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HIGH COURT OF CHHATTISGARH BILASPUR**Order Reserved on 04.02.2021****Order Delivered on 16.02.2021****Writ Petition (C) No.2242 of 2020**

Gondwana Engineers Limited an Existing Company duly registered and incorporated under relevant provisions of the Companies Act, 1956, having its Registered Office At- 82, Abhyankar Nagar, Park Road, Nagpur (Maharashtra) 440010

By and Through- Mr. Manish Shrivastava, Aged 36 Years, Son of Shri Rajkumar Shrivastava, Authorized Representative of Gondwana Engineers Limited, Working for Gain At- 82, Abhyankar Nagar, Park Raod, Nagpur (Maharashtra) 440010

---- Petitioner**Versus**

1. Union of India Through Secretary, Ministry of Housing and Urban Affairs, Government of India 140-C, Nirman Bhawan, New Delhi- 110108
2. State of Chhattisgarh Through Secretary, Ministry of Urban Development and Administration, Government of Chhattisgarh, Indrawati Bhawan, Block-D, Fourth Floor, Atal Nagar, Nava Raipur, District- Raipur, Chhattisgarh
3. State Urban Development Agency, Through the Chief Executive Officer, Indrawati Bhawan, Block-D, Fourth Floor, Atal Nagar, Nava Raipur, District- Raipur, Chhattisgarh
4. IPE Global Limited, Project Development And Management Consultants (PDMC) Through Team Leader, Office At- Sector-27, Nawagaon, Parsatti, Atal Nagar, Nava Raipur, District- Raipur, Chhattisgarh 492101
5. Municipal Corporation Jagdalpur, Through, Commissioner, Hikmipara, Jagdalpur, District- Bastar, Chhattisgarh 494001

---- Respondents

For Petitioner	: Shri Jatin Joshi, Advocate
For Respondent/UOI	: Shri Ramakant Mishra, Assistant Solicitor General
For Respondent/State	: Shri Vikram Sharma, Deputy Government Advocate
For Respondent No.5	: Shri H.B. Agrawal, Senior Advocate with Shri Pankaj Agrawal, Advocate

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

C A V Order

P.R. Ramachandra Menon, Chief Justice

1. Termination of the contract awarded to the Petitioner as per Annexure P/1 order dated 15.07.2020 without issuing any prior notice or opportunity of hearing despite the specific clause contained (Clause 14) in Annexure P/3 Notice Inviting Tender ('NIT') made the Petitioner to approach this Court challenging the said order and also praying for interdicting the steps being taken by the 5th Respondent-Municipal Corporation with regard to issuance of further NIT for completion of the works. There is also a contention that the bank guarantee furnished by the Petitioner has been en-cashed quite arbitrarily and without issuing notice. The prayers are in the following terms :

“10.1 This Hon'ble Court may kindly be pleased to issue writ / writs, order / orders, direction / directions for quashing the Impugned Order of Termination dated 15/07/2020 (Annexure P/1) passed by the Respondent No. 1.

10.2 This Hon'ble Court may kindly be pleased to issue writ / writs, order / orders, direction / directions for restraining the Respondents for issuing further NIT towards completion of work with respect to Notice Inviting Tender (“NIT”) bearing number 257; dated 15/03/2017 [System Tender Number 16313].

10.3 This Hon'ble Court may kindly be pleased to issue writ / writs, order / orders, direction / directions to set aside the NIT, if any, issued by the Respondents towards completion of

work with respect to Notice Inviting Tender (“NIT”) bearing number 257; dated 15/03/2017 [System Tender Number 16313].

10.4 Any other relief or relief(s) which this Hon'ble Court may think proper and appropriate in view of the facts and circumstances of the case may also kindly be granted.”

2. Heard Shri Jatin Joshi, the learned counsel appearing for the Petitioner, Shri Ramakant Mishra, the learned Assistant Solicitor General representing the Union of India, Shri Vikram Sharma, the learned Deputy Government Advocate representing the State and Shri H.B. Agrawal, the learned senior counsel appearing for the 5th Respondent-Municipal Corporation.

3. With regard to the sequence of events, the learned counsel for the Petitioner points out that Annexure P/3 NIT was issued by the 5th Respondent-Municipal Corporation on 15.03.2017 for Augmentation and Reorganisation to Jagdalpur Water Supply Scheme under Amrut Mission, Government of Chhattisgarh on Turn Key Basis (Form – F). On coming out successful, the Petitioner was issued Annexure P/4 'Letter of Intent' on 29.05.2017 and Annexure P/5 agreement was executed between the Petitioner and the 5th Respondent-Municipal Corporation on 08.06.2017, in turn, leading to issuance of Annexure P/6 work order in favour of the Petitioner on 15.06.2017. It is stated that various letters/communications were issued to the Petitioner through the 5th Respondent-Municipal Corporation to grant permission for removing some obstructions and further to procure and grant of approval/permission of the Public Works Department/such other Authorities wherein there was inordinate delay. A joint meeting was convened, also with the involvement of the 4th

Respondent/Project Consultant and it was decided on 03.01.2020 to grant extension of time by 12 months, by way of two phases, which allegedly was not given effect to by the 5th Respondent-Municipal Corporation. On 13.01.2020, the 5th Respondent-Municipal Corporation admittedly required the Petitioner to renew the bank guaranties till December 2020, failing which the bank guarantee would be en-cashed by them. According to the Petitioner, the bank guaranties were to expire on 09.02.2020, 31.05.2020 and 21.06.2020 and hence they were sought to be renewed by the 5th Respondent-Municipal Corporation before 20.01.2020. In response to the letter dated 13.01.2020 of the 5th Respondent-Municipal Corporation, asking for renewal of bank guaranties, the Petitioner sent Annexure P/18 reply on 16.01.2020. Without any regard to the same, the 5th Respondent-Municipal Corporation sent Annexure P/19 to the Bankers to the Petitioner on 27.01.2020 to en-cash the bank guarantee of Rs.96,40,000/- that was to expire on 09.02.2020, though it was objected by the Petitioner vide Annexure P/20 dated 29.01.2020.

4. With reference to the contents of Annexure P/21 sent by the 4th Respondent, that the Project Manager was absconding for about 15 days, the position was clarified by the Petitioner vide Annexure P/22 stating that he was on 'medical leave' because of some injuries and that the work was never abandoned by the Petitioner. In response to Annexure P/23 letter dated 28.02.2020 sent by the 5th Respondent-Municipal Corporation, the Petitioner submitted revised work plan on 07.03.2020, but the work admittedly could not be supported for want of time extension order, outstanding payment of the bills and further due to the lock-down restrictions imposed by the Government of India, Ministry of Home Affairs under the Disaster Management Act, 2005, with reference to the COVID-

19 pandemic. According to the Petitioner, without any regard to the terms and conditions of the contract, bank guarantee furnished by the Petitioner towards performance guarantee of Rs.4,82,00,000/- was got en-cashed by the 5th Respondent-Municipal Corporation on 05.06.2020 and further en-cashed three bank guaranties to the tune of Rs.3,59,20,000/- furnished by the Petitioner towards security against the mobilization advance on 01.07.2020. This was followed by Annexure P/1 order of termination dated 15.07.2020 which is put to challenge in this writ petition.

5. The learned senior counsel representing the 5th Respondent-Municipal Corporation submits that the writ petition itself is not maintainable; firstly, since there was an effective alternate remedy by way of Arbitration as provided in the tender/agreement and further, disputed questions of fact are involved. It is also pointed out that there was inordinate delay in completing the works by the Petitioner in respect of the water supply scheme which in fact was to be completed within 30 months from 08.06.2017 and before 08.12.2019. Though extension of time was given once, no concrete steps were being pursued by the Petitioner and further since the bank guarantee was not renewed by the Petitioner, despite the many a request, it had to be got en-cashed on time and the work had to be terminated. The learned counsel submits that opportunity of hearing was given with reference to the inordinate delay and lapses of the Petitioner and alerting of further consequences by way of termination of the contract and encashment of the bank guarantee vide Annexure R/5 letter dated 28.02.2020. The learned counsel submits that the 'decision making process' taken by the 5th Respondent-Municipal Corporation is quite transparent in all respects and if at all there is any grievance, it can only be resolved by way of alternate remedy by way of Arbitration. It is also pointed out that, interference has been declined by this Court in

similar circumstance, with reference to the 'alternate remedy', as per judgment dated 04.09.2020 in Writ Appeal No.327 of 2020, a copy of which is placed for perused.

6. The learned counsel for the Petitioner submits that no notice was ever issued to the Petitioner before termination of the contract vide Annexure P/1. This was mandatory in view of Clause 14 of the tender notification, which is to the following effect :

“14. If the contractor(s) shall become bankrupt or compound with or make any assignment for the benefit of his/their creditors or shall suspend or delay the performance of his/their part of the contract (Except on account of causes mentioned in clause 13 or in consequence of not having proper instructions for which the contractor(s) shall have duly applied.) The COMMISSIONER may give to the contractor(s) or his/their assignee or trustee, as the case may be, notice requiring the work to be proceeded with and in case of default on the part of the contractor (s) or his/their assignee or trustee for a period of 7 days, it shall be lawful for the COMMISSIONER to enter upon and take possession of the works and employ any other person or persons to carry on and complete the same and to authorise his/them to use the plant, materials and property of the contractor (s) upon the works and the costs and the charges incurred in any way in carrying on and completing the said works are to be paid to the COMMISSIONER by the Contractor (s). The COMMISSIONER shall be the final authority to determine the amount spent to complete the unfinished work. The certificate of

COMMISSIONER as to the value of the balance work done shall be final and conclusive against the contractor.”

7. The learned counsel submits that for en-cashing the bank guarantee also, proper/prior notice is necessary in view of Clause 2 of the tender notification, which is to the following effect :

“(2) If the tendered, whose tender has been accepted, and after signing the agreement, (i) does not start regular actual physical items of work within 25% (twenty five percent) of the time allowed for completion, or abnormally slowdown the work or (iii) abandons the work, or (iv) merely goes on applying for extension or time, the Commissioner shall serve as “show cause” notice with details to the contractor in this regard and if the contractor does not reply, or if his reply is considered not satisfactory (at the sole discretion of the Commissioner), his earnest money and the performance security money of the Bank Guarantee in this regard shall be forfeited in favour of the JAGDALPUR MUNICIPAL CORPORATION. If the contractor has committed a similar default on earlier occasion (s) in previous three consecutive years the contractor shall be debarred from participating in any future tender of JAGDALPUR MUNICIPAL CORPORATION for a period of 2 (two) years from the date of such order, by the authority which had registered him/her. Such orders & action shall be final binding and conclusive.”

8. In support of the contention of the Petitioner that alternate remedy is no bar to entertain the writ petition even in contract matters; reliance is

sought to be placed on the verdict rendered by the Apex Court in **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Others** reported in (1998) 8 SCC 1 (paragraph-15), **Harbanslal Sahnia and Others v. Indian Oil Corporation Limited and Others** reported in (2003) 2 SCC 107 (paragraphs-19 and 28 to 30), **ICOMM Tele Limited v. Punjab State Water Supply and Sewerage Board and Others** reported in (2019) 4 SCC 401 (paragraph-15), **Zonal Manager, Central Bank of India v. Devi Ispat Limited and Others** reported in (2010) 11 SCC 186 (paragraph-15) and **Union of India (UOI) and Others v. Tania Construction Private Limited** reported in (2011) 5 SCC 697. Reliance is also sought to be placed on the verdict passed by a Division Bench of this Court in **Shivam Coal Carriers Private Limited v. South Eastern Coalfields Limited and Others** reported in 2019 (IV) MPJR (SC) 44.

9. The crux of the dictum laid down by the Apex Court in the above judgments is to the effect that the power of this Court under Article 226 of the Constitution of India can be invoked if there is violation of the fundamental rights or infringement of principles of natural justice or the decision taken is quite arbitrary in all respects; when the existence of alternate remedy is no bar. There cannot be any dispute in view of the authoritative pronouncements of the law by the Apex Court that the power of the Writ Court cannot be curtailed merely with reference to existence of alternate remedy and this Court can definitely interfere whenever/ wherever injustice is seen with reference to the specific contexts pointed out by the Apex Court.

10. The question is whether any such circumstance is made out and whether this Court should pursue such a task in exercise of its discretionary power?

11. The tender was floated in the year 2017 and the agreement was executed on 08.06.2017; leading to issuance of work order dated 15.06.2017 and the work was to be completed within 30 months; i.e. the time was available up to 08.12.2019. Admittedly, the work was not completed on time, despite the extension stated as given. When inordinate delay and lapses are attributed on the part of the Petitioner, reciprocal insinuation is made by the Petitioner by putting blame on the 5th Respondent-Municipal Corporation for not procuring and getting necessary permissions and clearances; besides referring to the consequences pursuant to the lock-down due to COVID-19 pandemic. As it stands so, there is a dispute on the factual aspects, which can be resolved only by taking evidence, which is not possible in a proceeding under Article 226 of the Constitution of India.

