THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO

WRIT PETITION Nos.15032 of 2010

AND

W.P. Nos.10815 of 2008, 14986 AND 15331 of 2010

ORDER:

W.P.No.15032 OF 2010

The petitioner herein seeks a Writ of Mandamus for declaring the action of the first respondent in inviting bids by its Tender No.1/2009-10 on 28.08.2009 for (1) Construction of Earth-cum-Rock Fill Dam I, II & III Spill Channel, Approach Channel; (2) Construction of Spill Way and its ancillary works and (3) Construction of 960 MW Hydro Electric Power Station including O & M for 3 years for Indira Sagar Polavaram Project on EPC Turn key System even before complying with the terms and conditions of the contract entered into between the Government and the petitioner for pre-closure of subsisting contract and seeking to entrust the work comprehensively in favour of a third party even without taking over the possession of the project areas in question from the petitioner as illegal, unfair, prejudicial, malafide and contrary to the mandatory provisions of the constitution of India and consequentially to direct the respondents to refrain from in any way interfering with the possession of the project areas including the site and the work so far done by the petitioner-contractor before settlement of the claims of the petitioner-contractor pending with the Government by Constitution of a High Power Committee by the Government and not to entrust the Indira

Sagar Polavaram Project work in the enlarged scope detrimental to the interests of the petitioner and to settle and pay the claimed amounts of the petitioner forthwith and pass such other order.

The Superintendent Engineer, Indira Sagar Head Works Circle, Polavaram (henceforth referred to as 'S.E') acting on behalf of the Government of Andhra Pradesh in its Irrigation and Command Area Development Department entered into EPC Agreement No.1/2006-2007 on 11.08.2006 with the writ petitioner for executing the work for investigation, survey etcetera, including preparation of designs and drawings, land plan schedules and construction of Earth-cum-Rock Fill Dam I, II & III, Leading and Approach Channel, Spill Channel on Spill Way and operation and maintenance for 3 years for Indira Sagar Polavaram Project across river Godavari at Polavaram in Andhra Pradesh on EPC Turn key System. On 07.07.2007, the S.E issued the work order for commencing the execution of the work immediately to the writ petitioner. it is the claim of the petitioner that for want of various clearances to be obtained by the Government from various agencies/authorities such as River Conservation Authorities, Forest Authorities, Environment Authorities and the Central Government, the project work could not be proceeded with. It was also the case of the petitioner that the land was not made available for execution and the final design of the channel was not furnished by the Government and impediments for clearing the design have not been got over and without any regard for these factors for which the petitioner has no control, the S.E through his communication dated 03.09.2009 has issued a notice of 14 days duration invoking Clause 61 of PS to APSS with a view to terminate the contract. According to the petitioner, the S.E in his notice dated 03.09.2009 has erroneously and also mischievously attributed the delay in execution of the work to the writ petitioner-contractor. Immediately, the petitioner has drawn a detailed reply on 06.08.2009 not only protesting against the proposed action, but has also pointed out as to where the fault lies. In view of the serious and contentious nature of the reply furnished by the petitioner, the State Government intervened in the matter and convened a conference in the chambers of the Hon'ble Minister for Irrigation. Several high ranking officials of the Government as well as the Chief Engineer and the S.E attended the meeting along with the representatives of the petitioner consortium. The petitioner has presented it's view point very clearly and forcefully. The Hon'ble Minister has assured that appropriate consideration would be shown in the matter. Thereafter, in quick succession, a meeting was convened in the chambers of the Hon'ble Chief Minister on 23.08.2009. After considerable amount of debate, the Hon'ble Chief Minister has desired that the agreement No.1/2006-2007 dated 11.08.2006 be pre-closed without any penal consequences flowing from such pre-closure. It was agreed at the said meeting that the accounts of the writ petitioner for the works executed till then will be settled and the claims will be referred to High Power Committee. The petitioner had been made to agree for this course of action and accordingly, the S.E passed orders on 28.08.2009 pre-closing the Agreement No.1/2006-2007 dated 11.08.2006 with immediate effect. Thus, the said Agreement No.1/2006-2007 dated 11.08.2006 has been drawn to close on 28.08.2009. Since, it is one of the important terms and consideration of the agreement dated 25.08.2009, that the Government will settle the accounts of the petitioner amicably and reasonably by High Power Committee to be constituted by the Government, the petitioner has drawn a statement of claims and dues and furnished it to the S.E on 10.09.2009. In response thereto, the S.E has informed the petitioner that the High Power Committee proposed to be constituted by the Government to settle the accounts on the above work is yet to be set up and after constitution of such a committee, the said fact will be intimated to the petitioner herein and the accounts relating to the work may be submitted after the constitution of the High Power Committee. However, the State Government in its Irrigation Department through its memo dated 03.10.2009 directed the Chief Engineer to place the proposal regarding dues due to the pre-closure of the agreement with the petitioner and place the proposals in that regard before the State Level Standing Committee, duly including the Engineer-in-Chief (ADM) as a special invitee and send its recommendation to the Government for taking further action in the matter. It is urged that this action of the State Government is contrary to the agreement arrived at for pre-closure of Agreement No.1/2006-2007 dated 11.08.2006. Instead of constituting a High Power Committee, unilaterally the State Government has altered the position by directing the matter to be referred to the State Level Standing Committee by including therein the Engineer-in-Chief (Admin) as a special invitee. When the petitioner has protested the S.E by his communication dated 30.10.2009 informed the petitioner that the Government has nominated an existing committee to settle the accounts of the petitioner and except the difference in the nomenclature, there is no distinction and that the committee will examine all the accounts putforth by the petitioner and furnish its recommendations to the Government. The petitioner has submitted its claim for settlement in a sum of Rs.246,61,27,504/-. The break-up of this claim running over Rs.246 crores is placed at page

