IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.2278 of 2023

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M/s Sri Gopikrishna Infrastructure Private Limited having its office at RT-503, Fifth Floor, Royal Tara Apartment, Survey Mauza, Sheikhpura, P.S. Shastri Nagar, Bihar, 800014 through its Authorized Representative, Ram Pravesh Mistry aged about 40 years (M), resident of Shastri Nagar, Near Hindi School, Konnagar, P.O.-Barabahra, P.S. Uttarpara, Dist-Hoogly, West Bengal.

... ... Petitioner/s

Versus

1. South Bihar Power Distribution Company Limited registered office-Vidyut Bhawan, Bailey Road, Patna through its Managing Director.
2. The Chairman-cum-Managing Director, South Bihar Power Distribution Company Limited, Vidyut Bhawan, Bailey Road, Patna.
3. The Managing Director, South Bihar Power Distribution Company Limited, Vidyut Bhawan, Bailey Road, Patna.
4. The Sr. Manager (F and A), South Bihar Power Distribution Company Limited, registered office Vidyut Bhawan, Bailey Road, Patna.
5. The Branch Manager, Union Bank of India, Banjarahills Branch, D. No. 8-246/2/1 Road No. 4, Opp. GVK Mall, Banjarahills, Hyderabad.
6. The Branch Manager, HDFC Bank, Bank House Road No. 1, Banjarahills, Hyderabad.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Mrigank Mauli, Sr. Advocate
		Mr.Brisketu Sharan Pandey, Advocate
		Mr. Sanket, Advocate
		Mr. Abhishek Kumar, Advocate
For the Respondent Nos. 1 to 4	:	Mr. Umesh Prasad Singh, Sr. Advocate
		Mr. Kunal Tiwary, Advocate
		Mr. Vaibhava Veer Shanker, Advocate
		Mr. Sameer Sawarn, Advocate

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CORAM: HONOURABLE MR. JUSTICE SANJEEV PRAKASH SHARMA

ORAL JUDGMENT

Date : 19-04-2023

The matter come up on Interlocutory Application No. 2 of 2023 seeking vacation of the interim order dated 14.02.2023 passed by this Court whereby the respondents were directed not to encash the bank guarantee.

2. Mr. Umesh Prasad Singh, learned Sr. Counsel appearing for the respondents-South Bihar Power Distribution Company submits that the order of restraining from invoking bank guarantee ought not to have been passed by this Court while exercising powers under Article 226 of the Constitution of India. It is stated that four bank guarantees for four packages of work allotted to the petitioner which have not been finalized and the contract has not been closed nor the final bill has been prepared. As the closure proposal of the project has not been finalized, the petitioner was asked to extend the bank guarantee but they rushed to this Court and an order has been passed to restrain against the respondents. It is further stated that the closure of the project could not be done because of the revised bill of quantity vis-a-vis rate has not been determined by the petitioner.

2.1 Learned counsel also relies on the provisions of the Commercial Courts Act, 2015 (hereinafter referred to as 'the

Act of 2015) to submit that efficacious alternative remedy exists in terms of the Act and the writ petition would itself not lie. He also relies on a judgment passed by a Co-ordinate Bench of this Court while hearing an appeal against the order passed by the District Judge under the Act of 2015 in the case of ***South Bihar Power Distribution Company Limited vs. Bhagalpur Electricity Distribution*** reported in ***2019 (3) PLJR 18***.

2.2 Learned counsel also relies on a judgment passed by the Hon'ble Supreme Court in the case of ***Gujarat Maritime Board Vs. Larsen and Toubro Infrastructure Development Projects Limited and Anr.,*** reported in ***(2016) 10 SCC 46*** to submit that there can be no occasion for the High Court to interfere into the contractual matters under Article 226 of the Constitution of India especially when there are disputed questions involved.

3. Per contra, Mr. Mrigank Mauli, learned Sr. counsel appearing for the petitioner opposes the prayer made by the respondents and submits that there are closure certificates which have already been issued in favour of the petitioner and the period of performance has also expired and completion certificate has also been issued and, therefore, Bank Guarantees could not bee allowed to be encashed.

3.1 On the question of alternative remedy, learned counsel submits that the definition of commercial dispute as laid down under the Act would not take into account the issues which have been raised in the present petition and, therefore, the same need not be referred to the commercial court. He further relies on a judgment in the case of ***M. P. Power Management Company Limited Jabalpur Vs. Sky Power Southeast Solar India Private Limited and Ors*.,** reported in ***(2023) 2 SCC 703*** to submit that the writ petition would lie against the action of the State which has a duty to act fairly and to eschew arbitrariness in all its actions.

3.2 Learned counsel, therefore, submits that there is no occasion to relegate the matter to the alternative forum, more so, as there is no dispute that there is already a closure of the contract and proposal thereto has already been submitted and report has also been received by the respondents about the agreement having closed.

4. I have considered the submissions. In order to examine whether this Court should exercise its powers under Article 226 of the Constitution of India for adjudicating the issues raised by the petitioner, it would be apposite to quote the prayers made by the petitioner in the writ petition which are

manifold as under :-

(I) For issuing a writ of mandamus or any other appropriate writ quashing/ setting aside the letter dated 19.01.2023 bearing Memo No.112 passed by Respondent No. 4 whereby and whereunder the Respondent Bank (Respondent No.5/6) has been directed to encash the Bank Guarantee furnished by the petitioner against LOA No.581 dated 25.02.2014 in case, extension of the Bank Guarantee (worth Rs.2,29,38,073/-) is not granted on or before 02.02.2023;

(ii) For issuing a writ of mandamus or any other appropriate writ quashing/ setting aside the letter dated 19.01.2023 bearing Memo No.113 passed by Respondent No. 4 whereby and whereunder the Respondent Bank (Respondent No. 5/6) has been directed to encash the Bank Guarantee furnished by the petitioner against LOA No.721 dated 29.03.2014 in case, extension of the Bank Guarantee (worth Rs.46,93,326/-) is not granted on or before 02.02.2023;

(iii) For issuing a writ of mandamus or any other appropriate writ quashing/ setting aside the letter dated 19.01.2023 bearing Memo No.114 passed by Respondent No. 4 whereby and whereunder the Respondent Bank (Respondent No. 5/6) has been directed to encash the Bank Guarantee furnished by the petitioner against LOA No.581 dated 25.02.2014 in case, extension of the Bank Guarantee (worth Rs.2,29.38,073/-) is not granted on or before 15.02.2023;

(iv) For issuing a writ of mandamus or any other appropriate writ quashing/ setting aside the letter dated 19.01.2023 bearing Memo No.115 passed by Respondent No. 4 whereby and whereunder the Respondent Bank (Respondent No. 5/6) has been directed to encash the Bank Guarantee furnished by the petitioner against

LOA No.581 dated 25.02.2014 in case, extension of the Bank Guarantee (worth Rs.7,10,30,186/-) is not granted on or before 19.02.2023;

(v) For issuing a writ of mandamus or any other appropriate writ directing the Respondent No.5 and 6 not to credit the amount and also not to encash the Bank Guarantee in favour of Respondent No.1 until the pendency of the present writ application.

(vi) For issuing appropriate writ including writ of mandamus directing the Respondents No.1 to 3 to issue letter regarding Acceptance of Closure proposal submitted by the petitioner way back in the year 2018.

(vii) For holding that it is illegal on the part of Respondents No. 1 to 3 to have invoked the Bank Guarantee without there being any default on part of the petitioner.

(viii) For holding that it is illegal on the part of the Respondents No.1 to 3 to have kept be acceptance of closure proposal submitted by petitioner on hold and simultaneously encashing the Bank Guarantee on the ground of non-extension of the earlier Bank Guarantee even though the defect liability period for the projects handled by the petitioner has already passed and completion certificate have already been issued.

(ix) For issuing appropriate writ of mandamus directing thereby Respondents No.1 to 3 to issue letter communicating closure proposal and release of Bank Guarantee held by Respondent No.1 to 3, furnished by the petitioner in relation to Letter of Award(s) i.e. LOA No.581 dated 25.02.2014, 721 dated x) 29.03.2014 towards the projects (i for supply of materials and equipment's for composite work of supply of materials and equipment's, erection, testing and commissioning of 33/11 KV line, New 33/11 KV Power Sub-station, Installation of

New DSS and augmentation of DT, R&M of DSS, new LT line and R&M of LT line, 33 KV line of TURNKEY basis in Nalanda, Nawada & Banka District under Special Plan (BRGF) Phase-II and Balance Work of Phase-I; and (I) erection of materials & equipment's for composite work of supply of materials and equipment, erection, testing and commissioning of 33/11 KV line, New 33/11 KV Power Sub-station, Installation of New DSS and augmentation of DT, R&M of DSS, new LT line and R&M of LT line, 33 KV line of TURNKEY basis in Nalanda, Nawada & Banka District under Special Plan (BRGF) Phase-II and Balance Work of Phase-1.

For passing any such other order/orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

5. In ***M.P. Power Managing Committe Vs. Sky Power (supra),*** after having noticed the principles reiterated in ***Joshi Technologies International Inc. vs. Union of India and Ors.*** reported in ***(2015) 7 SCC 728***, the Apex Court observed as under :-

"82. We may cull out our conclusions in regard to the points, which we have framed:

82.1. *It is, undoubtedly, true that the writ jurisdiction is a public law remedy. A matter, which lies entirely within a private realm of affairs of public body, may not lend itself for being dealt with under the writ jurisdiction of the Court.*

82.2. *The principle laid down in Bareilly Development Authority [Bareilly Development Authority v. Ajai Pal Singh, (1989) 2 SCC 116] that in the case of a non-statutory contract the rights are governed only by the terms of the contract and the decisions, which are purported to be followed, including Radhakrishna Agarwal [Radhakrishna Agarwal v. State of Bihar, (1977) 3 SCC 457] , may not continue to hold good, in the light of what has been laid down in ABL [ABL International Ltd. v. Export*

Credit Guarantee Corpn. of India Ltd., (2004) 3 SCC 553] and as followed in the recent judgment in Sudhir Kumar Singh [State of U.P. v. Sudhir Kumar Singh, (2021) 19 SCC 706 : 2020 SCC OnLine SC 847] .

82.3. *The mere fact that relief is sought under a contract which is not statutory, will not entitle the respondent State in a case by itself to ward off scrutiny of its action or inaction under the contract, if the complaining party is able to establish that the action/inaction is, per se, arbitrary.*

82.4. *An action will lie, undoubtedly, when the State purports to award any largesse and, undoubtedly, this relates to the stage prior to the contract being entered into (see Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489]). This scrutiny, no doubt, would be undertaken within the nature of the judicial review, which has been declared in the decision in Tata Cellular v. Union of India [Tata Cellular v. Union of India, (1994) 6 SCC 651] .*

82.5. *After the contract is entered into, there can be a variety of circumstances, which may provide a cause of action to a party to the contract with the State, to seek relief by filing a writ petition.*

82.6. *Without intending to be exhaustive, it may include the relief of seeking payment of amounts due to the aggrieved party from the State. The State can, indeed, be called upon to honour its obligations of making payment, unless it be that there is a serious and genuine dispute raised relating to the liability of the State to make the payment. Such dispute, ordinarily, would include the contention that the aggrieved party has not fulfilled its obligations and the Court finds that such a contention by the State is not a mere ruse or a pretence.*

82.7. *The existence of an alternate remedy, is, undoubtedly, a matter to be borne in mind in declining relief in a writ petition in a contractual matter. Again, the question as to whether the writ petitioner must be told off the gates, would depend upon the nature of the claim and relief sought by the petitioner, the questions, which would have to be decided, and, most importantly, whether there are disputed questions of fact, resolution of which is necessary, as an indispensable prelude to the grant of the relief sought. Undoubtedly, while there is no prohibition, in the writ court even deciding disputed questions of fact, particularly when the dispute surrounds demystifying of documents only, the Court may relegate the party to the remedy by way of a civil suit.*

82.8. *The existence of a provision for* *arbitration, which is a forum intended to quicken the pace of dispute resolution, is viewed as a near bar to the entertainment of a writ petition [see in this regard, the view of this Court even in ABL [ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd., (2004) 3 SCC 553] explaining how it distinguished the decision of this Court in State of U.P. v. Bridge & Roof Co. (India) Ltd. [State of U.P. v. Bridge & Roof Co. (India) Ltd., (1996) 6 SCC 22] , by its observations in SCC para 14 in ABL [ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd., (2004) 3 SCC 553]].*

82.9. *The need to deal with disputed questions of fact, cannot be made a smokescreen to guillotine a genuine claim raised in a writ petition, when actually the resolution of a disputed question of fact is unnecessary to grant relief to a writ applicant.*

82.10. *The reach of Article 14 enables a writ court to deal with arbitrary State action even after a contract is entered into by the State. A wide variety of circumstances can generate causes of action for invoking Article 14. The Court's approach in dealing with the same, would be guided by, undoubtedly, the overwhelming need to obviate arbitrary State action, in cases where the writ remedy provides an effective and fair means of preventing miscarriage of justice arising from palpably unreasonable action by the State.*

82.11. *Termination of contract can again arise in a wide variety of situations. If for instance, a contract is terminated, by a person, who is demonstrated, without any need for any argument, to be the person, who is completely unauthorised to cancel the contract, there may not be any necessity to drive the party to the unnecessary ordeal of a prolix and avoidable round of litigation. The intervention by the High Court, in such a case, where there is no dispute to be resolved, would also be conducive in public interest, apart from ensuring the fundamental right of the petitioner under Article 14 of the Constitution of India. When it comes to a challenge to the termination of a contract by the State, which is a non-statutory body, which is acting in purported exercise of the powers/rights under such a contract, it would be over simplifying a complex issue to lay down any inflexible rule in favour of the Court turning away the petitioner to alternate fora. Ordinarily, the cases of termination of contract by the State, acting within its contractual domain, may not lend itself for appropriate redress by the writ court. This is, undoubtedly, so if the Court is duty-bound to arrive at findings, which involve untying knots, which are presented by disputed questions of facts. Undoubtedly, in view of ABL [ABL*

International Ltd. v. Export Credit Guarantee Corpn. of India Ltd., (2004) 3 SCC 553] , if resolving the dispute, in a case of repudiation of a contract, involves only appreciating the true scope of documentary material in the light of pleadings, the Court may still grant relief to an applicant. We must enter a caveat. The Courts are today reeling under the weight of a docket explosion, which is truly alarming. If a case involves a large body of documents and the Court is called upon to enter upon findings of facts and involves merely the construction of the document, it may not be an unsound discretion to relegate the party to the alternate remedy. This is not to deprive the Court of its constitutional power as laid down in ABL [ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd., (2004) 3 SCC 553] . It all depends upon the facts of each case as to whether, having regard to the scope of the dispute to be resolved, whether the Court will still entertain the petition.

82.12. *In a case the State is a party to the contract and a breach of a contract is alleged against the State, a civil action in the appropriate forum is, undoubtedly, maintainable. But this is not the end of the matter. Having regard to the position of the State and its duty to act fairly and to eschew arbitrariness in all its actions, resort to the constitutional remedy on the cause of action, that the action is arbitrary, is permissible (see in this regard Shrilekha Vidyarthi v. State of U.P. [Shrilekha Vidyarthi v. State of U.P., (1991) 1 SCC 212 : 1991 SCC (L&S) 742]). However, it must be made clear that every case involving breach of contract by the State, cannot be dressed up and disguised as a case of arbitrary State action. While the concept of an arbitrary action or inaction cannot be cribbed or confined to any immutable mantra, and must be laid bare, with reference to the facts of each case, it cannot be a mere allegation of breach of contract that would suffice. What must be involved in the case must be action/inaction, which must be palpably unreasonable or absolutely irrational and bereft of any principle. An action, which is completely mala fide, can hardly be described as a fair action and may, depending on the facts, amount to arbitrary action. The question must be posed and answered by the Court and all we intend to lay down is that there is a discretion available to the Court to grant relief in appropriate cases.*

82.13. *A lodestar, which may illumine the path of the Court, would be the dimension of public interest subserved by the Court interfering in the matter, rather than relegating the matter to the alternate forum.*

