

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No. 14700 of 2019

BJCL Srinath (JV) having its Office at 103,Lane No.2,Kehar Singh Estate, Saidulajab, New Delhi 110030 through its Authorized Signatory namely Nitish Agarwal @ Nitish Kumar Agarwal, aged about 42 years, (Male),son of Sri Tulsi Prasad Agarwal, resident of F-217,Antriksha Apartment, Sector 14 Extension, Rohini, PS Rohini, Dist. North West Delhi 110085 and local resident at Flat No.304, 3rd Floor, Madhuban Apartment, L B S Shastri Nagar, PS Shashtri Nagar,Dist.Patna-800023.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary,Govt. of Bihar,Patna
2. The Additional Chief Secretary, Water Resources Department,Govt. of Bihar,Patna
3. The Engineer in Chief Food Control and Water Resources,Department,Patna
4. The Chief Engineer, Floor 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,Bihar

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr.Prabhat Ranjan, Advocate

For the Respondent/s : Mr.Anjani Kumar (AAG-4)

Mr. Sanjay Kumar, AC to AAG-4

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

C.A.V. JUDGMENT

Date : 09-07-2021

The present petition has been taken up for consideration through the mode of Video conferencing in view of the prevailing situation on account of COVID 19 Pandemic, requiring social distancing.

2. The present writ petition has been filed for quashing the show cause notice dated 27.06.2019 issued by the Executive Engineer, Western Embankment Division, Birpur, whereby and



whereunder the petitioner has been asked to file his show cause reply as to why the agreement no. 01/SBD-2018-19 be not rescinded. The petitioner has further prayed for quashing of the order dated 04.07.2019 issued by the Executive Engineer, Western Embankment Division, Birpur, whereby and whereunder the agreement in question has been rescinded in terms of clause-3 of the General Conditions of Contract forming part of standard bidding documents.

3. The brief facts of the case are that a short re-tender notice no. 6 of 2017-18 was issued vide letter dated 05.02.2018 inviting offers for the work pertaining to “*residual work of raising and strengthening of eastern and western Koshi embankment, construction of bituminous road over it and construction/ renovation/ restoration of structures*”. The petitioner had participated in the tender process and being the lowest bidder was awarded the tender and then the letter of acceptance dated 11.04.2018 was issued with the stipulation that the work was to be completed by 31.03.2019. An agreement dated 18.04.2018 bearing agreement no. 01/SBD/2018-19 was entered into between the respondent no. 7 and the petitioner. It is the case of the petitioner that there was delay in providing approved drawings, lay out plans etc. for starting the work in



question leading to slow progress of work. Nonetheless, without issuing any show cause notice and without seeking any explanation from the petitioner, the petitioner was saddled with imposition of liquidated damages clause under the signature of the Superintending Engineer vide letter dated 07.01.2019. However, subsequently, the matter was sorted out and the liquidated damages which was imposed against the petitioner was withdrawn vide letter dated 02.02.2019. Thereafter the petitioner was served with a letter dated 21.06.2019 intimating the petitioner about the decision to rescind the agreement and get the remaining work done at the risk and cost of the petitioner firm. It appears that various communications were exchanged in between the petitioner and the respondent with regard to the submission of revised construction programme and grant of extension of time, nonetheless the respondents decided to withdraw the entire mobilization advance given to the petitioner firm and decided to invoke the bank guarantee, whereafter the concerned bank was directed to en-cash the same in favour of the respondents. The petitioner had then challenged the decision of the respondents to invoke the bank guarantee before this Court by filing a writ petition bearing CWJC No. 12998 of 2019 but the same was dismissed vide order dated 28.06.2019,



however, with liberty to the petitioner to seek remedy, in accordance with law.

4. It is the further case of the petitioner that as soon as the aforesaid writ petition was dismissed, the petitioner was served with a show cause notice dated 27.06.2019, whereby and whereunder the petitioner was directed to submit its reply within a week, as to why the agreement in question be not rescinded, to which the petitioner had filed a detailed reply dated 01.07.2019. In the meantime, the respondents had proceeded to re-advertise the work in question by issuing a notice inviting tender dated 02.07.2019. The respondent no. 7 had then vide letter dated 04.07.2019 rescinded the agreement of the petitioner.

