

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.10602 of 2014

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ECI Engineering AND Construction Company Limited a company duly incorporated under the Companies Act, 1956 having its Registered Office at Plot No. A-12-13, Panchavati Township, Manikonda, Rajendra Nagar Mandal, RR District, Hyderabad - 500089 through its General Manager Sri Peddu Srinivasa Rao, Son of Late P.V. Ratnam.

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Department of Road Construction, Government of Bihar, Patna.
2. The Secretary, Road Construction Department, Government of Bihar, Patna.
3. Engineer-in-Chief cum Additional Commissioner cum Special Secretary, Road Construction Department, Visheshwariya Bhawan, Bailey Road, Patna.
4. The Superintending Engineer, Bhojpur Road Circle, Ara (Bihar).
5. The Executive Engineer, Bhabhua Road Division, Bhabhua (Bihar).

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 10702 of 2014

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ECI Engineering and Construction Company Limited a Company duly incorporated under the Companies Act, 1956 having its registered office at Plot No. A-12-13, Panchavati Township, Manikonda, Rajendra Nagar Mandal, RR District, Hyderabad - 500089 through its General Manager Sri Peddu Srinivasa Rao son of late P.V. Ratnam.

.... Petitioner/s

Versus

1. The State of Bihar Through The Principal Secretary, Department of Road Construction Government of Bihar, Patna.
2. The Secretary, Road Construction Department, Government of Bihar, Patna.
3. Engineer-in-Chief-Cum-Additional Commissioner-Cum-Special Secretary, Road Construction Department, Visheshwariya Bhawan, Bailey Road, Patna.
4. The Superintending Engineer, Bhojpur Road Circle, Ara (Bihar).
5. The Executive Engineer, Road Construction Division, Dehri-on-Sone, Bihar.

.... Respondent/s

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Appearance :

**(In CWJC No. 10602 of 2014) &
(In CWJC No. 10702 of 2014)**

For the Petitioner/s : Mr. Y.V. Giri, Sr. Adv.
Mr. Nikhil Kr. Agrawal, Adv.
Mr. Santosh Kr. Mishra, Adv.
For the State : Mr. Kaushal Kumar Jha, A.A.G.
Mr. Amish Kumar AC to A.A.G.

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CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA

CAV JUDGMENT

Date: 6-11-2015

Both the writ applications, filed by the same petitioner, in fact also involving identical issues, were heard together and are being disposed of by this common judgment.

2. In CWJC No. 10602 of 2014, the prayer of the petitioner in paragraph no.1 of the writ application reads as follows:-

- “1(i) To issue an appropriate writ/order/direction , in the nature of certiorari for quashing the Order dated 17.12.2012 passed by the Executive Engineer, Bhabhua Road Division, Bhabhua as contained in Memo No. 1489 dated 17.12.2012 by which the work of strengthening of Bhabhua-Adhaura Road awarded under Package No. BR/SBW/MDR/04/06-07 vide Agreement No.1 PWD-2/2006-07 to the Petitioner Company in purported exercise of power under Clause-3(iii), 3(iv) & 3(a) of the Special Bid Document (SBD) of the Contract has been rescinded and has further been directed that in terms of Clause-14(b) of the SBD the rest of the incomplete work would be carried out by any means at the risk and cost of the Petitioner (as contained in Annexure-18).*
- (ii) To issue an appropriate writ/order/ direction, in the nature of certiorari for quashing the Letter No.86 dated 29.01.2014 issued by the Executive Engineer, Road Division, RCD, Bhabhua by which he has requested the Senior Manager, Oriental Bank of Commerce, S.D. Road, Branch- Secunderabad (A.P.) to forfeit the Bank Guarantee bearing No. 10410005711 dated 28.01.2011 amounting to Rs. 50 Lacs furnished for security Deposits by the Petitioner and to issue a Bank Draft against the said B.G. Amount, as contained in Annexur-22.*
- (iii) To issue an appropriate writ/order/ direction, in the*

nature of certiorari for quashing the Letter No. 87 dated 29.01.2014 issued by the Executive Engineer, Road Division, RCD, Bhabhua by which he has requested the Senior Manage, Bank of Indian, Hyderabad MCB PTI Building, AC Guards, Masab Tank, Hyderabad (A.P.) to forfeit the Bank Guarantees bearing Nos. (a) 86981 FIBG 110034 dated 15.04.2011 of Rs. 50 Lacs (b) 86981 FIBG 110060 dated 08.06.2011 of Rs. 90 Lacs, the total being Rs. 1.40 crore furnished for Security Deposit by the Petitioner and to issue a Bank Draft against the said B.Gs. Amount, as contained in Annexure-23.

- (iv) *To issue an appropriate writ/order/ direction in the nature of certiorari for quashing the Letter No. 88 dated 29.01.2014 issued by the Executive Engineer, Road Division, RCD, Bhabhua by which he has requested the Senior Manage, Oriental Bank of Commerce, S.D. Road, Branch-Secunderabad (A.P.) to forfeit the Bank Guarantee bearing No. 10410007006 dated 10.11.2006 amounting to Rs. 1,07,93,709/- furnished for Performance Guarantee by the Petitioner and to issue a Bank Draft against the said B.G. Amount, as contained in Annexure-24.*
- (v) *To issue an appropriate writ/order/ direction, directing the Respondents not to forfeit the aforesaid Bank Guarantees furnished by the Petitioner Company for Security Deposit and Performance Guarantee during pendency of the writ application.*
- (vi) *To issue an appropriate writ/order/ direction, in the nature of mandamus commanding the Respondents to release the payments of EOT, Escalation, RA Bills, Extra Work Variation and Security Deposit amounting approximately Rs. 1,41,89,520/-."*

3. In CWJC No. 10702 of 2014, the prayer of the

petitioner reads as follows:-

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- “1(i) *To issue an appropriate writ/order/ direction, in the nature of certiorari for quashing the Order dated 18.12.2012 passed by the Executive Engineer, Road Division, Dehri-on-Sone as contained in Memo No. 3038 dated 18.12.2012 by which the Contract Work of improvement of Roads under Road Division Dehri-on-Sone (Bihar) awarded under Package No. BR/SBW/MDR/05/06-07 to the Petitioner Company in purported exercise of power under Clause-3(iii), 3(iv) & 3(a) of the Special Bid Document (SBD) of the Contract has been rescinded and has further been directed that in terms of Clause-14(b) of the SBD the rest of the incomplete work would be carried out by any means at the risk and cost of the Petitioner (as contained in Annexure-13).*
- (ii) *To issue an appropriate writ/order/ direction, in the nature of certiorari for quashing the Order dated 03.01.2014 issued vide Letter No. 96 dated 25.01.2014 by the Executive Engineer, Road Division, Dehri-on-Sone by which he has forfeited the Bank Guarantees being B.G. No. 8698 IFIGB 110033 dated 15.04.2011 amounting to Rs. 2 Crores and B.G. No. 8698 IFIGB 110061 dated 08.06.2011 of Rs. 70 Lacs both furnished by the Petitioner Company and have also directed the Manager, Bank of India, Mid Corporate Branch, Hyderabad to prepare Demand Draft in his favour, as contained in Annexure-18.*
- (iii) *To issue an appropriate writ/order/ direction, directing the Respondents not to en-cash the aforesaid Bank Guarantees furnished by the Petitioner Company during pendency of the writ application.*
- (iv) *To issue an appropriate writ/order/ direction, in the nature of mandamus commanding the Respondents to release the Security Deposit (Retention Money), earnest Money and Penalty Amount which have been deducted arbitrarily and also to direct the*

Respondents to make payment of the extra work which has been taken by the Petitioner.

