IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.10.2020

DELIVERED ON : 07.10.2020

CORAM :

THE HON'BLE MR.A.P.SAHI, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

W.A.No.158 of 2020

Indian Oil Corporation Limited,
rep. by its General Manager,
LPG Boiling Plant,
Government Engineering Campus,
Salem – 636 011. ... Appellant

Vs.

1.Lt. Col. Sasikumar (Retd.),
Proprietor,
Sasikumar Security Agency,
Room No.4/223A, Kottavilai,
Ananthamangalam, Panikulam,
Kanyakumari District,
Tamil Nadu – 629 173.

2.The Director General (Resettlement),
Government of India,
Ministry of Defence, Directorate General of Resettlement,
West Block – IV, R.K.Puram,
New Delhi – 110 066. ... Respondents

Prayer: Appeal filed under Clause 15 of the Letters Patent against the order dated 30.12.2019 made in W.P.No.34305 of 2019.

For Appellant : Mr.T.R.Rajagopalan
Senior Counsel
for Mr.V.Anantha Natarajan

For Respondents : Mr.P.J.Rishikesh
for respondent No.1

JUDGMENT

The Hon'ble Chief Justice

This writ appeal has been filed by the appellant Indian Oil Corporation questioning the impugned judgment dated 30.12.2019, whereby a learned Single Judge, in a matter of contract relating to security services being engaged by the appellant Corporation, has allowed the writ petition filed by the first respondent petitioner holding that the pre-closure of the contract was invalid and contrary to law. The learned Single Judge has, accordingly, directed that the appellant Corporation should adhere to the agreement dated 24.7.2019 and retain the services of the first respondent petitioner for the entire period of the agreement.

2. The appeal was filed earlier, but it took some time for being taken up for admission and on 13.7.2020, we heard learned counsel for the parties and passed the following order:

> *"Heard learned Senior Counsel for the appellant and learned counsel for the first respondent / petitioner.*
>
> *2. Primarily, the question that arises for consideration is as to whether in a matter of contract of employment, a writ petition could have been entertained, more so, in the wake of the fact that the very contract of employment also provides for an Arbitration clause. The learned Single Judge has proceeded to allow the writ petition and quashed the termination of the contract on the ground that no reasons have been assigned thereto.*
>
> *3. Prima facie, we find from the terms of the contract, particularly, clause-29 read with clause-16 of the Terms and conditions of the Tender and the Duration of the Contract as provided in the tender condition that the Corporation has the authority to terminate the contract of service at any time by giving one month notice in writing or without prior notice in this regard. In the present case, the appellant has been given one month's prior notice and wages for termination of contract.*

4. The Apex Court in several cases has first drawn the distinction between a public law action and remedy in relation thereto and a dispute involving private law coupled with the remedies in relation thereto. One of such decisions is in the case of Joshi Technologies International Inc. v. Union of India and others, (2015) 7 SCC 728, where in paragraphs (69) to (70.11), the Apex Court has drawn the parameters of making such a remedy available, after having examined one of the leading cases of Shrilekha Vidyarthi v. State of U.P., (1991) 1 SCC 212, where it was held that the engagement of a lawyer by the State Government under the Criminal Procedure Code or Legal Remembrance Manual indicated the existence public element attached to the 'office' or 'post' of District Government Counsel. In the present case, keeping in view the pure contractual engagement of a security personnel through a private security agency, and a tender floated with no statutory control or involvement of a public office or post, it is highly doubtful as to whether a relief under Article 226 of the Constitution of India could be extended.

5. In our opinion, the learned Single Judge has prima facie proceeded on an erroneous assumption of law in

order to maintain the writ petition without discussing the law of maintainability.

6. Consequently, until further orders of this Court, we stay the operation of the impugned order dated 30.12.2019.

7. Learned counsel for the first respondent prays for time to file a counter.

8. Three weeks time is granted for filing counter affidavit and two weeks time is granted for filing rejoinder by the appellant.

9. List the matter on 24.08.2020."

3. At the very outset, as pointed out by Shri T.R.Rajagopalan, learned Senior Counsel for the appellant Corporation, even though the duration of the contract has been shown to be 24 months in the agreement dated 24.7.2019 said to have been executed between the parties, yet the period of the contract, as disclosed in the tender notice dated 19.6.2019, was one year only. While issuing the letter of acceptance dated 10.7.2019, there was a stipulation that the contract

shall be for a period of one year and liable to be extended for another period of one year at the discretion of the appellant Corporation. Thus, according to Shri Rajagopalan, learned Senior Counsel, the contract has to be construed for a period of one year only and which period expired on 31.7.2020. He, therefore, submits that no further relief can be extended to the first respondent petitioner, as the contract has not been extended at the discretion of the appellant Corporation for a further duration of one year, and therefore, the continuance extended under the impugned judgment deserves to be set aside.

