IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.12906 of 2016

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1. Vijeta Projects and Infrastructure Ltd. Regd. Office : West Morabadi Grounds, Ranchi - 834008 represented through its General Manager, Shri Anuranjan Kumar Rakesh S/o Shri Prabhudeo Narain Singh resident of Mohalla - Bariatu, P.S. - Bariatu, District - Ranchi.

.... Petitioner/s

Versus

1. The State of Bihar through Chief Secretary, Old Secretariat, Government of Bihar, Patna.
2. The Principal Secretary, Water Resource Department, Government of Bihar, Patna.
3. Superintending Engineer (Planning & Monitoring), Monitoring Circle - 3, Water Resources Department, Government of Bihar, Patna.
4. The Chief Engineer, Sinchai Srijan, Water Resources Department, Nalanda at Biharsharif.
5. The Superintending Engineer, Irrigation Circle, Nalanda, Biharsharif.
6. The Executive Engineer, Irrigation Division, Uderasthan Jahanabad, Bihar.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Vimal Kirti Singh,
Mr. Sidhartha,
Mr. Akhileshwar Singh

For the State : Mr. Ranjeet Kumar, AC to AG

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

CAV JUDGMENT

Date: 09-01-2018

Heard the parties.

2. In the present writ petition, petitioner is seeking relief of writ of mandamus giving direction to the respondents to pay him as per the recommendation dated 11.10.2014 of Chief Engineer, Sinchai Srijan, Water Resources Department, Nalanda at Biharsharif (respondent no.4) and the Superintending Engineer, Irrigation Circle, Nalanda, Bihar Sharif (respondent no.5) for the additional quantity of work done by him at 269% in excess to the original Bill of Quantity (BOQ)/agreement for the year 2007.

3. Through the supplementary counter affidavit filed by the State of Bihar brought on record the letter dated 13.10.2016 (Annexure-B) which has been issued by the Engineer-in-Chief to Chief Engineer thereby informed the claim of the petitioner for payment of extra amount at the revised rate of 2012 in terms of Clause 12.2 of S.B.D., has been rejected on the ground that Schedule F of the agreement wherein the upper ceiling of quantity of extra work is silent. On that account the recommendation of the Chief Engineer, Gaya vide letter no. 1303 dated 11.10.2014 was found against to the provision of Clause 12.2 of SBD which has been challenged by the petitioner by filing amendment petition vide I.A. No. 8772 of 2016.

4. This Court vide order dated 15.2.2017 directed the petitioner to file a representation to the Principal Secretary, Water Resources Department, Government of Bihar (respondent no.2) with a direction to the Principal Secretary to consider the case of the petitioner and take decision on its own merit whereafter the Principal Secretary vide letter no.510 dated 30.3.2017 after giving thorough consideration has rejected the claim of the petitioner of an extra amount in terms of Clause 12.2 of SBD wherein he has held that petitioner has been paid extra amount by way of escalation under Clause 10CA or clause 10CC which has further been challenged by filing amendment petition vide I.A. No.3038

of 2017.

5. People of State of Bihar are mostly dependent on agriculture, irrigation facility would improve the agriculture growth rate, structural change is key element improvement of agriculture out put. The Government of Bihar in order to create congenial environment for agriculture growth decided to creates infrastructure for irrigational facility for growth improvement of out put decided to build a water Barrage with canal facility at the Uderasthan river. A notice inviting tender (NIT) was issued by the Executive Engineer, Irrigation Division, Uderasthan (respondent no.6) for construction of Barrage Left and Right Head Regulators, Guide Bund and Afflux Bund on the river Falgu at Uderasthan. Petitioner also put his sealed cover tender. Petitioner succeeded in technical and financial bid as being lowest tenderer obtained the work in his favour as was declared successful. The petitioner entered into an agreement. The Designs and Drawings of the project was prepared by the Design Wing of the Water Resources Department, Government of Bihar, in the agreement, the time for completion of work was fixed 30 months. The total value of work was Rs.66.06 Crores. The petitioner collected material and machine to start the work but on 22.10.2007 petitioner was informed for stoppage of the work. On enquiry the petitioner came to know the designs had been sent to Central

Water Commission, New Delhi and Central Water Power Research Station, Pune for Hydralic Model Test for vetting. By the time the petitioner had already deployed huge quantity of human power and machine for construction and completion of Barrage to achieve target within the stipulated time has started to carry out the work at the project site almost for 5 months. After long spell on receipt of technical clearance from the Central Water Power Research Station, Pune for Hydraulic Model Text, the Joint Secretary (Engineering), Water Resources Department, Bihar vide letter dated 9.12.2009 informed the Chief Engineer, Sinchai Srijan, water Resources Department, Nalanda at Biharsharif (respondent no.4) about the various technical changes, change of design, location, size and shape of the Barrage structure and accordingly altogether a fresh new designs and drawings were prepared by the Design Wing, Water Resource Department and the work was to be done accordingly.

6. The Executive Engineer, Irrigation Division, Uderastha, Jehanabad (respondent no.6) vide letter dated 16.4.2010 informed the petitioner to resume the work of proposed Barrage. The original agreement which the petitioner entered with the Chief Engineer, Sichai Srijan, water Resource Department, Nalanda at Biharsharif (respondent no.4), the work value was Rs.66.06 Crores but after change of lay out plan and design, the work value

increased to an amount of Rs.138.72 Crores. The petitioner agreed to work up-to 66.06 Crores at the old rate but for further extra work at prevailent market rate. As per petitioner, this special gesture was shown to the State of Bihar on account of long standing relationship even though the work was altogether new, as the entire spectrum of work has been changed, in the quantum indicated in the original bill of quantities (BOQ) location, size and nature. The petitioner addressed a letter dated 21.4.2010 to Chief Engineer (Respondent no.4), in paragraph 3 of the said letter the petitioner has mentioned that the above change, including shifting of location or work site and substantial change in Design, Quantities of various items and scope of work altered the character of the Original Agreement to an extent which resulted into altogether a novation of the contract and has been mentioned that in order to maintain continuity of good relationship with the department the petitioner had shown readiness to carry out the work at the contractual rate limited to the original agreemental quantities. It has further been mentioned, for further work, request was made by the Company to pay them as per prevailing market rate or as per mutually acceptable/agreed rate. After lapse of three years, the petitioner started work but he did not receive any response with regard to payment at the market rate for additional quantity of work. The petitioner vide letter dated

15.9.2013 (Annexure-8) addressed to the Executive Engineer, Water Resources Department (Respondent no.6) requested for necessary amendment of rate for extra work in terms of Clause 12 of S.B.D. When the petitioner did not receive any response, again wrote a detailed letter to the Executive Engineer (Respondent no.6) vide letter dated 22.10.2013 (Annexure-P9) wherein it has been mentioned that the original work value of the contract was for Rs.66.06 Crores, was to be completed within 30 months. The petitioner Company in order to carry out the work within the contractual period had mobilized the necessary infrastructure but in the meantime, the work was stopped for nearly 29 months later on directed to start, in the meantime nature and volume of the work increased substantially in comparison to original agreement in different facet, i.e. earth work, RCC/PCC, TMT and Z type sheet pillar. The rates are being paid for above items even after escalation far behind the current workable rate but he has taken on its shoulder looking to the past relationship started carrying out the work in anticipation that the department would take corrective action to remove the anomaly in the interest of the project. Analysis for justification for workable rate will follow shortly.

7. Again the petitioner Company wrote a letter dated 5.4.2014 (Annexure-P10) to the Principal Secretary, mentioning therein that the nature of work has substantially changed as the

volume of work increased in between 27% to 269% in term of Clause 12 of Contract, read with Schedule F and P.W.D. Code all the items have become extra/new item for which new rates have been given at the current market rate or at least as per the latest schedule rate. Claim has been made to enhance the rate in terms of Clause 12 of the Contract read with Schedule F and PWD Code. As work was substantially changed in its volume and nature request was made to make payment as per the current rate or at least as per latest schedule.

8. The continuous efforts, it appears, it gave result as the Superintending Engineer wrote letter dated 30.4.2014 (Annexure-P11) to the Chief Engineer requested to examine the request of the petitioner and take suitable decision. The Executive Engineer (Respondent no.6) vide letter dated 21.5.2014 (Annexure-P12) directed the petitioner Company to submit comprehensive detailed analysis of the extra work along with rate without delay, for forward action could be taken. The petitioner Company wrote letter dated 26.5.2014 (Annexure-P13) addressed to the Executive Engineer attaching comprehensive detailed analysis of the increased work and rate for all such works where the quantity has increased substantially much beyond the quantity stipulated in original Bill of Quantity (B.O.Q) as the work was to be completed in all respects by June, 2015 immediate approval of the revised

rate as per enclosed analysis is of paramount importance and any delay in approval of rate will only delay the completion of this prestigious project.

9. After examining the bills submitted by the petitioner the Superintending Engineer (respondent no.6) vide letter dated 9.10.2014 (Annexure-P14) addressed to Chief Engineer recommended the payment for the extra amount of money in terms of Clause 12.2 of SBD, on the same day the Executive Engineer wrote a letter to the Superintending Engineer vide letter no.897 dated 9.10.2014 attached necessary paper and information details with respect to extra amount to be paid. The Chief Engineer wrote a letter dated 11.10.2014 (Annexure-15) to the Superintending Engineer, granted approval for payment of extra amount of Rs. 27.187 Crores in terms of Clause 12.2 of SBD, When nothing happened, then the petitioner Company addressed a letter dated 18.6.2015 (Annexure-P16) to the Principal Secretary-cum-Commissioner, Water Resources Department, Government of Bihar wherein it has given details of the change claiming to be completely a new work, resulting into novation of the contract as work has been increased by 27% to 269% and the rate which has been paid even after adding normal escalation as provided in the agreement is 50% below the prevailing rates of 2012, claimed that the payment made at the rate is not workable at all.

10. During pendency of this case vide letter dated 13.10.2016 (Annexure B to the supplementary counter affidavit=Annexure 1 of I.A. No.8772 of 2016) rejected the claim of extra amount as per clause 12.2. of S.B.D. by the Engineer-in-Chief addressed to Chief Engineer. In the said letter attached the minutes proceeding of Group of Engineers considered the claim of petitioner and rejected. In the said proceeding, the ground of rejection has been mentioned, (i) No outer limit has been provided in Schedule F (ii) The petitioner never objected the rate of payment (iii) the petitioner did not act in terms of Clause 12 of SBD as the petitioner did not submit the quantity deviated amount of work along with analysis of increased market rate (iv) Claim of entitlement of rate as per Clause 12.2 of the agreement is beyond period of limitation. This Court vide order dated 15.2.2017 referred the matter to the Principal Secretary vide order no.510 dated 30.3.2017 (Annexure-A to the supplementary counter affidavit) rejected the claim of the petitioner on that ground that no outer limit has been provided in Schedule F as the columns are blank and as such the claim of the petitioner in terms of Clause 12.2 and 12.3 is not sustainable in view of the fact that petitioner has been paid extra amount by way of escalation clause in terms of Clause 10 CA and 10 CC of General Condition of B.B.D.

11. Counsel for the petitioner has submitted that at the initial

stage the work value was Rs.66.06 Crores, later on it increased to the work value of Rs.138.72 Crores asserted that payment at the old rate is illegal requires rectification. As per petitioner the change in project is completely novation of project substantial alteration in size, volume and nature of project, claimed that Company is entitled to payment at current rate as it was/is not possible to carry out and complete the work at the rate which was prevalent of 2007 submitted that his case is squarely covered by the judgment of the Hon'ble Supreme Court in the case **of Union of India V. Tantia Construction (P) Ltd., reported in (2011) 5 SCC 697**. Second ground, the petitioner has taken about the applicability of is doctrine of "sub silentio" as and when the petitioner Company was finally asked to restart the work, it instantly addressed a letter dated 21.4.2014 (Annexure-P9) informing to the Chief Engineer work he instantly informed that the petitioner was/is ready to carry out the work at the old rate up to the original amount of bill of quantity and for the extra work the payment has to be made at the market rate or as per mutually acceptable/agreed rate. The Chief Engineer wrote a letter to Superintending Engineer dated 11.10.2014 (Annexure-15) wherein it has been mentioned that increased work is more than 25% and recommended for payment of extra amount of Rs.27.187 Crores as per clause 12.2 of SBD. It has further been submitted that respondent authority had never informed the petitioner that petitioner Company was/is required to carry out the entire work at the agreed rate not be given the benefit at the new rate. Initial work value was Rs.66.06 Crores and later enhanced to Rs.138 Crores with such huge change of quantity, quality, structural and volume inasmuch as all authorities have recommended for higher rate. Even though, there is no written agreement but by their conduct, silence indicated that Government was agreed to the proposal of revised rate of extra amount, has placed reliance on two judgments of the Hon'ble Supreme Court in the case of **Hyderabad Municipal Corporation v. M.K. Mudaliar, reported in (1985)2 SCC 9**, paragraph no.2 and in the case of **BPCL v. Great Eastern Shipping Co. Ltd., reported (2008)1 SCC 503**, paragraph 19 and 20.

12. As per argument of the petitioner, in the event of increase of work more than 25%, Clause 12.2 of SBD will come into operation and as per that Clause the Company will be entitled to payment as per current market rate in terms of Clause 12 SBD deals with deviations, variations extent and pricing and Clause 12.2 SBD deals with deviation extra items and pricing, deviation substituted items, pricing and deviation, deviated quantities, pricing. He has further submitted that if the work is more than 25% the petitioner would be entitled to the current market rate in

terms of Clause 12.2. SBD, placed reliance on the judgment of the Hon'ble supreme Court in the case of **S. Harcharan v. Union of India, reported in (1990) 4 SCC 647,** paragraph nos. 15 and 16. The counsel for the petitioner has submits that the view of the Principal Secretary rejecting the claim of the petitioner on the back drop of fact that Schedule F of the agreement does not prescribe outer limit, in such situation, claim of the petitioner that any work more than 25% will attract the provision of Clause 12.2 SBD, has been replied by the counsel for the petitioner, as the filling up the forms properly is basic duty of the Officers of management. It is duty of management to see that every column of the agreement should be properly filled up, the Management cannot take benefit of blank left in the agreement. It has further been claimed that any blank in the agreement, the onus is upon the management not on the petitioner and the State cannot take advantage blank in the Schedule F, placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Bank of India and another v. K. Mohandas and others,** reported in (2009)5 SCC 313. The letter dated 22.10.2013 (AnnexureP-9) makes it clear that payment and terms of escalation is far behind of rate prevalent during the year 2012.

13. Learned counsel for the petitioner submits that payment for entire work at the rate prevalent during of 2007 is abnormally

below the market rate, not workable rate, causes heavy loss and rejection of claim is illegal violates Article 14 of the Constitution of India and refusal to pay at prevalent rate in terms of Clause 12.2 of SBD is nothing but coercive payment as in normal circumstances the work cannot be carried out under rate during 2013 at the rate prevalent rate of in 2007 when there has been substantial enhancement of rate of every item, refusal to enhance rate is an act of arbitrary exercise of power and violates Article 14 of the Constitution of India, placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Srilekhas Vidyarthi v. State of UP**, reported in (1991) 1 SCC 212, paragraph 4 and in the case of **Gujraj State Financial Corporation v. Lotus Hotel (P) Ltd.,** reported in (1983) 3 SCC 379 .

14. In reply the State has taken a plea that petitioner has already been paid excess amount, in terms of escalation of Clause for Rs. 52 crores at 2007 rate. As per his entitlement he has received payment. It has also been submitted the definition extra item Clause 12.2 of SBD stipulates in the case of extra item, the contractor may within fifteen days of receipt of order or occurrence of event would claim. In the Clause 12 of SBD detail procedure has been stipulated, only on following the procedure that contractor would be entitled for payment of extra amount as mentioned in Clause 12 of SBD, failure to follow the procedure,

will disentitle excess payment. Further made statement that petitioner has been paid total amount of Rs.238 Crores. The counsel for the State further submitted that there was/is no need for extra payment as the petitioner vide letter dated 16.4.2010 was asked to go ahead with the work, he started work and completed substantial quantity of work, further submitted that this writ petition is not maintainable, as action of the State cannot be said to be suffering from any arbitrariness, committed any discrimination as has not claimed any similarly situated persons having been given the relief, petitioner has been deprived of same. The agreement was executed on 10.4.2007, the work was directed to be stopped. The petitioner, once, vide letter dated 21.4.2010 claimed for payment as per the market rate of the extra work but thereafter he did remain silent for quite long years. On 16.4.2010 he was asked to start work, on the same day he has started the work and substantial quantity of work was carried out. For the first time on 15.9.2013 (Annexure-P8) the petitioner wrote a letter invoking Clause 12.2 SBD. As per the State, no correspondence was made by the petitioner with the State during the period from 21.4.2010 to 15.9.2013, after long gap the claim has been raised. Letter dated 22.10.2013 (Annexure P-9) does not disclose the demand of the petitioner as having claimed workable rate inasmuch as the petitioner has no legal right to claim the relief sought for in the writ petition. The application dated 5.4.2014 (Annexure P-10) is incomplete application. Petitioner had not assigned details of analysis of work, corresponding claim which the petitioner has mentioned in paragraph 2 of the application. The petitioner has filed application dated 26.5.2014 (Annexure-P-13) attached analysis claiming that payment at the revised rate. The State has placed reliance on Clause 12.2 of SBD where deviation, deviated quantities, pricing has been stipulated. As per argument of the State in the event deviation the claim application with analysis was to be filed within 15 days and the same was to be disposed of within one month. The application for extra amount could be filed in two contingencies (i) receipt of order and (ii) occurrence of excess work supported by proper analysis. It has further been submitted that for issuance of writ of mandamus it requires that the person must have a legal right and corresponding legal duties. It has further been argument that analysis has not been defined but must have co-relation with the price escalation or increase of volume of work. This clause 12(2) of SBD contains word “May” and “Shall” the word “May” take colour of shall. The claim of amount as per Clause 12(2) of SBD is not sustainable as the petitioner failed to follow pre requisite, the claim in proper manner has been made for the first time vide letter dated 5.4.2014 (Annexure-10) as letter dated 22.10.2013

(Annexure-9) stipulates analysis for justification or workable rate will follow shortly and for the first time vide letter dated 26.5.2014 (Annexure-13) was attached with detailed analysis. This letter itself indicates that before aforesaid letter no analysis as per Clause 12(2) of SBD was submitted and no valid claim was ever made.

15. Learned counsel for the State has placed reliance on Clause 12.3 of SBD which empowers the department to reduce the rate after issuance of notice and show cause within one month. Clause 12.4 SBD obligates contractor to send to Engineer-in-Chief once every three months an up-to-date account giving complete details of all claims for additional payment to which the contactor may consider entitle if not filed will be treated to have waived its claim. He is required to file report to show the work done in preceding three months. Thrust in the argument has been made that the petitioner was required to claim within the time mentioned in Clause 12.2 of SBD. If the claim has not been made in proper manner now he cannot assert any claim of the said amount. Further reliance has been placed on Clause 10 CA which deals with payment on account of increase/decrease in prices of construction materials after receipt of tender. There is escalation in Clause. It has further been argued that petitioner has been made payment in terms of escalation clause (as per Clause 10 CA and

10 CC of SBD). It has been argued that escalation has been claimed after completion of 70% of work. The petitioner has already received escalation of Rs. 35,78, 07, 628 and now it can not claim the extra amount. Reliance has been placed on the judgment in the case of **State of U.P. V. Bridge and Roof**, reported in (1996) 6 SCC 22 paragraph 15 and 16 and asserted that instead of approaching this Court, the petitioner should have opted for arbitration, placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Zonal Manager, Central Bank of India vs. Devi Ispat Limited and others**, reported in (2010) 11 SCC 186, paragraph nos. 19 and 28. Petitioner cannot claim mandamus as he has no legal right in view of the fact that claim has been made after long delay and huge payment has been made and 70% work has been completed. The petitioner has alternative remedy by way of Arbitration for interpretation of Clause of contract, can not be gone into writ jurisdiction. The claim is barred by Clause 12.4 of SBD inasmuch as State authority has acted reasonably, fairly and paid the amount of Rs.1,38 Crores and escalation payment of Rs. 35 Crores.

16. Learned counsel for the petitioner, in reply, has submitted that the plea that has been taken by the State for disentitlement is not based on any merit, on the ground that petitioner, right from beginning has been claiming the prevailing

market rate or as per mutually acceptable agreed rate at market value just after receipt of the revised work order with complete change. Clause 12.2. of SBD provides when new event has taken place would creates cause of action to make claim. The resistance of the State that petitioner did not make claim within time, is completely contrary to the fact admitted in the present writ petition and also submitted that petitioner has legal right in view of legal right has been defined in the Law Lexicon edited nu P. Ramanatha Aiyar gives meaning. "It is an assertable claim, enforceable before Courts and administrative agencies. In a wider sense, it is any advantage or benefit conferred upon a person by rule of law, there are legal rights not enforceable though recognized in law, rights enforced by International Court granted by International law but nor enforceable. It is the capacity of asserting a secured interest than a claim that could be asserted in Courts." On the strength of definition, learned counsel for the petitioner submits that petitioner has a legal right for claiming the benefit in the present writ petition and further said that even disputed question ascertainable from the pleading of parties the writ petition is maintainable placed reliance on the following judgments of the Hon'ble Supreme Court: (i) Sanjana M.W 16(Ms) v. Hindustan Petroleum Corpn. Ltd., reported in (2005) 8 SCC 242 (ii) Noble Resources Ltd. v. State of Orissa and another, reported in (2006) 10 SCC 236 (iii) Food Corporation of India and another v. Seil Ltd. and other, reported in (2008) 3 SCC 440 (iv) Kishan Sahkari Chini Mills Ltd. and others v. Vardan Linkers and others, reported in (2008)12 SCC 500 (v) Karnataka State Forest Industries Corporation v. Indian Rocks, reported in (2009) 1 SCC 150 (vi) Sushiula Chemicals Private Limited and another v. Bharat Coking Coal Limited and others, reported in (2010) 10 SCC 388 (vii) State of Kerala and others v. M.K. Jose, reported in (2015)9 SCC 433 and Rishi Kiran Logistics Private Ltd. v. Board of Trustees of Kandla Port Trust and others, reported in (2015) 13 SCC 233.

17. It has been submitted the State nowhere in the counter affidavit has taken a plea that the petitioner has completed substantial work on the same date but for the first time such plea has been raised by the State and such plea of State be ignored. Petitioner placed reliance on para nos. (X) (G-2) and (G-3) of I.A. No.8772 of 2016. The petitioner has placed reliance on letter no.1229 dated 9.9.2013 (Annexure-A supplementary counter affidavit of Respondent nos. 3 to 7) of Superintending Engineer addressed to Chief Engineer to grant approval with respect to excess work, drew attention to letter dated 22.10.2013 (AnnexureP-9) reflecting demand of money in terms of current market rate. Placed reliance on letter dated 21.4.2014

(AnnexureP-12) which is the letter of Executive Engineer calling upon the petitioner to submit analysis and details of claim. The petitioner, in order to assert its claim, placed reliance on letter dated 26.4.2014 (Annexure-P-13), letter dated 9.10.2014 (AnnexureP-14) and letter of Chief Engineer dated 11.10.2014 (AnnexureP-15) and finally submitted that the petitioner is entitled to receive payment of amount of money at the market rate beyond Rs.66 Crores, i.e. original bill of quantity, submitted Bridge and Roof case (supra) is not applicable.

18. In view of the aforesaid discussions, this Court has to decide following points; maintainability of the writ petition in view of provision of Arbitration as this Court should exercise power or the petitioner be asked to approach before Arbitration proceeding, second the point has been claimed by the petitioner that the fresh work order is novation of contract "as petitioner was asked after three long years to construct altogether a new Barrage with a new specification and new volume of work, in the event extra work for more than 25% the petitioner cannot be compelled to carry out the work at the old rate. Third is that altogether the petitioner has been writing letter that he will do the work up-to 66.06 Crores at the old rate and the rest quantity of work will be done on the prevalent market rate which was never rejected as it will be presumed that the State was agreeable to make payment in

terms of market rate as per Clause 12.2 of SBD. 4th whether the action of the State asking the petitioner to carry out the work even after Rs. 66 crores at the old rate of 2007 is an arbitrary exercise of power or whether the blank in Schedule F of the contract gives carte-blanche to State to ask the petitioner to carry out the work at the old rate without any limitation even in the event of quantity of work has increased in multiple times.

19. In the present case the State has entered into an agreement for construction of Barrage with the petitioner. Earlier period the Courts were very reluctant to entertain the writ petition with respect to the contract matter but in course of time, development of law has a new era has emerged in which the Court has found that the State or its instrumentality are engaged in different type of commercial activities apart from it sovereign. The Government in a welfare State regulator and dispenser of special services and provider of a large number of benefits including jobs of contracts, licences, quotas, mineral rights. The Government pours forth wealth, money benefits, services, contracts, quotas and licences. The valuable dispensed by Government take many forms but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They compromise social security benefits, cash grants for political sufferers and the

whole scheme of State and local welfare. Thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of business or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largesse in the form of Government contract. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilization by private corporations and individuals by way of lease or licence. All these mean growth in the Government largesse and with the increasing magnitude and range or governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal right but the large majority of them are in the nature of privileges. But on that account can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? The discretion of the Government has been held to be not unlimited in that the Government cannot be given or withhold largesse in its arbitrary discretion or at its sweet will. Even in the contract matter for exercise of judicial review the action of the Government will be tested on the touch stone of Article 14 of the Constitution of India.

20. The State or its instrumentality or agency would exercise its power or discretion subject to the constitutional or public law limitations. The rule inhibiting arbitrary action by Government must apply equally where such State or Corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will but its action must be in conformity with some principle which meets the test of reason and relevance.

21. Article 14 strikes the arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory. It must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterize every State action, whether it be under

authority or law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party but its action must conform to some standard or nor which is rational and non-discriminatory.

22. In republic, the action of the Government should be fair, proper, transparent and non-arbitrary. It must appear that citizens are governed under the rule of law not the rule of Jungle and they must adopt a standard which must be inconsonance with Article 14 of the Constitution of India. It will be relevant to quote paragraph 21 and 22 of the judgment of Hon'ble Supreme Court in the case of **Ramana Dayaram Shetty v. International Airport Authority of India and others**, reported in AIR 1979 SC 1628:

> This rule also flows directly from the doctrine of equality embodied in Art. 14. It is now well settled as a result of the decisions of this Court hl E. P. Rayappa v. State cf Tamil Nadu(l) and Maneka Gandhi v. Union of India(2) that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is protected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory. This principle was recognised and applied by a Bench of this Court presided over by Ray, C.J., in Erusian Equipment and

Chemicals v. State of West Bengal (supra) where the learned Chief Justice pointed out that "the State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person The Government cannot choose to exclude persons by discrimination. The order of black-listing has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting.... A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling....It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the (1) [1974] 2 S. C. R. 348.

(2) 1978] 2 S. C. R. 621.

goods." It must, therefore follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with any one, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground.

It is interesting to find that this rule was recognised and applied by a Constitution Bench of this Court in a case of sale of kendu leaves by the Government of Orissa in Rashbihari Panda v. State of Orissa.(1) The trade of kendu leaves in the State of Orissa was regulated by the Orissa Kendu Leaves (Control of Trade) Act, 1961 and this Act created a monopoly in favour of the State so far as purchase of kendu leaves from growers and pluckers was concerned. Section 10 of the Act authorised the Government to sell or otherwise dispose of kendu leaves purchased in such manner as the Government might direct. The Government first evolved a scheme under which it offered to renew the Licences of those traders who in its view had worked satisfactorily in the previous year and had regularly paid the amount due from them. The scheme was challenged and realising that it might be struck down, the Government withdrew the scheme and instead, decided to invite tenders for advance purchase of kendu leaves but restricted the invitation to those individuals who had carried out contracts in the previous year without default and to the satisfaction of the Government. This method of sale of kendu leaves was also challenged by filing a writ petition on the ground inter alia that it was violative of Articles]4 and 19(1)(g) and this challenge, though negatived by the High Court, was upheld by this Court in appeal. The Court pointed out that the original scheme of offering to enter into contracts with the old licences and to renew their terms was open to grave objection, since it sought arbitrarily to exclude many persons interested in the trade and the new scheme under which the Government restricted the invitation to make offers to those traders who had carried out their contracts in the previous year without default and to the satisfaction of the Government was also objectionable, since the right to make tenders for the purchase of kendu leaves being restricted to a limited (1) [1969] 3 S.C.R. 374.

class of persons, it effectively shut out all other persons carrying on trade in kendu leaves and also the new entrants into that business and hence it was ex-facie discriminatory and imposed unreasonable restrictions upon the right of persons other than the existing contractors to carry on business. Both the schemes evolved by the Government were thus held to be violative of Articles 14 and 19(1)(g) because they "gave rise to a monopoly in the trade in kendu leaves to certain traders and singled out other traders for discriminatory treatment". The argument that existing contractors who had carried out their obligations in the previous year regularly and to the satisfaction of the Government formed a valid basis of classification bearing a just and reasonable relation to the object sought to be achieved by the sales namely, effective execution of the monopoly in the public interest, was also negatived and it was pointed out that: "exclusion of all persons interested in the trade, who were not in the previous year licencees, is ex facie arbitrary; it had not direct relation to the object of preventing exploitation of pluckers and growers of kendu leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade, to the State".

The Court referred to the offer made by a well known manufacturer of bidis for purchase of the entire crop of kendu leaves for a sum of Rs. 3 crores which was turned down by the Government and expressed its surprise that no explanation was attempted to be given on behalf of the State as to why such an offer, from which the State stood to gain more than Rs. 1 crore, was rejected by the Government. It will be seen from this judgment that restricting the invitation to submit tenders to a limited

> class of persons was held to be violative of the equality clause, because the classification did not bear any. just and reasonable relation to the object sought to be achieved, namely, selling of kendu leaves in the interest of general public. The standard or norm laid down by the Government for entering into contracts of sale of tendu leaves with third parties was discriminatory and could not stand the scrutiny of Article 14 and hence the scheme was held to be invalid. The Court rejected the contention of the Government that by reason of section 10 it was entitled to dispose of kendu leaves in such manner as it thought fit and there was no limitation upon its power to enter into contracts for sale of kendu leaves with such persons it liked. The Court held that the Government was, in the exercise of its power to enter into contracts for sale of kendu leaves; subject to the constitutional limitation of Article 14 and it could not act arbitrarily in selecting persons with whom to enter into contracts and discriminate against others similarly situate. The Court criticised the Government for not giving any explanation as to why an offer for a large amount was not accepted, the clearest implication being that the Government must act in the public interest; it cannot act arbitrarily and without reason and if it does so, its action would be liable to be invalidated. This decision wholly supports the view we are taking in regard to The applicability of the rule against arbitrariness in State action.

23. In the case of **ABL International Ltd. and another v. Export Credit Guarantee Corporation of India Ltd. and others**, reported in (2004) 3 SCC 553 the matter was relating to the contract. The question arose about the maintainability of the writ petition as the claim made by the ABL International Ltd. was repudiated led to filing of the writ petition. The Court has affirmed the view which was taken in the case of **Life Insurance Corporation of India Vs. Escorts Ltd. & others**, reported in (1986) 1 SCC 264 where it has been held that if the action of the State is related to contractual obligation or obligations arising out of the tort, the court may not ordinarily examine it unless the

action has some public law character attached to it. The Court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The Court has taken further view that it is difficult to lay in demarcating the frontier between the public law domain and the private law filed. It is impossible to draw the line with precision. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons and robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management by a resolution of the company like any other shareholder and that judgment has also been considered in the case of **State of U.P. & Ors. Vs. Bridge & Roof Company (India) Ltd.**, reported in (1996) 6 SCC 22 wherein it has been held that when the contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration. The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement fo disputes arising from the contract, there is no reason why the parties should not follow adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India. The existence of an effective alternative remedy in this case provided in the contract itself is a good ground for the Court to decline to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India.