- (v) *To issue an appropriate writ/order/ direction, in the nature of mandamus commanding the Respondents to approve and make payment of the Final Bills of Nokha-Noonsari Road, Rajpur- Nokha Road and Itma-Sakla Road amounting approximately Rs. 1,02,30,035/- (Rupees One Crore Two Lacs Thirty Thousand and Thirty Thousand and Thirty Five only) and to close the Contract.”*

4. Though the bulk of both the writ applications are quite voluminous but the facts of both the cases lie in a very narrow compass. In CWJC No. 10602 of 2014. It is the case of the petitioner that pursuant to the Notice Inviting Tender (NIT) for execution of the improvement of road under the aegis of the Road Construction Division, a contract was awarded to the petitioner and the value of the work to be executed was Rs. 53,96,85,465/- and after the petitioner had furnished performance bank guarantee on 10.11.2006, the formal agreement was entered into on 6.1.2007 under which the work was to be completed by 5.12.2008.

5. The petitioner, however, could not complete the work despite repeated reminders given to it by the Respondents. As a matter of fact the petitioner, on the basis of undertaking to complete the work in its letter dated 9.12.2008, was given extension of time till 31.3.2009 but when the work could still not be completed by the petitioner and it had given another undertaking on 8.10.2009



whereafter the time for completion of the work was extended up to 31.3.2010. As a matter of fact, when the petitioner's work was found to be wholly unsatisfactory by the Respondents, it was also subjected to certain monetary damages of Rs. 1,90059 lacs on 21.1.2009 and again the similar amount of Rs. 1,90059 of damage was imposed on 5.2.2009 which also was deducted from the running bills of the petitioner.

6. Despite the aforesaid penal measures taken by the authorities of the Road Construction Department, there was insufficient progress of work for which the petitioner was again made aware by the letters of the Executive Engineer, Road Division, Bhabua dated 19.2.2011 and 21.5.2011 informing the petitioner that if the work was not completed within the prescribed extended period of time, action could be taken against it as stipulated under the Standard Bidding Document (SBD). As a matter of fact, the petitioner in its application dated 10.3.2011 had again given a written undertaking on affidavit to complete the work by 30.6.2011 and on this written undertaking, the Engineer-in-Chief of the Road Construction Department vide letter no. 1659 dated 5.4.2011 had given the final extension of time till 30.6.2011 but, even then, in course of periodical fortnightly review of the progress of the work of the petitioner, the same was found to be unsatisfactory. From the records, it would also transpire that as with regard to construction of Bhabua Adhaura road,

the petitioner was given extension of time by the order of the Engineer-in-Chief dated 28.11.2011 to complete the work by 31.3.2012 but there was no significant progress towards the completion of the aforesaid work and even construction of that road was not completed by the petitioner on 31.3.2012.

7. Ultimately, the petitioner was given a show-cause notice on 7.8.2012 and when the reply of the petitioner was not found to satisfactory, a final show-cause notice was given on 30.11.2012. From the reply filed by the petitioner, it becomes clear that it was not willing to complete the work and, as such, the contract was rescinded by the impugned order dated 17.12.2012 by the Executive Engineer, Road Construction Division, Bhabua as per Clause 3(iii) 3(iv) and 3(a) of the SBD and the amount of advance and security was forfeited. In the same impugned order, it was also made clear to the petitioner that the remaining left over work of the petitioner would be completed at the risk and cost of the petitioner as stipulated under Clause 14(b) of the SBD. Subsequently, the follow up consequential action were taken by the Executive Engineer by way of invoking the bank guarantee by the three separate letter nos. 86, 87 & 88 all dated 29.11.2014 asking the banker of the bank to deposit a sum of Rs. 50 lacks, 1.40 crore and Rs. 1,07,93,709/-.

8. In the second writ application of the same petitioner, CWJC No. 10702 of 2014, the facts again relevant for the purpose of



this writ application is that the petitioner was awarded contract for construction of Nokha-Noonsari Road, Rajpur-Nokha Road and Itma-Sakla Road on a contract price of Rs. 45,78,51,618/- and after it had deposited the performance bank guarantee of Rs. 91,57,032/-, the formal agreement was executed on 13.10.2006 under which construction of the road by the petitioner was to be completed by 13.9.2008. Here also, the petitioner did not complete the work within the stipulated period and on its request, the time for completion of the work was extended by order dated 18.11.2008 up to 25.3.2009. The petitioner by its letter dated 3.12.2008 had given an undertaking in writing to complete the work by 30.6.2009 and had also submitted an application for extension of time from 25.3.2002 to 30.6.2009 whereafter under the order of the competent authority, the time was extended up to 31.3.2009 with a stipulation that some of the portion of the work, namely, DE-1, DE-5 and DE-7 must be completed by 25.3.2009.

9. When the petitioner did not complete the aforesaid specified work of DE-5 and DE-7 and was found to have completed only 59.1% of the total work as on 26.3.2009, a show-cause notice was issued to the petitioner as to why he should not be debarred in participating in any future tender which was followed by another letter of the Executive Engineer of the Road Construction Department dated 6.4.2009 for expediting the work of construction of the road of



DE-2, DE-5, DE77 & DE-8. In response to the aforesaid letter of the Executive Engineer dated 6.4.2009, the petitioner had submitted a revised work programme undertaking to complete the work by 31.5.2009. In the meantime, the Executive Engineer by his letter dated 27.4.2009 on account of finding the construction of four roads being DE-2, DE-5, DE-7 and DE-8 not completed had passed an order debarring the petitioner from participating in any future tender of the department. The petitioner, however, did not complete the work whereafter it was given a show-cause notice by the Executive Engineer on 20.7.2009 and in reply thereof, the petitioner vide its letter dated 24.7.2009 had given an undertaking to complete the work by 31.12.2009 and had also asked for the extension of the time.

