GAHC010017182022

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

Case No. : WP(C)/661/2022

DHANJIT SARMA
PROPRIETOR OF ARROW MEDICAL SOLUTIONS, S/O. LT. BIPIN CH. SARMA, R/O. HOUSE NO.-40, ANANDA NAGAR PATH, SIXMILE, P.S. DISPUR, P.O. KHANAPARA, GUWAHATI-781022, DIST. KAMRUP (M), ASSAM.

VERSUS

THE UNION OF INDIA AND 3 ORS
REP. BY THE SECRETARY TO THE GOVT. OF INDIA, MINISTRY OF LABOUR AND EMPLOYMENT, NEW DELHI.

2:THE EMPLOYEES STATE INSURANCE CORPORATION
REGIONAL OFFICE
BAMUNIMAIDAM
GUWAHATI-781021.

3:THE MEDICAL SUPDT.
EMPLOYEES STATE INS. CORPORATION MODEL HOSPITA
BELTOLA
PEER AZAN FAKIR ROAD
NEAR KHANAPARA KENDRIYA BIDYALAYA
GUWAHATI-781022.

4:THE BPL MEDICAL TECHNOLOGIES PRIVATE LTD.
11TH KM
BANNERGHATA ROAD
ARAKERE
BENGLORE
KARNATAKA
PIN-56007

Advocate for the Petitioner : MR. A SAIKIA, MR T T MONI,MR. J ISLAM,MR. A S ALI,MR. N K DAS,MR T KALITA

Advocate for the Respondent : ASSTT.S.G.I., MR S CHAUHAN (r-4),MR B PUSHILAL (r-4),MR. K GOGOI (r-1),SC, ESIC

Date on which judgment was reserved : **30.01.2026**
Date of pronouncement of judgment : **06.03.2026**

Whether the pronouncement is of the operative part of the judgment? : **NA**

Whether the full judgment has been pronounced? : **Yes**

BEFORE
HONOURABLE MR. JUSTICE RAJESH MAZUMDAR

JUDGMENT & ORDER (CAV)

Date : 06-03-2026
(Rajesh Mazumdar, J.)

Heard Mr. B.K. Das, learned counsel for the petitioner and also heard Mr. M. Smith, learned counsel appearing for the respondents.

2. This writ petition has been instituted under Article 226 of the Constitution of India by the petitioner with the following prayer;

> "*Under the above facts and circumstances it is therefore prayed that your Lordships would be pleased to admit this petition, call for the records, issue a rule calling upon the respondents to show cause as to why a writ in nature of Mandamus shall not be issued to direct the respondents to pay an amount of Rs. 32,25,000/- (Rupees Thirty two lacs and twenty five thousand) only to the petitioner within a specified time and on perusal of record and reply to show cause if any and after hearing the parties would be pleased to make the rule absolute by directing the respondents to pay the aforesaid amount to the petitioner within a specified time. And or pass any other order/orders as your Lordships may deem fit and proper in the interest of justice.*"

3. The story unfurled in the writ petition is that the petitioner, a proprietorship

firm, is dealing with manufacture and supply of medical and dental instruments. The petitioner firm fulfilled the requirements for a medical and general equipment manufacturing & trading unit.

4. The respondent No.3, namely the Medical Superintendent, Employees State Insurance Corporation Model Hospital, Guwahati had floated a bid document in the "Government e Marketplace" (in short, the GeM) inviting the tender for supply of "C ARM FLUROSCOPE X RAY Machine" from intending suppliers/vendors.

5. The proprietorship firm participated in the tender process and had offered to supply the BPL C RAY C ARM Fluoroscope with motorised machine, the price of which was fixed by the Original Equipment Manufacturer (OEM) as uploaded in GEM was Rs. 32,40,000/-. On finding the bid successful and to its satisfaction, the respondent No.3 awarded the bid in favour of the petitioner herein vide Contract No. GEMC-511687762071052 generated on 13.05.2021.

As per the terms and conditions of the contract, the petitioner had delivered the BPL CRAY C ARM FLUROSCOPE with motorised mechanical motion on 16.07.2021 at ESIC Model Hospital, Beltola. The machine was installed on 20.07.2021 by the authorized service engineer deputed by respondent No.4, i.e. the original equipment manufacturer, who has been arrayed as the respondent No. 4 in this writ petition. The installation report, acknowledging the installation was generated on 20.07.2021.

6. Upon successful delivery of the equipment, the petitioner uploaded the invoice in the GeM with a unit price of Rs. 32,25,000/-. The Consignee Receipt and Acceptance Certificate (in short, the CRAC) was uploaded by the respondent No.3 in GeM on 21.08.2021, showing the acceptance of the item supplied by the firm of the petitioner.

7. When the petitioner did not receive his due payment, he submitted a representation on 07.09.2021 before the respondent No.3 for release of the payment. A reminder was submitted on 23.09.2021. The respondent No.3, by a communication addressed to the respondent no. 4, i.e. the original equipment manufacturer, had

raised certain issues like the "Country of origin of monitor was made in China, high cost, improper functioning etc." A copy of the same was marked to the present petitioner firm. In reply, the petitioner sent a mail on 14.10.2021 informing the respondent No.3 that the equipment had been installed by the engineer of the respondent No.4 and all service related issues post installation in the machine was to be addressed by the respondent No.4, which was the original equipment manufacturer.

8. The respondent No.3 thereafter instead of taking steps for releasing the payment, raised a complaint in the GeM on 13.11.2021 raising grievances of "defect in wire and camera in the machine". In reply, the petitioner reaffirmed that after-sale service was in the jurisdiction of the original equipment manufacturer i.e. the respondent No.4. On 17.01.2021, the respondent No. 3 has again raised a demand for replacement of the machine from the petitioner and the original equipment manufacturer. The petitioner reminded respondent No. 3 that since the CRAC has been uploaded on 21.08.2021, which is one month after the date of installation, the petitioner was entitled to the payment of bills as raised by him within 10 days from the date of issuance of CRAC. According to the petitioner, since an admitted amount upon conclusion of a contract has remained unpaid, he has preferred the present writ petition praying for an appropriate writ in the nature of mandamus directing the respondents to pay an amount of Rs. 32,25,000/- to the petitioner by the respondent No. 3.

9. Mr. B.K Das, learned counsel for the petitioner has referred to the terms and conditions of the bid documents. Thereafter, by referring to the contract, the learned counsel for the petitioner has submitted that it is not the case of the respondent No.3, that any terms and conditions of the bid or the contract had been violated or that any of the General terms and conditions on GeM 3.0 (Version 1.19) had been violated.

10. The learned counsel for the petitioner has submitted that the petitioner had abided by all the conditions applicable on the present contract and it is not the case of

the respondent No.3 that there was any violation of the same. By referring to Clause-11 of the General terms and conditions, the learned counsel for the petitioner has submitted that the respondent No.3 had the right to reject the goods supplied by the petitioner within 10 days of receipt of the consignment. Clause-11 & 12 of the General terms and conditions on GeM 3.0 (Version 1.19) referred to by the learned counsel for the petitioner is reproduced herein below for ready reference;

"***11. Buyer/Consignee's Right of Rejection (Return Policy):***

i. The Goods delivered shall bear the self certified Manufacturer's/Seller's Warranty/Guaranty. Buyer/Consignee shall have the right to inspect the supplied Goods themselves and/or through their appointed agency at consignee's own cost, at Consignee's site(s) after receipt and accept or reject on proper justification any consignment of the Goods received within a period of 10 days (unless otherwise specified in STC or ATC) of receipt of consignment of goods. The date of receipt shall be reckoned from the date of receipt of the Goods as notified in the Provisional Receipt Certificate (PRC) which will be issued online by consignee immediately after receipt of Goods.

ii. In case of Service contract, the Buyer reserves right to reject the same in conformance with the terms and conditions of the agreed Service Level Agreement (SLA). However, such right to reject services offered by the Seller under the contract shall be exercised by the Buyer within 10 days (unless otherwise specified in STC or ATC) of the date of receipt of the Service. The date & time of start and completion of the Service, shall be indicated by the Seller while raising on-line invoice for a specified period of Service as per Service Level Agreement (SLA). The date of such invoice or the date of completion of the service, whichever is later shall be reckoned as date of receipt of the Service.

iii. On Acceptance/Part Acceptance or Rejection of Goods/Services, Consignee will issue an on-line 'Consignee's Receipt cum Acceptance Certificate' (CRAC), which will form the basis of Payments to the Seller.

iv. No payment shall be made for rejected goods or services. After intimation of the rejection/part rejection by the Buyer/Consignee, the Seller shall be liable to remove/lift back such rejected Goods within 10 days without any extra charge/cost to the Buyer/Consignee failing which

suitable ground rent/warehousing charges would be payable by the Seller to the Buyer /Consignee. If the Seller fails to remove/lift back such rejected Goods within reasonable time period, the Buyer/Consignee shall have the right to dispose off such rejected goods at the risk and cost of the seller.

