GAHC010111372020

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3242/2020

PYRAMID E AND C PROJECTS PVT. LTD
A COMPANY REGISTERED UNDER THE COMPANIES ACT, 1956, AND HAVING ITS REGISTERED HEAD OFFICES AT 6TH FLOOR, B WING, I THINK TECHNO CAMPUS, OFF. EASTERN EXPRESS HIGHWAY, POKHRAN ROAD NO. 2, THANE WEST, MAHARASTRA INDIA-400607 AND REP. B HEREIN BY ITS DIRECTOR PROPOSALS PYRAMID E AND C PROJECTS LTD.

VERSUS

THE ASSAM PETRO- CHEMICALS LIMITED AND 3 ORS.
A GOVT. OF ASSAM UNDER TAKING HAVING ITS HEAD OFFICE AND FACTORY SITE AT NAMRUP, P.O. PARBATPUR, DIST. DIBRUGARH, ASSAM, PIN-786623

2:THE MANAGING DIRECTOR
ASSAM PETRO-CHEMICALS LTD. 4TH FLOOR
ORION PLACE
MAHAPURUSH SRIMANTA SANKARDEV PATH
BHANGAGARH
GUWAHATI-781005

3:THE SARASWAT CO-OPERATIVE BANK LTD.
A SCHEDULED URBAN CO-OPERATIVE BANKING INSTITUTION WITH ITS REGISTERED OFFICES AT EKANATH TAHKUR BHAWAN 953
APPARSAHEB MARATHE MARG
PRABHADEVI MUMBAI-400025
MAHARASHTRA.

4:THE ICICI BANK LTD.
SOHAM PLAZA
CHAITALSAF
MANPADA

THANE
GODHUNDER ROAD
THANE (W)-4000607
REP. BY ITS BRANCH MANAGE

Advocate for the Petitioner : MR. P K TIWARI

Advocate for the Respondent : GA, ASSAM

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

ORDER

Date : 22-09-2022

Heard Mr. R.J. Das, the learned counsel appearing on behalf of the petitioner. Also heard Mr. K.N. Choudhury, the learned senior counsel assisted by Mr. N Deka, the learned counsel appearing on behalf of the respondent Nos.1 & 2. None has appeared on behalf of the respondent Nos.3 & 4.

2. The instant writ petition has been filed challenging the communication dated 27.07.2020 issued by the Respondent Nos.1 & 2 to the petitioner; for a direction to the respondent Nos.1 & 2 to permit the petitioner to carry out the contract at the original cost and rates with a suitable eligible technological supplier to perform the required transfer of technology in establishing the Formaldehyde plant as per the original tender terms and conditions; for quashing and setting aside the notice of termination dated 20.08.2020 and all other consequential actions. Further to that, in the interim, it was prayed that a direction be issued to the respondent No.1 to

refrain from forfeiting the Earnest Money Deposit covered by BG No. 48/1 dated 15.07.2019 amounting to Rs.44,25,000/- lakhs and not to issue any termination order to the petitioner with respect to the contract in question.

3. The brief facts of the instant case is that the Respondent No.1 Company on 16.05.2019 floated an Invitation to Bid (for short ITB) for execution of its 200 TPD Formaldehyde Project at Daknabari, Boitamari in Western Assam. Thereupon the respondent No.1 issued 3 corrigendums to the initial ITB whereby vide the corrigendum No.1 some changes were made to the bid terms and the Corrigendum Nos.2 & 3 were with respect to the extension of time.

4. In terms with paragraph 3.3 of the ITB, the bid was required to be accompanied by an Earnest Money Deposit (EMD) of Rs.44,25,000/- and the same was required to be made in the form of Bank Guarantee or Demand Draft payable to Assam Petro-Chemicals Limited at Punjab National Bank, Bhangagarh Branch, Guwahati. The petitioner herein submitted his bid on 15.07.2019 accompanied by the Earnest Money Deposit of Rs.44,25,000/- by way of Bank Guarantee issued by the Respondent No.3. It has been alleged that the bid of the petitioner was accepted by the respondent without demur or without any reservations.

5. Against the said Invitation to Bid, there were three bidders who submitted their bid and the petitioner was found as L-1 bidder. Thereupon on 20.11.2019 the petitioner was

issued the Letter of Acceptance of Contract. By the said Letter of Acceptance of Contract, the petitioner was asked to submit the Security Deposit (SD) of 10% of the value of contract i.e., 10% of Rs.70.80 crores only, within 15 days of signing of the contract, by way of Performance Bank Guarantee from a Scheduled Bank etc. There was also an alternate provision for deduction of 10% from contractors running bills towards Security Deposit Payment/ adjustment. Clause 7 of the said Letter of Acceptance of Contract being relevant is quoted herein below:

> "*7. <u>SUBMISSION OF SECURITY DEPOSIT</u>*
>
> *Within fifteen (15) days of the Contract signing, the Contractor shall furnish to owner, their revocable Contract Performance Bank Guarantee from any Indian Nationalised/Scheduled Bank/Indian Branch of an International Bank acceptable to owner for an amount equivalent to 10% (ten percent) of the awarded Contract Price in types and proportions of currencies in which the Contract Price is payable in accordance with the Contract Security deposit amounting to 10% value of the Contract to be provided and shall remain valid upto twelve (12) months beyond the date of acceptance of the project. Alternatively an amount equivalent to 10% from the respective running bills will be deducted and retained with APL upto a period of Twelve (12) months beyond the date of acceptance of the project. Furthermore, the retention money can be released on extension of PBG for the twelve (12) months from the date of acceptance towards defect liability period. The Contractor shall procure the Contract Performance Bank Guarantee in the form (Form of Contract Performance Bank Guarantee of Tender). The Contractor shall maintain the Contract Performance Bank Guarantee at its own expense and shall ensure it shall remain valid*

for a period of not less than 3 (three) months after the expiry of the Extended Defect Liability Period. The Contract Performance Bank Guarantee shall be extended by such period as Owner may require if the Completion is delayed beyond the Time for Completion and/or the Final Completion is delayed beyond the schedule date of Final Completion and any extension thereof as per directions of the Engineer-in-Charge.

In the event that the Contract Price is increased during the Contract Validity Period for any reason whatsoever, the value of the Contract Performance Bank Guarantee shall be increased proportionately by the Contractor within 7 (seven) Business Days to ensure that it remains an amount which is equivalent to 10% (ten percent) of the revised Contract Price as determined by the Engineer-in-Charge.

6. It would also be seen from a perusal of the said Letter of Acceptance, more particularly in Clause No.8 that the petitioner was requested to make an agreement on Non Judicial Stamp Paper of Rs.100 immediately on receipt of the Letter of Acceptance for execution of the contract in accordance with the Articles of the Contract Agreement and the proforma of which was enclosed to Annexure 11 of the ITB. Clause 5 of the Letter of Acceptance categorically mentioned what documents would constitute the contract documents.

7. In pursuance to the said Letter of Acceptance, the petitioner and the respondent No.1 entered into a Contract Agreement on 20.11.2019. Clause 9 of the said Contract Agreement stipulates the various documents which shall form a part of the said Contract Agreement. Amongst the various

documents, the Letter of Acceptance and the Bid Documents also forms a part of the said Contract Agreement. Clause 13 of the said Contract Agreement stipulates that the contractor shall provide the Performance Bank Guarantee on or before 20.01.2020.

8. It was on account of the manner in which the Performance Bank Guarantee was to be submitted as stipulated in Clause 7 of the Letter of Acceptance (LOA) and the ITB, disputes arose between the petitioner and the respondent Nos.1 & 2. While it is the case of the petitioner that the Performance Bank Guarantee dated 20.01.2020 was duly submitted in accordance with the ITB and Letter of Acceptance, but it is the case of the respondent Nos.1 & 2 that the said Performance Bank Guarantee so submitted was not in accordance with the Bid Documents and Clause 7 of the Letter of Acceptance. At this stage this Court would also take note that the petitioner have not enclosed the entire Bid Documents and more specifically the Bid Documents in connection with the Performance Bank Guarantee which ought to have been done for proper adjudication of the present proceedings.