10. It also transpires that in the meeting held in the chambers of the Secretary of the Road Construction Department on 9.9.2009, the representative of the petitioner had undertaken that the work would be commenced on 10.9.2009 and pursuant to the said oral assurance, a written undertaking in the form of revised work programme was submitted by the petitioner on 8.9.2009 requesting the extension of time till 28.2.2010. The Executive Engineer, however, by the letter dated 14.10.2009 had informed the petitioner that the work programme was also incomplete, inasmuch as, there was no mention of the completion of the construction work of the Nokha-Nunsari Road (DE-5) and, as such, the petitioner was asked to give



the work programme on affidavit as to in what period it would complete the work. The petitioner, however, did not respond to the aforesaid letter of the Executive Engineer dated 14.10.2009 whereafter it was subjected a show-cause notice by the Executive Engineer vide letter dated 20.11.2009 and was also asked to make certain repairs in the other completed work of DE-1, DE-3, DE-4 and DE-9 in view of its being under Defect Liability Period.

11. The petitioner infact was asked to participate in the meeting to be held in the office of the Secretary of the Road Construction Department on 20.11.2009 though the petitioner by its letter dated 16.11.2009 had given a written undertaking to complete the work by 31.3.2010 but the work of construction of road was still not completed and on 26.3.2010, it had submitted a revised work programme and given a written undertaking on affidavit to complete the work on 31.3.2010 whereafter it was also granted extension of time till 31.3.2010 with a further stipulation that the remaining incomplete work of DE-2, DE-5, DE-7 & DE-8 should be completed by the petitioner by 31.5.2010. The work, however, was not completed by the petitioner even by 31.5.2010. The petitioner after almost one year on 13.2.2011 had submitted an application with revised work programme seeking extension of time till 31.3.2011 and again by another application dated 23.4.2011 had sought extension of time till 30.6.2011.



12. The petitioner in this case also had given a written undertaking that the work of the two roads, namely, DE-2 and DE-5 will be completed by the petitioner by 30.6.2011 and on such an undertaking, the time for completion of the work was again extended by an order dated 5.4.2011 giving time till 30.6.2011 and ultimately the Engineer-in-Chief, in view of the request of further extension of time vide letter dated 28.11.2011, had given the petitioner last extension of time till 31.3.2012. The petitioner, however, did not complete the road construction work till 31.3.2012 whereafter the explanation was called for on 11.8.2012 and 25.8.2012 and in reply whereof the petitioner vide his letter dated 24.8.2012 and 18.10.2012 had given a written undertaking to complete the work after the rainy season. The petitioner, however, did not take up the unfinished work whereafter it was subjected to show-cause notice on 11.10.2012, 29.11.2012, 8.12.2012 and 10.12.2012 as to why the agreement of the petitioner should not be rescinded and the amount of security should be forfeited apart from its being black listed. The petitioner, in reply to the aforesaid show-cause notices, by letter dated 17.12.2012, had given an undertaking to complete the work by 15.3.2013 and had also sought extension of time for completion of the work.

13. It was in these circumstances that the impugned order was passed on 18.12.2012 rescinding the contract and also forfeiting the performance guarantee and the amount of security of the petitioner



and also informed him that the left over of the work of the petitioner will be completed at the risk and cost of the petitioner. As a follow up measure, the Executive Engineer, Road Construction Department, Dehri-on-Sone had approached the banker for invoking the bank guarantee of the petitioner and deposit of a sum of Rs. 2 crore 70 lacks in the government Treasury.

14. Mr. Y.V. Giri, learned senior counsel for the petitioner, while assailing the impugned orders in both the writ applications, had mainly concentrated on the aspect that the petitioner had almost completed the work, inasmuch as, in the first writ application, the work of the petitioner relating to construction of road in Bhabua Road Division, it had not only completed two out of three roads, namely, Chainpur-Biur to G.T. Road and Aukhra Hata-Mahdaich Road and in fact even the work of the third road, namely, Bhabhua-Adhaura Road, the petitioner had completed 99% of the work and only 4 K.M. of the road work was to be completed. He has also submitted that the progress of the work of the petitioner was obstructed on account of area being hilly and infested with naxalites as also due to withholding of its payment of running bills apart from non-availability of aggregate in the State of Bihar and sudden price rise of the bitumen. Mr. Giri has emphasized that under such circumstances, the impugned order rescinding the contract and also subjecting the petitioner to forfeiture of its advance and security by

way of invoking bank guarantee is wholly arbitrary and illegal.

15. In the same vein, Mr. Giri, while explaining the facts of the second case, had submitted that the construction of the main work allotted to the petitioner was already completed and it was only in respect of widening and strengthening of Beda Darshna DIH, Raipur Chor road was in fact an additional work for which agreement had been completed. He has also sought to explain that the petitioner had completed the entire work except 1% work in two roads i.e. Rajpur Nokha Road and Nokha Noorsarai Road and that too on account of non-availability of the aggregates as the Sasaram Quarries were closed. Mr. Giri in this regard has laid emphasis that at the time of agreement, the respondents had assured to provide aggregates from Sasaram quarry but when that were not provided, the petitioner was forced to bring aggregates from distant places in the State of Uttar Pradesh at much higher prices which led to delay in completion of only a very small quantity of work left to be completed in the aforesaid two roads. In this case also, Mr. Giri had sought to rely on the problem of extremists at certain point which had also hampered the progress of work apart from the severe cold weather condition hampering the progress of bitumen work.

16. Thus according to Mr. Giri , the impugned order rescinding the agreement of the petitioner in both the cases was wholly arbitrary and illegal, therefore they are fit to be quashed and

both the writ applications should be accordingly allowed.

17. Per contra, learned counsel for the State, in both the cases, has initially raised the question of maintainability of the writ applications on account of existence of arbitration clause in the interparte agreement. Apart from that, the respondents, by filing the counter affidavit, have explained that time being essence of the contract, the petitioner did not complete the work, inasmuch as, even the two completed works were not actually completed fully and around 5.726 KM of the work of WMM & BM and 7.490 KM of the SDBC-7 was still to be completed. It has also been explained that whatever reasons have been given by the petitioner for non-completion of the work are not correct because for the same subject, other contractors had completed the work in view of agreement no. 5 PWD-2 of 2012-13.

18. Learned counsel for the State in fact had also relied on different communications made from time to time to show that there was no laches on the part of the petitioner and in fact the petitioner was twice being reminded from time to time to complete the work apart from making payment of running bill corresponding to the progress of the work apart from making payment of escalation by eight times inasmuch as in the counter affidavit, the respondents have also explained that the rise in Bitumen price took place after the stipulated working period as per the agreement and the quarry also

was closed after the working period.

19. Apart from the aforesaid explanation, the respondents have also explained that both the contracts were awarded at a higher rate of more than 8.10% of the scheduled rate only after considering the situation of the site and, therefore, the petitioner cannot be allowed to take a plea of deteriorating condition at the site on account of naxalite problem or any other related issues. The respondents have also explained that the impugned order has been passed as a last measure and that too when the work was not completed by the petitioner even after expiry of four years from the date of original time schedule for completion of the work.

20. Amidst the aforesaid pleadings followed by the submission of the learned counsel for the both the petitioners, the first and foremost question will be as to whether the writ application can be maintained for enforcing the contractual obligation. Admittedly, the agreement in both the cases arises out of arises out of non-statutory contract. Thus, strictly speaking, the terms of the contract cannot be enforced by a writ application as was held by the Apex Court in the case of *M/s Radhakrishna Agarwal & Ors. Vs. State of Bihar & Ors.* reported in *AIR 1977 SC 1496* wherein it was held that after the state or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines right and obligations of

the parties inter se. Here under Clause 3, the provision has been made as to when the contract can be determined/rescinded which, for the sake of clarity and convenience, is quoted herein below:-

“Clause 3

When Contract can be Determined/Rescinded

Subject to the other provisions contained in this clause the Engineer-in-Charge may, without prejudice to his any other rights or remedy against the contractor in respect of any delay inferior workmanship, any claims for damages and/or any other provisions of this contract or otherwise, and whether the date of completion has or has not elapsed by notice in writing absolutely determine the contract in any of the following cases:

- i) If the contractor having been given by the Engineer-in-Charge a notice in writing to rectify, reconstruct or replace any defective work or that the work is being performed in an inefficient or otherwise improper or unworkman like manner shall omit to comply with the requirement of such notice for a period of seven days thereafter.*
- ii) If the contractor being a company shall pass a resolution or the court shall make an order that the company shall be wind up or if a receiver or a manager on behalf of a creditor shall be appointed or if circumstances shall arise which entitle the court or the creditor to appoint a receiver or a manager or which entitle the court to make a winding up order.*
- iii) If the contractor has without reasonable cause, suspended the progress of the work or has failed to proceed with the work with due diligence so that in the opinion of the Engineer-in-Charge (which shall be final and binding) he will be unable to secure completion of the work by the date of completion and continues to do so after a notice in writing of seven days from the Engineer-in-Charge.*

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- iv) *If the contractor fails to complete the work within the stipulated date or items of work with individual date of completion, if any stipulated, on or before such date(s) of completion and does not complete them within the period specified in a notice given in writing in that behalf by the Engineer-in-Charge.*
 - v) *If the contractor persistently neglects to carry out his obligations under the contract and/or commits default in complying with any of the terms and conditions of the contract and does not remedy it or take effective steps to remedy it within 7 days after a notice in writing is given to him in that behalf by the Engineer-in-Charge.*
 - vi) *If the contractor commits any acts mentioned in Clause 21 hereof;*
 - vii) *If the work is not started by the contractor within 1/8th of the stipulated time subject to the maximum of 45 days.*

When the contractor has made himself liable for action under any of the cases aforesaid, the Engineer-in-Charge on behalf of the Governor of Bihar shall have powers:

- a) *To determine or rescind the contract as aforesaid (of which termination or rescission notice in writing to the contractor under the hand of Engineer-in-Charge shall be conclusive evidence). Upon such determination or rescission the Earnest Money Deposit, Security Deposit already recovered and Performance Guarantee under the contract shall be liable to be forfeited and shall be absolutely at the disposal of the Government.*
- b) *After giving notice to the contractor to measure up the work of the contractor and to take such whole or the balance or part thereof as shall be un-executed out of his hands and to give it to*

another contractor to complete the work. The contractor, whose contract is determined or rescinded as above, shall not be allowed to participate in the tendering process for the balance work.

In the event of above course(s) being adopted by the Engineer-in-Charge, the contractor shall have no claim to compensation for any loss sustained by him by reasons of his having purchased or procured any materials or entered into any engagements or made any advances on account or with a view to the execution of the work or the performance of the contract. And in case action is taken under any of the provision aforesaid the contractor shall not be entitled to recover or be paid any sum for any work thereof or actually performed under this contract unless and until the Engineer-in-Charge has certified in writing the performance of such work and the value payable in respect thereof and he shall only be entitled to be paid the value so certified.

Clause 3A

In case, the work cannot be started due to reasons not within the control of the contractor as decided by Chief Engineer within 1/4th of the stipulated time for completion of work, either party may close the contract. In such eventuality, the Earnest Money deposit and the Performance Guarantee of the contractor shall be refunded, but no payment on account of interest, loss of profit or damages, etc. shall be payable at all. the reasons shall be examined by the Superintending Engineer and his decision shall be final and binding.”

21. As would be evidenced from the aforesaid Clause-3 of the SBD, an specific power has been vested to assess the work and

also take action if the work is not completed within the prescribed period of time. Determination/rescinding of the contract, therefore, is part of the condition of agreement.

22. Way back the Apex Court in the case of *C.K. Achutan Vs. State of Kerala* reported in *AIR 1959 SC 490* relating to cancellation of contract for supply of milk to government had gone to hold the writ application to be wholly misconceived and it was observed that a contract which is held from Government stands on no different footing from a contract held from a private party and a breach of contract may entitle a person to get damages or even specific performance by a civil court, but no petition would lie.

23. A division bench of this Court following the ratio in the case of C.K. Achutan (supra) in the case of *B.K. Sinha Vs. State of Bihar* reported in *AIR 1974 Pat 230* had again reiterated the same principles by holding as follows:-

“A writ of mandamus cannot issue to compel the authorities to remedy a breach of contract pure and simple.”

24. The Apex Court again in the case of *Har Shankar Vs. Dy. Excise & Taxation Commissioner* reported in *AIR 1975 SC 1121* while considering the issue of cancellation of retail sale of country liquor and foreign liquor on account of default in making payment had gone to hold as follows:-

“Those who contract with open eyes must accept the burdens of the contract along with its benefits. Reciprocal rights

and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force.”

25. Judged in this background, this Court would find it very difficult to examine as to whether the petitioners or the respondent State is the erring person. The facts themselves reveal that the required work was not completed by the petitioner within a period of two years and infact even after expiry of a period of four years from the agreed date of completion of work. Whether the petitioner was facing naxalite problem or whether the petitioner was not getting the materials or whether the petitioner was actually deliberately trying to delay the completion of the project as has been explained by the respondents being a wholly disputed question of fact cannot be decided in writ jurisdiction.

26. It is here that the preliminary objection of the State becomes one of great significance. Clause 25 of the agreement provides full mechanism for resolution of such dispute by mode of arbitration. Clause 25 reads as follows:-

“25. Except where otherwise provided in the contract all questions and dispute relating to the meaning of the specifications, design, drawings and instructions here-in-before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim right matter or thing whatsoever in any way arising out of or relating to contract, designs, drawings, specifications, estimates, instructions, orders or these

conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter.

- i) *If the contractor considered any work demanded of him to be outside the requirements of the contract, or dispute any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 7 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of fifteen days from the receipt of the contractor's letter.*

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the letter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator failing which the said decision shall be final binding and

conclusive and not referable to adjudication by the arbitrator.

- ii) *Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above disputes or difference shall be referred for adjudication through arbitrator appointed by Engineer-in-Chief or the administrative head of the said P.W.D. if the arbitrator so appointed is unable or unwilling to act or resign his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.*

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by such Engineer-in-Chief or the administrative head of the department as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitrator at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 45 days or receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.



The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of the contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.

All arbitration shall be held at PATNA and at no other place.”

27. To that extent, this Court would find substance in the preliminary objection raised by the learned counsel for the State who has also placed reliance on a judgment of the Radha Krishn Agarwal (supra) as with regard to maintainability of a writ application arising out of non-statutory contract. Further, the Apex Court in the case of

State of U.P. Vs. Bridge & Roof Co. (India) Ltd. reported in (1996) 6 SCC 22 has categorically gone to hold that in presence of an arbitration clause, the writ application will not be maintainable. In this regard, the Apex Court had held as follows:-

“Further, the contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration. The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy- in this case, provided in the contract itself- is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226.”

28. Further, the contract in question contains clause providing settlement by arbitration. This court would not like to go to multiply the issue in presence of arbitration clause, inasmuch as, the same view has also been reiterated even in the case of *ABL International Ltd. & Anr. Vs. Export Credit Guarantee Corporation of India Ltd. & Ors.* reported in 2004(3) SCC 553 wherein it has been held as follows:-

“It is well known that if the parties to a dispute had agreed to settle their dispute by arbitration and if there is an agreement in that regard, the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration, unless of course both the parties to the dispute agree on another mode of dispute resolution.”

29. Even recently, a Division Bench of this court to which I

am also party in the order dated 12.1.2011 in LPA No. 762 of 2009 has gone to hold as follows:-

“The refusal of writ application under Article 226 of the Constitution in a case where the parties are bound by an earlier agreement providing for arbitration by now is a well settled law.”

30. Mr. Giri in reply has relied to the aforesaid preliminary objection in the judgment of the Apex Court in the case of *M/s Hindustan Petroleum Corpn. Ltd. & Ors. Vs. M/s Super Highway Services & Anr.* reported in 2010(2) PLJR 160 (SC). This Court would however find that no objection in the aforesaid case was raised with regard to arbitration clause being not invoked by the Petroleum Dealer and in fact whatever was said in that case can more or less has to be held to be only a proposition under Article 142 of the constitution of India. From reading of paragraph no.19 of the judgment in the case of Hindustan Petroleum Corp. (supra) this Court would find that law was never laid down by the Apex Court in relation to a case that in presence of an arbitration clause, a writ application would be maintainable. This fact would become more clear from reading of paragraph no.19 which reads as follows:-

“19. Although, Clause 68 of the Dealership Agreement refers to arbitration, it is unfortunate that the said question was not raised before the High Court. It is now too late in the day for the petitioner Corporation to contend that in view of Clause 68 of the Dealership Agreement, the Respondent No.1 was not entitled to seek its remedy before the writ Court. In any event, by filing appeal against the order of the learned Single Judge,

the Petitioner herein also submitted to the jurisdiction of the writ Court, without objecting to the same.”

31. Thus, no law was laid down in the case of M/s Hindustan Petroleum Corporation Ltd. (supra) much less the issue of maintainability of the writ application in presence of arbitration clause.

32. The next judgment relied by Mr. Giri of the Apex Court in the case of *Union of India & Ors. Vs. Tania Construction Private Limited* reported in *2011(5) SCC 697* will also have no application in the facts of the present case. In this case, it was the finding of the High Court and also affirmed by the Apex Court that Tania Construction had been subjected to termination of contract dehors the terms and conditions. Thus, when the High Court had entertained the writ application, the Apex Court had only clarified in paragraph no.33 & 34 that the alternative remedy is not an absolute bar to revocation of writ jurisdiction of the High Court. Moreover, the view earlier taken by the Apex Court in the light of cases holding the writ application to be not maintainable in presence of arbitration clause having been not dealt, the judgment in the case of Tania Construction (supra) has to remain confined in the facts and circumstances of that particular case.

33. This court, therefore, will have no difficulty in holding that in presence of the arbitration clause, the two writ applications will not be maintainable, inasmuch as, the petitioner is having an

efficacious alternative remedy by way of invoking arbitration clause.

34. This Court would also not find any force in the submission of the learned counsel for the petitioner that reasons are lacking in the impugned order. As noted above, both the impugned orders have literally dealt the issue and each and every submissions of the petitioner has been taken into consideration. The impugned order therefore cannot be said to be non-speaking order so as to make the judgment of the Apex Court in the case of *Oryx Fisheries Private Limited Vs. Union of India & Ors.* reported in (2010) 13 SCC 427 applicable. Here the plain and simple case of the respondents was that the petitioner had not completed the work within the prescribed time limit and in fact even after four years of the stipulated date and, thus, the respondents were not required to say anything more when they had good reasons to believe that the petitioner was not even following its written undertaking for completing the work not once, not twice but at least more than half a dozen times.

35. Finally, the submission of the learned counsel for the petitioner that the impugned order is bad because the allegation of violating the terms and conditions of the agreement was made by the authority which has passed the impugned orders and thereby becoming judge of its own cause is also not acceptable to this Court. The reliance placed in this regard on the judgment of the Apex Court in the case of *M/s J.G. Engineering Private Limited Vs. Union of*

India and another reported in (2011) 5 SCC 758 is also misplaced. Let it be noted that the aforesaid case had arisen from the arbitration proceedings and only the arbitrator had gone to hold that the action taken by the departmental authorities in disallowing certain claims of the contractor was bad.

36. This aspect of the matter in fact has been considered by this Court in a recent judgment dated 25.3.2015 in CWJC No. 12566 of 2014 Phular Construction Company Vs. State of Bihar & others containing the same terms and condition under S.B.D. wherein it was held as follows:-

“36. The last of the submission of Mr. Vikas Kumar, learned counsel for the petitioner, that the department cannot itself take an action because it is a party to the agreement and the matter has to be referred to a neutral person for determining as to whether the petitioner had committed any breach of terms and conditions of the agreement has to be also noted for its being rejected. The reliance of the learned counsel for the petitioner to certain observations made in this regard in paragraph no.26 in the case of M/s NCC Ltd. [2013(1)PLJR 952] seems to be wholly misplaced, inasmuch as the sweeping observation on the basis of a judgment of Apex Court in the case of M/s J.G. Engineers Private Ltd. v. Union of India & anor., reported in (2011)5 SCC 758, is too far wide and in fact not at all contextual. In the case of M/s J.G.Engineers Pvt. Ltd. (supra) the issue actually was with regard to correctness of an award of the arbitrator. The terms and conditions of the agreement were, therefore, pressed into action to examine as to whether the counter claim of the Union of India against the contractor M/s J.G.Engineer could be rejected by the arbitrator in view an unilateral decision of the authorities of the Union of India. Let it be noted that the arbitrator had held that the contractor had committed no delay and thus, was entitled to certain relief of payment of amount under the terms and



conditions of the agreement as claimed by it in the arbitration proceeding but the High Court had reversed the decision of the arbitrator against which the contractor M/s J.G.Engineers had moved the Apex Court. It was in that context that certain observations were made with regard to unilateral decision taken by the department which were examined by the arbitrator and were found to be not correct. The said judgment of M/s J.G.Engineers Pvt. Ltd. (supra), therefore, is not an authority that in no case the department or the Government awarding contract can take its decision as also annul the contract on the ground of violation of terms and conditions of the contract and for each and every issue such decision has to be taken by a neutral person.

37. Such declaration made by this Court in the case of M/s N.C.C. (supra) would place the contractor on dictating terms because firstly it would default in completing work and then it would expect the department to refer the matter to a neutral person to adjudicate as to whether there was no fault on the part of the contractor. That, however, is not the ratio of the judgment of the case of M/s J.G.Engineer Pvt. Ltd. (supra) which in fact lays down the law only with regard to the grounds on which the award of the arbitrator can be interfered by the Court in exercise of power under section 34 of the Arbitration and Conciliation Act. Thus, whatever has been held by the learned Single Judge in the case of M/s NCC Ltd. (supra) on the basis of ratio laid down by the Apex Court in the case of M/s J.G.Engineers Pvt. Ltd. (supra) does not seem to be correct enunciation of law.

38. The view of learned Single Judge in the case of M/s N.C.C. (supra) even other wise cannot be made applicable to the facts of the case of the petitioner because in the present case the power has been in the agreement vested to the department to take action against the defaulting contractor in case of breach of terms and conditions of the agreement as clearly spelt out in different clauses forming part of the contract. If the wide proposition laid down by the learned Single Judge in the case of M/s NCC Ltd. (supra) is accepted to be correct enunciation of law, this Court would find it difficult to allow any contractor to be subjected to determination or cancelling any contract though it may have agreed with its open eyes as the petitioner had while entering into the agreement. Clause 3 of the agreement of the clause of contract of

petitioner in this regard reads as follows:

"CLAUSE 3 When Contract can be determined/Rescined

Subject to the other provisions contained in this clause the Engineer-In-Charge may, without prejudice to his any other rights or remedy against the contractor in respect of any delay inferior workmanship, any claims for damages and/or any other provisions of this contract or otherwise, and whether the date of completion has or has not elapsed, by notice in writing absolutely determine the contract in any of the following cases :

i) It the contractor having been given by the Engineer-in-Charge a notice in writing to rectify, reconstruct or replace any defective work or that the work is being performed in an inefficient or otherwise improper or unworkman like manner shall omit to comply with the requirement of such notice for a period of seven days thereafter.

ii) If the contractor being a company shall pass a resolution or the court shall make an order that the company shall be wind up or if a receiver or a manager on behalf of a creditor shall be appointed or if circumstances shall arise which entitle the court or the creditor to appoint a receiver or a manager or which entitle the court to make a winding up order.

iii) if the contractor has, without reasonable cause, suspended the progress of the work or has failed to proceed with the work with due diligence so that in the opinion of the Engineer-in-Charge (which shall be final and binding) he will be unable to secure completion of the work by the date of completion and continues to do so after a notice in writing of seven days from the Engineer-in-Charge.

iv) If the contractor fails to complete the work within the stipulated date or items of work with individual date of completion, if any stipulated, on or before such date(s) of completion and does not complete them within the period specified in a notice given in writing in that behalf by the

Engineer-in-Charge.

v) If the contractor persistently neglects to carry out his obligations under the contract and/or commits default in complying with any of the terms and conditions of the contract and does not remedy it or take effective steps to remedy it within 7 days after a notice in writing is given to him in that behalf by the Engineer-in-Charge.

vi) If the contractor commits any acts mentioned in Clause 21 hereof:

vii) If the work is not started by the contractor within 1/8th of the stipulated time subject to the maximum of 45 days.

When the contractor has made himself liable for action under any of the cases aforesaid, the Engineer-in-Charge on behalf of the Governor of Bihar shall have powers :

a) To determine or rescind the contract as aforesaid (of which termination or rescission notice in writing to the contractor under the hand of Engineer-in-Charge shall be conclusive evidence). Upon such determination or rescission the Earnest Money Deposit, Security Deposit already recovered and Performance Guarantee under the contract shall be liable to be forfeited and shall be absolutely at the disposal of the Government.

b) After giving notice to the contractor to measure up the work of the contractor and to take such whole, or the balance or part thereof as shall be un-executed out of his hands and to give it to another contractor to complete the work. The contractor, whose contract is determined or rescinded as above, shall not be allowed to participate in the tendering process for the balance work.

In the event of above course(s) being adopted by the Engineer-in-Charge, the contractor shall have no claim to compensation for any loss sustained by him by reasons of his having purchased or procured any materials or entered into any engagements or made any advances on account or with a view to the execution of the work or the performance of the contract. And in case action is taken under any of the

provision aforesaid the contractor shall not be entitled to recover or be paid any sum for any work thereof or actually performed under this contract unless and until the Engineer-in-Charge has certified in writing the performance of such work and the value payable in respect thereof and he shall only be entitled to be paid the value so certified.

