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HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (C) No. 2914 of 2019**

- West India Construction Company, Western Chambers, 1/3 Akash Ganga, Bhailai Tahsil and District Durg, Through Partner Ashok Kumar Jain, Aged 65 years, S/o Late Shri C.D. Jain, 69/8 Nehru Nagar (West) Bhilai, Tahsil & District Durg, Chhattisgarh.

---- Petitioner

Versus

1. State Govt. of Chhattisgarh Through The Secretary, Gramin Yantriki Sewa Department, Mahanadi Bhawan, Atalnagar, Capital Complex P.S. Rakhi, New Raipur, Chhattisgarh.
2. Chief Engineer, Gramin Yantriki Sewa, Vikash Bhavan, Raipur, Chhattisgarh.
3. Superintending Engineer, Gramin Yantriki Sewa, Behind Collectorate Premises, Durg, Chhattisgarh.
4. Executive Engineer, Gramin Yantriki Sewa Division, Bemetara, District Bemetara, Chhattisgarh.

---- Respondents

For Petitioner	:	Shri Ajay Shrivastava, Advocate.
For Respondents/State	:	Shri Siddharth Dubey, Deputy Government Advocate.

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

Order on Board**Per P. R. Ramachandra Menon, Chief Justice****12.01.2021**

1. Cancellation of the contract awarded to the Petitioner-Company for the alleged defaults, forfeiting the EMD, security deposit etc. and imposing

penalty as per Annexure P/4 dated 15.03.2019 is put to challenge in this writ petition, besides seeking for a direction to effect the payment stated as due in respect of the work already done by the Petitioner.

2. Shri Ajay Shrivastava, the learned counsel appearing for the Petitioner submits that the Petitioner establishment is an institution engaged in the field of construction of buildings etc. for the past four decades and on participating in the tender floated by the Respondents, the work was awarded on 05.11.2014 for construction of the Zila Panchayat Building, Bemetara and some other structures for a total bid value of Rs.196.00 lacs. According to the Petitioner, the work was completed as borne by Annexure P/2 certificate dated 26.12.2016 issued by the 4th Respondent/Executive Engineer, RES Division, Bemetara. It is also pointed out that the building was inaugurated by the Hon'ble Chief Minister in presence of several dignitaries as borne by Annexure P/3. It was nearly 39 months after completion of the construction and inauguration of the building as above that Annexure P/4 order was issued on 15.03.2019, cancelling the contract and forfeiting the EMD/security deposit, besides imposing penalty, which is highly arbitrary in all respects and hence the challenge.

3. The prayers in the writ petition are under following terms:

“10.1 That this Hon'ble Court may kindly be pleased to quash order dated 15.03.2019 Annexure P/4 of respondent no.4 Executive Engineer cancelling agreement of contract and amounts shown as recoverable therein may kindly be held as void. Annexure P/10 letter dated 25.05.2019 & 30.05.2019 of respondent no.4 addressed to Branch Manager, Bank of Baroda for encashment of Bank guarantee may kindly be held as illegal.

10.2 and to order respondent no.4 to make payment of final bill of Rs. 22 lacks and amount of

Bank guarantee performance guarantee etc total amount Rs. 44,34,525+interest @ 12% of Rs.22 lacs and earnest money etc. shown in petitioner's letter Annexure P/6 against construction of Zila Panchayat building, Bemetara, with interest @ 12% pending since August 2016 as completion certificate has already been issued by the then Executive Engineer on 26.12.2016 vide Annexure P/2 under clause 6 of agreement which stipulates that measurement taken by Engineer in charge is conclusive and binding.

10.3 That any other relief which the Hon'ble Court may deem fit and proper may kindly be allowed."

The reliefs sought for are vehemently opposed from the part of the Respondents, who have filed a detailed return, also producing copies of the relevant testimonials.

4. Shri Siddharth Dubey, the learned Deputy Government Advocate for the State submits that the work awarded to the Petitioner in November 2014 was to be completed within 11 months, but there was much delay and failure on the part of the Petitioner who sought for extension of time on different occasions, as borne by Annexure R/1 and Annexure R/2 requests. The delay in completion of the work seeking for extension of time was only attributable to the Petitioner, which could be granted only by imposing penalty in terms of the specific terms of the agreement. That apart, the work which was executed by the Petitioner was also found not satisfactory as per the approved designs and hence various notices were issued to cure the shortfalls as borne by Annexure R/3. The learned counsel further submits that Annexure P/2 certificate produced by the Petitioner as to the alleged completion of the building is not correct or acceptable and the proper completion certificate has to be issued by the Engineer-in-Charge, in the 'form' appended at the end of the Agreement, after fulfilling the various conditions and also the measurement. A full text of the Agreement has been produced as Annexure R/4. With reference to

the entries in the relevant pages of the measurement book produced as Annexure R/5, it is contended that there was an excess payment of Rs.3,67,220/-. As per the measurement book, the Petitioner had completed work only for Rs.1,79,71,674/- and hence the work was not completed in all respects. It is also brought to the notice of this Court that inspection of the premise was done by the Competent Authorities on different dates and various shortcomings were brought to the notice of the Petitioner asking to have the same cured as borne by Annexure R/6 and Annexure R/7, followed by Annexure R/8 notice dated 26.02.2019.

5. That apart, the District Collector, Bemetara also passed Annexure R/9 order dated 05.03.2019, constituting a team of 5 members to inspect the building in presence of the Petitioner and to prepare a 'Panchnama'. Annexure R/10 is a copy of the 'Panchnama' prepared on 06.03.2019, wherein as many as 26 shortcomings have been pointed out. Though the Petitioner's representative was present, he later left the scene declining to subscribe his signature to the 'Panchnama'. It is pointed out that the Petitioner-Company has also violated the conditions of the contract, ignoring the Agreement and hence the contract has been terminated as per Clause 3(2) of the 'General Conditions' of the contract vide the impugned order (Annexure P/4). The learned counsel for the Respondents further pointed out that the Petitioner is also having an alternative remedy in terms of Clause 28 of the General Conditions of the contract by way of 'Arbitration'.

6. Clause 28 of the General Conditions of the contract reads as follows:

“Clause 28. Except as otherwise provided in this contract, all question and dispute relating to the meaning of the specification, designs, drawings and instructions herein before mentioned as to thing whatsoever in any way arising out of or relating to

the contract designs, drawings, specification, estimate, concerning the works or the execution or failure to execute the same, whether arising during the progress of the work, or a after the abandonment thereof shall be referred to the Superintending Engineer for his decision, within a period of 30(thirty) days of such an occurrence(s). There upon the Superintending Engineer shall give his written instructions and/ or decision, after hearing the contractor and Executive Engineer within a period of 15(fifteen) days of such request. This period can be extended by mutual consent of parties.

Upon receipt of written instructions or decisions, of Superintending Engineer, the parties shall promptly proceed without delay to comply such instructions or decisions. If the Superintending Engineer fails to give his instruction or decisions in writing within a period of 15(fifteen) days or mutually agreed time after being requested and/or, if the party (es) is/are aggrieved against the decisions of the Superintending Engineer, the aggrieved party may within 30 days prefer an appeal to the Chief Engineer, who shall afford an opportunity to the parties of being heard and to offer evidence in support of his appeal. The chief engineer will give his decision within 30(thirty) days, or such mutually agreed period.

If any party is not satisfied with the decision of the chief Engineer he can file the petition for resolving the dispute through arbitration in the arbitration tribunal.

A reference to Arbitration Tribunal shall be no ground for not continuing the work on the part of the Contractor. Payment as per the original terms and condition of the agreement shall be continued by the Executive Engineer in accordance with clause 8 above."

7. After hearing both the sides, we find that the case put forth by the Petitioner that the work has been completed to the satisfaction of the Respondents and that the amounts due to the Petitioner are wrongly withheld is not accepted by the Respondents, who have referred to the various proceedings and communications as to the alleged shortfalls and the non-completion of the work. In other words, the factual position as pleaded by the Petitioner is not admitted and there is disputed question

of facts, which cannot be adjudicated by this Court in exercise of the power under Article 226 of the Constitution of India. The fact finding exercise can only be done by other appropriate 'forum' and by virtue of Clause 28 of the General Conditions of contract a specific forum is provided for causing the matter to be pursued and resolved by way of Arbitration.

8. The learned counsel for the Petitioner submits that interference of this Court is necessitated also for the reason that the cancellation of the contract by the 4th Respondent/Executive Engineer as per Annexure P/4 itself is wrong, he having no power, authority or jurisdiction in this regard; which in fact stands exclusively vested upon the Governor. This Court does not find it necessary to deal with the said submission as it also amounts an 'arbitrable dispute' which can be raised by the Petitioner before the appropriate forum in terms of Clause 28.
9. The learned counsel further submits that the Clause 28 can be pursued only under specific and limited circumstances mentioned therein, which does not include a situation as in the instant case where the work is complete. But Clause 28 clearly demonstrates that the remedy under the said clause is available also in respect of the execution or failure to execute the work, whether arising during the progress of the work or after the abandonment thereof, which is to be referred in the first instance to the Superintending Engineer, as specified, to be taken up further before the Chief Engineer and later, if so necessitated, by reference to the Arbitration Tribunal.
10. In the above circumstances, this Court does not find it as a fit case to interfere for causing the reliefs prayed for in the writ petition to be considered in view of the disputed question of facts. The Petitioner is at a

liberty to pursue the matter for redressal of the grievance in terms of Clause 28 of the General Conditions of the contract. This Court expresses the hope and desire that since the grievance is a long pending one, earnest efforts shall be taken from the part of the Respondents to cause the dispute, once raised by the Petitioner, to be caused to be finalized within the shortest possible time.

11. Interference is declined and the writ petition is dismissed with the above observation.

Sd/-

(P. R. Ramachandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge