

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

WP (C) No. 2802/2024
CM No. 7637/2024

Reserved on 19.12.2024.

Pronounced on 31.12.2024

M/S Navnirman Construction Company through its ...Petitioner(s)/Appellant(s)
partner Manish Singh,
S/o Late Ajit Kumar Singh
C/o L-40, Road No-20, Sri Krishna Nagar, Patna,
800001 (Bihar)

Through: Mr. Arif Sikander Mir, Advocate with
Ms. Zeeshan Yaqoob, Advocate.

Vs.

1. **Union of India Through Secretary Ministry of ...Respondent(s)**
Defense Government of India;
2. **Director General Border Roads,**
Seema Sadak Bhawan, Ring Road Naraina,
Delhi Cantt, New Delhi-110010;
3. **Chief Engineer**
Project Vijayak, Border Roads Organization
R/o HQ CE (P) Vijayak
C/o 56 APO, Pin Code; 931721;
4. **M/S Amardeep Constructions**
Office-71, Ranjan Bar Kunjwani Talab,
Jammu, 189991;

Through: Mr. Rahul Panth, Sr. Advocate with
Mr. Aswad Attar, Advocate- R-4. (Th. Video conferencing)
Mr. Viqas Malik, Advocate (R-1-3).

CORAM:

HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1. The petitioner was allotted work for "Design and Construction of 130. Mtr Span (90+40) Major permanent bridge (Durga Bridge) at Km 173.55 on Leh-Chalunka Road under 54 RCC/16/BRTF" vide letter of acceptance dated 31st July, 2020. After exchange of numerous communications between the petitioner and the official respondents, the Colonel, being the officiating Chief Engineer, vide communication dated 12 May 2023, cancelled the contract allotted

in favour of the petitioner w.e.f. 12th May, 2023 by invoking the condition 54 of general conditions of contract.

2. The petitioner being aggrieved of the termination of the contract sought the settlement of the dispute through arbitration and an Arbitrator was appointed vide order dated 4th August 2023 by the Hon'ble the Chief Justice. The learned Arbitrator entered the reference and held the termination of the contract as bad under law, vide award dated 15th October 2024.
3. During the pendency of the arbitration proceedings, the respondents No. 3 floated a fresh NIT dated 25th April 2024 for "Execution of the balance Design and Drawings (including proof checking from IIT) and construction of 130 M Multi Span (90+40) Major permanent Bridge (Durga BR) with Steel Super structure and balance Sub- Structure at KM 173.55 on Leh-Chalunka Road under 54 RCC/18 BRTF of Project Vijayak in Ladakh (UT)". This contract was allotted to the respondent No. 4 vide Letter of Acceptance dated 23rd September 2024.
4. The petitioner has filed the present petition for issuance of an appropriate writ, order or direction including the one in the nature of:-

- a. *Writ of certiorari to quash NIT dated 25th April 2024 and Letter of Acceptance dated 23rd September 2024.*
- b. *Writ of mandamus, directing the official respondents to allow the petitioner to complete the work in pursuance of Letter of Acceptance dated 31st of July, 2020 of the Accepting Officer (Chief Engineer)-respondent No.3 in the present case at the **revised rates**.*

5. The petitioner has sought the above-mentioned reliefs on the following grounds: -

- i. *That the learned Arbitrator has declared the letter of termination of contract dated 12th May, 2023, as bereft of any legal force and the only effect of this finding is that the work has to be completed by the petitioner and the work allotted to the petitioner in pursuance of earlier tender is legally intact. Therefore, the impugned NIT and LOA have to be declared as non-est in the eyes of law.*
- ii. *That during pendency of the arbitral proceedings, the official respondents invited fresh bid which contained certain data, that was missing in the earlier bid document and because of absence of that data only, the petitioner was prevented from submitting the design for approval, resulting into non-execution of work.*
- iii. *That after the petitioner came to know about the fresh bid, the petitioner vide communication 5th February, 2024 and 22nd May, 2024, requested the official respondents for providing fair opportunity to the petitioner to execute the work. The respondents appeared on 18th April, 2024 and sought time to examine the scope and feasibility of the submission made by the petitioner before the Arbitrator. The said submission is duly recorded in the minutes of the proceedings of the learned Arbitrator. The respondents on the one hand were getting the arbitral proceedings postponed under the guise of settlement and on the other hand a new bid was invited for the balance work on 25th April, 2024. The lowest bidder, by playing fraud by submitting manipulated documents obtained the bid and the official respondents were duly informed by the petitioner.*

iv. The respondents informed the learned arbitral tribunal that the case for settlement has been taken up with the higher authorities for necessary direction in respect of feasibility of the settlement, but the decision was still awaited. In view of this, a request was made to postpone the date of hearing by a month instead of 6th June 2024. The matter finally came to be heard on merits by the learned Arbitrator and was reserved for pronouncement of award and in the meantime, the mandate of Arbitral tribunal expired on 16th September 2024 and the parties by mutual consent extended the mandate of the arbitral tribunal by one month. The official respondents without waiting for the outcome of the arbitral proceedings, vide letter of acceptance dated 23rd September 2024, allotted the execution of the balance work to the respondent No. 4 illegally and arbitrarily.

6. Learned counsel for the respondent Nos. 1 to 3 had submitted the reply in open court, which was taken on record.
7. The respondent Nos. 1-3 have objected the maintainability of the writ petition on various pronouncements of the Hon'ble Apex Court. On facts, it is stated that the bridge in discussion is a bottleneck on an axis which is the only connectivity to the Southern Glacier, Sub-Sector Hanif and the Sub-Sector West, where the troops of Indian Army are deployed on icy high-altitude axis at close range of the Western enemy. These facts have been narrated by the respondents, perhaps to demonstrate that the bridge in question is of strategic importance. It is stated that the petitioner was allotted contract for design and construction including Sub-soil investigation of 130 mtr span (90m+40m) Major Permanent Bridge

(Durga Bridge) at Km 173.55 on Leh-Chalunka road under 54 RCC/16 BRTF for Rs. 10,37,00,000.00. The petitioner took nine months to deposit the performance security Deposit (PSD) and to accept the work order after conclusion of the contract. Taking into consideration the importance of the bridge, the poor response of the contractor-petitioner and the progress of just 3.30% till May, 2023 (after lapse of 02 years, 09 months and 11 days), the said contract was cancelled by the Accepting Officer, i.e. Officiating Chief Engineer, Project Vijayak in the capacity of Accepting Officer. In order to execute the balance work, a new contract was awarded to the respondent No.4, i.e. M/s Amardeep Constructions on 23rd September 2024 after taking approval of the higher authorities, i.e. DGBR as per communication dated 13th September, 2024. Performance security deposit (PSD) of Rs. 91.40 lakhs was deposited by the respondent No. 4 on 19th October, 2024 well within the period of 28 days and the work order has been placed on 25th October, 2024. The Sub-Soil Investigation (SSI) report, design and drawings submitted by M/s Navnirman Construction Company for Chalunka side abutment and super structure duly approved by competent authority were included in the new tender, initiated for execution of balance work of the said bridge. Scope of SSI was deleted as it was already carried out by the petitioner. It is further averred that the respondent No. 4 has mobilized the resources on ground and started the excavation work of the abutment. It is further pleaded that though the SSI was already carried out and included in the agreement but for more surety, SSI is being carried out by the

respondent No.4 at its own cost, so that better design can be carried out based on actual ground inputs. In nutshell, the stand of the official respondents is that the delay on the part of petitioner to execute the work, prompted the official respondents to cancel the contract allotted to the petitioner and float a fresh tender for execution of balance work, and ultimately the respondent No. 4 emerged as a successful bidder.

8. The respondent No. 4 has opposed the writ petition on the ground that the petitioner through the medium of present writ petition is virtually seeking the execution of award passed by the learned Arbitrator and it was never the case of the petitioner before the learned Arbitrator that it be permitted to execute the balance work but to the contrary, the petitioner in its claim, claimed the payment of Rs. 1,50,41,600.00 as loss of contractor's profit of 15% of the balance work and even the said claim has not been allowed by the learned Arbitrator. It is also stated that in the garb of present petition, the petitioner is seeking enforcement of one part of arbitral award dated 15.10.2024, the enforceability of which can only lie in terms of Section 36 of the Arbitration and Conciliation Act, 1996, once the period stipulated for setting aside the arbitral award prescribed under section 34 of the Act (supra) lapses. In the instant case, the award is still open to challenge, therefore, the question of enforceability does not arise at all. It is also the stand of respondent No. 4 that it has submitted the performance bank guarantee of Rs. 91,40,000/- and after receiving the work order, it has mobilized the men and machinery immediately to site for conducting SSI for

