

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7654 of 2019

ILF Consulting Engineers Almondz Global Infra Consultant Ltd. (Joint Venture) having office at F 33/3, Okhla Industrial Area, Phase-II, New Delhi-110020 through its Authorized Signatory namely Sri Sudhakar Singh, aged about 58 years (Male), Son of Late Triloki Singh, R/o B-Block, B-565, Sarita Vihar, New Delhi

... .. Petitioner/s

Versus

1. M/s Bhagalpur Smart City Ltd. having its office At-Municipal Corporation Court Compound, Bhagalpur, Bihar-812001 through its CEO/Managing Director
2. The Managing Director/CEO Bhagalpur Smart City Ltd., At-Municipal Corporation Court Compound, Bhagalpur, Bihar-812001
3. The State of Bihar through Principal Secretary, Urban Development Department, Government of Bihar, Patna
4. The Principal Secretary Urban Development Department, Government of Bihar, Patna

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Y.V. Giri, Sr.Adv. Mr.Ashish Giri, Adv. Mr. Sumit Kumar Jha, Adv. Mr. Rajat Kumar Tiwary, Adv.
For the Respondent/s	:	Mr. Lalit Kishore, AG Mr. Manish Kumar, Adv. Mr.Kinkar Kumar (SC9) Mr. Yogesh Kumar, Adv.

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
CAV JUDGMENT

Date :15-07-2019

Petitioner in the present is a Joint Venture Limited Company (hereinafter referred to as the 'JV') of ILF Consulting Engineers and Almondz Global Infra Consultants Ltd. ILF Consulting Engineer is the lead partner. Petitioner has moved this Court invoking its writ jurisdiction for the following reliefs:-

“i) To issue a writ/order/direction in the nature of certiorari for quashing the letter bearing



no.142/BSCL dated 27.03.2019 issued under the signature of the Managing Director/CEO, Bhagalpur Smarty City Ltd. by which pursuant to the decision taken in the meeting of the Board of Directors held on 11.03.2019 notice of termination of the contract agreement dated 02.08.2017 has been issued in relation to planning, designing, managing, implementing and monitoring area based development projects and PAN city projects for BSCL including scope for services, team arrangement and deliverable under the smart city project pursuant to Clause 2.9.1(f) of the agreement. (Annexure-13)

ii) To direct the authorities to produce the decision taken in the meeting of the Board of Directors of Bhagalpur Smarty City Ltd. held on 11.03.2019 wherein the petitioner has been held to have failed to fulfill the duties and objectives in terms of contract agreement dated 02.08.2017 and quash the same.

iii) To hold and declare that the impugned notice of termination dated 27.03.2019 is wholly illegal in violation of rule of natural justice and also without jurisdiction.

iv) To issue interim/ex-parte interim order/direction preventing the authorities from taking any further coercive steps against the petitioner including actions of debarring/blacklisting etc. & refund the bank guarantee that has been forfeited.

v) To any other relief or reliefs for which the petitioner is found to be entitled in the facts and circumstances of the case.”

By filing an Interlocutory Application (I.A.) No.1 of 2019 the petitioner has sought to amend the writ application in the light of the developments which took place during the pendency of the writ application. In the amendment application, the following reliefs have been prayed:-



“1(vi) To issue writ/order/direction in the nature of certiorari for quashing the letter no.161 dated 19.04.2019 issued under the signature of the Managing Director cum CEO, Bhagalpur Smart City Ltd. by which the petitioner has been directed to refund an amount of Rs.60 lac paid as advance allegedly on ground of non-performance in terms of the contract agreement.

(vii) To issue writ/order/direction in the nature of certiorari for quashing the letter no.171 dated 24.04.2019 issued under the signature of the Managing Director cum CEO, Bhagalpur Smart City Ltd. by which the petitioner has been imposed with the penalty of Rs.1.125 crore pursuant to clause 7.3.2 of the contract agreement on ground of non-performance of the work as per the agreement to be paid before 24.05.2019 failing which actions of recovery will be imitated.

(viii) To pass interim order staying the operation of letter no.161 dated 19.04.2019 and letter no.171 dated 24.04.2019 during the pendency of the writ application and further, preventing the respondent from taking any coercive action pursuant to the said letters.”

Again by placing a supplementary affidavit, the petitioner has brought to the notice of this Court the fresh notice inviting tender published on the website of the respondent no.1 whereby the respondent no.1 has invited Request for Proposal (RFP) for selection of Project Management Consultant (PMC) to Design, Develop, Manage and Implement Smart City Projects under the Smart City Mission.

A perusal of the writ application would show that for the purpose of implementing the Smart City Project of Bhagalpur City,



the Government of Bihar and the Union Government incorporated a body corporate namely “Bhagalpur Smart City Ltd.” (hereinafter referred to as the ‘BSCL’) as a special purpose vehicle (SPV) (respondent no.1). The ‘BSCL’ floated an expression of interest for the purpose of Project Development And Management Consultant (PMC) of Smart City Projects of Bhagalpur City on 28.01.2017. The petitioner participated in the process of selection and was finally issued a letter of acceptance dated 29.07.2017. The agreement dated 02.08.2017 (Annexure-1) came to be executed. Under the agreement the petitioner had to provide certain consulting services as defined in the general conditions attached to the contract and the consultant (the petitioner) agreed to provide the services in accordance with the provisions of the contract and the payments to be made by the employer (respondent no.1).

According to clause ‘3’ of the agreement, the consultant had to start the services on 17th August, 2017 and the services were to be completed by 16th February, 2020 unless the contract is terminated earlier in accordance with its terms and conditions. Clause ‘4’ prescribes a financial limit according to which the payments under the contract shall not in any circumstance exceed Rs.11,25,00,000/- exclusive of any government tax, if applicable. In terms of clause ‘5’ of the agreement, the time shall be the



essence as regards the performance by the consultant of its obligations under the agreement.

Section 2 of the agreement deals with commencement, completion, modification and termination of contract. For the purpose of present case, it would be apt to quote sub-clause 2.8 and 2.9 in entirety as under:-

“2.8 Suspension

The Employer may, by written notice of suspension to the Consultant, suspend all payments to the Consultants hereunder if the Consultants fail to perform any of their obligations under this Contract, including the carrying out of the Services, provided that such notice of suspension(i) shall specify the nature of the failure, and (ii) shall request the Consultants to remedy such failure within a period not exceeding thirty (30) days after receipt by the Consultants of such notice of suspension.

2.9 Termination

2.9.1 By the Employer

The Employer may, by not less than thirty (30) days' written notice of termination to the Consultants (except) in the event listed in paragraph (f) below, for which there shall be a written notice of less than sixty (60) days, such notice to be given after the occurrence of any of the events specified in paragraphs (a) through (f) of this Clause 2.9.1, terminate this Contract:

(a) if the Consultants fail to remedy a failure in the performance of their obligations hereunder, as specified in a notice of suspension pursuant to Clause 2.8 hereinabove, within thirty (30) days of receipt of such notice of suspension or within such further period as the Employer may have subsequently approved in writing;



(b) if the Consultants become (or, if the Consultants consist of more than one entity, if any of their Members) insolvent or bankrupt or enter into any agreements with their creditors for relief of debt or take advantage of any law for the benefit of debtors or go into liquidation or receivership whether compulsory or voluntary;

(c) if the Consultants fail to comply with any final decision reached as a result of arbitration proceedings pursuant to Clause 8 hereof;

(d) if the Consultants submit to the Employer a statement which has a material effect on the rights, obligations or interests of the Employer and which the Consultants know to be false;

(e) if, as the result of Force Majeure, the Consultants are unable to perform a material portion of the Services for a period of not less than sixty (60) days; or

(f) if the Employer, in its sole discretion and for any reason whatsoever, decides to terminate this contract.

Further clause 2.9.3, and 2.9.6 read as under:-

“2.9.3 Cessation of Rights and Obligations

Upon termination of this Contract pursuant to Clauses 2.2 or 2.9 hereof, or upon expiration of this Contract pursuant to Clause 2.4 hereof, all rights and obligations of the Parties hereunder shall cease, except (i) such rights and obligations as may have accrued on the date of termination or expiration, (ii) the obligation of confidentiality set forth in Clause 3.3 hereof, (iii) the Consultant's obligation to permit inspection, copying and auditing of their accounts and records set forth in Clause 3.6 (ii) hereof, and (iv) any right which a Party may have under the Applicable law.

2.9.6 Disputes about events of Termination

If either Party disputes whether an event specified in paragraphs (a) through (e) of Clause 2.9.1 or in



Clause 2.9.2 hereof has occurred, such Party may, within forty-five (45) days after receipt of notice of termination from the other Party, refer the matter to arbitration pursuant to Clause 8 hereof, and this Contract shall not be terminated on account of such event except in accordance with the terms of any resulting arbitral award.”

The agreement also provides for imposition of penalty in case of delay in completion of services. Clause 7.3.2 lays down a condition whereunder the penalty equal to 0.05% of the contract price per day subject to a maximum 5% of the contract value will be imposed in case of delay in completion of services and shall be recovered from payments due/performance security. However in case of delay due to reasons beyond the control of the consultant, suitable extension of time will be granted. Clause 9 provides a dispute redressal mechanism. Clause 9.1 and 9.2 of the agreement are thus quoted hereunder for a ready reference:-

“9.1 Amicable Settlement

The Parties shall use their best efforts to settle amicably all disputes arising out of or in connection with this Contract or the interpretation thereof.

9.2 Dispute Settlement

Any dispute between the Parties as to matters arising pursuant to this Contract, which cannot be settled amicably within thirty (30) days after receipt by one Party of the other Party's request for such amicable settlement, may be submitted by either Party for settlement. If the dispute(s) is not resolved amicably then it shall be referred to arbitration and



shall be dealt as per the provisions of the arbitration & conciliation Act 1996.”

It is the case of the petitioner that in terms of conditions of contract, the petitioner provided a bank guarantee for the value equivalent to 5% of the total contract value towards performance security, for an amount of Rs.56,25,500/-. It is stated that in terms of Reference (TOR) the scope of work of the petitioner required the JV/Consultant/Petitioner to provide technical support to respondents to plan, design, prioritize, develop, procure, implement and monitor smart city projects under the Smart Cities Mission. The petitioner had to deploy various key experts during the duration of the project. The entire payment for the project has been divided into three parts. The initial 15% payment was to be made during the project development phase whereas the balance 70% was to be made during the project implementation phase on bi monthly basis. The remaining 15% was linked with the total expenses during the project implementation phase.

The petitioner claims that the petitioner had proceeded to work, deployed necessary manpower and informed the respondent no.1 regarding deployment of Deputy Team Leader and Office Manager as also that the remaining key personnel will be joining service in due courses. Reference in this regard has been made to letter dated 18.08.2017 contained in Annexure-3 to the



writ application. The respondent no.1 however informed the petitioner that the consultants are bound to obtain the employer's prior approval in writing before appointing such members of key personnel as listed in Appendix 'A' of the agreement. It was alleged that no key personnel appointed by the consultant has officially reported to the Chief Executive Officer, BSCL and biographical data of the personnel to be appointed by the consultant have not been submitted to the employer for prior approval. It was also alleged that in the review meeting chaired by the Chairman, BSCL there was no satisfying response by the representatives of the consultant, regarding the scope of work, upcoming priorities and timeline. The respondent no.1 pointed out to the petitioner that Smart City Project is one of the flagship programmes of the Government of India and needs to be completed in a time bound manner. The delay, it was alleged from the petitioner's side at the commencement of the project, is a reflection of deficiency in services from their side and, therefore the petitioner was called upon to explain as to why as per the provisions of Section 7.3.2 a penalty equal to 0.05% of the contract price per day should not be imposed from the start date i.e. 17th August, 2017.



It appears that once letter no.612 dated 26.08.2017 (Annexure-4) was served upon the petitioner, the correspondences alleging violation of the terms and conditions of the agreement started floating. Another letter dated 27.11.2018 of the BSCL (Annexure-6) alleged a number of violations of the stipulations of the contract and it goes on to say that the petitioner would adhere to the terms of the contract in terms of providing the specified manpower as per the contract agreement along with timelines of manpower deployment in consultation with the employer, failing which the BSCL will be at liberty to appoint the manpower and the cost would be borne by the petitioner. The letter (Annexure-6) was replied by the petitioner. They claim that they had played a pivotal role in assisting for recruitment of key managerial and other posts for SPV. The notices for recruitment for BSCL were also prepared by them and because the SPV was not strengthened for a long time as per requirement, the petitioner requested BSCL to strengthen the SPV with equipment and software. The petitioner alleged that even then BSCL was unable to arrange equipment and software to be used for providing the technical support to the design office. The petitioner therefore denied the queries raised by BSCL and took a stand that there was no violation of the provisions of the contract. At the same time the petitioner alleged that there had



been a failure of consideration on the part of BSCL as the due payments in terms of the contract have not been released to them. The petitioner therefore requested the respondent no.1 to release all the due payments to enable the petitioner to continue with the service.

By yet another letter dated 542 dated 10.12.2018 the respondent no.1 called upon the Chairman and Managing Director of the petitioner to show cause as to why ILF Consulting Engineers along with Almondz Global Infra Consultant Limited should not be blacklisted for not providing the human resources as specified in the contract agreement. He was called upon to submit a reply within seven days. The petitioner took a plea that they had deployed the resources as specified in the contract agreement and as per the need of the BSCL projects, it was further stated that it was not feasible to deploy all professionals, neither it was required as per the TOR.

The aforesaid correspondences and the kind of allegations and replies have been taken note of in order to sufficiently understand the issues which have led to the present condition/situation.



The ultimate impugned action came in form of letter no.142/BSCL dated 27.03.2019 (Annexure-13 to the writ application) which reads as under:-

“Notice of Termination

Letter No.142/BSCL

Dated:27.03.2019

From

*Managing Director cum CEO,
Bhagalpur Smart City Limited.*

To

*Mr. Sudhakar Singh
ILF Consulting Engineers in association with
ALMONDZ Global Infra-Consultant Ltd.
F-33/3, Okhla Industrial Area, Phase-II, New
Delhi-110020, India.*

*Subject-Notice of Termination of your Contract with
Bhagalpur Smart City Limited (“BSCL”).*

Sir,

This is to bring to your kind notice that in compliance with the decision taken in the meeting of the Board of Directors, at its meeting held on 11th of March, 2019, you are hereby issued a Notice of Termination with effect from 27/03/2019, as you have totally failed to fulfill any of your duties/objectives as specified in the contract agreement (dated 02.08.2017) entered into with you by ESCL regarding planning, designing, managing, implementing and monitoring Area based Development Projects and PAN City Projects for “BSCL” including Scope of Services, Team Arrangement and Deliverables envisaged in the Terms of Reference stipulated therein under the Smart City Project pursuant to Clause 2.9.1(f) of your Contract Agreement dated 2nd August, 2017 with “BSCL”.

Your faithfully,

Managing Director cum CEO.”



It appears that on the same day vide letter no.144/BSCL the petitioner invoked the bank guarantee and called upon the Chief Manager, Vijaya Bank to pay to the BSCL an amount of Rs.56,25,500/- (Annexure-14). In paragraph '1' of the writ application however the letter invoking the bank guarantee (Annexure-14) is not under challenge. A prayer, however, has been made for a direction to refund the bank guarantee that has been forfeited.

It further appears that the petitioner had earlier moved the Hon'ble Delhi High Court in OMP(I) (COMM.) 97/1999 by filing an application under Section 9 of the Arbitration and Conciliation Act, 1996. The said application was heard and disposed off by the Hon'ble Single Judge of the Delhi High Court vide order dated 02.04.2019 holding that since in terms of Clause 9.3 of the special conditions of the contract the arbitration shall take place at Bhagalpur, Bihar, the parties have clearly intended to vest exclusive jurisdiction for adjudication of their disputes in the court at Bhagalpur alone. Relying upon the judgment of the Hon'ble Supreme Court in the case of **Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd. & Ors. (2017) 7 SCC 678** wherein it has been held that the seat of the arbitration shall vest exclusive jurisdiction in that court, the application



preferred by the petitioner was dismissed holding that the Delhi High Court does not have territorial jurisdiction to entertain the application (Annexure-15 to the writ application).

In the aforementioned background the writ application has now been presented before this Court. During the pendency of this writ application the petitioner has been served with letter no.161 dated 19.04.2019 (Annexure-24) calling upon them to refund Rs.60 lacs paid to the petitioner on account of payment in the nature of an advance. According to Annexure-24 the petitioner could not perform/render services in accordance with the terms of reference (TOR) of their contract, hence, the refund was required. Further vide letter no.171 dated 24.04.2019 the petitioner has been communicated about imposition of penalty of 10% of the contract value of Rs.11.25 crores i.e. Rs.1.125 crore pursuant to clause 7.3.2 under Section 3 and the petitioner has been called upon to pay the same before 24th May, 2019 failing which it will be realized from the petitioner by taking recourse to legal action. As stated above, the respondent no.1 has also come out with notice inviting tender during the pendency of the writ application.

Mr. Y.V. Giri, learned senior counsel representing the petitioner submits that notice of termination dated 27.03.2019 (Annexure-13), letter of encashment of bank guarantee



(Annexure-14) and the subsequent orders (Annexure-24 and 26 respectively) including the re-tendering are wholly without jurisdiction and action of the respondent no.1 is in violation of the Article 14 of the Constitution of India, hence, not permissible in the facts and circumstances of the case. It is his submission that the notice of termination in fact has been issued under clause 2.9.1(a), but it has been deliberately recorded to have been issued under sub-clause (f) to avoid the implications in terms of clause 2.9.6. It is submitted that by invoking the clause 2.9.1(f), the respondent no.1 has attempted to make the dispute non-arbitral.

Learned senior counsel has supported his argument by further submitting that the correspondences present at Annexure-4, 6 and 8 clearly indicate that there are allegations as to failure on the part of the petitioner in performing their part of the obligations under the agreement and hence the impugned action is in fact in exercise of power by the respondent no.1 in terms of Clause 2.9.1. (a) and hence the said issue becomes arbitral in terms of Clause 2.9.6.

It is submitted that the action taken against the petitioner without issuing any show cause notice is wholly illegal and without jurisdiction. The imposition of penalty in terms of Clause



7.3.2 without there being any adjudication on the issue of delay by an independent arbitrator is also liable to be set aside.

Mr. Y. V. Giri, learned senior counsel for the petitioner has submitted before this Court referring to Annexure-21 which is the minutes of the review meeting held on 02.04.2019 in the Chamber of Principal Secretary, Urban Development and Housing Department, Government of Bihar that in course of review meeting the Chief General Manager of BSCL informed the Principal Secretary that the PDMC (petitioner) has already been removed and action towards constitution of new PDMC is being taken. Mr. Y.V. Giri has thus shown that the stand of respondent nos.1 and 2 now taken before this Court is not in consonance with what have been disclosed in the review meeting on 02.04.2019 to the Principal Secretary of the concerned department. In order to strengthen his argument he has now submitted that by floating the notice inviting tender dated 03.06.2019 during the pendency of the writ application the respondent nos.1 and 2 have only strengthened the belief of the petitioner that the impugned letter/communication as contained in Annexure-13 to the writ application is nothing but a notice of removal without giving any opportunity of hearing/show cause to the petitioner and therefore it is violative of Article 14 of the Constitution of India.



In course of argument since the respondents took a stand that the dispute is an arbitrable dispute, at the end learned senior counsel for the petitioner submits that the relief prayed in the writ application may be moulded by appointing a sole arbitrator for adjudication of the dispute between the parties and in the meantime the penal action such as encashment of bank guarantee, refund, imposition of penalty and re-tendering be set aside and the parties be directed to await the final outcome of the arbitration proceeding before terminating the agreement as per the mandate of Clause 2.9.6.

Submissions of Respondent-'BSCL'

Contesting the writ application initially Mr. Lalit Kishore, learned senior advocate and thereafter Mr. Manish Kumar, learned advocate on record submits that the present writ application is fit to be dismissed in limine in view of Clause 9 of the agreement between the parties which provides for mechanism for “settlement of disputes” by way of arbitration. Learned counsel submits that this Court sitting in its writ jurisdiction may not go into interpreting the terms of the contract where the contract itself provides for mode of settlement of dispute. It is submitted that the scope of judicial review in contractual matters are limited. In this connection, reliance has been placed on the judgment of the



Hon'ble Supreme Court in the case of **Sri Ram Builders Vs. State of Madhya Pradesh and Others** reported in **2014(14) SCC 102** (paragraphs 58 to 60 and 67). It is further submitted that the dispute regarding the terms of contract is a contractual dispute and in the case of **National Highway Authority of India Vs. M/s. Ganga Enterprises and another** reported in **AIR 2003 SC 3823** (paragraph 6) the Hon'ble Supreme Court refused to decide the question of legality/illegality in the matter of forfeiture of security deposit. The respondent nos.1 and 2 have taken a stand that in terms of Clause 9.2 even the dispute of the present nature may be taken up for amicable settlement and in case dispute is not resolved amicably it may be referred to arbitration in terms of provisions of the Arbitration and Conciliation Act of 1996.

There is a categorical stand of respondent nos.1 and 2 that they have presently served only the notice of termination on the petitioner but the final decision with regard to termination of the contract is yet to be taken. It is however also the stand of the respondent nos.1 and 2 that the petitioner having accepted all the terms of the agreement cannot escape from the implication of clause 2.9.6 and cannot continue with the work which benefit is available only if either party disputes whether an event specified in paragraphs (a) through (e) of clause 2.9.1 and not in case of



termination under clause 2.9.1(f). As regards the resolution of the Board of Directors taken in its meeting held on 11.03.2019 it has been submitted that with reference to paragraph 9 of the counter affidavit that the board of BSCL had discussed the matter and observed that the project has suffered irreparable damage and loss of goodwill and credibility due to lack of professionalism, non-deployment of key resources etc. hence the resolution was unanimously taken to issue notice of termination under clause 2.9.1(f). Various reasons shown in paragraph 9 of the counter affidavit have been relied upon. It is thus submitted on behalf of the respondent nos.1 and 2 that at this stage, in the present writ application, the petitioner is not entitled for any of the reliefs as prayed.

CONSIDERATION

Having heard learned senior counsel for the petitioner and learned senior counsel as well as advocate on record on behalf of the respondent nos.1 and 2 as also upon perusal of the records, this Court finds that initially when the writ application was taken up for hearing, the contention of Mr. Y.V. Giri, learned senior counsel for the petitioner was that the respondent nos.1 and 2 have taken recourse to clause 2.9.1(f) of the agreement with intention to make the disputes non-arbitral, thus apparently the argument was



based on an assumption that only in case of termination in terms of clause 2.9.1(a) to 2.9.1(e) the dispute may be resolved through the process of arbitration but as the arguments progressed and the stand of the respondent nos.1 and 2 were placed before this Court stating that in terms of clause 9.2 of the agreement the present dispute would be arbitrable, Mr. Y.V. Giri has made a prayer that the relief in the writ petition be moulded by appointing a sole arbitrator for adjudication of the dispute between the parties and in the meantime the impugned action be set aside and parties should be directed to await final outcome of the arbitration as per the mandate of clause 2.9.6.

In these circumstances first question which would fall for consideration before this Court is as to whether it would be appropriate, just and proper for this Court sitting in its writ jurisdiction under Article 226 of the Constitution of India to appoint a sole arbitrator for adjudication of the disputes. This Court would not have even slightest of doubts in its mind that sitting in its writ jurisdiction this Court should not take upon itself the jurisdiction to appoint an arbitrator. The Arbitration and Conciliation Act, 1996 under which the parties have agreed to go for arbitration is an equally efficacious remedy, a complete code in itself and provides the forum where an application for appointment



of an arbitrator may be made if the parties fail to appoint an arbitrator with mutual consent. The Constitutional Court must restrain itself when the petitioner has an equally efficacious remedy. In the case of **Titaghar Paper Mills Co. Ltd. Vs. State of Orrisa** reported in (1983) 2 SCC 433 the Hon'ble Supreme Court had been pleased to observe as under:

“11. It is now well recognized that where a right or liability is created by a Statute which gives a special remedy for enforcing it, the remedy provided by that Statute only must be availed of”

This Court, therefore while exercising its' extra-ordinary writ jurisdiction must take note of legislative intent manifested in the provisions of the Arbitration and Conciliation Act, 1996. This Court, therefore, is not willing to exercise its' discretion to mould the relief as prayed by the writ petitioner by appointing a sole arbitrator. The parties are at liberty to proceed with for settlement of their disputes in terms of the arbitration clause under the agreement (Annexure-1). As noted above petitioner had moved Hon'ble Delhi High Court under Section 9 of the Act of 1996 but after that instead of taking recourse to the remedy available under the Act of 1996 they chose to invoke writ jurisdiction of this Court. In the opinion of this Court writ jurisdiction would not be the correct remedy here.



Now coming to the next prayer made on behalf of the petitioner, this Court finds that the prayer of the petitioner for a direction to the respondents to refund the bank guarantee amount and to cancel the imposition of penalty are also not to be entertained by this Court in its writ jurisdiction because for purpose of arriving at a conclusion with regard to the action of the respondent no.1, legality or illegality in the matter of encashment of bank guarantee and imposition of penalty, this Court would be required to go into the terms of the contract, interpret them and then enter into factual discussion into the allegations and counter allegations between the parties, then only after recording a finding of fact as to who is at fault the impugned action may or may not be set aside. This Court would, therefore, not take up these exercise which would require intense fact finding exercise based on the adducement of evidences by both the parties, such fact finding exercise is also not required by this Court when the parties have agreed that the dispute is an arbitrable dispute in terms of the agreement. In ultimate analysis, the arbitration tribunal dealing with the matter would be competent to look into the evidences, record a finding and then take a view as regards the impugned action of the respondent nos.1 and 2. Therefore, as regards the invocation of bank guarantee and imposition of penalty it would be



only appropriate if the issues are left open to be considered by a duly constituted arbitral tribunal.

This leads to the last submission of the petitioner with regard to the re-tendering done by the respondent nos.1 and 2 during the pendency of the writ application. This Court finds from the stand of the respondent nos.1 and 2 that they have yet to take a final decision with regard to the termination of the agreement. In the written notes of argument submitted on their behalf also it has been reiterated that they have served the notice of the termination on the petitioner, but the final decision with regard to termination of contract has not been taken even though sixty days has lapsed because of the pendency of the present writ application.

Neither in course of argument nor in the written notes of argument the respondent nos.1 and 2 have explained as to how even before termination of the agreement of the petitioner a fresh notice inviting tender could be issued when the matter was still being heard and on the last date before summer vacation it was adjourned for further hearing on behalf of the respondents. In absence of any explanation, this Court is of the considered opinion that the notice inviting tender even before termination of the present agreement with the petitioner would give a reason to belief that what was informed to the Principal Secretary of the



Department in review meeting on 02.04.2019 was not in consonance with the stand of respondent nos.1 and 2 which is now being taken before this Court. This Court would however not go for a discussion on this issue once it is found that the respondent nos.1 and 2 have themselves come forward to say that they have yet not taken a decision and they have presently issued a termination notice in terms of clause 2.9.1(f).

In the given facts and circumstances, this Court therefore finds that the notice of termination (Annexure-13) is not to be treated as a final decision of termination of agreement, the petitioner is given liberty to submit its explanation within a period of 15 days from today and thereafter the respondent nos.1 and 2 shall proceed to consider the same and pass an appropriate order thereon within 30 days thereafter. By virtue of their own stand, the notice inviting tender shall not be proceeded with by respondent nos.1 and 2 until a decision in the matter of termination of the petitioner is taken and it is ultimately held that the agreement is liable to be terminated. It will be a totally independent exercise by respondent nos.1 and 2 in accordance with law and the agreement between the parties.

In view of the discussions hereinabove, in case the respondent nos.1 and 2 decide to terminate the agreement and a



dispute arises, the same will be an arbitrable dispute in terms of clause 9.2 of the agreement in accordance with the provisions of the Arbitration and Conciliation Act, 1996. As regards the dispute arising out of invocation of the bank guarantee, imposition of penalty and a direction to refund Rs.60 lacs also the petitioner has a remedy available to take up these issues before the arbitrator. It will be open for the parties herein to raise all contentions before the arbitral tribunal.

This writ application stands disposed off in terms stated hereinabove.

(Rajeev Ranjan Prasad, J)

arvind/-

AFR/NAFR	NAFR
CAV DATE	24.06.2019
Uploading Date	15.07.2019
Transmission Date	

