

THE HON'BLE SRI JUSTICE P. NAVEEN RAO

WRIT PETITION NO.46485 OF 2018

Date: 06.06.2019

Between:

M/s.Saptarishi Hotels Pvt.Ltd.,
Sy.No.91, Telecomnagar, Gachibowli,
Hyderabad, Telangana, rep.by its
Director Mr. Yash Deep Sharma
and another.

..... Petitioners

and

National Institute of Tourism and Hospital
Management (NITHM), A state of Telangana
Undertaking/autonomous Society,
Telecomnagar,Gachibowli, Hyderabad,
Rep.by its chairman.

..... Respondent



This Court made the following :

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ORDER:

Heard learned senior counsel Sri D.Prakash Reddy for petitioners and Sri Vasudeva Reddy, learned counsel for respondent.

2. Two issues arise for consideration are:

i) Maintainability of writ petition seeking declaration and direction in attempting to dispossess the lessee/petitioners from the property in Survey No.91 of Telecom Nagar, Gachibowli village, Serilingampally mandal, Ranga Reddy district to an extent of Ac.3.00 by owner, and

ii) If the first issue is affirmatively answered in favour of the petitioners, the second issue for consideration is whether the respondent can evict the petitioners without following due process of law ?

3. To appreciate the issues in the writ petition, it is necessary to briefly note the relevant facts:

4. Lease agreement was executed on 24.11.2010 by the National Institute of Tourism and Hospital Management (NITHM) in favour of Saptarishi Hotels Private Limited and Maha Hotel Projects Pvt. Ltd. (respondent and petitioners respectively). In terms of this lease agreement, period of lease was for 33 years from Zero Date i.e., when physical possession of the project site was to be delivered by the respondent and the lease holder was entitled to design, finance, construct, operate and maintain a 4 Star up market business class hotel and other buildings and support structures on Build, Operate and Transfer (BOT) basis under

Public Private Partnership (PPP) mode. On 10.8.2011, Development and Management Agreement was entered between respondent and petitioners respectively.

5. Article 8 of the lease agreement deals with events of default and termination. Article 8.2 deals with termination due to event of default. To this case, Article 2 of Development and Management Agreement is also relevant. It deals with development of project and payments. Article 2.2(d)(iii) of this agreement is similar to Article 8.2(a)(iii) of lease agreement dated 24.11.2010. In terms thereof, respondent terminated the agreements on 23.7.2016.

6. Alleging that as a consequence to termination, the respondent is seeking to evict the petitioners, this writ petition is filed.

7. To complete the narration of relevant facts, aggrieved by the decision to terminate the lease agreement, arbitral proceedings were set in motion. The Arbitral Tribunal comprised of Hon'ble Justice B.P. Jeevan Reddy, Hon'ble Justice B.Sudershan Reddy, Retired Judges of Hon'ble Supreme Court and Hon'ble Justice M.H.S.Ansari, Retired Judge of this Court. By Award dated 6.12.2018, the Arbitral Tribunal dismissed the claim. Suffice to note that as of now, the decision to terminate the lease agreement by the respondent stands affirmed by the Arbitral Tribunal. Therefore, the only issue for consideration in this writ petition is with reference to attempting to evict/eviction by the respondent.

8. As noted above, in the prayer portion, petitioners sought declaration of action of respondent in attempting to dispossess the

petitioners, whereas, according to the respondent, petitioners were already dispossessed and the respondent has taken possession of the property. Leaving aside the issue as to whether there was an attempt to dispossess or already dispossessed and who is in physical possession, two primary aspects of writ petition, noted above, are considered hereunder.

9. Learned senior counsel for petitioners would contend that merely because lease and development agreements are terminated, it is not automatic that the lessees be thrown out without following due process. Even if petitioners are held to be unauthorised occupants, owner of the property is required to follow due process and can not enter into the property in possession of lessee straight away. Such Action is ex-facie illegal, amounts to taking law into their hands, creates dangerous trend and amounts to arbitrary exercise of power.

