



Supreme Court of India reiterates that presence of an arbitration agreement in a contract is not an absolute bar to availing remedies under Article 226 of the Constitution¹

Brief Facts

Three appeals (“**Appeals**”) were filed by (i) UNITECH Limited (“**Unitech**”); (ii) Telangana State Industrial Infrastructure Corporation (“**TSIIC**”); and (iii) State of Telangana against a judgment of a Division Bench of the High Court of Telangana (“**Telangana High Court**”), which upheld the order of a Single Judge of the High Court of Telangana confirming the liability of TSIIC to refund an amount of INR 1.65 billion to Unitech, but modified the date from which the interest rate had to be computed.

The background in which the judgments of the Division Bench and the Single Judge came to be passed is as hereunder:

The Andhra Pradesh Industrial Infrastructure Corporation Ltd (“**APIIC**”) entered into a development agreement with Unitech for developing and constructing a township project. Pursuant to this, Unitech deposited a total amount of INR 1.65 billion towards project costs and land development expenses. A litigation in regard to the project land was pending and the allotment of land by APIIC to Unitech was made subject to the outcome of the pending litigation. The development agreement also contained an arbitration clause.

Subsequently, APIIC called upon Unitech to commence work on the project land. In response, Unitech informed APIIC that it would have to first establish its title to the land before work could commence on the project land. Thereafter, the High Court of Andhra Pradesh held that the Andhra Pradesh government did not have title to the project land. This position was eventually also confirmed by the Supreme Court.

During this time, due to the reorganisation of the State of Andhra Pradesh into Andhra Pradesh and Telangana, the project land came under the control of the newly-formed TSIIC. On 14 October 2015, Unitech sought a refund of all the amounts paid by it from APIIC and TSIIC together with interest and damages for the loss suffered by it. Despite repeated reminders, Unitech was not refunded the amount claimed by it. Consequently, despite the existence of an arbitration clause in the development agreement, Unitech filed a writ petition before the

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Supreme Court which was disposed off after granting liberty to Unitech to file a writ petition before the High Court of Telangana.

Unitech filed a writ petition under Article 226 of the Constitution before the High Court of Telangana seeking a refund of INR 1.65 billion together with interest from the date of the payments made by it. This writ petition was allowed by the Single Judge of the High Court.

The State of Telangana and TSIC filed a writ appeal against the order of the Single Judge. The Division Bench upheld the order of the Single Judge on the liability of TSIC to refund INR 1.65 billion to Unitech but with interest from 14 October 2015 (the date when Unitech first sought the refund), as opposed to the dates of payment of the instalments, from September 2007.

In the Appeals, TSIC *inter alia* contended that the High Court should not have entertained a writ petition in a purely contractual matter and when the development agreement contained an arbitration clause. Unitech argued that the existence of an arbitration clause would not divest the High Court of its jurisdiction under Article 226 of the Constitution and that the exercise of writ jurisdiction in a contractual matter is not ruled out in cases where there is no dispute with respect to the basic facts.

Issue

Whether the writ petition filed by Unitech under Article 226 of the Constitution was maintainable?

Judgment

The Supreme Court noted past precedents and took the view that the State or any of its instrumentalities will not be exempted from acting fairly in their business dealings on the ground that they have entered into a contract. It held that while exercising its jurisdiction under Article 226, the court is entitled to enquire whether the action of the State or any of its instrumentalities was arbitrary, unfair or in violation of Article 14 of the Constitution.

The Supreme Court categorically held and reiterated that the presence of an arbitration clause within a contract between a State instrumentality and a private party is not an absolute bar to availing remedies under Article 226. It held that 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 would lie. It further held that the presence of an arbitration clause in a contract does not oust the jurisdiction under Article 226 in all cases but it ought to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked.

The Supreme Court noted that TSIC, being a State instrumentality, had not only breached its contractual obligations but also failed to refund the amounts admittedly payable to Unitech. In view of the foregoing, the Supreme Court held that the Single Judge and the Division Bench rightly invoked their jurisdiction under Article 226 and the writ petition filed by Unitech was maintainable.

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Analysis

The present decision is a reiteration of the principle that the existence of an arbitration agreement in a contract is not a bar to invoking the writ jurisdiction under Article 226. This judgment is favourable for investors who may have undisputed claims against State entities. This is because where undisputed claims exist, State entities cannot insist that disputes be resorted to the comparatively time consuming process of arbitration. Such insistence could be said to be a misuse of the existence of an arbitration clause in contracts. This judgment is a much-needed reminder for State entities who enter into commercial contracts with private entities that they must ensure that they do not violate their constitutional mandate under Article 14 to act fairly and reasonably, and consequently, contribute to ease of doing business in India, while ensuring smooth public-private partnerships.

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1 Authored by Ila Kapoor, Partner, Shruti Sabharwal, Principal Associate and Akriti Kataria, Associate; *Unitech Ltd. and Ors. v. Telangana State Industrial Infrastructure Corporation and Ors*, Civil Appeal Nos. 317-319 of 2021, Supreme Court, 2021 SCC OnLine SC 99, judgment dated 17 February 2021.

Coram: Dhananjaya Y. Chandrachud and M.R. Shah, JJ.

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