

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

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No.16954 of 2021

Debashish Mitra

Vs.

Union of India and others

For the petitioner	:	Mr. Ranjan Kali, Mr. Mitul Chakraborty
For the respondent nos. 2 to 4	:	Mr. Shuvasish Sengupta, Mr. Soumyajit Mishra
Hearing concluded on	:	10.06.2022
Judgment on	:	29.06.2022

Sabyasachi Bhattacharyya, J:-

1. The petitioner, being a proprietor of a firm carrying on business under the name and style of M/s. D. M. Enterprises, emerged successful in a tender floated by the respondent no.4 on June 9, 2020 and a provisional acceptance letter was issued to the petitioner on July 21, 2020. On the same date, the petitioner deposited a Performance Bank Guarantee of Rs.7,13,446/-.
2. The work order was issued in favour of the petitioner on July 31, 2020. An agreement was, accordingly, entered into between the parties on the same date.

3. Subsequently, the petitioner commenced the work in terms of such agreement, for maintenance and provisioning of land-line and broad-band network. However, due to subsequent difficulties faced by the petitioner, the petitioner gave a letter on August 24, 2020 intimating the respondent-authorities about the hindrance in the completion of the job.
4. Due to the natural calamity Amphan, on August 29, 2020 the petitioner further pointed out a set back to the work by his letter to the respondents.
5. The petitioner thereafter raised an invoice to the tune of Rs.5,80,326/-.
6. Subsequently, there was further correspondence between the petitioner and the respondents regarding the difficulties and hindrance allegedly faced by the petitioner in completing the job.
7. Letters to such effect dated September 10, 2020, December 8, 2020 and December 3, 2020 were exchanged between the parties.
8. Subsequently, on October 17, 2020, October 31, 2020 and December 17, 2020, the respondent-authorities issued notices to the petitioner, pointing out the deficiency in performance of the petitioner.
9. Subsequently, *vide* Notice dated January 12, 2021², the work order of the petitioner was cancelled by the respondents and the Performance Guarantee was forfeited.
10. Learned counsel for the petitioner contends that the respondents violated principles of natural justice and arbitrarily terminated the

contract between the parties, without adhering to the Clauses of the agreement itself.

11. Being public authorities, the respondents ought to have acted transparently and without *mala fides*, it is contended. Learned counsel for the petitioner places reliance on Clause 3.6(b) of the Contract, which provides that the contract will be terminated and PBG (Performance Bank Guarantee) forfeited, upon non-performance and failure to meet all the SLAs for consecutive three months. Notice shall be served for non-performance, as per the said Clause, in the first, second and third months before final termination. It is further submitted that the respondents in the present case blatantly contravened such provision for issuance of three notices in each of the consecutive preceding months before termination.
12. Moreover, the petitioner was not given any right of hearing which, according to the petitioner, is in gross violation of the principle of *audi alterem partem*, which is an essential component of natural justice.
13. Learned counsel appearing for the petitioner further contends that although there is a provision for arbitration in Clause 20 of the contract, the Supreme Court as well this Court, in several cases, have held that an alternative remedy in the form of an arbitration clause is not an absolute bar in the exercise of power by this Court under Article 226 of the Constitution of India, if the relevant yardsticks are met.
14. Learned counsel for the petitioner places reliance on an unreported judgment dated September 2, 2021 passed by a co-ordinate bench in

WPA 12367 of 2021 between the present parties. A similar violation was alleged, it is contended, and the learned Single Judge, by observing that the provision of Clause 3.6(b) was not complied with by the Authorities, quashed the notices impugned therein.

15. Learned counsel places further reliance on another unreported judgment of the Supreme Court in *Union of India Vs. Tania Construction Private Limited*, dated April 18, 2011, wherein it was held that it is well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable.
16. Learned counsel for the petitioner next relies on the Supreme Court in *Unitech Limited and others Vs. Telengana State Industrial Infrastructure Corporation and others*, reported at 2021 SCC OnLine SC 99. In the said judgment, the Supreme Court observed that, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and, in consequence, in violation of Article 14. The jurisdiction under Article 226 was held to be a valuable constitutional safeguard against an arbitrary exercise of State power or a misuse of authority. It was further held by the Supreme Court that the presence of an arbitration clause does oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked. In the said case, it was held that the jurisdiction under Article 226

was rightly invoked by the Single Judge of the Division Bench of the High Court.

17. Learned counsel appearing for the respondent-authority relies on Section 14(c) of the Specific Relief Act and submits that the challenge is to a contract between the parties which determinable in nature. As such, the present writ petition is not maintainable under said provision.
18. That apart, the remedy of the petitioner would at best lie in damages, which precludes the petitioner from seeking, in effect, specific performance of the contract.
19. Learned counsel for the respondents relies on *Radha Krishan Industries Vs. State of Himachal Pradesh and others*, reported at (2021) 6 SCC 771, wherein the exceptions to the rule of alternative remedy were stipulated to be :
 - (a) the writ petition has been filed for the enforcement of a Fundamental Right protected by Part-III of the Constitution;
 - (b) there has been a violation of the principles of natural justice;
 - (c) the order or proceedings are wholly without jurisdiction; or
 - (d) the *vires* of a legislation is challenged.
20. A writ petition, it was held, should not be entertained when an efficacious alternative remedy is provided by law. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that

particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies, it was held, is a rule of policy, convenience and discretion.

- 21.** Learned counsel next places reliance on a Division Bench judgment of the Delhi High Court delivered in *Rajasthan Breweries Limited Vs. The Stroh Brewery Company*, reported in 2000 (55) DRJ (DB) in support of the proposition that where a technical know-how agreement is terminated by a party, the contract is determinable by the action of parties and could not be specifically enforced.
- 22.** Learned counsel for the respondents next cites *Kerala State Electricity Board and another Vs. Kurien E. Kalathil and others* reported at (2000) 6 SCC 293 for the proposition that the writ court is not ordinarily the proper forum for resolution of disputes relating to terms of contract with a statutory body. A contract, it was held, does not become statutory simply because it has been awarded by a statutory body for the construction of a public utility. Contractual or commercial activities, the Supreme Court held, by a statutory body need not necessarily raise issues of public law. The principle of exhaustion of alternative remedies was thus discussed by the Supreme Court in the context of maintainability of a challenge under Article 226 of the Constitution. The Supreme Court went on to hold that a statute may expressly or impliedly confer power on a statutory body to enter into contracts, in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to

be settled by the ordinary principles of the law of contract. It was reiterated that the fact, that a party to the agreement is a statutory or public body, will not by itself affect the principles to be applied.

- 23.** Learned counsel also relies on *Joshi Technologies International INC Vs. Union of India and others*, reported at (2015) 7 SCC 728, in particular paragraph 70.6 thereof, in support of his propositions.
- 24.** The limited window for interference under Article 226 of the Constitution of India has been laid down exhaustively by the judgments cited by the parties, as discussed above. A consideration of the present contract between the parties is essential to decide whether such yardsticks are met in the present case.
- 25.** The primary grievance of the petitioner is that Clause 3.6(b) of the agreement was contravened by the respondents.
- 26.** The said Clause stipulates that the fault parameters, as specified therein, have to continue for three consecutive months and notice has to be served for non-performance in each of the preceding consecutive three months before final termination of the contract and forfeiture of the performance guarantee.
- 27.** Clause 20.1 of the contract provides an arbitration clause in respect of any dispute, difference, question or disagreement arising between the parties in connection with, construction, meaning, operation, effect and interpretation of the contract or breach thereof.
- 28.** In the present case, the annexures to the writ petition indicates that the work order was cancelled *vide* notice dated January 12, 2021. By

the same notice, the performance guarantee of Rs.7,13,446/- was forfeited as per Clause 3.6(b) of Section 3 Part-A of the Bid document.

- 29.** Although not produced by the petitioner, the respondent nos. 2, 3 and 4, in their affidavit-in-opposition, have annexed three letters preceding the termination, each of which complained about the non-performance and non-compliance of previous letters in respect of the contract by the petitioner.
- 30.** The allegations made in the said three letters are sufficiently clear to serve the purpose of notices under Clause 3.6(b) insofar as alleged violation of contract by the petitioner is concerned, inasmuch as specific and transparent allegations have been made in that regard.
- 31.** Although on September 21, 2020 the respondent-Authorities issued a letter asking the petitioner to inform the author of the letter on daily basis whenever any outdoor fault was restored for the purpose of verification, the said letter cannot be termed as a letter within the contemplation of Clause 3.6(b) in respect of non-performance of contract clauses by the petitioner.
- 32.** However, the subsequent three communications issued by the respondents in writing clearly indicate and allege the non-performance of such clause by the petitioner. The respective dates of the said communications are: October 17, 2020, October 31, 2020 and December 17, 2020.
- 33.** Going strictly by the letter of Clause 3.6(b), the three notices were not served in the first, second and third month before termination. The first letter was dated October 17,2020, whereas the second was issued

on October 31, 2020 and not in November, 2020. The third letter, however, was duly issued on December 17, 2020.

- 34.** The second letter, thus, does not strictly fulfill the requirement of said Clause of the agreement.
- 35.** However, it is arguable as to whether the provisions of Clause 3.6(b) mandate a strict time gap of one month between each of the preceding letters before termination or whether three notices during the preceding three-month period would be sufficient for the purpose of termination within the contemplation of Clause 3.6(b).
- 36.** It is noteworthy that the entire case of the writ petitioner is based on a technical contravention of the stipulated time-gaps between the issuance of the three letters preceding termination, which does not comprise any patent irregularity, arbitrariness or *mala fide* on the part of the respondent-Authorities or an effort to favour any third party in preference over the petitioner.
- 37.** In fact, in public works, a strict standard is to be maintained for performance, more so, as the nature of the petitioner's work included maintenance of telecommunication lines and internet connections, which together comprise the bulwark of the entire virtual interconnectivity in the state. A disruption in such service would entail various parts of the state being cut off from each other, causing several important projects and essential activities to come to a grinding halt or get delayed.
- 38.** Moreover, the alleged breach committed by the respondents was not of such a serious nature that it tantamounted to patent violation of any

core provision of the contract and/or any Fundamental Right, for that matter.

39. Although there was interference in a somewhat similar matter between the parties by a co-ordinate Bench, the occasion for interference there was clearly recorded to be a gross violation of Clause 3.6(b), as opposed to the present case.
40. In the said case, no notice was issued at all prior to final termination whereas, in the present case, three consecutive notices were issued. Since the language of Clause 3.6(b) was that the notices have to be served in the “first month, second month and third month” before final termination, apart from the second notice being one day earlier than November 1, 2020, the stipulation of the said Clause was substantially complied with, since the three letters were issued on October 17, October 31 (one day before November 1, which would have satisfied the Clause to the letter) and December 17 of the year 2020 respectively.
41. From another perspective, the mandatory three-month time notice period can be construed in such manner that three notices merely have to be issued for the three preceding months prior to termination, and need not each have been issued in three distinct months.
42. Inasmuch as the petitioner’s proposition, that there should have been a gap of one month each between the said three notices, the same cannot be accepted, since the clause-in-question does not provide that notices had to be issued after a gap of one month each, thrice before the final termination. The clear stipulation in the clause is that the

notices have to be issued in the first, second and third months before final termination. Hence, barring the second notice being technically early by a day, no fault could be found with the respondents in complying with the provisions of Clause 3.6(b). Hence, it cannot be said that the petitioner is entitled either to reversal of cancellation of the termination or damages.

- 43.** In such view of the matter, the writ petition fails. Accordingly, W.P.A. No.16954 of 2021 is dismissed on contest.
- 44.** There will be no order as to costs.
- 45.** 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.)