



Serial No. 01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP(C) No. 116 of 2024

Date of Decision: 20.08.2024

M/s RKI India Limited

... Petitioner(s)

- Versus -

1. State of Meghalaya,
Represented by the Commissioner & Secretary,
To the Govt. of Meghalaya, Power Department,
Shillong.
2. The Chairman cum Managing Director,
MePDCL, Lumjingshai, Shillong.
3. The Director (Distribution), MePDCL,
Meghalaya, Shillong.
4. The Chief Engineer (Projects) MePDCL,
Meghalaya, Shillong
5. The Superintending Engineer (Projects)
MePDCL, Tura
6. The Asian Development Bank,
Represented by its Project Manager

... Respondent(s)

Coram:

Hon'ble Mr. Justice H. S. Thangkhiew, Chief Justice (Acting)

Appearance:

For the Petitioner(s) : Ms. Liz Mathew, Sr. Adv. with
Ms. B. Vennemalai, Adv.
Mr. S. Deb, Adv.

For the Respondent(s) : Mr. A.S. Pandey, Adv.
Ms. R. Colney, GA



i)	Whether approved for reporting in Law journals etc.:	Yes/No
ii)	Whether approved for publication in press:	Yes/No

JUDGMENT AND ORDER

1. The petitioner company on being the successful bidder in a tender floated by the respondent No. 2, for the work titled 'East Garo Hills Circle-Distribution System Improvement: 33/11 KV Sub-station Development', was issued the Letter of Allotment (LoA) and a contract agreement, was duly executed on 21.12.2020, between the respondent No. 2 and the petitioner, for the said work amounting to Rs. 74,34,56,822/- with the completion time for the said works being 18 months from the effective date of commission.

2. It appears that though the contract was scheduled to be completed in November, 2022, taking the effective date of contract to have commenced from 29.05.2021, the work was delayed due to various reasons which the petitioner company maintained was due to circumstances beyond its control. On 02.05.2023, a show cause notice was issued by the respondent No. 4, directing the petitioner to answer as to why the contract should not be terminated failing which clause 42.2 of



the conditions of contract would be invoked. The petitioner replied to the said show cause assuring the respondents that the project would be completed by December, 2023. Thereafter the petitioner was called for a review meeting, on 06.07.2023 which however, the representative of the petitioner company did not attend citing reasons that he was suffering from COVID, the absence whereof, was not taken kindly by the respondents. Subsequent review meetings were then held on 06.07.2023 and 03.08.2023, and though the petitioner submitted a representation on 05.08.2023, replying to the issues raised in the minutes of the review meeting, the respondent No. 4 on 22.8.2023 issued a notice of termination, highlighting the slow progress of the work. The respondent No. 4 then on 15.12.2023 issued the letter of termination and decided to invoke clause 42.2.2 for termination w.e.f. 16.12.2023. Thereafter, the respondent No. 4 floated a fresh tender on 08.02.2024, for the remaining works, with the dead line for submission of bids on 25.04.2024. The petitioner company being aggrieved is therefore before this Court impugning the letter of termination dated 15.12.2023 and the tender notice dated 08.03.2024.

3. Ms. Liz. Mathew, learned Senior counsel assisted by Mr. S. Deb, learned counsel for the petitioner at the outset, has argued that



though the matter is a contractual dispute, there has been a considerable shift in the scope of judicial review which would make the writ petition maintainable. In the instant case, she submits the issue is not merely of a termination of contract and computation of damages, which would typically invoke arbitration, but instead the issues center on the arbitrariness of the respondents in terminating the contract despite their own lapses, and the subsequent re-tendering of the project, which would result in loss being caused to the public exchequer and as such she contends the case also has public law character. In support of these contentions, the learned Senior counsel has placed reliance on the following judgments:-

- i) *ABL International Ltd. vs. Export Credit Guarantee Corporation of India Ltd., (2004) 3 SCC 553***
- ii) *Joshi Technologies International Inc vs. Union of India (2015) 7 SCC 728***
- iii) *M.P. Power Management Co. Ltd. Jabalpur vs. Sky Power Southeast Solar India Pvt. Ltd. (2023) 2 SCC 703***
- iv) *Subodh Kumar Singh Rathour vs. Chief Executive Officer, 2024 SCC OnLine 1682***

4. It is further submitted that time is not of essence in the contract, inasmuch as, from the initial stage though the contract was entered into on 21.12.2020, the respondents had paid the advance only on



29.5.2021, thereby delaying the effective date of the contract, though the petitioner promptly on the execution of the contract, had submitted the performance bank guarantee on 30.12.2020, and also advance payment bank guarantee on 12.01.2021. It is also submitted that substantial delay was caused by the respondents in handing over the work sites, as also the failure of the respondents to release payments on time. Learned Sr. counsel then contends that the termination was illegal and arbitrary, as the show cause notice which was issued on 2.5.2023 itself is unwarranted, as at that point of time the completion of the project had been extended to 30.6.2023. The respondents' non-cooperation she contends, and their failure to take corrective action in time had resulted in the delays in the project. Though substantial progress in the works had been achieved, she submits the action of the respondents in re-tendering the works, will result in unnecessary financial strain on the exchequer, as the same will result in increase in costs and also delay the project's completion, and further the re-tender decision being highly arbitrary, has affected the petitioner's rights. On the point of the executed bank guarantees made under clause 13 of the Conditions of Contract, the learned Senior counsel submits that the claim for encashment of the remaining bank guarantees is unsustainable as the respondents holds approximately 3.15 crores as retention money and Rs. 1.85 crores worth



of work is completed but not billed. As such she submits, the respondents cannot be allowed to encash the bank guarantees amounting to Rs. 3,32,30,000/-, at this stage.

5. The learned Senior counsel in furtherance of her submissions, has relied upon the rejoinder affidavit filed on behalf of the petitioner company, to argue in detail the various aspects of the explanation given to the respondents for the delay caused, the extension which was allowed till 30.06.2023, and has laid great emphasis on the prayer of the petitioner company to allow it to complete the remaining works by December, 2024, without any escalation in the rates. The learned Senior counsel has then submitted that the situation has been caused due to the unreasonable deadlines and arbitrary action resorted to by the respondents, and further has contended that there is no claim for any amount from the respondents to render the instant dispute arbitrable, but the issues raised, squarely deal with the reasonableness of State action in the illegal termination of the contract, and the re-tendering process. The re-tendering she submits, apart from causing loss to the public exchequer, is also not feasible as the works will never be able to be completed within the time as scheduled. She therefore prays that the impugned letter of termination as well as the tender notification be set



aside and quashed, and the petitioner company be allowed to complete the remaining portion of the works.

6. Mr. A.S. Pandey, learned counsel on behalf of the respondents Nos. 2 to 5, has submitted that the petitioner company has raised disputed questions of facts, and in this context, has referred to the time schedule annexed to the writ petition to show that the petitioner company was required to adhere to the said schedule, which however it failed to do so. He submits that the project was to be completed within the period of 18(eighteen) months from 21.12.2020, and though the package was made effective on 29.05.2021, with the completion date being 28.11.2022, the petitioner even by this date had not completed anything worthwhile in the entire project. The learned counsel has vehemently argued that the writ petition is not maintainable and that the petitioner company has efficacious alternative remedy in the terms of the contract itself, wherein at clause 45, it has been provided that any dispute arising out of the contract would be settled through arbitration, and this aspect he submits is fortified, more so by the prayers sought by the petitioner company in the instant writ, which shows that the disputes relate to adjudication of a contract, and therefore arbitration is the appropriate remedy. The petitioner company, he submits is essentially seeking specific



performance of a contract, which stood terminated solely on account of admitted delays and breaches on the part of the petitioner company. It is further submitted that the petitioner company has not approached this Court with clean hands and suppressed material facts, and has not even placed the bank guarantee document on record before this Court, and instead has filed incomplete bank guarantee documents through a Misc. application. He then contends that the instant writ petition is an abuse of the legal process, as the petitioner company is essentially seeking directions from this Court to revive a contract that has been terminated, even after being given due hearing and ample opportunity to complete the project. It is further submitted that there can be no judicial review in commercial matters, wherein a contract has been terminated when the right has been vested on the Employer to terminate the same.

7. The learned counsel then submits that a bank guarantee is an independent contract between the Bank and the beneficiary, and the Bank is always obliged to honour its guarantee, and that the petitioner company through the instant writ petition is essentially seeking to obtain illegal benefits by retaining the bank guarantees as well as the advance mobilization amounts already given. It has also been submitted that in spite several attempts to encash the remaining bank guarantees from the



Union Bank of India, the Bank it appears, on instructions and pressure applied by the petitioner company, has resisted to same though legally bound to do so. Learned counsel has taken this Court through a series of letters and emails dated 07.02.2024 onwards till 27.06.2024, whereby requests have been made for revocation of the bank guarantees which are still to be honoured.

8. The learned counsel further submits that though the termination was as far back as 15.12.2023, no urgency was shown by the petitioner company who has approached this Court only on 24.04.2024, and without pursuing the matter effectively before this Court thereafter, after a period of 3(three) months on 25.07.2024, had filed a Misc. application praying for staying of the encashment of the bank guarantee. He submits that the contract having exhaustively provided for dealing with such situations, as can be seen from clauses 42.2, and 42.2.2, apart from clauses 44.1 and 45, the actions of the respondents is justified in terminating the contract and the petitioner company has adequate alternate remedy to resort to, if aggrieved in any manner.

9. Heard learned counsel for the parties.



10. It is to be noted that essentially the dispute that has been brought before the Court is contractual, which the petitioner however has sought invocation of writ jurisdiction on the grounds as have been set forth and argued by the learned Senior counsel for the petitioner. The judgment of ***ABL International Ltd. vs. Export Credit Guarantee Corporation of India Ltd.***, (supra) has been pressed in support of the contention that a writ court can issue suitable directions to set right arbitrary actions of the State. However, on a close examination of the facts of the present case, especially the sequence of events in a contract of great public utility, what can be seen is that the petitioner on the tardy progress of work had been show caused and in reply thereto, apart from the same not being satisfactory has also brought into play disputed facts which are impossible to be determined by a writ court. It is not the case that the disputed question of facts present are minor or ancillary to the issue, but in fact strike at the very core of the dispute, as they involve questions as to the cause of delay which the petitioner though has attributed to certain circumstances and reasons, however has not produced any tangible material to substantiate the same. Thus, the decision rendered in ***ABL International Ltd. vs. Export Credit Guarantee Corporation of India Ltd.***, is of no assistance to the writ petitioner, especially with the detailed mechanism for alternate remedy



being present in the contract agreement itself. Further, the case of ***Joshi Technologies International Inc vs. Union of India*** (supra) cited by the petitioner in para 69 itself, has provided that though there is no absolute bar to the maintainability of a writ petition even in contractual matters, where there are disputed question of facts or even when a monetary claim is raise but however at para 55 and 69.2 thereof, it has been held as follows:-

“55. Law in this aspect has developed through catena of judgments of this Court and from the reading of these judgments it would follow that in pure contractual matters the extraordinary remedy of writ under [Article 226](#) or [Article 32](#) of the Constitution cannot be invoked. However, in a limited sphere such remedies are available only when the non-Government contracting party is able to demonstrate that it is a public law remedy which such party seeks to invoke, in contradistinction to the private law remedy simpliciter under the contract. Some of the case law to bring home this cardinal principle is taken note of hereinafter.

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.”

11. In the case of ***M.P. Power Management Co. Ltd. Jabalpur vs. Sky Power Southeast Solar India Pvt. Ltd.*** (supra) which has also been relied upon by the petitioner, the same is also of no assistance as in



the facts of the present case, breaches in the contract had been acknowledged by the petitioner itself, and the action of the respondent in terminating the contract being based on cogent grounds after due notice to the petitioner, natural justice had also been served. The dispute in view of the facts, in the considered view of this Court being in the realm of private law, no remedy is therefore available before a writ court. Coming to the case of ***Subodh Kumar Singh Rathour vs. Chief Executive Officer*** (supra) which has exhaustively discussed, the scope of judicial review of the actions of the State in the matters relating to a contract/tender disputes, it is worthwhile to note that the cancellation of the contract in the said case was held to be illegal as there was an arbitrary exercise of powers at the behest of State functionaries. Further, in the same judgment the Supreme Court in para-43 thereof, had highlighted the doctrines and principles guiding judicial review, such as the principles of natural justice, reasonableness and proportionality, which ensured that administrative actions are not arbitrary discriminatory or capricious. In the case at hand however, none of these principles having been breached, as the termination was made on the basis of an elaborate decision making process, the said judgment does not come to the aid of the petitioner.



12. As discussed earlier, without reiterating the events in detail, the petitioner had been issued three show cause notices, the last being dated 02.05.2023, whereof in reply thereto, the petitioner by letter dated 08.05.2023, had acknowledged the lapses on their part by citing various reasons, and further in spite of the extension granted, failed to speed up the progress of the work. It is also to be noted again herein that review meetings had been held but as recorded and the picture that emerged was that though the petitioner had already availed of mobilization advances, it was not in a position to implement the project. In this context, it is relevant to refer to a letter of the writ petitioner dated 05.08.2023, wherein in the explanation that had been offered, at para-1 of the said letter itself it was admitted that they had not been able to complete even one Sub-station, due to various reasons, and had committed therein that progress would be seen after 60 days. From the bare facts present in the materials on record, the subsequent action of termination by the respondent can in no manner be said to be arbitrary or illegal.

13. Another aspect that deserves consideration is that the petitioner has sought stay orders in the encashment of bank guarantees that have been furnished by the petitioner, the encashment thereof, so far, as submitted, has been thwarted as is evident from the materials and



correspondence on record. A bank guarantee as is well known, is an independent contract between the bank and the beneficiary and a bank is always obliged to honour its guarantee. A dispute between the beneficiary and the party on whose instance the bank guarantee has been furnished, is immaterial, as it is settled law that courts should not ordinarily interfere with the invocation or encashment of bank guarantees, so long as the invocation is in the terms of the bank guarantee. Numerous judgments in this regard have reiterated this position on the limited scope of interference such as in the case of *Atlanta Infrastructure Limited vs. Delta Marine Company Ltd., (2021) 20 SCC 593*, wherein it was held that the only reason for interference could be egregious fraud and fraud must be relatable to the bank guarantee, none of which is present in the instant case.

14. On a footnote, another aspect that cannot be ignored is that the petitioner has made a challenge to the notification for re-tendering, and the termination of contract at a very belated stage. Even in the conduct of the proceedings before this Court, the petitioner has been tardy and as noted from the order sheets, the matter did not proceed as the counsel appearing for the petitioner could not obtain instructions from 07.05.2024 and sought time repeatedly till 16.07.2024, when it is



submitted that they wanted to pursue the matter, and as such the matter was listed for admission hearing on 25.07.2024. Thereafter only, applications were made for stay of the encashment of the bank guarantees, which was after a period of over 3(three) months since the institution of the writ petition, that too when it was pointed out that no details whatsoever had been provided in the writ petition of the bank guarantees to warrant any consideration for stay of encashment.

15. In the given facts and circumstances of the case therefore, as discussed above, there being no element of arbitrariness or unreasonableness on the part of the respondents to warrant any interference in exercise of powers under Article 226, and the dispute being purely contractual and in the realm of private law, and more so with alternative remedy being provided in the contract itself, the writ petition is devoid of any merit and is accordingly dismissed.

Chief Justice (Acting)

Meghalaya
20.08.2024
"V. Lyndem PS"