39. Yet again in Clause 14 of the agreement stipulation was made for cancellation of contract in full or part on the certain eventuality which again for the sake of clarity and convenience is quoted hereinbelow:

"**CLAUSE 14 Cancellation of Contract in full or part** If the contractor :

- i) at any time makes default in proceeding with the works or any part of the work with due diligence and continues to do so after a notice in writing of 7 days from the Engineer-in-Charge; or
- ii) Commits default to comply with any of the terms and conditions of the contract and does not remedy it or take effective steps to remedy it within 7 days after a notice in writing is given to him in that behalf by the Engineer-in-Charge; or
- iii) Fails to complete the works or items of work with individual dates of completion, on or before the date(s) of completion, and does not complete them within the period specified in a notice given in writing in that behalf by the Engineer-in-Charge; or
- iv) Shall offer or give or agree to give to any person in Government service or to any other person on his behalf any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to the obtaining or execution of this or any other contract for Government; or
- v) Shall enter into a contract with Government in connection with which commission has been paid or agreed to be paid by him or to his knowledge, unless the particulars of any such commission and the terms of

payment thereof have been previously disclosed in writing to the Accepting Authority/Engineer-in-Charge; or

vi) Shall obtain a contract with Government as a result of wrong tendering or other non-bonafide methods of competitive tendering; or

vii) Being an individual, or if a firm, any partner thereof shall at any time be adjudged insolvent or have a receiving order or order for administration of his estate made against him or shall take any proceedings for liquidation or composition (other than a voluntary liquidation for the purpose of amalgamation or reconstruction) under any Insolvency Act for the time being in force the sequestration of his estate or if a trust deed be executed by him for benefit of his creditors; or

viii) Being a company, shall pass a resolution or the Court shall make an order for the winding up of the company, or a receiver or manager on behalf of the debenture holders or otherwise shall be appointed or circumstances shall arise which entitle the Court or debenture holders to appoint a receiver or manager; or

ix) Shall suffer an execution being levied on his goods and allow it to be continued for a period of 21 days; or

x) Assigns, transfers, sublets (engagement of labour on a piece-work basis or of labour with materials not to be incorporated in the work, shall not be deemed to be subletting) or otherwise parts with or attempts to assign, transfer sublet or otherwise parts with the entire works or any portion thereof without the prior written approval of the Competent Authority;

The Competent Authority may, without prejudice to any other right or remedy which shall have accrued or shall accrue hereafter to Government, by a notice in writing to cancel the contract as a whole or only such items of work in default from the Contract. The Engineer-in-Charge shall on such cancellation by the Competent Authority have powers to :

(a) Take possession of the site and any materials, constructional plant, implements stores, etc., thereon; and/or

(b) Carry out the incomplete work by any means at the risk and cost of the contractor.

On cancellation of the contract in full or in part, the Engineer-in-Charge shall determine what amount, if any, is recoverable from the contractor for completion of the works or part of the works or in case the works or part of the works is not to be completed, the loss of damage suffered by Government. In determining the amount, credit shall be given to the contractor for the value of the work executed by him up to the time of cancellation, the value of contractor's materials taken over and incorporated in the work and use of plant and machinery belonging to the contractor.

Any excess expenditure incurred or to be incurred by Government in completing the works or part of the works or the excess loss or damages suffered or which may be suffered by Government as aforesaid after allowing such credit shall without prejudice to any other right or remedy available to Government in law be recovered from any moneys due to the contractor on any account, and if such moneys are not sufficient the contractor shall be called upon in writing and shall be liable to pay the same within 31 days.

If the contractor fails to pay the required sum within the aforesaid period of 30 days the Engineer-in-Charge shall have the right to sell any or all of the contractors unused materials, constructional plant, implements, temporary buildings, etc. and apply the proceeds of sale thereof towards the satisfaction of any sums due from the contractor under the contract and if thereafter there be any balance is outstanding from the contractor, it shall be recovered in accordance with the provisions of the contract.

Any sums in excess of the amounts due to Government and unsold materials, constructional plant, etc., shall be returned to the contractor, provided always that if cost or anticipated cost of completion by Government of the works or part of the works is less than the amount which the contractor would have been paid had he completed the works or part of the works, such benefit shall not accrue to the contractor."

(Underlining for emphasis)

40. The aforesaid underlined stipulations made in the agreement have been quoted in extenso only for the purpose to show that the competent authority of the department has been vested full power and authority to take action against the contractor and therefore, it will be very difficult for this Court to accept the submission of the petitioner that in no event any action can be taken against the contractor by the authorities of the department and such a decision, as to whether any default was committed by the contractor, has to be decided only by a neutral person. That again would be firstly going into the terms and conditions of the contract and that too a non-statutory contract which cannot be in view of law laid down by the Apex Court in the case of Radha Krishna Agrawal (supra) at least enforced by a writ petition under Article 226 of the Constitution of India. Secondly as per stipulation made in Clause 3 and 14 of the Agreement if the contractor makes a default or causes breach of terms and conditions it is the competent authority of the department who has been vested power to take appropriate action not only for determination of contract but also taking other penal measures.

41. As a matter of fact it is for this reason that if the contractor becomes aggrieved on account of any action taken by the competent authorities of the department within the terms and conditions of the contract that a provision for arbitration has been also made as has been already quoted above. The dispute in fact relating to the agreement in any form can arise only when the department will take a decision against the contractor and the remedy in such cases

would be only the arbitration and nothing else.

42. The petitioner also cannot expect this writ Court to decide as to whether it had justified reasons either in not completing the work or seeking extension of time because even the issue of extension of time is not a matter of right and is covered by Clause 5 of the Clause of contract which reads as follows:

"CLAUSE 5 Time and Extension for Delay

The time allowed for execution of the Works as specified in the Schedule 'F' or the extended time in accordance with these conditions shall be the essence of the Contract. The execution of the works shall commence from such time period as mentioned in letter of acceptance or from the date of handing over of the site whichever is later. If the Contractor commits default in commencing the execution of the work as aforesaid, Government shall without prejudice to any other right or remedy available in law, be at liberty to forfeit the security deposit absolutely.

5.1 As soon as possible after the contract is concluded the Contractor shall submit a Time & Progress Chart for each milestone and get it approved by the Department. The Chart shall be prepared in direct relation to the time stated in the Contract documents for completion of items of the work. It shall indicate the forecast of the dates of commencement and completion of various trades or sections of the work and may be amended as necessary by agreement between the Engineer-in-Charge and Contractor within the limitations of time imposed in the contract documents, and further to ensure good progress during the execution of the work, the contractor shall in all cases in which the time allowed for any work, exceeds one month (save for special jobs for which a separate Programme has been agreed upon) complete the work as per milestone given in schedule 'F'.]

5.2 If the work(s) be delayed by.

i) force majeure, or

ii) Serious loss or damage by fire, or

iii) Civil commotion, local.

iv) delay on the part of other contractors or tradesmen engaged by Engineer-in-Charge in executing work not forming part of the Contract, or

v) non-availability of stores, which are the responsibility of Government to supply or

vii) non-availability or break down of tools and Plant to be supplied or supplied by Government or

vii) any other cause which, in the absolute discretion of the authority mentioned in Schedule 'F' is beyond the Contractor's control.

then upon the happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to the Engineer-in-Charge but shall nevertheless use constantly his best endeavors to prevent or make good the delay and shall do all that may be reasonably required to the satisfaction of the Engineer-in-Charge to proceed with the works.

5.3 Request for the rescheduling of Milestones and extension of time, to be eligible for consideration, shall be made by the contractor in writing within fourteen days of the happening of the hindering event causing delay on the prescribed form. The Contractor may also, if practicable, indicate in such a request the period for which extension is desired.

5.4 In any such case the authority mentioned in Schedule 'F' may give a fair and reasonable extension of time and reschedule the milestones for completion of work. Such extension shall be communicated to the Contractor by the Engineer-in-Charge in writing, within 3 months of the date of receipt of such request. Non application by the contractor for extension of time shall not be a bar for giving a fair and reasonable extension by the Engineer-in-Charge and this shall be binding on the contractor.

5.5 The basic centerlines, reference points and benchmarks will be fixed by the department. The contractor shall established at his own cost at suitable points, additional reference lines and bench marks as may be necessary and

instructed by the engineer-in-charge. The contractor shall remain responsible for the sufficiency and accuracy of all the bench marks and reference lines."

(underlining for emphasis)

37. In the present case, it is not the grievance of the petitioner that it had not been given extension of time. As has been noted above, the petitioner was given repeated extension of time on its written undertaking but, the petitioner had not completed the work and, therefore, this Court would not find any error in the impugned order rescinding the contract of the petitioner as per the terms and conditions of the agreement quoted above.

38. The overemphasized submission of the learned counsel for the petitioner that it had completed almost all the work and it was wholly unfair on the part of the respondents to also forfeit the amount of security and advances as well as invoking the bank guarantee would also not impress this Court. Rescinding of contract having been already set out in Clause-14 of the SBD, already quoted above, this court would find no error in the action of the respondent in invoking the bank guarantee. The issue as to whether the amount of bank guarantee invoked is much more than the value of the work left to be completed by the petitioner is a question of evidence but the parties having been bound by the inter-parte agreement also providing for forfeiture of the security and advance and also rescinding of the agreement, no complaint can be made if one of the parties has taken

an action well within the terms of the contract. Reference in this connection may be usefully made to the judgment of the Apex Court in the case of *Divisional Forest Officer Vs. Bishwanath Tea Co.* reported in *AIR 1981 SC 1368* wherein it was held as follows:-

“Ordinarily, where a breach of contract is complained of, a party complaining of such breach may sue for specific performance of the contract if contract is capable of being specifically performed, or the party may sue for damages. Such a suit would ordinarily be cognizable by civil court. The High Court in its extraordinary jurisdiction would not entertain a petition either for specific performance or contract or for recovering damages. A right to relief flowing from a contract has to be claimed in a civil court where a suit for specific performance of contract or for damages could be filed.”

39. Yet again, the same view was reiterated in a more emphatic manner by the Apex Court in the case of *Premji Bhai Parmar Vs. Delhi Development Authority* reported in *AIR 1980 SC 738* where it was held as follows:-

“After the State or its agents entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.”



40. This Court would in fact found the present case to be fully covered by the ratio laid down by the Apex Court in the case of *State of Bihar Vs. Jain Plastic & Chemicals Ltd.* reported in 2002(1)SCC 216 wherein a writ application filed against the deduction of amount from the final bill to be paid to the contractor due to breach of contract was held to be not maintainable and the Apex Court had gone to hold that even if it is possible to decide the question raised in the petition on the basis of affidavits and counter affidavits, it would not be proper to exercise extraordinary jurisdiction under Article 226 of the Constitution in cases of alleged breach of contract.

41. The aforesaid view of the Apex Court in the case of Jain Plastics and Chemicals Ltd. (supra) has been again reiterated in a very recent judgment of the Apex Court dated 14.08.2015 in the case of State of Kerala and others Vs. M.K.Jose reported in 2015(4) PLJR 146 (SC) wherein law has been laid in the following terms :-

13. A writ court should ordinarily not entertain a writ petition, if there is a breach of contract involving disputed questions of fact. The present case clearly indicates that the factual disputes are involved. In State of Bihar v. Jain Plastics and Chemicals Ltd. reported in (2002) 1 SCC 216, a two-Judge Bench reiterating the exercise of power under Article 226 of the Constitution in respect of enforcement of contractual obligations has stated:-

“It is to be reiterated that writ petition under Article 226 is not the proper proceedings for adjudicating such disputes. Under the law, it was open to the respondent



to approach the court of competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226.”

In the said case, it has been further observed:-

“It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter-affidavits, but that would hardly be a ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the appellants would justify breach of contract by the respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs.”

14. In *National Highways Authority of India v. Ganga Enterprises* reported in (2003) 7 SCC 410, the respondent therein had filed a writ petition before the High Court for refund of the amount. The High Court posed two questions, namely, (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the

Contract Act; and (b) whether the writ petition is maintainable in a claim arising out of breach of contract.

While dealing with the said issue, this Court opined that:-

“It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of Kerala SEB v. Kurien E. Kalathil reported in (2000)6 SCC 293, State of U.P. v. Bridge & Roof Co. (India) Ltd. reported in (1996) 6 SCC 22 and Bareilly Development Authority v. Ajai Pal Singh reported in (1989) 2 SCC 116. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr Dave, however, relied upon the cases of Veriganto Naveen v. Govt. of A.P. reported in (2001) 8 SCC 344 and Harminder Singh Arora v. Union of India reported in (1986) 3 SCC 247. These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed”.

42. Here in the present case, this Court has no iota of doubt that there was a breach of terms and conditions of the agreement in the sense that the petitioner had not completed the work and, therefore these two writ petitions questioning the impugned orders rescinding the contract again in terms of the terms and conditions of the contract in view of involving serious disputed questions of fact cannot be entertained under Article 226 of

Constitution of India on the ground of maintainability specially when the petitioner has an efficacious alternative remedy by way of arbitration.

43. Thus, for the reasons indicated above, both the writ applications fail and are accordingly dismissed.

44. Before parting with, this Court must make it clear that nothing said in this order shall come in the way of the petitioner in invoking arbitration clause and if the petitioner takes it recourse to arbitration proceeding, the same shall be decided on the basis of its own merit without being prejudiced by anything said in this judgment.

45. There will be, however, no order as to costs.

(Mihir Kumar Jha, J)

Patna High Court
Dated the 6th November 2015
N.A.F.R./Rishi/-

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