5. The learned counsel for the petitioner has submitted that firstly the show cause notice dated 27.06.2019 does not mention the grounds on which the show cause notice has been issued and steps have been initiated for rescinding the agreement in question. The learned counsel for the petitioner has further submitted that though the petitioner by its show cause reply dated 01.07.2019 had submitted a detailed reply, however, the same has not been considered while passing the impugned order dated 04.07.2019, rescinding the agreement of the petitioner. Thus, it is submitted that the impugned order dated 04.07.2019



is an unreasoned order as well as does not deal with the submissions made by the petitioner in its show cause reply dated 01.07.2019, hence on this ground alone the impugned order dated 04.07.2019 is vitiated. In this connection, the learned counsel for the petitioner has relied on a judgment rendered by the Hon'ble Apex Court in the case of ***ORYX Fisheries Private Limited vs. Union of India & Ors.***, reported in ***(2010) 13 SCC 427***.

6. The learned counsel for the petitioner has further submitted that the impugned order dated 04.07.2019 also suffers from another fallacy inasmuch as the Executive Engineer, Western Embankment Division, Birpur, who is the competent authority under the contract to terminate the contract in question has not applied his independent mind and has not decided for himself, by exercising his independent mind and unfettered judgment, as to whether the contract is required to be terminated or not inasmuch as he has acted in light of the departmental directions given by the Joint Secretary (Engineering), Water Resources Department, Bihar, Patna vide letter No. 2229 dated 04.07.2019, as mentioned in last paragraph of the impugned letter dated 04.07.2019. It is submitted that the said letter dated 04.07.2019 written by the



Joint Secretary (Engineering) Water Resources Department, Bihar, Patna clearly contains a direction to cancel the agreement of the petitioner herein under clause-14 of the General Conditions of Contract and then issue a tender for execution of the remaining work at the risk and cost of the petitioner. It is thus submitted that the Executive Engineer, Western Embankment Division, Birpur, has passed the impugned order dated 04.07.2019, rescinding the agreement of the petitioner, in compliance of the letter of the Joint Secretary (Engineering), Water Resources Department, Bihar, Patna dated 04.07.2019, hence on this ground as well the impugned order dated 04.07.2019 is fit to be set aside. In this connection, the learned counsel for the petitioner has referred to a judgment rendered by this Court in the case of **Kashish Developers Private Limited** vs. The State of Bihar & Ors., reported in **(2021) 1 PLJR 642**, paragraph nos. 14 and 17 whereof are reproduced herein below:-

“14. The learned Senior Counsel for the petitioner has also pointed out that the impugned order dated 02.07.2020 suffers from another fallacy inasmuch as the last paragraph thereof would show that the Executive Engineer, Construction Division No. 2, Building Construction Department, Bihar, Patna, who is the competent authority under the contract to terminate the



contract in question, has not applied his mind and has not decided for himself by exercising his independent mind and unfettered judgment as to whether the contract is required to be terminated or not inasmuch as he has acted in light of the departmental directions given by the Chief Engineer (Patna), Building Construction Department, Patna vide letter no. 581 dated 02.07.2020 and by the Superintending Engineer, Construction Circle, Building Construction Department, Patna, vide letter no. 300 dated 02.07.2020, hence, on this ground alone, the impugned order dated 02.07.2020 is fit to be set aside. In this connection, the learned Senior Counsel for the petitioner has referred to a judgment reported in AIR 1952 SC 16 (Commissioner of Police v. Gordhandas Bhanji), paragraph no. 44 to 46 whereof are reproduced herein below:-

44. We have held that the Commissioner did not in fact exercise his discretion in this case and did not cancel the license he granted. He merely forwarded to the respondent an order of cancellation which another authority had purported to pass. It is evident from these facts that the Commissioner had before him objections which called for the exercise of the discretion regarding cancellation specifically vested in him by Rule 250. He was therefore bound to exercise it and bring to bear on the matter his own independent and unfettered judgment and decide for himself whether to cancel the license or reject the objections. That duty he can now be ordered to perform under section 45.