confirming the underground status at site. The respondent No.4 has also appointed the Designer for the balance design work for the project and prepared the drawing and design of the above referred bridge which are in process of submission to HQDGBR. It is also pleaded that for the 'A1' side foundation, the answering respondent has mobilized machinery to achieve the foundation level given to answering respondent as per the approved drawings which were provided as a part of the contract by the department, as these drawings were approved by HQDGBR. For pier well foundation and 'A2' foundation side, the respondent No.4 has fabricated the cutting edge (approximately 8.5 MT) for the bridge and has already procured the 13.3 MT reinforcement required to build 'A1' side foundation. The respondent No. 4 has also stated that the petitioner was declared as L1 bidder at a cost of Rs. 10.37 Crore. In the same bid, the L2 bidder had quoted an amount of Rs. 17.50 Crores. The fact that the respondent No. 4 has been declared as successful bidder for amount of Rs. 18.28 Crores, clearly demonstrates that bid of Rs. 10.37 Crores submitted by the petitioner concerned was grossly undervalued. The petitioner when subsequently realized that the work could not be completed at the said amount, the project was abandoned by the petitioner.

9. Mr. Arif Sikander Mir, learned counsel for the petitioner has submitted that once the learned Arbitrator has declared the termination of the contract vide communication dated 12.05.2023, as non-est and has directed the authority concerned to pass fresh orders in the light of the relevant material, the contract between the

petitioner and the official respondents gets revived and as such the respondents cannot proceed ahead with the execution of the work allotted to the private respondent in pursuance to NIT dated 25.04.2024, impugned by the petitioner in the present petition. During his submissions, the learned counsel for the petitioner has submitted that the petitioner would not press the relief, whereby the petitioner has sought the directions to the official respondents to allow the petitioner to complete the work in the present case at the revised rates. He has also submitted that the benefit of the work executed by the petitioner was granted to the private respondent by providing the data in the NIT impugned in this petition.

10. *Per contra*, Mr. Viqas Malik, learned counsel for the official respondents, has submitted that the petitioner had made 14 claims before the learned Arbitrator and no relief was sought by the petitioner for permitting the petitioner to continue with the work. When the NIT dated 25th April 2024 was floated by the official respondents and the Letter of Acceptance dated 23.09.2024 was issued in favour of the private respondent, the petitioner never initiated any proceedings, to demonstrate its willingness to execute the work in question, till the award was passed by the learned Arbitrator. During the arbitral proceedings, the petitioner no doubt made offer for executing work at revised rates, but the offer was not accepted by the official respondents. He has laid much stress that the award passed by the learned arbitral tribunal has not attained finality and the official respondents have already awarded the contract to the private respondent and the private respondent after

complying the initial conditions, has proceeded ahead with the execution of the work. He has also argued that for the commercial interest of the petitioner, the work on the project of strategic importance cannot be stalled, by quashing the tender impugned in this petition.

11. Mr. Rahul Pant, learned senior counsel for the private respondent, has submitted that the petitioner is virtually seeking the execution of the award passed by the learned Arbitrator through the medium of this writ petition, which in fact can be enforced only in terms of Section 36 of the Arbitration and Conciliation Act, 1996, once the period stipulated for setting aside the arbitral award lapses. The award passed by the learned Arbitrator is still open to challenge, therefore the question of enforceability does not arise at this stage. He has further argued that the private respondent, not only has invested huge amount and has collected men and machinery for the purpose of execution of the work but also has done good amount of work on spot, as such at this belated stage, the work being done on spot cannot be stopped.

12. Heard learned counsel for the parties and perused the pleadings of the parties.

13. This is admitted fact that the termination of the contract allotted to the petitioner, vide communication dated 12th May 2023 has been declared non-est by the learned Arbitrator vide award dated 15th October, 2024. A perusal of the award reveals that aggrieved of the termination of the contract, the petitioner had lodged 14 claims including the relief of cancellation of the termination of the contract

by the official respondents. The learned Arbitrator vide award dated 15th October 2024 has declared the termination of contract as non-est and has directed the authority concerned to pass fresh orders in the light of relevant material. He has further observed that the fate of performance security and action contemplated to be taken, if any in the light of agreement entered into between the parties, will depend on the outcome of his finding including how the part of work executed by the claimant is to be treated. The submission made by the petitioner that with the passing of award by the learned Arbitrator, the old contract is revived, though appears to be very attractive but the relief sought by the petitioner, though relinquished subsequently during arguments, that the official respondents be permitted to allow the petitioner to complete the work on revised rates, speaks a lot about the intention of the petitioner.

14. This is also evident that the NIT impugned in this petition was floated in the month of April, 2024 and till the award was passed by the learned Arbitrator, the petitioner did not find itself aggrieved of the same and never threw any challenge to the NIT, though the petitioner made offer to the official respondents for execution of work at the revised rates i.e. the enhanced rates but was not accepted by the official respondents. It is evident that the petitioner got encouraged to file this writ petition by the passing of award only, whereby the termination of the contract was held to be bad in law. This court cannot lose the sight of the fact that the contract has been awarded to the private respondent, who has proceeded ahead

with the execution of work and has also made huge investments. There is substance in the submission made by the learned senior counsel for the private respondent that the petitioner is in fact seeking the execution of the award through the medium of this writ petition, which has not yet attained any finality.

15. The fact that there were negotiations between the petitioner and the official respondents for the execution of the work at the enhanced rates, cannot come to the rescue of the petitioner, as any indulgence by this court directing the official respondents to permit the petitioner to execute the work at enhanced rates would amount to re-writing of the contract by the court, which is not permissible under law. Otherwise also, during his submissions, the learned counsel for the petitioner has submitted that the petitioner would not press for the relief of directing the official respondents to permit the petitioner to execute the work at enhanced rates. The impugned NIT cannot be quashed merely because the termination of contract, awarded earlier in favour of the petitioner, has been held to be bad in law, more particularly when the authority concerned has been directed by the learned Arbitrator to pass fresh orders. The authority may or may not pass the order in favour of the petitioner and till the same is done, the fate of the construction of a bridge, of vital importance cannot be permitted to hang in balance.

16. It is the stand of the petitioner that the bridge in question is of strategic importance from the security point of view, as it will provide connectivity to the southern glacier, sub-sector Hanif and the sub sector West, where the troops of Indian army are deployed

on high altitude at close range of the western country, known to threaten the security of the country. At present, the capability of these soldiers is dependent upon the logistic support of the fragile 400 feet bailey suspension bridge which is in deteriorated condition and is of the limited load capacity. It is due to this reason that the construction of the bridge in question is of a vital importance. The claims made by the petitioner before the learned Arbitrator clearly reveals that the petitioner has only commercial interest in the work, whereas the work in question is of strategic importance from the security point of view. When the commercial interest is pitted against the public and national interest, then the balance must tilt in favour of public and national interest. In ***Abraham Patani v. State of Maharashtra***, (2023) 11 SCC 79, the Hon'ble Apex Court has held that when the public interest is so clearly articulated and is an urgent and pressing exigency, private interests must give way to the extent required.

17. In ***Joshi Technologies International Inc. v. Union of India***, (2015)

7 SCC 728, the Hon'ble Apex Court has held as 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.*

(emphasis added)

18. In **National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd.**, (2022) 6

SCC 401, the Hon'ble Supreme Court of India has observed as under:

48. *Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution*

*of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner's notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. **With these words of caution and advice, we rest the matter there and leave it to the wisdom of the Court(s) concerned, which ultimately may look to the larger public interest and the national interest involved.***

(emphasis added)

19. It would be apt to note that the rights of the petitioner have not been finally determined and the official respondents may or may not choose to assail the award passed by the learned Arbitrator and in the event, they choose not to do so, still the competent authority has to decide the issue in the light of directions of the learned Arbitrator, which may lead to time consuming further litigation. In fact, there appears to be no end to litigation in the near future and as such, the execution of the work cannot be allowed to remain in limbo till the litigation comes to an end.
- If the petitioner finds that wrong has been committed, the petitioner can

resort to proceedings seeking damages, as it earlier sought before the learned Arbitrator, but cannot seek the quashing of NIT dated 25th April 2024 and letter of acceptance dated 23.09.2024 by writ of certiorari.

20. In view of what has been considered and discussed above, this Court is of the considered view that the present petition lacks merit and deserves to be dismissed.

21. Accordingly, the writ petition is *dismissed* along with connected CM(s).

SRINAGAR:
31.12.2024.
"Ab. Rashid – PS"



(RAJNESH OSWAL)
JUDGE