***12. Payment Authority and Payment Terms**:*

Payments shall be made to the Seller in the manner below:

*i. **For Goods**:*
In case of goods, 100% payment will be released within ten (10) days of issue of consignee receipt-cum-acceptance certificate (CRAC) and on-line submission of bills unless otherwise in STC/ATC.
*ii. **For services**:*
In case of services, 100% payments on the basis of monthly (unless otherwise specified) bills will be paid ten (10) days of issue of consignee receipt-cum-acceptance certificate (CRAC) and on-line submission of bills unless otherwise specified in STC/ATC."

11. The learned counsel for the petitioner has submitted that it is the matter of record, which has not been disputed, that the equipment was delivered on 16.07.2021. It was installed on 20.07.2021 and the CRAC had been uploaded by respondent No.3 on 21.08.2021. In such circumstances, it is the submission of the learned counsel for the petitioner that respondent No.3 could not have denied the payment as reflected in the CRAC in Gem of Rs. 32,25,000/- beyond 31.08.2021.

12. The learned counsel for the petitioner has further submitted that the respondent No.3, had for the first time on 07.10.2021 raised the issue of monitor machine being made in China, that the same quality machine cost was available for around Rs. 9-15 lacs and that the machine was not functioning properly from the beginning of its use. The learned counsel for the petitioner has submitted that all these grounds were initiated by views of a purported committee, of which neither the petitioner nor the original equipment manufacturer had been given any notice. the

learned counsel for the petitioner has submitted that, in any case, certificate of acceptance having being issued as per the contract, any further grievances would have to be addressed by the respondent No.4, who was the original equipment manufacturer and who would be liable to maintain the product through the period of warranty and guarantee of the product.

13. The learned counsel for the petitioner has submitted that even as per the contract issued by the respondent No.3, it was well within the knowledge of the respondent No.3 that it would have a period of 10 days to either accept or reject the equipment that was supplied. The learned counsel for the petitioner has therefore submitted that since the contract is one with the State and since it has been completed *qua* the petitioner by delivering the equipment and uploading invoices and had been accepted by the respondent No.3 by issuing the CRAC/acceptance certificate, the respondent No.3, as a State had acted arbitrarily by shunning its responsibilities and that the respondent No.3 will remain liable to pay the contract amount to the petitioner.

14. The learned counsel for the respondent No.2 & 3 initiated his arguments by submitting that the present writ petition is not maintainable, inasmuch as, there is a specific arbitration clause under Clause 16 in the terms and conditions of GeM (government e-market place) portal. According to the learned counsel, the dispute raised by the petitioner should have been referred to sole arbitrator as per terms and conditions of the contract at Clause 2.8. He as argued that the petitioner has not made any application for appointment of an arbitrator although allegations of violation of the terms and conditions of GeM and matters relating to contract has to be decided by way of arbitration as disputed question of facts are involved and where evidences are required to be adduced by both the parties. He has referred to the case of **Babanrao Rajaram Puna** vs **Samarath Builders and developers, reported in (2022) 9 SCC 691,** where the Apex Court has observed that a binding reference to arbitration between the parties ought to have been given full effect by the High Court.

The learned counsel for the respondent No.2 & 3 has also relied on a judgment rendered by the High Court of Telangana in W.P No.20309/2021 in a similar case. He has submitted that contract vide No. GEMC-51168776207152 with the petitioner specifies the product details, the item details and the terms and conditions of GeM and as per the product details in the contract (Annexure- 5 of the writ application) as well as (Annexure- 10 of the writ application) the parties to the contract are bound by the terms and conditions of the agreements.

15. The learned counsel for the respondent Nos. 2 and 3 has submitted that supply of defective C-ARM Fluoroscope X-ray machine by the petitioner was not acceptable to his clients. The respondent No. 4 was informed by the mail on 16.11.2021 and 18.11.2021. On 02.11.2021 the Engineer physically inspected and verified the machine and submitted a report that the video connector wire and camera is defective and needs to be replaced, it was also further observed that from the day of the installation the image was faulty. The payment in respect of the machine was not released as the machine is a defective one and needs to be replaced.

