

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Order Reserved on 3.2.2021****Order delivered on 16.2.2021****WPC No. 3019 of 2020**

- M/s Ambika Projects, Through Partner- Pankaj Singh, S/o Shri, aged about 40 years, R/o Behind Shagun Gargen Bauripara Ambikapur, P.S. Kotwali, District Surguja Chhattisgarh.

---- Petitioner**Versus**

1. State of Chhattisgarh, Through; Secretary, Mahanadi Bhawan, New Mantralaya, Atal Nagar District Raipur Chhattisgarh.
2. Engineer in Chief, Public Works Department, Civil Lines, District Raipur (CG)
3. The Chief Engineer, PWD (Bridge Division), Raipur (CG)
4. The Superintending Engineer, PWD (Bridge Division) Circle- Raigarh, District Raigarh (CG)
5. The Executive Engineer, PWD (Bridge Division) Division - Raigarh, District Raigarh (CG)

---- Respondents

For Petitioner	:	Mr. Rajeev Shrivastava & Mr. Apoorva Tripathi, Advocates
For Respondents	:	Mr. Vikram Sharma, Dy. Government Advocate.

Hon'ble Shri PR Ramachandra Menon, CJ**Hon'ble Shri Parth Prateem Sahu, J****C A V Order****Per Parth Prateem Sahu, J**

1. Floating of Tender Notification bearing No.344/TC/20-21: System Tender No.68856 dated 4.11.2020 for the work of 'construction of (Balance Work of) High Level Bridge I/c Approach Road across Mand River at Bangarsuta-Maharajganj

(Munund) Road', is put to challenge in this writ petition *inter alia* on the ground that the same has been floated without measuring the work already carried out by the petitioner in response to tender notification issued earlier for the same work.

2. Facts of the case, in brief, are that respondent No.3 had floated a tender notification for the work of 'construction of (Balance Work of) High Level Bridge I/c Approach Road across Mand River at Bangarsuta-Maharajganj (Munund) Road', in which the petitioner participated, came out successful as lowest bidder and consequently, work order was issued on 7.8.2018. After execution of agreement, petitioner commenced the work but due to some unavoidable circumstances the work could not be completed and the agreement came to be terminated vide order dated 26.5.2020 under Clause-3 of the tender notification. Against termination of the agreement, petitioner approached the High Court by filing writ petition bearing WPC No.1962/2020 on the grounds mentioned therein including a ground that application for reference made before the Superintending Engineer has been rejected by a non-speaking order. The writ petition came to be dismissed vide order dated 31.8.2020 with a direction to the petitioner to avail the remedy available under Clause 28 of the terms and conditions of the agreement. The petitioner invoking Clause 28 of the agreement approached the authority concerned, during the pendency of application before the authority, respondent

authority concerned floated tender in question on 4.11.2020 for the balance work of contract which was earlier awarded to the petitioner. This made the petitioner to file instant writ petition with following prayers:-

“A. May, this Hon'ble Court be pleased to set aside the Notice Inviting Tender No.344/TC/20-21: System Tender No.68856, for the work of “construction of (Balance Work of) High Level Bridge I/c Approach Road across Mand River at Bangarsuta-Maharajganj (Munund) Road dated 04.11.2020” (Annexure P-1) being published without obtaining proper measurements of the Work site, thereby being irrational, flawed and Ipso facto arbitrary.”

B. May, this Hon'ble Court be pleased to direct any independent agency for taking proper measurements of the work executed by the petitioner at his work site.

C. May this Hon'ble Court be pleased to direct the respondents for making the due and admitted payments of the petitioner for the work executed by the petitioner after February 2019 as due and admissible payment amounting to Rs.81,76,419/-.

D. May, this Hon'ble Court be pleased to direct the Respondent No.3 to grant an fair opportunity of hearing and presenting evidence prior to settlement of the work with any 3rd party executing agency.