10. According to learned counsel for respondent, after lease/ development agreement is terminated the property automatically reverts to owner. This is clear from Articles 8.2 (a)(iii) of lease agreement / 2.2 (d) (iii) of development agreement and petitioners are not entitled to notice before evicting them. Petitioners are bound by the clauses in the agreement. As respondent gets back possession in terms of above Articles, Writ Petition is not maintainable. He would submit that there is no public law element involved in this case, nor the decision of respondent would amount to arbitrary exercise of power. He would submit that in matters of this nature even panchanama is not required.

11. Remedy under Article 226 of the Constitution of India is extraordinary and discretionary remedy. Though it has no bounds, it has self imposed restraint in exercising such jurisdiction. Ordinarily writ Court do not entertain writ petition whenever efficacious remedy is available to a person to redress his grievance and relegates party to avail remedies available to him in law.

12. On the scope of writ remedy in contractual matters, more particularly on the issue of eviction, precedent decisions throw enough light. The law laid down by the Hon'ble Supreme Court in various judgments is briefly recapitulated hereunder:

(i) In **Andi Mukta Sadguru v. V.R. Rudani**¹, the Supreme Court at paragraph 15 held as under:

“If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied.”

(ii) In **LIC of India v. Escorts Ltd.**,² the Apex Court at paragraph 102 held as under:

“If the action of the State is related to contractual obligations or obligations arising out of the tort, *the court may not ordinarily examine it unless the action has some public law character attached to it.* Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain

¹ (1989) 2 SCC 691

² (1986) 1 SCC 264

and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances....”

(iii) In **ABL International v. Export Credit Guarantee Corp. of India**³, the Hon’ble Supreme Court at paragraphs 27 and 28 held as under:

“27. From the above discussion of ours, the 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 fact 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 Corpn. v. Registrar of Trade Marks* [(1998) 8 SCC 1] .) ***And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and***

³ (2004) 3 SCC 553

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.”

(iv) In **Joshi Technologies International v. Union of India**⁴, the Supreme Court exhaustively considered the above precedents as well as the catena of judgments to formulate the following governing principles, which have been consistently followed subsequently:

“69. The position thus summarised 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, it can refuse to exercise. It also follows that under the following circumstances, “normally”, the Court would not exercise such a discretion:

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. 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.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

⁴ (2015) 7 SCC 728

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further the 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:

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.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

70.3. 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.

70.4. Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. 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.

70.6. 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.

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 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.

70.8. 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.

70.9. 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.

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.

70.11. 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.”

13. These precedents would create small window of judicial review in matters governed by terms of contract. If the action of State or its instrumentality is illegal, arbitrary, irrational and / or there is procedural impropriety. However, scope of judicial review on issues concerning eviction of a lessee is very very limited.

14.1. The facts in **Rajasthan State Industrial Development and Investment Corporation and another v. Diamond & Gem Development Corporation Limited and another**⁵ are as under. The Rajasthan State Industrial Development and Investment Corporation (RIICO) allotted the land to an extent of Ac.105 to the

⁵ (2013) 5 SCC 470

first respondent company for establishment of Gem Industrial Estate for the manufacturing of gemstones. On 22.05.1989, lease deed was executed. The lease deed mandate that the respondent company must complete the said project within a period of five years and non-compliance thereof would entitle the appellant to recover the possession. Alleging that the first respondent company has not complied with the terms of the lease, lease was cancelled. This was challenged successfully before the High Court. RIICO is the appellant before the Supreme Court. Considering the facts of the said case and the precedents on the subject, Supreme Court held as under:

“21. It is evident from the above that generally the Court should not exercise its writ jurisdiction to enforce the contractual obligation. The primary purpose of a writ of mandamus is to protect and establish rights and to impose a corresponding imperative duty existing in law. It is designed to promote justice (*ex debito justitiae*). The grant or refusal of the writ is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or to establish a legal right, but to enforce one that is already established. While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, *inter alia*, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal.

22. Hence, discretion must be exercised by the court on grounds of public policy, public interest and public good. The writ is equitable in nature and thus, its issuance is governed by equitable principles. Refusal of relief must be for reasons which would lead to injustice. The prime

consideration for the issuance of the said writ is, whether or not substantial justice will be promoted. Furthermore, while granting such a writ, the court must make every effort to ensure from the averments of the writ petition, whether there exist proper pleadings. In order to maintain the writ of mandamus, the first and foremost requirement is that the petition must not be frivolous, and must be filed in good faith. Additionally, the applicant must make a demand which is clear, plain and unambiguous.”

