HONOURABLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION NO.36262 OF 2018

<u>Date: 31.12.2018</u>

<u>Between:</u>

N.Muthun Rao, S/o Sridhar Rao, Aged about 40 years,
(Licence Holder of Canteen Business) in Suryapet Hi-Tech
Bus Station, Suryapet District

.....Petitioner

and

Telangana State road Transport Corporation, rep.by its
Vice Chairman and Managing Director, Bus Bhavan,
Musheerabad, Hyderabad and another.

.....Respondents

The Court made the following:

HONOURABLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION NO.36262 OF 2018

ORDER:

Heard Sri C.Ramachandra Raju learned counsel for petitioner and Sri A.Ravi Babu, learned counsel for respondent-Corporation.

2. On 03.08.2011, tender notification was issued calling for bids to lease Canteen in Hi-Tech Bus Station in Suryapet for a period of seven years. Petitioner was successful bidder and lease was granted to him. The terms of lease prescribed lease period as seven years, commencing from 05.09.2011 to 04.09.2018. The lease agreement also envisages extension of lease for another three years. Petitioner completed the lease period of seven years and sought for extension of lease for another three years. By letter dated 22.09.2018, petitioner was granted extension by three months. Seeking declaration of action of respondent-Corporation in not renewing the lease for further period of three years and renewing lease for three months only is arbitrary and discriminatory, this writ petition is filed. The licence granted to the petitioner is governed by the deed of licence executed on 05.09.2011.

3. The salient features of the terms are as under:

(i) Monthly licence fee payable was fixed at 1,30,000/-. Licence fee is enhanced by 15% in 4th and 5th years and by 20% in 6th and 7th years. It would be enhanced by 25% over 7th year licence fee for the next three years block period on further extension.

(ii) Initial period of licence is seven years, which can be extended by another three years subject to satisfactory performance of the Canteen Licensee during the initial seven years period.

(iii) List of items are include in the annexure appended to the agreement deed which can be sold in the Canteen.

(iv) Clause-27 of deed of licence deals with the termination of licence. It can be terminated if licensee defaults in payment of licence fee for three months consecutively or three times in a calendar year; fails to do business for continues period of 90 days; found encroached into the platforms, area meant for passenger movement, or any other stall/shop; the licensee sells other items or performs other business, other than the items specified in tender notification or as recorded in the deed of licence.

4. The only question for consideration is whether the respondent-Corporation can refuse to renew the licence for further period of three years.

5. A close scrutiny of clause-1 read with clause-21 would show that ordinarily licence is renewed for further period of three years after completion of initial seven years period, if the licensee agrees to pay enhanced licence fee of 25% over and above licence fee fixed for the seventh year, subject of course to satisfactory performance of canteen during the first seven years.

6. Though in the counter-affidavit, it is averred that a complaint was forwarded by the Principal Secretary to the Government, Transport, Roads and Buildings, wherein allegations were leveled against the petitioner. Apparently no action was taken on improper performance of Canteen against petitioner and clause-27 was not invoked and, therefore, condition imposed in clause-1 is not attracted. Further, even after receipt of such complaint, authorities were negotiating with petitioner and granted

extension for three months. It appears, the other stall licensees in the same Bus Station have also complained on 26.07.2018 alleging that canteen in other bus stations are allowed to sell only Tea, Tiffins and Meals, whereas canteen licensee in Hi-tech Bus Stand is selling all the items such as, cool drinks and bakery products, but paying less licence fee. Though these two issues were referred in paragraph-4 of the counter-affidavit, there is no whisper as to what action was taken on the said two aspects. Further, what is the nature of complaint made to the Principal Secretary is also not disclosed. As noted above, no action was taken against petitioner on the allegation of violating clause-27 of the lease deed. The complaint of stall holders was with reference to the amount of licence fee collected, but not on functioning of the petitioner.

7. The further averments in the counter-affidavit would go to show that the licence fee fixed to the petitioner is far less and higher licence fee would be secured for the same premises. It appears, petitioner and respondent-Corporation entered into negotiations for higher licence fee. The averments in paragraph-7 of the counter-affidavit also would go to show that petitioner agreed to enhance licence fee of 35% instead of 25% and the same was not agreed by the Managing Director. It appears, there was internal correspondence among the hierarchy of Officers and ultimately having realized that if fresh tenders are called, it is possible to secure higher licence fee, decision not to grant renewal was taken.

8. It is thus discernible from the averments of the counter-affidavit that there is no adverse decision taken by invoking clause-

27 and the Corporation was not opposing grant of extension of lease period, but was only concerned with the amount of licence fee offered by the petitioner.

9. Having regard to the specific stand of the Corporation in the counter-affidavit, what is required to be noticed is that relationship between the petitioner and the respondent-corporation is governed by the deed of licence. Deed of licence, as noted above, envisages initial licence period as seven years with periodical increase in the licence fee and option of renewal if petitioner agrees to pay higher licence fee at 25% than what was paid in the 7th year. The contract do not envisage any negotiation for higher licence fee nor it impose restrictions on renewal, if the licensee do not agree for enhancement of licence fee over and above agreed upon. The averments made in the counter-affidavit only go to show that since there is a possibility of respondent-Corporation securing higher licence fee than what was fixed to the petitioner, decision not to renew licence was taken.

10. The tender notification issued on 03.08.2011 and the deed of licence entered into with the petitioner was governed by the policy framework in awarding of contract notified vide Circular No.12/2011-OPD(C), dated 21.03.2011. Paragraph 4.0 prescribes the licence period. Licence period of canteens in Major, 'A' and 'B' Class Bus stations should be for initial period of seven years, which can be extended by another three years and the total maximum period should be ten years. Paragraph 4.3 deals with the payment of licence fee. These two clauses are the basis for initiating the tender process and awarding of licence to the

petitioner and same clauses are incorporated in the deed of licence. It can easily be assumed that once a contract is awarded, the licensee should have reasonable time to settle down in carrying on business and should be able to provide quality service to the commuters using the Bus Stations. Therefore, it also takes into consideration possible revenue that can be generated by the licensee and the source of income to the corporation. Taking note of these factors, the periodical increase of licence fee is also incorporated in the policy document at paragraph 4.3. Thus, it is the policy of the respondent-Corporation to grant licence for seven years initially and renewable by three years. Thus, renewal be granted ordinarily and can be refused only if assessment of performance was not satisfactory. Nothing adverse was noted against petitioner and his licence was not terminated on that ground. It may be true that if fresh tenders are called, the respondent-Corporation may secure higher licence fee. But, that cannot, *per se,* be a ground to violate terms of contract entered into and deny the renewal merely on that ground.

11. In view of specific terms of deed of licence, the action of respondent-Corporation in not granting renewal of licence for further period of three years would be amounting to arbitrary decision and the same is not sustainable.

12. The principle of law is well settled that ordinarily in matters of contract and enforcement of terms of contract, the writ Court does not interfere in exercise of power of judicial review. However, as held by the Hon'ble Supreme Court in **ABL International Ltd. and another** v. **Export Credit Guarantee Corporation of India**

Ltd. And others[1] and **Joshi Technologies International Inc.** v. **Union of India**[2]**,** if there was arbitrary exercise of power by a party to the contract, which is State or its creature, the Writ Petition is maintainable and writ Court may pass appropriate orders to remove the illegality noticed by the Court, which was offending Article 14 of the Constitution of India.

