

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No.817 of 2016

M/s Kymore Engineering Works Pvt. Ltd., Through Vikramaditya Singh, Managing Director (Proprietor), S/o Late Rajendra Singh, aged about 39 years, Shanti Niketan Amar Patan, P.S. Civil Line, Satna, District Satna (M.P.)

---- Petitioner

Versus

1. State of Chhattisgarh, through the Secretary, Water Resources Department, Mahanadi Bhawan, New Mantralay, Raipur (C.G.)
2. The Engineer-in-Chief, Water Resource Department, Raipur (C.G.)
3. The Chief Engineer, Mahanadi – Godavari Kachar, Water Resources Department, Raipur (C.G.)
4. The Superintending Engineer, Water Resources Department, Shivnath Mandal, Durg (C.G.)
5. Executive Engineer, Water Resource Department, Balod (C.G.)

---- Respondents

For Petitioner:	Mr. Apoorva Tripathi, Advocate.
For State/Respondents:	Mr. Shashank Thakur, Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

02/08/2017

1. The petitioner seeks to challenge the order of recovery passed by the respondent authorities of the State Government seeking to recover ₹ 323.076 lakhs from the petitioner on the ground that the petitioner has failed to execute the work awarded to it within the time stipulated and, therefore, it is liable to pay the amount in dispute.

2. This writ petition has been filed by the petitioner with the following facts: -

2.1) The petitioner is A-5 Class Contractor registered with the respondent Department and participated in a notice inviting tender calling bids from the registered contractors for construction work of Cement Concrete in situ lining, Colaba fixing and construction & repair of structures of 14 Nos. minors of Kharkhara Right Bank Canal System in which he participated and ultimately, his bid was found viable and he was awarded work by order dated 27-1-2009. Accordingly, the petitioner deposited security amount and earnest money and started work, but on account of repeated release of water in the said canal, work allotted to him could not be completed and exclusively, the default was attributable to the State authorities. But, ultimately, ignoring the request for extension of time, the petitioner's contract was terminated on 30-8-2012 and though it was subjected to re-tendering, but it could be re-tendered only on change of tender conditions and yet, by orders Annexures P-1, P-2 and P-3, recovery of ₹ 323.076 lakhs has been sought to be imposed against the petitioner and entire payment of other works has been stopped.

2.2) Return has been filed by the State Government stating inter alia that the petitioner is guilty of not completing the work right in time as the State has huge loss in addition to the fact that the work in question could not be completed and there is huge

public unrest on account of work not having been completed right in time. It has been also been pleaded that as per clause 4.3.2 (A) of the tender document, compensation for delay, the contractor is liable to pay compensation, it has been claimed rightly and there is clause 4.3.38.1 which deals with recovery of dues from the contractors. It has finally been pleaded that the State is absolutely justified in directing recovery of said amount from the petitioner and challenge to the same is not sustainable in law and the writ petition is liable to be dismissed.

3. Mr. Apoorva Tripathi, learned counsel appearing for the petitioner, would vehemently submit that the State Government is absolutely unjustified in directing recovery of the subject amount from the petitioner in defiance of clause 4.3.38.1 which deals with recovery of dues from the contractors. He would further submit that the sum due or the amount due has not been adjudicated either by the arbitrator or by the Arbitral Tribunal or by any other arbitrator, even the work in question was not re-tendered and the State without any adjudication of the sum due against the petitioner cannot issue the impugned notice which is unsustainable and bad in law. Initially work has not been re-tendered, after change of some conditions of the tender, it has been re-tendered, ultimately. Strongly, he placed reliance upon a Division Bench decision of this Court in the matter of **M/s. Macadum Makers v. State of Chhattisgarh and others**¹ to buttress his submission.