14.2. **Shalini Shyam Shetty and another v. Rajendra Shankar**

Patil⁶ is the case where a suit for eviction was filed. The suit was decreed directing the defendants to hand over the vacant peaceful possession of the suit premises to the plaintiff. First appeal was partially allowed. Then appellant filed writ petition in the High Court to issue a writ of certiorari and call for the papers and proceedings from the lower Courts. The writ petition was dismissed on the only ground against the concurrent finding of facts by the Courts below, the exercise of writ jurisdiction is not warranted. Supreme Court noticed that issue was a pure dispute of landlord and tenant between private parties, but writ petition is entertained by the High Court. The Supreme Court held as under:

“65. We would like to make it clear that in view of the law referred to above in cases of property rights and in dispute between private individuals, writ court should not interfere unless there is any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory. ”

15. Keeping in mind the law on the subject, it is necessary to consider the relevant articles of agreements. They read as under:

⁶ (2010) 8 SCC 329

15.1. Article 8.2(a)(iii) of lease agreement reads as under:

“Upon such termination and on the date of termination, the lessee shall handover the peaceful possession of the Project Site with all the immovable structures. In case the Lessee fails to handover, the project site with the immovable structure embedded in the said site shall be deemed to have been handed over to the Lessor and the Lessor shall become the possessor of the Project Site and assets thereon and notwithstanding the said stipulation, Lessor is entitled to take such steps as are necessary for eviction of Lessee and re-possession of the said assets and the Lessee hereby acknowledges, admits and agrees to the aforesaid stipulation and the right of the Lessor”.

15.2. Article 2.2(d)(iii) of Development and Management Agreement reads as under:

“In case of failure of the Developer to adhere to the provisions under sub-clauses (ii) and (iii) notwithstanding anything contained contrary to this provision, NITHM shall have the right to terminate the Agreement without the need to issue Any notice of such default to cure and without any liability for damages, compensation of whatever nature, and on such termination and within next two days the Developer shall hand over the Project Site along with all the immovable assets embedded to the Project viz; structures, fixtures, attachments failing which the Project Site along with the aforesaid assets shall be deemed to have been handed over and NITHM shall have the right to enter into the Project Site and continue to possess and manage the Project Site and the Project Assets and do with the Project Site and the Project Assets as it likes”.

16. Two significant facets of these clauses are: (i) on termination of lease / development agreement, the lessee has to handover peaceful possession voluntarily on the date of termination of lease/

within two days of termination of development agreement as the case may be; and (ii) if it was not voluntarily handed over, it would be deemed to have been handed over to owner. These aspects of the agreements are relied by respondent on their entitlement to take possession. A *prima facie*, reading of these clauses make it obvious that vesting of possession on termination of lease/development agreement is automatic.

17. Two parties to a contract are governed by the covenants mutually agreed and specified. *Prima facie*, when a term in the contract holds deemed vesting of subject property in the owner, nothing more is required by the owner except to walk into and take control of his property. It cannot be said that decision/action of respondent to take possession is unsupported by law. In view thereof, it cannot be said that decision to take possession of the subject property by respondent as amounting to illegal/ arbitrary exercise of power. The issue of taking possession/eviction is in the realm of private law. In the facts of this case, it cannot be said that petitioners had reasonable expectation of continuing in possession even after lease was terminated. It is entirely different aspect for petitioners to contend that in spite of said clauses the owner is required to follow due procedure even to evict unauthorised occupant. For this, petitioners have to avail common law remedy. In the case on hand, the parameters of judicial review in matters governed by contract are not attracted. Objection on maintainability of Writ Petition is upheld.

18. Having regard to this view, the Court is not expressing any opinion on the second issue and left open to be agitated in

appropriate proceedings. It is also made clear that there is no expression of opinion on merits. The decision is confined to consider the objection on maintainability of writ petition.

19. The Writ Petition is accordingly dismissed. Pending miscellaneous petitions shall stand closed.

JUSTICE P.NAVEEN RAO

Date: 06.06.2019
DA/KKM



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