45. *It was objected as to this that there is no specific law which compels him to exercise the discretion. Rule 250 merely vests a discretion in him but does not require him to exercise it. That is easily met by the observations of Earl Cairns L.C. in the House of Lords in Julius v. Lord Bishop of Oxford [5 App. Cas. 214 at 222, 223.], observations which have our full and respectful concurrence:—*

“There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.”

46. *The discretion vested in the Commissioner of Police under Rule 250 has been conferred upon him for public reasons involving the convenience, safety, morality & welfare of the public at large. An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor can it be evaded; performance of it can be compelled under section 45.*



17. The impugned order dated 02.07.2020 is also bad in law, for the reason that the Executive Engineer, Construction Division No. 2, Building Construction Department, Bihar, Patna, who is the competent authority under the contract to terminate the contract in question, has not applied his mind and has not decided for himself by exercising his independent mind and unfettered judgment as to whether the contract is required to be terminated or not inasmuch as he has acted in light of the departmental directions given by the Chief Engineer and the Superintending Engineer, as aforesaid, hence, on this ground as well, the impugned order dated 02.07.2020 is fit to be set aside, more so being squarely covered by the law laid down by the Hon'ble Apex Court in the aforesaid decision rendered in the case of Gordhandas Bhanji (Supra)."

7. Per contra, the learned counsel for the respondent State Shri Sanjay Kumar, AC to AAG-4 has submitted that the Executive Engineer, Western Embankment Division, Birpur, had on several occasions requested the petitioner to start the work immediately, however, the petitioner had delayed in starting the work with oblique motives. It is also stated that the approved design of structure and FRL of the western embankment was made available to the representatives of the petitioner including the scope of work TBM etc. pertaining to the eastern embankment on 01.06.2018 itself and as far as the western



embankment is concerned, the requisites were made available to the petitioner on 29.10.2018. In fact a review meeting was held on 23.07.2018, wherein the Chief Engineer had warned the representatives of the petitioner that action would be taken in terms of the agreement if the work is not started immediately. Thereafter, several warnings were given to the petitioner to execute the work as per the work programme, failing which appropriate action would be taken. In fact the progress of the work was reviewed by the Chief Engineer in the meetings held on 17.11.2018 and 17.12.2018 and the progress of the work qua the petitioner was found to be very slow. In nutshell, it is the case of the respondent State that after the issuance of the work order, firstly the petitioner started the work after a great delay and then also its progress regarding completion of the work was found to be very slow on account of inadequate plant and machinery, personnel, construction materials at the work site, etc.. The learned counsel for the respondent-State has further submitted that till the agreement of the petitioner was rescinded the petitioner had completed only 11% work, hence the Minister of the Department and the Additional Chief Secretary, upon having inspected the site on 12.06.2019/13.06.2019 had also found that not only 11 percent of the work had only been



completed but the petitioner had also not executed any work since January, 2019, thus the Chief Engineer was directed to issue separate notice inviting tender for execution of the remaining works at the eastern and western Koshi embankment, at the risk and cost of the petitioner, whereafter the Executive Engineer had communicated the said direction to the petitioner vide letter dated 21.06.2019. It is under such compelling circumstances that a show cause notice dated 27.06.2019 was issued to the petitioner calling upon him to submit his show cause reply as to why the agreement be not rescinded. The petitioner had then filed his reply and upon consideration of the same, the agreement in question has been cancelled vide order dated 04.07.2019 issued by the Executive Engineer. The learned counsel for the State has further submitted that the impugned order dated 04.07.2019 is a self speaking and a reasoned order and it clearly spells out the reasons for cancellation of the agreement in question i.e. huge delay on the part of the petitioner in starting the work, the petitioner engaging in very slow execution of work and having completed only 11 per cent of the total work during the contract period despite having been requested several times to increase the pace of work. It is also submitted that clause-6 of the SBD (General Conditions of



Contract) provides for dispute redressal system and according to clause-6.1 such disputes are to be referred to the empowered standing committee for settlement, whose decision shall be final and binding upon the contractor. It is pointed out that clause-6.2.1 debars arbitration in view of the said provision of disputes redressal mechanism. Thus, it is submitted that there is no merit in the present writ petition and the same is fit to be dismissed.