103 of the writ petition paper book and displayed as Ex.P.22. Far from settling the claim, the State Government was proceeding by floating fresh tenders through its tender No.1/2009-2010 dated 28.08.2009. Hence, this writ petition.

The Chief Engineer of the Project, the second respondent has drawn a detailed counter affidavit and filed the same. It was set out that the work of construction of Earth-cum-Rock Fill Dam with its ancillary works was entrusted to the writ petitioner consortium for a total contract value of Rs.883.9971 crores and the contract period was of 3 years duration. The work was entrusted to the joint venture firm more on the strength of experience and turn over of M/s. CR18G, a Chinese firm. As per the terms of the joint venture agreement produced at the time of filing the tenders, the firm M/s. CR18G will be responsible for the overall designs and engineering including investigation and that it will execute dam gaps-I, II & III including diaphragm wall and protection works to spill channel, etcetera. Thus, the consortium agreement disclosed that M/s.CR18G will be totally responsible for overall designs and engineering including investigation. It was also pointed out by the Chief Engineer that after entrustment of work to the petitioner consortium, the Department has never seen the representation of M/s. CR18G either at the site of work or at the meetings conducted by the departmental officers. It was set out that after issuance of the work order, the petitioner firm has started earth work excavation in spill channel which was readily available for execution. But however, the petitioner did not show performance to the expectations and as per the milestones suggested by it and instead dragged on the work on some pretext or the other. In fact, the petitioner firm has suspended the work in middle of May, 2009 for no valid reasons. Even prior thereto, the daily turn over of work by the petitioner firm was very negligible. It is asserted by the Chief Engineer that the total work carried out by the petitioner after exhausting more than 2 years was only 1.68% of the contract value. It is agreed that the Hon’ble Chief Minister had reviewed the progress of works on 23.08.2009 and decided to pre-close the contract with the consent of the petitioner, since there are certain lapses even on the part of the State Government. Thus, the Hon’ble Chief Minister considered it as an amicable solution instead of terminating the contract under Clause 61 of PS to APSS to avoid possible legal complications, which might come in the way of the objective of the project and thus serving the people. The Hon’ble Chief Minister during the review has considered it appropriate to fix up a single agency for the entire project work including work of executing and commissioning 960 MW Hydro Power Station, as it would be advantageous to get the work done by a single entity, as coordination amongst various wings becomes easier. Hence, fresh tenders were floated on 28.08.2009 for a joint package of (1) Construction of ECRF Dam with its ancillary works (2) Construction of spillway with the ancillary works and (3) Construction of 960 MW Hydro Power Station with its ancillary works for Rs.6231.14 Crores. But however, finally when the tenders are opened on 28.06.2010, no response thereto was found. Therefore, the Chief Engineer has pointed out that after the pre-closure of the agreement entered into by the Government with the petitioner, a composite tender is floated duly clubbing the other two works namely (1) Construction of spillway with the ancillary works and (2) Construction of 960 MW Hydro Power Station with its ancillary works. That is a policy decision and it cannot be questioned by the petitioner herein, inasmuch as, no right of the petitioner is violated. The Chief Engineer has therefore challenged the competence of the writ petitioner to call in question the right of the Government to call for fresh tenders comprehensively after the agreement entered by the petitioner is pre-closed.

W.P. Nos.10815 of 2008, 14986 AND 15331 of 2010

Sine the same petitioner has instituted all these 3 cases and since the respondents are also common and the controversy also has similarity of fact situation to that of W.P.No.15032 of 2010, they were heard together and are decided by this common order.

W.P.No.10815 of 2008 is instituted challenging the order passed by the Executive Engineer, Indira Sagar Head Works Division No.1 in proposing to recover Rs.27.66 crores out of Rs.31.68 crores released in favour of the petitioner earlier as mobilization advance, whereas, only a sum of Rs.4.01 crores was recovered from the bills of the petitioner.

W.P.No.14986 of 2010 is instituted seeking a *Writ of Mandamus* to adhere to the terms contained in the agreement entered into between the parties and the Government for pre-closure of the subsisting contract and a subsisting contract by settling the claims made by the petitioner company on 11.09.2009 and also consequently to set-aside the tender notice No.1/2009-2010 floated on 28.08.2009.

W.P.No.15331 of 2010 was instituted seeking a *Writ of Mandamus* for declaring the action of the fourth respondent S.E in proposing to encash the bank guarantees for Rs.10.00 crores furnished by the petitioner company on 08.05.2009 as part of it's obligation in the agreement entered into with the first respondent-State.

The petitioner, which is a construction company entered into a joint venture with a Chinese company. Since the joint venture was successful, it was entrusted with the work of investigation, soil exploration, preparation of designs and drawings, estimates, construction of spillway of 985.50 meters length approximately consisting of 48 vends each of size 16 meters x 15 meters on the right flank to discharge 36 cusecs of water with full reservoir level at + 45.72 meters for Indira Sagar Project across river Godavari at Ramayyapet Village in West Godavari on EPC Turn Key System. The total contract value was to the order of Rs.633.60 crores. The work is to be executed within a period of three years and accordingly, Agreement No.78/2004-2005 dated 23.03.2005 was entered into by the petitioner with the State Government. It is not in dispute that the petitioner company has executed work at the spillway site to the extent of 17.29% of the total work. However, the petitioner company also participated in the meeting that took place in the chambers of Hon'ble Chief Minister on 23.08.2009 and agreed for pre-closure of it's contract and agreed to have it's accounts and claims settled amicably. It is the claim and case of the petitioner that the accounts of the petitioner company are required to be settled within 120 days. As per the agreement, resulting in pre-closure without any penal consequences, the petitioner has lodged its claim with the Superintendent Engineer on 11.09.2009 in a sum exceeding Rs.308 crores. However, without settling the claims of the petitioner, the State Government has floated fresh tenders on 28.08.2009 and hence, W.P.No.14986 of 2010 was filed. Earlier thereto, when the unrecovered portion of the mobilization amount in a sum of Rs.27.66 crores is sought to be recovered from the petitioner, it instituted W.P.No.10815 of 2008 and similarly when the bank guarantee furnished by it pursuant to the Agreement No.78/2004-2005 is sought to be encashed, it filed W.P.No.15331 of 2010.

Since the contentions canvassed are almost identical, I am dealing with them by making a reference to W.P.No.15032 of 2010 in detail herein below, which principles and conclusions drawn by me would equally be applicable to the present cases also.

Heard Sri P.P. Rao, learned Senior Counsel and also Sri M.R.K. Chowdary, learned Senior Counsel on behalf of the learned counsel for the petitioner in W.P.No. 15032 of 2010 and Sri D. Prakash Reddy and Sri S. Satyam Reddy, learned Senior Counsel on behalf of the petitioner in W.P.Nos.10815 of 2008 & batch and the learned Advocate General on behalf of the respondents.

The petitioner consortium was awarded the work relating to investigation, survey, preparation of designs and drawings, land plan schedules and construction of Earth-cum-Rock Fill Dam I, II & III and accordingly, agreement No.1/2006-2007 was entered into on 11.08.2006. Nearly 11 months thereafter, the S.E granted the work order to commence the project work. Certain amount towards mobilization advance was paid to the petitioner. Thus, a sum of Rs.44 crores was granted as mobilization advance. The grant of mobilization advance is treated and considered as a loan for which the recovery mechanism is also provided. It is the case of the S.E that the petitioner has committed default in getting the work executed as per the time schedules fixed. It is alleged that the designs themselves have not been got approved. It is also complained that the excavation of spill channel commenced from January, 2008 and continued upto 19.05.2009 for nearly 17 months duration. The petitioner has excavated only 20.14 lakh cubic meters of earth work against a total quantity of 331 lakh cubic meters, as per the agreement. It is the specific case of the S.E that land of the extent of Ac.582.50 was made available during October 2007 itself and another extent of Ac.44.14 of land comprising of hillock was made available during October, 2008 and thus a total extent of Acs.626.64 of land was made available whereas, the excavation of spill channel work was undertaken in less than Ac.100.00 of land. It is the case of the S.E that the total extent of land required to be delivered as per the agreement was only Ac.788.36 and thus, land of Ac.160 only remained to be handed over out of the total extent. Instead of trying to excavate earth work of 1 lakh cubic meters per day, the petitioner in more than 16 months duration has excavated a little more than

20 lakhs cubic meters. It was also the case of the S.E that the machinery that was available at the site work was also very minimal. In that; 1 work Excavator, 9 Dumpers, 1 Dozer, 1 Hydraulic Crane, 2 Wheel Loaders, 2 Air Compressors, 1 Crusher, 1 Batching Plant, 1 Caza Grander Spa, 1 Welding Machine, 1 Motor Grader and 1 63 KV Generation Set is all that was deployed. Therefore, with this kind of insufficient machinery, it will not be possible for one to carry out the work of the magnitude contemplated by the agreement. It is in this backdrop the 14 days notice contemplated by Clause 61 of Andhra Pradesh Standard Specifications (APSS) has been invoked and issued by the S.E on 03.08.2009. It must be stated, that the petitioner company has denied and refuted the allegations leveled against it by the S.E in his 14 day notice dated 03.08.2009. It is in this backdrop, that a meeting was convened in the chambers of the Hon'ble Minister for Irrigation on 12.08.2009 which was attended to by the high ranking officials also and after hearing in detail the petitioner and its version, a subsequent meeting was convened before the Hon'ble Chief Minister of the State on 23.08.2009. After taking into account and consideration the rival view points, a pragmatic approach appears to have been adopted by the State. It is at this meeting that the Chief Engineer has pointed out that the head works consist of three components namely (1) Earth-cum-Rock Fill Dam (2) Spillway and (3) the Power block. In so far as water distribution system is concerned, Right Main Canal and Left Main Canal supported by a network of distributaries were designed to provide water to the end users. While the progress of work of providing canals taken up by various agencies is satisfactory, the slow progress of head-works was considered as a cause for serious concern. Unless the head works are completed in quick time, it will not be possible to impound water in the reservoir and the benefits contemplated under the project cannot be reaped. The Chief Engineer has noted that the work entrusted to the writ petitioner herein has been turned out to the extent of 1.68% of the total work which was to be completed within 3 years from 07.07.2007 i.e. by 06.07.2010. It is in this context, the factors and reasons which have contributed to the delay in execution of the project have been taken complete note of. Three possible options available to the State, such as (1) Termination of the contract under Clause 61 of the preliminary specifications (PS) to Andhra Pradesh Standard Specifications (APSS) (2) To continue the works with the same agencies by providing them cost escalation for the abnormal increase in quantities and (3) Pre-closing of the contracts duly settling the accounts and to invite fresh bids have been explored and debated. It is not difficult for one to guess that if the first option is exercised, it will certainly lead to litigation with both sides interested in blaming the other and holding the other exclusively responsible for the delay for the progress of execution of the works. The second option is to continue execution of works with the same contractor by agreeing for cost escalation for the abnormal increase of the work. That would have still left some doubts in the mind of the State as to whether the petitioner would be able to accomplish the work at all, what with the view point of the Chief Engineer expressing grave concern about the outcome of execution of work by the petitioner. In juxtaposition to options 1 & 2, it was, option 3 that has provided a fair chance to both sides. In that, the State Government will be buying peace with the contractors as they will not be taking the litigation route for delaying the project any further. Further, there is an incentive for them to have their accounts settled and the State will be left with the freedom to pursue fresh tenders. Thus, the best option available to the State has been exercised and after deliberations about the merit behind accepting the third option, the agreement

with the existing agencies were ordered to be pre-closed duly settling their accounts and claims and also decided to proceed to invite fresh bids. The minutes of this meeting were placed before this Court by the learned Advocate General in both the cases and they are reproduced herein below for convenience.

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From the above, it has clearly emerged that all relevant factors that contributed for the delay in execution of the project lying on both sides have been fairly taken note of. While there was some delay in land acquisition and implementation of the corresponding relief and rehabilitation programme of displaced persons and a change brought about by CWC in other technical parameters resulting in increase in spill way and spill channel quantities, etcetera, were also contributory factors and the other reasons for the delay from the contractors side were also noticed. The disappointingly poor percentage of quantity of work executed thus far by the contractor was obviously the tilting factor for the State Government to call a quits with the contractor. Once the contract is terminated, without attaching any penal consequences, the prospects of securing fresh competitive bids by floating comprehensive tenders afresh were considered to be bright enough. In terms of the meeting of minds that took place during the deliberations held in the chambers of the Hon’ble Chief Minister, the following three decisions in the form of concluded agreement have emerged.

1. To pre-close the existing contract with the petitioner

2. The accounts of the contractor are to be settled

3. Fresh bids for execution of the work in a comprehensive manner by a single agency be invited.

Accordingly, the S.E has intimated the petitioner promptly that the agreement entered with it earlier stood pre-closed on 28.08.2009. Thus far, there is no difficulty.

In the light of the above agreement, after due deliberations and participation of both sides, it clearly emerges that the writ petitioner has become a former contractor of the State Government but not an existing contractor. The authorization granted to it in furtherance and in pursuance of the agreement entered by it with the State Government earlier stood terminated. Hence, he cannot have any enforceable rights or obligations arising there from. The consideration for such termination is two fold.

1. No penal consequences will flow against the petitioner for whatever the default is attributable to it for not working out properly or faithfully the agreement.

2. The second is, it will have the right to settle its account by the State Government and if, in that process, any issues arise in settlement of accounts, a High Powered Committee may be constituted by the State Government.

In view of these considerations, behind the agreement entered anew by the parties, it emerges that, no penal action contemplated by the original agreement entered into by the petitioner for any breach or violation of the terms thereof is liable to be taken against the petitioner by the respondents. I am therefore, of the opinion that the action of the respondents in proposing to invoke and recover certain monies, which were covered by the bank guarantees furnished as part of fulfillment of the obligations arising out of the contract entered into earlier is not permissible. In this context, it will be appropriate to bear in mind the principles enunciated by the Supreme Court in ***Hindustan Construction Co. Ltd. vs. State of Bihar and others***, ***U.P. State Sugar Corporation vs. SUMAC International Limited***, ***BSES Ltd. (Now Reliance Energy Limited) vs. Fenner India Ltd*** and ***Himadri Chemicals Industries Limited vs. Coal Tar Refinery Company***.

In ***U.P. State Sugar Corporation vs. SUMAC International Limited*** (para 11 & 12) the Supreme Court has carved out two exceptions to the generally accepted principle that the beneficiary of an unconditional bank guarantee is entitled to realize such a bank guarantee strictly in terms of the agreement thus far worked out with the Bank by him irrespective of any pending disputes. The exceptions are:

1. A fraud in connection with the bank guarantee, which would vitiate the very foundation of such a bank guarantee;

2. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irreparable harm or injustice to one of the parties concerned.

Though this arena of exceptions to the normal rule of unfettered encashment of bank guarantee is demarcated, but, when an attempt is made to expand the net of exceptions further, in BSES Limited case, the Supreme Court has adopted a very cautious approach in paragraph 14 of the said Judgment which reads as under:

> "We are afraid that in the face of the law succinctly laid down in U.P Coop. Federation and reiterated in numerous judgments of this Court referred to earlier, we are unable to accept the wide proposition of law laid down in the foreign judgments cited by Mr Sorabjee. Whatever may be the law, as to the encashment of bank guarantees in other jurisdictions, when the law in India is clear, settled and without any deviation whatsoever, there is no occasion to rely upon foreign case-law."

In the instant case, one of the important considerations that weighed with the State for pre-terminating the contract though such a contingency was not conceived of originally, is centered around the obligation not to pick up faults on the parts of the contractor as part of purchase of peace bargain. In other words, the State has agreed not to pick up the holes from the alleged failure on the part of the contractor to keep pace with the schedule of progress of execution of the project work. The old wounds should not be racked up, appears to be the spirit behind the move. When once it is agreed that both sides will refrain from throwing the blame on the opposite side and thus agree for a quiet termination of the existing contract, it is not fair or proper on the part of the respondents to fall back upon any of the penal clauses contained in the original agreement which stood terminated now. In my opinion, the original agreement entered into by and between the petitioner and the State received a decent burial by the agreement negotiated and worked out pragmatically by both sides on 23.08.2009. Hence, the obligations arising out of there from cannot be insisted any longer to be performed by the writ petitioner. Therefore, the facts of the present case attract the second exception carved out in ***U.P. State Sugar Corporation*** case.

For the same parity of reasoning, I must also take note that the writ petitioner has consented to the State Government exercising it's right in floating fresh tenders comprehensively. In fact, the consent of the petitioner may not be really necessary, but however, the State has acted very cautiously and carefully in the matter and reiterated its right to invite fresh bids by incorporating the same in the agreement dated 23.08.2009. By his consent, conduct and agreement, the petitioner has accepted for the pre-closure of his existing agreement relating to the execution of the part of the project work awarded to him and when once the consent of the petitioner is obtained and acted upon by the State Government, he ceases to have any subsisting right or interest in the work relating to the project particularly based upon the strength of the terms contained in the agreement entered into by him earlier. When once the said agreement has been terminated by pre-closure method, all the rights and obligations of the writ petitioners vis-à-vis the project have come to an abrupt end, excepting those which have been specifically preserved in the subsequent agreement. What has been preserved was the right of the petitioner to secure settlement of his accounts for the works of the project executed. Therefore, I am clearly of the view that there is no merit whatsoever behind the petitioner's claim that the State Government has erred in floating tenders afresh. The prayer of the petitioners to refrain the State Government from finalizing the tender floated afresh by it for securing comprehensive execution of the left over works is clearly beyond the right and reach of the petitioners. The petitioners in the status of 'former contractor' of the State Government cannot raise any objection in that regard. At best, they could have competed with any other bidder provided they have the necessary eligibility to participate in the fresh enquiry, but certainly not in their capacity as former contractor.