24. The Hon'ble Supreme Court has considered the case of **Kumari Shri Lekha Vidyaarthi & Ors. Vs. State of U.P. & Ors**., reported in (1991) 1 SCC 212. The Court in the case of ABL International Ltd. in paragraph 27 has held as follows:

> *"27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:*
>
> *(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.*
>
> *(b) Merely because some disputed question of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.*
>
> *(c) A writ petition involving a consequential relief of monetary claim is also maintainable."*

25. The Court has further held a discretionary right to entertain or not to entertain writ petition would exercise such action of the State or its instrumentality is arbitrary and unreason able so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons for which the Court thinks it necessary to exercise the said jurisdiction.

26. So while exercising the power the Court has to keep balance the legitimate right vis-à-vis nature of State action and has to be tested whether the action of the State is arbitrary and based on no reason rather is whim and fancy in its action.

27. In the case of **Zonal Manager, Central Bank of India vs. Devi Ispat Limited and others**, reported in (2010) 11 SCC 186 the Court in paragraph 19 it has been held that it is settled law that the disputes relating to interpretation of terms and conditions of a contract could not be examined/challenged or agitated in a petition filed under Article 226 of the Constitution. It is a matter for adjudication by a civil court or in arbitration, if provided for in the contract or before DRT or under the Securitization Act.

28. A writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record will not normally be entertained by a Court in the exercise of its jurisdiction under Article 226 of the Constitution of India. Ultimately culled out a final verdict in paragraph 28 of the

aforesaid judgment is as follows:

> *"28. It is clear that (a) in the contract if there is a clause for arbitration, normally, a writ court should not invoke its jurisdiction: (b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and (c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution of India in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power. In the light of the legal position, writ petition is maintainable even in contractual matters, in the circumstances mentioned in the earlier paragraphs."*

29. It is no doubt that the Court while exercising the power has to scrutinize the action of the State to ensure that fairness in action, non-arbitrariness, non-discretionary but must be fair and reasonable and State cannot claim as a private party but the State and its instrumentality stand on different pedestals bound by constitutional limitation. They are bound by limitation of public

law, in place of character the contradiction, the State or its instrumentality must be fair and proper with certain yard stick. In judicial review, with respect of dispute falling within the domain of contractual obligations, may be more limited and in doubtful cases, the parties may be relegated for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. It will be relevant to quote paragraph 22 of the of the judgment of the Hon'ble Supreme Court in the case of Kumari Shrilekha Vidyarthis:

> *"22. There is an obvious difference in the contract between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, act indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review with respect of dispute*

falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its action."

30. In the case of **Sanjay Kumar Shukla vs. Bharat Petroleum Corporation Limited and others**, reported in (2014) 3 SCC 493 the Court in paragraph 17 has held that in arriving to a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for

awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation.It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporation, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

31. In the case of Baidyanath Singh v. The State of Bihar and others (L.P.A. No.1861 of 2016) this Court while dealing the order of judicial review the Court has held that the Court in the contractual will not examine the issues involved therein under

Article 226 of the Constitution of India unless contract is statutory contract or the action involved public law element. In case of a breach of contract, the party complaining of such breach may sue for specific performance of the contract if the contract is capable of being specifically performed otherwise, the party may sue for damages. The power of judicial review conferred on this Court under Article 226 of the Constitution of India could be invoked in contractual matters only if the public law element is present and not in respect of the contracts failing within the realm of private law. The Court has also held that every act of a statutory bodies, like private parties, have power to contract or deal with property. Such activity has not raised any issue of public law element or it is not a statutory contact, the Court has refused to grant relief.

32. As the respondent has taken a plea that in Clause 25 of the agreement stipulates that in the event of dispute the forum has been provided for arbitration and has submitted that as it is dispute with respect to amount of payment the petitioner should invoke the arbitration clause. It will be relevant to quote Clause 25 of the Agreement:

> *"Clause 25: Settlement of Dispute & Arbitration: Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the*

work or as to any other question, claim right matter or thing whatsoever in any way arising out of or relating to contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned. (i) If the contractor considered any work demanded of him to be outside the requirements of the contract, or dispute any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 7 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of fifteen days from the receipt of the contractor's letter

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in *support of his appeal. The Chief Engineer shall given his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.*

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above disputes or difference shall be referred for adjudication through arbitrator appointed by Engineer-in—Chief or the administrative head of the said P.W.D. If the arbitrator so appointed is unable or unwilling to act or resign his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

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

It is also a term of this contract that if the contractor does nto make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 45 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be dischared and released of all liabilities under the contract in respect of these claims.

