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HIGH COURT OF CHHATTISGARH, BILASPUR

WPC No. 1844 of 2020

M/S MMP Water Sports Pvt Ltd, through Mr. B. Vijay Kumar authorized Representative, aged-40 years, R/o Buddha Talab Main Gate, Mahamay Ward, Swami Vivekanand Sarovar, Chhattisgarh.

---- Petitioner

Versus

1. Chhattisgarh Tourism Board, through Managing Director, 2nd Floor, Udyog Bhawan, Ring Road No.1, Telibandha, Raipur – 492006, C.G.

2. Raipur Municipal Corporation, through Commissioner Nagar Nigam Head Office, Near Mahila Police Thana, Gandhi Udyog, Raipur, C.G.

3. Raipur Smart City Limited through Managing Director Ground Floor Chhatrapati Shivajee Maharaj Outdoor Stadium Campus, In front of Buddha Talab, Raipur, Chhattisgarh.

---- Respondents

along with

WPC No. 2479 of 2020

M/S MMP Water Sports Pvt Ltd, through Mr. B. Vijay Kumar authorized Representative, aged-40 years, R/o Buddha Talab Main Gate, Mahamaya Ward, Swami Vivekanand Sarovar, Raipur, Chhattisgarh.

---- Petitioner

Versus



1. Chhattisgarh Tourism Board, through Managing Director, 2nd Floor, Udyog Bhawan, Ring Road No.1, Telibandha, Raipur – 492006, C.G.
2. Raipur Municipal Corporation, through Commissioner Nagar Nigam Head Office, near Mahila Police Thana, Gandhi Udyog, Raipur, C.G.
3. Raipur Smart City Limited through Managing Director Ground Floor Chhatrapati Shivajee Maharaj Outdoor Stadium Campus, In front of Buddha Talab, Raipur, Chhattisgarh.

---- Respondents

(Cause-title taken from Case Information System)

For Petitioner : Mr. Kishore Bhaduri, senior counsel assisted by Mr. Siddharth Shukla, Advocate.

For Respondent No. 1 : Mr. Ashish Shrivastava, senior counsel assisted by Mr. Aman Pandey, Advocate.

For Respondent No. 2 : Mr. Anumeh Shrivastava, Advocate.

For Respondent No. 3 : Mr. Animesh Tiwari, Advocate.

Date of Hearing : 07.04.2022

Date of Judgment : 12.05.2022

Hon'ble Mr. Arup Kumar Goswami, Chief Justice

Hon'ble Mr. Gautam Chourdiya, Judge

C.A.V. Judgment

Per Arup Kumar Goswami, Chief Justice

WPC No. 1844 of 2020 and WPC No. 2479 of 2020 are filed by the same petitioner against the same respondents and the subject matter in both the writ petitions are substantially same. In WPC No. 2479 of 2020,



cause of action that had accrued subsequent to the filing of WPC No. 1844 of 2020 are incorporated.

2. These two petitions have been listed together and, accordingly, both the writ petitions are disposed of by this common order.

3. The facts of the case as pleaded by the writ petitioner in WPC No.1844 of 2020, *inter alia*, are that the petitioner is a marine specialist company dealing with ports and marine infrastructure, ship building and ship repair, water front developments including floating marinas, water sports facilities and water activities with experience of 21 years.

4. Respondent No. 1 had issued an Expression of Interest dated 06.12.2015 “for setting up, development, management and operation ‘integrated leisure destination’ and its peripheral area situated at Swami Vivekanand Sarovar (Budha Talab), Raipur, Chhattisgarh, (herein after referred to as ‘licensed premises’)”.

5. On being declared as a successful bidder, a License Agreement dated 25.10.2016 was executed between the petitioner and respondent No.1. The activities covered under the planned scope of licensed premises included jetty with jet boats, floating party boat, water sports, adventure and amusement activities, etc. The petitioner is to invest a sum of Rs. 12 crores in the project and that petitioner had already invested an amount of Rs. 5 crores. The project was to be operationalised in phased manner subject to receipt of permissions/approvals from the concerned authorities within the time-frame as provided in clause 4. In terms of clause 5, license period was 30 years from the date of commencement with a right of renewal for further 30 years.



6. Clause 5.3 provides that a period of eighteen months shall be given to furnish and develop the recreational facilities as per Phase-I (subject to delivery of deliverables) in order to start the Commercial Operations and that date after eighteen months of signing the License Agreement is termed as 'Commercial Operation Date' (COD).

