THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 29th August, 2025

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.04 of 2023

Petitioners : Swadhi Health Management LLP and Another

versus

Respondents : State of Sikkim and Others

Writ Petition under Article 226 of the Constitution of India

Appearance

Mr. Munawwar Naseem, Mr. Harish Gaur and Mr. Bhusan Nepal, Advocates for the Petitioners.

Mr. Aarohi Bhalla, Additional Advocate General with Mr. Thinlay Dorjee Bhutia, Government Advocate for the Respondents.

Ms. Charulata Chettri, Legal Officer, Health and Family Welfare Department.

JUDGMENT

Meenakshi Madan Rai, J.

1. The root of strife between the Petitioners and the Respondents pivots around the alleged non-payment of ₹ 5,90,00,000/- (Rupees five crores and ninety lakhs) only, towards administration, facilitation and management of the Su-Swastha Yojana, through Su-Swastha Facilitation Centre, for the financial year 2021-22, to the Petitioner No.1 by the State-Respondents.

2. The Petitioners' case, very briefly summarised, is that, the Government sought to launch a Health Scheme for Sikkim Government employees and their dependent family members with the purpose of providing cashless medical treatment. Su-Swastha Yojana was therefore conceived and a Tender floated by the Respondents No.1 and 2 on 02-11-2020, to Award the Contract for

the Su-Swastha Yojana Facilitation Centre. The Contract was awarded to the Petitioner No.1 by the Respondents No.1 and 2 after completion of all necessary formalities. The Work Order, bearing No.108/H&FW, dated 04-02-2021, was issued by the Respondents No.1 and 2 in favour of the Petitioner No.1, confirming that the Government of Sikkim had approved the implementation of Su-Swastha Yojana Scheme by the Petitioner No.1 and the Government had accepted to operationalise the Facilitation Centre. One room was allotted to the Petitioners to set up the Facilitation Centre vide Office Order, bearing No.3014/H&FW, dated 05-02-2021. The work commenced on an urgent basis as per the verbal instructions of the Respondents No.1 and 2, consequent upon which the operation of the Facilitation Centre and the Su-Swastha Yojana was taken up by the Petitioners at their own costs and expenses without lapse in terms of Clause 3 of the Contract. With the launch of this Scheme, more than 84,000 (eighty-four thousand) beneficiaries were enrolled in the Su-Swastha Yojana. In the meanwhile, the Service Contract Agreement was also finalised between the Petitioners and the Respondents. Clause 5 of the Contract mentioned that ₹ 5,90,00,000/- (Rupees five crores and ninety lakhs) only, including GST, being an amount of minimum guaranteed consideration, is payable to the Petitioners. The Sikkim Su-Swastha Yojana (Employees Health Scheme) Rules, 2021, were notified by the Respondents No.1 and 2, vide Notification No.237/H&FW, dated 22-06-2021, while the existing Sikkim Services (Medical Facilities) Rules of 1981 were repealed. The Government Departments were directed to deduct contributions of the Government employees, from their monthly salaries of September, 2021, vide Circular issued by

Respondent No.4, dated 07-09-2021. A Demand Notice dated 23-08-2021 was served by the Petitioners to the Respondents No.2 and 3, requesting them to release payment to the Petitioners in terms of the Contract and a Reminder issued on 07-09-2021. This was followed by another Demand Note, dated 06-10-2021, served on the Respondent No.2, however no payments were made by the Respondents for services rendered by the Petitioner No.1 in the financial year 2021-22. The Respondents thus failed to pay the minimum guaranteed amount in terms of the Contract. A Right to Information Act, 2015, application came to be filed by the Petitioner, dated 29-06-2022, with the Respondents No.1, 2 and 4, in order to obtain necessary documents pertaining to the said Scheme. Respondent No.2 sent a response on 10-08-2022, whereby a copy of the Contract was provided by the Respondents. The responses brought to light that no budgetary allocation was provided by Respondent No.1 in the budget of the Respondent No.2 Department, for the financial year 2021-22, nor expenditure incurred for the Scheme for that same year, indicating the intention of the Respondents never to discharge their contractual obligation towards the Petitioners. Hence, the prayers in the Writ Petition, viz.,

