opinion that the order of the Commissioner should be quashed on the ground that he did not give any reasons for his conclusions. We have already extracted the passage above which shows that after reciting the various contentions he baldly stated his conclusions without disclosing his reasons. In a matter of this kind the Commissioner should indicate his reasons, however briefly, so that an aggrieved party may carry the matter further if so advised."

32. Although this Court not concerned with the merit of a decision, but decision-making process, what is required to be noticed is that the petitioner had, in his replies, made some significant submissions. It was pointed out that even when there was some technical deviations in the material supplied by M/s. Barin, it did not amount to a deviation and flaw but was instead an improvement and that was stated by none else but the respondents themselves in earlier proceedings when award of this contract was challenged by third party and that too by filing an affidavit. It has also been noted that initially when the inspection team had carried out inspection at works of M/s. Barin, Italy from 17.6.1996 to 21.6.1996 it issued inspection advise date 20.6.1996, inter alia, observing that the equipment was technically acceptable from T.E. parameters and parties' working point of view. Even where it was rejected subsequently by DGS&D, the purchaser viz. respondent No. 2 was satisfied with the equipment and thus, there was difference of opinion between two authorities. What is sought to be highlighted is that defense of the petitioner was not a sham

which deserved this kind of contemptuous/summary treatment. In order to show that due consideration is given to such submissions, it was incumbent upon the authority to at least indicate briefly in the order as to why these contentions of the petitioner did not cut any ice with the competent authority. It may be that there would be good reasons to reject these contentions but that should be discernible from the impugned order itself. It is trite law that when authority has omitted to give reasons in the impugned order such a deficiency cannot be supplied by the State by adducing sufficient ground therefore when the validity of the order is challenged ([See Collector of Monghyr v. Keshav Prasad](#),). In the instant case I am of the considered view that the competent authority has not given any reason for his conclusion, namely, as to why the reply and submissions of the petitioner were unconvincing. Such an order cannot stand judicially scrutiny. This order is accordingly set aside. Writ petition stands allowed and rule is made absolute.

33. However, it would not preclude the respondents to pass fresh order in consonance with law and after giving reasons in support of its order.”

26. In the case of *THE SIEMENS ENGINEERING & MANUFACTURING CO. OF INDIA LTD. v. THE UNION OF INDIA AND ANOTHER*¹⁸, the Hon’ble Apex Court held that the rule requiring reasons to be given in support of an order is like the principal of *audi alteram partem*, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.

27. In the instant case, there is absolutely no controversy on the reality that in response to the notices given to expedite the execution of works, the petitioner submitted replies in an elaborate manner. A perusal of the impugned orders dated 09.12.2017 reveal, in vivid and candid terms, that except stating that the replies submitted by the petitioners were not

¹⁸ (1976) 2 SCC 981

acceptable, the respondent authorities did not make any endeavour to verify the contents of the same. In the considered opinion of this Court, the said action is a patent violation of the principles of natural justice, in view of the law laid down in *JOSHI TECHNOLOGIES INTERNATIONAL INC (supra 7)* and the judgment of the Delhi High Court *MEKASTER TRADING CORPORATION (supra 17)* and the judgment of the Hon'ble Apex Court referred to in *THE SIEMENS ENGINEERING & MANUFACTURING CO. OF INDIA LTD. (supra 18)*, the impugned action cannot be sustained and the present writ petitions, questioning such an action is undoubtedly maintainable.

28. On this ground alone, the impugned action to the extent of deletion of part of the works contracts cannot be sustained in the absence of non-consideration of the contents of the replies. Having acknowledged the replies and having shown the same as a reference in the impugned order, there is absolutely no justification on the part of the respondents in not advertng to the contents of the same. This Court also finds sufficient force in the submission of the learned Senior Counsel that the reports of the Technical Advisory Committee was also not taken into consideration. The contention with regard to the jurisdiction of the Superintendent Engineer to pass the orders, deleting portion of the works, in the considered opinion of this Court is liable for rejection in view of the Clause 1.1 of the Instructions to Bidders and Clause 26.2 of General Conditions of Contract.

29. After giving thoughtful consideration to the entire material available on record, this Court has absolutely no scintilla of hesitation to come to an irresistible conclusion that the impugned action on the part of the respondent authorities is highly arbitrary and illegal and a patent violation of the principles of natural justice. Since this Court is inclined to set aside the

impugned orders dated 9.12.2017 on the ground of violation of principles of natural justice, this Court does not propose to go into other contentions advanced by the learned Senior Advocates and the learned Advocate General.

30. For the aforesaid reasons, the impugned orders dated 09.12.2017 passed by the Superintending Engineer, deleting part of the works from the works contracts of the petitioners herein are hereby set aside with a liberty to the respondents to pass orders afresh, after considering the replies dated 08.09.2017 submitted by the petitioners herein and after giving opportunity of hearing to the petitioners herein. It is also made clear that the petitioners herein are entitled to place further material, if any, in support of their respective cases within two weeks from the date of receipt of this order. Further action in respect of the present works contracts shall be subject to outcome of the said exercise to be undertaken by the respondents. It is also made clear that till the orders are passed afresh, as mentioned *supra*, the interim orders granted by this Court shall remain in operation.

31. Accordingly, the writ petitions are disposed of. As a sequel, the miscellaneous petitions, if any, shall stand disposed of. There shall be no order as to costs.

Date: 5.6.2018
GRK/DA

A. V. SETHA SAI, J

THE HON'BLE SRI JUSTICE A.V.SESHA SAI



W.P.Nos.97, 10109 & 295 of 2018

5.6.2018

Grk/da