13. In **ABL International Ltd,** the scope of writ jurisdiction in matters where relationship of parties is governed by terms of contract and one party to the contract is State or its instrumentality was considered. On review of precedent decisions, the Supreme Court held, if action of State or its instrumentality is hit by Article 14 of the Constitution of India, the Writ Petition is maintainable. The Supreme Court held at paragraph Nos.19, 22 and 23 as under:

> 19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of *Gunwant Kaur* [(1969) 3 SCC 769] this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.
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> 22. We do not think the above judgment in *VST Industries Ltd.* [(2001) 1 SCC 298 : 2001 SCC (L&S) 227] supports the argument of the learned counsel on the question of

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[1] (2004) 3 SCC 553
[2] (2015) 7 SCC 728 : 2015 SCC Online SC 490

maintainability of the present writ petition. It is to be noted that *VST Industries Ltd.* [(2001) 1 SCC 298 : 2001 SCC (L&S) 227] 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 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 statute concerned 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 the 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 Shrilekha Vidyarthi* v. *State of U.P.* [(1991) 1 SCC 212 : 1991 SCC (L&S) 742] wherein this Court held: (SCC pp. 236-37, paras 22 & 24)

"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 the State or an instrumentality of the State is a party of 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 in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent. In this context, we may note that though the first respondent is a company registered under the Companies Act, it is wholly owned by the Government of India.

14. On reviewing the law on the subject, the Supreme Court in **Joshi Technologies International Inc.** *(supra)* summarized the legal position in paragraph No.70 of the decision. To this extent, the relevant paragraph reads as under:

> "70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:
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> 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.
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> 70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.
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> 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.
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> 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 the 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."

15. In **Air India Limited v. Cochin Industrial Airport Limited and others**[3]**,** Supreme Court held;

"7. ……But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned……"

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[3] (2000) 2 SCC 617

16. Guided by the above preposition of law and on analysis of facts on record, it is apparent decision not to extend lease for three more years as per clause-1 read with clause-21 of the agreement amounts to arbitrary exercise of power vitiating the decision.

17. By side wind, learned senior counsel appearing for respondent-Corporation sought to contend that it is no more open to petitioner to contend that petitioner is entitled to renewal of licence in terms of clause-1 read with clause-21 of the deed of licence executed on 05.09.2011 in view of the supplementary deed of licence entered into by the petitioner and the respondent-Corporation confining the renewal of licence to three months and the new supplementary deed of licence do not envisage further renewal. Learned senior counsel placed on record the supplementary deed of licence entered on 29.09.2018. Last paragraph of this supplementary deed of licence would itself show that the said agreement is governed by the terms and conditions of original agreement dated 05.09.2011 and it is not an independent agreement, but is a supplementary agreement. It is apparent to note, in the writ petition, petitioner challenges the action of entering into supplementary licence agreement granting renewal only for three months and not extending the licence period for three years as agreed upon.

18. Having regard to the factual background, as noted above, supplementary deed of licence cannot be looked into in isolation ignoring the terms of deed of licence executed on 05.09.2011. Therefore, contention of learned senior counsel cannot be

countenanced. The claim of petitioner cannot be non-suited on that ground.

19. Learned senior counsel also sought to contend that on 10.08.2018 petitioner agreed to increase licence fee to 35% and, therefore, at any rate, petitioner cannot go back on that statement. *Per contra*, learned counsel for petitioner sought to contend that in fact on account of bifurcation of the State, the movement of Buses in the Bus Station reduced as few buses of State of Andhra Pradesh now being operated and, therefore, petitioner is sustaining losses. To support said contention, reliance is placed on the letter written by the Depot Manager, Suryapet, on 11.06.2018, addressed to the Regional Manager highlighting the grievance of petitioner that petitioner is sustaining losses on account of reduction of flow of Buses in the Bus Stand. The Court is not inclined to go into rival claims on increase or reduction of licence fee as the case may be.

20. The Writ Petition is accordingly allowed. Respondents are directed to review the licence of petitioner for another period of three years w.e.f. 05.09.2018. However, this order does not come in the way of parties negotiating for revision of licence fee. Pending miscellaneous petitions shall stand closed.

JUSTICE P.NAVEEN RAO

Date: 31.12.2018
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