8. I have heard the learned counsel for the parties and gone through the materials on record. This Court finds that though the impugned order dated 04.07.2019 is not entirely unreasoned but then this Court finds that the decision of the Executive Engineer-cum-Nodal Officer, Western Embankment Division, Birpur, to rescind the agreement of the petitioner vide the impugned order dated 04.07.2019 has been taken in compliance of the letter no. 2229 dated 04.07.2019 issued by the Joint Secretary (Engineering), Water Resources Department, Bihar, Patna, whereby and whereunder he had directed to cancel the agreement in question and get the balance work executed by re-tendering the same at the risk and cost of the petitioner, hence it is clear that the Executive Officer, Western Embankment Division, Birpur, who is the competent authority under the contract to terminate the contract in question, has not applied his



mind and has not decided for himself by exercising his independent mind and unfettered judgment as to whether the contract is required to be terminated or not inasmuch as he has acted in light of the departmental directions given by the Joint Secretary (Engineering), Water Resources Department, Bihar, Patna dated 04.07.2019, hence on this ground alone the impugned order dated 04.07.2019 is fit to be set aside more so the said issue being squarely covered by the law laid down by the Hon'ble Apex Court in a decision rendered in the case of *Gordhandas Bhanji* (supra). Accordingly, the impugned order dated 04.07.2019, as contained in letter dated 442, issued by the Executive Engineer, Western Embankment Division, Birpur, rescinding the agreement of the petitioner is set aside, however, liberty is reserved to the Executive Engineer, Western Embankment Division, Birpur, to issue a fresh show cause notice to the petitioner, detailing therein the grounds on which the respondent Department seeks to rescind the agreement so that appropriate opportunity is granted to the petitioner to rebut the same and put forth his defence, whereafter the Executive Engineer, Western Embankment Division, Birpur, upon receipt of the reply of the petitioner, shall apply his mind and pass a reasoned and a self-speaking order. It is expected that the entire



exercise, as aforesaid, shall be completed within a period of six months from today.

9. Another issue which arises for consideration is that though the petitioner was served with a show cause notice dated 27.06.2019 wherein one week time was granted to the petitioner to furnish explanation as to why the agreement in question be not rescinded, however, without even waiting for the said period to lapse, the respondents proceeded to re-advertise the balance work in question and a notice inviting tender dated 02.07.2019 was issued thus making it apparent that before issuance of the impugned order dated 04.07.2019, rescinding the agreement of the petitioner, the respondent authorities had already taken a decision to rescind the agreement of the petitioner, hence the show cause notice was issued to the petitioner with a premeditated mind, hence on this score as well the impugned order dated 04.07.2019 is vitiated and is fit to be set aside.

10. As far as the objection taken by the respondent State to the effect that the present writ petition is not maintainable in view of clause-6 of the standard bidding document (General Conditions of Contract), it is clear from the said clause-6.1 of the SBD (General Conditions of Contract), that majority of the members of the Standard Empowered Committee to which any



dispute, which has arisen out of the contract, is required to be referred to, are officials of the respondent State. This Court is of the view that in light of the amendment made in Section 12 of the Arbitration and Conciliation Act, 1996 and in view of the judgment rendered by the Hon'ble Apex Court in the case of ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corpn. Ltd.***, reported in **(2017) 4 SCC 665**, the Arbitrator cannot be an official of the State Government, hence the contention of the respondents that the dispute ought to be referred to the Standard Empowered Committee, has got no force in the eyes of Law.

11. Nonetheless, this Court further finds that in case the action of the respondent is illegal and without jurisdiction, if the principles of natural justice have been violated and if the fundamental rights of the petitioner has been violated, a writ petition would definitely be maintainable, even in a contractual matter. Reference in this regard be had to judgments rendered by the Hon'ble Apex Court in the case of ***Whirlpool Corporation vs The Registrar of Trade Marks Mumbai & Ors.***, reported in **(1998) 8 SCC 1**, the one rendered in the case of ***Harbanslal Sahnia v. Indian Oil Corpn. Ltd.***, reported in **(2003) 2 SCC 107**, the one rendered in the case of ***Sanjana M. Wig vs. Hindustan Petro Corporation Limited***, reported in



(2005) 8 SCC 242 and the one rendered in the case of **Joshi Technologies International Inc. vs. Union of India & Ors.**, reported in (2015) 7 SCC 728. Admittedly in the present case the impugned order has been passed in violation of the principles of natural justice inasmuch as firstly proper show cause notice, setting out the reasons/grounds on which the respondents propose to rescind the agreement of the petitioner have not been furnished and the show cause notice dated 27.06.2019 is absolutely silent on this aspect and secondly the Executive Engineer, Western Embankment Division, Birpur, who is the competent authority under the agreement to rescind the agreement has not applied his mind and has instead rescinded the agreement in question by the impugned order dated 04.07.2019 on the dictate of the Joint Secretary, (Engineering), Water Resources Department, Bihar, Patna. Thus, in such a case as the present one, the alternative remedy being harped upon by the learned counsel for the respondents for the purposes of settlement of disputes shall not be a bar to the maintainability of the present writ petition, hence the said contention of the respondents that the present writ petition is not maintainable, is not tenable in the eyes of law, hence is rejected. In fact, even an arbitration clause in an agreement is not a bar to



invocation of writ jurisdiction in case injustice has been caused inasmuch as the same has to be struck down as an anathema to the rule of law and the provisions of the Constitution. Moreover, the constitutional powers vested in the High Court under Article 226 of the Constitution of India, cannot be fettered by any alternative remedy available to the parties. Reference in this connection be had to a judgment rendered by the Hon'ble Apex Court in the case of ***Union of India & Ors. vs. Tania Construction Private Limited***, reported in ***(2011) 5 SCC 697***. In this regard, it would also be apposite to refer to a Judgment rendered by the Hon'ble Apex Court in the case of Uttar Pradesh Power Transmission Corporation Ltd. and Another *Versus* CG Power and Industrial Solutions Limited and Another, reported in 2021 SCC OnLine SC 383, paragraphs No. 67 and 68 whereof are reproduced herein below:-

"67. Even though there is an arbitration clause, the Petitioner herein has not opposed the writ petition on the ground of existence of an arbitration clause. There is no whisper of any arbitration agreement in the Counter Affidavit filed by UPPTCL to the writ petition in the High Court. In any case, the existence of an arbitration clause does not debar the court from entertaining a writ petition.

68. It is well settled that availability of an alternative remedy does not prohibit the High Court from entertaining a writ petition in an appropriate case. The



High Court may entertain a writ petition, notwithstanding the availability of an alternative remedy, particularly (1) where the writ petition seeks enforcement of a fundamental right; (ii) where there is failure of principles of natural justice or (iii) where the impugned orders or proceedings are wholly without jurisdiction or (iv) the vires of an Act is under challenge. Reference may be made to Whirlpool Corporation v. Registrar of Trade Marks, Mumbai reported in (1998) 8 SCC 1 : AIR 1999 SC 22 and Pimpri Chinchwad Municipal Corporation v. Gayatri Construction Company, reported in (2008) 8 SCC 172, cited on behalf of Respondent No. 1."

12. Having regard to the facts and circumstances of the case and for the reasons mentioned hereinabove, the impugned order dated 04.07.2019, as contained in letter dated 442, issued by the Executive Engineer, Western Embankment Division, Birpur, rescinding the agreement of the petitioner is set aside, however, liberty is reserved to the Executive Engineer, Western Embankment Division, Birpur, to proceed afresh in the matter, as aforesaid.

13. The writ petition stands allowed.

(Mohit Kumar Shah, J)

S.Sb/-

AFR/NAFR	AFR
CAV DATE	05.07.2021
Uploading Date	14.07.2021
Transmission Date	