7. After execution of the License Agreement, the petitioner, by an e-mail dated 23.11.2016 and letter dated 24.11.2016, requested the respondent No. 1 for commencing execution of the deliverables as per clause 2B of License Agreement which included parking provisions, lighting, power load, water connection, cleaning of water, sewerage connection, etc. It had also submitted vide letter dated 27.04.2017 the final site plan for the Swami Vivekanand Sarovar (Budha Talab) with the respondent No. 1 for approval for development of an integrated leisure destination, and for approval of the Building Plan and Development Plan of the License Area (Premises) in line with the terms of the License Agreement.

8. By a letter dated 19.06.2017, the respondent No.1 had granted partial approval for undertaking cleaning of the licensed premises, beautification of the pier and for starting the water sports and fountain under the supervision of respondent No. 3 and consultant. It was informed that approvals for balance work would be communicated to the petitioner later on.

9. Subsequently, the lease agreement was amended on 25.10.2017 to give effect to incorporation of Special Purpose Vehicle (SPV) for the execution of the project as required under clause 9.42 of the License



Agreement. This amendment was executed in terms of clause 9.44. The amendment, amongst others, replaced “Modern Maintenance Products (India) Private limited” with whom respondent No. 1 had executed the contract dated 25.10.2016 by “MMP Water Sports Private Limited” in the License Agreement, which is the petitioner in the two writ petitions.

10. A Resolution dated 05.08.2017 was passed in a meeting of Mayor-in-Council, approving the selection of the petitioner under Public-Private Partnership (PPP) mode for the project on the condition that no permanent construction would be undertaken and that the area of lake will not be reduced.

11. The Resolution was communicated to the petitioner by the respondent No. 1 vide letter dated 23.11.2017 and the petitioner was further directed to start the commercial operations in the light of letter dated 05.08.2017. The respondent No. 1 had also sent a letter dated 23.11.2017 to the respondent No. 2 requesting them to approve and send the signed copy of the final site plan submitted by the petitioner, so that the petitioner can undertake the development activities in accordance with site plan.

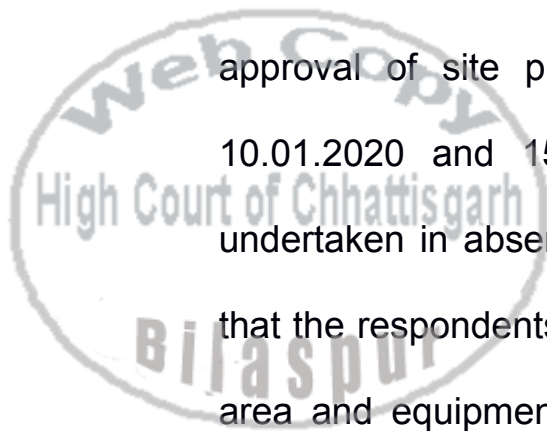
12. After receiving necessary approvals and consents from the State Environment Impact Assessment Authority (SEIAA) and the Chhattisgarh Conservation Board, the petitioner had commenced the commercial operations on 19.10.2018 to the extent the same was allowed under letter dated 05.08.2017.





13. By letter dated 11.12.2018, the petitioner requested the respondent No. 1 to provide the copy of the approved site plan so that development work can be undertaken in accordance with the same.

14. It is pleaded that the petitioner had started commercial operations in the month of October, 2018 and carried out development work in the peripheral areas such as entrance plaza and proper railing, boating jetty, viewing deck and gazebo, island pathway beautification and cleaning peddle and pontoon boats etc., but in absence of approved site plan, project development had come to a stand still. In such circumstances, letter dated 27.06.2019 was issued to respondent No. 1 to expedite approval of site plan. The said letter was followed by letters dated 10.01.2020 and 15.06.2020 indicating that development works were undertaken in absence of approved site plan to the extent permitted and that the respondents No. 2 and 3 had demolished the Solar Power Building area and equipment without informing the petitioner although the same were transferred in favour of the petitioner. With the onset of Covid-19 pandemic, the petitioner had invoked clause 19 of the License Agreement and had suspended the operations and the same was communicated by letter dated 30.03.2020 and an e-mail dated 12.05.2020. However, arbitrarily and illegally the respondent No. 3 had a issued Notice Inviting Tender No. 309/RSPL/2020 and Request of Proposal dated 07.08.2020 for “selection of an agency for procurement and other accessories, operation of boats and provide maintenance services at Swami Viveknand Sarovar (Budha Talab), Raipur, Chhattisgarh” for a period of three years, indicating therein that the last date of filing tender is 20.08.2020.



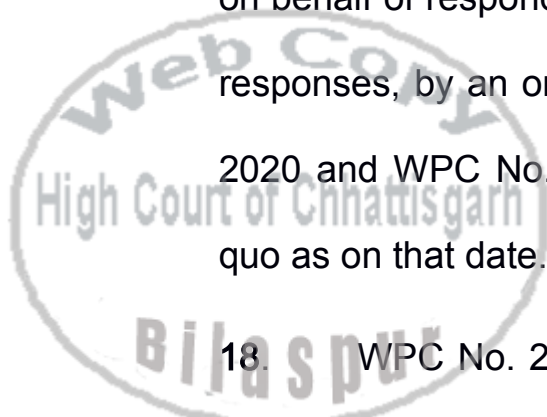


15. Though no order of termination had been served upon the petitioner by the respondent No.1, it was circulated in the newspapers that the petitioner's License Agreement had been cancelled.

16. It is in the background of the above factual matrix, WPC No. 1844 of 2020 was filed praying for setting aside and quashing the NIT No. 309/RSPL/2020 and Request for Proposal dated 07.08.2020 and for a direction to respondent No.1 to provide the approved site plan to the petitioner along with other deliverables.

17. Noticing that despite service of notice, there is no representation on behalf of respondent No.3 and that other respondents had also not filed responses, by an order dated 11.01.2021, this Court in WPC No. 1844 of 2020 and WPC No. 2479 of 2020 had passed an interim order of status quo as on that date.

18. WPC No. 2479 of 2020 was filed with the same factual matrix as presented in WPC No. 1844 of 2020. In addition, it is stated that after issuance of notice in WPC No. 1844 of 2020 by this Court on 19.08.2020, the respondent No.1 had terminated the License Agreement dated 25.10.2016 and amendment to License Agreement dated 08.05.2017 by notice of termination dated 05.09.2020 by invoking clause 19 of the Contract Agreement and immediately thereafter, the respondent No.3 had issued a Notice Inviting Tender No.323/RSCL/2020 and Request for Proposal for "Design, Supply, Installation, Testing and Commissioning of Musical Fountain at Swami Vivekanand Sarovar (Budha Talab), Raipur, Chhattisgarh including operation and maintenance of 5 years on 08.09.2020. Accordingly, prayer was made to set aside and quash the





notice of termination dated 05.09.2020 and License Agreement dated 25.10.2017 as well as to set aside and quash Notice Inviting Tender No. 323/RSCL/2020 and Request for Proposal dated 08.09.2020, issued by respondent No.3.

19. In WPC No.1844 of 2020, no affidavit was filed by respondent No.1. The respondent No. 2 had filed an affidavit stating that it is a formal party. In the affidavit filed by respondent No.3, it is stated that an order dated 30.05.2020 was issued wherein it was indicated that no Resolution was passed in General Council Meeting of Raipur Municipal Corporation prior to issuance of license to the petitioner and that due procedure of floating of tender had not been followed by respondent No.1 and that on the basis of the said letter dated 30.05.2020, License Agreement of the petitioner was terminated by the respondent No.1. It is also stated that the respondent No.3 is working under a project called "renovation and beautification works of Swami Vivekanand Sarovar and garden, Raipur.

20. The Raipur Municipal Corporation had accorded approval for constitution of Raipur Smart City Limited to be undertaken on the property of Municipal Corporation, Raipur and that Budha Talab development project has been approved under the Raipur Smart City mission by the Raipur Municipal Corporation, after termination of License Agreement dated 25.10.2016. It is on the basis thereof, NIT dated 07.08.2020 was issued, which, however, came to be cancelled because of technical issues and subsequently, again on 11.11.2020, notice was issued for the same work. It is stated that no sanction order had been issued to anyone.

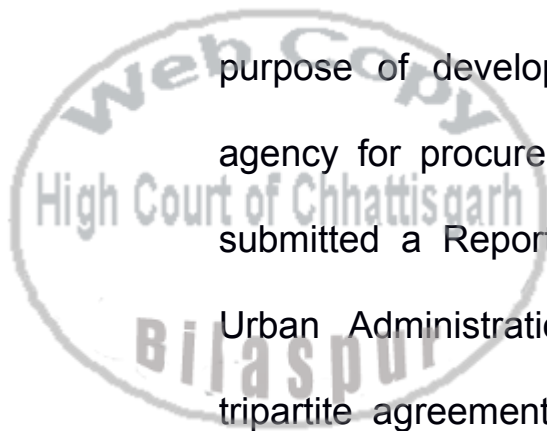


21. In WPC No.2479 of 2020 also, the respondent No. 2 had taken the stand that it is a formal party to the proceedings.

22. Respondent No.1, in its response at paragraph 4 stated that the respondent No.2, vide decision of Mayor-in-Council dated 05.08.2017 and the decision of General Council Meeting dated 15/12/2017 approved the selection of the petitioner for development purposes of Swami Vivekanand Sarovar (Budha Talab), Raipur under PPP mode on the condition that no permanent construction would be undertaken and the area of lake will not be reduced. It is stated that concerned department of the State Government had constituted a three-member enquiry committee for the purpose of development of convenient operation for the selection of agency for procurement and other accessories, operation etc. and had submitted a Report dated 30.10.2019, based on which Department of Urban Administration & Development, recommended cancellation of tripartite agreement executed in respect of Budha Talab garden to the Department of Tourism and based on the same, the Department of Tourism issued a letter dated 26.06.2020 instructing the respondent No.1 to take appropriate action with regard to cancellation and accordingly, the respondent No.1 issued notice of termination dated 05.09.2020 and therefore, the respondent No.3 had issued fresh NIT dated 08.09.2020.

23. An additional affidavit was filed by respondent No.1 on 25.10.2021 in terms of an order dated 22.10.2021 with regard to the order of termination of Agreement of the petitioner.

24. The respondent No. 3, while reiterating the stand taken in the response filed in WPC No.1844 of 2020, further stated that in connection





with the tender of musical fountain at Swami Vivekanand Sarovar, work order was issued on 15.10.2020 in favour of the L1 bidder and first payment to the tune of Rs.157.50 lakhs was released on 20.10.2020 and thereafter, second payment of Rs.78.75 lakhs had been released and that 90% work of the musical fountain has already been completed.

25. Mr. Kishore Bhaduri, learned senior counsel for the petitioner makes pointed submission to the effect that during the subsistence of the contract agreement between the petitioner and the respondent No.1, respondent No.3 could not have issued the NIT and Request of Proposal dated 07.08.2020, which according to the respondent No.3 had now been cancelled and now another fresh tender for the same work by NIT dated 11.11.2020 has been issued.

26. It is submitted that though the impugned notice of termination had been issued invoking clause 19 of the License Agreement, the condition precedent for invoking clause 19 being absent, the impugned notice of termination agreement is arbitrary, illegal and cannot be sustained in law.

27. It is submitted that the respondents No. 1 and 2, for extraneous consideration in order to grant undue benefit to respondent No.3 had terminated the Contract Agreement of the petitioner after almost four years of execution of the same. He has submitted that in the attending facts and circumstance, this Court may issue a writ of mandamus to respondent No.1 to provide the approved site plan, at the earliest.

28. Mr. Ashish Shrivastava, learned senior counsel, appearing for respondent No. 1, submits that the writ petitions are not maintainable in view of the arbitration clause in the Contract Agreement dated 25.10.2016.



Relying on an additional affidavit dated 25.10.2021, it is submitted by him that for invoking clause 19, no reasons are required to be cited and the requirement of 21 days' notice as contemplated under clause 19.1 of the License Agreement dated 25.10.2016 may not be applicable under the facts and circumstances of the case.

29. Mr. Animesh Tiwari, learned counsel, appearing for respondent No.3 submits that the order of termination has been actually issued on the basis of letter dated 30.05.2020 issued by the Department of Urban Administration and Development. He further submits that at the time of filing of the return dated 06.02.2021, 90% of the work of musical fountain has been completed. However, in view of the interim order dated 11.01.2021, no further work is being undertaken and in the aforesaid circumstances, he contends that it may not be in the interest of justice to interfere with the NIT No. 323/RSCL/2020 and Request for Proposal dated 08.09.2020 and the work of musical fountain should be allowed to be completed by the successful tenderer.

30. Mr. Bhaduri submits that availability of alternative remedy by way of arbitration is not always a bar for exercising jurisdiction under Article 226 of the Constitution of India. He has submitted that issuance of tender by respondent No. 3 is intrinsically connected with the termination of contract of the petitioner and there is no privity of contract between the petitioner and respondent No.3.

31. It is further submitted that there is also no agreement in between the petitioner and respondent No.2. Though it has been urged that the writ



petitioner is liable to be relegated to avail alternative remedy, no plea was taken to that effect by any of the respondents in their responses

32. We have considered the submissions made by the learned counsel for the parties and have perused the materials on record.

33. Clause 2B of the contract agreement dated 25.10.2016, reads as follows:

“2B. Scope of the Licensor

2.5 The Licensor shall aid and assist the Licensee for setting up and operationalizing the premises which includes assisting in procurement of mandatory Central and State Government Licenses (which shall include but not limited to procurement of Environmental Clearance and other allied licenses/permissions/NOC, MOEF and Ministry of Tourism Clearance) for operationalizing and running the integrated Recreation Activities in the licensed premises. All other sanctions, permissions, no objections, letter of intent, consent, licenses, clearance, approvals etc. pertaining to the business activity shall be obtained by the Licensee at his cost and such document shall be kept effective and in force at all material times throughout the License period.

2.6 The Licensor shall be responsible for developing the site area with the essential infrastructure to make the site accessible to the visiting tourist. This shall include adequate parking for the employees and the customers of the Integrated Recreation Centre, last mile connectivity to the





site, drinking water connection, toilets, storage, boat sheds. Initial and periodic Lake Water Cleaning as required for optimum operation of Water Activities & other related infrastructure including transmission lines, sewerage and water supply lines in the vicinity of project site. The development of such supporting infrastructure shall be done in close consultation with the Licensee. The Licensor shall allocate adequate area to the Licensee for installation of activities mentioned in Clause 3 here under.

2.7 The Licensor shall assist the Licensee for providing if any special subsidy / exemptions under the prevailing Chhattisgarh State Tourism Policy.”

34. The Activities covered under the planned scope of project are following:

“3. Activities covered under the planned scope

3.1 Activities which are covered under the planned scope of the project are in following:

- Food Kiosks
- Amphitheater
- Jetty with Jet Boats
- Floating Party Boat
- Water Sports
- Adventure, Amusement Activities
- Ferris Wheel Activities





- Kids Play area
- Artisans' Display Area
- Handicraft Outlets
- Retail Outlets
- Flea Market
- Fountain and Laser Light Show
- Exhibition, Events & Banquets Area

3.2 The activities undertaken in the Project may comprise of but shall not be limited to the above mentioned activities.”

35. It is an admitted position that notice inviting tender and request of proposal dated 07.08.2020 was issued by respondent No.3.

36. Relevant portion of the notice of termination of license dated 05.09.2020, read as follows:

“12. The scope of the Licensor, inter alia, included aiding and assisting the licensee in procurement of mandatory central and State Government Licenses (which shall include but not limited to procurement of Environmental Clearance and other allied license/permissions/NOC, MOEF and Ministry of Tourism Clearance) for operationalizing and running the integrated Recreation Activities in the licensed premises. The Licensor is responsible for developing the site area with the essential infrastructure to make the site accessible to the visiting tourist. This included adequate



parking for the employees and customers of the integrated Recreation Centre, last mile connectivity to the site, drinking water connection, toilet, storage boat sheds, Initial and Periodic Lake Water Cleaning as required for optimum operation of Water Activities & other related infrastructure including transmission lines, sewerage and water supply lines in the vicinity of project site.

13. In terms of the said License Agreement, the Deliverables being within the scope of the Licensor, said Chhattisgarh Tourism Board, and to be delivered by the Chhattisgarh Tourism Board required procuring the co-operation and agreement of other independent agencies including Raipur Nagar Nigam Ltd., and Raipur Smart City Ltd., and other government agencies and statutory entities.

14. Although over 46 months have elapsed since the execution of License Agreement dt 25.10.2016, and 39 months have elapsed since the Amendment in favour of SPV said M/s. MMP Water Sports Pvt Ltd., Mumbai, on 08.05.2017, the Chhattisgarh Tourism Board has not been able to deliver the deliverables.

15. The Chhattisgarh Tourism Board has appointed a fact finding committee to investigate the various aspects of the said ILD Project including jurisdiction of various authorities / agencies in the matter of processing of the said





ILD Project, and reserves its rights to initiate legal steps as warranted in the matter.

16. Meanwhile, the said SPV, M/s. MMP Water Sports Pvt Ltd., Mumbai, has vide their letter dt 15.06.2020, raised the subject of delay before the Chhattisgarh Tourism Board, and expressed their grievance on account of said delay arising out of non approval of the Development Plan, and requested the Board to look into the matter in the interest of the ILD Project.

17. In view of the said inordinate delay in delivering the deliverables due to reasons beyond the control of Chhattisgarh Tourism Board, the grievance of the non-approval of the Development Plan cited by the said M/s. MMP Water Sports Pvt. Ltd., Mumbai, and the request of the Board to look into the matter in the interest of the ILD Project, the Chhattisgarh Tourism Board has thought it expedient to deliberate on the matter in depth and on a priority basis.

Now, THEREFORE, after due deliberations and application of mind in depth, in view of the said inordinate delay in delivering the deliverables by Chhattisgarh Tourism Board, the Chhattisgarh Tourism Board does hereby invoke the provisions of Clause 19 captioned Force Majeure, and Clause 19.1 of the said License Agreement dated 25.10.2020 read with Amendment to License Agreement dt 08.05.2017 which reads as follows:

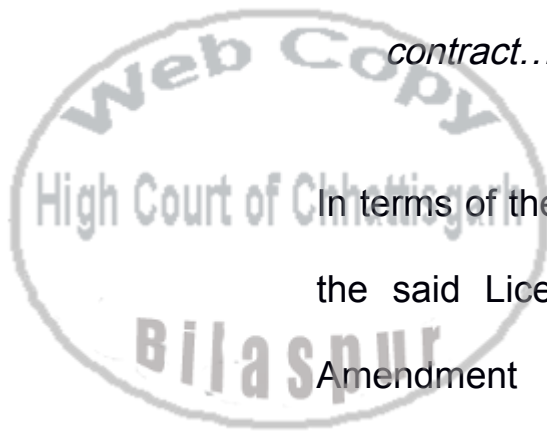




“if at any time, during the continuance of this contract, the performance in whole or in part, by either party, of any obligation under this is prevented or delayed..... Act of State or direction from Statutory Authority, epidemic, quarantine restrictionprovided further that if the performance in whole or part of any obligation under this contract is prevented or delayed by reason of any such event for a period exceeding 90 days either party may, at his option terminate the contract....”

In terms of the aforesaid provisions of Clause 19 and 19.1 of the said License Agreement dated 25.10.2016 read with Amendment to License Agreement dt 08.05.2017, the Chhattisgarh Tourism Board, does hereby terminate the said License Agreement dated 25.10.2016 read with Amendment to License Agreement dt 08.05.2017.

FURTHER, TAKE NOTICE THAT in view of the aforesaid Termination of License Agreement dated 25.10.2016 read with Amendment License Agreement dt. 08.05.2017, you are hereby directed to comply with the terms of the said License Agreement dated 25.10.2016 read with Amendment to Agreement dt 08.05.2017, which shall continue to remain alive even after the termination of the said License

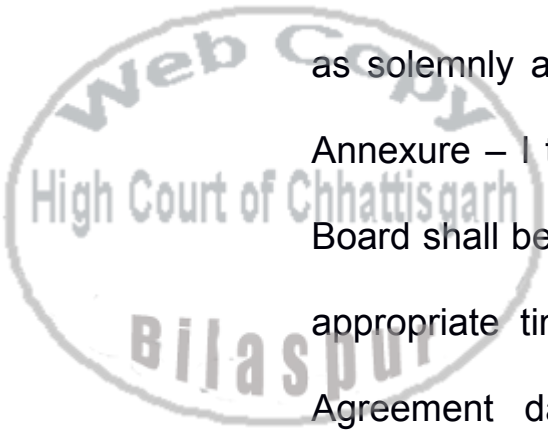




Agreement dated 25.10.2016 read with Amendment to License Agreement dt. 08.05.2017.

FURTHER, TAKE NOTE THAT in view of the aforesaid Termination of the License Agreement dated 25.10.2016 read with Amendment to License Agreement dt. 08.05.2017, you are hereby directed to comply with the terms of the said License Agreement dated 25.10.2016 read with Amendment to License Amendment dt 08.05.2017, and to vacate the License Premises and handover peaceful vacant possession of the licensed premises to the Chhattisgarh Tourism Board as solemnly affirmed by you in Affidavit being Clause g of Annexure – I thereto, failing which the Chhattisgarh Tourism Board shall be at liberty to take remedial / penal action at the appropriate time as provided for in terms of said License Agreement dated 25.10.2016 read with Amendment to License Agreement dt 08.05.2017, and/or as provided under law.

FURTHER, TAKE NOTICE THAT in terms of Clause 14.3 of the License Agreement dated 25.10.2016 read with Amendment to License Agreement dt 08.05.2017, no part of the License Fee, Security Deposit and Conservancy Charges is refundable in the event of cancellation / revocation of the License by the Licensor. Further, in terms of Clause 14.4, the Licensor will have right to the revoke some/whole part of Security Deposit furnished by the Licensor in case of non-





obligation of the terms and conditions of the License Agreement.

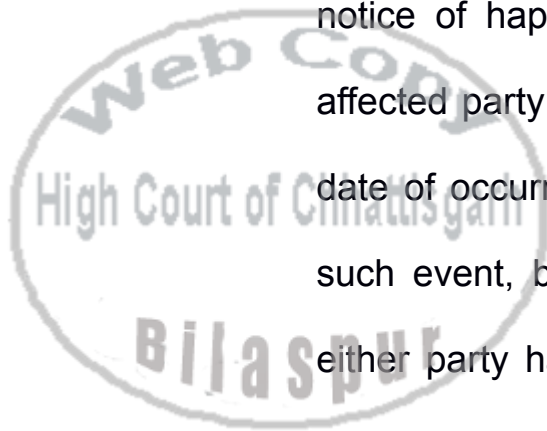
FURTHER, TAKE NOTICE THAT in that you have any further grievance or claims, we drew your kind attention that in terms of the clauses including clause 1) of Anneuxre – I of the License Agreement dated 25.10.2016 read with Amendment to License Agreement dt 08.05.2017, you have solemnly affirmed that you shall peacefully hand over the vacant possession of the licensed promises on termination / cancellation / revocation of license in accordance tih the instructions issued the Licensor in this regard and seek resolution of dispute, if any, through financial compensation only. Accordingly, in case you have any dispute or claims or grievance of whatsoever nature you may please respond accordingly to this Notice of Termination, with full details of your legitimate grievance and claims, and in terms of the provisions of Clause 20 of the License Agreement dated 25.10.2016 read with Amendment to License Agreement dt 08.05.2017, the Chhattisgarh Tourism Board, shall be pleased to appoint an Arbitrator to adjudicate upon the same in terms of the provisions of the Arbitration & conciliation Act, 1996 as amended up to date or re-enacted for an amicable resolution of your disputes, claims and issues.”

37. Clause 19 of the contract agreement reads as follows:

“19. **Force-Majeure**



19.1 If at any time, during the continuance of this contract, the performance in whole or in part, by either party, of any obligation under this is prevented or delayed, by reason of war, or hostility, acts of the public enemy, civic commotion, sabotage, Act of State or direction from Statutory Authority, explosion, epidemic, quarantine restriction, strikes and lockouts (as are not limited to the establishments and facilities of the Licensor), fire, floods, natural calamities or any act of GOD (hereinafter referred to as EVENT), provided notice of happenings of any such EVENT is given by the affected party to the other, within 21 Calendar days from the date of occurrence thereof, neither party shall, by reason of such event, be entitled to terminate this contract, nor shall either party have any such claims for damages against the other, in respect of such non-performance or delay in performance provided the contract shall be resumed as soon as practicable, after such EVENT comes to an end or ceases to exist. Time frame for resuming operation shall be mutually agreed between the parties, provided further that if the performance in whole or part of any obligation under this contract is prevented or delayed by reason of any such event for a period exceeding 90 days either party may, at his option terminate the contract except in case partial operation has been commenced by the Licensee.”





38. Clause 19 provides that in the case of events as indicated therein, after notice of such grievance is given by the affected party to the other within 21 calendar days from the date of occurrence thereof, neither party shall, by reason of such event be entitled to terminate the contract and neither of the parties shall have any claim for damages against the other in respect of such non-performance or delay in performance. However, the contract shall be resumed as soon as practicable, after such event comes to an end or ceases to exist. Time-frame for resuming operation is to be mutually agreed between the parties. It is also provided that if the performance in whole or part of any obligation under the said contract is prevented or delayed by reason of any such event for a period of exceeding 90 days, either party may, at his option, terminate the contract except in case of partial operation has been commenced by the Licensee.

39. Notice of termination dated 05.09.2020 would go to show that clause 19 of the agreement relating to Force Majeure had been invoked by respondent No.1 as there was inordinate delay in delivering the deliverables by respondent No.1 due to reasons beyond the control of respondent No.1. What are the reasons beyond the control of respondent No. 1 has, however, not been indicated. In absence of any of the events arising for suspension of the contract, the respondent No.1 could not have taken recourse to terminate the contract under Clause 19. It is also to be remembered that partial operation had been commenced by the Licensee *i.e.* the writ petitioner and therefore, even if there is delay exceeding 90 days after Force Majeure event occurs, Licensor cannot opt to exercise option to terminate the contract.

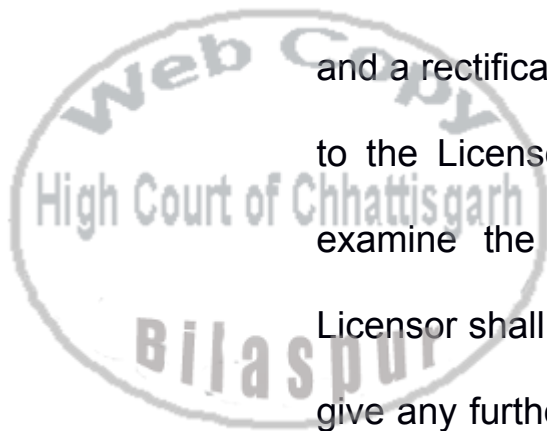


40. Clause 21 is on the subject of termination / revocation of License.

Clause 21.1 and 21.3 are relevant and are reproduced below:

“21.1 In case of default of any materials of the terms stipulated herein or breach of any of the terms and conditions of the License Agreement or any instruction of Licensor in accordance of this agreement or if any legislation prohibiting or restricting such terms is imposed or impending, the Licensor shall be entitled to revoke / cancel / terminate the License granted under this Agreement, subject to issuance of 1 months’ written Notice to the Licensee Intimating the default and a rectification period of 3 months thereof shall be granted to the Licensee, post which the Licensor shall review and examine the default and in case it is not rectified the Licensor shall terminate the agreement without being liable to give any further notice to the Licensee. In such an event, the Licensee will not be entitled to any refund of License Fee or the Security Deposits. The Licensee undertakes to vacate the Licensed Premises immediately (in “as was where was” condition)

21.3 The Licensee may also, without assigning any reason surrender its License and terminate the License Agreement after giving one month’s prior written notice to the Licensor, but in such an event the Licensor shall not refund the License Fee, conservancy charges and the Security Deposit or any part thereof.”





