

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Civil Writ Jurisdiction Case No.7682 of 2015**

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McNally Bharat Engineering Company Limited having its Registered Office at 4, Mangoe Lane, Kolkata- 700001 and Corporate Office at Eco Space, Campus-2B, Premises No. 11 F/12, New Town, Rajarhat, Kolkata- 700156.

.... .... Petitioner

Versus

1. The Bihar State Electricity Board, now known as Bihar State Power Holding Company Limited, through its Chairman-cum-Managing Director, Vidyut Bhawan, Bailey Road, Patna.
2. The Chairman-cum-Managing Director, Bihar State Power Holding Company Limited, Vidyut Bhawan, Bailey Road, Patna.
3. The Bihar State Power Generation Company Limited, through its Managing Director, Vidyut Bhawan, Bailey Road, Patna.
4. The Managing Director, Bihar State Power Generation Company Limited, Vidyut Bhawan, Bailey Road, Patna.
5. The Chief Engineer (P&D), Bihar State Power Generation Company Limited, Vidyut Bhawan, Bailey Road, Patna.
6. The General Manager-cum-Chief Engineer, Bihar State Power Generation Company Limited, Barauni Thermal Power Station.

.... .... Respondents

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**Appearance :**

For the Petitioner : Mr. Y. V. Giri, Sr. Advocate,  
Mr. S.D. Sanjay, Sr. Advocate,  
Mr. Hemant Kumar, Advocate

For the Respondents : Mr. K.N. Choubey, Sr. Advocate,  
Mr. Vinay Kirti Singh,  
Mr. Akhileshwar Singh, Advocates

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**CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN**

**ORAL JUDGMENT**

**Date: 22-05-2015**

I have heard the parties and have perused the records of

this case.

The writ petition has been filed *inter alia* for grant of following reliefs:-

“(i) For issuance of a writ of Certiorari or any other appropriate writ, order or direction quashing letter no.278 dated 11.05.2015 whereby and where under the respondent Chief Engineer (P & D), Bihar State Power Generation Company Limited (respondent no.5) has unilaterally terminated the contract of Ganga River Water Scheme with the petitioner company without even whispering about notice dated 20<sup>th</sup> April, 2015 given by the petitioner company for referring the matter before an Adjudicator in terms of Clause 6.1.1 of General Condition of Contract.

(ii) For issuance of a writ of mandamus or any other appropriate writ, order or direction commanding the respondents to act on the notice dated 20<sup>th</sup> April 2015 (Annexure-15) given by the petitioner company to the respondent no.1 under Clause 6.1.1 of General Condition of Contract and refer the matter before an Adjudicator in terms of the said clause of General Condition of Contract for adjudication of the dispute related with Contract Agreement no.03 & 04 dated 3<sup>rd</sup> July 2012.

(iii) For any other relief/relief (s) for which the petitioner is entitled to in accordance with law and in the facts and circumstances of the case.”

The petitioner claims that pursuant to an invitation of offer, it had quoted its offer for the required work, v.i.z, Ganges Water Supply Package for Barauni Thermal Power Station, Phase I and II.

The contracts were signed between the petitioner and the respondent-Bihar State Electricity Board now known as Bihar State Power Holding Company Limited. The copies of agreement/ contract nos.3 and 4 have been appended as Annexure 2 series. However, according to the petitioner, due to certain impediments,



work could not be completed within time and, thus, letters were written to the respondents for suitable extension of the contractual delivery period. It has been contended on behalf of the petitioner that reasons for delay stands described in the copies of the letters written to the respondent-Company appended as Annexure 13 series. One of the reasons was the objection being raised by IWAI as necessary permission could not be obtained by the respondents regarding construction of coffer dam. It has been pointed out from Annexure 13, which is a letter written by the petitioner to the Chief Engineer (P & D), Bihar State Power Generation Co. Ltd. dated 02.07.2014, that, for establishing clear water pump house and desilting chamber/Electrical Sub-station Building, no front was made available till that date and there was issue of payment also due to which the contract was delayed.

Learned counsel for the petitioner has further pointed out from the minutes of the meeting convened on 19.12.2014 under the Chairmanship of the Chief Secretary, Government of Bihar to discuss the major issues faced by the Bihar State Power Generation Company Limited in bringing various generation projects in Bihar, a copy of which has been appended as Annexure 14/1, that the issue for execution of Ganga Water Scheme was also discussed and it was found that the site could not be made available to the petitioner by the



respondents due to some technical reasons like existing constructed homes, shops and passing of IOCL pipeline etc. There was some issue for acquisition of Ash Dyke also and the Chief Secretary was requested to resolve the critical issue of acquisition of land. However, when nothing was done and contract was not extended as well as payments were not made then the petitioner, vide Annexure 15 dated 20.04.2015, had invoked Clause 6.1 of the General Conditions of Contract requesting to share the name of the Adjudicator appointed by the respondents for resolution of the issues but unfortunately, without taking such step, the impugned Annexure 1 which is a letter dated 11.05.2015, has been issued and though subject matter indicates that it was a final termination notice for Ganga River Water Scheme but the content shows that the whole contract itself has been terminated and the petitioner has been requested to depute its representatives for final measurement on 15.05.2015 failing which *ex party* measurement was to be made by the Engineer-in-Charge of Barauni Thermal Power Station. It is stated in the letter that the petitioner had failed to complete the works even at the sites where there is no hindrance whatsoever. It is contended that no prior show cause notice before taking final termination of the contract was ever issued and the petitioner was never given reasonable opportunity to answer the charges. It is further contended that there is no whisper in the letter



regarding Annexure 15 dated 20.04.2015 written by the petitioner to the respondents for nominating the Adjudicator for resolving the issue in terms of Clause 6.1 of the General Conditions of Contract and without resorting to such methodology for resolving of the dispute, the respondents have unilaterally terminated the contract. It is further contended that one of the parties to the contract cannot unilaterally hold that the other party is defaulter and penalize him in such a manner. It is urged that which party is at fault and what were the reasons for delay in execution of the work has to be determined by an independent adjudicating authority and for that purpose only Clause 6.1 has been inducted in the General Conditions of Contract.

In support of the aforesaid submission, learned counsel for the petitioner has placed reliance upon a decision of the Apex Court rendered in **M/s. J. G. Engineers Pvt. Ltd. V. Union of India & Anr. [A.I.R. 2011 Supreme Court 2477]**. Learned counsel has further placed reliance upon a decision of a Single Bench of this Court rendered in **M/s NCC Ltd. (formerly known as Nagarjuna Construction Company Limited) and Anr. Vs. the State of Bihar & Ors. [2013 (1) PLJR 952]** holding that effect of an order declaring a party as defaulter is grave. Since such action would have serious consequences upon the right of a contractor to exercise his fundamental right under Article 19(1)(g) of the Constitution, it cannot



be considered as a purely contractual situation or violation of contractual right. Thus, such action can be questioned by the contractor who has suffered the order by challenging the same by filing a writ petition under Article 226 of the Constitution of India. Learned counsel further places reliance upon another decision of the Hon'ble Supreme Court rendered in **Oryx Fisheries Private Limited Versus Union of India and Others [(2010) 13 Supreme Court Cases 427]** holding that it is well settled that even quasi-judicial authority in exercise of its statutory power must act fairly and must act with an open mind while initiating a show cause proceeding. A show cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice and the noticee should get an opportunity to deny his guilt and establish his innocence. The Apex Court has laid down the guidelines for the quasi-judicial authority for proceeding in such situation. Learned counsel has submitted that the principles laid down in the aforesaid case would be applicable in the present case also. It is contended that the letters, whenever written by the respondents, were duly replied but not a single ground taken in such letters have even been discussed in the impugned Annexure 1.

A counter affidavit has been filed on behalf of the respondents defending their action in issuing Annexure 1. It is



submitted that there has not been any violation of the principle of natural justice inasmuch as Annexure 1 itself refers to three earlier letters which were given to the petitioner. He refers to one such letter referred in Annexure 1 which is dated 27.11.2013 to show that vide paragraph 12 thereof the petitioner was requested in terms of Clause 42.2 of the General Conditions of Contract to the remedy the defaults which has been stated in the letter and to complete the works mentioned in paragraph 10(A), 10(B) and 10(C) thereof within 14 days of such notice failing which his contract would be liable to be terminated as per Clause 42.2 of the General Conditions of Contract. Learned counsel appearing for the respondents has further submitted that vide Annexure B dated 17.07.2014 again a last chance was given to the petitioner in continuation of the earlier notice dated 27.11.2013 to resume the site works and furnish its utilization statement of amounts released by them positively by 19.07.2014 failing which strong coercive steps may be taken against the petitioner. Learned counsel for the respondents have also prepared a chart appended as Annexure E to show the status of work and work sites to impress upon this Court that even where the sites have been made available, the work has not been completed as at some places only 50% work and at other places about 70% work has been completed. Learned counsel for the respondents has also placed reliance upon the minutes

of the meeting appended as Annexure 14/1 to show that petitioner was directed to complete the work otherwise strong action would be taken.

Upon consideration of the rival contention of the parties, this Court finds force in the submission raised on behalf of the petitioner. It may be true that the petitioner could not complete the work within the period of contract but he was all along writing letters and explaining the things and showing that the respondents were also not been able to get the necessary permission or sites were not made available by them due to some land acquisition hiccup etc. and ultimately they raised Clause 6.1 of the General Conditions of Contract for appointment of Adjudicator so that differences could be resolved. The respondents admittedly did not act upon the aforesaid request made which, in my considered opinion, they were duty bound to do before taking any stern action such as termination of the contract. The aforesaid Clause of the General Conditions of Contract is extracted as under for better appreciation of the matter:-

“6.1 Adjudicator

6.1.1 If any dispute of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract, including without prejudice to the generality of the foregoing, any question regarding its existence, validity or termination, or the execution of the Facilities- whether during the progress of the Facilities or after their completion and whether before or after the termination, abandonment or breach of the Contract-the parties shall seek to resolve any such dispute or difference by mutual consultation. If the parties fail to resolve such a dispute or difference by mutual consultation, then the dispute shall be referred in writing by either party to the Adjudicator, with

a copy to the other party.

6.1.2 The Adjudicator shall give its decision in writing to both parties within twenty eight (28) days of a dispute being referred to it. If the Adjudicator has done so, and no notice of intention to commence arbitration has been given by either the Employer or the Contractor within fifty-six (56) days of such reference, the decision shall become final and binding upon the Employer and the Contractor. Any decision that has become final and binding shall be implemented by the parties forthwith.”

Clause 6.1.1 lays down in clear terms that if the parties failed to resolve their difference by mutual consultation then the dispute shall be referred in writing by either parties to the Adjudicator with a copy of the other party who shall give its decision in writing to both the parties within 28 days of a dispute being referred to it. If no notice of intention to commence arbitration has been given by either the employer or the contractor within 56 days of such decision then it shall become binding upon the employer and the contractor. Any decision that has become final and binding shall be implemented by the parties.

Though it has been contended at the time of hearing that, in view of Annexure 15, which is a notice for adjudication under Clause 6.1.1., having been addressed to the Chairman, Bihar State Electricity Board (BSEB), an authority no more in existence as it has been replaced by the Company namely Bihar State Power Holding Company Limited, nothing could be considered but in my considered opinion a hyper-technical issue is being raised by the



respondents as it has nowhere stated in the counter affidavit that the aforesaid notice, contained in Annexure 15, was never received by them. That apart, it also appears that a copy of the same has also been sent to the Managing Director, Bihar State Power General Company Limited as well as to the Chief Engineer (P & D) Bihar State Power General Company Limited, who, in fact, is the author of the impugned Annexure 1.

Thus, in my considered opinion, the decision taken in Annexure 1 suffers from diverse vices. It is true that a notice, as contained in Annexure A, was given on 27.11.2013 directing the petitioner to complete the work mentioned in paragraph 10(A), 10(B) and 10(C) thereof within 14 days failing which steps for termination as per Clause 42.2 would be taken but that step was never taken by them and again a letter was issued on 17.07.2014 in continuation of the earlier letter directing him to furnish utilization statement released by them positively by 19.07.2014 failing which strong coercive steps may be taken against the company. Petitioner's grievance and pointing out the deficiency on part of the respondents has been appended in the writ application as Annexure 10 series as well as 13 series. The last reference given in the impugned Annexure 1 is of letter no.514 dated 17.07.2014 which has been appended as Annexure B to the counter affidavit. By issuing aforesaid letter a direction was



given to the petitioner to resume site works and clear front as well as to furnish its utilization statement of amount released by the respondents, failing which stern action would be taken but in fact no action was taken within a reasonable period. Annexure 1 again shows that it is a final termination notice of the Ganga Water River Scheme but it appears that in fact a decision for termination has been taken. However, Annexure 1 does not disclose at all as to whether any reply was given by the petitioner to the referred letters or not. If replies were given, what grounds were raised by the petitioner and if some grounds have been raised by the petitioner then why those grounds are not tenable. A unilateral decision for termination of contract appears to have been taken. Even the notice for adjudication of matter by appointment of Adjudicator has also not been discussed in the impugned letter at all.

The Apex Court in **M/s. J. G. Engineers Pvt. Ltd. (Supra)** has observed that the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or other party committed breach. The said question can only be decided by an adjudicatory forum. In the case in hand, though the petitioner has referred the matter by asking the respondents to nominate the Adjudicator in terms of Clause



6.1.1, neither such action was taken by the respondents nor does the letter stand discussed in the impugned order. Identical view has been taken by A Single Bench of this Court also in **M/s. NCC Ltd. (Supra)** holding that, if the charge of default is made by the authorities of the State which was factually denied by the contractor who, on the other hand, had made allegations against the State authorities itself as being equally liable and at fault in the matter, in such case, the issue can only be decided by an impartial adjudicatory body.

In view of the aforementioned facts and circumstances and after consideration of the matter as above, this Court is of the opinion that the impugned Annexure 1 fails the taste of fairness and, thus, is held to be an arbitrary action by the respondents and, as such, is liable to be quashed and set aside. Accordingly, the same is quashed and set aside. The respondents are directed to respond to Annexure 15 by pointing out the name of the Adjudicator for the purpose of resolving of the dispute as per Clause 6.1.1 of the G.C.C. The petitioner would also be required to co-operate so that Adjudicator comes out with a decision within 28 days from the date of reference of the matter to it for adjudication. Thereafter, both the parties would be at liberty to proceed further in accordance with law and the terms and conditions of the contract as well as the G.C.C. However, it is made

clear that whenever the respondents decide to proceed against the petitioner, reasonable opportunity would be required to be given to it before taking any final action.

With the aforesaid observations, findings as well as the directions given, this writ application stands allowed.

**(Dr. Ravi Ranjan, J)**

N.H. / Sanjay-II/-

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