

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Appeal No. 337 of 2021**

(Arising out of the order dated 11.8.2021 passed by learned Single Bench in Writ Petition (C) No.3320/2020)

Maa Bhagwati Construction, a partnership firm through its partner Parul Rai
S/o Shri Rajesh Kumar Rai, aged about 35 years, resident of Flat No.107,
First Floor Vaishali Pride, Minocha Colony, Bilaspur, District-Bilaspur
Chhattisgarh-495001

----Appellant

VERSUS

1. State of Chhattisgarh Through – Principal Secretary, Public Works Department, Mahanadi Bhawan, Mantralaya, Atal Nagar, Naya Raipur (CG)
2. Engineer-in-Chief, Public Works Department, Nirman Bhawan North Block, Sector-19, Atal Nagar, Naya Raipur (CG)
3. Chief Engineer, Public Works Department, Raipur Zone, Raipur (CG)
4. Superintending Engineer, Public Works Department, Circle No.1, Raipur (CG)
5. Executive Engineer, Public Works Department, Raipur Division No.2, Medical College Parisar, Raipur (CG)

-----Respondents

For Appellants	:	Mr.Kishore Bhaduri, Senior Advocate with Mr.Anand Dadariya, Advocate
For Respondents	:	Mr.Sunil Otwani, Additional Advocate General

Hon'ble Shri Justice Sanjay K. Agrawal and
Hon'ble Shri Justice Arvind Singh Chandel

Order on Board
(17.11.2021)

Sanjay K. Agrawal, J.

1. This writ appeal is directed against the order dated 11.8.2021 passed by the learned Single Judge in WP(C) No.3320 of 2020, whereby the learned Single Judge has dismissed the writ petition filed by the writ appellant herein

reserving liberty in favour of the writ appellant to seek the remedy before the arbitration tribunal, which has been sought to be challenged in this writ appeal.

2. Mr.Kishore Bhaduri, learned Senior Counsel with Mr.Anand Dadariya, learned counsel appearing for the writ appellant, would submit that the learned Single Judge is absolutely unjustified in dismissing the writ petition filed by the writ appellant in view of arbitration clause 28 of the agreement asking him to avail the remedy before the arbitration tribunal and in view of decisions of the Supreme Court in the matters of Unitech Limited and others v. Telangana State Industrial Infrastructure Corporation (TSIIC) and others¹ and Radha Krishan Industries v. State of Himachal Pradesh & Ors.², it can be held that despite the availability of alternative remedy, the writ petition would be maintainable, as such, the impugned judgment passed by the learned Single Judge deserves to be set aside.
3. On the other hand, Mr.Sunil Otwani, learned Additional Advocate General for the respondents/State, would submit that the learned Single Judge is absolutely justified in dismissing the writ petition filed by the writ appellant on the ground of availability of the remedy before the arbitration tribunal under the Chhattisgarh Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter called as 'Act of 1983').
4. We have heard learned counsel appearing for the parties, considered their rival submissions made hereinabove and also went through the records with utmost circumspection.
5. The short question is involved, whether the learned Single Judge is justified in dismissing the writ petition filed by the writ appellant on the ground of availability of efficacious remedy before the arbitration tribunal constituted

¹ 2021 SCC Online SC 99

² (2021) 6 SCC 771

under the Act of 1983.

6. The Supreme Court in the matter of Union of India and others v. Tania Construction Private Limited³ has clearly held that the constitutional powers vested in the High Court cannot be fettered by any alternative remedy available to the authorities including arbitration. It was observed as under:-

“33. Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.

34. We endorse the view of the High Court that notwithstanding the provisions relating to the Arbitration Clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the writ petition filed on behalf of the respondent company. We, therefore, see no reason to interfere with the views expressed by the High Court on the maintainability of the writ petition and also on its merits.”

7. Similarly, in the matter of Unitech Limited (supra), the Supreme Court relying upon its earlier decisions has clearly held that the presence of an arbitration clause within a contract between a state instrumentality and a private party has not acted as an absolute bar to availing remedies under Article 226 of the Constitution of India. It was observed as under:-

“40. This exposition has been followed by this Court, and has been adopted by three-judge Bench decisions of this Court in *State of UP v. Sudhir Kumar*⁴ and *Popatrao Vynkatrao Patil v. State of Maharashtra*⁵. The decision in *ABL International*, cautions that the plenary power under Article 226 must be used with circumspection when other remedies have been provided by the contract. But as a statement of principle, the jurisdiction under Article 226 is not excluded in contractual matters. Article 23.1 of the Development

³ (2011) 5 SCC 697

⁴ 2020 SCC Online SC 847

⁵ Civil Appeal 1600 of 2000 (Supreme Court of India)

Agreement in the present case mandates the parties to resolve their disputes through an arbitration. However, the presence of an arbitration clause within a contract between a state instrumentality and a private party has not acted as an absolute bar to availing remedies under Article 226. If the state instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers of the Article 226 of the Constitution would lie. This principle was recognized in *ABL International*:

“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 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.”

(emphasis supplied)

41. Therefore, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does not oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked. The jurisdiction under Article 226 was rightly invoked by the Single Judge and the Division Bench of the Andhra Pradesh in this case, when the foundational representation of the contract has failed. TSIC, a state instrumentality, has not just reneged on its contractual obligation, but hoarded the refund of the principal and interest on the consideration that was paid by Unitech over a decade ago. It does not dispute the entitlement of Unitech to the

refund of its principal.”

8. Similarly, in the matter of Radha Krishan Industries (supra), the Supreme Court while taking into note of earlier decisions of the Supreme Court in Whirlpool Corpn. (supra) and Harbanslal Sahnia and another v. Indian Oil Corpn. Ltd. And others⁶ laid down the principles for maintainability of writ petition as under:-

“ 27. The principles of law which emerge are that :

27.1 The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2 The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

27.3 Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4 An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

27.5 When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6 In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.

28. These principles have been consistently upheld by this Court in Chand Ratan v Durga Prasad⁷, Babubhai Muljibhai Patel v Nandlal Khodidas Barot⁸ and Rajasthan SEB v. Union of India⁹ among other decisions.

⁶ (2003) 2 SCC 107

⁷ (2003) 5 SCC 399

⁸ (1974) 2 SCC 706

⁹ (2008) 5 SCC 632

9. Reverting to the facts of the present case in light of aforesaid judgments of the Supreme Court, it is quite vivid that though the writ petition is maintainable despite the availability of arbitration clause, but the writ appellant has failed to demonstrate any of the exceptions held by their Lordships of the Supreme Court in the matter of **Radha Krishan Industries** (supra) for maintaining writ petition. Learned Single Judge in para-9 of the impugned order has clearly held that since agreement between the parties contains an arbitration clause in shape of arbitration clause 28 and both the parties are bound by it and granting liberty to the writ appellant to invoke the remedy before the arbitration tribunal constituted under the Act of 1983, the writ petition has been dismissed. After hearing learned counsel appearing for the parties and after going through the records, we are of the considered view that the learned Single Judge is absolutely justified in dismissing the writ petition filed by the writ appellant on the ground of availability of the remedy before the arbitration tribunal under the Act of 1983 as the writ appellant has failed to demonstrate any of the exceptions as noticed hereinabove for maintaining writ petition as held by the Supreme Court in **M/s Radha Krishan Industries** (supra). We do not find any force in this writ appeal. It deserves to be and is hereby dismissed.

10. At this stage, Mr.Kishore Bhaduri, learned Senior Counsel, would submit that Arbitration Tribunal be directed to expedite the hearing, if it is so filed, before the tribunal. Needless to say, in the event of filing arbitration reference, the Arbitration Tribunal would do well to consider and decide the same in accordance with law expeditiously.

Sd/-

(Sanjay K. Agrawal)
Judge

Sd/-

(Arvind Singh Chandel)
Judge