



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 12th MARCH, 2024

IN THE MATTER OF:

+ **W.P.(C) 14027/2023 & CM APPLs. 55426/2023, 55428/2023, 64316/2023**

ANTARES SYSTEMS LTD.

..... Petitioner

Through: Mr. Gautam Narayan, Ms. Asmita Singh, Mr. Harshit Goel, Mr. Sujay Jain and Mr. K.V. Vibhu Prasad, Advocates.

versus

DELHI DEVELOPMENT AUTHORITY & ANR. Respondents

Through: Mr. Sanjay Katyal and Ms. Kritika Gupta, Advocates for R-1/DDA.
Mr. S.K. Sharma and Mr. Chitrakrit Rana, Advocates for R-2.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioner has approached this Court challenging the action of Respondent No.1/DDA in conducting its e-auction through the e-Wizard portal of M/s Unibrain as stated in public advertisement dated 25.09.2023 and Corrigendum dated 25.09.2023 which the Petitioner alleges is in violation of the Agreement dated 06.08.2020 entered into between the Respondent No.1/DDA and the Respondent No.2/ITI Limited on the ground that the Work Order dated 03.08.2020 placed on the Respondent No.2/ITI Limited by the Respondent No.1/DDA was based on the Memorandum of



Understanding (MoU) dated 16.03.2020 entered into between the Petitioner herein and the Respondent No.2/ITI Limited. It is stated that it was only on the strength on the Memorandum of Understanding (MoU) dated 16.03.2020 entered into between the Petitioner and the Respondent No.2/ITI Limited, the Respondent No.2/ITI Limited could get the work order from Respondent No.1/DDA as service provider for E-Auction Portal Services. The Petitioner is also challenging the Order dated 31.10.2023 wherein Respondent No.1/DDA has amended the work order dated 03.08.2020 to the extent of shifting to e-Wizard portal which is a product of a third party M/s Unibrain as a service provider for providing e-auction services.

2. The facts, in brief, leading to the filing of the instant writ petition are as under:

- a. Respondent No.2/ITI Limited floated an expression of interest for selection as an “application service provider” for providing e-procurement solution and related services. It is stated that pursuant to expression of interest floated by the Respondent No.2/ITI Limited, the Petitioner herein, which is an ISO 9000 certified company, engaged in development of Information Technology Solutions, customized software and providing solutions for e-governance and IT fields, such as SPEC WIZARD, TENDER WIZARD and HR-payroll. The Petitioner showed interest and a Memorandum of Understanding (MoU) was entered into between the Petitioner and the Respondent No.2/ITI Limited on 04.08.2015 which was valid for a period of 36 months from 04.08.2015.
- b. On 04.08.2015, the Memorandum of Understanding (MoU) records



that the Petitioner had developed the software application as sought by the Respondent No.2/ITI Limited in its expression of interest. The said MoU also records that the Petitioner agrees to join hands with Respondent No.2/ITI Limited on exclusive basis for a fruitful association, complementing each other's strengths in their respective areas of competence and utilizing their respective skills and expertise in business cooperative activity. The purpose of the said MoU was to enable the Respondent No.2/ITI Limited to provide e-procurement solution to the clients of Respondent No.2/ITI Limited. The said MoU was for a period of 36 months and it was further extended for a period of 36 months from 04.08.2018.

- c. The Respondent No.1/DDA floated a tender on 10.12.2019 for appointment of a service provider for providing e-auction services. A perusal of the relevant clauses of the tender, a sum of Rs.20 lakhs as Earnest Money Deposit was to be deposited by the bidder. The tender also stated that the bid shall not be altered or modified after its submission and the tender will not be sub-let, sub-contracted in part or in full after getting the assignment/award of work. The tender specifically stated that the parties shall enter into a contract, incorporating all clauses, pre-bid clarifications and the proposal of the Bidder, between the DDA and the successful bidder. It is also pertinent to mention that the data sheet which is a part of the tender required the tenderer to reveal the details of the consortium partner and the MoU entered into with the consortium partner had to be provided along with the bid. The data sheet also specifically



provided that the e-Auction solution provided by the bidder should conform to the requirements of the IT Act, 2000 and amended IT Act, 2008. The data sheet 3 annexed to the tender document required that the bidder should give a certificate of credentials of the consortium partner which is a developer of the e-Auction platform like the Petitioner herein. The functional specifications of the solution developed by the bidder or the consortium partner, the security considerations were also to be furnished as per the tender document.

- d. It is stated that Respondent No.2/ITI Limited showing the Petitioner herein as a consortium partner and giving the details of the software as developed by the Petitioner made a bid before Respondent No.1/DDA for appointment as a service provider for providing e-auction services. It is stated that the consortium of the Petitioner and the Respondent No.2/ITI Limited was declared to be the L-1 bidder. Pursuant to another expression of interest, the Petitioner and Respondent No.2/ITI Limited entered into another Memorandum of Understanding (MoU) dated 16.03.2020. The said MoU was for a period of 36 months from the date of the MoU i.e., 16.03.2020. The said MoU specifically provided that the Petitioner and Respondent No.2/ITI Limited have mutually agreed that they shall remain as irrevocable members of tie-ups for the complete execution and completion of the identified order(s)/contract(s) for joint participation on an exclusive basis. The said MoU also indicated that for all technical and financial terms and conditions of the customer



contract, will apply on back-to-back basis between Respondent No.2/ITI Limited and the Petitioner for their respective part/scope of work. The MoU also provided that termination or expiry of the MoU shall not relieve either of the parties of its obligations incurred prior to the date of termination/expiry of the MoU.

- e. Pursuant to the consortium of the Petitioner and Respondent No.2/ITI Limited being declared as the highest bidder, the work order dated 03.08.2020 was placed by the Respondent No.1/DDA on the Respondent No.2/ITI Limited for providing e-auction services and an Agreement dated 06.08.2020 was entered into between the the Respondent No.1/DDA and the Respondent No.2/ITI Limited. It is pertinent to mention here that Clause 3 of the said Agreement specified that the tender document and the technical bid would a part of the contract. The said Agreement was for a period of five years and the entity which was awarded the contract was bound by the technical proposal submitted by the consortium. The work order, thereafter, was placed on the Petitioner by the Respondent No.2/ITI Limited. Disputes arose between the Petitioner and Respondent No.2/ITI Limited. Respondent No.2/ITI Limited issue a notice to the Petitioner for breach of MoU dated 16.03.2020. The MoU dated 16.03.2020 was terminated by the Respondent No.2/ITI Limited on 03.11.2022 on the ground that the Petitioner has breached the exclusivity clause. It transpires that Respondent No.2/ITI Limited decided to substitute the Petitioner by another service provider, namely, M/s Unibrain. Material on record discloses that the



Respondent No.2/ITI Limited had proposed to migrate from the system offered by the Petitioner to another system called “eWizard” system which was developed by M/s Unibrain. Material on record further discloses that Respondent No.1/DDA also amended the work order dated 03.08.2020 to the limited extent of shifting to e-Wizard portal developed by M/s Unibrain as a service provider for providing e-auction services on 31.10.2023. It is stated that now Respondent No.1/DDA has issued advertisements for e-auction services on the basis of the software developed by M/s Unibrain, and therefore, the Petitioner has approached this Court with the following prayers:

“(a) Issue an appropriate writ, order or direction declaring that the actions of Respondent No.1 in conducting its e-auction through the eWizard portal of M/s Unibrain as stated in public advertisements dated 25.09.2023 (ANNEXURE P-1) and Corrigendum dated 25.09.2023 (ANNEXURE P-2) is in violation of the RFP, the work order dated 03.08.2020 and agreement dated 06.08.2020;

b) Issue an appropriate writ, order or direction declaring that the actions of Respondent No.1 in conducting its e-auction through the eWizard portal of M/s Unibrain as stated in Document dated 07.10.2023 (ANNEXURE P-3) and public advertisement dated 09.10.2023 (ANNEXURE P-4) is in violation of the RFP, the work order dated 03.08.2020 and agreement dated 06.08.2020;