¹ AIR 2012 Chhattisgarh 123

4. Mr. Shashank Thakur, learned State Counsel, would submit that the petitioner is a rank defaulter in executing the work and important work like construction/repair of canal could not even satisfactorily be completed by the petitioner despite of cooperation being extended by the respondent authorities which led to termination of his contract in accordance with clause 4.3.2 (A) read with clause 4.3.38.1.. Notice for recovery of subject amount has been issued against the petitioner which is absolutely unjustified in the facts of the present case. Therefore, the writ petition as framed and filed deserves to be dismissed.
5. I have heard learned counsel for the parties considered the rival submissions made herein-above and also gone through the record with utmost circumspection.
6. The first question would be whether writ petition against action of the State authorities seeking to recover disputed amount would be maintainable or not. This question is no longer res integra and in **M/s. Macadam Makers** (supra), a Division Bench of this Court while relying upon the decisions of the Supreme Court in the matters of **ABL International Ltd. and another v. Export Credit Guarantee Corporation of India Ltd. and others**², **Karnataka State Forest Industries Corporation v. Indian Rocks**³, **Sushila Chemicals Private Ltd. and another v. Bharat Coking Coal Limited and others**⁴ and **Kisan Sahkari**

2 (2004) 3 SCC 553

3 (2009) 1 SCC 150

4 (2010) 10 SCC 388

Chini Mills Ltd. and others v. Vardan Linkers and others⁵,

held that writ petition is maintainable in case of contractor taking recourse to extraordinary remedy seeking to invoke writ jurisdiction of Court, alleging action of State authorities as arbitrary and unreasonable.

7. The next question for consideration would be whether the State authorities are justified in issuing notice for recovery of the aforesaid subject amount in dispute without having due adjudication by the competent authorities.
8. In the matter of **State of Karnataka etc. v. Shri Rameshwara Rice Mills Thirthahalli etc.**⁶ contractor had entered into an agreement with the State for construction of certain buildings. As the contractor failed to complete the work, the contracts were terminated in terms of agreement entered into by them and damage payable were assessed and sought to be recovered as arrears of land revenue, without there being any adjudication upon the question with regard to the liability of the parties. The Supreme Court considering clause 12 of the agreement observed as under: -

“Even assuming for argument's sake that the terms of clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the

5 (2008) 12 SCC 500

6 AIR 1987 SC 1359

committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of clause 12.”

9. A Division Bench of this Court in the matter of **A.K. Construction Company v. The State of M.P.**⁷ where work of construction was awarded after completion of work, bills were submitted and the claim bills, however, were not released which led to dispute between the parties and the aggrieved party approached Arbitration Tribunal constituted under the Chhattisgarh Madhyastham Adhikaran Adhiniyam, 1983. Defence of the State Government was that the Government dues were to be recovered and in terms of the agreement, the Government was entitled to recover “sums recoverable” not only under the contract in question, but also under other contracts. The Division Bench speaking through A.K. Patnaik, CJ (as then His Lordship was), held that the Government could not be arbiter, Judge of its own cause and could not recover the amount unless the amount is held to be due and recoverable by way of adjudication either by the Court or by the Arbitration Tribunal, and observed as under: -

“It will be clear from second sentence of the aforesaid clause that in the event of the security being insufficient or if no security has been taken

⁷ 2005 (4) M.P.H.T. 15 CG

from the contractor, then the balance or the total sum recoverable, as the case may be, shall be deducted from any sum then due or which at any time thereafter may become due to the contractor under the instant or any other contract with the Govt.. The expression 'sum recoverable' would mean any sum that is admitted by a contractor to be due to the Govt. or that is disputed by the contractor but adjudicated by the Court or the arbitrator to be due and recoverable from the contractor. This can be the only interpretation of Clause 4.3.39.1 consistent with the principle of natural justice that no person can be a Judge of his own cause. In case, it is held, as has been held by the Arbitration Tribunal that the "sum recoverable" is any amount which the Govt. or any authority of the Govt. considers to be recoverable from the contractor, then the Govt. or such authority will be a Judge of its own cause and would be entitled to recover any sum from the contractor, even though the said sum is disputed and not adjudicated to be due and recoverable from the contractor by the arbitrator or the Court."