4. It is pointed out by Shri Rajagopalan, learned Senior Counsel that before the learned Single Judge, there was an interim order and the writ petition had been finally allowed and therefore, the first respondent petitioner was necessarily to be continued, but after 31.7.2020 the contract has been awarded to a third party, as there is no extension of the contract in favour of the first respondent petitioner.

5. In the above background, the issue of approaching an

Arbitrator in terms of Clause 32 of the agreement and the question posed by us in our order dated 13.7.2020 becomes slightly academic, but has to be answered, as learned counsel for the parties have heavily relied on several judgments. It is, therefore, necessary for us to deal with it, keeping in view the other issues, which have been raised by the appellant Corporation as well as by the first respondent petitioner.

6. The main plank of the argument of the first respondent petitioner, which stands accepted by the learned Single Judge, is that the impugned intimation of pre-closure dated 14.11.2019 that was challenged before the learned Single Judge was not stipulated in terms of the agreement between the parties, which as per Clause 29 requires termination of the agreement on the fulfillment of certain terms and conditions. It is urged that none of those conditions existed so as to warrant termination or pre-closure of the agreement and therefore, the pre-closure was arbitrary, unreasonable, unfair and in violation of the principles of natural justice. It is also submitted that no reasons having been recited, the impugned communication was rightly held by the learned Single Judge to be invalid. The reasons that were sought

to be supplemented through the counter-affidavit was unacceptable, keeping in view the findings recorded by the learned Single Judge in paragraph (21) of the impugned judgment.

7. Shri P.J.Rishikesh, learned counsel for the first respondent petitioner further submitted that according to him and as per the ratio of the decisions relied on by him, alternative remedy by relegating the matter to arbitration is unwarranted and the discretion exercised by the learned Single Judge is protected in terms of the ratio of the aforesaid decisions. The judgments relied on by learned counsel for the first respondent petitioner are as follows:

(i) *Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others, (1978) 1 SCC 405.*

(ii) *Kumari Shrilekha Vidyarthi and others v. State of U.P. and others, (1991) 1 SCC 212.*

(iii) *Harbanslal Sahnia and another v. Indian Oil Corporation Limited and others, (2003) 2 SCC 107.*

(iv) *ABL International Limited and another v. Export*

Credit Guarantee Corporation of India Limited and others, (2004) 3 SCC 553.

(v)Union of India and others v. Tantia Construction Private Limited, (2011) 5 SCC 697.

(vi)Allied Motors Limited v. Bharat Peroleum Corporation Limited, (2012) 2 SCC 1.

(vii)Indian Oil Corporation Limited v. Nilofer Siddiqui and others, (2015) SCC 125.

(viii)Surya Constructions v. State of Uttar Pradesh and others, 2019 SCC OnLine SC 447.

(ix)Ashish Gupta v. IBP Company Limited and another, 2005 (85) DRJ 395.

8. It is, therefore, urged that the pre-closure order has been rightly set aside and in view of the unblemished service rendered by the first respondent petitioner, there is no reason to discontinue the services, which should be allowed for a period of two years, as directed by the learned Single Judge in terms of the agreement. It is vehemently contended that the action taken by the appellant was

unreasonable, arbitrary and beyond proportions of judicious discretion.

9. Responding to the said submissions, Shri Rajagopalan, learned Senior Counsel for the appellant Corporation, has already urged that the period of contract has come to an end and he further submits that the agreement clause categorically indicates the availability of a specific remedy of arbitration, which cannot be avoided by the first respondent petitioner, as no ground for interference had been made out under Article 226 of the Constitution of India. He submits that the public law remedy would not be available to the first respondent petitioner in this case, as it was a private contract, and he therefore submits that in view of the judgments relied on by him, the writ petition ought not to have been entertained and hence, the appeal deserves to be allowed. He has cited the following decisions to support his contentions:

(i) Bareilly Development Authority and another v. Ajai Pal Singh and others, (1989) 2 SCC 116.

