

**HIGH COURT OF TRIPURA
AGARTALA
WP(C) NO.454 OF 2022**

Sri Nimai Kar,

Class-1, Government Contractor,
Son of Late Makhan Lal Kar, resident of Village Shibnagar,
College Road, P.O.- Agartala, P.S.- East Agartala, Sub-division-
Sadar, District- West Tripura.

.....**Petitioner(s)**

Versus

1. The State of Tripura,

Represented by the Secretary & Commissioner, Public Works
Department, Government of Tripura, having his office at
Secretariat Building, P.O.- Kunjaban, P.S.- New Capital Complex,
Sub-division-Agartala, District- West Tripura, Pin-799006.

2. The Commissioner & Secretary,

Public Works Department, Government of Tripura,
Having his office at Secretariat Building, P.O.- Kunjaban,
P.S.- New Capital Complex, Sub- Division- Agartala,
District-West Tripura, Pin-799006.

3. Hindustan Steelworks Construction Limited,

A Company registered under the Companies Act, 1956 having its
registered office at P-34-A, Garihut Road(South) Kolkata-700031.
Represented by its Head(Project Unit) having his office at Banik
Kutir, Sankar Chowmuhani, Krishnanagar, Agartala, District- West
Tripura.

**4. The Head(Project) Hindustan Steelworks Construction
Limited(Tripura Unit)** having his office at Banik Kutir, Sankar
Chowmuhani, Krishnagar, Agartala, District-West Tripura.

.....**Respondent(s)**

For the Petitioner(s)	: Mr. Somik Deb, Sr. Advocate. Mr. S. Majumder, Advocate.
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For the Respondent(s) : Mr. S.M. Chakraborty, Sr. Advocate.
Ms. P. Chakraborty, Advocate.

WP(C) NO.1033 OF 2022

Sri Nimai Kar,

Class-1, Government Contractor,
Son of Late Makhan Lal Kar, resident of Village Shibnatgar,
College Road, P.O.- Agartala, P.S.- East Agartala, Sub-division-
Sadar, District- West Tripura.

.....**Petitioner(s)**

Versus

1. The State of Tripura,

Represented by the Commissioner & Secretary, Public Works Department(Road & Buildings), Government of Tripura, having his office at New Secretariat Complex, Gorkhabasti, Agartala P.O.- Kunjaban, P.S.- New Capital Complex, Sub-division-Agartala, District- West Tripura.

2. The Commissioner & Secretary,

Public Works Department(Roads & Building), Government of Tripura, having his office at New Secretariat Complex, P.O.- Kunjaban, Gorkhabasti, Agartala P.S.- New Capital Complex, Sub-Division- Agartala, District-West Tripura.

.....**State Respondent(s)**

3. Hindustan Steelworks Construction Limited,

A Company registered under the Companies Act, 1956 having its registered office at P-34-A, Garihut Road(South) Kolkata-700031. Represented by its Head(Project Unit) having his office at Banik Kutir, Sankar Chowmuhani, Krishnanagar, Agartala, District- West Tripura.

4. The Head(Project) Hindustan Steelworks Construction Limited(Tripura Unit) having his office at Banik Kutir, Sankar Chowmuhani, Krishnanagar, Agartala, District-West Tripura.

5. The Zonal Head, Hindustan Steelworks Construction Limited (Tripura Unit), having his office at Banik Kutir, Sankar Chowmuhani, Krishnanagar, Krishnanagar, Agartala, District-West Tripura.

.....**HSCL respondent(s)**

6. **The Union Bank of India**, having its registered office at Union Bank Bhavan, 239 , Vidhan Bhavan Marg, Nariman Point, Mumbai-400021, Maharashtra, India.

Represented by its MD & CEO, Union Bank of India, having its registered office at Union Bank Bhavan, 239, Vidhan Bhavan Marg, Nariman Point, Mumbai-400021, Maharashtra, India.

7. **The Chief Manager,**

Union Bank of India having his office at Agartala Branch, 4 HGB Road, P.O.- Agartala, P.S.- East Agartala West Tripura, 799001.

.....**Respondent(s)**

For the Petitioner(s) : Mr. Somik Deb, Sr. Advocate.
Mr. S. Majumder, Advocate.

For the Respondent(s) : Mr. S.M. Chakraborty, Sr. Advocate.
Ms. P. Chakraborty, Advocate.

Date of hearing : 25.01.2024.

