THE HON'BLE SRI JUSTICE P. NAVEEN RAO

WRIT PETITION No.40618 OF 2018

Date:20.11.2018

Between:

M/s. Hydrop Mineral Water Private
Limited, D.No.52-1/5-2, 3rd Cross Roads,
Veterinary Colony, Vijayawada,
Rep., by its Managing Director .. Petitioner

And

Andhra Pradesh State Road Transport
Corporation, RTC House, PNBS,
Rep., by Managing Director,
Jijayawada, Andhra Pradesh and others .. Respondents

This Court passed the following order:

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ORDER:

Heard learned counsel for the petitioner and learned Standing Counsel for the Andhra Pradesh State Road Transport Corporation.

2. Concessionaire Agreement was entered into by the petitioner with Andhra Pradesh State Road Transport Corporation on 21.04.2017. The subject of the agreement is establishment of Drinking Water Plant and supplying packaged drinking water in all bus stations of the respondent – Corporation. Alleging that the work is not executed within the time stipulated in the agreement, the agreement was terminated on 05.10.2018, impugned in the Writ Petition.

3. Learned counsel for the petitioner would contend that Clause 16.2 of the Concessionaire Agreement empowers the respondent – Corporation to terminate the contract. However, according to proviso appended to Clause 16.2 (b) thereof, before resorting to termination, the respondent – Corporation is required to follow the procedure envisaged in Clause 16.3 and the same was not followed.

4. Per contra, learned Standing Counsel for the respondent – Corporation would submit that notices were issued to the petitioner requesting him to specify the stage of execution of work and also informed him that he has to furnish fortnightly report on progress of construction of work. But, so far, the packaged drinking water is not made available to the passengers in the bus

stations run by the respondent – Corporation. Alleging that there was no response from the petitioner and that the work was not granted and the packaged drinking water was not supplied even after exhausting the time line prescribed, termination was resorted. He would therefore submit that though strictly Clause 16.2 of the Concessionaire Agreement was not followed, but all the ingredients of that Clause were followed before terminating the contract.

5. Learned Standing Counsel also contended that the Writ Petition is not maintainable as the petitioner is seeking enforcement of terms of contract and he has to avail the ordinary civil law remedy or has to invoke Clause 18 of the Concessionaire Agreement to resolve the disputes.

6. It is appropriate to note that terms of contract do not envisage dispute resolution by arbitration. Clauses which are relevant to consider the issue agitated in the Writ Petition and opposed by the respondent - Corporation are 16.2, 16.3 and 18. They read as under:

"**16.2 Parties Rights**

(a) Upon the occurrence of the Concessionaire Event of Default, the Grantor shall, subject to the provisions of this Article 16, without prejudice to any other rights and remedies available to it under this Agreement be entitled to terminate this Agreement.

(b) Upon the occurrence of the Grantor Event of Default, the Concessionaire shall, subject to the provisions of Concession Agreement, without prejudice to any other rights and remedies available to it under this Agreement be entitled to terminate this Agreement.

Provided that before proceedings to terminate this Agreement, the Party entitled to do so shall (i) in terms of Clause 16.3 issue a Consultation Notice and follow the Remedial Process in Clause 16.4, (ii) give due consideration and shall have due regard to the nature of the underlying Event of Default, its implication on the performance of the respective obligations of Parties under this Agreement and the circumstances in which the same has occurred.

16.3 Consultation Notice

Either Party exercising its right under Section 16.2, shall issue to the other Party a notice in writing specifying in reasonable detail the underlying Even of Default(s) and proposing consultation amongst the Parties and the Lenders to consider possible measures of curing of otherwise dealing with the underlying Event of Default (the "**Consultation Notice**").

18.Dispute Resolution

If any dispute or difference or claims of any kind arises between the Grantor and the Concessionaire in connection with construction, interpretation or application of any terms and conditions or any matter or thing in any way connected with or in connection with or arising out of this Agreement, or the rights, duties or liabilities of any Party under this Agreement, whether before or after the Termination of this Agreement, then the

(a) Parties shall meet together promptly, at the request of any Party, in an effort to resolve such dispute, difference or claim by discussion between them, period to resolve such dispute should be within 30 days, failing which,

(b) Per-se the courts of Andhra Pradesh only shall have the jurisdiction to decide."

7. A cursory glance of the notices issued to the petitioner on various dates, photo copies of which are enclosed to the counter affidavit filed by the respondent – Corporation, would show that

the same was not in compliance with Clause 16.3. Clause 16.3 of the Agreement requires consultation process. If the respondent – Corporation comes to the conclusion that the party to the contract defaulted in complying with the terms of the contract, it has to initiate consultation process and issue notice specifying the details underlying the events of default(s) and proposing consultation amongst the parties and the lenders to consider possible measures of curing or otherwise dealing with the underlying 'Event of Default'. If steps taken by the respondent – Corporation did not result in resolution of the dispute amicably and if there is no progress in the work, it may resort to termination of contract in terms of Clause 16.2. Further steps required to be taken after 16.3 stage are delineated in paragraphs 16.4 to 16.8. Even Clause 18 requires amicable settlement on any dispute or difference. On failure of such effort, an aggrieved party can avail civil law remedy. Apparently, as this procedure was not followed, thus, action of the respondent – Corporation impugned in the Writ Petition would amount to arbitrary exercise of power and authority.

8. The principle of law is well settled that ordinarily in matters of contract and enforcement of terms of contract, the writ Court does not entertain the Writ Petition. 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

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

writ Court may pass appropriate orders to remove the illegality noticed by the Court, which was offending Article 14 of the Constitution of India.

9. 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 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.

10. On reviewing the law on the subject, the Supreme Court in **Joshi Technologies International Inc.** 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 summarized as under:
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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."

11. One other Clause requires to be noticed is Clause 18 of the Concessionaire Agreement. This Clause deals with 'Dispute Resolution'. According to this Clause, if any dispute or difference or claim of any kind arises between the Grantor and the Concessionaire in connection with construction, interpretation or application of any of the terms and conditions or connected with or arising out of the Agreement, or seeking to enforce the rights, duties or liabilities under the Agreement, whether before or after the termination of the Agreement, both parties should meet together at the request of any party in an effort to resolve such

dispute, difference or claim, failing which aggrieved party can avail remedies before the Court of law. The mechanism provided by this Clause was also not availed before terminating the contract.

12. As noticed above, in the instant case, though Clauses 16.2 to 16.8 of the Concessionaire Agreement envisage particular procedure to be adopted before termination of contract, the said procedure was not followed before contract was terminated. In other words, after noticing the defaults committed by the petitioner, straight away the competent authority invoked the Clause 16.2 to terminate the contract without resorting to consultation mechanism envisaged in Clauses 16.3 to 16.8 and Clause 18 and therefore the same would amount to arbitrary exercise of power and therefore the decision is liable to be declared as illegal.

13. Though learned Standing Counsel sought to contend that several notices issued to petitioner before termination of contract would amount to compliance of Clause 16.3, the said contention is stated to be rejected. The correspondence relied on relates to concessionaire 'events of default' which would enable party to the contract to set in motion procedure envisaged in Clause 16.3.

14. As noticed above, without following due process as required by the terms of contract, the contract was terminated in an arbitrary manner by the respondent - Corporation and the same is not sustainable in law.

15. Leaving it open to the respondent – Corporation to follow the procedure as required by the terms of contract, while setting aside

the decision to terminate the contract with petitioner, impugned in the Writ Petition, the Writ Petition is allowed. It is made clear that this Court has not entered into the merits of the respective contentions. There shall be no order as to costs. Pending Miscellaneous Petitions, if any, shall stand closed.

P. NAVEEN RAO, J

Date:20.11.2018

Note:- Issue C.C. in one week.
(B/o)
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