

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 2128 OF 2021

M/s ISC Projects-BNA-Infra (JV),
Joint Venture through its Director -
Special Power of Attorney
Ashwin Suresh Agrawal

.. Petitioner

Versus

The Union of India and others

.. Respondents

Mr. R. S. Deshmukh, Senior Advocate i/by Mr. Nirmal Rajendra
Dayama and Devang Deshmukh, Advocate for the Petitioner.
Mr. A. G. Talhar, A.S.G. for Respondent No. 1.
Mr. S. B. Deshpande, Advocate for Respondent Nos. 2 and 3.

**WITH
WRIT PETITION NO. 2294 OF 2021**

M/s B N Agrawal,
through its partner -Special
Power of Attorney
Ashwin Suresh Agrawal

.. Petitioner

Versus

The Union of India and others

.. Respondents

Mr. R. S. Deshmukh, Senior Advocate i/by Mr. Nirmal Rajendra
Dayama and Devang Deshmukh, Advocate for the Petitioner.
Mr. A. G. Talhar, A.S.G. for Respondent No. 1.
Mr. S. B. Deshpande, Advocate for Respondent Nos. 2 and 3.

**CORAM : S. V. GANGAPURWALA &
SHRIKANT D. KULKARNI, JJ.**

DATED : 10th March, 2021.

PER COURT:-

. The petitioners are assailing the recovery notices issued to them by the respondent No. 3.

2. Pursuant to the tender notice the petitioners filled in the tender. The petitioners were awarded the work for construction of 165 Nos Minor bridges and Earthwork in embankment and cutting between Chalisgaon – Jalgaon (93 Kms.) in Writ Petition No. 2128 of 2021. The work of construction of one important and 21 Major bridges in Manmad – Jalgaon section in connection with Manmad – Jalgaon 3rd line (160 Kms.) in Writ Petition No. 2294 of 2021 was awarded. The said work was awarded in March 2019. During the continuance of the work the impugned recovery notices are issued.

3. Mr. Deshpande, learned counsel for respondent Nos. 2 and 3 raises a preliminary objection that the parties under the terms of the contract have agreed to refer the dispute to the arbitration.

4. Mr. Deshmukh, learned senior counsel for the petitioners strenuously contends that excepted matters as provided in the clause of arbitration cannot be referred to arbitration. The learned senior counsel refers to clauses 57.2 and 57.3 (15) of the terms of the tender. According to the learned senior counsel, the present dispute would be

within the realm of excepted matters as provided under clause of tender and cannot be referred to arbitration.

5. The learned senior counsel further contends that availability of a remedy before the arbitrator or before any other Court would not affect the powers of this Court under Article 226 of the Constitution of India and even in matters involving contractual disputes, this Court can entertain the writ petition. The learned senior counsel relies on the judgment of the Apex Court in case of *Union of India & Ors. Vs. Tania Construction Pvt. Ltd.* Reported in *2011 (5) SCC 697*.

6. The learned senior counsel further lays emphasis that the impugned recovery notices are issued in violation of principles of natural justice. Prior to issuance of the recovery notices no show cause notices were issued, nor say of the petitioners was called. The petitioners could have explained the payments made to it and that the payments are not illegal or excess payments. Referring to the affidavit in reply filed by the respondents, the learned senior counsel submits that the respondents are also not fully convinced of the alleged over payments or excess payments. They do not have any record to verify the same, still the recovery notices are issued against the petitioners. The same suffers from non application of mind.

7. The learned senior counsel further submits that the officer who has issued the recovery notices, on the same day has also issued another communication to the effect that the matter of wrongful payment / over payment / bogus payment done previously is under investigation by the vigilance department. The said letter is of even date. The impugned recovery notice is issued before completion of investigation. The same would not satisfy the test of the reasonableness and also no conclusive finding could have been arrived at about excess payment made to the petitioners. In the light of that, the learned senior counsel emphasizes to entertain the writ petitions under Article 226 of the Constitution of India.

8. The learned senior counsel further submits that the recovery claimed is of Rs. 04 Crore and odd amount in each matter and the security deposit of the petitioners is more than Rs. 08 Crore in each matter. The amount claimed by the respondents even if found to be genuine could be recovered from the security deposit of the petitioners.

9. Though the learned senior counsel for the petitioners and the learned counsel for the respondents canvassed their submissions on merits, it would appear that clause of arbitration exists between the parties. The respondents have not determined the contract as per the terms of settlement of disputes. Excepted matters are detailed under

clause 57.3. The clause relied by the learned senior counsel for the petitioners would not inure to the benefit of the petitioners in as much as clause 57.3. (15) would apply only if the contract is determined owing to the default of contractor. In the present matters the contract between the parties still subsist. The contract is not determined. None of the other matters as detailed under clause 57.3 can be invoked to bring it within the purview of the excepted matters.

10. As contended by the learned counsel for the respondents, the present matter is arbitrable and can be dealt with by the arbitrator to be appointed in terms of the agreement between the parties.

11. In the case of *Union of India & Ors.* (supra) the matter before the Apex Court was for payment of the work already completed by the company. In the said matter it does not appear that there was dispute with regard to the work done and the rate agreed upon. In the present matters the dispute between the parties revolve around the alleged excess payment or otherwise. The same would certainly require the evidence and detailed investigation of disputed facts.

12. As the dispute between the parties is arbitrable and the matter can be dealt with by the arbitrator as per the terms and conditions agreed between the parties, we are not inclined to invoke our writ

jurisdiction under Article 226 of the Constitution of India.

13. The parties may take up the process for arbitration and for further reliefs as the petitioners may claim under the provisions of the Arbitration and Conciliation Act. In that event, all contentions of the parties are kept open.

14. Writ petitions, as such, are disposed of with aforesaid observations. No costs.

(SHRIKANT D. KULKARNI)
JUDGE

(S. V. GANGAPURWALA)
JUDGE

PS.B.