(c) Issue an appropriate writ, order or direction declaring that any attempt on part of the Respondents to illegally, arbitrarily and unilaterally shift the e-auction portal for auction of DDA properties from



Petitioner's product TenderWizard to that of a third party service provider such as eWizard of M/s Unibrain is in violation of the RFP, the work order dated 03.08.2020 and the agreement dated 06.08.2020;

(d) Issue an appropriate writ, order or direction restraining the Respondents from illegally, arbitrarily and unilaterally shifting the e-auction portal for auction of DDA properties from Petitioner's product TenderWizard to that of a third party service provider such as eWizard of M/s Unibrain for the remaining duration of the agreement dated 06.08.2020;

(e) Issue an appropriate writ, order or direction to the Respondents to continue the services of the Petitioner in provision of an e-auction portal for auction of DDA properties for the remaining duration of the agreement dated 06.08.2020;

(f) Issue an appropriate writ, order or direction to Respondent No.1 to release the payment of Rs.3 crores due to the Petitioner against bills submitted for services already rendered by ASL for auctions conducted by use of TenderWizard; and

(g) Any other appropriate writ, order or directions as the Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

3. Notice was issued in the writ petition on 20.10.2023. Counter affidavits have been filed by the Respondents.

4. Learned Counsel appearing for the Petitioner contends that Respondent No.2/ITI Limited had placed the bid in respect of the tender floated by Respondent No.1/DDA for appointment of a service provider for providing e-auction services on the basis of the software developed by the



Petitioner and on the strength of MoU dated 16.03.2020 entered into between the Petitioner and Respondent No.2/ITI Limited. He states that the basis of placing the bid was the software developed by the Petitioner and, therefore, it was now not open for Respondent No.2/ITI Limited to substitute the Petitioner with anybody else and Respondent No.1/DDA could not have entered into a fresh agreement with the Respondent No.2/ITI Limited on the basis of an Agreement entered into between the Respondent No.2/ITI Limited and another software provider i.e., M/s Unibrain without calling for fresh tender. He states that the only method by which Respondent No.1/DDA could have permitted the Respondent No.2/ITI Limited to provide services to it was that the Respondent No.1/DDA would have first terminated the Agreement dated 06.08.2020 entered into between Respondent No.1/DDA and Respondent No.2/ITI Limited and called for a fresh tender and then would have allowed Respondent No.2/ITI Limited to make a fresh bid on the basis of a fresh MoU entered into by Respondent No.2/ITI Limited with M/s Unibrain.

5. It is the contention of the learned Counsel for the Petitioner that the Petitioner could not have been substituted by the Respondent No.2/ITI Limited with any other party as the very basis of the bid was the consortium agreement entered into between the Petitioner and Respondent No.2/ITI Limited. He states that the amended work order dated 31.10.2023 issued by Respondent No.1/DDA to Respondent No.2/ITI Limited for providing e-auction portal services using e-Wizard which is the proprietary product of a third party is in the violation of RFP of the bid document. He states that the MoU dated 16.03.2020 entered into between the Petitioner and Respondent



No.2/ITI Limited is a part of the tender document and the very basis of the contract. He states that amended work order dated 31.10.2023 is in violation of the terms of the RFP.

6. Learned Counsel appearing for the Petitioner further states that the termination of the MoU between the Petitioner and the Respondent No.2/ITI Limited cannot mean automatic termination of the work order dated 03.08.220 as the MoU dated 16.03.2020 specifically provides that both the parties i.e., the Petitioner and the Respondent No.2/ITI Limited, would be liable for its obligations even in the event of termination or expiry of the MoU. He draws attention of this Court to Clause 3 of the MoU dated 16.03.2020 which specifically states that the termination or expiry of the MoU shall not relieve either Party of its obligations incurred prior to the date of termination/ expiry of the MoU. He states that the Respondent No.1/DDA and Respondent No.2/ITI Limited are both instrumentalities of the State and the action of the Respondent No.1/DDA and Respondent No.2/ITI Limited in using the e-auction portal of a third party is contrary to the MoU dated 16.03.2020 entered into between the Petitioner and Respondent No.2/ITI Limited and is violative of Article 14 of the Constitution of India and is arbitrary.

7. *Per contra*, learned Counsel appearing for Respondent No.1/DDA states that Respondent No.1/DDA only recognizes Respondent No.2/ITI Limited as the service provider for E-Auction Portal Services. He draws attention of this Court to Clause 38 of the Agreement dated 06.08.2020 entered into between Respondent No.1/DDA and Respondent No.2/ITI Limited which permits Respondent No.1/DDA to assign any rights, interests



and obligations under the work order to third parties. He states that in view of the termination of MoU dated 16.03.2020 and in view of the fact that Respondent No.1/DDA was informed that Respondent No.2/ITI Limited is coming up with a better system, Respondent No.1/DDA agreed to substitute the Petitioner with another service provider i.e., M/s Unibrain which it was entitled to do so. He states that the Petitioner ought to have challenged the termination of the MoU dated 16.03.2020. He states that since the MoU dated 16.03.2020 is terminated, there is no privity of contract between the Petitioner and Respondent No.1/DDA, and therefore, the present writ petition is not maintainable. He states that the correct remedy for the Petitioner is only to file a suit for damages against Respondent No.2/ITI Limited and a writ against Respondent No.1/DDA for restraining Respondent No.1/DDA from issuing tenders on the basis of using the software of e-Wizard developed by M/s Unibrain with whom Respondent No.2/ITI Limited has entered into an Agreement. He states that Respondent No.1/DDA cannot be left high and dry and cannot be forced to go for issuing a fresh tender just because the MoU dated 16.03.2020 entered into between the Petitioner and Respondent No.2/ITI Limited has been terminated. He emphasizes on the fact that Respondent No.1/DDA has entered into the Agreement dated 06.08.2020 only with Respondent No.2/ITI Limited and not with the Petitioner.

8. Learned Counsel appearing for Respondent No.2/ITI Limited contends that the writ petition should be dismissed on the ground of non-joinder of parties. He states that M/s Unibrain is a necessary party to the writ petition since the interest of M/s Unibrain is going to be affected. He places



reliance upon Udit Narayan Singh Malpaharia v. Additional Member, Board of Revenue, Bihar, AIR 1963 SC 786 and Tractor and Farm Equipment Ltd. v. Secretary to the Govt. of Assam, Dept. of Agriculture & Ors., (2004) 2 GLR 56. Learned Counsel appearing for Respondent No.2/ITI Limited further states that the Petitioner herein is indirectly challenging the termination of MoU dated 16.03.2020. He states that the said MoU dated 16.03.2020 was entered into between the parties in Karanataka and, therefore, the writ petition is not maintainable in Delhi. He also states that the MoU dated 16.03.2020 specifically provides that the said MoU can be rescinded by Respondent No.2/ITI Limited if there is any breach of any condition or terms of the MoU. He states that since the Petitioner has broken the exclusivity clause, the MoU dated 16.03.2020 has been terminated by Respondent No.2/ITI Limited and that Respondent No.2/ITI Limited is, therefore, free to provide services of a third party to Respondent No.1/DDA.

9. Learned Counsel appearing for Respondent No.2/ITI Limited also places reliance upon Clause 6 of the MoU dated 16.03.2020 which provides that if the Petitioner fails to fulfill its part of the work to the satisfaction of Respondent No.2/ITI Limited then Respondent No.2/ITI Limited has the right to terminate the work contract and get the same executed by other agencies at the risk and cost of the Petitioner.

10. It is also contended by Respondent No.2/ITI Limited that there is an arbitration clause and, therefore, in the presence of alternate efficacious remedy, the writ petition is not maintainable.

11. Heard learned Counsel appearing for the Parties and perused the



material on record.

12. The admitted facts of the case are that Respondent No.2 has entered into an MoU dated 04.08.2015 with the Petitioner on its selection as an Application Service Provider for providing e-procurement related services. The MoU specifically records that the Petitioner has developed software applications as software of Respondent No.2 and its expression of interest. The purpose of the MoU was that the Petitioner and Respondent No.2 were to join hands on exclusive basis for a fruitful association complementing each other's strength in areas of competence and utilizing their respective skills and expertise in business. The purpose of the MoU as recorded earlier was to enable Respondent No.2 to provide e-procurement services to its clients. Clauses 2, 4, 7 and 28(b) of the MoU dated 04.08.2015 reads as under:

"2. ITI and Antares will participate jointly in addressing e-procurement opportunities with ITI acting as the lead bidder and Antares as partner on an exclusive basis during the period of validity of the contract.

4. Validity :- The term of this MoU shall be for a period of 36 (Thirty Six) months ("Term") from the Effective Date of this MoU. All obligations hereunder shall only apply during the Term of this MoU unless expressed explicitly herein. However, termination or expiry of the MoU shall not relieve either Party of its obligations incurred prior to the date of termination/ expiry of the MoU. The terms and conditions of the customer's contract entered during the validity of this MoU shall be applicable, till all the obligations related to the contract is met. The duration of the MoU may be extended on mutual agreement executed in writing.



7. For all technical and financial terms & conditions of the customer contract, will apply on back-to-back basis between ITI and Antares for their respective part/scope of work. However, if Antares fails to fulfill its part of the work to the satisfaction of ITI/Customer, ITI has the right to terminate the work contract with Antares & get the same executed by other agencies at the risk and cost of Antares.

28 (b) However, termination shall not relieve either Party of its obligations incurred prior to the date of termination."

13. Respondent No.1/DDA floated a tender where Respondent No.2 was a service provider. At this juncture, it is necessary to reproduce the relevant clauses of the RFP floated by Respondent No.1, which read as under:-

"46. Modification and Withdrawal of Bids: No bid may shall be altered/modified after submission to the DDA. In case, the tenderer does not submit the Offer as per terms and conditions, and / or modifies and / or withdraws offer, the entire amount of Earnest Money would liable to be forfeited.

xxx

59. The tenderer will not sub-let / sub-contract in part, or in full after getting the Assignment / Award of Work. In the event of tenderer sub-letting the work / subcontracting in part or full after the Award of the Work, the tenderer shall be considered to have thereby committed a breach of agreement and DDA shall forfeit the Performance Security Deposit and invoke the Performance Bank Guarantee. The tenderer shall have no claim, whatsoever, for any compensation or any loss on this account.



60. Subsequent to receipt of valid Performance Guarantee from the successful Bidder, the parties shall enter into a contract, incorporating all clauses, pre-bid clarifications and the Proposal of the Bidder, between the DDA and the successful Bidder. "

14. The clauses in the data sheet which has been filed along with RFP which are relevant read as under:-

S. No.	Parameter	Documents to be submitted	Page No of the bid
xxx			
(18)	<i>The e-Auction (Reverse auction & Forward Auction) solution proposed by the bidder and related system should conform to the requirements of the IT act 2000, amended IT act 2008</i>	<i>(Recent Copy of Certificate should be attached showing the validity period).</i>	
(19)	<i>The e-Auction (Reverse auction & Forward Auction) solution proposed by the bidder and related system should conform to the requirements of CVC guidelines, Central Govt. Guidelines, STQC Certified</i>	<i>(Bidder should give declaration to this effect & recent copy of STQC certification should be attached with Pre-qualification bid showing the validity period). STQC certificate should be on the name of the participating bidder.</i>	



15. The relevant clauses of the data sheet which is a part of the bid document read as under:-

S. No.	Criteria	Basis for Valuation	Max Marks	Supporting Documents (Forms to be used)	Ref. No./ page
A. Bidder's Profile (20)					
xxx	xxx	xxx	xxx	xxx	
(2)	Certification and Credentials Sole Bidder / IT Consortium Partner [Developer of E-Auction Platform] (valid on the date of submission of bid) ISO 9001: 2015 or latest; and SEI-CMMiL3 Certification or above	ISO 9001:2015 & SEI-CMMiL5: 10 Marks ISO 9001:2015 & SEI-CMMiL3: 6 Marks Only ISO 9001:2015: 2 Mark	10	Copy of CMMI Certificate Certifying agency should be in the approved list of agencies on CMMI website. (https://www.cmmiinstitute.com). CMMI Certificate should have Appraiser ID and Appraisal-ID.	
xxx	xxx	xxx	xxx	xxx	
C. Solution Proposed, Approach and Methodology (45)					
xxx	xxx	xxx	xxx	xxx	
(7)	Functional Specifications of Solution (Details of Requirements on which assessment shall be made may be seen in Form J)	Qualitative assessment of Solution meeting the Functional requirement of DDA	10	Please provide Compliance to DDA Requirements in Form J	
(8)	Security Considerations (Details of Requirements on which assessment shall be made may be seen in Form K)	Qualitative assessment of Solution meeting the Security requirement of DDA	10	Please provide Compliance to DDA Requirements in Form K	
xxx	xxx	xxx	xxx	xxx	
D. Resource Profile - Lead Resources (10) / Application development Manpower					
(10)	Project Manager/ Team Leader	Evaluation Methodology of CV, CV: 4 Marks	4	CV of concerned Lead resource in (Form M)	



		<i>a. Qualification: 1 mark</i> <i>b. Adequacy for Assignment: 1 mark</i> <i>c. Relevant Experience: 1 mark</i> <i>d. Past experience of similar project: 1 mark</i>			
(11)	Database Management Expert	CV: 3 Marks <i>a. Qualification: 1 mark</i> <i>b. Adequacy for Assignment: 1 mark</i> <i>c. Relevant Experience: 1 mark</i>	3	CV of concerned Lead resource (Form M)	
(12)	Data Security Expert	CV: 3 Marks <i>d. Qualification: 1 mark</i> <i>e. Adequacy for Assignment: 1 mark</i> <i>f. Relevant Experience: 1 mark</i>	3	CV of concerned Lead resource (Form M)	

16. The technical bid submitted by Respondent No.2 shows the Petitioner herein as a consortium member. The technical bid filed by Respondent No.2 shows that the entire technical bid is based on the software provided by the Petitioner. The pre qualification bid proposal contains the profile details of the Petitioner. It also contains the MoU dated 04.08.2015 entered into



between the Petitioner and Respondent No.2 and amendment dated 26.04.2018, copy of the work orders and completion certificates placed by Respondent No.2 for the work which has been performed along with the Petitioner and the certificates of the software of the Petitioner and the declaration of the ITI were also filed.

17. A perusal of the RFP and the bid submitted by Respondent No.2 shows that the heart of the entire bid of Respondent No.2 was the software of the Petitioner and Respondent No.2 could not have placed the bid without the software of the Petitioner and though the bid is in the name of Respondent No.2, it has actually been given to a consortium because the Petitioner has been shown as a consortium member in the bid filed by Respondent No.2. It cannot be said that Respondent No.2 in its own capacity has filed the bid. Pursuant to the bid, the bid of the consortium was accepted and an agreement was entered into between Respondent No.2 and Respondent No.1.

18. At this juncture, it is necessary to reproduce certain clauses of the agreement dated 06.08.2020. Clauses 3, 4, 5, 18 and 37 of the agreement which are necessary read as under:-

" 3. The following documents shall form part of this Agreement and be read and construed accordingly:-

<i>a</i>	<i>Price Details</i>	<i>Annexure-A</i>
<i>b</i>	<i>Tender Document</i>	<i>Annexure-B</i>
<i>c</i>	<i>Corrigendum issued by DDA on the Tender Document</i>	<i>Annexure-C</i>
<i>d</i>	<i>Technical bid submitted by Agency</i>	<i>Annexure-D</i>

4. The Terms and Conditions and Clauses mentioned



in the Tender Document (Annexure-B), subject to Corrigendum issued (Annexure- C) shall deemed to be the clauses of this agreement.

5. In consideration of the payments to be made by the DDA to the Agency as hereinafter mentioned, the Agency hereby covenants with the DDA to provide E-Auction Portal Services, in conformity in all respects with the provisions of this Agreement/Tender Documents.

xxx

18. Agency shall be deemed to be bound by the technical proposal (Annexure D) submitted and shall meet the functionalities proposed by him in the said technical proposal, whether or not covered in the scope of work provided by the DDA.

xxx

37. The Work order shall not be assigned by the Agency save and except with prior consent in writing of the DDA, which the DDA will be entitled to decline without assigning any reason whatsoever."

(emphasis supplied)

19. A perusal of the above clauses shows that the bid which was made by the consortium forms a part of the agreement entered into between the parties. The contract has been entered into by the consortium of the Petitioner and Respondent No.2 on the one side and Respondent No.1 on the other side.

20. The short question which arises for consider is whether Respondent No.1 can replace the Petitioner by any other party and continue with the agreement entered into between the Petitioner and Respondent No.2.

21. The MoU dated 04.08.2015 states that both the Petitioner and



Respondent No.2 were liable for their obligations even if the MoU had expired with the efflux of time. The contention of the Respondent that since the agreement has been signed only by the lead member, it was open for the lead member to change its partner and proceed further with the contract cannot be accepted.

22. The entire bid of Respondent No.2 was based on the software given by the Petitioner. Respondent No.2 could not have dropped the Petitioner, an entity who is the third party, because that would alter that very basis of the contract entered into between the Petitioner and Respondent No.2 with Respondent No.1. Putting a new party in the consortium replacing the Petitioner will amount to material alteration of the contract. It is well settled that material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the deed in its original state, or reduces to certainty some provisions which was originally not ascertained and as such void or which may prejudice the party otherwise bound by the deeds as originally executed. As stated earlier, the Petitioner has already been shown as a consortium member and the lead consortium member cannot drop its another member of the consortium and continue with the contract. The only remedy for Respondent No.2 was to terminate the contract with Respondent No.1 and the DDA had to invite fresh bids and then proceed ahead with the further auction.

23. The conduct of Respondent No.1 in permitting Respondent No.2 to proceed ahead with another member whose software has yet not been evaluated by Respondent No.1 cannot be permitted as it takes away the valuable rights of the Petitioner. The contract could have been proceeded



ahead only with the consortium. The amendment order dated 31.10.2023 issued by the DDA to Respondent No.2/ITI to provide e-auction portal services using E-Wizard which belongs to a third party and not the Petitioner, therefore, is in direct contravention with the terms of the RFP and bid which has been incorporated in terms of the agreement dated 06.08.2020.

24. Respondent No.1 and Respondent No.2 are both 'State' and cannot be permitted to act arbitrarily. The action of Respondent No.1 in going ahead with Respondent No.2 with another member is arbitrary, and therefore, unsustainable.

25. The MoU is a part of the tender document submitted by Respondent No.2. Respondent No.2 was well aware that even though the MoU between the Petitioner and Respondent No.2, it does not relieve either party of their obligations and, therefore, Respondent No.1 could not have proceeded ahead with Respondent No.2 with some other party with completely new software.

26. The contention of the Respondents that the writ petition suffers from the vice of non-joinder of necessary parties cannot be accepted. The Petitioner has challenged the action of Respondent No.1 in proceeding ahead in amending the order and permitting Respondent No.2 to provide e-auction portal services using E-Wizard which is proprietary product of the third party, i.e., Unibrain, which is contrary to the agreement entered into between Respondent No.1 and the consortium of Petitioner and Respondent No.2. Therefore, in the scheme of things, Unibrain is not a necessary party nor a proper party. The action of Respondent No.1 in continuing with Respondent No.2 along with party other than the consortium member is



under challenge, for which purpose, the newly added member whose services have been used need not be heard as the *lis* is primarily between the Petitioner and Respondent No.1 and Respondent No.2.

27. It is well settled that the presence of alternate remedy alone does not take away the right of a person to approach the Court under Article 226 of the Constitution of India. The powers of the Courts are not fettered by an arbitration clause. The Apex Court in Union of India & Ors. v. Tania Construction Private Limited, (2011) 5 SCC 697, has held as under:-

"21. In support of his aforesaid submissions Mr Chakraborty firstly relied on and referred to the decision of this Court in Harbanslal Sahnia v. Indian Oil Corpn. Ltd. [(2003) 2 SCC 107] , wherein this Court observed that the rule of exclusion of writ jurisdiction by availability of an alternative remedy, was a rule of discretion and not one of compulsion and there could be contingencies in which the High Court exercised its jurisdiction in spite of availability of an alternative remedy.

22. Mr Chakraborty also referred to and relied on the decision of this Court in Modern Steel Industries v. State of U.P. [(2001) 10 SCC 491] , wherein on the same point this Court had held that the High Court ought not to have dismissed the writ petition requiring the appellant therein to take recourse to arbitration proceedings, particularly when the vires of a statutory provision was not in issue. Reference was also made to the decisions of this Court in Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] ; NSSO v. Champa Properties Ltd. [(2009) 14 SCC 451 : (2009) 5 SCC (Civ) 402] and Hindustan Petroleum Corpn. Ltd. v. Super Highway Services [(2010) 3 SCC 321] , where similar views had been expressed.



23. *Mr Chakraborty submitted that while enacting the Arbitration and Conciliation Act, 1996, the legislature had intended that arbitration being the choice of a private Judge agreed upon by the parties themselves to settle their disputes, there should be minimum interference by the regular courts in such proceedings. In this regard, Mr Chakraborty referred to Section 5 of the aforesaid Act which indicates that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in the said part.*

xxx

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."*

28. Similarly, the Apex Court in Unitech Limited & Ors. v. Telangana State Industrial Infrastructure Corporation (TSIIC) & Ors., (2021) 16 SCC 35, has summarized the principle as under:-



"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."

29. In any event, it is also doubtful whether a member of the consortium



in its individual capacity could invoke the arbitration clause. [Refer to: M/s Geo Miller & Co. Pvt. Ltd. v. Bihar Urban Infrastructure Development Corporation Pvt. Ltd. & Anr., **2017 SCC Online Del 7075**].

30. In view of the above, this Court is of the opinion that Respondent No.1 has acted arbitrarily while proceeding ahead with the contract with Respondent No.2 in which the Petitioner was a consortium partner and in the absence of Petitioner, Respondent No.1 with a third party has accepted a system which has not even been approved by the authorities of Respondent No.1. Respondent No.1 had no option but to terminate the contract and then resort to such other procedure for proceeding ahead with Respondent No.2.

31. The writ petition is allowed. Pending applications, if any, stand disposed of.

SUBRAMONIUM PRASAD, J

MARCH 12, 2024

S. Zakir