10. Similarly, the Division Bench of this Court in **M/s. Macadam Makers** (supra) following **Shri Rameshwara Rice Mills Thirthahalli's** case (supra) and **A.K. Construction Company** (supra), has laid down similar proposition as under: -

"20. It is therefore, apparently clear that though respondents claimed certain amount to be recoverable from the petitioner, alleging that the work of the petitioner was unsatisfactory and he failed to repair the road within the time stipulated as per letter dated 06.11.2008, the petitioner took recourse to the provision contained under the arbitration clause-29 by raising a dispute before the Superintending Engineer. However, without adjudication of the petitioner's liability towards payment, alleged sum is sought to be recovered against the petitioner, and respondent-Executive Engineer has proceed to issue impugned letter dated 03.12.2010. This act on the part of the respondents-State authority can only be termed as arbitrary and unreasonable, violative of Article 14 of the Constitution of India. Moreover, respondents could not bring to the notice of this Court any law operation in the field, authorizing the respondents authority to recover the amount by stretching their hands to the

due payment and deposits of the petitioner with other offices in connection with other works. Even in the agreement, no such terms have been stipulated. Present is not a case where even after adjudication, petitioner failed to deposit the amount and, therefore, the respondents have proceeded to recover the amount as arrears of land revenue.”

11. In the matter of **Bharat Sanchar Nigam Ltd. and another v. Motorola India Pvt. Ltd.**⁸, the Supreme Court has followed the principle of law laid down in **Shri Rameshwara Rice Mills Thirthahalli's** case (supra) holding that a party cannot be a judge in his own cause.
12. In the matter of **J.G. Engineers Pvt. Ltd. v. Union of India and another**⁹, the Supreme Court has relied upon **Shri Rameshwara Rice Mills Thirthahalli's** case (supra) to hold that adjudication upon the issue relating to a breach of condition of contract and adjudication of assessing damages arising out of breach are two different and distinct concepts and right to assess damages arising out of a breach would not include a right to adjudicate upon as to whether there was any breach at all and one of the parties to an agreement cannot reserve to himself the power to adjudicate whether the other party has committed breach.
13. Very recently, in the matter of **M/s. Gangotri Enterprises Ltd. v. Union of India and others**¹⁰, the Supreme Court while considering the question of encashment of bank guarantee has held that the sum claimed by the respondents from the appellant is in the nature of damages, which is not yet adjudicated upon

8 AIR 2009 SC 357

9 (2011) 5 SCC 758

10 AIR 2016 SC 2199

arbitration proceedings. Their Lordships observed in paragraph 42 of their report as under: -

“42. On perusal of the record of the case, we find that firstly, arbitration proceedings in relation to the contract dated 22.08.2005 are still pending. Secondly, the sum claimed by the respondents from the appellant does not relate to the contract for which the Bank Guarantee had been furnished but it relates to another contract dated 22.08.2005 for which no bank guarantee had been furnished. Thirdly, the sum claimed by the respondents from the appellant is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings. Fourthly, the sum claimed is neither a sum due in praesenti nor a sum payable. In other words, the sum claimed by the respondents is neither an admitted sum or a sum which stood adjudicated by any Court of law in any judicial proceedings but it is a disputed sum and lastly, the bank guarantee in question being in the nature of a performance guarantee furnished for execution work of contract dated 14.07.2006 (Anand Vihar works) and the work having been completed to the satisfaction of the respondents, they had no right to encash the Bank Guarantee.”

14. In view of the above-stated settled legal position that the State authorities cannot recover the above-stated amount from the petitioner without due and prior adjudication by the competent authority, the impugned notices are liable to be quashed.

15. As a fallout and consequence of aforesaid discussion, I am of the considered opinion that the notices issued by the Superintending Engineer and the Engineer-in-Chief dated 20-8-2015 and 4-8-2015, respectively, are arbitrary, unreasonable and violative of Article 14 of the Constitution of India, the same are therefore, liable to be quashed and are accordingly, quashed. However, the petitioner is at liberty to take recourse to the

remedy of adjudication / arbitration as per clause 4.3.29.2 by approaching the Superintending Engineer who shall consider and dispose of the dispute by passing appropriate orders in accordance with the stipulations contained in the arbitration clause, expeditiously, if recourse is made.

16. The petitioner will cooperate in the arbitration proceedings. Mr. Tripathi, learned counsel for the petitioner, at this stage, submits that let the competent authority be directed to dispose of the arbitration proceedings within three months. The prayer is fair and reasonable. It shall be done accordingly by concerned.

17. The writ petition is accordingly, allowed to the extent indicated herein-above. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge