

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7147 of 2020

M/s Birendra Prasad Singh having its registered office At and P.O.- Barki Mahuali Takiya Bazar, Sasaram (Rohtas) represented through its Partner namely Devesh Kumar, aged about 35 years (Male), son of Birendra Prasad Singh, resident of At and P.O.- Barki Mahuali Takiya Bazar, P.S.- Kargahar, District- Rohtas at Sasaram.

... .. Petitioner/s

Versus

1. The State of Bihar through Principal Secretary, Road Construction Department, Government of Bihar, Patna.
2. The Principal Secretary, Road Construction Department, Government of Bihar, Patna.
3. The Chief Engineer, National Highway South Wing, Road Construction Department, Government of Bihar.
4. The Superintending Engineer, National Highway Circle, Dehri- on- Sone (Rohtas).
5. The Executive Engineer-cum- Authority Engineer, National Highway Wing Gaya Road Construction Department, Government of Bihar, Gaya.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Y. V. Giri, Sr. Advocate Mr. Pranav Kumar, Advocate
For the Respondent/s	:	Mr. Manoj Kumar Ambastha, SC-26
For the Intervenor	:	Mr. Krishna Murari, Advocate

CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY
ORAL JUDGMENT

Date : 8th-02-2021

Heard learned counsel for the petitioner and the respondents as well as intervenor.

2. Parties have filed their detailed pleading, but having regard to the fact that the Court proposes to decide the writ application on the issue of compliance of principles of natural justice alone. There is no occasion for this Court to deal with the detailed facts of the case, except the relevant one, which is set out below:



On 06.02.2018 tender notice was invited in connection with EPC/NH-Gaya/2017-18 for the work strengthening and widening of two lane with paved shoulder from Km 181.465 to Km 201.665 of NH-120 (Nasriganj- Bikramganj).

On 07.09.2018: The tender committee accepted the tender of the petitioner and letter of acceptance was issued in favour of petitioner. On 27.09.2018, agreement was entered between the petitioner and the Superintending Engineering, NH Circle. After agreement correspondence were made between the parties on the issue of providing working front and dispute arose as to acceptance of appointed date for starting construction work. On 28.05.2019, the petitioner invoking clause 23.2.1 of the agreement requested the respondent for termination of agreement on the ground that despite expiry of 90 days the defect pointed out by him was not cured by the respondents and working front and forest clearance was not provided and as such the work could not be started and, therefore, in terms of the agreement, the petitioner requested for termination of agreement.

On 10.06.2019 to 18.03.2020, correspondence were made between the petitioner and the respondents on the issue of forest clearance and providing work site for carrying construction work and blame game on each other started. On 20.03.2020, the



respondent terminated the agreement on the ground of petitioner's failure to carry construction work, despite several opportunities. On 23.03.2020, the petitioner after receipt of the termination order requested the respondents to set aside the termination order. On 14.05.2020 fresh tender was issued.

3. This application was heard on different dates. On 17.08.2020 noticing the submissions of the petitioner that the impugned order dated 20.03.2020 was passed in violation of principles of natural justice inasmuch as no notice in terms of Clause 23.1.2 of the agreement was issued before taking action of termination of contract, the Court directed the respondents to file counter affidavit, but no counter affidavit was filed. In the aforesaid circumstance, on 16.10.2020, the Court was constrained to pass order of status quo as existing on 16.10.2020.

4. After the order dated 16.10.2020, intervention application, bearing I.A. No. 1 of 2020, was filed by the successful tenderer of fresh tender. Considering the reasons mentioned in the intervention application, the intervenor was allowed to be added as party.

5. On 07.01.2021, details submissions were advanced by the parties, which is reflected from the order dated 07.01.2021, which is quoted herein below:



“Heard learned senior counsel appearing on behalf of the petitioner, learned counsel appearing on behalf of the State as well as learned counsel for the intervenor.

The petitioner has challenged the validity of termination letter no. 187 dated 20.03.2020 (Annexure- 20) by which the respondents have decided to terminate the engineering procurement and construction agreement dated 27.09.2018 and decided to forfeit performance bank guarantee and additional bank guarantee dated 15.10.2018.

Mr. M.K. Ambastha, learned counsel for the State, right from the very beginning opposed the writ on merit by filing counter affidavit notwithstanding the fact that the petitioner-firm in terms of clause 23.2.1 & 23.2.2 of the agreement on 27.09.2018 requested the respondents for termination of the agreement informing that despite expiry of 90 days, the defect pointed out was not cured and forest clearance was not provided to the petitioner.

Mr. Y.V. Giri, learned senior counsel appearing on behalf of the petitioner, submits that the petitioner requested the respondent-Executive Engineer through letter (Annexure-5) informing that till date 90% of the clearance as per clause 4.1.3 has not been provided and as such there is laches on the part of the respondents. Mr. Giri submits that issuing notice before termination of agreement as per the agreement was mandatory but that was not issued. The action of the respondents in terminating the agreement and forfeiture of performance bank guarantee is illegal and unreasonable and as such unsustainable. He submits that in the instant case there is gross violation of principles of natural justice. He submitted that if the agreement contemplates the requirement of issuance of notice before taking any action of termination of the agreement, the respondents are under obligation to issue notice to the petitioner for termination



of the agreement and forfeiture of performance bank guarantee but unfortunately, that was not followed and the respondents have decided to terminate the agreement and forfeiture of performance bank guarantee without issuance of 15 days mandatory notice and as such the entire action as per Annexure-20 is unsustainable.

This Court has decided the issue that violation of principles of natural justice in the matter of termination of contract inasmuch as without mandatory notice is illegal. The Court finds that in the instant case also notice is mandatory one and non-issuance of 15 days notice is violation of principles of natural justice and as such rendered the decision (Annexure-20) and all consequential decision is bad and unsustainable in law.

Mr. Krishna Murari, learned counsel appearing on behalf of the intervenor, submits that the intervenor being declared successful in subsequent tender after following due procedure of law has been awarded the work should be allowed to execute the construction work. He has no concern with the action of the State vis-a-vis petitioner. He submits that in CWJC No. 7085 of 2020 (*Hitech Sweet Water Technologies Pvt. Ltd. Vs. The State of Bihar & others*), this Court remanded the matter, which may be followed in this case but without affecting prospect of the successful bidder. He submits that not allowing the intervenor to execute the construction work is not in the public interest. Therefore, without affecting the subsequent tender, the Court may decide the writ application in the interest of the State and public.