(ii) State of U.P. and others v. Bridge & Roof Company (India) Limited, (1996) 6 SCC 22.

(iii)Kerala State Electricity Board and another v. Kurien E.Kalathil and others, (2000) 6 SCC 293.

(iv)State of Bihar and others v. Jain Plastics and Chemicals Limited, (2002) 1 SCC 216.

(v)National Highways Authority of India v. Ganga Enterprises and another, (2003) 7 SCC 410.

(vi)Joshi Technologies International Inc. v. Union of India and others, (2015) 7 SCC 728.

He further submits that the authority to terminate the agreement is explicit in the work order recited against Clause 16 under the head of Other Terms and conditions and also under the head of Duration of Contract.

10. However, learned counsel for the first respondent petitioner urged that a case is an authority as a precedent on what it actually decides and not what follows from it. He submits that one difference on facts may make a substantial departure in application of law. There is no dispute with these general propositions that are long settled. In the present case, the issue is of invoking the arbitration

clause instead of invoking the extraordinary discretionary remedy under Article 226 of the Constitution of India.

11. The judgment in the case of ***Joshi Technologies International Inc.*** (supra) was examining this legal proposition and it then went on to record the broad principles that were culled out from the past precedents, some of which have been relied on by the parties. The same as contained in paragraphs (69) to (70.11) are extracted herein under:

> *"69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such a discretion:*
>
> *69.1. The Court may not examine the issue unless the*

*action has some **public law character** attached to it.*

*69.2. **Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration**.*

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

*70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects **relating to contracts entered into by the State/public authority with private parties**, can be summarised as under:*

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the

obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of

the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of the

State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. ***The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element****. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State*

and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision-making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. 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."

12. The legal position that has been indicated in the judgments cited at the bar lay down the settled principle that alternative remedy is not an absolute bar for the discretion to be exercised by the High Court in exercise of the writ jurisdiction under Article 226 of the

Constitution of India, but the exceptions have been also clearly laid down and the exercise of discretion is an exercise of restraint adopted by the High Court that wherever appropriate and efficacious remedies are available, such a jurisdiction should not be normally invoked. In the instant case, there is an arbitration clause, which is reproduced herein under:

> *"**32. Arbitration:***
>
> *If any dispute or difference of any kind whatsoever shall arise between the Parties in connection with or arising out of this agreement (and whether before or after the termination) Parties hereto shall promptly and in good faith negotiate with a view to its amicable resolution and settlement. In the event not amicable resolution or settlement is reached within a period of thirty (30) days from the date on which the dispute or difference arose, such dispute or difference shall be referred to a mutually acceptable sole Arbitrator. The existence of any dispute or difference or the initiation or continuation of the arbitration proceedings shall not postpone or delay the performance by the parties of their respective obligations pursuant to this Agreement. The outcome of the Arbitration shall be binding upon all parties involved. The Indian Arbitration and Conciliation Act, 1996 as amended by*

The Arbitration and Conciliation (Amendment) Act, 2015 or any statutory modification or re-enactment thereof and the rules made thereunder for the time being in force shall apply to the arbitration proceedings under the clause."

13. The aforesaid clause leaves no room for doubt that in case of any doubt or dispute arising out of the terms of the contract, the matter has to be resolved through arbitration. In this regard, it would be apt to mention the letter of acceptance dated 10.7.2019, which has been issued by the appellant Corporation indicating the duration of the contract as one year that could be extended for a period of one year at the sole discretion of the Corporation. This is in tune with the notice of tender dated 19.6.2019, whereas the stated agreement said to have been entered into between the parties in clause 29 reads as under:

"29. This agreement shall remain in force for a period of 24 Months (Two Year) subject to extensions if any and notwithstanding anything to the contrary herein contained, the Corporation shall be at liberty to terminate this agreement forthwith upon or at any time after the happening of any of the following events:-

(a) If the Contractor shall commit a breach of

any of the convenient and stipulations contained in the agreement and fail to remedy such breach within three days of the receipt of a written notice from the Corporation in this regard.

(b) (i) Upon the death or adjudication as insolvent of the contractor if be as indicated.

(ii) Upon the dissolution of partnership of the contractors firm or the death or adjudication as insolvent of any partners of the firm if the party be a firm.

(c) If any attachment if levied and/or continued to be levied for a period of seven days upon the effects of the contractor or any individual partners for the time being of the Contractors firm.

(d) A receiver shall be appointed of any property or assets of the Contractor or of any partner if the Contractor is Partnership Firm or Director if the Contractor is a Company.

(e) If the license issued to the Contractor by

the relevant authorities is cancelled or revoked.

(f) If the contractor shall for any reason make default in payment to Corporation in full or his outstanding as appearing in the Corporation's book of account beyond four days of demand by the Corporation.

(g) If the contractor does not adhere to the instructions issued from time to time by Corporation with safe practices to be followed by him in carrying out various jobs assigned to him.

(h) If any information given by the contractor shall be found to be untrue or incorrect in any material particular.

(i) The contractor shall either himself or by his servants, Agents, commit or suffer to be committed any act which in the opinion of Location-in-Charge whose decision shall be final, is prejudicial to the interest or good name of the Corporation or its product, the Location-in-Charge shall not be bound to give

reasons for such decisions."

14. The learned Single Judge has held that the letter of acceptance cannot override the terms of the agreement. However, another aspect of the matter viz., terms of the tender notice dated 19.6.2019, has not been dealt with by the learned Single Judge, which categorically prescribes the period of contract at item No.7 in the tender notice as one year only. The letter of acceptance does say that the same would be for a period of one year and would be extendable by a period of one year at the sole discretion of the Indian Oil Corporation Limited. This aspect also does not appear to have been dealt with by the learned Single Judge while arriving at that conclusion. We, therefore, find that if there is a dispute with regard to the duration of the contract, then the same would be clearly an arbitrable dispute. Nonetheless, in the present case, this is not the reason for which the contract came to be pre-closed.

15. We are, therefore, of the view that the conclusion drawn by the learned Single Judge that there is complete absence of reasons in the impugned pre-closure order dated 14.11.2019 appears to be

correct and the same, as observed in paragraph (21) of the impugned judgment, cannot be supplemented by any reason in the counter-affidavit.

16. Whether there were any conditions available for termination or not, as per the terms of Clause 29 of the agreement, may be an arbitral dispute under Clause 32 thereof. But, in the absence of any reasons, we find that the appellant Corporation could have dealt with the matter by passing an appropriate reasoned order even if it was proceeding to take a decision of pre-closure of the contract, more so, when it was to adversely affect the duration of the contract that was already subsisting. To that extent, we find the order of pre-closure to be deficient in law. This could have been very easily rectified by giving some appropriate reasons, which obviously has not been done for reasons best known to the appellant Corporation. The subsequent communication dated 26.11.2019 simply states as per terms and conditions of tender and the discretion of the Corporation.

17. Violation of principles of natural justice as engrained in Article 14 of the Constitution of India includes non-recording of

reasons in an order, quasi-judicial or administrative by an instrumentality, like the appellant. To this extent, we are in agreement with the learned Single Judge and the arguments of the learned counsel for the first respondent petitioner, but we respectfully do not approve of the direction under the impugned judgment to continue adherence to the contract beyond the period of one year or the authority of the appellant to terminate the contract.

18. The tender notice dated 19.6.2019 at item No.7 clearly recites as under:

7	*Period of Contract*	*The Contract will be valid for a period of one year from the date of commencement with an option to extend another 1 year at the discretion of IOC subject to the validity of DRG sponsorship.*

19. The letter of acceptance dated 10.7.2019 contains the following recital:

> *"This has reference to your offer for the subject tender submitted. We are pleased to inform you that your offer has been accepted for PROVIDING SECURITY SERVICES ON CONTRACT AT SALEM BOTTLING PLANT at 14%*

Service Charge. The value of tender is Rs.1,03,08,816/- (Rupees One Crore three lakhs eight thousand eight hundred and sixteen only) including 14% Service Charge and 18% GST for a period of one year.

Contract period : Contract shall be for a period of one year from the date of placement of Work Order. The contract may be further extended on the same terms and conditions for a further period of one year, subject to satisfactory performance at the sole discretion of IOCL.

You are therefore advised to complete the necessary formalities and forward the same to DGM(Plant), Salem BP.

1.Payment of security deposit as per clause no.23 given in page no.10 of tender.

2.Executing the contract agreement (as applicable) on a non-judicial stamp paper of requisite stamp fee, etc.

The detailed work order with terms and conditions will be given by DGM(Plant), Salem BP."

These communications are prior to the Contract Agreement dated 24.7.2019.

20. The learned Single Judge concludes that the agreement being for 24 months, its pre-closure without valid reason is against the contract. In our opinion, the offer, the acceptance and the agreement followed by the work order dated 25.7.2019 read together does reflect the power of the appellant to terminate the agreement or extend the contract for one year after the expiry of one year at its sole discretion. This aspect is being disputed by the first respondent petitioner. The discretion of the appellant under the letter of acceptance cannot be a substituted exercise by the Court, and if disputed, the arbitration clause is clearly attracted as the dispute arises out of and in relation to the duration of the contract. This area of dispute is therefore in our opinion for the reasons aforesaid clearly an arbitral dispute involving the determination of the intention of the contracting parties that would involve questions of fact, which should not be a matter of investigation under Article 226 of the Constitution of India.

21. Another dimension that deserves to be indicated is about the maintainability of a Writ Petition in a contractual matter to find out as to whether the dispute would fall within the Public Law Remedy or a

Private Law field. As observed by the Apex Court in the case of ***Joshi Technologies International Inc.*** (supra) that in order to ascertain this, each case has to be examined on its facts whether the contractual relations between the parties bear any insignia of public element. It has been held that if it is found that the nature of the activity or the controversy involves public law element then only the matter can be examined under Art.226 of the Constitution of India to adjudicate whether the action of the instrumentality or the State agency is fair, just and equitable while undergoing the decision-making process and is otherwise not arbitrary. On the facts of the present case, the decision-making process of ordering pre-closure of the contract was not supported by any reasons recited in the order itself. The reason otherwise stated in the counter-affidavit or in the subsequent communication dated 26-11-2019 did not indicate any reason arising out of the contract or otherwise was sought to be supported through an affidavit which cannot be accepted in view of the law laid down in the case of ***Mohinder Singh Gill*** (supra). The Court cannot go into the sufficiency of the reasons but the reason should exist in the order or, even on the record. In the present case, had the reason existed and had it been recited in the order, there would be no justification for

entertaining the writ petition but, once there arises a dispute about the correctness of the reasons then such a controversy enters into the realm of a private law element for which the machinery is arbitration. We have therefore found that the issuance of the communication of pre-closure was abrupt without any reasons and to that extent, it was unfair. The learned single Judge ought to have limited the exercise of jurisdiction, if at all only to that extent but beyond that it was a private contractual arbitral dispute that would be governed by the terms of arbitration. The reasons that were sought to be supplemented through the counter affidavit or the communication dated 26.11.2019, therefore, would be a matter of assessment if the arbitration clause is invoked. We therefore view this transaction by splitting into two, the validity of the decision-making process and then the course of action available to the parties. Consequently, whether the duration of the contract or its continuance in the terms thereof would be purely a contractual dispute for which a arbitral dispute has to be raised and a Writ Petition under Art.226 for that purpose would not be maintainable.

22. There is yet another aspect which we may point out that when it comes to gathering intention of the contracting parties, one of the questions is as to whether there is any intention in the contract to block the consideration of any part of the transaction which took place prior to the agreement viz. intentions which can be gathered from the notice of the tender, its acceptance and the work order. In the event a conflict in this respect is to be resolved then there is a presumption that the parties intended to abide by such terms and conditions including the terms of duration of the contract. The interpretation on this issue is also to be looked into from the point of view as to who is the author of the document. On this we may quote paragraph 39 of the judgment of the Apex Court in ***Cartel Infotech Limited v. Hindustan Petroleum Corporation Limited and others, reported in (2019) 14 SCC 81*** that is gainfully reproduced herein under:

> *"39. Another aspect emphasised is that the author of the document is the best person to understand and appreciate its requirements. In the facts of the present case, the view, on interpreting the tender documents, of Respondent 1 must prevail. Respondent 1 itself, appreciative of the wording of Clause 20 and the format, has taken a considered view. Respondent 3*

cannot compel its own interpretation of the contract to be thrust on Respondent 1, or ask the Court to compel Respondent 1 to accept that interpretation. In fact, the Court went on to observe in the aforesaid judgment that it is possible that the author of the tender may give an interpretation that is not acceptable to the constitutional court, but that itself would not be a reason for interfering with the interpretation given. We reproduce the observations in this behalf as under: (Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818, SCC p. 825, para 15)

> *'15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but*

that by itself is not a reason for interfering with the interpretation given.'"

23. The aforesaid aspect therefore if requires a interpretation then, the said aspect has to be gone into for which the arbitral platform is the appropriate remedy. The question as to whether the Corporation has the sole discretion for continuing the contract beyond the period of one year would therefore be dependent on the same.

24. Learned counsel for the first respondent/petitioner vehemently argued that the very purpose of providing security through Security Agency manned by ex-servicemen has a public purpose behind it which is of rehabilitation and therefore, viewed from that angle, the writ petition was maintainable. We do not think this to be a broad spectrum view inasmuch as the privilege offered to such security agencies by virtue of a scheme from the Director General of Rehabilitation is not a guarantee for offering a contract of services but a privilege for extending priority in order to avail professional engagements as a measure of first choice by the Public Sector Undertakings (PSUs) to ultimately extend a measure of rehabilitation.

The PSUs therefore cannot avoid adopting of such priority measures, but in the present case this is not the issue at all. The only issue is as to whether the pre-closure ordered by the appellant was justified or not.

25. What has happened in the present case is that the notice dated 19.6.2019 inviting tender and the letter of acceptance dated 10.7.2019 categorically recite that the tenure of the contract shall be one year and its further duration for another year to be extended at the discretion of the appellant. This has not been considered and its impact examined by the learned Single Judge, but nonetheless it was open to the appellant Corporation to have exercised its discretion appropriately. The pending litigation does not appear to have impeded this exercise of discretion. The appellant Corporation has already, according to the learned counsel for the appellant, awarded the contract to a different person.

26. In the facts of the present case, we find that the learned Single Judge has maintained the duration of 24 months on the ground that there is an agreement to that effect. As already noted above, this

finding has been arrived at without looking to the tender notice as well as the letter of acceptance dated 10.7.2019.

27. There is yet another fact which cannot be lost sight of and which was hinted at by the learned counsel for the appellant. Mr. Rajagopalan contends that the correctness or otherwise of the recitals in the agreement and the manner of its execution may require a departmental enquiry keeping in view the terms of the notice of the tender, the letter of acceptance and the work order but he submits that he would not make any submissions on that count as that is in the discretion of the Corporation. We also do not intend to take the matter any further on that issue but since the learned counsel for the first respondent/petitioner has invited our attention to the agreement which is a photocopy, we do not find the designation of the official who has signed on behalf of Indian Oil Corporation and secondly, the letter of acceptance having been issued by the Deputy General Manager (Contracts), his endorsement or signature on the said contract does not appear to be recited. Another issue relating to the document is that the learned counsel for the first respondent/petitioner relied on

the Empanelment Certificate the validity whereof is certified from 13th March, 2019 to 6th January, 2020. It is further provided that the validity of the certificate would be also governed by the maximum age of 60 years of the age of the proprietor of the agency. The first respondent/petitioner may have been below the age of 60 years at the time when the contract was entered into but as on date keeping in view the date of birth of the first respondent/petitioner as indicated therein which is 7-1-1960, the first respondent/petitioner has crossed the age of 60 years.

28. We, therefore, modify the impugned judgment and allow the appeal to the said extent, whereby the learned Single Judge has treated the contract to be for two years without adverting to the aforesaid documents. In the light of what has been said above, even though we uphold the quashing of the pre-closure notice by the learned Single Judge, we find that the extension of the contract to survive for the entire period of 24 months is seriously disputed. In the event, the first respondent petitioner seeks any continuance or extension of the contract, the same is at the sole discretion of the

Corporation or in the event any dispute is preferred by the first respondent petitioner, then the arbitration platform will have to be availed of. The impugned judgment dated 30.12.2019, whereby the learned Single Judge has issued directions for adherence to the agreement for continuing the contract is therefore set aside, subject to the above.

The appeal is allowed to the aforesaid extent. No costs. Consequently, C.M.P.No.2199 of 2020 is closed.

(A.P.S., CJ.) (S.K.R., J.)
07.10.2020

Index : Yes
bbr

To

1.The General Manager,
Indian Oil Corporation Limited,
LPG Boiling Plant,
Government Engineering Campus,
Salem – 636 011.

2.The Director General (Resettlement),
Government of India,
Ministry of Defence, Directorate General of Resettlement,
West Block – IV, R.K.Puram,
New Delhi – 110 066.

THE HON'BLE CHIEF JUSTICE
AND
SENTHILKUMAR RAMAMOORTHY, J.

bbr

Judgment in
W.A.No.158 of 2020

07.10.2020