

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 9535 of 2020

**Lords Bluetech Co. Private Limited and another
Vs.
State of West Bengal and others**

For the petitioners	:	Mr. Rajarshi Dutta, Mr. Arjun Mukherjee, Mr. Roshan Sengupta
For the State-respondents	:	Mr. Susovan Sengupta, Mr. Sudip Das, Mr. Subir Pal
Hearing concluded on	:	16.12.2020
Judgment on	:	22.12.2020

Sabyasachi Bhattacharyya, J:-

1. The petitioner no. 1-company and the petitioner no. 2, its director/shareholder, have moved the instant writ petition against a notice of termination of contract to supply various food products under the name of the respondent no. 2 to financially underprivileged sections of the society, entered into between the parties on February 17, 2017. The notice was dated November 5, 2020 and set out alleged violation of Clauses 6, 7, 8, 22 and 23 of the said contract as grounds for cancellation of the same. The distribution of food items pertain to a government scheme named "21se Annapurna".

2. Learned counsel for the petitioner argues that the respondents violated Article 14 of the Constitution of India by arbitrarily terminating the contract. As such, irrespective of the existence of a contractual relation between the parties, this court can interfere with such termination under Article 226 of the Constitution of India.
3. In support of such contention, learned counsel cites a judgement reported at *AIR 1990 SC 1031 (Mahabir Auto Stores and Ors. vs. Indian Oil Corporation and Ors.)* for the proposition that every action of the State or an instrumentality of the State, in exercise of its executive power, must be informed by reason. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution shall be applicable to such exercise of power. The Supreme Court held that having regard to the nature of the transaction it would be appropriate to state that in cases where the instrumentality of the state enters the contractual field, it should be governed by the incidence of the contract; it may not be necessary to give reasons but, in the field of this nature fairness must be there to the parties concerned. Having regard to the large number or the long period and the nature the dealings between the parties the appellant, it was held, should have been taken into confidence. Equality and fairness at least demands this much from an instrumentality of the State dealing with a right of the State not to treat the contract as subsisting. However, the Supreme Court proceeded to evolve a process which would work.

4. Learned counsel next places reliance on a judgement reported at (2011) 5 SCC 697 (*Union of India (UOI) and Ors. vs. Tania Construction Pvt. Ltd.*) for the proposition that even if there is an arbitration clause in the agreement between the parties, an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court. Injustice, whenever and wherever it is there, has to be struck down as an anathema to the rule of law and the provisions of the Constitution. The Supreme Court endorsed the view of the High Court that notwithstanding the provisions relating to the arbitration clause, the High Court was fully within its competence to entertain and dispose of the writ petition filed on behalf of the respondent company.
5. Next placing reliance on *Kumari Shrilekha Vidyarthi and Ors. vs. State of U.P. and Ors.*, reported at (1991) 1 SCC 212, learned counsel for the petitioners argues that although 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 the rights by resort to remedies provided for adjudication of purely contractual disputes, 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, as held in the report, the

obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract, requiring it to fulfil the obligation of article 14 of the Constitution, and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract, enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterise 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. Article 14, it was held, applies also to matters of governmental policy and if the policy or any action of the government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.

6. Learned counsel for the petitioners places reliance on Clause 20 of the agreement-in-question, which is set out below:

“20. The time for this Agreement is the essence of contract. Neither of the parties shall have the liberty to terminate this Agreement at their own will. Any breach in the covenants of this Agreement by either of the parties shall be brought to the notice of the other party by written communication and a minimum time of 3 (three) months would be given for rectification of the breach, after passage of 3 (three) months or the stipulated time as given in the

notice of rectification, the party giving the notice shall have the right to terminate this Agreement.”

7. Learned counsel submits that, as per the said clause, neither of the parties to the agreement shall have the liberty to terminate it at their own will. Any breach in the covenants of the agreement by either of the parties shall be brought to the notice of the other party by written communication and a minimum of three months would be given for rectification of the breach. After passage of three months or the stipulated time as given in the notice of rectification, the party giving the notice will have the right to terminate the agreement. In the present case, however, no such notice of rectification was given, in writing or otherwise, thus depriving the petitioners of the three months' time to rectify, if there was any breach at all. In any event, the petitioners argue that the petitioners were never in breach of any of the clauses of the agreement. Rather, it is submitted that the petitioners had incurred huge expenses for honouring the contract. It is argued that the provisions of the other clauses of the agreement have to be read with reference to Clause 20.
8. The petitioners refute the allegation that they were in breach of Clause 22 of the contract, which is quoted below:

“22. Monthly fixed and floating amount on sale of product shall be calculated by Benfish management and the M/s Lords on a quarterly basis and after such calculations, M/s Lords shall pay the amount within 15 (fifteen) days on completion of each quarter to Benfish H.Q., by account payee cheque/draft in favour of West Bengal State Fishermen's Co-Operative Federation Ltd

(Benfish), after adjusting the minimum quarterly lease rent failure to pay in time on 4 consecutive quarter will terminate the agreement automatically without any notice.”

9. It is submitted that for the quarter starting from October, 2019, the last payment by the petitioners was made in February, 2020, which itself shows that the terms of Clause 22 have been strictly observed by the petitioners. In fact, a license agreement was entered into between the KMC and the respondent no. 2 as late as on March 6, 2020 to widen the scope of implementation of the scheme concerning the services of the petitioners, wherein the petitioner no. 2 was a signatory, apart from the representatives of the KMC and respondent no. 2. This reflects the conduct of the respondents in continuing the services of the petitioners in terms of the agreement-in-question even in March, 2020, thereby obviating any allegation of breach of contract by the petitioners from the respondents' end.
10. Learned counsel also places reliance on the annexures to the petitioners' affidavit-in-reply in show that the concerned accounts reflected full payment on that score by the petitioners to respondent no. 2, which, counsel argues, negates the question of contravention of Clause 22 of the agreement. That apart, photocopy of an account payee check to the tune of ₹ 50,000, annexed at page no. 90 of the writ petition, is referred to by learned counsel for the petitioners to refute the allegations of non-payment levelled against the petitioners

in paragraph nos. 11 and 12 of the affidavit-in-opposition of respondent no.2.

11. As regards the ‘complaints’ allegedly received by the respondents against the petitioners from purported franchisees, annexed at pages 19 to 25 of the affidavit-in-opposition of respondent no. 2, learned counsel for the petitioners controverts those and submits that those are being disclosed for the first time with the affidavit. As regards the purported ‘complaint’ at page 23 of the opposition, counsel relies on a copy of another letter by the author of such complaint (the second letter is annexed at page 14 of the reply) and submits that, at around the same time, the same person (namely Santonu Sengupta), apparently a franchisee, writes to the petitioners seeking extension of the franchise but in the same breath complains against the petitioners before the respondents. Another franchisee, namely Probir Kumar Sarkar, apparently took recourse to similar double standards, which is evident from the patent contradiction in his ‘complaint’ at page no. 19 of the opposition and request to restart franchisee with the petitioners at page no. 13 of the reply. Such gross discrepancies vitiate the veracity of such ‘complaints’, counsel for the petitioners argues.

12. Hence, the petitioners pray that the respondents’ decision of termination of contract, communicated in the letter dated November 5, 2020, be quashed.

- 13.** Learned counsel appearing for the respondents argues at the outset that the disputes raised by the petitioners do not touch the public law domain but arise from breach of contractual obligations. Since the contract-in-question was of a private nature and not a statutory contract, the writ jurisdiction ought not to be invoked in the matter.
- 14.** Citing *Life Insurance Corporation of India v. Escorts Ltd. and Others* [(1986) 1 SCC 264], learned counsel submits that while every action of the State or its instrumentality must be informed by reason and in appropriate cases actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution, Article 14 cannot be construed as a charter for judicial review of State actions and to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. If the action of the State is related to contractual obligations, 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 question of demarcating the frontier between the public law domain and the private law field must be decided in each case with reference to the particular action, the activity in which the State or its instrumentality is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances.

15. Learned counsel next places reliance on *Zonal Manager, Central Bank of India v. Devi Ispat Limited and Others* [(2010) 11 SCC 186], where it was held that where in the contract there is a clause for arbitration, normally a writ court should not invoke its jurisdiction. The existence of effective alternative remedy provided in the contract itself is a good ground for declining to exercise the extraordinary jurisdiction of the court under Article 226. If the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power. In the light of the legal position, writ petition is maintainable in contractual matters, in the circumstances mentioned in various judgements of the Supreme Court.

16. In the present case, the respondents argue, Clause 22 of the agreement specifically provides that failure on the part of the petitioners to pay in time on four consecutive quarters will terminate the agreement automatically without notice. Hence, no formal notice of termination was necessary at all, as the violation of Clause 22, along with other clauses of the contract, has been mentioned in the impugned communication dated November 5, 2020. The said communication was by way of abundant caution and no notice to

rectify the breach, as contemplated Clause 20, was necessary since the contract stood terminated automatically on the breach of Clause 22.

- 17.** That apart, there has been no contravention of Article 14 of the Constitution of India in the present case. The respondents have merely enforced the contract and the present dispute arises entirely out of contractual obligations. Thus, it is submitted, this court ought not to interfere with such termination under its writ jurisdiction.
- 18.** A consideration of the arguments of the parties and the materials on record necessitates a short enquiry into the scope of interference by the writ court in the present context. The cited reports are uniform in their deprecation of the interference by the writ court in questions of breach of contract and matters arising out of contractual obligations of a private nature. The limited scope of interference is primarily confined to a violation of the duty of the State or any of its instrumentalities to conform to equality and fairness and adhere to the Constitutional vision as embodied in Article 14 of the Constitution of India. Even in discharge of obligations relating to private contracts, the State is subject to judicial scrutiny in the event of arbitrariness on the part of the State.
- 19.** Availability of alternative remedy, even in the form of an arbitration clause, cannot operate as an absolute bar if there is manifest injustice on the part of the State or any of its instrumentalities.

20. Against the above backdrop, it is to be seen whether the respondent no.2 herein acted arbitrarily or occasioned manifest injustice, irrespective of its contractual obligations. In the present case, respondent no. 2 terminated its contract with the petitioner no. 1 at a single stroke of the pen, by issuing the letter dated November 5, 2020. Certain clauses of the contract were quoted therein and violation of those by the petitioners was alleged, without referring to the details as to such purported violation. Moreover, even without entering into the clauses of the contract-in-question, no prior opportunity of representation was given to the petitioners before such termination. In the absence of specific powers under the contract to do so, which are justiciable to reason and legal viability, such action of the respondents would, by itself, constitute gross arbitrariness and contravention of the basic principles of natural justice, in particular the doctrine of *Audi Alteram Partem*.

21. As regards the nature of the obligations of the respondents, even with regard to the obligations arising out of the contract, it is evident that the contract was designed to serve a public purpose, being supply of food at a concessional rate to the less privileged strata of society, which manifestly comes within the domain of public law and involves duties which the State is enjoined to perform under the Constitution of India. The contract merely delegates such function to the petitioners, acting as agents of respondent no. 2, an instrumentality of

the State, which does not absolve respondent no. 2 from its liability to act reasonably and in good faith.

22. Clause 22 of the agreement-in-question is the only provision which contemplates an automatic termination of the agreement without any notice. However, the invocation of such clause presupposes an omission on the part of the petitioners to make payments of the quarterly dues in time, by not incurring defaults for four consecutive quarters. The materials annexed with the writ petition and the affidavits in-opposition and in-reply amply demonstrate that the petitioners have been paying their quarterly dues in time. Such payments are further vindicated by the financial statements annexed to the affidavit-in-reply, which indicate payments being accepted without objection at least up to March, 2020, leaving no scope for a default on the part of the petitioners for four consecutive quarters, even up to this date. Moreover, the fact that the KMC entered into a license agreement with the petitioners in March, 2020 (which a representative of the respondent no. 2 had signed, along with one of the KMC and the petitioner no. 2) in furtherance of the scheme for which the contract-in-question was entered into, unerringly indicates that the contract-in-question was in subsistence till March, 2020. Since four quarters have not yet elapsed after March, 2020, there cannot arise any question of the petitioners being in default of Clause 22 of the contract by failing to pay for four consecutive quarters thereafter. In fact, additionally, *prima facie* proof of payment by an

account payee cheque dated March 31, 2019 is also furnished at page no. 90 of the writ petition. Since payments were accepted and a license entered into between the KMC and the petitioners in the context of the contract-in-question even till March, 2020, it is apparent that there could not have been any allegations of non-payment of quarterly instalments by the petitioners to invoke Clause 22 of the contract.

- 23.** In any event, if there was a breach of Clause 22 by the petitioners from the perspective of respondent no. 2, it was the incumbent duty of the said respondent, in all fairness and keeping in view the public nature of the contract (behoving respondent no. 2 to act impartially and in good faith in the capacity of a public authority), to give sufficient prior notice to the petitioners to represent the petitioners' stand/defence on such allegations, before arriving at the conclusion that the contract stood automatically terminated.
- 24.** As regards the other allegations, relating mostly to inferior quality of food supply by the petitioners, the same are not only levelled for the first time in this court, but also did not find place in any manner in the notice of termination, thus meriting no consideration at all.
- 25.** Even proceeding as per the Contract Act, Sections 202 and 204 thereof confer certain rights on the petitioners in view of the petitioners having proceeded with their part of performance of the contract and having invested substantial amounts at minimum profit (due to the implicit altruistic nature of the work), acting in good faith

on the basis of the contract. Unilateral termination, thus, is contrary to law as well.

26. The agreement-in-question does not provide for any sanction for the breach, even if any, of the other provisions invoked in the impugned termination letter, that is, Clauses 6, 7, 8 and 23, let alone termination of the contract. In any event, the respondent no. 2 was duty-bound under the contract-in-question to serve a three months' rectification notice to the petitioners in case of contravention of such clauses. Entitlement to terminate the contract would arise in case of such breach, if any, being not remedied by the petitioners within such three months. Hence, the termination notice is bad in law even as per the terms of the contract, apart from being violative of Articles 14 and 19 of the Constitution of India, as well as of the principles of natural justice.

27. Thus, it is imperative that the impugned termination of contract is set at naught.

28. Accordingly, W.P.A. No. 9535 of 2020 is allowed. The impugned decision to terminate the agreement dated February 17, 2017 between the petitioner no. 1 and respondent no. 2 and the communication to that effect dated November 5, 2020 (Annexure 'P-8' at page no. 106 of the writ petition) are quashed. Any other action, if taken consequent to such termination, also stands revoked. The respondents shall allow the petitioners to resume work as per the agreement between the parties dated February 17, 2017 with immediate effect.

29. There will be no order as to costs.

30. Urgent certified website copies of the order shall be provided to the parties upon due compliance of all the requisite formalities.

(Sabyasachi Bhattacharyya, J.)