

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR**WPC No. 2277 of 2020**

Radius Water Limited A Special Purpose Vehicle And A Company Duly Incorporated Under The Companies Act , 1956 Having Its Registered Office At Sheonath River, Road No. 3, Borai Industrial Growth Centre, Village Rasmada, District Durg, Chhattisgarh, Through Its Authorised Signatory , Shri Syed Ahtisham Ali, Aged About 54 Years , R/o Vardhman Nagar , Rajnandgaon Chhattisgarh. 491441., District : Rajnandgaon, Chhattisgarh

---- **Petitioner****Versus**

1. State Of Chhattisgarh Through The Secretary, Department Of Commerce And Industries, Mantarlaya, Mahanadi Bhawan, Atal Nagar, New Raipur Chhattisgarh., District : Raipur, Chhattisgarh
2. Chhattisgarh State Industrial Development Corporation Limited An Undertaking Of Government Of Chhattisgarh, Through Its Managing Director, Having Its Office At First Floor, Udyog Bhawan, Ring Road No. 1, Raipur Chhattisgarh 492004., District : Raipur, Chhattisgarh

---- **Respondents**

For Petitioner	:	Mr. Brian Da Silava, Sr. Advocate with Mr. Abhinav Kardekar, Advocate
For State/Res.No.1	:	Mr. Siddharth Dubey, Dy. GA
For Res. No.2	:	Mr. P. N. Bharat with Mr. Kashif Shakeel, Advocates

Hon'ble Shri Justice P. Sam Koshy
Order on Board

01/10/2020

1. Aggrieved by the decision of the respondent No.2 holding that contract period of the petitioner comes to an end w.e.f. 04.10.2020 the present writ

petition has been filed. Challenge also is for the quashment of the order issued by the respondent No.2 directing the petitioner to transfer its permanent assets to the respondent No.2 as per the agreement entered into between the parties.

2. Brief facts in nutshell relevant only for the adjudication of the present writ petition are that the petitioner company registered under the Companies Act entered into an agreement with the erstwhile Madhya Pradesh Audyogik Kendra Vikas Nigam Limited (in short 'MPAKVN Ltd.') on 05.10.1998. Agreement was on Build/Own/Operate and Transfer (BOOT) basis (in short 'The Agreement'). The Very purpose and object of the agreement was to provide assured water, infrastructure facilities to BORAI Industrial Growth Centre at District Durg (In short 'BIGC'). As per the agreement the petitioners were to construct necessary infrastructure/project within a period of two years and shall thereafter commission the same and own and operate the said Project for a period of 20 years and thereafter shall transfer the entire assets on as is where is basis to the respondent No.2.
3. As stated earlier the agreement was entered into between the petitioner and respondent No.2 on 05.10.1998 and as per the agreement the petitioner were to develop and construct the infrastructure by October, 2020 and thereafter the petitioner were to own and operate the system for 20 years i.e. till October, 2020 before transferring the same to the respondent No.2. However, though the agreement was entered into on 05.10.1998 the petitioners could not start development and construction of the project because of an objection that was raised by the Railway Department and Railways by an order dated 27.01.1999 had asked the respondent No.2 to stop the work immediately. The Railways had taken the

objection for the reason that the Railway track, and an underbridge on the railway track was closeby to the site and therefore taking into consideration the safety aspect of the railway track and passengers and the trains moving on those tracks and public passing through the underbridge was taken note of while stopping the work. That the said work thereafter was stalled for a considerable period of time and it was only after much persuasion at the level of the petitioner and respondent No.2, that the Railway authorities finally vide their order dated 13.08.1999 issued a no objection certificate. It is this date where the dispute in the present writ petition revolves around.

4. According to the petitioner since they have got the NOC only on 13.08.1999 and it is only thereafter that they could start, develop and construct the project, the 2 years period would start from 13.08.1999 till 13.08.2001 and 20 years period for the petitioners to own and operate would be 20 years from August, 2001 to August, 2021. Whereas the stand of the respondents is that the period of 20 years stands predetermined in the agreement dated 05.10.1998 wherein 2 years for the development of the project would be starting from October, 1998 till October, 2000 and thereafter the petitioner would have the right to own and operate the project for 20 years i.e. till October, 2020.
5. According to the petitioner there is no dispute whatsoever so far as the petitioner not being able to develop and construct the project on account of stalling of the construction by the Railways till August, 1999. It was contention of the petitioners that for the starting of the construction and development of the project it was incumbent upon the respondent No.2 to have provided a land free from all encumbrances which in the instant case the petitioners got only in August, 1999, therefore for all practical purposes

the period of 2 years for the construction of the project stood commenced only from August, 1998 onwards. According to the petitioners, from the time of agreement till the NOC was received there was no lapse or fault on the part of the petitioner in not commencing with the construction and development of the site. Therefore the petitioner cannot be deprived of the benefits of contract for the actual 20 years after the period of 2 years starting from August, 1999 till August, 2021. According to the petitioner applying the law of equity also they should have for all practical purposes permitted to continue with the project uptill August, 2021 before being transferred to respondent No.2.

6. According to the petitioner the decision on the part of the respondents in treating the contract period coming to an end w.e.f. 04.10.2020 is in total violation to the contract/agreement entered into between the parties and the petitioner cannot be made to suffer for no fault of his. It was also the contention of the petitioner that by taking over the project from the petitioner almost an year before schedule would be highhandedness on the part of the respondents and also illegal. According to the petitioner the respondents cannot and should not have permitted to take advantage of their situation and deprive the petitioner of their legitimate claim of operating the project till August, 2021. The action also on the part of the respondents would also be unfair and unequitable. It was also argued that action also amounts to colourable exercise of power, arbitrary and violative of Article 14. For the all aforesaid reasons, counsel for the petitioner prayed for applying the doctrine of legitimate expectation and sought for direction by this Court ordering that petitioners would be entitled to operate the project till August, 2021 before transferring the same to respondent No.2.

7. Per contra, learned counsel for respondent No.2 opposing the petition vehemently contended that writ petition is not maintainable at this juncture. According to the counsel for respondents, the writ petition is not maintainable for the reason that under the agreement itself there is a dispute redressal clause and where the clause provides for parties to avail arbitration as a mode to redress the disputes/grievances. As per the respondents, once when there is a mechanism provided under the agreement which was accepted by the petitioner at the first instance 20 years ago there is no reason why the petitioners should avail the Writ remedy instead of availing the remedy by resorting to arbitration proceedings. Counsel for the respondents further contended that petitioners themselves have in the past in respect of dispute arising out of the same contract had resorted to arbitration proceedings and matter is pending consideration before this Court after being decided by Arbitrator and thereafter by Commercial Court. It is also contended by the respondents that since in the past they have availed the arbitration recourse, in the present also they have to follow the same recourse rather than approaching the Writ Court. It was lastly contended that even otherwise the writ would not be maintainable for the reason that there are highly disputed questions of facts involved in the writ petition and which would require recording of evidences in respect of respective contentions on either side and for the said reason also the writ petition would not be maintainable.
8. As regards availability of alternative remedy, counsel for the petitioner relied upon the judgements in the case of **M.D., H.S.I.D.C. & Ors. Vs. Hari Om Enterprises & Anr., AIR 2009 SC 218**, in the case of **Union of India & Others Vs. Tania Construction Private Limited, (2011) 5 SCC 697**, in

the case of **Popatrao Vyankatrao Patil Vs. State of Maharashtra & Others, 2020 SCC Online SC 291**, in the case of **State of Orissa & Others Vs. Mangalam Timber Products Ltd., (2004) 1 SCC 139** in the case of **ABL International Ltd. & Another Vs. Export Credit Guarantee Corporation of India Ltd. & Others (2004) 3 SCC 553**, in the case of **Joshi Technologies International Inc. Vs. Union of India & Others, (2015) 7 SCC 728**, in the case of **Rajasthan State Industrial Development & Investment Corporation & Another Vs. Diamond & Gem Development Corporation Limited & Another (2013) 5 SCC 470**, in the case of **State of U.P. and Others Vs. Bridge & Roof Company (India) Ltd., (1996) 6 SCC 22**.

9. To negate the aforesaid legal pronouncements, counsel for the respondent No.2 relied upon the judgements in the case of **Joshi Technologies International Inc.(Supra), Rajasthan State Industrial Development & Investment Corporation & Another (Supra), State of U.P. and Others Vs. Bridge & Roof Company (India) Ltd. (1996) 6 SCC 22**.
10. Having heard the contentions put forth on either side and on perusal of records what is relevant at this juncture is to take note of the contents of the agreement entered into between the parties. Plain perusal of the Agreement Annexure P-4 in the present writ petition clearly reveals that there is no any clause which permits extension of time in the event if construction of the project company got delayed at the hands of the respondents or any other party other than the fault of the petitioner. The agreement also does not have a clause which says that respondents would be providing the site free from all encumbrances before petitioners could start the construction of the project.

11. At this juncture it would be relevant to refer to certain provisions of the agreement Clause 3.b.(i), Clause 4.5, Clause 5.1(a), Clause 8, 9, 10 & 13 for ready reference are reproduced hereinunder :-

“3.b.i) The Project Company will prepare detail designs and drawings based on feasibility report and get it approved from the concerned Chief Engineer of Water Resources Department of the M.P. Government or any other authority for an on behalf of the Corporation. The Corporation shall extend all co-operation for this purpose. Reasonable Delay, if any, on this count will be unclaimable by the project Company.”

“4.5) COMPENSATION FOR EARLY COMPLETION-

The earlier construction of the project before stipulated two years, according to Clause 4.4 shall be Bonus Concession Period for owning, operation and maintenance over and above 20 (twenty) years basic concession period during which the PROJECT COMPANY shall earn revenue for the facility extended. Similarly in case of delay in construction period beyond stipulated two years, 20(twenty) years basic concession period will be reduced to the extent of such delay in construction.”

“5.1a) The PROJECT COMPANY shall have right of operation and maintenance for basic 20 (twenty) years, after the stipulated two years of Project Construction period; subject to agreed adjustment in the concession period as per earlier Clause 4.5, During the concession period, the PROJECT COMPANY will own, operate and maintain the Project and sell water to the Corporation, on agreed terms.”

8. RESPONSIBILITY AND OBLIGATIONS OF THE CORPORATION-

8(a) The Corporation shall provide its best efforts to obtain permission from the Water Resources Department of the M.P. State Government to spare 30 (thirty) MLD water for Borai Industrial Growth Centre Water Supply in lean period(s) for the entire concessional years of water supply by the project company.

8(b) The corporation shall provide required land including their apartment area free of cost for all component of Project assets and allow the project company to perform its obligations; under this concession agreement.

8(c) After detail survey and planning of Barrage, if any govt. or private land, shall come under submergence, the Corporation shall pay all compensation(s) of all such lands and settle the whole issue(s).

It shall be obligatory on the part of the corporation to identify Government land/lands, Private land/lands, buildings, standing structures etc. etc. However, the project company shall identify such outer limit of submergence of maximum impounded areas).

8(d) The Corporation shall lease out all the existing Project assets (procurement cost @ Rs.502.75 lacs) on a token amount of Rs.1/- (Rs. One) per year as lease money; effective for the entire concession period. For this purpose, a lease deed shall be executed and delivered to the project company within a fortnight of assigning agreement.

However, the corporation will have right to use the leased assets during the construction period i.e. before handing over the project to the project company.

8(e) The Corporation takes sole responsibility for guaranteed purchase of 4.00 MLD water quantity on take or pay basis from the project company through out the concession period.

8(f) The Corporation shall extend all the co-operation and commitments as spelled in Section -IV point 14 of the Tender document⁶ (enclosed as Annexure-D).

8(g) The Corporation shall handover/pledge warrantee/indemnity of the existing project assets to the project company.

8(h) The Corporation being consumer in the instant case, alone shall abide by the circulars of Water Resources Department dated 29.04.98 and 1.6.98 or any amendment/circular/circulars issued in this regard, in future too.

8(i) The Corporation shall protect to project company from any competition by extending monopoly right to sell the water to the present and also to new industries in all phases/sectors of this Borai Industrial Growth Centre during concession period through the Corporation.

8(j) The Corporation shall renew the approval/agreement of Water Resources Department of the M.P. State Government towards use of water from its own source and/or from Government/Water Resources Department's source as and when required for Borai Industrial Growth Centre Water Supply Project.

8(k) The Corporation shall ensure completion of water treatment plant within two years since agreement. Delayed Completion of Water Treatment Plant from the construction of Project as spelled in Clause 4.4 shall not be related with taking over of the Project for operation and maintenance by the project company.

9. RESPONSIBILITY AND OBLIGATIONS OF THE PROJECT COMPANY-

9(a) The Project Company will be responsible for timely implementation of the Project.

9(b) The Project Company will be following risks, which may effect the Project viability;

(I) Interest rate risk on debt.

(II) Project cost over-run risk.

(III) Flood losses and damage risk.

(IV) Cost to achieve the Project operation and maintenance requirements.

9(c) The Project Company will comply with the safety standards.

9(d) The Project Company will prefer to use Indian Equipment, Technology and Man Power.

9(e) The Project Company will employ Indian personnels and try to train them during the Operation and Maintenance period.

9(f) The Project Company will maintain insurance of the entire Project assets during the concession period.

9(g) The Project Company will transfer the technology, inventions, conclusions which will come out during the concession period to the Corporation. However, it will be used by the Corporation for the same project only and shall not pass on the same, even with some changes; to other or to other Industrial centres of the State Government or its Corporations; without written consents of the Project Company.

9(h) The Project Company will abide by rules and regulations related to employees and labour.

10. COMMON OBLIGATIONS OF THE CORPORATION AND THE PROJECT COMPANY-

10(a) Each will have right on the Project documents, design, drawings and records for the purpose of this Project.

10(b) Each will encourage co-operation and efficiency for fair reward to each other.

10(c) Force Majeure-

There are certain force majeure event(s) which the Corporation and/or the project company would be unable to prevent or influence and which are uninsurable i.e. Earthquake, War, Riots, Nuclear explosion etc. etc. In such or similar event(s) that the project assets are seriously damaged and insurance proceeds are not available; the tariff would be specially reviewed between the Corporation and the Project Company by mutual consent to compensate the cost to rebuild the damaged assets of the Project and or losses caused due to such interruption(s) of Water supply/Effluent treatment.

10(d) Settlement of Dispute(s)-

Concession agreement is predicated upon reciprocal promises. In case of dispute(s), if any, it shall be resolved as under:

10.d.1) By Mutual Settlement- To be settled within a period of two months from the date of Notice of such dispute(s) by the concerned party to the other party of this agreement, failing which the aggrieved party has a right to invoke Arbitration.

10.d.2) By Arbitration- Such Arbitration shall be in accordance with the provisions of the Arbitration and Conciliations Ordinance 1996 (No.8 of 1996) including the amendments, if any, to this enactment, at the time of reference of dispute(s).

10(e) The Project Company will ensure employment of minimum 60% (sixty percent) staff, on selective basis on taking over the existing Project assets. However the staff will have choice to accept the salary structure of the Project Company or the terms of the Corporation for salary and service conditions. In case, if any grievance arises in service conditions of the staff, so absorbed by the Project Company, it will be settled mutually between the representative of the Project Company and the Corporation.

In case of dis-agreement between the Project Company and the Corporation on the above issue, the matter will be referred to the Managing Director, M.P. State Industrial Development Corporation Ltd. whose decision will be final and binding on both the parties.

Similarly the Corporation will ensure employment of minimum 60% (sixty percent) of the then staff (who has served for a total of 15 (fifteen) years in the Project Company), on selective basis at the time of transfer of the Project to the Corporation on the same terms and conditions on which they were employed by the Project Company.

13. RENEWAL OPTION-

The Corporation and the Project Company may renew the concession period one year before the expiry of the concession period, on a mutual consent basis. “

12. Undisputedly the petitioner started construction of the project on 13.08.1999 onwards and project was completed in the 13 months time and it was commissioned w.e.f. 15.11.2000 and since then petitioners have been operating the said plant. Clause 13 has a renewal clause and which was to be done one year before expiry of the concession period, there

does not seem to be any efforts made on either side for the renewal of the concession period. There was no correspondence made on either side to determine the contract period whether it would come to an end in October, 2020 or whether it would come to an end in August, 2021.

13. These are disputed question of fact which has to be thrashed out before the appropriate forum as provided under the agreement itself and which was mutually agreed upon. It is here that judgment of the Supreme Court in the case of **Joshi Technologies (Supra)** is worth referring, wherein the Supreme Court in Paragraph 69 has laid down certain circumstances under which the Courts normally should not exercise its Writ discretionary power. For ready reference Paragraph 69 is reproduced hereinunder :-

“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:

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.

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

14. Similarly in the case of Rajasthan State Industrial Development Investment Corporation (Supra) in Paragraph 19 to 21 have held as under :-

“19. There can be no dispute to the settled legal proposition that matters/disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction under [Article 226](#) of the Constitution. Thus, writ court cannot be a forum to seek any relief based on terms and conditions incorporated in the agreement by the parties. (Vide: [Bareilly Development Authority & Anr. v. Ajay Pal Singh & Ors.](#), AIR 1989 SC 1076; and [State of U.P. & Ors. v. Bridge & Roof Co. \(India\) Ltd.](#), AIR 1996 SC 3515).

20. [In Kerala State Electricity Board & Anr. v. Kurien E. Kalathil & Ors.](#), AIR 2000 SC 2573, this Court held that a writ cannot lie to resolve a disputed question of fact, particularly to interpret the disputed terms of a contract observing as under:

“10.....The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition.If a term of a contract is violated, ordinarily the remedy is not the writ petition under [Article 226](#). We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract.....

11.....*The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under [Article 226](#) of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract.... The contractor should have relegated to other remedies.”*

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 justiceiae). 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.”*

15. Now so far as judgement cited in by the learned counsel for the petitioner are concerned, those are settled legal position as it stands where it has been repeatedly held and laid down by the Supreme court that in a given case even if there is an alternative remedy available the Writ Court should not hesitate in entertaining the writ petition for the enforcement of law and equity. There is also no dispute of the legal proposition as it stands that

alternative remedy is not an absolute bar to invoke the writ jurisdiction of the High Court under Article 226.

16. What is also to be seen is the fact that once when there is a remedy of arbitration available for redressal of grievances and disputes and petitioners having invoked the said remedy in the past arising out of the very same contract, there is no reason why the petitioners should not avail the same recourse as of now. So far as irreparable loss if any is concerned, the same could also be looked into in the arbitration proceedings and we must not forget that even under the arbitration law there are provisions for seeking interim relief both under Section 17 as also under Section 9.

17. For the aforesaid reasons reserving the right of the petitioner to avail the remedy of arbitration if it so chooses in terms of agreement between the parties, the present writ petition in the given factual backdrop does not have merits and same stands rejected.

**Sd/-
(P. Sam Koshy)
Judge**