Mr. Manoj Kr. Ambastha, learned counsel appearing on behalf of the State also admits that notice of 15 days was not issued before taking decision (Annexure-20).

In the aforesaid facts and circumstances, the Court is prima facie of the view that action of the State in termination of



the agreement is not only violative of principles of natural justice but fair play. If the State is adamant to take action in terms of the agreement and terminate the agreement, there was no justifiable reason to deny termination of the agreement at the request of the petitioner which was requested in terms of agreement as evident from Annexure-5. The Court is of the view that any consequential action is bad and the order of termination of agreement is not sustainable for non-compliance of mandatory notice of 15 days and in consequence thereof, forfeiture of performance bank guarantee and all subsequent actions appear to be without jurisdiction. But having regard to the submission of Mr. Ambastha, that proposes to file written argument.

Judgment is reserved.”

6. Although the Court was inclined to allow the writ application on the ground of non-compliance of notice under Clause 23.1.2 of the agreement in the light of the order dated 05.10.2020 passed in C.W.J.C. No. 7085 of 2020 (***Hitech Sweet Water Technologies Pvt. Ltd. Vs. The State of Bihar & others***) where this Court held out that in case the decision is taken for termination of contract without compliance of mandatory requirement of pre-termination notice, the action is violative of principles of natural justice and cannot sustain. The Court in the larger public interest indicated in the order dated 07.01.2021 indicated that in the peculiar facts and circumstances, it would be just and proper that the order of termination, although violative of



principles of natural justice would not adversely affect the fresh tender provided the respondent State is prepared to refund the performance of Bank guarantee of the petitioner and also ensure payment to the petitioner to the extent that the petitioner has worked in terms of the contract, but the State counsel insisted that he wanted to file written notes of argument, the judgment was reserved. After the order dated 07.01.2021, the parties have filed their written notes of argument. The written notices of argument filed on behalf of the petitioner, respondent State and the intervenor are quoted herein below:

(6) (A) WRITTEN SUBMISSION ON BEHALF OF THE PETITIONER

1. That the present writ application has been filed for quashing the termination letter no. 187 dated 20.03.2020 issued under the signature of the Superintending Engineer, Superintending Engineer, National Highway Circle, Dehri-on-Sone (Rohtas) terminating the engineering procurement and construction Agreement No. 3 bearing Job No. 120-BR-2017-18-922 dated 27.09.2018 and performance security bank guarantee no. 460611PEBG180008 dated 15.10.2018 amounting to Rs. 2,96,84,392/- and additional bank guarantee no. 46061PEBG180009 dated 15.10.2018 for Rs. 73,86,432 has been forfeited and encashed and commanding the respondents to permit/ allow the petitioner to complete the work in terms of EPC Agreement with a direction upon the respondents to provide 90% complete encumbrance free site under the agreement per execution of the work by the petitioner as per the Agreement No. 3 bearing Job No. 120-BR-2017-18-922



- dated 27.09.2018 and commanding the respondents to refund the performance security bank guarantee no. 460611PEBG180008 dated 15.10.2018 amounting to Rs. 2,96,84,392/- and additional bank guarantee no. 46061PEBG180009 dated 15.10.2018 for Rs. 73,86,432 after setting aside the termination order dated 20.03.2020.
2. The petitioner is a partnership firm registered under the partnership Act and also is a registered class-I Contractor in terms of the provisions of the Bihar Contractors Registration, Rules, 2007 and eligible to participate in a tender issued by the Road Construction Department.
3. The NH Division of RCD came out with an NIT bearing NIT no. 09EPC/NH-Gaya/2017-18 dated 06.02.2018 for the work strengthening and widening of 2 lane with paved shoulder from Km 181.465 to Km 201.665 of NH-120, (Nasriganj - Bikramganj) in the State of Bihar, EPC Mode (Job No. 120-BR-2017-18/922). Accordingly the petitioner participated in the said NIT, thereafter on the basis of decision dated 03.08.2018 of the Tender Committee the LOA was issued through letter no. 2662 dated 07.09.2018 to the petitioner for entering into the agreement and subsequently the petitioner entered into an agreement on 27.09.2018 with the Superintending Engineer National Highway Circle, RCD for the above-mentioned work.
4. That Clause 23.1 of the agreement discusses about the termination for contract default and Clause 23.1.2 refers to 15 days termination notice before termination of the agreement, the relevant portion of the said clause is being quoted hereunder below ;

“23.1 Termination for Contractor Default

23.1.1 Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have



occurred, and the Contractor fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Contractor shall be deemed to be in default of this Agreement (the “Contractor Default”), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure.

23.1.2 Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Contractor Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Contractor; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Contractor of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Contractor to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.”

It is submitted that the present case, no such 15 days termination notice was ever served upon the petitioner before the issuance of termination letter no. 187 dated 20.03.2020 in violation of the conditions mentioned in the agreement.

5. That from the office of the Executive engineer letter no. 152 dated 14.02.2019 was issued wherein it was mentioned that the stretch of NH-120 from KM 181.465 to KM 201.665 (Nasriganj – Bikramganj) is being handed over and despite that the work has not been started and the appointed date for the work is fixed for 14.02.2019. The same was replied through letter dated 17.11.2018 indicating the reason due to which the work could not be started. In the said reply, it was clearly mentioned that the



reciprocal promises were not fulfilled by the respondent and no forest clearance and working front was made available. Therefore, the work could not be started despite that the appointed date for the work is fixed for 14.02.2019.

6. The petitioner firm in terms of the clause 23.2.1 and 23.2.2 as contained in the agreement requested for termination of the agreement through letter/ notice dated 28.05.2019 due to the reason that even expiry of 90 days the defect pointed out was not cured, the working site and the forest clearance was also not provided to the petitioner firm due to which the work could not started.
7. The Executive Engineer, National Highway Circle issued a letter no. 690 dated 31.07.2019 for handing over the site and fixing revised appointed date. In the said letter, it was also mentioned that the first stage forest clearance for the project road has already been obtained through letter no. 479 dated 26.06.2019 and unilaterally the respondents revised the appointed date in terms of Clause 28 of the agreement and the new appointed revised date was from 31.07.2019. At this stage, it is relevant to mention here that since the respondents have failed to perform their part of obligation as per the agreement in getting the forest clearance, the appointed date to start the work was revised from 14.02.2019 to 31.07.2019 which shows that the respondents till 31.07.2019 did not obtained the forest clearance.
8. Thereafter, the Executive Engineer NH Division through letter no. 898 dated 11.10.2019 that the letter of award was issued on 12.01.2018 and again through letter no. 256 dated 10.06.2019 joint verification was carried out and the revised appointing date was fixed for 31.07.2019. Further, with respect to the forest clearance it was informed that on the basis of meeting held on 16.08.2019 the bituminous work has to be carried out within formation width and no permission is required. In Para 5 it was



admitted by the respondents that in the inspection it was found that 70-75% of the work areas is not having any tree so the work can be started which shows that in terms of the agreement 90% of the encumbrance free site was not provided to the petitioner firm as per Clause 4.1.3(a).

9. That another letter from the office of the Executive Engineer NH Division, Gaya was issued bearing letter no. 48 dated 09.01.2020 wherein it was admitted that only first stage forest clearance has been obtained however, the steps are being taken for clearance of the second stage is in process which is in violation with the clause 4.3 of the agreement in which the environment clearance has been obtained prior to the entering into agreement. In the said letter, it was also mentioned in terms of the circular reference 1552 dated 30.10.2019 the effort has to be made to cut down minimum number of trees within proposed paved shoulder width i.e. 10 mtr. It is apparent that the necessary forest clearance has not been obtained by the respondents till 09.01.2020.
10. That thereafter, the petitioner firm was directed through letter no. 95 dated 23.01.2020 from the office of the Executive Engineer NH Division that on the basis of the review meeting held with the Principal Secretary RCD, with all clarification including the forest environment clearance was directed to start the work within 7 days and again the appointed date earlier fixed from 31.07.2019 was modified to 06.01.2020 by the respondents unilaterally.
11. That thereafter, through letter dated 18.03.2020 the petitioner firm represented before the Principal Secretary and mentioned that the first appointed date 14.02.2019 was revised in want of forest clearance. Further the second revised date was issued on 31.07.2019 which is the part of the forest clearance and even at that relevant period of time the entire forest clearance was not



obtained by the respondents. Even no authority engineer in terms of the clause 10.1.2 has been shared by the respondents till date and requested to take appropriate action.

12. That through letter no. 187 dated 20.03.2020 issued under the signature of Superintending Engineer terminated the agreement contract entered on 27.09.2018 by the respondents on the ground that despite several letters to commence with the work and the same has not been started. Further in terms of clause 23.1.1 (d, c, j, s, p, q, r) & 23.1.2 the RCD terminate the contract Agreement No. 3 bearing Job No. 120-BR-2017-18-922 dated 27.09.2018 and further the performance security bank guarantee no. 460611PEBG180008 dated 15.10.2018 amounting to Rs. 2,96,84,392/- and additional bank guarantee no. 46061PEBG180009 dated 15.10.2018 for Rs. 73,86,432 has been forfeited and encashed.

13. The petitioner firm after receiving the termination order dated 20.03.2020 made another representation through letter dated 23.03.2020 and 30.03.2020 for setting aside the termination before the Principal Secretary as there is no 15 days termination notice was served upon the petitioner which is mandatory in terms of the agreement.

14. That the order dated 20.03.2020 issued under the signature of the Superintending Engineer, NH Division is violative of principle of natural justice, also in violation of the Clause 23.1.2 by which 15 days termination notice has to be given and in the present case no such termination notice has been ever served to the petitioner and behind is back without fulfilling the reciprocal promises by the respondent has termination the agreement unilaterally. The order dated 20.03.2020 is completely violation of the ratio decided by the Hon'ble Apex Court in the case of **Gorkha Security Services Vs. Government (NCT of Delhi) & Ors., reported in (2014) 9 SCC 105** wherein the Hon'ble Apex



Court while deciding the ratio has held that even in administrative action the rules of natural justice are to be followed any action which has adverse effect on the person or the establishment the same has to be preceded by issuing show cause. In the present case, no show cause termination notice of 15 days was served upon the petitioner firm. Similar view has been adopted by the Division Bench of this Hon'ble Court in the case of **Kamladitya Construction Pvt. Ltd. vs. State of Bihar & Ors. in LPA No. 1153 of 2017 through its order dated 09.10.2017.**

15. That the respondents while issuing the order dated 20.03.2020 has not considered the fact that they have failed to carry out their reciprocal promises in terms of clause 4.1.3(a) by which the 90% of the total project of the Highway with working front has to be provided by the respondents within a period of 90 days and in the present case, the respondents has failed to carry out their part of obligation arising out of the present agreement entered with the petitioner firm and therefore, the non-consideration of these aspects is also in violation of the ratio decided in the case of N.C.C. Vs. State of Bihar & Ors. reported in (2013) 1 PLJR 952 wherein while deciding the ratio the Hon'ble Patna High Court has held that where the contractor did not admit the allegation of liability and fault and made allegation against the state authorities as being equally liable and at fault in the matter the state authorities cannot decide such matter which involves liability on their part and accordingly, the non-compliance on part of the respondents cannot be shifted upon the petitioner firm.

16. That it is relevant to mention here that the respondents themselves has kept on shifting the appointed date from 14.02.2019, 31.07.2019 and finally on 06.01.2020 due to not having the requisite permission / clearance from the concerned



authority and continuously pressurizing the petitioner firm to start out the work without any clearance. Thus the present case is a fit case where the respondent has failed to carry out their reciprocal promises and therefore order dated 20.03.2020 requires judicial interference

17. That it is relevant to mention here that the action of the respondent terminating the agreement without giving any opportunity behind his back is complete violation and in teeth of the ratio decided in the case of **Union of India & Ors. vs. Tania Construction Pvt. Ltd. reported in (2011) 5 SCC 697** and also in violation of the ratio decided in the case of **ABL International Ltd. & Anr. Vs. Export Credit Guarantee Corporation of India reported in (2004) 3 SCC 553** wherein it has been held that the action of terminating the agreement is violative of Article 14 of the Constitution of India and it was held that Arbitration Clause is not a bar to invocation of writ jurisdiction when in justice is cause and rule of law is violated and the same amounts to violative of Article 14 of the Constitution of India

18. the said termination order is completely in violation of the ratio by the Hon'ble Apex Court laid down in *Swadeshi Cotton Mills v. Union of India & Ors.*, (1981) 1 SCC 664. Here, it was held that the principle of natural justice is considered so fundamental as to be implicit in the concept of ordered liberty and therefore, the same cannot be waived in any decision making function. It was reiterated that the fundamental maxim of *audi alteram partem* that includes the facets of the notice of the case to be met and opportunity to explain, cannot be sacrificed at the altar of administrative convenience or celerity. This view has also been reaffirmed by the Hon'ble Supreme Court in *Orxy Fisheries Private Limited v. Union of India & Ors.*, (2010) 13 SCC 427. Here, it was held that the authority while acting in exercise of its



statutory power must act fairly and must act with an open mind while initiating a show-cause proceeding. A show cause proceeding meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charged indicated in the notice.

19. That it is submitted that in *ABL International Ltd. & Anr. v. Export Credit Guarantee Corporation of India*, (2004) 3 SCC 553, the Hon'ble Supreme Court held that the action of terminating the agreement is violative of Article 14 of the Constitution of India and in appropriate cases, the writ Court has the jurisdiction to entertain a writ petition even when disputes questions of fact are involved and there is no absolute bar in maintaining the writ petition under Article 226 of the Constitution of India. Similarly, in *Union of India & Ors. v. Tania Construction Private Ltd.*, (2011) 5 SCC 697 wherein it has been held that the action of the respondents terminating the agreement without giving any opportunity is in complete violation of the conditions of the agreement and is contrary to the rule of law. Further, it was also held that arbitration clause is not a bar for invocation of a writ jurisdiction when injustice is caused and rule of law violated. On the principle of natural justice, in *Gorkha Securities Private Limited v. Government (NCT of Delhi) & Ors.*, (2014) 9 SCC 105, the Hon'ble Supreme Court held that the impugned order of blacklisting without proper notice is contrary to the principle of natural justice. It is incumbent on the department to issue show-cause notice that it intended to impose a penalty of blacklisting so as to provide adequate and meaningful opportunity to show cause against the same.

20. That it is submitted that the order dated 20.03.2020 terminating the agreement especially without an opportunity of being heard has seriously prejudiced the petitioner and such action is contrary



to the duty cast upon the authority to act judicially. The said decision of termination by the authority comes in the ambit of quasi judicial act and accordingly the decision by any authority discharging quasi judicial function is required to follow the principle of natural justice including *audi alteram partem*. This is an undisputed and established principle, reiterated in several judicial pronouncement including the decision of the Hon'ble Supreme Court in the case *Board of High School and Intermediate Education, UP v. Ghanshyam Das Gupta & Ors.*, AIR (1962) SC 1110. In the present case also, not only is the body acting in a quasi judicial manner and therefore, is required to give an opportunity to the party being prejudiced i.e. the petitioner, clause 23.1.2 of the agreement also specifically mandates 15 days termination notice which was never served upon the petitioner before passing the order.

21. That in these background it is submitted that the said impugned order of termination and recovery is violative of rule of natural justice and perverse, arbitrary being violative of Article 14 of the Constitution of India and is thus fit to be quashed.

22. That it is submitted that in forfeiting the bank guarantees, grave justice has been caused to the petitioner. While, the petitioner had furnished the bank guarantees in accordance with the EPC Agreement, the Respondent's continuing defaults resulted in the work not commencing and completing within the set period. This had led to the guarantees already lying for an unfairly prolonged period. Further, since the very Termination is wrongful, the consequent forfeiture of the bank guarantees is also without basis, causing injury to the petitioner, and liable to be set aside

23. That in order to be a valid show cause notice it has been held that the fundamental purpose behind the serving of show cause notice is to make the noticee understand the precise case set up against him which he has to meet. This requires the statement of



imputations detailing out the alleged breaches and defaults committed. Another requirement is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case even if the breaches / defaults complained of are not satisfactorily explained. Such requirement becomes all the more imperative when it comes to termination of the agreement.

24. That the law has been settled that an authority must act fairly and must act with an open mind while initiating her show cause proceeding. A show cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice. At this stage of show cause itself the person cannot be confronted with definite conclusion of his alleged guilt and if so the show cause notice gets vitiated by unfairness and bias and the subsequent proceeding become an idol ceremony.

Conclusion:- In the facts and circumstances of the case it is submitted that the impugned order dated 20.03.2020 is untenable in the eyes of law as no 15 days termination notice in terms of clause 23.1.2 of the agreement has been served upon the petitioner before issuance of the termination order. The respondents even failed to perform their part of reciprocal promises and failed to obtain environment clearance as required under the agreement. The law in this regard has already been settled recently by this Hon'ble Court in case of Hitech Sweet Water Technologies Pvt. Ltd. vs. The State of Bihar & Ors. reported in 2021 1 BLJ 437 in which it has been held that the termination clauses are mandatory in nature and respondents are required to provide opportunity of hearing before passing termination order. Thus, on the basis of abovementioned



grounds and the ratio decided by the court the present order is fit to be quashed.”

6 (b) **WRITTEN ARGUMENT ON BEHALF OF THE
STATE OF BIHAR (RESPONDENT NOS. 1 TO 5).**

1. **Prayer/Pleadings of the petitioner:** The petitioner has challenged the validity of agreement termination letter no. 187 dated 20.03.2020 (Annexure-20) by which the respondents have decided to terminate the engineering procurement and construction agreement dated 27.09.2018 and decided to forfeit performance bank guarantee and additional bank guarantee dated 15.10.2018. The challenge is mainly on the ground of non issuance of show-cause notice in terms of clause 23.1.2 before termination of agreement. Also no forest clearance was obtained in terms of clause 4.3. Also no working front and 90% encumbrance free land was provided to the petitioner.
2. **Similar matter adjudicated by Arbitral Tribunal :** At the very outset the Respondents No 1-5 state and submit that this Hon’ble Court in a similar matter had refused to exercise its discretionary powers under Article 226 of the constitution as the issue of termination of agreement/forfeiture/could be agitated before an arbitral tribunal in terms of contract itself. ***In CWJC No 22458 of 2018- Star Build Max Pvt Ltd Vs State of Bihar and Ors - this Hon’ble Court passed order dated 29-7-2019 as follows: “Having argued for sometime, learned counsel for the petitioner has well understood his limitations in arguing the matter against the order of termination and forfeiture of the security deposits which are the issues which may be agitated before the Arbitral Tribunal in terms of the Contract itself. In view of the prayer made before this court the writ application is permitted to be withdrawn with a liberty to seek his remedy before the Arbitral Tribunal. This application is disposed of as***



withdrawn”. In the instant case also the petitioner may seek his remedy before arbitral tribunal as the issue involved is termination of agreement/forfeiture/encashment of bank guarantee.

3. **Regarding show-cause notice** : The Respondents No 1-5 further state and submit that the claim of the petitioner of non issuance of show-cause notice in terms of clause 23.1.2 before termination of agreement is false and misconceived. The petitioner was given notice/warned on 19/10/2019 vide Annexure R/B –page 124 of the Counter Affidavit where in he was warned to start work failing which appropriate action would be taken against him in terms of the agreement. The petitioner was again warned/noticed on 26/10/2019 vide Annexure R/C- page 126 of the Counter Affidavit by which he was warned to start the work immediately failing which contract may be terminated and bank guarantee may be revoked/ encashed. The petitioner was again warned/noticed on 3/1/2020 vide Annexure R/F-page 131 of the Counter Affidavit by which he was warned to start the work immediately failing which action would be taken against him in terms of the agreement. The petitioner was again warned/noticed on 23/1/2020 vide Annexure 16 page 88 of the Writ application by which he was warned to start the work immediately failing which contract may be terminated.

Thus from the above it will be clear that the petitioner was given as many as 4 notices before termination of the Contract. The notices warned of termination of contract and forfeiture/encashment of bank guarantee if the requested action was not taken. It is thus submitted that sufficient compliances have been done regarding show-cause/notice before termination of the contract. It is humbly stated and submitted that on perusal of all the above 4 referred annexure it is clearly discernible that agreement was liable to be



terminated if actions were not taken as per the notice and thus the test as laid out para 20 (ii) 2nd part with respect to show-cause notices as enumerated in Gorkha Security Services (AIR 2014 SC 3371) was clearly satisfied.

4. **Regarding exercise of power under Article 226 of the Constitution of Indian contractual matters:**

The Respondents No 1-5 further state and submit that the petitioner has utterly failed to demonstrate the element of public interest before this Hon'ble Court for seeking intervention of this Hon'ble Court under Article 226 of the Constitution of India. *It is submitted that this Hon'ble Court must not exercise its power under Article 226 in contractual matters simply on making out a legal point but should interfere only in furtherance of public interest. In the instant case the element of furtherance of public interest has not been pleaded and has not been argued and thus there is no element of public interest.* Thus this Hon'ble Court may not exercise its powers under Article 226 of the Constitution. Reliance for the said proposition of law is made on para 20,21 of the MonteCarlo's case (AIR 2016 SC 4946) and on para 16 in HP Housing's case (AIR2011SC887).

5. **Denial of termination of agreement at the request of petitioner- Annexure 5 Page 65 of the writ petition:**

Vide the Annexure 5/Page 65 of writ petition the petitioner requested for termination of the agreement as work front had not been given to it. However vide Annexure 6/page 66 of the writ petition (also para 46 of the Counter Affidavit) the department responded to Annexure 5 by which the petitioner was directed to join joint inspection with Executive Engineer as he had not discharged his obligation as laid out in Article 8, clause 8.2.2 and Article 10, clause 10.1 and since Clause 10.1.1 to 10.1.6 of the agreement. Thus petitioner had no liberty to



request for termination at his own sweet will. He could have requested for termination but only after discharge of its obligations prior to the said request.

6. Conduct of petitioner

(a) False claim and self conflicting statements:

The conduct of the petitioner is not above board as would be evident from Annexure- R/G page 133 of the counter affidavit wherein it accepted 30-1-2020 as the appointed date to start the work but in the very next para of the said letter demanded joint inspection to carry out repair work before commencement work where as vide Annexure 12 page 77 of the writ petition it asserted that it was maintaining the road since the agreement. Thus the petitioner is making conflicting statements and claims and is guilty of breach of agreement at each and every stage.

(b) Dilly dallying

Right from the date of signing of agreement the department had been insisting to move forward in terms of the agreement so that and “Appointed day” could be fixed. The department tried to fix “joint inspection” and “appointed day” on 14/2/2019 (Annexure 4/Page 63 of WP), 31/7/2019 (Annexure 8/Page 69), 6-1-2020 (Annexure 16/Page 88 of WP) and 30/1/2020 (Annexure R/G /Page 133 of Counter Affidavit). However the petitioner kept dilly dallying on each and every occasion. The conduct of the petitioner is also magnified on perusal of Annexure 6/Page 66 of WP, Annexure 10/Page 73 of the WP and Annexure R/F page 131 of the counter affidavit which demonstrates that it was failing to discharge its obligations in terms of the agreement.

7. Forest Clearance/ encumbrance free land: That it is humbly submitted that *forest clearance* was given vide order dated 2.9.2029 (Annexure 9/Page 70 of the writ petition) and vide order dated 30-10-



2019 (Annexure R/D /Page 128 of the Counter Affidavit) Both the dates are much prior to the “Appointed Date- 30-1-2020 ” as accepted by the petitioner as will be evident from Annexure R/G dated 30-1-2020.

Also **90% encumbrance free land** was made available to the petitioner (Annexure-R/F dated 3-1-2020 page 131 of the counter affidavit) much before the petitioner accepted the “Appointed Date- 30-1-2020” (Annexure R/G dated 30-1-2020 page 133 of the Counter affidavit). Thus even though **forest clearance** and **90% encumbrance free land was made available to the petitioner before 30-1-2020 i.e the appointed date** (Annexure R/G dated 30-1-2020 page 133 of the Counter affidavit), **it still did not start its work.**

That in the view of aforesaid submissions and statements the Respondents were fully justified in terminating the agreement and encashing the bank guarantee. In fact the actions sub serves the element of public interest because the petitioner kept dilly dallying and did not start the work.. The delay in work results in cost escalation which is a national loss and thus the writ is fit be dismissed with costs.

6 (c) WRITTEN SUBMISSIONS ON BEHALF OF THE
INTERVENER-RAMIYA CONSTRUCTION PVT. LTD.

1. In the instant writ application there are three limb of prayers. The intervener is concerned with the third limb of prayer only, whereby the prayer has also been made for quashing the Second Tender issued vide NIT No. 03EPC/NH-GAYA-2020-21 dt.14.05.2020 for the same work of widening to 2-Lane with paved shoulder from Km.181+465 to 201+665 of NH-120 (Nasriganj to Bikramganj) in the State of Bihar on EPC mode to be completed within 18 months in as much as the concerned is now only live link between South Bihar & Eastern Part of U.P and thus bears heavy constant traffic.



2. It is humbly submitted on behalf of the intervener that considering the nature of the public work and requirement to complete the same on earliest vis-à-vis high public interest, this Hon'ble Court while issuing notice **vide order dt.17.08.2020**, **specifically rejected the prayer for interim relief / stay** and thereby impliedly permitted the State to proceed with the second tender process.
3. Consequently, the Second Tender Process was completed and the **intervener being found most suitable, was awarded with the work vide work order dt.19.09.2020 (Anx-IA-1)** on relatively lower price @ Rs. 55,34,44,444/- as against earlier price of the petitioner @ Rs. 59,37,87,840/- (Anx-2 to WP), which was accepted by the Intervener and as a result of which the Intervener mobilised huge machinery and Human Resource at the Site and almost completed the work of Survey & designing by making investment of Crores of Rupees as required under First part of the EPC.
4. However, on **16.10.2020**, on account of non-filing of Counter Affidavit by the State, an order of **status quo** was passed and as a result of which, the further process came to be stand still.
5. The State thereafter filed **Counter Affidavit dt-26.10.2020** and on **26.11.2020, the Intervention Application was allowed**. However the matter was posted for final consideration on 05.01.2021. But the same was taken up on 07.01.2021 and after hearing, while reserving the final judgment; parties have been asked to submit their written submissions.
6. In the facts of the case it is humbly submitted at threshold that this Hon'ble Court may be kind enough not to interfere with the Second Tender Process and award thereof to the Intervener, on amongst the following facts and governing law vis-à-vis limited scope of judicial review in the matter of Government Contracts:-

(a) The petitioner in spite of bringing on record the work order no. 445 dt. 19.09.2020 issued in favour of the intervener out of second tender, did not challenge the same, either independently or by any amendment application and thus impliedly waived the challenge to second tender process under the *doctrine of acquiescence, estoppels & sub-silentio*. In this regard it is also well settled that unless any order / instrument is challenged &



set aside, same will not be impliedly adjudged wrong by any party to the lis.

Reference:-

M. Meenakshi & Ors. Vrs. Metadin Agarwall, reported in (2006) 7 SCC 470. Para-18 thereof reads as under:-

"It is well settled principle of law that even a void order is required to be set aside by a competent Court of Law inasmuch as an order may be void in respect of one person but may be valid in respect of another. A void order is necessarily not non-est. an order cannot be declared to be void in a collateral proceeding and that too in absence of authorities who were the authors thereof. The orders passed by the authorities were not found to be wholly without jurisdiction. They were not, thus nullities.

(b). The second tender process is altogether separate transaction and not inextricably interwoven to the first tender process which stood allegedly frustrated within the meaning of section-54 of the Indian Contract Act, followed by *termination and forfeiture* of earnest money, to which the **Intervener** have no concern at all. Thus under the "**Rule of Substantial Severability**", the challenge to second tender cannot be allowed by way of automatic consequences, even if the first & second prayer is allowed for closure of contract as has been intended by the petitioner in the very beginning of the contract vide letter dt. 28.05.2019 (Anx-5 to WP). In this regard reference may be made to text of **DE Smith's Judicial Review** (Chapter-5, Topic- Partial Illegality & Severance) which concludes as under:-

"Where the text could be severed so that the valid part could operate independently of the invalid part, then the test of substantial severability would be satisfied when



the valid part is unaffected by and independent of the invalid part"

(c). Even otherwise the petitioner has no vested right to execute the work under the Law of Public Contract. All the more when allotment of contract happens to be essentially a commercial transaction and there is no allegation of any mala fide to suggest that everything was tailor made to award the work in favour of the Intervener. It is also not even asserted that entire Second Tender Process is in anyway against the public interest, which happens to be paramount consideration, while deciding the challenge to the allotment of Public Contract. On the contrary further delay in execution will cause irreparable loss to the public exchequer in the nature of escalation of material price and public injury due to frequent accidents on account of pitiable condition of the road. Therefore, in the interest of justice as a whole it is desirable to save the second tender process and allow the Intervener to expeditiously execute the work, even if this Hon'ble court finds that some procedural irregularity has been committed by the state while making cancellation of First Tender awarded to the writ petitioner, as time happens to be the main essences of contract.

Reference:-

i. Tata Cellular Vs UOI reported in (2006) 7 SCC 470, Pr. 86, 87 and 92 thereof reads as under :-

Pr- 86. An innovative approach is made by **Clive Lewis** as to why the courts should be slow in quashing administrative decisions (in his Judicial Remedies in Public Law 1992 Edn. at pp. 294-95). The illuminating passage reads as under:

"The courts now recognise that the impact on the administration is relevant in the exercise of their remedial jurisdiction. Quashing decisions may impose heavy administrative burdens on the administration, divert resources towards reopening decisions, and lead



to increased and unbudgeted expenditure. Earlier cases took the robust line that the law had to be observed, and the decision invalidated whatever the administrative inconvenience caused. The courts nowadays recognise that such an approach is not always appropriate and may not be in the wider public interest. The effect on the administrative, process is relevant to the courts' remedial discretion and may prove decisive. This is particularly the case when the challenge is procedural rather than substantive, or if the courts can be certain that the administrator would not reach a different decision even if the original decisions were quashed.

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Pr-94. The principles crystallised while exercising power of judicial review in Public contract allotment matter are deducible are :

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or



quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

- ii. Raunaq International Ltd. vs. IVR Construction Ltd. (1999) 1 SCC 492, Pr11

"When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."

- iii. Jagdish Mandal vs State of Orissa reported in (2007) 14 SCC 517, pr-22 "



“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound.” When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderer with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.

Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;



(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under [Article 226](#).xxx

(d). At the strength of aforesaid authoritative Judicial pronouncements, which has been recently reiterated by the Hon'ble supreme court of India in the case of **Bharat Coaking Coal limited vs AMR DEV** reported in **(2020) 4 Supreme 722 (Pr-29 to 39)** {duly attached as Flag-A}; it is humbly submitted that since more public Interest will be sub served, if the Second Tender process is allowed to proceed expeditiously and whereas since only personnel element is involved in the prayer of the petitioner seeking quashing of the second Tender Process, the same is not at all tenable on law. Secondly same is also rendered otiose with the issuance of Work order dt-19.09.2020 in favour of Intervener and waived on account of non challenge to the same by the petitioner.

It is therefore most respectfully and humbly submitted that viewed from any corner, the third limb of prayer of the petitioner for quashing of the Second Tender is fit to be rejected, else serious prejudice would entail not only to the petitioner but also to the Public interest at large.”

7. On behalf of the petitioner submission has been advanced that in the instant case that the parties to the agreement were obliged to perform their part of the obligation in terms of the Engineering Procurement and Construction agreement (Annexure-3). It has been submitted on behalf of the petitioner that Clause 23 of the agreement talks about the termination of contract. It has been contended on behalf of the petitioner, with reference to Annexure-5, that the petitioner has requested the authority to terminate the contract in terms of Clause 23.2.1 and 23.2.2, as



there was failure on the part of the respondents in fulfillment of their part of the obligation under the agreement, but arbitrarily the respondents have not allowed termination of agreement in terms of Clause 23.2.1 and 23.2.2 of the agreement. He referred to the various circumstances and the document enclosed in the writ application to contend that the respondents have utterly failed to comply the obligation to provide working front and forest clearance in connection with the execution of the contract work and finally vide Annexure-20 the respondents have decided to terminate the contract of agreement invoking power under Clause 23.1.1 of the agreement, but notice as required under Clause 23.1.2. was not issued before termination of contract. For ready reference Clause 23.1.1, 23.1.2, 23.2.1 and 23.2.2 of the agreement is quoted herein below:

“23.1.1 Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Contractor fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Contractor shall be deemed to be in default of this Agreement (the “Contractor Default”), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure.

23.1.2 Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Contractor Default, the Authority shall be



entitled to terminate this Agreement by issuing a Termination Notice to the Contractor; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Contractor of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Contractor to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.”

23.2.1 in the event that any of the defaults specified below shall have occurred, and the Authority fails to cure such default within a Cure Period of 90 (ninety) days or such longer period as has been expressly provided in this Agreement, the Authority shall be deemed to be in default of this Agreement (the “Authority Default”), unless the default has occurred as a result of any breach of this Agreement by the Contractor or due to Force Majeure.

23.2.2 Without prejudice to any other right or remedy which the Contractor may have under this Agreement, upon occurrence of an Authority Default, the Contractor shall be entitled to terminate this Agreement by issuing a Termination Notice to the Authority; provided that before issuing the Termination Notice, the Contractor shall by a notice inform the Authority of its intention to issue the Termination Notice and grant 15 (fifteen) days to the Authority to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.

If on the consideration of the Authority’s representation or otherwise, the contractor does not issue the Termination Notice on such 15th day and prefers to continue with the project, it is deemed that the cause of action of the



*Termination Notice has been condoned by the Contractor.
Hence he forfeits his right to any other remedy on that count.”*

8. It has been contended on behalf of the petitioner with reference to the judgment of the Apex Court in **ABL International Ltd. & Anr. Vs. Export Credit Guarantee Corporation of India & Ors**, reported in **(2004) 3 SCC 553** and the **Union of India & Ors. Vs. Tania Construction Pvt. Ltd.**, reported in **(2011) 5 SCC 697** that arbitrary action of termination of contract is amenable to jurisdiction under Article 226 of the Constitution. Since the respondents have acted in most arbitrary manner in terminating the contract without following the mandatory requirement of issuing notice of termination i.e. 15 days notice before taking decision to terminate the agreement, their action cannot sustain.

9. On behalf of the State Mr. Manoj Kumar Ambastha, SC-26 submitted that there is provision for arbitration, therefore, the writ remedy is not appropriate and reference is made to the decision of this Court in C.W.J.C. No. 22458 of 2018. The order dated 29.07.2019 passed in C.W.J.C. No. 22458 of 2018 enclosed with the written notes of argument is the order passed by a Co-ordinate Bench of this Court on the request of the petitioner to



withdraw the writ petition with liberty to seek remedy before the Arbitral Tribunal.

10. Submissions have also been advanced on behalf of the State that the petitioner was cautioned vide notice dated 19.10.2019, 26.10.2019, 09.01.2020 and 23.01.2020, but the written notes of argument fails to answer the issue raised by the petitioner that mandatory notice in terms of Clause 23.1.2 was not issued to the petitioner before terminating the contract and forfeiting the performance of Bank guarantee. He also submitted that the exercise of jurisdiction under Article 226 of the Constitution in construction matter is uncalled for. The aforesaid submission of the State is unsustainable in view of the judgment of the Apex Court in the case of **ABL International Ltd. and Union of India & Ors. Vs. Tania Construction Pvt. Ltd.** (supra) where it has been held out that alternative remedy of arbitration is no bar to judicial review under Article 226 of the Constitution of India.

11. It is now well settled that arbitrariness in decision making process goes to the root of the case and render the decision illegal and unsustainable, since in the present case notice as required under Clause 23.1.2 was not issued, the action of the respondent is patently arbitrary decision and in such situation, the



action of the respondent is amenable to judicial review under Article 226 of the Constitution.

12. The respondent State with reference to Annexure-5 to the writ application has submitted that though the petitioner requested for termination of agreement, but the petitioner was directed to join inspection made by the respondent and thereafter on different occasions the petitioner was granted opportunity to carry construction work and thereafter the action of the respondent cannot be termed as arbitrary. Submissions have been advanced that the petitioner has no liberty to request termination at his sweet will. He could have requested for termination only after discharge of its obligation prior to the said request.

13. Such construction of the respondent is not in tune with the terms of the agreement (Clause 23 of the agreement). The respondents have highlighted dilly dally and conduct of the petitioner and submitted that the petitioner was more to be blamed for not carrying construction work then finding fault with the respondent in providing Forest clearance. The correspondence between the petitioner and the respondents were going on and ultimately in larger public interest, the agreement was terminated.

14. The intervenor has stepped in the case only because status quo order was passed by this Court. It has been submitted on



behalf of the intervenor that he was successful tenderer in the fresh tender and only because of the status quo he has not been allowed to carry construction work. Submissions have been advanced with reference to different authorities that the petitioner challenged as to termination of contract and forfeiture of bank guarantee and its validity may be examined by the Court, but without affecting the fresh tender and successful tenderer in the subsequent fresh tender.

15. This Court has already indicated earlier that this Court was not inclined to grant any interim relief in the writ application, but due to dilly dally on behalf of the respondent in filing counter affidavit, status quo order was passed.

16. The present writ application involves the issue of termination of contract and forfeiture of performance of Bank guarantee, as the ground of violation of principle of natural justice and due to the failure on the part of the respondent to file counter affidavit for proper adjudication of the writ application, this Court was constrained to pass status quo order on 16.10.2020.

17. Considering the competing interest of the parties and the larger public interest, the Court is not inclined to widen the scope of judicial review in the present case. The Court wishes to confine its scrutiny to the extent the respondents have taken decision as to termination of contract and forfeiture of



performance of Bank guarantee of the writ petitioner, the Court is not willing to go into the issue of subsequent fresh tender and the successful tenderer in the fresh tender, therefore, it was made clear in the earlier paragraphs of this judgment that this writ application is confined to adjudication of the termination of agreement and forfeiture of performance of bank guarantee and issue of fresh tender and the other consequences of fresh tender are not the subject matter of the judicial review in the present writ proceeding. The respondents are free to proceed with their decision on fresh tender in relation to the execution of work.

18. Adverting to the issue of termination of agreement and forfeiture of performance of bank guarantee are concerned, the parties to the agreement are obliged to perform their part of the obligation in terms of the agreement. The State is not a favourite litigant even in the commercial activities of the State its action is to be judged at the touchstone of Article 14 of the Constitution of India. If the action is found to be arbitrary, the State cannot take a plea that the State and its functionary are free to act according to its own standard.

19. The Apex Court has occasion to laid down the principle of fair and non-arbitration in the action of the State, even in commercial activity reference in this connection may be made



to the case of **Ramana Dayaram Shetty vs The International Airport of India & Ors**, reported in **AIR 1979 SC 1628**. Since the State has professed its action to be judged at the touch stone of terms and conditions of agreement, particularly, Clause 23 of the agreement (Annexure-3), this Court is required to examine the rationality of its action.

20. It is now well settled that if the State proposes that its action should be judged at the touch stone of the professed norms, then in that situation any departure from those norms is only at the pain of invalidity. The principle laid down by **Justice Frankfurter in Vitarelli Vs. Seaton**, reported in **359 US 535**, which has been followed by this Court as well as by the Apex Court on numerous occasions. Applying the aforesaid proposition of law, the Court finds Firstly: that the State action is to be judged at the touch stone of the terms and conditions of the agreement and on scrutiny it is found that the State has failed to perform its part of the obligation and Clause 23.2.1 and 23.2.2 provide for termination of contract on account of default of the employee then the State cannot take the plea that though State failed to comply its part of the obligation and in terms of Clause 23.2.1 and 23.2.2 the contractor has liberty to terminate the contract, yet the State will not terminate the contract notwithstanding specific request made



by the petitioner in this regard (Annexure-5). Similarly, the State action is judged at the touch stone of Clause 23.1.2 of the agreement, which requires 15 days prior termination notice warning in connection with the construction work cannot be construed, as termination notice mandated under Clause 23.1.2 of the agreement, the action of the respondents to terminate agreement and forfeit performance Bank guarantee cannot sustain.

21. This Court has occasion to decide the issue of non-issuance of mandatory notice in C.W.J.C. No. 7085 of 2020 **(Hitech Sweet Water Technologies Pvt. Ltd. Vs. The State of Bihar & Ors)** and its effect. The Court held out that non-issuance of notice renders the decision unsustainable and on that account, the order of termination was quashed.

22. In order to maintain consistency and also on consideration of the various aspects of the matter, the Court finds that the order of termination is bad and the consequent action of forfeiture of performance of Bank guarantee in the absence of mandatory termination notice cannot sustain. Accordingly, the order dated 20.03.2020 (Annexure-20) is quashed.

23. However, in the larger public interest and also considering the fact that there is too much delay in construction of work, the Court is not inclined to grant any further relief to the



petitioner, except payment for work if any already carried out by the petitioner in terms of the agreement and refund of performance of bank guarantee, as this Court has held that the order as contained in Annexure-20 is violative of principles of natural justice for want of issuance of mandatory termination notice.

24. Accordingly, the writ application is allowed to the extent indicated herein above. The respondents are free to proceed with the fresh tender in accordance with law.

25. There shall be no order as to costs.

(Anil Kumar Upadhyay, J)

uday/-

AFR/NAFR	NAFR
CAV DATE	07.01.2021
Uploading Date	08.02.2021
Transmission Date	NA