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

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

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

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

33. So in the present case there is clause of arbitration in settling the dispute through arbitration. In this background it will be relevant to consider the judgment of the Hon'ble Supreme Court in the case of **Whirl Pool Corporation v. Registrar of Trade Marks, Mumbai and others**, reported in (1998)8 SCC 1 where the Court has dealt and delineated the exercise the power under Article 226 of the Constitution of India under what circumstances and ground, the High Court would be correct to exercise the power under Article 226 of the Constitution of India. The Court has held that the power under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature fof habeas corpus, mandamus, prohibition, quo-warranto and certiorari, for the enforcement of any of the fundamental rights contained in Part III of the Constitution but also for any other purpose. The High

Court under Article 226 of the Constitution has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restriction one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But, the alternative remedy, has been consistently held by this Court not to operate as a bar at least in three contingencies, namely, where the writ petition has been filed for the enforcement of fundamental right or where there has been a violation of the principle of natural justice or where the order or proceedings is without jurisdiction or the vires of an Act has been challenged. Principle to exercise discretionary jurisdiction even in the event of availability of alternative remedy except on satisfying any of the situation mentioned herein above. The exercise of power under Article 226 of the Constitution is the rule requiring the exhaustion of statutory alternative remedies before the writ petition is entertained, is rule of policy. It will be relevant to quote paragraph nos. 14, 15 and 16 of the aforesaid judgment:

> *"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the high Court not only for issuing writs in the nature of habeas corpus mandamus, prohibition, quo warranto and certiorari for enforcement of*

any of the Fundamental Rights contained in part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the high Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition ahs been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

16. Rashid Ahmed v. Municipal Board, Kairama laid down tht existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another Rashid case, namely, K.S. Rashid & Son v. Income Tax investigation Commission which reiterated the above proposition and held that where alternative remedy existed, it *would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, unless there are good grounds therefor', which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances."*

34. This Court has considered the aforementioned principle of exercise of power of judicial review applying the test is to see whether it is a fit case where power of judicial review should be exercised in favour of the petitioner.

35. In the present case, the petitioner has sought a relief for issuance of mandamus to give direction to pay the money in terms of recommendation dated 11.10.2014 issued by the Chief Engineer, Water Resources Department, Gaya as original bill of quantity was Rs. 66 Crores was replaced by enhancement of quantity of work became Rs.138 Crores. The cost of project was Rs.66.06 Crores, was to be completed within 30 months. He has started the work and suddenly on 22.10.2007 petitioner was instructed for immediate stoppage of the work because drawing and design was sent to Central Water Commission, New Delhi and Central Water Power Research Station, Pune for Hydralic Model Test. After two years on 4.12.2009 it was completely a new shape of Barrage structure, guide bund etc, therefore, there is

fresh drawings and designs. Every thing has changed the projection was/is altogether is completely new. He has agreed to proceed with the work but limited to the original bill of quantity of Rs.66.6 Crores and was agreeable to carry out the work as prevailing the market rate or as per mutual rate. The payment was made. He has approached to the authority vide letters dated 21.4.2010 (Anneure-7), 15.9.2013 (Annexure-8), 22.10.2013 (Annexure-9) and vide letter dated 5.4.2014 (Annexure-10) where he has claimed that quantity of work has increased from 27% up-to 269%. First the case was recommended by the Exeutive Engineer/ Superintending Engineer and vide letter dated 26.5.2014 (Annexure-13) the petitioner has again made a claim and up to the level of Chief Engineer recommendation was made in favour of the petitioner for payment of extra amount of Rs.27.187 Crores in terms of rate prevailent on 1.10.2012. During pendency of the case High Level Committee constituting five Engineers all are in the rank of Chief Engineer and Superintending Engineer and rejected the claim of ther petitioner which he has challenged. During pendency of the case this Court has referred the matter for consideration before the Commissioner-cum-Secretary who has finally decided the matter against the petitioner.

36. During discussion it has transpired that that the petitioner

has been paid the amount of its bill in terms of Clause 10 CA and Clause 10 CC but claim has been made by the petitioner that Clause 12 of the Standard Bidding Document will be applicable and it also appears that petitioner has been given the benefit of escalation clause as provided under Clause 10 CA and 10 CC and extra amount has been given at the prevailing the market rate inasmuch as it is interpretation of the applicability of two clauses whether in the present case the petitioner will be entitled the extra amount in terms of Clause 12 or State has made proper amount applying escalation clause 10 CA and 10 CC is a proper exercise of power by the State. It is also undisputed fact that petitioner has been paid altogether Rs. 35.78 Crores under escalation clause and the claim of the petitioner is for payment in terms of at the rate in 2012 but the rate must have increased in between 2007 and 2012, so straightway as the price of items of articles has changed dependent on rise of the cost of the material as State has taken a plea that Schedule F is completely blank without any ceiling. It has to be tested that effect of blank Schedule F. These are gray area required complete evidence and it also requires deep consideration and this Court is of the view that in view of applying principle as laid down in the case of Whirl Pool Corporation (supra) it does not fall any of the exception mentioned there. This Court is of the view that the petitioner should invoke jurisdiction of arbitration where the arbitrator will examine all aspect of the matter including the effect blank maintained Schedule vis-à-vis the claim in terms of Clause 12 the arbitrator will have an opportunity to decide the extra plea of waiver of extra amount has been claimed by the State.

37. In the interest of justice, the petitioner is directed to invoke arbitration and settle the dispute through arbitration.

38. With the aforesaid observation and direction this writ petition is disposed of. Any observation made in this judgment either in favour of the petitioner or for the State will not have a bearing before arbitrator who will decide the lis on its own merit, not to be swayed by any observation, if any, made by this Court.

(Shivaji Pandey, J)

Vinay/-

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