9. Thereupon, it appears that there were certain discussions between the petitioner and the respondent Nos.1 & 2 for a settlement as regards the submission of the Performance Bank Guarantee. At this stage, it may be relevant to take note of a communication dated 02.03.2020

written by the Manager, Commercial of the petitioner to the respondent No.1 stating inter alia that the Performance Bank Guarantee which have been created from the ICICI Bank on 20.01.2020 was submitted to the respondent No.1 and the officials of the respondent No.1 had also obtained written confirmation from the banker of the petitioner through an email on 22.01.2020 but the respondent Nos.1 & 2 informed the petitioner that the BG was not acceptable to them because one of the clauses does not match with the ITB. It was further mentioned in the said communication that the bankers of the petitioner have also pointed out the impracticability of the clause in the ITB format to the respondent No.1 on 30.01.2020, during which the respondent no.1 seemed to have agreed, however, the respondent later on did not agree to the said Bank Guarantee in the format so submitted by the petitioner. Under such circumstances, the petitioner vide the said letter have indicated that on account of the delay in the decision of the submission of the Performance Bank Guarantee, several matters remained pending with the respondent Nos.1 & 2 for which the petitioner was adversely effected. Considering the said, the petitioner vide the said letter requested the respondent Nos.1 & 2 to expedite in resolving the issue highlighted. Further the respondent Nos.1 & 2 were requested to return the EMD within 7 (seven) days from the date of receipt of the letter and make payment of Rs.54.51 lakhs, failing which, it was mentioned that the petitioner shall initiate appropriate action

to recover the amount along with the EMD.

10. To the said communication dated 02.03.2020, the respondent No.1 replied by a communication dated 05.03.2020 to the petitioner wherein it was mentioned that in Clause 3.3 of the ITB, it was clearly mentioned that the bid shall be accompanied by an EMD of Rs.44,25,000/- and it was clearly mentioned in the said clause that for any reason whatsoever a bidder withdraws his bid at any time during the validity period or if the selected bidder refuses to enter into an agreement and/or to furnish a security deposit for faithful performance of the agreement entered into within the time stipulated, the bidder would be deemed to have abandoned the bid and the deposit by him will be forfeited and the amount under the BG/Demand Draft would be encashed by respondent. Further to that, it was mentioned that in terms with clause 4.3 of the ITB, the petitioner was required to furnish the irrevocable contract Performance Bank Guarantee as Security Deposit from any Indian Nationalised Bank/Scheduled Bank/Indian branch of an International Bank to the respondent for an amount equivalent to 10% of the awarded contract within 15 days of the effective date i.e., from the date of execution of the Contract Agreement but the petitioner have failed to do so. It was mentioned that the scanned copy of the Performance Bank Guarantee which was placed before the respondent Nos.1 & 2 from the ICICI Bank, there was a deviation in the Performance Bank Guarantee format annexed with ITB and the deviation carried out clearly

indicates that the petitioner have manipulated clause 2 of the Performance Bank Guarantee from the original Performance Bank Guarantee format in the ITB and as such, the same was not acceptable. In the said letter the other grievances as agitated in the communication dated 02.03.2020 was also addressed to. It was mentioned that as the petitioner had completely failed to comply with clause 4.3 of the ITB and the respondent have got full liberty to forfeit the EMD and cancel the contract with the petitioner and as such, a final chance was given to the petitioner to complete the entire process and to submit the Performance Bank Guarantee in original, that too, in the format provided in the ITB without any change within 5 (five) days from the date of issue of the letter which was sent by official mail.

11. To the said communication dated 05.03.2020 the petitioner again replied but stuck to the point that the respondent No.1 & 2 had initially agreed with the format submitted by the petitioner after being explained by the bankers of the petitioner. It further appears that there has been various communications exchanged between the parties thereupon, whereby the parties tried to settle their disputes mutually, but nothing substantial happened. It is under such circumstances that on 27.07.2020 the respondent issued a communication stating inter alia that the termination of the Contract would be as per the terms of the Agreement/ITB only; stating inter alia that all the issues involved have been duly addressed in the communication dated 20.07.2020,

however, the respondent further reiterated the same in the communication dated 27.07.2020. The said communication being relevant and as the same has been put to challenge, the same is quoted herein below:

> "*Ref: APL/Formalin – II/NBQ/2020/475*
>
> ***Date** : 27/07/2020*
>
> *To,*
>
> ***Pyramid E & C Projects Pvt. Ltd.***
> *6th Floor, B Wing, I –Think Techno Campus*
> *Eastern Express Highwat, Pokhran Road No.2*
> *Thane (west) – 400607, India*
>
> ***Kind Attention**: Mr. Prasad Nair, Manager-Commercial*
>
> ***Subject**: Contract no. Against LOA Ref No. APL /PROJ /FORMALIN/II/2019/3428 Dated 20/11/2019*
>
> ***Ref.:** your letter PEP.910-PJ-APL-009 dated 23/07/2020*
> *Dear Sir,*
>
> *This has reference to your letter PEP.910-PJ-APL-009 dated 23/07/2020 in response to our letter Ref. No.APL/Formalin-II/NBQ/2020*
>
> *In our above letter (dated 20/07/2020) all issues have been explicitly explained. Nevertheless, we reiterate that,*
>
> > *i) The termination of the contract will be as per terms of the agreement/ITB only.*
> >
> > *(ii) You have failed to provide the Security Deposit (PBG) as per the format provided in the ITB which you have accepted. Therefore, accepting the PBG which is otherwise not as pet the ITB requirement does not exist. Further, despite our several request, you (M/s Pyramid E&C Projects Pvt. Ltd) have not submitted the original Security Deposit (PBG).*
> >
> > *(iii) The information of your Technology Licensor (M/s*

MyP s.r.l) liquidation was informed by the Technology Licensor (MyP s.r.l) only and nobody else. Non execution of Tripartite License Agreement between you (M/s Pyramid E&C Projects Pvt. Ltd), Technology Licensor (MyP s.r.l) and Assam Petro-Chemicals Ltd. (APL) violates clause 4.10 of the agreement /ITB. Your offer without Technology Licensor agreement do not qualify and automatically the agreement with us ceases.

(iv) As per the agreement certain procedural formalities and work plan need to be approved by the Project Management Consultant, M/s Tata Consulting Engineers (TCE) and therefore APL is not responsible to pay for any work carried out without due approval. M/s TCE has not approved any Documents/Engineering drawing so far. Further, it is to be noted that APL do not hold any liability whatsoever in this regard.

Regarding held up of your EMD deposit we would like to request you to refer/read clause 3.3 of Chapter – 1 of ITB

Please note we will not entertain any further correspondences in this regard. The formal termination letter follows shortly.

Kindly acknowledge receipt

Thanking you
For an on behalf

(S U Zaman)
GM (Project i/C Boitamari)
Assam Petrochemicals Ltd."

12. Subsequent to issuance of the communication dated 27.07.2020, the respondent on 13.08.2020 invoked the Bank Guarantee No.48/1 dated 15.07.2019 which was the Bank Guarantee so submitted along with the bid. On 20.08.2020, the respondent through its Managing Director issued notice of

termination and thereby terminated the contract between the petitioner and the respondent No.1.

13. At this stage it may be relevant herein to mention that at the time when the writ petition was filed, the petitioner had no knowledge about the notice of termination and subsequently, on coming to learn about the notice of termination, have amended the writ petition. Be that as it may, immediately after filing of the writ petition on 21.08.2020, this Court had issued notice returnable on 10.09.2020 and provided that the earnest money deposited by the petitioner covered by BG No.48/1 dated 15.07.2019 amounting to Rs.44,25,000/- in the Saraswat Co-operative Bank shall not be forfeited/encashed by the respondent authorities. It was also observed that the further continuation of the interim order shall be considered on the next date for appearance of the respondent. It may be relevant herein to mention that even prior to the order being passed by this Court on 21.08.2020, the Bank Guarantee in question being BG No.48/1 was invoked by the respondent Nos.1 & 2 vide the communication dated 13.08.2020.

14. From a perusal of paragraph 19 of the writ petition, it appears that the petitioner came to learn about the communication dated 13.08.2020 on 17.08.2020 from its banker i.e., the Respondent No.3 and as such, it can be presumed that the said letter of invocation was duly received prior to 17.08.2020 by the Respondent No.3.

15. Upon appearance of the respondent Nos.1 & 2 pursuant to receipt of notice, an affidavit in opposition was filed wherein the respondents have reiterated their stand as mentioned in the various communications to the effect that the petitioner having failed to furnish the Performance Bank Guarantee in terms with clause 4.3 of the ITB and in terms with Clause 3.3 of the ITB, the respondent was justified in invoking the Bank Guarantee. Further to that, it has also been mentioned that the bid so submitted by the petitioner on the basis of which the contract agreement was entered into, was as a joint venture but immediately after the execution of the contract agreement, the other JV partner of the petitioner had withdrawn and as such, the contract agreement had to be terminated as without the JV partner who was to supply the technology, the contract cannot be executed. It would also be seen that along with the affidavit in opposition, the respondents have also filed an interlocutory application seeking vacation, modification and alteration of the order dated 21.08.2020 on the ground that on account of termination of the contract, the respondent have been put to huge losses and as such, the invocation of the Bank Guarantee which has been stalled by this Court by the interim order needs to be vacated.

16. Upon hearing the learned counsel for the parties and before entering upon the respective contentions of the parties on merits, this Court enquired with the learned counsels as to whether the ITB which is a part of the Contract Agreement

contains an Arbitration Clause. The learned counsel for the parties submits that the arbitration clause can be found in Clause 28 of the ITB and Clause 29 is a clause pertaining to conferring upon the jurisdiction on a particular court.

17. Taking into consideration that there exists an arbitration clause, a specific query was made to the learned counsel for the petitioner as to why the petitioner has approached this Court under Article 226 of the Constitution. It was submitted that the petitioner has approached this Court on the ground that the arbitration clause contained in the contract prima facie appears to be violative of the law of the land as it refuses to recognise the primacy of Arbitration and Conciliation Act, 1996 in respect to the arbitration proceedings. It was also mentioned that the appointment of the Senior Ministry officials as Arbitrators and Designating Administrative Officers as competent authority to hear appeals from awards is abhorrent to the scheme of the Act itself. The learned counsel submitted that the said aspect of the matter has been duly mentioned in paragraph No.27 of the writ petition.

18. In the backdrop of the above, let this Court take into consideration the Arbitration Clause which is Clause No.28 of the ITB. The same being relevant is quoted herein below:

> ***28. <u>RESOLUTIOIN OF DISPUTES/ARBITRATION</u>***
>
> ***28.1 <u>APPLICABLE TO PUBLIC SECTOR UNDERTAKING (PSU)</u>***

Except as otherwise provided elsewhere in the CONTRACT, in the event of any dispute or difference relating to the interpretation and application of the provisions of the CONTRACT, such dispute or difference shall be referred by either PARTY to the arbitration of one of the arbitrators in the Department of Public Enterprises to be nominated by the Secretary to the Government of India, in charge of the Department of Public Enterprises. The Arbitration and Conciliation Act, 1996 shall not be applicable to the Arbitrator shall be binding upon the PARTIES to the dispute, provided, however, any PARTY aggrieved by such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law and Justice, Government of India. Upon such reference the dispute shall be decided by the Law Secretary or the Special Secretary/Additional Secretary when so authorised by the Law Secretary, whose decision shall bind the PARTIES finally and conclusively. The PARTIES in the dispute shall share equally the cost of arbitration as intimated by the arbitrator. The arbitration as intimated by the arbitrator. The arbitrator (s) shall give reasoned award.

28.2 APPLICATION TO GENERAL

28.2.01 *Unless otherwise specified, in all cases of dispute which cannot be settled by mutual negotiation the matter shall be referred for arbitration and the disputes of differences shall be finally settled and binding on both PARTIES by arbitration to be held by two arbitrators appointed one by OWNER and one by CONTRACTOR chosen freely and without any limitations, out of any sources, including international sources.*

28.2.02 *Arbitration will follow the Arbitration and Conciliation Act, 1996 or the rules of the Indian Council of Arbitration, as may be agreed by the two PARTIES.*

28.2.03 *Before entering upon the arbitration, the two arbitrators shall appoint an umpire. If the two arbitrators*

are not able to reach an agreement on the selection of the umpire, the umpire shall be nominated by the Chairmen of the Indian Council of Arbitration.

28.2.04 *In case the two arbitrators of the PARTIES are not able to agree and decide the issue (s) on the disputed matter under their Arbitration, the final settlement of such issue(s) of the disputed matter shall be referred to the biding decision of the umpire nominated as provided under clause 28.2.03.*

19. A perusal of the above quoted clause would show that Clause 28.1 is applicable in case of a dispute arising between two Public Sector Undertaking (PSU), which is clearly spelt out in the heading of the said clause itself. But Clause 28.2 is an arbitration clause applicable in general and as such, the said dispute between the petitioner and the respondent would not come within the ambit of Clause 28.1 but would come within the ambit of clause 28.2.

20. A perusal of clause 28.2 clearly shows that each of the party shall appoint their own arbitrators and thereupon those two arbitrators shall appoint their umpire. It further mentions that the arbitration shall be conducted in terms with the provisions of the Arbitration & Conciliation Act, 1996 and or the rules of the Indian Council of Arbitration as may be agreed to by the parties.

21. Now let this Court take into consideration as to whether this Court should entertain the writ petition taking into consideration that there exist an arbitration clause. It is well settled principle of law that the Court under Article 226

of the Constitution would not normally entertain a writ petition when there exists an alternative remedy between the parties in respect to the contractual matters. However, there are exception to the said principle particularly (i) where the writ petition seeks enforcement of fundamental rights, or (ii) where there is a failure of natural justice, or (iii) where the impugned orders or proceedings are wholly without jurisdiction, or (iv) the vires of the Act is challenged. These principles were laid down by the Supreme Court in the case of ***Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai*** reported in ***AIR 1999 SC 22***. Though the observations of the Supreme Court in Whirlpool (supra) was in respect to exercise of judicial review in matters where there were availability of alternative remedies but the Supreme Court in the case of ***Harbanslal Sahnia And Anr. vs Indian Oil Corpn. Ltd. And Ors.*** reported in ***(2003) 2 SCC 107*** applied the said principles even when in the case of existence of arbitration clause. Para 7 of the said judgment in Harbanslal Sahnia (supra) being relevant is quoted herein below:

> ***7.*** *So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental*

> *rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] .) The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.*

A reading of the said quoted paragraph would show that in the said case before the Supreme Court, the contract which was the bread and butter of the petitioner therein was terminated for an irrelevant and non-existent cause

22. The Supreme Court dealt with a similar question as regards maintainability of the writ petition under Article 226 of the Constitution on account of the existence of an arbitration clause in the case of ***Unitech Limited and Ors Vs. Telegana State Industrial Infrastructure Corporation (TSIIC) & Ors*** reported in ***(2021) SCC online SC 99.*** The Supreme Court observed that remedies under Article 226 cannot be ousted only on the basis of the presence of an arbitration clause though it still needs to be decided from case to case as to whether the recourse to public law remedy can be justifiably invoked. Paragraphs 40 & 41 of the said judgment being relevant is quoted herein below:

> *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 and Popatrao Vynkatrao Patil v. State of Maharashtra . 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 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 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. 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. E.2 Contractual right to compensatory payment*

23. In another judgment of the Supreme Court in the case of ***Uttar Pradesh Power Transmission Corporation Ltd. & Ors Vs. C G. Power and Industrial Solutions Limited & anr*** reported in ***(2021) 6 SCC 15,*** the Supreme Court observed after taking into account the judgment in the case of

Harbanslal Sahnia (supra) that the existence of the arbitration clause did not debar the Court from entertaining a writ petition on the ground that in that particular case the respondent who was the petitioner before the Supreme Court did not oppose the writ petition on the ground of existence of an arbitration clause. The Supreme Court also observed that exercise of jurisdiction in a writ petition being discretionary, the High Court usually refrain from entertaining a writ petition which involves adjudication of disputed questions of fact which may require analysis of evidence of witnesses. Paragraphs 66 to 68 of the said judgment is quoted herein below:

> "***66.*** *Even though there is an arbitration clause, the petitioner herein has not opposed the writ petition on the ground of existence of an arbitration clause. There is no whisper of any arbitration agreement in the counter-affidavit filed by* UPPTCL *to the writ petition in the High Court. In any case, the existence of an arbitration clause does not debar the court from entertaining a writ petition.*
>
> ***67.*** *It is well settled that availability of an alternative remedy does not prohibit the High Court from entertaining a writ petition in an appropriate case. The High Court may entertain a writ petition, notwithstanding the availability of an alternative remedy, particularly: (i) where the writ petition seeks enforcement of a fundamental right; (ii) where there is failure of principles of natural justice or (iii) where the impugned orders or proceedings are wholly without jurisdiction or (iv) the vires of an Act is under challenge. Reference may be made to Whirlpool Corpn. v. Registrar of Trade Marks [Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1 : AIR 1999 SC 22] and Pimpri Chinchwad Municipal*

Corpn. v. Gayatri Construction Co. [Pimpri Chinchwad Municipal Corpn. v. Gayatri Construction Co., (2008) 8 SCC 172] , cited on behalf of Respondent 1.