41. When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may get validated by additional ground later supplemented.

42. In the case of *Commissioner of Police, Bombay v. Goverdhan Bhanji*, reported in *AIR 1952 SC 16*, it is observed as follows:

“Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanation subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do.

Public orders made by public authorities are meant to have public effects and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.”

43. Same view was reiterated in the *United Air Travel Services v. Union of India*, reported in *(2018) 8 SCC 141*.

44. The aforesaid observation was also followed in *Opto Circuit India Limited v. Axis Bank and Others*, reported in *(2021) 6 SCC 707*.

45. Therefore, though a frail attempt was sought to be made in the response that notice of termination was issued on the basis of letter dated 30.05.2020 issued by Department of Urban Administration and Development because of certain illegalities as indicated therein, the same cannot be taken note of.



46. The respondent No. 1 in the response filed in WPC No. 2479 of 2020 had categorically stated that the respondent No.2 Municipal Corporation, Raipur vide its Mayor-in-council decision dated 05.08.2017 and General Council Meeting dated “15/112/2017” had approved the selection of the petitioner for the project subject to certain conditions.

47. Despite such assertion, the respondent No. 2, instead of taking a stand in the matter, skirted the issue and pleaded that it was only a formal party to the proceedings.

48. The rule of exclusion of writ jurisdiction because of availability of alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, inspite of availability of alternative remedy by way of arbitration, the High courts can exercise its jurisdiction. In the case of *Harbanslal Sahnia and Another v. Indian Oil Corporation Ltd and Others*, reported in (2003) 2 SCC 107, the Hon'ble Court has observed as follows:

“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, 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 and is challenged [See *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors.*, (1998) 8 SCC 11. The present case attracts applicability of 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.”

49. In case of *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Others*, reported in (1998) 8 SCC 1, the Hon'ble Supreme Court made the following observations in paragraphs 14 and 15:

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.

15. Under Article 226 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. But the High Court



has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

50. In *Radha Krishnan Industries v. State of Himachal Pradesh and Others*, reported in (2021) 6 SCC 771, it is observed as follows:

“27. The principles of law which emerge are that:

27.1 The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2 The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.



27.3 Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4 An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;

27.5 When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6 In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.”

51. In case of *Uttar Pradesh Power Transmission Corporation Limited and Another v. CG Power and Industrial Solutions Limited and Another*, reported in

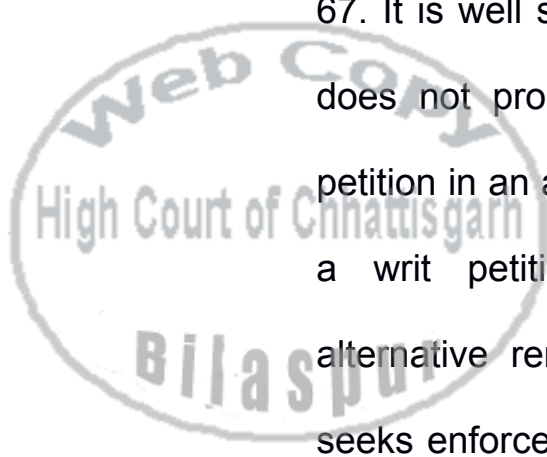


(2021) 6 SCC 15, the observations made in paragraphs 66 to 68 are as follows:

“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 (1) 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 Corporation v. Registrar of Trade Marks, Mumbai and Ors. reported in AIR 1999 SC 22 and Pimpri Chinchwad Municipal Corporation and Ors. V. Gayatri Construction Company and Ors, reported in (2008) 8 SCC 172, cited on behalf of Respondent No.1.

68. In Harbanslal Sahnia and Ors. v. Indian Oil Corporation Ltd. reported in (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. ”

52. In the instant case, apart from the fact that the notice of termination was issued on wholly irrelevant and non-existence ground, there was no arbitration agreement of the petitioner with respondent No. 2 and respondent No.3.

53. In that view of the matter, we are of the considered opinion that availability of alternative remedy is not an efficacious remedy in the instant case.

54. In view of the above discussions, notice of termination dated 05.09.2020 is set aside and quashed. The respondent No. 1 is directed to take steps for delivery of deliverables to the petitioner at the earliest

55. Having regard to the fact that 90% of the musical fountain work has since been completed, the successful bidder and respondent No.3 are allowed to complete the musical fountain.

56. The writ petitions stand allowed as indicated above.

Sd/-
(Arup Kumar Goswami)
CHIEF JUSTICE

Sd/-
(Gautam Chourdiya)
JUDGE