

**(2017) 06 UK CK 0046**  
**In the Uttarakhand High Court**  
**Case No : 335 of 2017**

M/s Sharma Traders

APPELLANT

Vs

State of Uttarakhand & others

RESPONDENT

**Date of Decision :** 23-06-2017

**Acts Referred:**

<a href=3998>Constitution of India</a>, <a href=3998-227>Article 227</a>, <a href=3998-29>Article 29</a> - Power of superintendence over all courts by the High Court - Protection of Interests of minorities  
<a href=7072>Specific Relief Act, 1963</a>, <a href=7072-14>Section 14(c)</a> - Contracts not specifically enforceable  
<a href=809>Arbitration and Conciliation Act, 1996</a>, <a href=809-9>Section 9</a> - Interim measures, etc., by Court  
<a href=15296>Uttar Pradesh Municipal Corporation Act, 1959</a>, <a href=15296-131>Section 131</a>, <a href=15297-131>Section 131</a>, <a href=16028-131>Section 131</a>

**Citation :** (2017) 06 UK CK 0046

**Hon'ble Judges :** K.M. Joseph, Alok Singh

**Bench :** Division Bench

**Advocate :** Arvind Vashistha, ?Vivek Pathak, ?H.M. Bhatia, ? Vipul Sharma, ? Subhash Upadhyaya

**Final Decision :** Disposed

## Judgement

1. The appeal is filed by the third respondent in the writ petition. The appeal is directed against order dated 29.05.2017 and order dated 09.06.2017 passed in a Recall Application.

2. Appellant was awarded a contract by the second respondent Uttarakhand Tourism Development Board. The contract related to parking of vehicles. It appears that, acting initially on the basis of a clause, which permitted the extension of the contract, the contract was extended for a period of four years till 2019. It is, thereupon, that the writ petition was filed as Writ Petition (M/S) No. 1179 of 2017 from which this appeal arises. The writ petition was filed by the third respondent in the appeal seeking following two reliefs:

"A- Issue a writ, order or direction in the nature of mandamus commanding the respondents to immediately initiate the process for E-tendering the parking lot known as Pandit Deen Dayal Upadhyaya Parking, Haridwar. B- Issue, a writ, order or direction in the nature of mandamus commanding the respondents to initiate an enquiry, if possible, through some independent agency to enquiry about

the rampant corruption, which took place in the grant of contract to the private respondent for a period from 25-8- 2015 to 25-8-2019." 3. The writ petition was filed on 16.05.2017. The third respondent / writ petitioner is a person, who had participated unsuccessfully in the grant of the contract in the year 2010. In the meantime, another development took place, namely, on 20.05.2017, the extension of the contract was cancelled by the second respondent Board. It is brought to our notice by Mr. Subhash Upadhyaya, learned counsel for respondent No. 3 / writ petitioner that on 27.05.2017, acting on the basis of the decision dated 20.05.2017, the Board decided to go in for fresh tender in regard to the contract. The next development to be noticed is the first impugned order passed in this case on 29.05.2017. In the said order, the learned Single Judge noted the stand of the second respondent Board that the Director of the Board has passed order dated 20.05.2017 vide which the extension granted in favour of the appellant has been cancelled. Thereupon, the learned Single Judge took the view that, as a matter of fact, there is no agency or contractor operating the parking and, subject to the decision of the writ petition, the second respondent Board was directed to initiate the process of e-tendering within a period of 10 days. It was also directed to be concluded within next two weeks. On the very next day, i.e. on 30.05.2017, appellant filed proceedings under Section 9 of the Arbitration and Conciliation Act seeking interim relief. In the same, it appears that the court only issued notice. Interim relief was not granted. Against the same, it is admitted that the appellant filed appeal before the High Court under the Act. That appeal, later on, came to be dismissed as not maintainable. Thereafter, appellant filed a writ petition purporting to be under Article 227 seeking orders as sought in Section 9 petition. The said writ petition is pending. Appellant, thereafter, filed a Recall Application and also a Stay Vacation Application and, still later, he filed a Special Appeal before this Court. The same, however, was withdrawn with liberty to press the Recall Application. The Recall Application was pressed and the second impugned order in this appeal came to be passed. The Recall Application came to be rejected. It is thereupon that the present appeal is filed.

4. We heard Mr. Arvind Vashistha, learned Senior Counsel appearing for the appellant; Mr. Subhash Upadhyaya, learned counsel appearing for respondent No. 3; Mr. Vipul Sharma, learned counsel appearing for respondent No. 2; and Mr. H.M. Bhatia, learned Brief Holder for the State.

5. Learned Senior Counsel for the appellant would submit that this is a case, where the learned Single Judge should have recalled the order having regard to

the facts. The appellant is faced with cancellation of the extension. He has invoked power under Section 9 of the Arbitration and Conciliation Act . The result of the order directing e-tendering is that the hearing of Section 9 petition is being prejudiced. He also submits that the findings have been made, which will imperil the case of the appellant. He would submit that, actually, the second respondent is not even a Nigam or a Local Body and, yet, the learned Single Judge has proceeded as if it is a Local Body, as is clear from the following paragraphs:

"When the writ petition came up for consideration on 29.05.2017, a direction was issued to have a recourse to the e- tendering, by the recall application submitted by the petitioner, he is trying to undo what he has otherwise failed to secure in the proceedings under Section 9 and in continuation thereof the appeal under Section 37 arising from the order of Civil Court. The extension of a contract according to the respondent no. 3 was a consequence of an extension clause provided under clause 3.3.1. The learned senior counsel for the respondent no. 3 while pressing his recall application has heavily placed reliance on sub clause (a) of clause 3.3.1 which reads as under:- In the event of the Concession Period extended by Concessioneing Authority beyond the said period in accordance with the provisions of this Concession Agreement, the Concession Period shall include the period / aggregate period by which the Concession is so extended. On precise reading of the aforesaid clause, it is the liberty, which is reserved for the Concessioneing Authority for extension of the agreement, the aforesaid provision cannot be adopted in a routine manner for granting extensions beyond the period principally agreed in the contract. This Court feels that the extension clause in the grant, provided therein was an enabling provision for the board to meet a contingency. The extension of a contract will not have any indefeasible claim and that too as a matter of right, when it I in contravention to Section 131 r/w Article 299 of the Constitution of India. If Section 131 is read in harmony with Section 132 in execution of the contract, in relation to an immovable property which forms part and parcel of the affairs of the corporation, the interest of the corporation has to play a paramount role, but still at this stage, since the petitioner has not agitated any grievance by invoking clause 12.1 by having a recourse to the independent arbitration proceedings in the light of the order said to have been passed on 20.05.2017, the Board rescinding his extension coupled with the fact that he has already invoked Section 9, the recourse to the recall application to overcome what he has failed to attain in Section 9 proceedings cannot be permitted, hence, the recall application is rejected."

6. It is submitted that the learned Single Judge has also made observations regarding the nature of the clause in the contract.

7. Per contra, Mr. Subhash Upadhyaya, learned counsel for respondent No. 3 / writ petitioner would point out that the appeal may not lie against the first order insofar as the special appeal filed against the same was withdrawn without

liberty to file a fresh appeal against the same. He would point out that this position is supported by the decision of the Supreme Court. He would further submit that, actually, in Section 9 petition, appellant has not called in question the tendering, which was ordered by the second respondent. To the same, Mr. Arvind Vashistha would point out that, actually, at the stage of Section 9 petition, he can only seek interim relief and e-tendering has been subsequently ordered pursuant to the direction of the learned Single Judge.

8. Mr. Vipul Sharma, learned counsel for the second respondent, would point out that tendering was already done on 27.05.2017 and all that had happened was that, pursuant to the direction of the High Court, e- tendering was resorted to. Mr. Vipul Sharma would also point out that, having regard to Section 14(c) of the Specific Relief Act, appellant would have no right at any rate to have the contract specifically enforced and, at best, he may have right to claim damages. He would also submit that the result of tendering is that public interest is safeguarded as a huge amount is being offered.

9. We notice, in fact, that the learned Single Judge has, subject to the writ petition, granted the relief in the Interim Relief Application, which appears to be on the lines of the main relief. Appellant filed a Recall Application. We would think that the learned Single Judge has erred in making a finding about the extension clause and in holding that the clause cannot be adopted in a routine manner for granting extensions. This we say as this is a matter, which would have to be decided in the Section 9 petition. Likewise, the learned Single Judge, in our view, has erred in holding that it was an enabling clause for the Board to meet a contingency. The observations, in other words, relating to the clause, we would think, should have been avoided. This we say as the appellant has already filed a petition under Section 9, apparently, in contemplation of the arbitration proceedings, which is what is contemplated under Section 9 of the Arbitration and Conciliation Act . The observations that extension of a contract will not have indefeasible claim and, that too, as a matter of right and also holding that extension is in contravention of Section 131 of the Municipal Corporation Act and Article 299 of the Constitution, appears to us to be not justified. We are not in a position to appreciate how Article 299 is being invoked in respect of a contract, which is being entered into by the second respondent, which is only a Body Corporate and which may not be governed by Article 299. Likewise, Mr. Vipul Sharma would submit that the second respondent is not a Local Body and it is only a Body Corporate, in which case, we are unable to see how Section 131 of the U.P. Municipal Corporation Act has anything to do with the contract in question. Reference to Section 132 also does not appear to be justified for the same reasons. In regard to the appellant not taking up the grievances by invoking clause 12.1, appellant would say that the appellant intends to take up the matter at the earliest. The most important part of the reasoning of the learned Single Judge appears to be the recourse to the Recall Application is to overcome what he has failed to attain in Section 9 . Learned Senior Counsel for the appellant would submit that Section 9 would have to be decided on the basis

of merits of the application; whereas, because of the order passed by the High Court, the consideration of Section 9 application will be prejudiced. 10. Appellant would submit that the order of the High Court is being made use of when Section 9 Application is being considered.

11. In fact, the learned Single Judge notes that the argument appears to be that, in view of the order dated 20.05.2017, much was not required to be done.

12. There is also reference to wider interest of the public as well as the interest of the local body created under Article 243. Here, we may, at once, notice that the second respondent is not a Local Body and, therefore, reference to Article 243 also is not correct. While it is true that interest of public should be considered, the question may arise as to the rights of the private parties under the contract and the law also requiring consideration.

13. We would think that, in the circumstances of the case, interest of justice would require that the order passed in the Recall Application be set aside. We also notice that the learned Single Judge has, in fact, in the first interim order, directed that the interim order is subject to the result of the writ petition. Now, it is said that the said writ petition and also the petition filed under Article 227 by the petitioner are pending and they are being considered by the same Bench. While setting aside the order passed in the Recall Application, we further request the learned Single Judge to decide the writ petition itself or may seek fresh orders on the Recall Application. We make it crystal clear that this Court has not expressed any view on the merits of the matter, save what we have already said. The learned Single Judge will be entirely free in the matter of deciding either the writ petition itself or the Recall Application.

14. The Special Appeal is, accordingly, disposed of.