> ***82.14.*** *Another relevant criteria is, if the Court has entertained the matter, then, while it is not tabooed that the Court should not relegate the party at a later stage, ordinarily, it would be a germane consideration, which may persuade the Court to complete what it had started, provided it is otherwise a sound exercise of jurisdiction to decide the matter on merits in the writ petition itself.*
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> ***82.15.*** *Violation of natural justice has been recognised as a ground signifying the presence of a public law element and can found a cause of action premised on breach of Article 14. (See Sudhir Kumar Singh [State of U.P. v. Sudhir Kumar Singh, (2021) 19 SCC 706 : 2020 SCC OnLine SC 847]).*

6. The Act of 2015 and its provisions have not been considered by the Apex Court in the aforesaid judgment.

7. The Act of 2015 has been brought into force on 31st of December, 2015 and was enacted by the Parliament to provide speedy disposal of the high value commercial disputes which were under consideration before the government for quite some time based on the law Commission's 188th report. After the Act was brought into force, certain amendments were also made in the year 2018. For ready reference Section Section 2(c) of the Act of 2015 is quoted as under :

> *c) "commercial dispute" means a dispute arising out of—*
>
> *(i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;*
>
> *(ii) export or import of merchandise or services;*
>
> *(iii) issues relating to admiralty and maritime law;*
>
> *(iv) transactions relating to aircraft,*

aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;

(v) carriage of goods;

(vi) construction and infrastructure contracts, including tenders;

(vii) agreements relating to immovable property used exclusively in trade or commerce;

(viii) franchising agreements;

(ix) distribution and licensing agreements;

(x) management and consultancy agreements;

(xi) joint venture agreements;

(xii) shareholders agreements;

(xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;

(xiv) mercantile agency and mercantile usage;

(xv) partnership agreements;

(xvi) technology development agreements;

(xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;

(xviii) agreements for sale of goods or provision of services;

(xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum;

(xx) insurance and re-insurance;

(xxi) contracts of agency relating to any of the above; and

(xxii) such other commercial disputes as may be notified by the Central Government.

Explanation.—A commercial dispute shall not cease to be a commercial dispute merely because—

(a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property;

(b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions;

(d) "Commercial Division" means the Commercial Division in a High Court constituted under sub-section (1) of Section 4;

(e) "District Judge" shall have the same meaning as assigned to it in clause (a) of Article 236 of the Constitution of India;

(f) "document" means any matter expressed or described upon any substance by means of letters, figures or marks, or electronic means, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter;

(g) "notification" means a notification published in the Official Gazette and the expression "notify" with its cognate meanings and grammatical variations shall be construed accordingly;

(h) "Schedule" means the Schedule appended to the Act; and

(i) "Specified Value", in relation to a commercial dispute, shall mean the value of the subject-matter in respect of a suit as determined in accordance with Section 12 7[which shall not be less than three lakh rupees] rupees or such higher value, as may be notified by the Central Government.".

8. From bare reading of the explanation, it is apparent that a commercial dispute shall not cease to be a commercial dispute merely because it is for realization of money or out of immovable properties or as security or any other relief pertaining to immovable properties or where there are private body as contracting parties on the one side and State on the

other. Thus, it takes into its ambit all kinds of disputes which can possibly arise on account of any agreement, contract or of nature thereof between private parties or with State as one of them.

8.1 Having said so, upon comprehensive reading of the prayer made by the petitioner, this Court finds that the commercial courts can amply examine and consider the dispute raised and pass suitable orders.

9. This Court in South Bihar Power Distribution Company (supra) has also considered the aforesaid aspect and the matter was remitted to the commercial Court, Patna to hear and pass necessary orders.

10. In view of the law laid down by the Apex Court in ***M. P. Power (supra)*** and the provisions as quoted above, this Court feels that the existence of the alternative remedy which is efficacious and having a statutory character with a relief of appeal available to an aggrieved party before this High Court against the order of the Commercial Court, the writ petition ought not to have been entertained, more so, as the claims raised by the petitioner are disputed by the respondents. Therefore, the interim order dated 14.02.2023 passed by this Court shall stand vacated.

11. In view thereof, the writ petition is disposed of with a liberty to the petitioner to approach the concerned Commercial Court for adjudication of the claims.

12. Interlocutory applications also stand disposed of.

(Sanjeev Prakash Sharma, J)

Ashwini/-
Item No.7

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	21.04.2023
Transmission Date	NA