Date of delivery of
Judgment & Order : 01/02/2024

Whether fit for reporting : YES.

HON'BLE MR. JUSTICE T. AMARNATH GOUD
J U D G M E N T & O R D E R

The 1st WP(C) No.454 of 2022 has been filed under Article 226 of the Constitution of India seeking the following reliefs:-

"i. Issue Rule, calling upon the respondents and each one of them, to show cause as to why a Certiorari and/or in the nature thereof, shall not be issued, for directing the respondents, to transmit the records, appertaining to this writ petition, lying with them, for rendering substantive and conscionable justice to the petitioner, and for quashing/setting aside the impugned letter dated 25.04.2022 (Annexure-2 supra)

ii. Issue Rule, calling upon the respondents and each one of them, to show cause as to why a Writ of Mandamus and/or in the nature thereof, shall not be issued, for mandating/directing them, to forthwith revoke/rescind the impugned letter dated 25.04.2022(Annexure-22 supra) and thereupon, for mandating/directing them to forthwith release the Security Deposit, the bank guarantee, furnished by the petitioner in connection with the Agreement (Annexure-2 supra) and clear off the outstanding dues withheld from the petitioner.

iii. Issue Rule, calling upon the respondents and each one of them, to show cause as to why a Writ of Prohibition and/or in the nature thereof, shall not be issued, for restraining/prohibiting them, from acting in any manner, in furtherance of the impugned letter dated 25.04.2022 (Annexure-22 supra), and further, fro restraining/injuncting them, from taking any penal action, against the petitioner, in connection with the Agreement (Annexure-2 supra), more particularly, in furtherance of the impugned letter dated 25.04.2022(Annexure-22 supra).

iv. In the Ad-interim, and thereafter, in the Interim, an Order in terms of relief(iii) supra;

v. Call for the records appertaining to this petition.

vi. After hearing the parties, be pleased to make the Rule Absolute in terms of i. to iv. Above.

vii. Costs of and incidental to this proceeding;

viii. Any other Relief(s) as to this Hon'ble High Court may deem fit and proper;"

2. The 2nd WP(C) No.1033 of 2022 has been filed under Article 226 of the Constitution of India seeking the following reliefs:-

"i. Issue Rule, calling upon the respondents and each one of them, to show casue as to why a Writ of Certiorari and/or in the nature thereof, shall not be issued, for mandating them, to transmit the records, relevant to the subject matter of this writ petition, for rendering substantive and conscionable justice to the petitioner, and for quashing/setting aside the impugned letter dated 19.11.2022(Annexure-14 supra)

ii. Issue Rule, calling upon the HSCL-respondents and each one of them, to show cause as to why a Writ of Mandamus and/or in the nature thereof, shall not be issued for mandating/directing the HSCL-respondents to forthwith revoke/rescind the impugned letter dated 19.11.2022(Annexure-14 supra), and thereupon, for mandating/directing them, to forthwith restore the Bank Guarantees of the petitioner, which have been invoked by the impugned Letter dated 19.11.2022(Annexure-14 supra).

iii. In the Ad-interim, and thereafter, on hearing the parties, in the interim, an Order in terms of relief(iii) supra;

iv. Call for the records, appertaining to this writ petition.

v. After hearing the parties, be pleased to make the Rule absolute in terms of (i) to (iv) above;

vi. Costs of and incidental to this proceeding;

vii. Any other Relief(s) as to this Hon'ble High Court may deem fit and proper."

3. Since both the writ petitions are interconnected, same are heard and taken up together for adjudication and disposal.

4. The Brief fact of WP(C) No.454 of 2022 is that for the execution of the work, namely, Chawmanu to Arunda, Package No.TR-04-208, Block-Chawmanu, respondents-HSCL issued a Notice Inviting Tender(in short '*NIT*') inviting bidders. The petitioner along with other bidders participated in the said tender process and the petitioner emerged successful. Informing the petitioner regarding the acceptance of the Bid No.94269(*NIT* No.102/TRRDA/HSL/SE/PD-III/2013-14) dated 27.06.2014, for the execution of the above-mentioned works, a letter of acceptance dated 31.07.2015 was issued in favour of the petitioner. In furtherance thereof, the petitioner entered into an agreement with the respondent-Hindustan Steelworks Construction Limited(*in short* '*HSCL*').