16. The learned counsel has thereafter referred to Clause 11(iv) of the GeM to impress that the purchaser is not liable to make any payment for rejected goods/services after intimation of the rejection/part rejection by the Buyer/Consignee. The seller shall be liable to remove/lift back such rejected goods within 10 days without any extra charges/cost to the Buyer/Consignee, failing which suitable ground rent/warehousing charges would be payable by the seller to the Buyer. If the seller failed to remove/lift back such rejected goods within a reasonable time, the buyer/consignee shall have the right to reject such rejected goods at the risk and cost of the seller. The petitioner as well as the respondent No. 4 have been informed several times to cure the defects in the machine which the petitioner as well as the respondent No.4 have miserably failed and as such, the answering respondents does not have any liability to make payment of such rejected goods/machines as per Clause 11(iv) of the GeM.

17. It is also submitted by the learned counsel that vide letter dated 12.11.2021 issued by the Deputy Medical Commissioner, ESI Corporation, Panchadeep Bhawan, New Delhi addressed to the CEO, GeM informed of the supply of defective/refurbished medical equipment by the petitioner and that the OEM/Respondent No. 4 could not rectify the defect. The said letter also requested for forfeiting the ePBG of the petitioner.

Having supplied the machine, it was the duty of the petitioner who had supplied the machine to see that the same functions properly as per the terms and conditions of GeM. The petitioner cannot evade responsibility by stating that the after sale service is the responsibility of the respondent No. 4. The release of payment in respect of BPL C-ARM Fluoroscope X-ray machine would arise once the defects in the machine are fully cured and/or the machine is replaced.

18. The learned counsel has further stated that it is also the terms of the GeM that notwithstanding the fact that the buyer or the quality assurance officer may have inspected and or approved/accepted the goods, it is further guaranteed that if during the guarantee/warranty period the goods be discovered not to conform to the requisite description and quality and/or giving satisfactory performance or have deteriorated, the decision of the buyer in that behalf shall be binding on the seller and the buyer shall be entitled to call upon the seller to rectify or replace the goods or such portion thereof as is found to be defective by the buyer within 7(seven) days. The petitioner and the respondent No. 4 till date have failed to comply with the provisions of Clause 10 (ii) of the GeM. The machine was purchased for treatment of patients and presently is lying in a store room of hospital without its utility since its installation and the action of the petitioner and the respondent No.4 is also against public interest. The petitioner having failed to cure the defects in the BPL C-ARM Fluoroscope X-ray machine which have occurred after installation, the petitioner as well as respondent No.4 have violated the terms and conditions of Clause 10(ii) of the

GeM and as such nothing is payable under Clause 11(iv) of the terms and conditions of GeM and the Hon'ble Court may be pleased to dismiss the petition.

19. The first issue this Court has now to take up is, whether, due to the presence of an "arbitration clause" in the General Terms of Contract of the GeM, the grievance of the petitioner regarding the refusal for payment after issuing the CRAC by the respondent No.3 is a dispute to be relegated for arbitration or whether, in view of the admitted position of facts and circumstances, this Court would decide the issue of maintainability of the writ in the positive and then proceed to decide the merit of the claim.

20. This Court has noticed that the respondent No.3, on being demanded to pay the contracted amount in the month of August 2021 against the CRAC issued by it on 21.07.2021, had raised issues regarding the equipment in the month of October 2021 for the first time. The respondent No.3 did not attempt at any point of time to refer any so-called dispute for arbitration and on its volition, decided to withhold the payment which it was obligated to make within 10 days of issuing the CRAC. The issue of reference of the dispute, sought to be created by the respondent No.3 itself, to arbitration has been taken up for the first time in the affidavit filed by it to oppose the writ petition. The respondent No. 3 has not disputed the liability to pay but has made a specific assertion that it would not be liable to pay unless the equipment is replaced. These observations have been recorded at this stage in this order, since it would have a bearing on the issue of whether the present writ is maintainable in its present form.

21. The learned counsel for the respondent no. 3 has relied upon the judgment of the Apex Court in **Babanrao Rajaram Puna (supra).** The issue before the Apex Court was whether the High Court was correct in rejecting an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of arbitrator when there was a specific clause evincing a clear intention of the parties for reference of disputes to arbitration. The Apex Court had held that rejection of the prayer for appointment of arbitrator was erroneous, even in the absence of the term to the effect

that "the decision of the arbitrator shall be final and binding" in the arbitration agreement. This Court humbly agrees to the said proposition.

22. However, this Court, in the present case, is not dealing with an application for appointment of arbitrator which is filed by a party raising a dispute. The respondent No.3 has not prayed for appointment of an arbitrator. On the other hand, the petitioner has approached this Court claiming arbitrariness and unreasonableness on the part of the respondent No. 3 in refusing to make payment despite issuance of CRAC in its favour and this Court is required to evaluate as to whether, in the presence of an alternative remedy, this Court would proceed to adjudicate the grievance of the petitioner qua the respondent No.3, who falls within the definition of "State" as envisaged in Article 12 of the Constitution of India.

23. The issue whether the High Court, in exercise of its power under Article 226 of the Constitution of India, would non-suit a litigant solely on the ground of existence of an alternative remedy or more specifically on the ground of existence of a clause relating to reference to arbitration, has been discussed in several landmark judgments.

24. In **Unitech Limited and Others** -Versus- **Telangana State Industrial Infrastructure Corporation [TSIIC] and Others**, reported in **[2021] 2 SCALE 653**, the Hon'ble Apex Court has held as follows:

> "***E. Analysis***
>
> ***E.1. Maintainability of the writ petition under Article 226***
>
> *32. Much of the ground which was sought to be canvassed in the course of the pleadings is now subsumed in the submissions which have been urged before this Court on behalf of the State of Telangana and TSIIC. As we have noted earlier, during the course of the hearing, learned Senior Counsel appearing on behalf of the State of Telangana and TSIIC informed the Court that the entitlement of Unitech to seek a refund is not questioned nor is the availability of the land for carrying out the project being placed in issue. Learned Senior Counsel also did not agitate the ground that a remedy for the recovery of moneys arising out a contractual matter cannot be*

availed of under Article 226 of the Constitution. However, to clear the ground, it is necessary to postulate that recourse to the jurisdiction under Article 226 of the Constitution is not excluded altogether in a contractual matter. A public law remedy is available for enforcing legal rights subject to well-settled parameters.

33. A two judge Bench of this Court in ABL International Ltd. v. Export Credit Guarantee Corporation of India, [7] *(2004) 3 SCC 553 [ABL International] analyzed a long line of precedent of this Court,* [8]*K.N. Guruswamy v. State of Mysore, AIR 1954 SC 592; Gujarat State Financial Corporation. v. Lotus Hotels (P) Ltd, (1983) 3 SCC 379; Gunwant Kaur v. Municipal Committee, Bhatinda, (1969) 3 SCC 769 to conclude that writs under Article 226 are maintainable for asserting contractual rights against the state, or its instrumentalities, as defined under Article 12 of the Indian Constitution. Speaking through Justice N Santosh Hegde, the Court held:*

"*27. …the following legal principles emerge as to the maintainability of a writ petition:*

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable."

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, [9]*2020 Scconline SC 847 and Popatrao Vynkatrao Patil v. State of Maharashtra,* [10]*Civil Appeal 1600 of 2000 (Supreme Court of India). 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, [11]Harbanslal Sahnia v. Indian Oil Corporation Ltd., (2003) 2 SCC 107; Ram Barai Singh & Co. v. State of Bihar & Ors., (2015) 13 SCC 592. 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)

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."

25. This Court in the case of M/s. M.K. Dhiroomal Associates JV, a Joint Venture of M/s M.K. Engineering and M/s Shiroomal and Sons Pvt. Ltd. -Versus- Union of India (Writ Petition (C) No. 6103 of 2012, Writ Petition (C) No. 266 of 2012 Decided on : 21-09-2023) has, held as follows:

"*11. The alleged dispute involved herein is the alleged decision to recover a sum of Rs. 25,21,881.27 by the respondent N.F. Railway authorities on the ground that the Contract Agreement between them stood vitiated to the extent of Rs. 25,21,881.27. As to the maintainability of a writ petition, the Hon'ble Supreme Court of India in ABL International Ltd. and another vs. Export Credit Guarantee Corporation of India Ltd. and others, reported in [2004] 3 SCC 553, after discussing a number of previous preiudacates/authorities, has laid down the legal principles as follows :- [a] in an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable; [b] merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule; and [c] a writ petition involving a consequential relief of monetary claim is also maintainable. The aforesaid principles have been followed in subsequent three-Judge Bench decision in State of Uttar Pradesh vs. Sudhir Kumar, reported in 2020 SCC OnLine SC 847 and Popatrao Vynkatrao Patil vs. State of Maharashtra, reported in [2020] 19 SCC 241. It is, however, to be kept in mind that the plenary power under Article 226 is to be exercised 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. Reiterating the said principles, it has been observed in Unitech Limited and others vs. Telangana State Industrial Infrastructure Corporation [TSIIC] and others, reported in [2021] 2 SCALE 653, that 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, it is equally well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does not oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked."*

26. In the present case, the undisputed facts are that the respondent No. 3 had floated a bid in the GeM and the petitioner had participated successfully. The equipment was supplied on 16.07.2021 and installed on 20.07.2021 and the CRAC was issued a month thereafter on 21.08.2021. The terms of the contract, as reproduced in the earlier paragraphs, required the payment to be made within 10 days thereafter. The payment was not made and the first complaint was raised on 7.10.2021. The contract does not allow withholding of payment for more than 10 days after the issue of CRAC and in fact, office memorandums on the issue are to the effect that penalties, in the form of interest @ 1% are to be imposed for delayed payment. The petitioner had raised demands for payments in the month of August 2021 itself and the respondents did not raise immediate objections and required the issue to be referred to arbitration. Instead, demands were made for replacement of the equipment. From the actions of the authorities at the helm of affairs in the administration of the respondent No.3, it appears that since the payment had yet to be made for the equipment procured, the said fact was used to pressurise the petitioner to replace the equipment, for which a CRAC certificate had already been issued. This appears to be arbitrary and unreasonable.

True it is that the respondent No.3 is entitled to certain relief in the event the

equipment turns out to be defective, but such relief would only arise to the respondent No.3 after it clears its obligation for making the contracted amount to the supplier/OEM Certified reseller. The contract itself does not empower the respondent No. 3 to withhold payment in the manner it has been done.

Whether a defective equipment had been supplied, whether the defects arose after the installation and issuance of the CRAC certificate and whether the machine is at all defective and if so, to what relief the respondents would be entitled to are matters of disputed facts, which would require evidence to be led and thus are arbitrable matters. But the issue as to whether a supplier would be entitled to payment for equipment supplied within a period of 10 days from the date of issue of the CRAC certificate does not require any deep probe, more so when the said certificate is not disputed by the respondent No. 3.

27. The Hon'ble Supreme Court in Kumari Shrilekha Vidyarthi reported in [1991] 1 SCC 212, has gone on to observe as under;

> "*22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.*
>
> *23. Thus, in a case like the present, if it is shown that the impugned State action is arbitrary and, therefore, violative of Article 14 of the Constitution,*

there can be no impediment in striking down the impugned act irrespective of the question whether an additional right, contractual or statutory, if any, is also available to the aggrieved persons.

24. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity."

28. In the present case, the decision to withhold the payment to the petitioner is a unilateral decision of the respondent No.3 and the same does not arise out of any terms engraved in the contract or in the General Terms and Conditions of the GeM. The payments are in fact required to be effected within a time span, failure of which is amenable to penalties. In such facts and circumstances, this Court has no hesitation in holding that the refusal of the respondent No.3 to make payments is an arbitrary and unreasonable attempt, violating the protection guaranteed by Article 14 of the Constitution of India.

29. Thus, in the considered opinion of this Court, there is no impediment to adjudicate the grievance of the petitioner in this writ petition only because of a clause

in the General Terms and Condition of the GeM which requires referral of disputes arising out of the contract to arbitration. This Court has noticed that there is no clause in the contract or the GTC which allows withholding of payments beyond 10(ten) days after issuing the CRAC. Therefore, the respondent No.3 remains liable to release the contracted amount to the petitioner forthwith. It is ordered accordingly. The respondent No. 3 shall make payment of the contracted amount to the petitioner to the tune of Rs. 32,25,000/- within a period of ten days from the date of receipt of a certified copy of this order as ten days' time was fixed in the contract itself from the date of issuing the CRAC. This order will not impede any rights of the respondent No. 3 to seek such remedies as available under the contract and the GTC of the GeM, so far as any grievances regarding the performance or efficiency of the equipment is concerned.

30. Writ petition is allowed to the extent indicated above.

31. Parties are left to bear their own costs.

JUDGE

Comparing Assistant