IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.12998 of 2019

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BJCL Srinath (Joint Venture) having its office at 103,Lane No.-2,Kehar Singh Estate, Saidulajab,New Delhi-110030 through its authorized representative Namely Sri Nitish Agarwal @ Nitish Kr. Agarwal, aged about 42 years (Male), son of Sri Tulsi Prasad Agarwal, resident at 2C/2D,Vardhmaan Apartment, Jain Mandir Gali, Janaki Path, Ganeshguri,Guwahati-781006 (Assam) and local resident at Flat No.-305, 3rd Floor,Madhuban Apartment,LBS Shashtri Nagar,Patna-800023.

... ... Petitioner/s

Versus

1. The State of Bihar through Principal Secretary,Water Resources Department,Govt. of Bihar,Patna
2. The Additional Chief Secretary, Water Resources Department,Govt. of Bihar,Patna
3. The Engineer-in-Chief, Flood Control and Water Resources,Patna
4. The Chief Engineer, Flood Control and Drainage, Water Resources Department,Patna
5. The Superintending Engineer, Kosi Barrage Birpur Circle,Birpur,Bihar
6. The Superintending Engineer, Eastern Kosi Embankment,Saharsa,Bihar
7. The Executive Engineer, Western Embankment Division,Birpur
8. The State Bank of India, Christian Basti,G.S. Road,Guwahati-781006 (Assam) through its Manager
9. HDFC Bank Ltd., 5,Community Centre,Garg Plaza,Sector-8, Rohini,Delhi-110085,through its Manager

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Y.V. Giri, Sr.Adv.
		Mr.Ashish Giri, Adv.
		Mr. Rajat Kumar Tiwary, Adv.
		Mr. Sumit Kumar Jha, Adv.
For the State	:	Mr. Kunal Tiwary, AC to GA-2
For the Respondent no.8:		Mr. Sanjiv Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL ORDER

2 28-06-2019 Petitioner, in the present case, has moved this Court for the following reliefs:-

> *"i) To hold and declare that since, the delay in completion of the work is not due to the default of the petitioner but failure of the authorities in*

performing their reciprocal promises, no penal action such as encashment of bank guarantees, risk and cost, termination, debarment, etc. can be done against the petitioner unless the same is adjudicated by an arbitrator in terms of the provision of the agreement.

ii) To direct the respondent authorities to grant time extension for completion of work in question in terms of clause-5 of the SBD as the delay was beyond the petitioner's control.

iii) to hold and declare that in the facts and circumstances of the case the petitioner is liable for grant of price escalation for the entire period of work beyond the original completion period.

iv) To appoint an arbitrator for resolution of dispute regarding delay in completion of the project and other issues so raised as the respondent have refused to appoint the same pursuant to the request made by the petitioner.

v) To issue a writ/ order/ direction in the nature of certiorari for quashing the letter no. 406 dated 24.06.2019 issued under the signature of the Executive Engineer, Western Embankment Division, Birpur to the banker of the petitioner i.e. State Bank of India, Christian Basti, G.S. Road, Guwahati by which the extended Bank guarantee submitted by the petitioner bearing no. SME/GSR/BG18-19/61 dated 16.05.2018 for an amount of Rs. 17,89,49,227.00 pursuant to agreement no. 01SBD/2018-19 dated 18.04.2018 has been forfeited on ground of slow progress of work by the petitioner and the remaining work to be proceeded at the risk and cost for which necessary direction has been given. (Annexure-5).

vi) To prevent the respondent authorities from encashing/ forfeiting other two bank guarantees of the petitioner of HDFC Bank submitted pursuant to the agreement no. 01SBD/2018-19 dated 18.04.2018 bearing bank guarantee no. 003GT020181030050 dated 13.04.2018 for amount of Rs. 18,054,645.00 and bank guarantee

no. 003GT02180540045 dated 23.02.2018 for amount of Rs. 17,735,200.00.
vii) To pass interim/ ex-parte interim relief staying the operation of the letter no. 406 dated 24.06.2019 issued by the Executive Engineer, Western embankment Division, Birpur and to prevent the respondent from encashing the following bank guarantees of the petitioner pursuant to agreement no. 01SBD/2018-19 dated 18.04.2018 :
(a) Bank guarantee no. SME/GSR/BG/18-19/61 dated 16.05.2018 for an amount of Rs. 17,89,49,227.00
(b) Bank guarantee no. 003GT02181030050 dated 13.04.2018 for amount of Rs. 18,054,645.00
(c) Bank guarantee no. 003GT02180540045 dated 23.02.2018 for amount of Rs. 17,735,200.00
viii) To pass interim/ ex-parte interim relief preventing the respondent authorities from taking further any coercive steps against the petitioner such as cancellation, retendering, debarment, etc.
ix) To any other relief or reliefs for which the petitioner is found to be entitled in the facts and circumstances of the case."

Mr. Y.V. Giri, learned senior counsel representing the petitioner has taken this Court through the various factual aspects including that in the meeting held on 16.01.2019 in the Chamber of the Additional Chief Secretary, Water Resources Department, Government of Bihar in course of discussion it has come to his notice that the work in question could not be completed by the contractor because he could not be made available the required documents, approved map and FRL (finished road level). Learned senior counsel submits that the contractor could not complete the work in question for no fault on his part, but when the respondents intended to initiate action against him, he raised a dispute under the arbitration clause present in the standard bidding document, but then the respondents refused to appoint their arbitrator as a result thereof the arbitration proceeding could not commence. It is submitted that the contractor-petitioner is ready to complete the work and had requested the respondents for extension of time but without looking into the same the respondents have proceeded to encash the bank guarantee of Rs.17,89,49,227.00 which was provided to the respondents against the mobilization advance. It is submitted that if the contractor is given some time the entire work will be completed and till then the encashment of the bank guarantee be restrained.

Learned counsel representing the State has opposed the writ application. It is submitted that the present writ application has been filed in fact for grant of injunction against the encashment of the bank guarantee and as such the writ application is not fit to be entertained in the light of the judgment of the Hon’ble Apex Court in the case of **Gujarat Maritime Board Vs. Larsen and Toubro Infrastructure**

Development Projects Limited and Another reported in **(2016) 10 SCC 46**. Learned counsel submits that a bare perusal of the reliefs prayed in the writ application would show that the petitioner is looking for declaration from this Court that the delay in completion of the work is not due to the default of the petitioner, this according to him will be a pure question of fact which cannot be decided by this Court under Article 226 of the Constitution of India. The further prayer for a direction to the respondents to grant time extension for completion of work would also amount to issuing a direction to a party to a contract to do certain things which he may like or not like in his own wisdom. It is submitted that another prayer made in the writ application is to appoint an arbitrator for resolution of the dispute regarding delay in completion of the project, again it is submitted that the appointment of arbitrator cannot be ordered under Article 226 of the Constitution of India as in case the petitioner has any grievance and the same is in the nature of an arbitral dispute, in terms of the provisions of the Arbitration and Conciliation Act, he may approach the appropriate court in appropriate jurisdiction for appointment of an arbitrator, but not before this Court.

Learned counsel for the State Bank of India is also present.

Having heard learned senior counsel for the petitioner as also learned counsel for the State, this Court is of the considered opinion that the kind of reliefs prayed in the writ application cannot be granted by this Court in exercise of its extraordinary writ jurisdiction under Article 226 of the Constitution of India. A perusal of the writ application and the reliefs prayed therein would show that the petitioner is virtually looking for an injunction against the encashment of the bank guarantee. In the case of **Gujarat Maritime Board Vs. Larsen and Toubro Infrastructure Development Projects Limited and Another** reported in **(2016) 10 SCC 46,** the Hon'ble Supreme Court was considering a challenge to an order passed by the Hon'ble High Court in which the High Court had been pleased to grant the injunction against the encashment of the bank guarantee, while considering the same, the Hon'ble Supreme Court in paragraphs 12 and 13 held as under:-

> *"12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra. In Himdadri Chemicals Industries Ltd. v. Coal Tar Refining Co.[5], at para 14: (SCC pp.117-18)*

5 (2007)8 SCC110

"14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned."

13. The guarantee given by the bank to the appellant contains only the condition that in case of breach by the lead promoter, viz., the first respondent of the *conditions of LoI, the appellant is free to invoke the bank guarantee and the bank should honour it "... without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...". It has also been undertaken by the bank that such written demand from the appellant on the bank shall be "... conclusive, absolute and unequivocal as regards the amount due and payable by the bank under this guarantee". Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 06.02.2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultant invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc. are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the bank is bound to honour the payment under the guarantee."*

Learned counsel for the State is correct in saying that this Court would not decide as to who is at fault for non-completion of the work and for that purpose the petitioner had been advised to invoke the arbitration clause, which in fact he had done by raising the dispute and calling upon the respondent to appoint an arbitrator. This Court finds that even if the respondents had not appointed their arbitrator on the request of the petitioner in terms of the contract the petitioner could have either appointed his arbitrator if it was so prescribed in the agreement who could have proceeded as a sole arbitrator or in case the conditions present in the agreement provided for sole arbitrator in that case petitioner could have moved before the appropriate court in appropriate jurisdiction for appointment of an arbitrator. That only could have been perhaps the correct remedy applied for which has not been done in the present case.

This Court also finds that in a case where the dispute is arbitrable as is being contended before this Court if an interim injunction is required, the parties so willing to seek injunction may make an application for the same in terms of Section 9 of the Arbitration and Conciliation Act, 1996 before initiation of the arbitration. Instead of pursing his remedy in accordance with the provisions of the Arbitration and Conciliation Act, 1996, the petitioner has chosen to move this Court in its writ jurisdiction.

This Court also finds that sitting in its writ jurisdiction, the High Court would not issue any positive direction to the respondents to grant extension of time as it is for the respondents in their wisdom as an employer to look into the request of the petitioner and take a decision thereon but except that the Court would have in an appropriate case directed the respondents to consider the request for extension of time, no positive direction for extension of time may be granted.

In the present case, the respondents have already taken a decision, they have invoked the bank guarantee which was furnished to secure mobilization advance. This Court would not be willing to interfere with the action of the respondents in the matter of invocation of the bank guarantee while sitting in its writ jurisdiction. This writ application is thus dismissed.

However, it goes without saying that, while dealing with the writ application, this Court has not gone into the merit of the contentions raised on behalf of the petitioner and it will be open for the petitioner to seek its remedy in accordance with law.

(Rajeev Ranjan Prasad, J)

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