(i) allow the Petition and issue a writ of Mandamus or any other appropriate writ, order or directions thereby directing the Respondents to make the payment of ₹ 5,90,00,000/- (Rupees five crores and ninety lakhs) only, towards administration, facilitation and management of the Su-Swastha Yojana through Su-Swastha Facilitation Centre for the financial year 2021-22 to the Petitioner No.1, at the earliest;

(ii) pass such other or further orders as this Hon'ble Court deem fit in the circumstances of the case; and

(iii) allow the Writ Petition with costs.

3. Learned Counsel for the Petitioners advancing his verbal arguments delved at length into the terms of the Contract, more specifically to the terms providing for payment of the minimum guaranteed consideration of ₹ 5,90,00,000/- (Rupees five crores and ninety lakhs) only, every financial year. It was canvassed that the Respondents have acted in an arbitrary and perverse manner, contrary to the well-established principles of law governing the performance of statutory Contract by non-payment of the minimum guaranteed consideration. That, the instrumentality of the State cannot commit a breach of a solemn undertaking to the prejudice of the other party, which acted on that undertaking and put itself in a disadvantageous position, incurring expenditure towards rendering services. That, the doctrine of estoppel in such circumstances kicks into place. Strength on this facet was drawn from ***SVA Steel Re-Rolling Mills Limited and Others*** vs. ***State of Kerala and Others***[1]. That, if a person aggrieved by a breach of Contract shows that though the breach is in the realm of Contract, the duty sought to be enforced is a constitutional or statutory duty, the remedy of a writ of mandamus may not be refused. It is the constitutional obligation of the High Court under Article 226 of the Constitution to enforce such duties. Besides, the Respondents have not alleged doctrine of frustration or temporary suspension due to any fault of the Petitioners, therefore, they are bound by estoppel to make payments.

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[1] (2014) 4 SCC 186

(i) It was next contended that the writ is maintainable despite an arbitration clause or an alternate remedy and there is no absolute bar to exercise of a writ jurisdiction by a Court, even when an alternative remedy is available. On the repeal of the Sikkim Government Medical Rules, no medical health benefit exists for the Government employees nor do they have recourse to medical health benefits as provided under the Su-Swastha Yojana. Reliance was placed on ***Uttar Pradesh Transmission Corporation Limited and Anothe***r vs. ***CG Power and Industrial Solutions Limited and Another***[2], ***Unitech Limited and Others*** vs. ***Telangana State Industrial Infrastructure Corporation and Others***[3], ***Perkins Eastman Architects DPC and Others*** vs. ***HSCC (India) Limited***[4] and ***Rajasthan Small Industries Corporation Limited*** vs. ***Ganesh Containers Movers Syndicate***[5].

(ii) The Respondents, till the filing of the Counter-Affidavit had never questioned the performance of the Petitioners in facilitating the Su-Swastha Yojana and such doubts raised now is an afterthought, lacking basis or supporting documents. It was also put forth that even if disputed questions of facts are raised, this does not deprive the High Court of its jurisdiction under Article 226. To fortify this submission, reliance was placed on ***ABL International Limited and Another*** vs. ***Export Credit Guarantee Corporation of India Limited and Others***[6], ***Gunwant Kaur and Others*** vs. ***Municipal Committee, Bhatinda and Others***[7], ***Unitech Limited*** (*supra*) and ***Union of India and Others*** vs. ***Tantia Construction Private Limited***[8].

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[2] (2021) 6 SCC 15
[3] MANU/SC/0084/2021
[4] MANU/SC/1628/2019
[5] (2019) 3 SCC 282
[6] (2004) 3 SCC 553
[7] MANU/SC/0397/1969
[8] (2011) 5 SCC 697

(iii) That, there was no clause in the Contract which permits suspension of the Contract or any part of it and the Petitioner was made aware of the Circular dated 29-09-2021 only after the Counter-Affidavit was filed and the Respondents arbitrarily suspended the deduction of ₹ 200/- (Rupees two hundred) only, from Government employees without informing the Petitioners and dismantled the entire Scheme which is thereby unreasonable. The attention of this Court was invited to ***Kumari Shrilekha Vidyarthi and Others*** vs. ***State of U.P. and Others***[9] wherein it was held that, it can no longer be doubted at this point of time that, Article 14 of the Constitution also applies to matters of Governmental Policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. Hence, the prayers in the Petition.

4. A joint Counter-Affidavit was filed by the State-Respondents No.1 to 4. Learned Additional Advocate General opposing the arguments canvassed by the Petitioners contended that, the Writ Petition is a money claim alleging breach of Clause 5 of the Contract Agreement, dated 14-06-2021. The State in its Counter-Affidavit has categorically averred that the Petitioners have failed to fulfil its obligations under the Agreement, to overcome this contention, the Petitioners have filed additional documents, by way of filing I.A. No.01 of 2023, without including any pleadings to substantiate their claims. Raising a preliminary objection to the maintainability of the Writ Petition, it was urged that disputed questions of facts exist in the present matter, which cannot be adjudicated upon by this Court under Article 226 of the Constitution.

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[9] MANU/SC/0504/1991

To bolster this argument, reliance was placed on ***Subodh Kumar Singh Rathour*** vs. ***Chief Executive Officer and Others***[10], ***PSK Engineering Construction and Co.*** vs. ***National Projects Construction Corporation Limited and Another***[11] and ***Sri Avantika Contractors (I) Limited*** vs. ***Union of India and Others***[12].

(i) The next ground urged on the issue of maintainability of the Petition, was the existence of an alternative remedy available to the Petitioners. It was strenuously argued that the tender conditions dated 02-11-2020, clearly provides under Clause 17 of Section XI that, in case of any dispute between the parties, it shall be referred to arbitration. The Service Contract Agreement executed between the parties on 14-06-2021 provides under Clause 1 of the General Condition of the Contract that, the "Tender Document" shall form an integral part of the Contract and shall be binding on both parties, it is specified that conflict resolutions as provided under the Tender, shall also form a part of the Contract. Reliance was placed on ***M. R. Engineers and Contractors Private Limited*** vs. ***Som Datt Builders Limited***[13]. Attention of this Court was also invited to the letter dated 11-06-2021, wherein the Petitioner as per Counsel for the Respondents has accepted the Contract on terms and conditions as outlined in the Tender. That, it is incorrect to interpret the letter dated 04-02-2021 as a work order. The work order, specifies that, actual implementation of the Project will be subject to the final approval of the Contract Agreement by the Government. The role and responsibilities of the Petitioners are enumerated in Clause 3(1)(a) of the Service Contract Agreement and they were to conduct

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[10] 2024 SCC OnLine SC 1682
[11] 2024 SCC OnLine Del 998
[12] SLR (2018) Sikkim 611
[13] (2009) 7 SCC 696

enrolment of all beneficiaries in the Su-Swastha Yojana, as per the list of beneficiaries provided to them by the authorised representatives of the State Government in the required format with the required fields. The KYC of the employees was to be executed by the Government as apparent from the prescribed format. The Respondent, as per Clause 4(n), is to conduct the enrolment data collection and verification, after which details would be made available to the Petitioner. In the above detailed circumstances, the assertion of the Petitioner that it has enrolled employees in excess of 85,000 (eighty five thousand) is denied. The registration of the State Government employees along with their dependent family members was to be conducted by the Nodal Officer designated by the respective Departments as mentioned in Circular dated 02-09-2021.

(ii) The Petitioners were under an obligation to issue beneficiary ID Cards to the enrolled beneficiaries and also to empanel 200 (two hundred) hospitals by the year end, which obligations remained unfulfilled.

