

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No. 14148 of 2022

**Debashis Mitra
Vs.
Union of India and others**

For the petitioner	:	Mr. Ranjan Kali
Hearing concluded on	:	11.07.2022
Judgment on	:	14.07.2022

Sabyasachi Bhattacharyya, J:-

1. Upon succeeding in a tender floated by the Bharat Sanchar Nigam Limited (BSNL) for the purpose of outsourcing maintenance and provisioning of landline and broadband for external plant of copper network in CTD under Business Area-West, the petitioner was awarded a contract.
2. Sub-clause 3.6(b) of the said contract provides that the contract will be terminated and PBG forfeited upon non-performance and failure to meet all the SLAs, that is, MTTR, Provisioning, fault clearance and repeat fault parameters for consecutive three months. It was further stipulated in the said clause that notice shall be served for non-performance in the first month, second month and third month before final termination.

3. It is contended that although the petitioner gave written replies to each of the three notices issued by the respondent-Authorities, none of those was considered by the respondents.
4. It is submitted that the respondent-Authorities asked the petitioner to continue the work, while in the same breath issuing show-cause notices on allegations of faults on the part of the petitioner.
5. Learned counsel for the petitioner places reliance on the several replies sent by the petitioner, which have been annexed to the writ petition.
6. It is contended that the purpose of issuing a show-cause notice is to give an opportunity to the concerned bidder to present his version on the allegations levelled in the show-cause notices. However, the said purpose was defeated by the respondents not giving any opportunity of hearing to the petitioner and/or not considering such replies.
7. Learned counsel submits that even prior to the termination the petitioner had sent several communications to the respondent-Authorities explaining the delay of the petitioner on grounds like the Amphan Cyclone, 'Bandh'/strike, etc. The said communications were entirely overlooked by the respondents in terminating the contract with the petitioner.
8. Learned counsel submits further that while undertaking the job as per the contract, the BSNL, through the petitioner, had been discharging public functions. Hence, the contract or the impugned action could not be said to be a private contract between the parties simpliciter.

9. Prior to imposing the major penalty of termination, learned counsel submits, the respondents-Authorities ought to have given an opportunity to the petitioner to explain the delay, if occasioned, in executing the work.
10. In an order dated June 29, 2022 passed in a previous writ petition between the same parties, bearing WPA No.19654 of 2021, the petitioner specifically contended that no show-cause notice was issued to the petitioner, as such, there arose no question of the petitioner giving any reply. Although the said order went against the petitioner in respect of another contract, it is argued that the facts of the said case are distinct from the present since in the instant case, the petitioner gave replies to each and every show-cause notice issued by the respondents but those were never considered by the respondents at all.
11. Learned counsel for the petitioner places reliance on another order of a different co-ordinate Bench dated September 2, 2021 passed in WPA No.12367 of 2021, wherein a similar clause of a contract was under consideration, in support of his propositions.
12. Since none appears for the respondents when the matter is called on for hearing, although the respondents were represented through counsel previously, the matter is heard *ex parte*.
13. Upon a perusal of the relevant clauses of the contract between the parties, it is seen that Clause 3.6 (b) of the contract was satisfied in the present case inasmuch as the respondents served three notices in

three consecutive months for alleged non-performance of the contract by the petitioner.

- 14.** In the present case, three separate notices were given respectively in March, April and May, 2022, in consonance with Clause 3.6 (b).
- 15.** Although Clause 3.6 (c) of the contract provides that the EOI/tender accepting authority may grant any relief in an action for termination considering the circumstances/nature of the appeal made by the bidder if one or more parameters are met, the said sub-clause categorically reserves such right to grant relief with the authority. We cannot read into the said clause an additional right of hearing to the bidder, which would tantamount to changing the terms of the contract itself.
- 16.** Although the petitioner had given replies to the notice, nothing prevented the respondent-Authorities from terminating the notice, even in the teeth of those replies, without giving any opportunity of hearing to the petitioner. Clause 3.6 (b) does not contemplate a further opportunity of hearing to the petitioner. In fact, the language of the said sub-clause does not permit of an interpretation that the three notices envisaged therein would be “show cause” notices. The notices, with a month’s interval between each other, were clearly meant to be mere precursors of the termination after three months and not intended to provide a detailed hearing to the noticee.
- 17.** A plausible ground for termination has been made out from the communications of the petitioner himself, which have been annexed to the writ petition. From the communications of the petitioner, both

before and after service of the three notices under Clause 3.6(b), it is seen that delay in commission of the allotted work was committed by the petitioner on repeated occasions, on one pretext or the other.

18. It was entirely the discretion of the respondent-Authorities, keeping in view the exigencies of the public work involved, to terminate or not to terminate the contract.
19. However, the petitioner has failed to make out any case of *mala fides*, arbitrariness and/or exercise beyond jurisdiction on the part of the respondent-authorities sufficient to prompt the writ court to set aside the termination of the contract between the parties.
20. In such view of the matter, WPA No.14148 of 2022 fails and is dismissed on contest.
21. There will be no order as to costs.
22. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)