IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.7259 of 2015

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Mora Tollways Limited, a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at 302, Shree Amba Shanti Chambers, Opposite Hotel Leela, Andheri Kurla Road, Andhri (East), Mumbai-400059, a Special Purpose Vehicle created by Atlanta Limited, 101, Shree Amba Shanti Chambers, Opposite Hotel Leela, Andheri Kurla Road, Andhri (East), Mumbai-400059 through its authorized representative and Project In Charge, Mr. Pillai Ponipass Packiriswami, Son of Late C.K. Packiriswami, permanent resident of flat No.38, Triveni Chaul, Police Station Santa Cruz and presently residing at flat no. 306, Jalalpur City, Gola Road, Police Station- Rupaspur, District-Patna.

.... Petitioner

Versus

1. The State of Bihar through Principal Secretary, Road Construction Department, Government of Bihar, Patna.
2. The Principal Secretary, Road Construction Department, Government of Bihar, Patna.
3. Bihar State Road Development Corporation Limited through its Managing Director, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
4. The Managing Director, Bihar State Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
5. The Chairman, Bihar State Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
6. The Directors, Bihar State Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
7. The Chief General Manager, Bihar State Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
8. The General Manager, Bihar State Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
9. The Deputy General Manager, Bihar State Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.

.... Respondents

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Appearance :

For the Petitioner : Mr. Y. V. Giri, Sr. Advocate
Mr. Dayanand Singh,
Mr. Sanjeev Kumar, Advocates

For the Respondents: Mr. Lalit Kishore, Pr. AAG
Mr. Harish Kumar- GP32

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date: 22-09-2015

The present writ petition has been filed for a direction to the respondents for making payment amounting to a sum of Rs.

610,52,72,733/- by way of Termination Payment to the petitioner on account of the respondents having acted arbitrary and illegally, and having failed to discharge their duty and reciprocal promise, thus compelling the petitioner to issue Termination Notice in relation to the Concession Agreement between the parties.

2. The petitioner is a Limited Company registered under the provisions of the Companies Act, 1956, having been created as a special purpose vehicle by its parent Company, Atlanta Ltd. Pursuant to a notice/request for qualification by the respondents dated 16.07.2010 for the construction, operation and maintenance of National Highway No. 30 in the State of Bihar, including the section from km 0.000 to km 116.760 (approx. 117.00 km) on the Mohania-Ara section of National Highway No. 30, by Four Laning on a Design, Build, Finance, Operate and Transfer (“DBFOT”) basis, Atlanta Limited was shortlisted and in due course a Concession Agreement was entered into between the petitioner-Company and the Managing Director of the Bihar State Road Transport Corporation, Patna (for short, “the Corporation”) on 10.09.2011.

3. After submission of bid and in the course of negotiation, the petitioner-Company made demands for a Mining Lease for stone quarries to be made available to it, as the bid had been submitted

keeping in mind the facilities of mining of aggregates from enumerated stones quarries in the possession of the Government of Bihar, and it duly indicated that in absence of the mining lease, it would be practically impossible for it to execute the project. It was only upon the expectation of grant of the Mining Lease that on the insistence of the Respondents, the validity of the original bid was extended by the Petitioner from time to time. After extension of the validity of the bid on four occasions, a Concession Agreement was finally entered into on 10.09.2011 as aforesaid. The issue relating to the provision~~s~~ of aggregates through a Mining Lease continued to remain the subject matter of correspondence, with the Managing Director of the respondent-Corporation by his letter No. 2254 dated 03.11.2011 requesting the Collector, Rohtas at Sasaram to take necessary action for relaxation of the Rules in special case~~s~~ in terms of the Mines & Mineral (Development & Regulation) Act, 1957. In view of the Government of Bihar not taking a decision to allow mining in the State of Bihar, the matter was referred to an Independent Engineer engaged by the Respondent-authorities, and after obtaining legal opinion, recommended by letter dated 31.05.2013 for either allotment of mines or for reimbursement of additional cost of procuring aggregates from neighbouring states estimated at Rs. 410.13 crores to the petitioner company.

4. For the first time, in the minutes of the meeting held on 05.08.2014, it was observed that there was no provision of extra lead of aggregates in the Concession Agreement, and the petitioner’s claim in this regard had already been rejected by the respondent-Corporation in their letter No. 1428 dated 16.06.2014. This led the petitioner to resort to the provisions of Clause 37.2 of the Agreement by issuance of Notice dated 09.08.2014 for curing the defaults by the respondent-authority within the period of 90 days as contemplated thereunder. The team of independent engineers appointed by the respondent-Corporation after examining the issue of the additional cost of procurement of aggregates, concluded in a report dated 09.09.2014 that the authority may take a decision for reimbursement of cost of excess lead of aggregates in public interest and for avoiding delay in the completion of the project, considering that such reimbursement would involve less financial implication to the Government exchequer as compared with the other two options, namely, the Termination Cost payable to the petitioner and the Re-tendering cost. Pursuant to the notice under clause 37.2 by the Petitioner, the respondent-Corporation agreed to cure the defaults as evident from the minutes of the review meeting dated 06.11.2014. The Chief General Manager of the respondent-Corporation vide letter dated 21.11.2014 also requested the Principal Secretary, Road Construction Department for an in-

principle Cabinet approval for payment of extra cost ~~of~~ carriage of stone aggregates to the tune of Rs. 435/- crores to the petitioner.

5. Despite further correspondence~~s~~ between the parties, however, the issue relating to reimbursement of cost of aggregates could not be resolved, and considering this failure on the part of the respondents to cure the defaults, the petitioner, on 04.02.2015, issued a notice of Intent to Terminate the Concession Agreement in terms of its Clause 37.2.2 of the Agreement. Acting upon such notice, the respondent-Corporation vide its letter dated 07.02.2015 directed the petitioner to submit details of all the materials, stores, plant machinery and equipments available at site for the purpose of Clause 37.4 (b) of the Concession Agreement. Despite further meetings and discussions, the matter could not be resolved and the petitioner finally invoked the provisions of Clause 37.2.2 by issuing a Termination Notice by letter dated 20.02.2015 and terminated the Concession Agreement dated 10.09.2011, further demanding Termination Payment of an amount of Rs. 610,52,72,733/- from the respondent-authorities pursuant to Clause 37.3.2 of the Concession Agreement.

6. It is noteworthy that more than a month after issuance of the Termination Notice dated 20.02.2015, the Principal Secretary, in his letter dated 23.03.2015, recommended the case of the petitioner to the

Infrastructure Development Authority for obtaining the approval of the Committee presided by the Secretary for payment of extra cost of carriage of stone aggregates to the petitioner. It was also observed therein that the petitioner had already terminated the Concession Agreement on 20.02.2015 in terms of Clause 37.2.2 of the Concession Agreement, which, however, had been termed illegal and not accepted by the respondent-Corporation and accordingly, the petitioner had been requested to resume the work. The petitioner then approached this Court by filing the present writ petition on 29.04.2015 (registered on 07.05.2015) and, significantly, the respondent-Corporation thereafter issued notice on 16.05.2015 in terms of Clause 37.1.2 for termination of the agreement and which finally culminated in the termination of the Concession Agreement by the Respondent-Corporation in terms of its letter No. 1382 dated 10.06.2015.

7. I.A. No. 4607 of 2015 and I.A. No. 4702 of 2015 have been filed by the petitioner for amendment of the prayer in the writ petition by way of seeking quashing of letter No. 1180 dated 16.05.2015 issued by the respondent-Corporation under Clause 37.1.2 of the Concession Agreement for termination thereof and letter No. 1382 dated 10.06.2015 issued by the respondent-Corporation terminating the Concession Agreement.

Having regard to the nature of the prayer and the facts and circumstances of the case, both interlocutory applications are allowed and treated as part of the writ petition.

8. At the very outset, Mr. Lalit Kishore, learned Principal Additional Advocate General appearing on behalf of the State, raise~~s~~ a preliminary objection on the very maintainability of the writ petition on the grounds of availability of alternative remedy by way of arbitration provided in the Concession Agreement. In this regard, he refers to the provisions of Article 44 of the Concession Agreement dealing with dispute resolution as follows:

> "44.1 Dispute resolution
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> 44.1.1. Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 44.2.
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> 44.1.2The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.
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> 44.2 Conciliation
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> In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing

mediation by the Independent Engineer, or without the intervention of the Independent Engineer, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 44.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 44.3.

44.3 Arbitration

Any dispute which is not resolved amicably by conciliation , as provided in clause 44.2, shall be finally decided by reference to Bihar Arbitral Tribunal in accordance with Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008, Rules framed thereunder or procedure prescribed by the Bihar Arbitral Tribunal. The award of Bihar Arbitral Tribunal shall be final and binding on the parties.

44.4 Adjudication by Regulatory Authority or Commission.

Deleted."

It is, therefore, submitted that if at all the petitioner had any grievance on the question of reimbursement of carriage cost of aggregates, the same ought to have been raised in arbitration proceedings in terms of Clause 44.3 referred to above. It is further submitted that the relief to the petitioner is not available by invoking the writ jurisdiction of this Court as the matter relates purely to a contract of commercial nature, and the dispute between the parties arises from the very terms of the contract, breach of which is alleged by the petitioner. In such circumstances, the ratio of the decision rendered in the case of *Radha Krishna Agarwal vs. State of Bihar* [AIR 1977 SC 1496] comes into play. Approving the view of the Patna High Court, three categories of cases were noticed in which breach of alleged contractual obligation by the State could be set up, as follows —

> "(i) Where a petitioner makes a grievance of breach of promise on the part of the State in cases where an assurance or promise made by the State he has acted to his prejudice and predicament, but the agree- ment is short of a contract within the meaning of article 299 of the Constitution;
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> (ii) Where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Act or Rules framed thereunder and the petitioner alleges a breach on the pan of State; and
>
> (iii) Where the contract entered into between the State, and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State."

It is submitted that the instant case is covered by category (iii) and in such circumstances, the matter can only be decided through ordinary civil suit as the dispute cannot be satisfactorily decided without detailed adduction of evidence. It is submitted that in cases of the present nature, it is the contract and not the executive power, which governs the relation of the parties, and is thus not amenable to the writ jurisdiction of this Court. Reliance for the purpose is also placed on a Full Bench decision of this Court in *Pancham Singh vs. State of Bihar* [1991(1) PLJR 352].

Reliance is next placed on a decision of the Apex Court in *Agri Gold Exims Limited vs. Sri Lakshmi Knits & Wovens* [(2007) 3 SCC 686] to the effect that Section 8 of the Arbitration & Conciliation Act, 1996 being peremptory in nature, in a case where Arbitration Agreement exists, the Court is under obligation to refer the parties to arbitration in terms of the Arbitration Agreement. Reliance is also placed on a decision in *IB Valley Transport & Others vs. Chairman-cum-Managing Director, Mahanadi Coalfields Limited & Others* [(2014) 10 SCC 630] which was disposed of with a direction to exhaust the remedy provided under Clause 12 of the Dispute Resolution Mechanism of the Company Rules by making a request to the Engineer Incharge for settlement of dispute before resorting to legal remedy.

Learned counsel for the respondents also relies on a decision in *Sri Ram Builders vs. State of Madhya Pradesh* [(2014) 14 SCC 102] reiterating the principle that issues involving adjudication of disputed questions of fact can only be suitably adjudicated in a civil suit, and the discretionary power of writ jurisdiction should be exercised with care and caution. It has been held therein that scope of judicial review is rather limited in contractual matters even where one contracting party is the State or an instrumentality of the State.

9. In response, Mr. Y.V. Giri, learned senior counsel appearing on behalf of the petitioner, vehemently opposes the preliminary objection on the grounds that in the present case the foundational facts are not disputed, and that the petitioner duly invoked the Termination Clause of the Agreement in respect of the authority default in providing for, or allowing reimbursement of the cost of, aggregates to the petitioner as consistently claimed by it, especially in view of the respondents' correspondence and assurances in that regard. It is submitted that arbitrariness in the action of the respondents is writ large on the face of it, considering that the Concession Agreement already stood terminated by reason of the Termination Notice dated 20.02.2015 issued by the Petitioner and which was duly acknowledged by the Principal Secretary, Road Construction Department (respondent No. 2) in his letter dated 23.03.2015 though not accepted by the respondent-Corporation. It is, submitted that the action of the respondent-Corporation in treating the petitioner's Termination Notice as illegal amounts to the respondents sitting in judgment in

their own cause, which could not be done, they themselves being a party to the contract and their status, therefore, did not stand on a higher pedestal than that of the petitioner. Further, the action of the respondent-Corporation in ignoring the petitioner's Termination Notice dated 20.02.2015 and instead issuing Termination Notice dated 10.06.2015, that too after the filing of the present writ petition, demonstrates inherent illegality and arbitrariness in the action of the respondents. Mr. Giri therefore submits that in such circumstances, the writ petition is maintainable in the light of a number of recent decisions of the Hon'ble Supreme Court as relied upon by him.

To begin with, he refers to the judgment in *Verigamto Naveen vs. Government of A.P.* [(2001) 8 SCC 344], in para 21 whereof it has unequivocally been observed that the earlier principles laid down in *Radha Krishna Agarwal's* case (supra) must now be understood as having undergone a change. He refers also to the undernoted decisions in support of his contention that alternative remedy would not constitute a bar for the writ Court in contractual matters where the action complained of is shown to suffer from arbitrariness or irrationality, etc. —

a) *Whirlpool Corporation vs. Registrar of Trade of Marks [(1998) 8 SCC 1]*
b) *ABL International Limited Vrs. Export Credit Guarantee*

Corporation of India [(2004) 3 SCC 533]

c) *Popcorn Entertainment vs. City Industrial Development Corporation [(2007) 9 SCC 593]*

d) *Union of India vs. Tantia Construction Limited [(2011) 5SCC 697]*

e) *Executive Engineer, Southern Electicity Supply Company of Orissa vs. Seetaram Rice Mill [(2012) 2 SCC 108]*

Mr. Giri also places strong reliance on a decision of the Hon'ble Supreme Court in *Monnet Ispat and Energy Limited vs. Union of India* [(2012) 11 SCC 1] to submit that the principles of promissory estoppel and legitimate expectation can be employed to found a cause of action in a writ petition and the application of these principles is not to be restricted only by way of defense. Moreover, the maintainability of a writ petition is dependent on the nature of the allegations made and cannot be tested with reference to the final result even if it ends up in dismissal. In the instant case, the writ petition would be maintainable in view of the petitioner’s pleadings with regard to arbitrariness and violation of well-settled legal principles on the part of the respondents, even if ultimately the writ petition may not succeed.

10. Having heard learned counsel for the parties and on careful consideration of the materials on record as well as the judicial

decisions referred to above, this Court finds merit in the submissions made on behalf of the petitioner on the question of the maintainability of the writ petition. The scope of interference in writ jurisdiction now stands rather enlarged after the decision in *Radha Krishna Agarwal's* case (supra). The remedy is, no doubt, a discretionary one but mere availability of alternative remedy cannot by itself constitute an absolute bar to its exercise in contractual matters in cases where arbitrariness is manifest.

11. This Court is, therefore, of the view that the preliminary objection raised on behalf of the respondents with regard to the maintainability of the writ petition cannot be sustained and accordingly the Writ Petition is held to be maintainable.

12. On the merits of the present case, this Court finds no error in the action of the Petitioner in issuing the Termination Notice, and the Respondent's contention that the Petitioner ought to have first opted for arbitration cannot be accepted. The request for aggregates or for reimbursement of cost of procurement thereof remained a claim of the Petitioner, and it was only after the Termination Notice was given to the Respondents that a dispute within the meaning of Article 44 of the Agreement can be said to have arisen. In other words, the core dispute between the parties relates not to the issue of aggregates, but is

concerned with the validity of the Termination Notice dated 20.02.2015 in accordance with Clause 37.2.2 of the Agreement. Moreover, the fact that the petitioner had terminated the Agreement by its Termination Notice cannot be disputed. Once the Agreement had been terminated by the Petitioner, the question of the Respondents terminating it over again could not arise as that would amount to termination of an already terminated agreement. The Respondents could only have sought remedy against such termination as may have been available to it. The respondent-Corporation on its part could not negate such notice by unilaterally treating the same as illegal. As held in *M/s J. G. Engineers Pvt. Limited vs. Union of India and Another* [AIR 2011 (SC) 2477] as also in para 16 in *M/s NCC Limited vs. The State of Bihar* [2013(1) PLJR 952], if the State is a party to the contract, it cannot decide whether there was a breach of contract by the other party. The remedy available to it had to be found within the terms of the agreement itself to which it was a party. If at all, therefore, the respondents might have taken recourse to Article 44 of the agreement for dispute resolution, including arbitration. Failing to do so and instead sitting in judgment to unilaterally dub the petitioner's Termination Notice as illegal must be as held to constitute arbitrary action on the part of the respondent-Corporation and it can safely be concluded that the respondent-Corporation has acted de hors the terms of the contract between the parties. It would further appear that the respondents' own Termination Notice dated 10.06.2015 has been issued after filing of the writ petition by the petitioner, possibly for the purpose of avoiding the consequences of having to make the Termination Payment to the petitioner as a fallout of the Termination Notice issued by the petitioner for authority default.

13. As regards the quantification of the consequent Termination Payment liable to be paid by the respondents with regard to the nature and extent of authority default in terms of Clause 37.2.2 of the agreement, the same would necessarily require detailed investigation into facts and adduction of evidence, into the details of which this Court need not travel. There is ample provision for Dispute Resolution detailed in Article 44 of the Concession Agreement referred to above, which the respondents are at liberty to advert to if they be aggrieved by the Termination Notice dated 20.02.2015 issued by the petitioner.

14. In the result, the respondent-Corporation's Termination Notice as contained in letter No. 1382 dated 10.06.2015 (Annexure-23) is hereby set aside with liberty to the respondents to take recourse to Article 44 of the Concession Agreement dated 10.09.2011, if so advised. Needless to say, the petitioner shall cooperate in all such

proceedings for resolution of the issues in dispute in accordance with law. The writ petition stands disposed of.

(Vikash Jain, J)

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