This takes us to the question of the settlement of accounts. The petitioner has made a huge grievance that instead of constituting a High Power Committee by the State Government, a State Level Committee has been proposed now for scrutinizing the claims made by the petitioners. The contention canvassed is that in the agreement worked out on 23.08.2009, it is agreed that a High Powered Committee would be constituted at the Government level for settling the claims. A look at paragraph 11.3 of the minutes of the meeting, where the meeting of minds between both sides has been arrived at would clearly disclose the following:

> "………….. if any issues arise in settlement of accounts, a High Powered Committee may be constituted at Government level to examine those issues and to make specific recommendations to the Government…….."

The intention clearly manifested behind this statement is this: If there is still any issue arising in the matter of settlement of accounts, in such an event, a High Powered Committee may be constituted at government level to examine those issues and then the High Powered Committee will make its specific recommendations to the Government for taking the necessary follow-up action. Thus, ultimately, the High Powered Committee was required to examine any such issue which still remained unresolved in the matter of settling the accounts. Therefore, the attempt made in trying to scrutinize the accounts/claims of the petitioner by a State Level Standing Committee, when understood correctly, is in no manner improper. It is also not in any conflict with the terms of agreement set about on 23.08.2009. A State Level Standing Committee comprising of technical persons are bound to scrutinize the accounts and claims by the petitioner, at the first instance. They will be able to make a realistic assessment as to how far the claims of the petitioner are genuine and as to what extent they are liable to be settled and as to how far some of those claims are fanciful, at this initial level of scrutiny. When viewed in that context, the technical committee will be able to separate the genuine claims and determine as to how much money, if at all, is due and payable to the writ petitioner contractor. For instance, the total contract value of the agreement No.1/2006-2007 dated 11.08.2006 entered into with the petitioner is of the total value of sum of Rs.884 crores. That was the money that would have been paid if the works have been completely and faithfully executed. Whereas, the S.E has asserted that the petitioner has only accomplished the work of 1.68% of the total value. Whereas, the claims made by the petitioner are running into Rs.246 crores. Per contra, the State appears to have released an amount of Rs.44.19 crores towards mobilization advance itself. If, any other payments were also made by the State Government, they are also liable to be taken into account and consideration. It is the State Level Standing Committee comprising of technical personnel who will be able to pronounce an appropriate opinion with regard to the nature of the claims made by the petitioner. Without in any manner expressing any opinion, and purely for illustration purposes, I point out herein, that a sum of Rs.10 crores has been claimed by the petitioner as good will component for business procurement. If, very expensive gifts have been distributed by the petitioner for pocketing the work, amongst it's friends and foes alike, the expenditure incurred in that regard, perhaps, cannot justifiably be passed on to the State Government. Therefore, I am clearly of the opinion that the State Level Standing Committee is bound to scrutinize each head of the claims of the petitioners and make their opinion available for the State Government. It is at this stage that the State Government would be required to constitute a High Powered Committee.

There is another aspect that is needed to be brought out here. The petitioner has also made a claim with regard to the equipment purchased by it specifically for the works of this project. The Superintending Engineer and the Circle Engineer have taken the view that such equipment is not ideally suited for the works required to be executed in this Project. At this stage, it is difficult to express any opinion, one way or the other, on the divergent view points canvassed by both sides. What kind of equipment is suitable for executing this kind of work is a matter of opinion of the experts. May be the Superintending Engineer and Circle Engineer may have viewed the equipment purchased by the petitioner as not ideally suitable one, whereas the petitioner consortium, having the necessary experience of having executed similar projects elsewhere, may be able to demonstrate the efficacy and efficiency of the equipment purchased by them. Therefore, by allowing the study by a Technical Committee at the initial stage, certain opinion in that respect can emerge, which will be advantageous for the High Powered Committee in getting guided, when it examines the legal question with regard to passing of title to any such equipment, if paid for by the State. Further, if the State is not desirous to have complete control of equipment by paying off it's cost, a most equitable measure would be required to be evolved by paying up hire charges upto the point of termination of the contract. The relevant legal questions can be addressed at a later stage by the High Powered Committee. I am, hence, convinced that the scrutiny by the State Level Standing Committee at the initial stage, of the claims made by the petitioner is warranted and it would be advantageous for the High Powered Committee later on to deal with that issue.

Though, the agreement dated 23.08.2009 did not spell out in so many words the composition of the High Powered Committee, but nonetheless, it is appropriate to address the question as to whether there is any legal obligation to constitute at the first place, a High Power Committee and what should be it's composition.

The discussions that took place on 23.08.2009 leave none in doubt that the State has agreed not only to pre-close the existing contract, but also for settling the accounts of the contractor. Further, if any issue arises in settlement of accounts, a High Powered Committee may be constituted at Government level to examine those issues and to make specific recommendations to the Government. Those recommendations are meant to be acted upon and they are not intended to be scrapped or departed there from. It is a solemn undertaking of the State that the issue of settlement of accounts would be worked out in a fair and satisfactory manner. In this context, it is only appropriate to bear in mind the principle enunciated by the Supreme Court in ***Biman Krishna Bose vs. United India Insurance Co. Ltd and another*** *and* ***ABL International Ltd. and another vs. Export Credit Guarantee Corporation of India Ltd. and others***

> Biman Krishna Bose vs. United India Insurance Co. Ltd and another
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> "3. …….Even in an area of contractual relations, the State and its instrumentalities are enjoined with the obligations to act with fairness and in doing so, can take into consideration only the relevant materials. They must not take any irrelevant and extraneous consideration, while arriving at a decision. Arbitrariness should not appear in their actions or decisions……."

ABL International Ltd. and another vs. Export Credit GuaranteeCorporation of India Ltd. and others

> "23. It is clear from the above observations of this Court, once State or an instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14 then we have no hesitation that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent……."

Therefore, to my mind, the assurance held out by the State for satisfactorily resolving the claims of the petitioner contractor have transformed themselves into a solemn promise and that promise can be enforced based upon the Doctrine of Promissory Estoppel. It will be profitable to visit in this context, as to how the Supreme Court has expounded the scope of applicability of the Doctrine of Promissory Estoppel *vis-à-vis* the representations made by the State regarding it's intentions in contractual matters.

In ***Union of India vs. Godfrey Philips India Ltd***, Justice P.N. Bhagwati in his opinion has set out the contours of the concept as entrenched in our legal system in the following words:

> "9. Now the doctrine of promissory estoppel is well-established in the administrative law of India. It represents a principle evolved by equity to avoid injustice and, though commonly named promissory estoppel, it is neither in the realm of contract nor in the realm of estoppel. The basis of this doctrine is the inter position of equity which has always, true to its form, stepped in to mitigate the rigour of strict law. This doctrine, though of ancient vintage, was rescued from obscurity by the decision of Mr. Justice Denning as he then was, in his celebrated judgment in Central London property Trust United v. High Trees House Limited(1956) 1 All E.R. 256. The true principle of promissory estoppel is that where one party has by his word or conduct made to the other a clear and unequivocal promise or representation which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise or representation is made and it is in fact so acted upon by the other party, the promise or representation would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings which have taken place between the parties. It has often been said in England that the doctrine of promissory estoppel cannot itself be the basis of an action: it can only be a shield and not a sword: but the law in India has gone far ahead of the narrow position adopted in England and as a result of the decision of this Court in Motilal Sugar Mills v. State of Uttar Pradesh:[1979]118ITR326(SC) , it is now well-settled that the doctrine of promissory estoppel is not limited in its application only to defence but it can also found a cause of action. The decision of this Court in Motilal Sugar Mills case (supra) contains an exhaustive discussion of the doctrine of promissory estoppel and we find ourselves wholly in agreement with the various parameters of this doctrine outlined in that decision.
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> 10. More importantly, it is necessary to point out that the decision in Motilal Sugar Mills case (supra) marks a significant development in the law relating to the doctrine of promissory estoppel. The principal question debated in that case was as to whether and if so, to what extent, is the doctrine of promissory estoppel applicable against the Government. It was contended on behalf of the State of Uttar Pradesh that the plea of promissory estoppel is not available against the exercise of executive functions of the State, for the State cannot bind itself, so as to fetter its future executive action. This contention was sought to be supported by relying on the observations of Rowlatt J. in an early decision in Rederiaktiebolaget Amphitrite v. The King (1921) 3 K.B. 500. But this Court observed in Motilal Sugar Mills case (supra) that what Rowlatt J. said in that case did not represent the correct law on the subject and pointed out that the doctrine of executive necessity propounded by Rowlatt J. was disapproved by Denning, J. as he then was, in Roberston v. Minister of Pensions (1949) 1 K.B. 227. Denning, J. categorically expressed the view in Roberston's case (supra) that the crown cannot escape its obligation under the doctrine of promissory estoppel "by praying in aid the doctrine of executive necessity". This Court also in Union of India v. Indo Afghan Agencies:[1968]2SCR366 , exploded the doctrine of executive

> necessity. Shah, J. speaking on behalf of the Court negative the argument urged on behalf of the Government that "it is not competent for the Government to fetter its future executive action which may necessarily be determined by the needs of the community when the question arises and no promise or undertaking can be held to be binding on the Government so as to hamper its freedom of executive action" and observed at page 376 of the Report:
>
> We are unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment. Under our constitutional set-up no person may be deprived of his right or liberty except in due course of and by authority of law; if a member of the Executive seeks to deprive a citizen of his right or liberty otherwise than in exercise of power derived from the law common or statute - the Courts will be competent to and indeed would be bound to protect the rights of the aggrieved citizens.
>
> The learned judge also after examining the decisions cited before him summed up the position in the following words:
>
> Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the Judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen.
>
> The defence of executive necessity was thus clearly negatived by this Court and it was pointed out that it did not release the Government from its obligation to honour the promise made by it, if the citizen, acting in reliance on the promise, had altered his position. The doctrine of promissory estoppel was in such a case applicable against the Government and it could not be defeated by invoking the defence of executive necessity. This Court in Motilal Sugar Mills case (supra) also negatived the argument that if the Government were held bound by every representation made by it regarding its intention, the result would be that the Government would be bound by a contractual obligation even though no formal contract in the manner required by Article 299 of the Constitution was executed. It was held by this Court that a party who has, acting in reliance on a promise or representation made by the Government, altered his position, is entitled to enforce the promise or the representation against the Government, even though the promise or representation is not in the form of a formal contract as required by Article 299 and that Article does not militate against the applicability of the doctrine of promissory estoppel against the Government.

On this question, R.S. Pathak, J and Amarendra Nath Sen, J concurred with the views of the Chief Justice P.N. Bhagwati.

Therefore, there is no escape to the State, but to constitute a High Powered Committee which would tender its opinion with regard to the claims/accounts of the petitioner.

Normally, when a State contemplates to constitute a High Powered Committee, it would be constituting the same under the Chairmanship of the Chief Secretary to the Government and it may comprise of two or three other members such as the Principal Secretary to the Government in the concerned department and the Principal Secretary in the Department of Finance, possibly being roped in as the other members. But, in the instant case, during the course of the meeting that took place in the chambers of the Hon'ble Chief Minister, the Principal Secretary to the Government in the

Irrigation Department had participated along with the other senior level officials. If a High Powered Committee is now constituted including him as a member, there could be a overlap of the view point canvassed by such an officer. This apart, the issue raised by the petitioners herein is not a simple or a straight forward one where, with all the expertise and administrative efficiency, a reasonably satisfactory solution can be found easily. The issues raised by the petitioners are fairly complicated and they are based on one legal principle or the other. Therefore, it would only be appropriate that a High Powered Committee shall be constituted under the Chairmanship of one of those Judges of the Supreme Court who have retired and are available for undertaking a task of this nature – which is akin to resolution of disputes by way of Arbitration - who can find a satisfactory solution for both the State as well as the contractor. There are several such eminent judges who are available who can be approached with a request for undertaking the task. A retired Judge of the Supreme Court, it is totally unnecessary for me to reiterate, can resolve the entire controversy in a just and satisfactory manner. The wisdom and vast experience of deciding complicated questions of law and fact, perhaps, is a necessity and key for the present problem. It is certainly open to the State to associate the Chief Secretary to the Government and the Principal Secretary to the Government in the Finance Department or in his place, any Retired Accountant General who is well versed in accounting or an expert in Costs & Works Accountant or a Chartered Accountant to be a part of the High Powered Committee. The recommendations of the High Powered Committee will have binding effect on both the State as well as the contractor. I, therefore, direct the State Government to constitute a High Powered Committee after obtaining the consent of any of the Judges of the Supreme Court who have retired to head such a Committee.

The High Powered Committee may get guided during deliberations or thereafter by the wise counsel of the Advocate General. The High Powered Committee will make its views known to the Government in the form of a report and it is for the State Government to accept the same objectively and take an appropriate follow-up action within a maximum period of three months from the date of receipt of the report from the High Powered Committee. The High Powered Committee is at perfect liberty to provide an opportunity of hearing to the petitioner company and in case it prefers to be represented by any Legal/Technical advisors, such presentation of the view point of the petitioner company may not exceed three such occasions/presentations. The High Power Committee will be at liberty to consult any other subject expert on it’s own terms for purposes of enabling it to evaluate the merit of the claim of the petitioner company. The High Powered Committee will suitably evolve the procedure to be followed by it including the remuneration for the task undertaken.

The writ petitions accordingly stand disposed of in the above terms.

Consequently, all miscellaneous applications pending shall stand closed. No costs.

JUSTICE NOOTY RAMAMOHANA RAO

20.04.2015
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