12. Coming to the question whether Annexure P/1 order of termination of the contract was passed arbitrarily, without informing the Petitioner as to the proposed action for the alleged delay (as contended by the Petitioner), reference is made to the various documents brought on record along with the preliminary objection dated 28.09.2020 filed on behalf of the 5th Respondent-Municipal Corporation. It will be worthwhile to have a look at the letter dated 20.01.2020 of the 4th Respondent/Project Consultant addressed to the Petitioner that the Project Manager of the Petitioner was absconding from Jagdalpur since 17.01.2020 and that the Petitioner was required to ensure presence of some other person without further delay or else action would follow as per the terms of the contract. With regard to the hurdles pointed out by the Petitioner with reference to the consequences of lock-down because of COVID-19 pandemic, reference is made to the **Order No.40-3/2020-DM-**

I(A) dated 15.04.2020 issued by the Government of India, Ministry of Home Affairs, in exercise of power under Disaster Management Act, 2005. Clause 11 of the consolidated revised guidelines, on the various measures to be taken for containment of COVID-19 in the Country, clearly provides exemption to 'public utilities' making them to remain functional. The said clause is reproduced below :

“11. Public Utilities: following to remain functional :

- i. Operations of Oil and Gas sector, including refining, transportation, distribution, storage and retail of products, e.g. petrol, diesel, kerosene, CNG, LPG, PNG etc.
- ii. Generation, transmission and distribution of power at Central and State/UT levels.
- iii. Postal services, including post offices.
- iv. Operations of utilities in water, sanitation and waste management sectors, at municipal/local body levels in States and UTs.**
- v. Operation of utilities providing telecommunications and internet services.”

13. Obviously, the contract involved is a 'water supply scheme' for the general public, which operation was to remain functional and the COVID-19 restrictions were never to have had any impact on such works. Among various notices/correspondences issued to the Petitioner, on different points of time, the learned counsel for the 5th Respondent-Municipal Corporation made a specific reference to the letter dated 28.05.2020, where details of all the lapses on the part of the Petitioner have been shown. The Petitioner has been alerted in the following terms- **“THE WORK IS KEPT ON HOLD BY YOU SINCE LAST MORE THAN YEAR for the reasons better known to you only”**. It was further stated that as to the contract of the Petitioner in the following terms- **“But till date you**

are unable to submit the work plan for the balance works, which clearly reflects your concerns for carrying the work". The penultimate paragraph gives a clear indication as to the **proposed action**, which is in the following terms :

"Finally, the intent of this reply is to clearly inform you that unless there is an immediate and considerable improvement on your part in all of the areas described above, JMC will be constrained to terminate your services and for accomplishing the left over works, another contractor will be hired. Note it carefully if such volatile action will be taken, all financial implications would be imposed on you which comprises of the cost of acquiring the another contractor. Apart from this we will also hold you liable for any other costs, we incurred in any case, as the whole phenomenon will only be due to dire repercussion of the delays and problems, caused by the non-performance based work logy as delivered by you."

This clearly shows that the Petitioner was intimidated of the lapses and that the 5th Respondent-Municipal Corporation would be constrained to terminate the services and that for completing the balance work, another contractor would be hired, followed by the consequences in respect of the course resulted.

14. The learned counsel for the 5th Respondent-Municipal Corporation points out that nothing transpired in the 'positive' from the part of the Petitioner, despite the alert given on 28.02.2020. It was only on finding that there was no other alternative, that the 5th Respondent-Municipal Corporation was constrained to en-cash the bank guarantee which had to

be done during the validity period itself. The contract had to be terminated as per Annexure P/1 order dated 15.07.2020, which is stated as perfectly in order.

15. After hearing both the sides, we find that the version put-forth by the Petitioner that Annexure P/1 order of termination of contract was issued without issuing any notice as to the proposal is not factually correct, in view of the specific contents of the letter dated 28.02.2020. This being the position, the alleged violation of the principles of natural justice in issuing Annexure P/1 order of termination and en-cashment of bank guarantee does not appear to be correct. We do not consider this as a fit case to invoke the discretionary jurisdiction under Article 226 of the Constitution of India and there is an effective alternate remedy by way of 'Arbitration' as provided under the NIT/Agreement; where the issue has to be considered with reference to the disputed question of facts and adjudication has to be done on the basis of the evidence to be adduced.

16. In the above facts and circumstances, interference is declined. The writ petition is dismissed, without prejudice to the rights and liberties of the Petitioner to pursue the remedy as above. It is made clear that we have not mentioned anything with regard to the merits of the case projected by both the sides, but have dealt only the maintainability of the writ petition.

Sd/-

(P. R. Ramachandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge