

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (C) No. 2375 of 2014**

A.P.Nirman Limited Through: Rajesh Kumar Agrawal S/o Late Gopi Ram Agrawal, Aged about 43 years, C 86, V.I.P. Estate, Opposite Ashoka Ratan Shankar Nagar, Raipur (Chhattisgarh), P.S. Shankar Nagar, Tahsil & Distt. Raipur (C.G.)

---- **Petitioner**

Versus

1. The State of Chhattisgarh, Through- Secretary, Water Resource Department, Mantralaya, New Raipur, Raipur (Chhattisgarh)
2. The Engineer-in-Chief, Water Resource Department Sihawa Bhawan, Raipur (Chhattisgarh)
3. The Chief Engineer, Water Resource Department, Mahanadi Godawari Basin, Raipur (Chhattisgarh)
4. The Executive Engineer, Water Resource Division Gariaband, Dist. Gariaband (Chhattisgarh)

---- **Respondents**

For Petitioner	:	Shri Rahul Jha, Advocate.
For Respondents	:	Shri U.N.S. Deo, Government Advocate.

Hon'ble The Acting Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Order On Board

Per Navin Sinha, Acting Chief Justice

05/03/2015

The present writ application assails order dated 28.7.2014 passed by the Engineer-in-Chief, Water Resources Department, declining to accept the recommendation of the Chief Engineer for a second extension of time to the Petitioner for completion of the contract works.

2. Learned Counsel for the Petitioner submits that it was allotted a contract for construction of Pairi Right Bank Canal System Lining Work. The work order was

issued on 11.2.2010 and agreement signed. The work could not be completed within the scheduled time mentioned in the contract for reasons attributable to the Respondents. The Petitioner therefore invoked Clause 4.30 of the agreement for extension of time without penalty. By order dated 1.12.2011, the Engineer-in-Chief concurring with the Chief Engineer under Clause 4.30 and 4.31 extended the time for completion of works till 30.6.2012. Notwithstanding the extension, for reasons attributable to the Respondents again by failing to release payments in due time and the consequent inability of the Petitioner to complete the works, the contract was illegally terminated on 30.6.2012. The Petitioner invoked Clause 4.47.1 and 4.47.2 of the agreement for arbitration. The Chief Engineer, the designated arbitrator under the arbitration clause, by his order on 8.7.2013 cancelled the termination order and ordered extension of time for completion of the works. The Petitioner commenced works thereafter in anticipation of approval but was unable to comply with the time schedule for the reasons again attributable to the Respondents. The Chief Engineer, in the circumstances recommended a second extension of time to the Petitioner by his letters dated 11.12.2013 and 28.3.2014 addressed to the Engineer-in-Chief. The Engineer-in-Chief has rejected it arbitrarily by the impugned order without assigning reasons.

3. It is additionally submitted that the Chief Engineer being the designated authority as an arbitrator under Clauses 4.47.1 and 4.47.2 of the agreement, the Engineer-in-Chief had no authority or jurisdiction to sit over the order of the arbitrator. The Chief Engineer is the ultimate authority in the matter because even if the Engineer-in-Chief had originally refused extension of time, the matter could have been taken before the Chief Engineer for arbitration. If the Engineer-in-Chief was not in concurrence with arbitrator exercising powers under the agreement, the Engineer-in-Chief was obliged to go before the Arbitration Tribunal and the Petitioner is not obliged to do so.

4. Learned Counsel for the State submitted that the first extension of time was granted on 1.12.2011 by the Engineer-in-Chief who alone was competent to do so

under Clause under Clause 4.31(ii) for extension beyond 25% of the stipulated period or six months whichever was earlier. The Petitioner accepted it without demur and did not question it to urge that the Chief Engineer alone was competent to do so. Despite the extension granted the Petitioner failed to complete the works within the extended time also. The Petitioner failed to appear for the personal hearing granted to it leading to a speaking ex-parte order of termination dated 30.6.2012. The Petitioner raised an arbitration dispute before the Chief Engineer under Clause 4.47.1 and 4.47.2 of the agreement. The Chief Engineer on 8.7.2013 opined that in view of the ex-parte cancellation, and the assurance given by the Petitioner to complete works within extended time, a second extension of time may be granted to it and alike the previous occasion, on 11.12.2013 and 28.3.2014 recommended the same to the Engineer-in-Chief under Clause 4.31(ii) of the agreement as the duration of extension was beyond his jurisdiction. Despite notices issued to it on 7.12.2013, 24.12.2013, 11.1.2014 and 20.1.2014 the Petitioner failed to execute the works. The Petitioner cannot keep seeking unlimited extensions. The recommendation for second extension of time did not find favour with the Engineer-in-Chief. In the entirety of the facts and circumstances of the case, if the reasons are evident from the records, it cannot be said that the impugned order dated 28.7.2014 is bad for being non-speaking in nature. The Petitioner was fully aware of all these developments and cannot be said to have been taken by surprise for no inexplicable reason. It was lastly submitted that the Petitioner itself wrote on 2.8.2014 that the Chief Engineer on 11.12.2013 and 28.3.2014 had recommended to the Engineer-in-Chief for extension of time and that it required at least two more seasons to complete the works.

5. We have considered the submissions on behalf of the parties. The present was a commercial agreement signed between the parties. The terms of the agreement are clear and effect has to be given to the intention of the parties to the contract. The Court in exercise of powers under Article 226 cannot rewrite the terms of the agreement arrived at between the parties or give its own interpretation to the same.

In matters relating to contracts, judicial restraint must be exercised and the parties must be left to perform their respective obligations in accordance with the agreement. If there are questions of disputed facts involved it cannot be adjudicated in the writ jurisdiction. Article 226 of the Constitution is not an appropriate remedy for any alleged breach of the contract or non-performance of the agreement alleged by either party. The jurisdiction under Article 226 in such a matter primarily is confined to fairness in the decision making process and whether there has been any arbitrariness or inaction on the part of the authority or whether the action was de hors the contract and if the evidence on record by way of documents was sufficient to conclusively arrive at a determination.

6. The limits for judicial review in such matter was considered in (1993) 1 SCC 445 (Sterling Computers Ltd. v. M & N Publications Ltd.) observing as follows :-:

“18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the “decision making process”. In this connection reference may be made to the case of Chief Constable of the North Wales Police v. Evans where it was said that:

“The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court.”

By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at the same time as was said by the House of Lords in the aforesaid case, Chief Constable of the North Wales Police v. Evans the courts can certainly examine whether “decision-making process” was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.”

7. The issue was again considered in (2006) 13 SCC 382 (Nagar Nigam v. Al Faheem Meat Exports (P) Ltd) holding :-

“20. Furthermore, we see force in the submission of Mr Jayant Bhushan, learned Senior Counsel for the appellant, that it was not for the High Court to fix the terms and conditions of the contract. It is for the State authorities to take a policy decision and fix the terms and conditions of the contract. It is one thing to say that the High Court in exercise of power of judicial review may strike down the contract or a notice inviting the tender if it offends Article 14 of the Constitution of India, but it is another thing to say that the High Court in exercise of the power of

judicial review would thrust a contract upon a non-willing party, particularly when the said exercise would be violative of Article 14 of the Constitution. Yet again, save and except in some very rare and exceptional case, the question of fixing any terms of the contract or laying down the terms and conditions is for the authority concerned to decide, and it is not a matter within the domain of the courts....”

8. It is not in dispute that the Petitioner was unable to complete the works within the original time schedule and the first extension granted. At this stage, we are not concerned with who may or may not have been at fault as the fact remains that extension of time was granted to the Petitioner on 1.12.2011 by the Engineer-in-Chief. Clause 4.30 of the agreement in general provides for extension of time. Clause 4.31 provides who shall be the competent authority to sanction extension of time. For extension of period for completion upto 25 percent of the stipulated period of contract or six months, whichever is less, the Chief Engineer is competent to do so. For the period beyond that, it is the Engineer-in-Chief who alone is competent. The Petitioner accepted the extension of time granted by the Engineer-in-Chief on 1.12.2011. According to the Petitioner the second extension was again necessitated for reasons attributable to the Respondents. The contract was terminated on 30.6.2012. In the writ jurisdiction, it is not permissible for us to examine disputed questions of facts as to who may have been at fault. We are fortified in this opinion because the order of termination dated 30.6.2012 itself states that despite an opportunity granted to appear and present his case, the Petitioner did not do so leading to ex-parte termination. Surely if the Petitioner was sanguine that the reasons were attributable to the Respondents alone, it would have definitely appeared on the scheduled date to present its case and persuade the authorities to hold that it was not a case of termination as the fault lay with them. This observation is however confined for the purposes of the present discussion only.

10. The Petitioner invoked the Arbitration clause. On 8.7.2013, the Chief Engineer under Clause 4.47.2 set aside the termination opining it was ex-parte in nature coupled with the undertaking given by the Petitioner for due performance and on

11.12.2013 and 28.3.2014 recommended for second extension of time to the Engineer-in-Chief since the period for which the extension of time was to be granted fell within the jurisdiction of the Engineer-in-Chief under Clause 4.31(ii) of the agreement. The Engineer-in-Chief declined to grant further extension of time. The fairness in action on part of the Respondents is evident from their act in giving first extension of time and recall of the termination order being ex-parte in nature. Whether a second extension ought to be granted or not is a matter in the exclusive domain of the Respondents and the Court cannot step into the shoes of the Respondents to take decisions on their behalf upon its own satisfaction unconcerned with commercial needs of the Respondents.

11. Judicial review will be confined to the question if the process for decision making not to extend the time on the second occasion was taken in accordance with law or not. True it is that any order having adverse consequences for another must be reasoned and speaking in nature. The requirement for a reasoned and speaking order is but a facet of the principles of natural justice evolved to prevent arbitrariness and to maintain transparency in the decision making process. The authorities granted extension of time first which could not be utilized by the Petitioner. The Petitioner did not respond to the show cause notice for termination leading to an ex-parte termination. The contract was restored and four notices given thereafter to expedite works which the Petitioner failed to do. The second extension has then been declined. The Petitioner in its reply dated 2.8.2014 acknowledges that the works have not progressed in accordance with the time schedule seeking confirmation of recommendation for second extension of time made by the Chief Engineer and that it had learnt that the Engineer-in-Chief was not inclined to extend the time. It does not state that progress of works was being delayed for reasons attributable to the Respondents.

12. If reasons are necessary in an order to control arbitrariness and the order is non-speaking in nature, but the reasons are apparent and can be culled out from the records of the case and the person concerned is fully aware of the

developments, nothing can be said to have happened behind its back. It cannot be urged that the order is non-speaking and therefore arbitrary. The principles of natural justice cannot be put in a strait jacket formula and its application will depend on the facts of each case. In (1977) 2 SCC 256 (Board of Mining Examination and Chief Inspector of Mines v. Ramjee) to quote the words of Justice Krishna Iyer it was said :-

“13....Natural justice is no unruly horse, no lurking landmine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt — that is the conscience of the matter.”

13. We are satisfied that no prejudice has been caused to the Petitioner in the facts and circumstances of the present case because of no reasons having been spelt out in the order dated 28.7.2014 which otherwise more than sufficiently emerges from the records of the case as discussed by us. In (1991) 3 SCC 38 (Union of India v. E.G.Namboodiri) it was observed :-

“10.....In governmental functioning before any order is issued the matter is generally considered at various levels and the reasons and opinions are contained in the notes on the file. The reasons contained in the file enable the competent authority to formulate its opinion. If the order as communicated to the government servant rejecting the representation does not contain any reasons, the order cannot be held to be bad in law. If such an order is challenged in a court of law it is always open to the competent authority to place the reasons before the court which may have led to the rejection of the representation. It is always open to an administrative authority to produce evidence aliunde before the court to justify its action.”

14. We shall now deal with the submission that the Engineer-in-Chief had no authority or jurisdiction to decline extension of time if the Chief Engineer exercising the powers of an arbitrator under the agreement had granted extension of time. That will call for a harmonious reading of the different clauses of the agreement. The Engineer-in-Chief is the competent authority to grant extension of time beyond certain period under Clause 4.31 (ii) of the agreement. It was in exercise of that

power, the first extension was granted on 1.12.2011 on the recommendation of the Chief Engineer accepted by the Petitioner without demur. The Chief Engineer exercising powers as arbitrator, was competent to pronounce upon the termination of the contract only. The observations by the arbitrator that it had also decided to extend the time, has to be read subject to Clause 4.31 (ii) of the agreement, and that was the manner in which the Chief Engineer and the Petitioner also understood the agreement. If the Chief Engineer was competent to extend the time in the circumstances he would not have written to the Engineer-in-Chief on 11.12.2013 and 28.3.2014. The Petitioner in his letter dated 2.8.2014 also acknowledged that it was the jurisdiction of the Engineer-in-Chief alone to extend the time and which he was not inclined to do. A harmonious interpretation shall have to be given to Clauses 4.31 and 4.47.2 of the agreement so that both can co-exist. Any other interpretation would be doing violence to the two clauses of the agreement rendering one of them redundant. We regret our inability to concur with the submission on behalf of the Petitioner that once the Chief Engineer had passed order under Clause 4.47.2, Clause 4.31 (ii) became redundant.

15. We therefore find no merit in the writ petition. The writ petition is dismissed.

ACTING CHIEF JUSTICE

JUDGE