(iii) The Corpus fund, mentioned in Clause 5 of the Agreement is created by the State Government employees and their dependent family members, which was to be ₹ 200/- (Rupees two hundred) only, per month, per individual. This submission was buttressed by Notification, dated 25-08-2021. The funds for the Corpus as mentioned in Clause 5 of the Notification was to be the contribution received from the Government employees and the State did not have a separate budget allocation for the Scheme. Clause 5(4) of the Agreement also provided that in case of lapse in responsibilities by the Petitioners, the payments can be deducted

along with head. Clause 14 of the Agreement provides that the payment to the Petitioners would be made only after claims approval. Contradictory voices are now being raised by the Petitioner, on the one hand by making a claim to a "minimum guaranteed consideration" under the Agreement and on the other placing reliance upon an 'invoice' as per the office Note Sheets obtained by them, without disclosing the source of such procurement. The pleadings in the Writ Petition do not give a break-up of the works done and expenditure incurred by the Petitioner in executing the said works and therefore, in the absence of necessary details the claims of the Petitioner demanding payment of minimum guaranteed consideration is untenable. Over and above all of the submissions, the State-Respondents vide Circular dated 29-09-2021 has withdrawn the Scheme till further orders and deductions made from Government employees were ordered to be refunded to them, this Circular admittedly has remain unchallenged. In view of the points raised in the arguments, the Writ Petition deserves a dismissal.

(iv) That, nowhere is it mentioned that the Corpus would comprise of a separate budget set aside by the Government of Sikkim as the Notification No.237/H&FW, dated 22-06-2021, provides that the Government may by Notification in the Official Gazette constitute a Corpus Fund to be called the Sikkim Su-Swastha Healthcare Fund for implementation of the Scheme. The fund was to be created as per contribution comprising of employee contribution, dependent contribution and Government contribution. Clause 5 upon which great emphasis was placed by the Petitioner at 5(3) provides that in the event a payment is withheld due to a query

or clarification, upon satisfactory redressal of such queries, any financial damages sustained by the Service Provider due to such delays shall be precluded with past dues. At Clause 5(4), the Contract further provides that in case of a lapse of responsibilities the payments to Service Provider can be deducted or withheld. These actions shall be processed as per the Conflict Resolution Clauses outlined in the Contract. Clause 7 of the Contract provides for Conflict Resolution and Dispute Settlement and requires the parties to make all efforts for settlement amongst themselves and in case of disputes arising in regard to terms and conditions or injustices created by the Covenant, the provisions of Section 89 of the Code of Civil Procedure, 1908, shall be resorted to. That apart, Clause 14 also lays down that the Su-Swastha Provider payments shall be processed within fifteen working days of claims approval and generation of payment authorisation by Su-Swastha Facilitation Centre. It is not the case of the Petitioners that they submitted any claims within fifteen working days apart from which there has to be an approval of the claims before payment is generated to the Petitioners. The arguments raised above all tantamount to disputed questions of fact and cannot be determined by a Writ Court and the Petition ought to be relegated to the correct forum for redressal of grievances.

5. Learned Counsel for the parties were heard at length, the pleadings perused as also the citations relied on by Learned Counsel for the parties. Parties also submitted their respective memorandum of arguments.

6. The question that concerns this Court is; Whether the Writ Petition in the facts and circumstances is maintainable.

7. Indubitably vide a Request for Proposal dated 02-11-2020, the Health and Family Welfare Department, Government of Sikkim, invited a Request for Proposal (Technical and Financial bids) from registered firms for the "Setting up Facilitation Center for managing Su-Swastha Yojna for Department of Health and Family Welfare, Government of Sikkim". The document detailed the costs of the proposal, the pre-bid meeting, closing date and time for receipt of bids, time and date for opening of bids which included technical bid and financial bid, venue for pre-bid meeting, submission of documents and deposit of earnest money. Pursuant thereto, the Petitioner Company was selected for the Project.

(i) The Tender Document, i.e., Request for Proposal document, put forth all details. Under **Section XI** of the Request for Proposal, it was detailed as follows;

> ***"SECTION XI***
>
> **RESOLUTION OF DISPUTES**
>
> 17.1 If dispute or difference of any kind shall arise between the Tender Inviting Authority/User Institution and the successful tenderer in connection with or relating ot the contract, the parties shall make every effort to resolve the same amicably by mutual consultations.
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> **17.2 In the case of a dispute or difference arising between the Tender Inviting Authority/User Institution and a domestic Successful tenderer relating to any matter arising out of or connected with the contract, such dispute or difference shall be referred to the sole arbitration of Secretary to Health, Govt. of Sikkim whose decision shall be final.**
>
> 17.3 Venue of Arbitration: The venue of arbitration shall be the place from where the contract has been issued, i.e., Gangtok, Sikkim, India.**"** **[emphasis supplied]**

It was admitted by Learned Additional Advocate General for the Respondents that the Arbitration and Conciliation (Amendment) Act, 2015, debars naming of Arbitrators as has been done in the

Tender Document. Hence, on the question of Arbitrator the Respondents will abide by the provisions of the Statute.

8. Learned Additional Advocate General had expressed his view that in terms of the Arbitration and Conciliation (Amendment) Act, 2015, the Arbitrator could not have been named in the Contract and the parties were to arrive at the appointment of such Arbitrator in terms of the Statute. In my considered view this position is not tenable in law for the reason that Section 12(5) of the Arbitration and Conciliation Act, 1996, as amended from 23-10-2015, provides as follows;

> **"12. Grounds for challenge**.— .....
> .....
> **(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:**
>
> **Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."** [emphasise supplied]

In the Seventh Schedule mentioned hereinabove, the Arbitrator's relationship with the party or Counsel are enumerated, which for brevity are not reproduced herein.

(i) In this context, relevant reference is made to the decision of the Supreme Court in ***S. P. Singla Constructions Private Limited*** vs. ***State of Himachal Pradesh and Another***[14] wherein the Supreme Court observed as follows;

> **"11.** Likewise, there is no merit in the contention of the appellant contractor that the appointed arbitrator is an employee in service of H.P. PWD which the provision of Section 12(5) of the 1996 Act (as amended w.e.f. 23-10-2015) bars at the threshold itself. In a catena of judgments, the Supreme Court held that arbitration clauses in government contracts providing that an employee of the

[14] (2019) 2 SCC 488

department will be the sole arbitrator are neither void nor unenforceable. [*Indian Oil Corpn. Ltd.* v. *Raja Transport (P) Ltd.* - (2009) 8 SCC 520, *ACE Pipeline Contracts (P) Ltd.* v. *Bharat Petroleum Corpn. Ltd.* - (2007) 5 SCC 304, *Union of India* v. *M.P. Gupta* - (2004) 10 SCC 504] The fact that a named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or lack of independence on his part. The arbitration agreements in government contracts providing that an employee of the department or a higher official unconnected with the work or the contract will be the arbitrator are neither void nor unenforceable.

12. Observing that, in government contracts before appointing arbitrators, the appointing authority should be more vigilant and more responsible in choosing arbitrators who are in a position to conduct arbitral proceedings in an efficient manner without comprising with the other duties, in *Union of India* v. *U.P. State Bridge Corpn. Ltd.* [(2015) 2 SCC 52], it was held as under : (SCC p. 65, para 17)

> "*17*. In the case of contracts between government corporations/State-owned companies with private parties/contractors, the terms of the agreement are usually drawn by the government company or public sector undertakings. Government contracts have broadly two kinds of arbitration clauses, first where a named officer is to act as sole arbitrator; and second, where a senior officer like a Managing Director, nominates a designated officer to act as the sole arbitrator. *No doubt, such clauses which give the Government a dominant position to constitute the Arbitral Tribunal are held to be valid. At the same time, it also casts an onerous and responsible duty upon the persona designata to appoint such persons/officers as the arbitrators who are not only able to function independently and impartially, but are in a position to devote adequate time in conducting the arbitration*. If the Government has nominated those officers as arbitrators who are not able to devote time to the arbitration proceedings or become incapable of acting as arbitrators because of frequent transfers, etc., then the principle of "default procedure" at least in the cases where the Government has assumed the role of appointment of arbitrators to itself, has to be applied in the case of substitute arbitrators as well and the court will step in to appoint the arbitrator by keeping aside the procedure which is agreed to between the parties. However, it will depend upon the facts of a particular case as to whether such a course of action should be taken or not. What we emphasise is that court is not powerless in this regard." (emphasis supplied)**"**

Therefore, the consideration as expressed in the said Judgment, is that, when a Government official is named as an Arbitrator in a Contract, it has to be borne in mind that his duties as Arbitrator do not compromise his official duties or prevent him from discharging his obligations on both sides efficiently.

(ii) That issue having been given a quietus, it is pertinent to notice that in the Service Contract Agreement, dated 14-06-2021, at Clause 1 the General Conditions of Contract have been laid down;

> **"**1. GENERAL CONDITION OF CONTRACT;
>
> **(1) The terms and conditions mentioned hereto along with the tender document shall form an integral part of this Contract and shall be binding on both the parties.**
>
> (2) The terms and conditions as mentioned in different clauses are as below
>
> - Functions of Health and Family Welfare / Government of Sikkim
> - Scope of Facilitation Center
> - Empanelment approach and target number of hospitals
> - Enrolment approach
> - Tariff approach to empanelled hospitals
> - Payments to providers in lieu of services rendered
> - Mandatory reports
> - **Conflict resolutions**
> - Exit or severance clauses
>
> **The above terms and conditions herewith shall be the integral part of this contract and shall be binding upon both the parties. Any amendment to these terms and conditions shall be added to the contract during tenure, or at renewal made only with mutual consent.**
>
> **The service provider shall agree to follow the guidelines issued by the Government and it's duly appointed representatives.**
>
> ……**"**

(iii) Thus, it is evident from the extract (*supra*) of the General Conditions of Contract that, the Tender Document shall form an integral part of the Contract and shall be binding on both parties. This provision gains importance for the reason that the Resolution of Disputes Section XI of the tender document (Request for Proposal)

provides for settlement of dispute by arbitration. In this context, in ***Union of India and Others*** vs. ***Puna Hinda***[15] the Supreme Court took into consideration the maintainability of a Writ Petition in a contractual matter and while making reference to a plethora of cases of the Supreme Court itself, it was observed as follows;

> **"24.** Therefore, the dispute could not be raised by way of a writ petition on the disputed questions of fact. Though, the jurisdiction of the High Court is wide but in respect of pure contractual matters in the field of private law, having no statutory flavour, are better adjudicated upon by the forum agreed to by the parties. The dispute as to whether the amount is payable or not and/or how much amount is payable are disputed questions of facts. There is no admission on the part of the appellants to infer that the amount stands crystallised. Therefore, in the absence of any acceptance of joint survey report by the competent authority, no right would accrue to the writ petitioner only because measurements cannot be undertaken after passage of time. Maybe, the resurvey cannot take place but the measurement books of the work executed from time to time would form a reasonable basis for assessing the amount due and payable to the writ petitioner, but such process could be undertaken only by the agreed forum i.e. arbitration and not by the writ court as it does not have the expertise in respect of measurements or construction of roads.**"**

(iv) On the same aspect, in ***Union of India*** vs. ***Parmar Construction Company***[16] the dispute therein had arisen between the Contractors and the Railway Establishment (Union of India) in the context of payment of escalated cost as demanded by the Respondent Contractors. There was a clause of arbitration in the Agreement. The Supreme Court observed *inter alia* in Paragraph 39 that it is advisable for the Court to ensure that the remedy provided as agreed between the parties in terms of the Contract is first exhausted.

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[15] (2021) 10 SCC 690

[16] (2019) 15 SCC 682

(v) In ***Northern Railways Administration, Ministry of Railway, New Delhi*** vs. ***Patel Engineering Company Limited***[17] it was observed that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration Agreement are exhausted.

9. The Petitioner also pressed into service several citations pertaining to the jurisdiction of the High Court despite availability of alternative remedy, which are being discussed below;

(i) In ***Kumari Shrilekha Vidyarthi*** (*supra*) relied on by the Petitioners, the Supreme Court was considering the validity of the Circular G.O. No.D-284-Seven-Law-Ministry dated 06-02-1990, issued by the Government of Uttar Pradesh, terminating all existing payments of Government Counsel w.e.f. 28-02-1990, violation of Article 14 of the Constitution was claimed. In my considered view, this is distinguishable from the matter at hand as it is necessary to bear in mind that in the Contract between the Petitioners and the Respondents an arbitration clause exists, which did not find place in the facts of the case of ***Kumari Shrilekha Vidyarthi*** (*ibid*).

(ii) In ***Gunwant Kaur*** (*supra*) referred to by the Petitioners, the Supreme Court held therein that the High Court was not justified in dismissing the Petition on the ground that it will not determine disputed questions of fact. It was observed that the High Court has jurisdiction to determine questions of fact even if they are in dispute and in the said case the interest of both the parties, the High Court should have entertained the Petition and called for an affidavit-in-reply from the Respondents and proceed to try the Petition, instead of relegating the Appellants to a separate suit. The facts therein are again distinguishable from the case under discussion. It was

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[17] (2008) 10 SCC 240

concerned with a land dispute and the Punjab High Court while dismissing the Writ Petition observed that, the grievance of the Petitioner is that the area sought to be taken possession of was not included in the Acquisition Notification of 1959 and an elaborate order of the Collector stated that, the true area of land demarcated corresponded to the area notified with as much accuracy is reasonably possible and the Court could not determine disputed questions of fact. As can be seen it is entirely distinguishable from the facts of the case, besides no alternative remedy was provided therein.

(iii) In ***Unitech Limited*** (*supra*) relied on by the Petitioners, the Supreme Court held that arbitration clause would divest the High Court of its jurisdiction under Article 226 of the Constitution to order refund with interest where a private developer who has entered into an agreement on a solemn representation of the existence of title in the Government is unable to proceed with the project due to a failure of title. From the facts as culled out in the case there was no dispute to the basic facts which included acceptance of the fact that refund was to be made. This is not the case in the instant matter and the arbitration clause cannot be ousted merely on the ground that the Court has powers to exercise its extraordinary jurisdiction.

(iv) The Petitioners also referred to ***Perkins Eastman Architects DPC*** (*supra*) wherein the issues were (i) whether the arbitration in the present case would be an International Commercial Arbitration or not. In case, it is not, then this Court cannot deal with the application under Section 11(6) read with Section 11(12)(a) of the Act. (ii) Whether a case is made out for exercise of power by

the Court to make an appointment of an arbitrator. From a reading of the two issues it is evident that this case is not relevant to the facts and circumstances under discussion.

10. The position of law is therefore clarified on the aspect under discussion. It is pertinent to notice that in ***M/s. Titagarh Paper Mills Ltd.*** vs. ***Orissa State Electricity Board and Another***[18] the Appellant Company had entered into an Agreement with the Respondent Electricity Board for the supplier of Hydro Electric Power. The Respondent Electricity Board had levied coal surcharge on the Appellant Company in terms of an Agreement. The Agreement bore an arbitration clause. The Appellant Company opted not to pursue the remedy of arbitration, but invoked the writ jurisdiction of the High Court. The High Court declined to entertain the Appellant's Petition on the ground that the Agreement with the Board provided for arbitration and hence, the Petition could not stand. The Petitioner appealed before the Supreme Court whereupon it was held *inter alia* that, in view of the issue raised there was no reason why the Appellant Company should not pursue its remedy in arbitration, having solemnly accepted Clause 23 of the Agreement instead of invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution to determine questions which really form the subject matter of the arbitration Agreement. The settled position of law is evident from the litany of precedents discussed above.

11. From the foregoing discussions it emanates that factual aspects are in dispute. The claims on the merits of the dispute in my considered view are to be addressed by Arbitration, as

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[18] (1975) 2 SCC 436

admittedly such clause finds place in the documents referred to hereinabove. The question framed by this Court is thus soundly answered.

12. Consequently, this Writ Petition is disposed of with liberty to the Petitioners to take recourse to the remedy of Arbitration.

(Meenakshi Madan Rai)
Judge
29-08-2025

Approved for reporting : **Yes**

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