***68.** In Harbanslal Sahnia v. Indian Oil Corpn. Ltd. [Harbanslal Sahnia v. Indian Oil Corpn. Ltd., (2003) 2 SCC 107] , this Court allowed the appeal from an order of the High Court dismissing a writ petition and set aside the impugned judgment of the High Court as also the impugned order of the Indian Oil Corporation terminating the dealership of the appellants notwithstanding the fact that the dealership agreement contained an arbitration clause.*

24. In another recent judgment of the Supreme Court in the case of ***Rapid Metrorail Gurgaon Ltd. Vs. Haryana Mass Rapid Transport Corporation Ltd. And Ors*** reported in ***(2021) SCC Online SC 269*** the Supreme Court was called upon as to whether the High Court was justified to entertain the writ petition on account of existence of arbitration clause. The Supreme Court observed that the High Court was concerned over a fundamental issue of public interest, which was the hardship that would be caused to the commuters who use the rapid metro as a vehicle of mass transport in Gurgaon. Under such circumstances, the Supreme Court held that the invocation of the public law remedy by the High Court was justified. It clarified that ordinarily the High Court in its jurisdiction under Article 226 of the Constitution would decline to entertain a dispute which is arbitrable as remedies are available under the Arbitration and Conciliation Act, 1996 for seeking interim directions either under Section 9 before the Court or under Section 17 before the Arbitral Tribunal.

Paragraphs 64 and 75 of the judgment being relevant, the said two paragraphs are quoted herein below:

> *64. In the present case, the High Court was evidently concerned over a fundamental issue of public interest, which was the hardship that would be caused to commuters who use the rapid metro as a vehicle for mass transport in Gurgaon. As such, the High Court's exercise of its writ jurisdiction under Article 226 in the present case was justified since non-interference, which would have inevitably led to the disruption of rapid metro lines for Gurgaon, would have had disastrous consequences for the general public. However, as a measure of abundant caution, we clarify that ordinarily the High Court in its jurisdiction under Article 226 would decline to entertain a dispute which is arbitrable . Moreover, remedies are available under the Arbitration and Conciliation Act, 1996 for seeking interim directions either under Section 9 before the Court vested with jurisdiction or under Section 17 before the Arbitral Tribunal itself.*
>
> *75. As noted earlier, the invocation of the writ jurisdiction of the High Court under Article 226 of the Constitution by HMRTC and HSVP was to challenge the termination notices dated 17 June 2019, and to obviate the consequence of the cessation of the rapid metro operations, which would have ensued on the expiry of the notice period. The arbitration clause of the Concession Agreements provides sufficient recourse to remedies which can be availed of. That apart, the order of the High Court dated 4 October 2019 has also clarified that the rest of the dispute that remains after the deposit of 80 per cent of the debt due, either arising out of the CAG report, the validity of the termination notices issued by both the parties and any past or future inter se claims and liabilities shall be agitated and decided in the arbitration proceedings. In view of the order which we propose to pass, the dispute between the High Court in the writ jurisdiction under*

Article 226 of the Constitution shall stand worked out by granting liberty to the parties to avail of their rights and remedies in accordance with law.

25. In the backdrop of the above proposition of law well settled by the Supreme Court, let this Court take into account whether this is a fit case for exercise of the public law remedy. The facts narrated above would show that the dispute between the petitioner and the respondent No.1 and 2 relate to whether the Performance Bank Guarantee to be submitted should be in accordance with the terms and conditions of the ITB and the format given in the ITB of the Performance Bank Guarantee. The question whether the petitioner agreed to abide by the terms of the ITB and the format of the Performance Bank Guarantee at the time of submission of tender are questions of fact. The dispute whether the respondent Nos.1 & 2 initially agreed for deviation with the format of Performance Bank Guarantee and thereafter resiled from it are also questions of fact to be determined. The invocation of the Bank Guarantee for failure to adhere to Clause 4.3 of the ITB are within the realm of the Contract agreed upon between the petitioner and the respondent Nos.1 & 2. The termination of the contract on account of not adhering to Clause 4.3 of the ITB and on account of the JV Partner of petitioner abandoning the contract also falls with the rights and liabilities of the parties as per the contract. These aspects can very well be agitated and adjudicated under the provisions of the Arbitration and Conciliation Act, 1996. There is no public interest involved in

the instant case for which the public law remedy is required to be invoked inasmuch as the private law remedy by way of arbitration can effectively adjudicate the rights of the parties.

26. Another very relevant aspect of the matter is the reason assigned why the petitioner has filed the writ petition. The reason has been assigned in paragraph 27 of the writ petition which is quoted herein below:

> "27. *That the petitioner asserts that he has no alternative efficacious remedy other than to prefer this writ petition. The arbitration clause in the contract appears prima facie to be violative of the law of the land, as it refuses to recognize the primacy of the Arbitration and Conciliation Act, 1996 in respect to arbitration proceedings. Further, appointment of senior Ministry officials as arbitrator and designating administrative officials as competent to hear appeals from awards, is abhorrent to the scheme of the act itself. As such, the petitioner asserts that notwithstanding the presence of an arbitration clause, valid or not, the said alternate remedy is illusory, transparently biased and utterly non-efficacious.*

27. A perusal of the above quoted paragraph of the writ petition would show that the reason assigned therein is completely misconceived inasmuch as Clause 28.1 of the ITB is not applicable so far as the petitioner is concerned. The said clause as stated herein above is in respect to disputes between Public Sector Undertaking (PSUs). Clause 28.2 being applicable in the instant case and the said clause being in consonance with the Arbitration and Conciliation Act, 1996, the grounds assigned in paragraph 27 is completely

misconceived. It must also be pertinent to mention that in paragraph 37 of the affidavit in opposition, the respondents have clearly mentioned that the writ petition is not maintainable due to the existence of the arbitration clause.

28. Consequently, for the reasons above mentioned this Court is of the opinion that this is not a fit case for exercise of jurisdiction under Article 226 of the Constitution as there is a effective and efficious remedy available to the petitioner.

29. The learned counsel appearing on behalf of the petitioner, however, submits that if the writ petition is dismissed and the petitioner is not given any protection for at least a period of 30 days, the recourse to the proceedings under the Arbitration and Conciliation Act, 1996 would be frustrated. He submits that he may be given some time so that he can avail the remedies as available under the Arbitration and Conciliation Act, 1996 and more specifically under the provisions of Section 9 of the said Act to seek some interim protection.

30. Considering the above, this Court therefore is of the opinion that it would be in the interest of justice to extend the interim order dated 21.08.2020 for a period of 30 (thirty) days from today so that the petitioner can take appropriate steps under the Arbitration and Conciliation Act, 1996. The said extension of the order dated 21.08.2020 shall end on the date of filing of the application under Section 9 of the Arbitration and Conciliation Act, 1996 or the expiry of 30 days from

today, whichever is earlier.

31. Before concluding, it is also relevant to take note of that the Bank Guarantee dated 15.07.2019 issued by the respondent No.3 categorically mentions in Clause 4(b) and 4(c) that the said Bank Guarantee shall be valid upto 10.01.2020 and the said bankers would be liable to pay the guaranteed amount only and only if the bankers received from the respondent a written claim or demand not later than 12 months from the expiry date i.e., 10.01.2020.

32. In the instant case, as admittedly the invocation was made on 13.08.2020 and the same was duly received as could be seen from paragraph No.19 of the writ petition, the said Bank Guarantee shall be deemed to have been demanded within the time stipulated under Clause 4(c) of the said Bank Guarantee.

33. It is made clear that in the eventuality the petitioner approaches the Court under Section 9 of the Arbitration and Conciliation Act, 1996, the Court shall independently deal with the said matter without being influenced by the observations made herein above.

34. With the above observations and directions, the instant petition stands disposed off.

JUDGE

Comparing Assistant