5. Thereafter inter alia challenging that the petitioner was guilty of non-execution of works, and further directing the petitioner to commence the execution of the balance work within

48 hours, the Zonal Head of respondent-HSCL made an impugned communication dated 25.04.2022. Failing which, it was stated that penal action would be taken against the petitioner. The Security Deposit and Performance Bank Guarantee would be forfeited and that the balance work would be executed at the risk and cost of the petitioner. Hence the petitioner filed this present writ petition seeking the above-mentioned reliefs.

6. The 2nd WP(C) No.1033 of 2022 has been filed by the petitioner challenging the impugned letter dated 19.11.2022, wherein the Zonal Head, respondents-HSCL issued the said letter requesting to invoke the Original Bank Guarantees and Fixed Deposit, in connection with Contract NIT Nos.72, 74, 81, 111 & 124 amounting to Rs.1,49,76,052.00/-, deposited by the petitioner, in favour of the respondents-HSCL, through RTGS. In furtherance thereof, the respondents-HSCL have withdrawn the said amount of Rs.1,49,76,052.00/- deposited by the petitioner in the shape of a Bank Guarantee, from the account of the petitioner. Aggrieved thereby, the petitioner has filed this present writ petition seeking the above-mentioned reliefs.

7. Heard Mr. Somik Deb, learned Sr. counsel assisted by Mr. S. Majumder, learned counsel appearing for the petitioner in both writ petitions as well as Mr. S.M. Chakraborty, learned Sr. counsel assisted by Ms. P. Chakraborty, learned counsel appearing

for the respondents-HSCL, Mr. Kohinoor N. Bhattacharjee, learned G.A. assisted by Ms. A. Chakraborty, learned counsel appearing for the respondents-State and Mr. P. Saha, learned counsel appearing for the respondent-Bank in WP(C) No.1033 of 2022.

8. Mr. Somik Deb, learned Sr. counsel appearing for the petitioner at the very inception of the argument on the point of alternative dispute resolution as per the contract agreement referred to **Paras-10,12,13 & 27** of the Hon'ble Supreme Court Judgment reported in **(2014) 2 SCC 201** titled as **P. Dasratharama Reddy Complex Vs. Government of Karnataka and anr.**, dated **25th October, 2013**, wherein the Hon'ble Apex Court took into consideration various agreements of various provisions. The same is produced here-in-under:-

" 10.....

"Clause-29: (a) If any dispute or difference of any kind whatsoever were to arise between the Executive Engineer/Superintending Engineer and the Contractor regarding the following matters namely,

(i) The meaning of the specifications designs, drawings and instructions herein before mentioned;

(ii) The quality of workmanship or material used on the work and

(iii) Any other questions, claim right, matter, thing, whatsoever, in any way arising out of or relating to the contract designs, drawings, specifications estimates, instructions, or orders, or those conditions or failure to execute the same whether arising during the progress of the work, or after the completion, termination or abandonment thereof, the dispute shall, in the first place, be referred to the Chief Engineer who has jurisdiction over the work specified in the contract. The Chief Engineer shall within a period of ninety days from the date of being requested by the Contractor to do so, given written notice of his decision to the contractor.

(b) Chief Engineer's decision final.- Subject to other form of settlement hereafter provided, the Chief Engineer's decision in respect of every dispute or difference so referred shall be final and binding upon the Contractor. The said decision shall forthwith be given effect to and contractor shall proceed with the execution of the work with all due diligence.

(C) Remedy when Chief Engineer's decision is not acceptable to Contract In case the decision of the Chief Engineer is not acceptable to the contractor, he may approach the Law Courts at for settlement of dispute after giving due written notice in this regard to the Chief Engineer within a period of ninety days from the date of receipt of the written notice of the decision of the Chief Engineer.

12. Clause 66 of the contract, which is subject matter of consideration in the appeals arising out of SLP(C)Nos. 31975/2011 and 13528/2012, reads thus:

“Clause 66 : SETTLEMENT OF DISPUTES:

66. If any disputes or difference of any kind whatsoever and contractor in connection with, or arising out of the contract or the execution of works, whether during the progress of the works or after their completion and whether before or after the termination abandonment or breach of the contract, it shall, in the first place, be referred to and settled by the Engineer who shall, within a period of forty five days from the date of being requested by the contractor to do so, give written notice of his decision to the contractor.

Subject to other form of settlement hereafter provided, such decision in respect of every dispute or difference so referred shall be final and binding upon the contractor. The said decision shall forthwith be given effect to, and the contractor shall proceed with the execution of the works with all due diligence. In case the decision of the Engineer is not acceptable to the contractor, he may approach the law courts for settlement of dispute after giving due written notice in this regard to the Engineer within a period of forty five days from the date of receipt of the written notice of the decision of the Engineer. If the Engineer has given written notice of his decision to the contractor and no written notice to approach the law courts has been communicated to him by the contractor within a period of forty five days from receipt of such notice, the said decision shall be final and binding upon the contractor. If the Engineer shall fail to give notice of his decision within a period of forty five days from the receipt of the contractor's request in writing for settlement of any dispute or difference as aforesaid, the contractor may within forty five days after the expiration of the first named period of forty five days approach the law courts, giving due notice to the Engineer. Whether the claim is referred to the Engineer or the law courts, as the case may be, the contractor shall proceed to execute and complete the works with all due diligence pending settlement of the said dispute or differences. The reference of any dispute or difference to the engineer or law courts may proceed notwithstanding that the works shall then be or be alleged to be complete, provided always that the obligations of the Engineer and the contractor shall not be altered by reason of the said dispute or difference being referred to the engineer or law courts during the progress of the works.

Neither party is entitled to bring a claim to resolution of disputes if the dispute or differences are not notified in writing within thirty (30) days after expiration of the maintenance period.” (emphasis supplied).

13. Clause 67 of the contract, which is subject matter of consideration in the appeal arising out of SLP(C) No.12553/2006, reads thus:

“SETTLEMENT OF DISPUTES

67) If any dispute or difference of any kind whatsoever shall arise between the Engineer and the Contractor in connection with, or arising out of the Contract, or the execution of works, whether during the progress of the works or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the Engineer who shall, within a period of ninety days from the date of being requested by the Contractor to do so, give written notice of his decision to the Contractor.

Subject to other form of settlement hereafter provided, such decision in respect of every dispute or difference so referred shall be final and binding upon the Contractor. The said decision shall forthwith be given effect to, and the Contractor shall proceed with the execution of the works with all due diligence. In case the decision of the Engineer is not acceptable to the Contractor, he may approach the law Courts at Bangalore for settlement of dispute after giving due written notice in this regard to the Engineer within a period of ninety days from the date of receipt of the written notice of the decision of the Engineer. If the Engineer has given written notice of his decision to the Contractor and no written notice to approach the law courts has been communicated to him by the Contractor within a period of ninety days from receipt of such notice, the said decision shall be final and binding upon the contractor. If the Engineer shall fail to give notice of his decision within a period of ninety days from the receipt of the Contractor's request in writing for settlement of any dispute or difference as aforesaid, the Contractor may within ninety days after the expiration of the first named period of ninety days approach the law Courts at Bangalore, giving due notice to the Engineer. However the claim is referred to the Engineer or to the law Courts, as the case may be, the Contractor shall proceed to execute and complete the works with all due diligence pending settlement of the said dispute or differences. The reference of any dispute or difference to the Engineer or law Courts may proceed notwithstanding that the works shall then be or be alleged to be complete, provided always that the obligations of the Engineer and the Contractor shall not be altered by reason of the said dispute or difference being referred to the Engineer or law Courts during the progress of the works.” (emphasis supplied).

27. To the aforesaid proposition, we may add that in terms of Clause 29(a) and similar other clauses, any dispute or difference irrespective of its nomenclature in matters relating to specifications, designs, drawings, quality of workmanship or material used or any question relating to claim, right in any way arising out of or relating to the contract designs, drawings etc. or failure on the contractor's part to execute the work, whether arising during the progress of the work or after its completion, termination or abandonment has to be first referred to the Chief Engineer or the Designated Officer of the Department. The Chief Engineer or the Designated Officer is not an independent authority or person, who has no connection or control over the work. As a matter of fact, he is having over all supervision and charge of the execution of the work. He is not required to hear the parties or to take evidence, oral or documentary. He is not invested with the power to adjudicate upon the rights of the parties to the dispute or difference and his decision is subject to the right of the aggrieved party to seek relief in a Court of Law. The decision of the Chief Engineer or the Designated Officer is treated as binding on the contractor subject to his right to avail remedy before an appropriate Court. The use of the expression ‘in the first place’ unmistakably shows that non-adjudicatory decision of the Chief Engineer is subject to the right of the aggrieved party to seek remedy. Therefore, Clause 29 which is subject matter of consideration in most of the appeals and similar clauses cannot be treated as an Arbitration Clause.”

8.1. Thereafter, learned Sr. counsel stated that the above-mentioned principles again came up for consideration before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide Judgment reported in **(2015) 12 SCC 677** titled as **International Amusement Limited Vs. India Trade Promotion Organisation and anr.**, dated **December 17, 2014** decided the same in below mentioned manner. The relevant paras are reproduced here under:-

"3. The appellant herein was running an amusement park in Pragati Maidan, New Delhi since the year 1984, which was well known as "Appu Ghar". The land for the purpose was initially allotted to the appellant by India Trade Promotion Organisation (for short 'the ITPO) on licence basis as the lease between the Central Government and the ITPO was still pending and as such permanent allotment of the land could not be made in favour of the appellant. Only as an administrative measure, the license agreements were entered into between the appellant and the ITPO. The appellant claimed that it was the permanent allottee of the land for running the amusement park on the similar lines as were allotted in favour of the Statutory Corporations/Instrumentalities of the State and Central Government. It was only on the assurance of the Land & Development Office (for short "the L&DO"), Ministry of Urban Development and ITPO that the appellant made huge amount of investment for establishing and running "Appu Ghar". The last agreement entered into between the parties was on 6.11.1995. In the said agreement, arbitration clauses 27 and 28 were incorporated, which are extracted hereunder :-

"27. The licensed premises are public premises as defined in the [Public Premises \(Eviction of Unauthorised Occupants\) Act, 1971](#) and fall within the jurisdiction of the Estate Officer, Pragati Maidan.

28. In case of any dispute arising out of or in connection with this agreement the disputes shall be referred to the sole arbitration of the Chairman, India Trade Promotion Organisation or his nominee whose decision/award shall be final, conclusive and binding on the parties. Application for reference to arbitration shall be made by either party within two months of arising of the dispute."

19. In view of the above rival legal contentions urged on behalf of the parties, to answer the aforesaid substantial questions of law, it is necessary for us to examine arbitration clause 28 of the license agreement dated 06.11.1995 entered between the parties, which has been extracted in the earlier portion of this judgment.

20. This Court must accept the contention of the learned senior counsel on behalf of the ITPO that the said clause in the licence agreement is not an arbitration agreement between the parties for the reasons discussed below."

8.2. To further strengthen his argument, learned Sr. counsel further referred to para-3 of the Hon'ble Supreme Court Judgment reported in **(2020) 19 SCC 464** titled as **Food Corporation of India Vs. National Collateral Management Services Limited(NCMSL)** dated **November 4, 2019**, the same is reproduced herein-under:-

*"3. Similarly the applicable clause in the agreement dated 04.01.2008 reads thus:-
Any dispute between the parties arising out of this agreement or pertaining to any matter which is subject matter of this Agency Agreement shall be referred to the Chairman and Managing Director of F.C.I./Principal for settlement and whose decision shall be final and binding on the both FCI/Principal and Agent"*

8.3. Mr. Deb, learned Sr. counsel further submits that the petitioner was ready and willing to execute the works but the works could not be executed because of prolonged inaction/non-action attributed to the respondents. The respondents cannot be permitted to take advantage of their own wrong, namely, non-communication of the decision for approval of the additional expenditure that would be incurred for the execution of the huge quantity of additional/deviation quantum of work.

8.4. In the terms of the WP(C) No.1033 of 2022, the learned Sr. counsel appearing for the petitioner urged this Court to direct the respondent-Bank to restore the Bank Guarantees to the petitioner, which have been invoked by the impugned letter dated 19.11.2022. Further, before the invocation of the Bank Guarantees, no show-cause notice was issued.

9. On the other hand, Mr. S.M. Chakraborty, learned Sr. counsel appearing for the respondents-HSCL to support his argument cited a Judgment dated **22.09.2015** passed by the Division Bench of this Court numbered as **WP(C) No.91 of 2015**, wherein, similar kind of principles were dealt with. The relevant paragraphs of the said Judgments are as follows:-

"10. Sri Deb has also referred to the Dispute Redressal Clause No.24 in the contract agreement wherein it is mentioned that whereas any dispute arises the same shall be sent to the Dispute Redressal Committee. The relevant Clause reads as follows :

"24. Dispute Redressal System

24.1 If any dispute or difference of any kind what-so-ever shall arises in connection with or arising out of this Contract or the execution of Works or maintenance of the Works there under, whether before its commencement or during the progress of Works or after the termination, abandonment or breach of the Contract, it shall, in the first instance, be referred for settlement to the competent authority, described along with their powers in the Contract Data, above the rank of the Engineer. The competent authority shall, within a period of forty-five days after being requested in writing by the Contractor to do so, convey his decision to the Contractor. Such decision in respect of every matter so referred shall, subject to review as hereinafter provided, be final and binding upon the Contractor. In case the Works is already in progress, the Contractor shall proceed with the execution of the Works, including maintenance thereof, pending receipt of the decision of the competent authority as aforesaid, with all due diligence.

24.2 Either party will have the right of appeal, against the decision of the competent authority, to the Standing Empowered Committee if the amount appealed against exceeds rupees one lakh.

24.3 The composition of the Empowered Standing Committee will be:

I. One official member, Chairman of the Standing Empowered Committee, not below the rank of Additional Secretary to the State Government;

II. One official member not below the rank of chief engineer;

and III. One non-official member who will be technical expert of Chief Engineer's level selected by the Contractor from a panel of three persons given to him by the Employer.

24.4 The Contractor and the Employer will be entitled to present their case in writing duly supported by documents. If so requested, the Standing Empowered Committee may allow one opportunity to the Contractor and the Employer for oral arguments for a specified period. The Empowered Committee shall give its decision within a period of ninety days from the date of appeal, failing which the contractor can approach the appropriate court for the resolution of the dispute.

24.5 The decision of the Standing Empowered Committee will be binding on the Employer for payment of claims up to five percent of the Initial Contract Price. The Contractor can accept and receive payment after signing as "in full and final settlement of all claims". If he does not accept the decision, he is not barred from approaching the courts. Similarly, if the Employer does not accept the decision of the Standing Empowered Committee above the limit of five percent of the Initial Contract Price, he will be free to approach the courts applicable under the law.". We are of the considered view that there are highly disputed questions of fact

involved in this writ petition. These disputes cannot be decided in writ proceedings. A writ Court normally does not enter into contractual matters. It is not the job of the writ Court to assess what is the amount due and payable. Only in rare cases where there is no dispute with regard to the amount payable, the writ Court may issue a writ directing payment of the amount. We are clearly of the view that in view of the absolutely contradictory stands taken by both sides there is a dispute between them. This dispute cannot be decided without recording the evidence.

12. We, therefore, dismiss this writ petition with liberty reserved to the petitioner to either take recourse to the dispute redressal mechanism mentioned in Clause 24 of the agreement or to file a suit in the Court of competent jurisdiction. We, however, make it clear that this dispute cannot be decided in the writ proceedings. Therefore, the writ petition is dismissed with the aforesaid directions. No order as to costs."

9.1. Mr. S.M. Chakraborty, learned Sr. counsel appearing for the respondents-HSCL submits that the impugned letter dated 25.04.2022 is not a letter of action but it is a letter of caution. So, this cannot be a subject matter of challenge by filing a writ petition before this Hon'ble Court. As such the 1st writ petition i.e., WP(C) No.454 of 2022 is a premature writ petition. 2^{ndly}, the learned Sr. counsel submits that if the petitioner feels aggrieved by the impugned letter itself, the remedy lies in the agreement itself. Clause 25 of the General Conditions of the Contract *inter alia* mandates that any dispute, arising out of the execution of the work would not be subject to arbitration and that all such disputes would be referred to the Dispute Redressal System, falling which, the parties to the contract would be free to seek redress from the Hon'ble Court. Learned Sr. counsel submits that Clause 25 of the Agreement gives the steps when a person can go to Court. Further, learned Sr. counsel also referred to Clause 24 i.e. the Dispute Redressal System of the contract. The petitioner has not exhausted

the remedies of the contract agreement. The petitioner was a signatory to the said agreement and as such cannot deviate and ignore the same.

9.2. Mr. S.M. Chakraborty, learned Sr. counsel submits that the Bank Guarantees were between the contractor and the Bank and it was an unconditional guarantee, and that whenever the guarantee will be invoked the Bank has to abide. The argument of Mr. Deb, learned Sr. counsel appearing for the petitioner that before the invocation of Bank Guarantees show cause notice has to be issued is not a requirement of law. It can be invoked anytime and it is totally unconditional.

Accordingly, to support the above-mentioned argument on invocation of Bank Guarantees, learned Sr. counsel cited **Para-26** of the Hon'ble Apex Court Judgment reported in **(2006) 2 SCC 728** titled as **BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd and anr.**, dated **February 3, 2006** which is reproduced here-in-under:-

"26. Accordingly, we are prima facie not satisfied that performance had been duly and satisfactorily certified. Under the terms of the "wrap-around agreement", the Appellant was entitled to encash all or any of the bank guarantees for breach of the First Respondent's obligations under any one of the contracts. In our view, it is the case of the Appellant that there was no satisfactory performance of the contract, as a result of which, the Appellant was justified in encashing the concerned bank guarantee. Indeed, as per the terms of the bank guarantee itself, the Appellant is the best judge to decide as to when and for what reason the bank guarantees should be encashed. Further, it is no function of the Second Respondent-Bank, nor of this Court, to enquire as to whether due performance had actually happened when, under the terms of the guarantee, the Second Respondent-Bank was obliged to make payment when the guarantee was called in, irrespective of any contractual dispute between the Appellant and the First Respondent. Indeed, in similar circumstances, this Court in [General Electric Technical Services Company Inc. v. Punj Sons \(P\) Ltd.](#), held:

"the Bank must honour the bank guarantee free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, the court should interfere. The nature of the fraud that the courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else."

9.3. Mr. Chakraborty, learned Sr. counsel to further strengthen his argument on the said argument, relied upon **Paras- 11 and 12** of Hon'ble Apex Court Judgment reported in **(2008) 1 SCC 544** titled as **Vinitec Electronics Private Ltd. Vs. HCL Infocystem Ltd.**, dated **November 2, 2007**, which is reproduced here-in-below:-

"11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an un- conditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. In [U.P. State Sugar Corporation vs. Sumac International Ltd.](#) , this court observed that :

12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would over ride the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.

12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and

irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In [BSES Limited \(Now Reliance Energy Ltd.\) vs. Fenner India Ltd.](#) And anr. this court held :

" 10. There are, however, two exceptions to this Rule. The first is when there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-

intervention is when there are special equities in favour of injunction, such as when irretrievable injury or irretrievable injustice would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this court, that in [U.P. State Sugar Corpn. V. Sumac International Ltd.](#) (1997) 1 SCC 568 (hereinafter U.P. State Sugar Corporation) this Court, correctly declare that the law was "settled".

10. During the course of the argument, Mr. P. Saha, learned counsel appearing for the respondent-Bank represented before this Court that in pursuance of the demand made by the respondents-HSCL, vide impugned letter dated 19.11.2022, the respondent-Bank immediately released the Bank Guarantees in favour of the respondents-HSCL and held that they do not have any obligation and prayed to dismiss the writ petition bearing No.WP(C)1033 of 2022 in so far as the respondent-Bank in concerned.

11. Mr. S.M. Chakraborty, learned Sr. counsel appearing for the respondents-HSCL in support of his contention made by the Bank-counsel Mr. Saha represented that on 22nd December, 2022, the said amounts have been deposited in the account of TRRDA.

12. Heard both sides and perused the evidence on record.

13. In terms of the argument of Mr. S.M. Chakraborty, learned Sr. counsel appearing for the respondents-HSCL that the petitioner has not exhausted his remedies given under the contract made between the petitioner and the respondents-HSCL, before approaching the Court by filing the writ petition under Article 226 of the Constitution of India, let us discuss the Dispute Redressal System given in the said Contract itself, which is reproduced here-in-under:-

"Dispute Redressal System

24.1 If any dispute or difference of any kind what-so-ever shall arises in connection with or arising out of this Contract or the execution of Works of maintenance of the Works there under, whether before its commencement or during the progress of Works or after the termination, abandonment or breach of the Contract, it shall, in the first instance, be referred for settlement to the competent authority within 45 days of arising the dispute or difference, described along with their powers in the Contract Data, above the rank of the Engineer. The competent authority shall, within a period of forty-five days after being requested in writing by the Contractor to do so, convey his decision to the Contractor, Such decision. in respect of every matter so referred shall, subject to review as hereinafter provided, be final and binding upon the Contractor. In case the Works is already in progress, the Contractor shall proceed with the execution of the Works, including maintenance thereof, pending receipt the competent authority as aforesaid, with all due diligence. of the decision of

24.2. Either party will have the right of appeal against the decision of the competent authority, to the Standing Empowered Committee within 90 days of decision of the competent authority if the amount appealed against exceeds rupees one lakh.

24.3. The composition of the Empowered Standing Committee will be

I. One official member, Chairman of the Standing Empowered Committee, not below therank of Additional Secretary to the State Government:

II. One official member not below the rank of chief engineer, and

III. One non-official member who will be technical expert of Chief Engineer's level selected by the Contractor from a panel of three persons given to him by the Employer

24.4. The Contractor and the Employer will be entitled to present their case in writing duly supported by documents. If so requested, the Standing Empowered Committee may allow one opportunity to the Contractor and the Employer for oral arguments for a specified period. The Empowered Committee shall give its decision within a period of ninety days from the date of appeal, failing which the contractor can approach the appropriate court for the resolution of the dispute.

24.5. The decision of the Standing Empowered Committee will be binding on the Employer for payment of claims up to five percent of the Initial Contract Price. The Contractor can accept and receive payment after signing as "in full and final settlement of all claims". If he does not accept the decision, he is not barred from approaching the courts. Similarly, if the Employer does not accept the decision of the Standing Empowered Committee above the limit of five percent of the Initial Contract Price, he will be free to approach the courts applicable under the law.

14. Since the specific redressal is there in the above-mentioned contract and further the provision of appeal, receipt of documents, and appreciation of evidence are also indicated in the contract, this Court finds that the petitioner ought to have exhausted the remedies given in the contract agreement. The petitioner was a signatory to the said agreement and he cannot deviate and ignore the same unless his legitimate rights are infringed upon which are guaranteed under the Constitution of India. Here it is not the case of that nature.

15. It is seen from the record and revealed from the arguments made by the learned counsel appearing for the parties that there are disputed questions of facts regarding which date the petitioner was handed over the subject land for execution of the works, on which date the petitioner has commenced the works, to what extent has petitioner commenced the work and completed the same and to what extend the petitioner has attended the maintenance works. None of the issues are found in the affidavit nor in the correspondence made by the petitioner to the respondents. It has not been specified in the affidavit nor is seen in

the records. The petitioner held the respondents accountable for laches. It is also seen from the correspondence of the respondents addressed to the petitioner that the respondents held the petitioner for not completing the works to their satisfaction but the details are undisclosed. In such a situation, where disputed question of facts are involved and certain crucial information is not provided by both parties, it is not possible to draw a conclusion on either side. On one hand, the petitioner submits that he has completed the works and there was no proper appreciation and cooperation in terms of the agreement by the respondents, vice versa the respondents contended that the petitioner has not completed the works in terms of the agreement. So, this disputed question of facts cannot be gone into in a writ petitioner filed under Article 226 of the Constitution of India.

16. In terms of the above facts and on perusal of the Judgment as referred by Mr. Somik Deb, learned Sr. counsel appearing for the petitioner, in support of his arguments, this Court finds that the same are not relevant to the facts of the case.

17. Further, the 1st writ petition i.e. WP(C) No.454 of 2022 is premature since the impugned letter dated 24.04.2022 is only a letter of caution and not a letter of action. So, this cannot be a subject matter of challenge by filing a writ petition before this Court

18. The 2nd writ petition i.e. WP(C) No.1033 of 2022 relates to the impugned letter dated 19.11.2022 addressed by respondents-HSCL to the Chief Manager, Union Bank of India seeking to release the Bank Guarantees. The present writ petition is filed on 28.11.2022. During the course of the argument, it is informed that in pursuance of the demand made by the respondent-HSCL, vide impugned letter dated 19.11.2022, the respondent-Bank immediately released the Bank guarantee in favour of the respondents-HSCL. As such nothing survives for granting any reliefs to the petitioner and this present WP(C) No.1033 of 2022 also becomes infructuous.

19. For the reasons stated above and also in terms of the principles given in the Judgments referred by Mr. S.M. Chakraborty, learned Sr. counsel appearing for the respondents-HSCL, both the writ petitions are dismissed giving liberty to the petitioner to avail remedies under law.

20. As a sequel, stay if any stands vacated. Pending application(s), if any also stands closed.

JUDGE

suhanjit

RAJKUMAR
SUHANJIT
SINGHA

Digitally signed by
RAJKUMAR
SUHANJIT SINGHA
Date: 2024.02.01
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