E. Any other relief which this Hon'ble Court may deem fit in the facts & circumstances of case.

F. Cost of the petition may also be awarded.”

3. Mr. Rajeev Shrivastava, learned counsel representing the petitioner submits that the petitioner has executed the work

under contract pursuant to work order issued by respondent authority concerned on 7.2.2018. However, respondent No.5 arbitrarily terminated the agreement entered between petitioner and respondent authorities, which was challenged by the petitioner before this Court and now it is pending before the Competent Authority under Clause 28 of the terms and conditions of agreement. Measurement of work executed by the petitioner has not been done and if the work site is handed over to subsequent successful contractor, the same would affect the interest of petitioner as the petitioner will not be able to make any claim against unevaluated work done by petitioner. It is pointed out that letter dated 26.5.2020 (Annexure P-8) terminating the contract and directing the petitioner to appear on the site for measurement of work done, was received by the petitioner only on 3.6.2020. In the said letter the date for measurement of work was mentioned as '10.6.2020', on which date the petitioner had to appear before respondent No.5 for filing proceedings under arbitration clause, hence the petitioner could not make himself available on work site for the purpose of measurement etc. In fact, no one was present on behalf of the petitioner on 10.6.2020, measurement was not conducted, despite this the respondent authorities have mentioned that measurement of work has been done on the date fixed i.e. 10.6.2020, which is not correct. Before issuing fresh tender notification for balance work, the respondent authorities should have properly measured the work done by the petitioner in presence of petitioner or his

representative and should have made the payment of bills due to the petitioner. The estimated value of work in the tender notification is based on the 2nd running bill of February. The value of work in the new tender includes the value of work already done by the petitioner. He submits that tender notification (Annexure P-1) is liable to be quashed as the same has been floated without taking proper measurement of work site. In alternate, he made a prayer that respondent authorities be directed to measure the work done by the petitioner on the work site.

4. Mr. Vikram Sharma, learned Deputy Government Advocate for the State submits that submissions made by learned counsel for the petitioner are not correct. The respondent authorities went to the site on the date fixed, measured the entire work done by the petitioner on site, prepared a panchnama to this effect on site itself, which was signed by the Sub-Divisional Officer, Sub-Engineer, Sarpanchas of two different Gram Panchayats by name Munund & Maharajganj, and other residents of the vicinity, who were present on the spot. The Supervisor/representative of the petitioner, present on spot at the time of measurement of work, was asked to sign the Panchnama but he refused to sign. It is also pointed out that there is an alternative remedy available to the petitioner under Clause 28 of the terms and conditions of contract of approaching respondent No.5 for redressal of grievances. Submission made by learned counsel for petitioner that fresh

tender notification has been issued only on the basis of second running bill for the balance work, is not correct. Value of work, as mentioned in the fresh tender notification Annexure P-1, is based on the Final Bill dated 6.7.2020 and after deducting value of work already done by the petitioner, valuation of balance work has been done at Rs.336.33 Lakhs. He also pointed out that amount of Rs.1,17,43,263/- mentioned in Abstract of 3rd RA Bill, which is at Page No.85 of writ petition, includes the 'secured advance'. Sarpanch of Gram Panchayat Maharajganj and other signatories of Panchnama dated 10.6.2020 have sworn affidavit to the effect that measurement of work was done on 10.6.2020, representative of petitioner by name Shri Kuber Yadav, Site In-charge, was present on site, in whose presence measurement of work was done. The officers conducting measurement of work, asked said Shri Kuber Yadav to sign the proceedings but he refused to sign and this fact falsifies the version of petitioner that at the time of measurement neither petitioner nor any of his representative was present. He submits that it is the case where at one hand the petitioner has deliberately not attended the proceedings drawn on the spot on 10.6.2020 and at the another hand, representative of petitioner present on the spot refused to sign the proceedings, hence the petitioner is not entitled for any relief as claimed in this writ petition. The relief with regard to payment of amount to the petitioner is subject matter of the dispute raised under Clause 28, which is pending consideration. Petitioner will be entitled for the said relief only if

the petitioner succeeds in arbitration proceedings pending consideration before the Competent Authority.

5. Referring to Page No.47 of the reply filed on behalf of the State, Mr. Rajeev Shrivastava, Advocate would argue that contention of respondents that measurement has been done on 10.6.2020 is not correct as in the running account bill placed on record it is clearly mentioned that measurement was done on 3.7.2020. Submission made by the learned State Counsel that representative of petitioner, who was present on spot, had refused to sign the proceedings is also incorrect for the reason that no such refusal by the representative of petitioner finds place in the panchnama prepared on 10.6.2020. Affidavits filed by the respondents before this Court on 3.2.2021 cannot be accepted as the same is clearly an afterthought. In this affidavit, for the first time, it is mentioned that representative of petitioner, who was present on work site, had refused to sign Panchnama. The action on the part of respondent authorities is *per se* illegal, arbitrary and not sustainable in the eyes of law. In support of his submissions, learned Counsel places his reliance on the decision of Hon'ble Supreme Court in case of **UMC Technologies Private Limited Vs. FCI & anr** reported in **2020 SCC Online SC 934**.

6. We have heard learned counsel for the parties and perused the record of case.

7. Undisputed facts of the case are that after coming out

successful in the tender notification issued by respondent authorities for the work in question, work order dated 7.2.2018 has been issued in favour of the petitioner. Respondent No.5 invoking Clause 3 (ii) of the contract agreement, terminated the contract awarded to the petitioner on 26.5.2020 and called upon petitioner to appear at the work site on 10.6.2020 for final measurement of work. The order dated 26.5.2020 was put to challenge by the petitioner before the High Court by filing writ petition, which came to be registered as WPC No.1962/2020. The said writ petition came to be dismissed vide order dated 31.8.2020 by observing thus:-

“7. In the above circumstances, we are of the view that the Petitioner has not exhausted the effective alternative remedy available. Further, considering the nature of the dispute raised, adjudication of the disputed questions of fact cannot be done in exercise of the discretionary jurisdiction under Article 226 of the Constitution of India. Hence the Petitioner is relegated to move the competent authority in terms of 'Clause 28' of Annexure P/4. Since the time stipulated therein is apparently over, we grant a further period of 15 days' time to the Petitioner, from the date of receipt of a copy of the judgment to pursue such proceedings before the 3rd Respondent/Chief Engineer. If such proceedings are filed within time as above, it shall be treated as a valid one, which shall be considered and disposed off on merit, after affording an opportunity of hearing to the parties concerned, in terms of the relevant provisions of law.

8. With the above observations, interference is

declined and the writ petition is dismissed. We make it clear that we have not expressed anything with regard to the merits of the case and it is for the competent authority to have the same considered and dealt with in accordance with law.”

8. In the aforementioned writ petition, the petitioner has not challenged the action taken by respondent authority concerned as per second part of the order dated 26.5.2020 on the ground that respondents have not measured the work after termination of contract on the scheduled date. In pursuance of the order dated 31.8.2020 passed by this Court in earlier round of litigation, the petitioner approached the Competent Authority invoking clause 28 of the agreement and the said proceedings are pending consideration. The first point for consideration of this Court in this writ petition, at this stage, is whether on 10.6.2020 the respondent authorities have measured the work done by petitioner on work site or not? Second point is whether the respondents acted arbitrarily or unreasonably in floating fresh tender vide Notification dated 4.11.2020 (Annexure P-1) affecting interest of the petitioner adversely.
9. The petitioner has admitted that he received letter dated 26.5.2020 on 3.6.2020, hence, it is apparent that letter of termination of contract directing petitioner to remain present on work site on 10.6.2020 for final measurement of work done, has been received by the petitioner much prior to the date fixed for measurement of work i.e. 10.6.2020. During the course of arguments, learned counsel for petitioner referred to

the rejoinder to argue that in between the period of passing of order of termination of contract and final measurement of work, there was nationwide lock-down on account of pandemic 'Covid-19', therefore, the petitioner could not make himself available on the spot on 10.6.2020 for final measurement. This submission of learned counsel for the petitioner is self-contradictory for the reason that on receipt of order dated 26.5.2020 on 3.6.2020, the petitioner drafted an application for reference on 5.6.2020 and submitted the same in the office of respondent No.5 on 10.6.2020, which is situated in Raigarh, as mentioned in cause title of petition, whereas petitioner is resident of city of Ambikapur. This shows that the petitioner was in a position to move from one place to another even during lock-down period. Even otherwise, as per guidelines issued by the Central Government/State Government, travelling from one place to another was permissible during lock-down period subject to obtaining of pass by the Competent Authority. Thus, it is apparent that petitioner himself has deliberately avoided to appear on the date fixed for final measurement. Most importantly, even after coming to know that final measurement has been taken by officers in presence of representative and elected members of gram panchayats on the date fixed i.e. 10.6.2020, the petitioner has not challenged the said action from the part of the respondent authorities prior to floating of tender notification. Attempt made by the petitioner indicates that the petitioner wants to stall the process of subsequent tender notification floated by

respondent department, which is of public importance.

10. In view of the above, we do not find any force in the submission of learned counsel for petitioner that due to imposition of lock-down in the entire country including in the State of Chhattisgarh, he could not appear on the date fixed for final measurement of work i.e. 10.6.2020.
11. As per panchnama prepared by the officers of respondent Department on 10.6.2020, at the time of final measurement not only officers of respondent Department i.e. Sub-Divisional Officer & Sub-Engineer, but two Sarpanch of different Gram Panchayats and many other persons of the vicinity, were also present and they have signed the proceedings wherein it is mentioned that final measurement of work is done in presence of Shri Kuber Yadav, representative of petitioner, and others. An attempt from the part of the petitioner is made to impeach the correctness of Panchnama dated 10.6.2020 saying that no measurement was taken by the respondent authorities on the date fixed and the allegation regarding denial on the part of said Kuber Yadav to sign the proceedings is also not correct as the said denial is not appearing in black & white in the panchnama, which is also indicative of fact that no measurement was taken on that date. We find it very difficult to accept this submission of learned counsel for the petitioner on more than one reasons. Panchnama dated 10.6.2020 is not only signed by the officers of respondent Department but elected Sarpanchas of two different Gram Panchayats and by

five persons of the locality including Secretary of Gram Panchayat, who were present on the spot at the time of measurement. To controvert the pleadings made by petitioner in rejoinder, respondents have filed affidavits of Sarpanchas and others, who have signed Panchnama dated 10.6.2020, in which there is specifically mentioned that on 10.6.2020 final measurement was taken by the officers; Kuber Yadav was present at the time of measurement, but he refused to sign Panchnama. Only on the basis of pleadings of petitioner, the proceedings signed by the officers, elected representatives of village panchayats and other residents of the vicinity cannot be thrown to winds. Panchnama has been signed by responsible government officers, elected members and office bearers of village panchayats for whose benefits the construction work of bridge is being done.

12. Another submission made by learned counsel for petitioner that if Kuber Yadav was present on spot and refused to sign Panchnama, then the said fact ought to have been mentioned in the Panchnama, is also not sustainable in view of affidavit of Kuber Yadav, which was placed on record by the petitioner as Annexure P-16. In Paragraph No.2 of said affidavit it is specifically mentioned that on 10.6.2020 he was pressurised by an employee of the office of respondent No.5 to sign on a blank paper, which he had refused. From the contents of said affidavit, it is clear that on 10.6.2020 the officers of respondent Department were present on the spot and when Kuber Yadav, representative of petitioner, was asked to sign the

document/paper, he refused to sign it.

13. In view of above peculiar facts and circumstances of case, the proceedings recorded by the officers of respondent Department, which was not only signed by the government officers, but also by elected representative & office bearers of Gram Panchayts and local residents, it cannot be said that respondent authorities have not conducted final measurement on the date fixed.
14. In the proceedings while exercising the jurisdiction of judicial review this Court has to look into whether the respondent authority has acted arbitrarily, unreasonably or malafidely. From the facts of case projected by either side and discussed above, we do not find any arbitrariness or unreasonableness in the action of the respondent authorities. The construction of bridge is of public importance and once the contract is terminated, the respondent authority is justified in issuing fresh tender for balance work after conducting the measurement and evaluating the value of work completed by petitioner.
15. For the foregoing discussions and the issue of measurement raised involves disputed question of facts, which could not be decided in writ jurisdiction, we are not inclined to exercise extraordinary jurisdiction under Article 226 of the Constitution of India in favour of the petitioner. Writ petition being devoid of substance fails and is hereby dismissed.

Sd/-
(P.R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge