

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present :-

THE HON'BLE JUSTICE DEBANGSU BASAK

And

THE HON'BLE JUSTICE PARTHA SARATHI SEN

FMA 999 of 2021

With

IA No: CAN 1 of 2021

CAN 2 of 2021

West Bengal State Fishermen's Co-Operative

Federation Limited (Benfish).

-Vs-

Lords Bluetech Co. Pvt. Ltd & Ors.

For the Appellants:	Mr. Kishore Datta, Ld. Advocate General
	Mr. Arijit Dey, Advocate
	Mr. D. R. Mukherjee, Advocate.

For the respondent Nos. 1	Mr. Srijit Chakraborty, Advocate
and 2:	Mr. Dhruv Chandha, Advocate
	Ms. Pallavi Ray, Advocate.

For the State	:	Mr. Susovan Sengupta, Advocate
		Mr. Subir Pal, Advocate

Hearing concluded on:	04.07.2024.
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Judgment on:	12.07.2024.
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PARTHA SARATHI SEN, J. : –

1. Challenge in this appeal is the judgement dated 22.12.2020 as passed by the learned Single Bench in WPA 9535 of 2020. By the impugned judgement learned Single Bench allowed the writ petition and

thus quashed the decision of the respondent no.2/authority therein to terminate the agreement dated 17.12.2017 between the writ petitioner and the respondent no.2 therein and the notice dated 05.1.2020. The respondent no.2/authority of the said writ petition felt aggrieved and thus preferred the instant appeal.

2. For effective disposal of the instant appeal, the facts leading to initiation of the writ petition is required to be dealt with in a nutshell and those are as follows:-

- i. On 17.02.2017 the appellant/authority herein and the private respondent no.1/writ petitioner entered into an agreement.
- ii. The agreement was for sale of '21se Annapurna' lunch scheme at the rate of Rs.21/- per plate by using the brand name of 'Benfish' of the appellant/authority. The said agreement contains several terms and conditions.
- iii. The execution of the deed of agreement between the parties is however not disputed.
- iv. According to the appellant/authority the respondent no.1/writ petitioner violated certain terms and conditions of the said agreement and thus a letter dated 26.03.2019 was issued by the appellant/authority.
- v. The said letter was duly replied by the respondent no.1/writ petitioner under cover of its reply letter dated 01.04.2019.
- vi. Since according to the appellant/authority the grievance as raised under the cover of letter dated 26.03.2019 was not met with

by the respondent no.1/writ petitioner, the appellant/authority by its letter dated 30.07.2019 requested the writ petitioner to comply with the terms and conditions of the said agreement in letter and spirit.

vii. According to the appellant/authority the respondent no.1/writ petitioner failed to discharge its obligation in terms of Clauses 6,7,8,22 and 23 of the said agreement and accordingly by issuing a letter dated 05.11.2020 the appellant/authority cancelled and terminated the aforesaid agreement which gave rise to the aforesaid writ petition.

3. In course of his submission learned advocate for the appellant/authority at the very outset draws out attention to the agreement dated 17.02.2017 between the appellant /authority and the respondent no.1/writ petitioner. Attention of ours is also drawn to the various clauses of the terms and conditions of the said agreement more specifically Clauses 6,7,8,13,20 and 22. Drawing attention to the notice dated 26.03.2019, the reply of the respondent no.1/writ petitioner dated 01.04.2019 and the second notice dated 30.07.2019 as issued by the appellant /authority it is submitted on behalf of the appellant that on conjoint perusal of the aforesaid two notices and the reply it would reveal that the respondent no.1/writ petitioner had failed and neglected to deposit monthly fixed and floating amount of sale of product on a quarterly basis within a fortnight on completion of each quarter to the appellant/authority and that apart the respondent/writ petitioner was

found to be defaulted in paying the security deposit and further they were found to be using an excess area of the premises of the appellant/authority which was not allotted to them.

4. It is submitted further on behalf of the appellant/authority that from the letter dated 10.04.2019 it would reveal further that the respondent no.1/writ petitioner had not denied any of the allegations of the writ petitioner and on the contrary the respondent no.1/writ petitioner insisted the appellant/authority to extend the time to deposit the contractual amount.

5. Drawing our attention to the letter dated 30.07.2019 it is submitted further that from the said letter it would reveal that despite several request made by the appellant/authority the respondent no.1/writ petitioner paid no heed to the request of the appellant/authority though their outstanding dues reached to the extent of Rs. 7,50,000/- till the date of issuing of such letter and that apart it was also found that they have defaulted in paying the usual rent of the mobile van and the respondent no.1/ writ petitioner has also violated the other conditions of the said agreement. In course of his argument learned advocate for the appellant/authority further submits that since the writ petitioner had failed to comply with the various terms and conditions of the said agreement including the Clause 22 of the said agreement, the appellant/authority is within their right to terminate such agreement without any prior notice and actually that has been done by issuing the notice dated 05.11.2020 which was impugned before the learned Single

Bench. It is submitted further that the learned Single Bench while passing the impugned order has failed to visualize the true spirit of Clause 22 of the terms and conditions of the said agreement and thus came to a wrong finding that that writ petitioner is entitled to the relief as sought for. It is submitted further that while passing the impugned order learned Single Bench has also failed to consider that the agreement as entered by and between the present appellant and the respondent no.1/writ petitioner was a non-statutory contract and that the learned Single Bench being a writ court is not supposed to enter into a dispute arising out a non-statutory contractual obligation.

6. It is further submitted that since before the learned Single Bench the writ petitioner has failed to make out a case with regard to the alleged arbitrary action on the part of the appellant/authority in issuing the notice of termination dated 05.11.2020 learned Single Bench ought to have been very slow in invoking its writ jurisdiction.

7. In support of his contention learned advocate for the appellant places his reliance upon the reported decision of ***M.P Power Management Company Ltd., Jabalpur vs. Sky Power Southeast Solar India Pvt. Ltd. and Ors*** reported in (2023) 2 SCC 703, ***The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. vs. Sipahi Singh and Ors*** reported in (1977) 4 SCC 145 and judgement dated 02.05.2024 as passed in MAT 1412 of 2023 (***The Ghani Khan Choudhury Institute of Engineering and Technology and Ors. vs. M/S Malda Construction***

Company & Ors.) passed by a Division Bench of this Court presided over by the Hon'ble the Chief Justice.

8. Per contra, learned advocate for the respondent no.1/writ petitioner also draws out attention to the notice of termination of agreement dated 05.11.2020. In course of his argument he also places his reliance upon the agreement between the appellant/authority and the respondent no.1/writ petitioner. It is submitted that from the terms and conditions of the said agreement it would reveal that in respect of the said agreement time was the essence of contract and it was agreed by and between the parties that prior to the termination of the agreement and/or to rectify the breach of the terms of the said agreement three months prior notice have to be given.

9. In course of his argument learned advocate for the respondent no.1/writ petitioner while referring to Clause 22 of the agreement in question also draws out attention to the statement of account (at page no.177) of the stay petition. It is submitted that the respondent no.1/writ petitioner had paid Rs.4,00,000/- to the appellant/authority towards monthly fixed amount which the learned Single Bench noticed rightly in its impugned judgement. It is thus submitted that from the internal page no.12 of the impugned judgement it would reveal that the learned Single Bench has come to a correct finding that there was no scope to observe that the writ petitioners defaulted for four consecutive quarters till date and thus keeping in mind the public nature of the contract and in absence of giving adequate opportunity to the writ petitioner to represent

their stand/ defence, the present appellant/authority was not justified to rescind the agreement in question. In course of his argument learned advocate for the respondent/authority also placed his reliance upon the following reported decisions of ***M.P Power Management Company Ltd., Jabalpur vs. Sky Power Southeast Solar India Pvt. Ltd. and Ors (supra), Unitech Limited and Ors. vs. Telangana State Industrial Infrastructure Copr. (TSIIC) and Ors. reported in (2021) 16 SCC 35.***

10. In course of his submission learned advocate for the State echoes the version of the learned advocate for the appellant/authority. He also places his reliance upon an unreported decision dated 23.03.2022 as passed in ***FMA 861 of 2019 (Dhaspara SKUS Ltd. and Anr. vs. State of West Bengal and Anr.)*** by a Division Bench of this Court.

11. Before entering into the merit of this appeal we propose to deal with the reported decisions as cited from the Bar.

12. Since both the appellant/authority and the respondent no.1/writ petitioner had placed their reliance upon the reported decisions of ***M.P Power Management (supra)*** we propose to look to the relevant paragraph of the said reported decision wherein the Hon'ble Apex Court expressed the following view:-

“82.12 In a case the State is a party to the contract and a breach of a contract is alleged against the State, a civil action in the appropriate Forum is, undoubtedly, maintainable. But this is not the end of the matter. Having regard to the position of the State and its duty to act fairly and to eschew arbitrariness in all its actions, resort to the constitutional remedy on the cause of action, that the action is

arbitrary, is permissible (See in this regard Kumari Shrilekha Vidyarthi and others v. State of U.P and others). However, it must be made clear that every case involving breach of contract by the State, cannot be dressed up and disguised as a case of arbitrary State action. While the concept of an arbitrary action or inaction cannot be cribbed or confined to any immutable mantra, and must be laid bare, with reference to the facts of each case, it cannot be a mere allegation of breach of contract that would suffice. What must be involved in the case must be action/inaction, which must be palpably unreasonable or absolutely irrational and bereft of any principle. An action, which is completely malafide, can hardly be described as a fair action and may, depending on the facts, amount to arbitrary action. The question must be posed and answered by the Court and all we intend to lay down is that there is a discretion available to the Court to grant relief in appropriate cases.”

In the unreported decision of the **Ghani Kahn Choudhury Institue of Engineering and Technology and Ors. (supra)** a Co-ordinate Bench of this Court held thus:-

“32. From the aforesaid discussion, this Court is of the considered view that in case of alleged violation of a contractual right or duty by the State or its instrumentalities or entities amenable to jurisdiction under Article 226, normally the aggrieved person has to avail the established civil adjudicatory process and only in exceptional circumstances in contractual matters or even when money claim is raised, the writ court may in exercise of its discretion entertain the writ petition.

33. In the case on hand, the allegation of the writ petitioners is with regard to violation of a contractual right. The writ petitioners have claimed payment on account of work done by them. The dispute,

therefore, is within the private realm. In order to maintain a writ petition involving such a dispute, the writ petitioners have to satisfy the Court that the case falls within the exceptional circumstances. The conduct of the writ petitioners may be of some relevance for deciding whether the case of the writ petitioners fall within the exceptional circumstances.”

13. In our considered view the reported decision of ***The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd (supra)*** has dealt with different subjects and thus the same is no way relevant for disposal of the instant appeal and thus we make no discussion on the same.

14. In the reported decision of ***Unitech Ltd. (supra)*** the Hon'ble Apex Court while deciding the jurisdiction of the High Court under Article 226 of the Constitution of India in a case of contractual dispute expressed the following view:-

“39.5. 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.

39.6. 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 (sic 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.

39.7. The jurisdiction under Article 226 was rightly invoked by the Single Judge and the Division Bench of the Andhra Pradesh High Court in this case, when the foundational representation of the contract has failed. TSIIC, 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.”

15. In the unreported decision of ***Dhaspara SKUS Ltd. and Anr.*** (*supra*) a co-ordinate bench of this court expressed the following view:-

“8. In the aforesaid circumstances, learned Single Judge has not committed any error in holding that the petition involves disputed questions of fact which cannot be decided in writ jurisdiction. Hence, we do not find 4 FMA 861 of 2019 any error in the order of the learned Single Judge. No case for interference is made out. Petition is accordingly dismissed. CAN 1 of 2019 (Old. No. CAN 4637 of 2019) is disposed of.”

16. It reveals to us that appellant has cancelled the agreement dated February 17, 2017 on the ground that the respondent failed to discharge obligations in terms of clauses 6, 7, 8, 22 and 23 of such agreement. In addition to such clauses, we have to consider clause 20 of the agreement

as it deals with the right to terminate the agreement. Such clauses of the agreement dated February 17, 2017 are as follows: –

“6. M/s Lords in the meeting of its Board of Directors shall adopt a resolution towards formation of a Managing Committee. Consist of 7/8 members of which three from Benfish and four/five from Lords and among of these three members from Benfish one member will be nominated as the Chairman of the said Managing Committee and Chairman will be authorized to vote with 'veto power' in any meeting of the said Managing Committee for looking after the affairs and/or interest of Benfish like quality control, checking of accounts of M/s Lords for determining monthly turnover, annual gross profit, net profit, balance sheet etc., to keep a watch on the performances of M/s Lords to keep it on line with the objects, clause, as mentioned in this agreement by himself or through his authorized representative. M/s Lords will make proper arrangements for such visit to units, TA, DA, seating arrangement in HQ and providing necessary documents as and when required for by the said Chairman. The Managing Committee or the Chairman through his veto power shall not take any decision/resolution which hampers the interest or prejudicial to or detrimental to the interest of either of the parties. If made, it will be treated as void. Secretary of this committee will be nominated by LORDS.”

“7. The Chairman of the Managing Committee may call annual general Meeting/ extraordinary general meeting of the committee or the Chairman may direct the Secretary of the Managing Committee to arrange for convening of such meeting.”

“8. Generally 2/3rd of the members of the Managing Committee will make quorum and decisions/resolutions be adopted on the vote of the majority of the members present subject to the veto power of the

Chairman. In the case of veto power or any disputes arising out of the majority decision/resolution, the decision/resolution should be placed before the Board of Directors/Special Officer of Benfish, whose decision will be final and binding on M/s Lords in all respect. However, resolutions adopted by majority members present including Chairman as his representative, without "Veto" need not require such approval of the Board of Director/Special Officer of Benfish, for which Managing Committee will enjoy full freedom in execution of the resolutions to perform their business freely and independently."

"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 will have the right to terminate this Agreement."

"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."

“23. M/s Lords shall submit audited Trading, Profit & Loss Account, Balance Sheet by reputed Chartered Accountants within 6(six) months of completion of the financial year to Benfish.”

17. Clause 6 of the agreement has cast an obligation on the respondent to adopt a resolution towards formation of a Managing Committee and make proper arrangement for the visit of the Managing Committee. Clause 7 has empowered the Chairman of the Managing Committee to call meetings. Clause 8 has laid down the procedure for the quorum and the voting of the Managing Committee.

18. Clause 20 of the agreement has specified that the time of the agreement is the essence of the contract. It has also provided that neither of the parties shall have the liberty to terminate the agreement at its own will. It has provided for a mechanism for rectification of any breach of the agreement by any of the party. Clause 20 has required one party complaining of breach to bring such breach to the notice of the other party by written communication and provide a minimum of 3 months for rectification of such breach. Despite such written communication and time of 3 months for rectification of the breach being given and the rectification not occurring then, the party giving the notice shall have the right to terminate the agreement.

19. Clause 20 has recognised the right to terminate the agreement. It has recognised that time is the essence of the contract. It has also provided for a rectification of the breach mechanism.

20. Clause 22 of the agreement has cast an obligation on the respondent to pay the amount calculated as payable by the appellant within 15 days of completion of each quarter by account by cheque to the specified entity after adjusting the minimum quarterly lease rent. It has also provided that failure to pay in time on four consecutive quarter will automatically terminate the agreement without any notice.

21. Apart from the right to terminate the contract as has been specified in Clause 20, Clause 22 has provided for an automatic termination of the agreement without any notice in the eventuality of non-payment of four consecutive quarter by the respondent.

22. Clause 23 of the agreement has cast an obligation upon the respondent to submit audited Trading, Profit and Loss Account, Balance Sheet by reputed Chartered Accountant within 6 months of completion of the financial year, to the appellant.

23. Materials placed before us has established that, appellant gave notices under clause 20 of the agreement to rectify the breaches of the agreement specified in such notices. Such notices had been issued on March 26, 2019 to which the respondent had replied to on April 1, 2019. Amongst the breaches complained of in the notice dated March 26, 2019 was the claim of non-deposit of fixed amount of ₹ 50,000 per month on regular basis as minimum Guarantee Lease Rent by the respondent. Documents placed on record has established that subsequent to such notice dated March 26, 2019, respondent continued to act in breach thereof.

24. The next notice is dated July 30, 2019 by which, again, appellant had highlighted various breaches committed by the respondent including non-payment of the fixed amount of Guarantee Lease Rent. Respondent did not reply to this notice. Nothing has been placed on record to establish that, the respondent did not act in breach of the agreement as notified by the appellant in the two notices or that, the respondent had rectified the defaults noted in the two notices. Consequently, the terms and conditions of the subject agreement had vested the appellant with the right to terminate the agreement.

25. Appellant had decided to terminate the agreement and issued the notice of cancellation of the agreement dated November 5, 2020. Such a decision of the appellant cannot be said to be arbitrary, based on no material at all or having been actuated by malice. Appellant had given adequate time as contemplated under the agreement, to the respondent to rectify the defaults. Appellant had issued written communication in terms of the agreement to the respondent to rectify the defaults. Defaults pointed out in the notices had remained unrectified.

26. In view of the discussion made hereinabove we thus find no arbitrariness at all on the part of the appellant/authority in issuing the notice dated 05.11.2020 on account of violation of Clause 22 along with other clauses of the said agreement in view of the fact Clause 22 of the agreement made it clear that failure to pay in time on four consecutive quarters would tantamount to termination of the agreement automatically without any further notice.

27. We thus find neither any arbitrariness nor any unreasonableness nor any irrationality on the part of the appellant/authority in issuing the notice of termination dated 05.11.2020 and by no stretch of imagination it can be said that the appellant/authority acted in an unfair manner despite non-receipt of the monthly amount on quarter to quarter basis within the stipulated period.

28. We thus find sufficient merit in the instant appeal and accordingly the instant appeal is allowed.

29. The impugned order dated 22.12.2020 as passed by the learned Single Bench in WPA 9535 of 2020 is thus set aside.

30. All interim applications are also disposed of.

31. There shall be no order as to costs.

32. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

(PARTHA SARATHI SEN, J.)

33. I Agree.

(DEBANGSU BASAK, J.)