

**IN THE HIGH COURT AT CALCUTTA**  
**Civil Appellate Jurisdiction**  
**APPELLATE SIDE**

Present:

**The Hon'ble Justice Tapabrata Chakraborty**  
**&**  
**The Hon'ble Justice Partha Sarathi Chatterjee**

**FMA 1400 of 2017**  
with  
IA No.CAN 1 of 2017 (Old No.CAN 7013 of 2017)

**M/s P.K. Thakur & Company Pvt. Ltd. & Anr.**  
**versus**  
**Union of India & Ors.**

*For the Appellants* : *Mr. Kishore Datta, Sr. Adv.,*  
*Mr. Debajyoti Basu,*  
*Mr. Kunal Ganguly,*  
*Mr. Tirupati Mukherjee.*

*For the Respondent*  
*Nos.2 to 5* : *Mr. Lakshmi Kr. Gupta, Sr. Adv.,*  
*Mr. Chayan Gupta,*  
*Mr. Pourush Bandyopadhyay,*  
*Mr. Dwip Raj Basu,*  
*Mr. Roumyadip Saha.*

*Hearing is concluded on* : *15<sup>th</sup> June, 2023.*

**Judgment On** : **27<sup>th</sup> June, 2023.**

**Tapabrata Chakraborty, J.**

1. The appellants preferred the writ petition being W.P. 2319 (W) of 2016 stating *inter alia* that by forming a consortium with M/s ION Exchange

(India) Limited (in short, ION), they participated in the tender process initiated by a Notice Inviting Tender (in short, NIT) dated 11<sup>th</sup> February, 2008 for the purpose of setting up '*Intake Works & Plant Make-up Water & Drinking Water System (Package No.20) at IISCO Steel Plant*' and emerged to be successful. Pursuant to the said NIT a contract agreement dated 28<sup>th</sup> November, 2008 was executed by and between Steel Authority of India Limited (in short, SAIL) and the consortium. In the said project, MECON India Limited (in short, MECON) was the consultant. The work for which the tender was floated included construction of raw water reservoirs which required excavation, formation of embankment at the original location of the reservoir. For the purpose of effective execution of the work, the appellants had to undertake changed (additional) work of rock cutting to the extent of 66160.615 cubic meter. Such additional work was not disclosed in the tender document and for completion of the same SAIL extended the time for completion of the project. The said additional work undertaken by the appellants was certified by MECON and SAIL. The quantum of additional work executed and the excess cost incurred was intimated to SAIL by a representation dated 20<sup>th</sup> June, 2011, however by a memo dated 30<sup>th</sup> January, 2015, such extra claim regarding '*rock cutting and disposal during excavation of works reservoir*' was refused on a purported plea that such claim was not found tenable by MECON. However, such additional work as undertaken by ION was accepted and the additional amount claimed was approved *vide* memo dated 12<sup>th</sup> May, 2011. Alleging that the respondents

have grossly violated the rights of the writ petitioners as enshrined under Article 14 of the Constitution of India, the writ petition was preferred.

2. Upon contested hearing, the writ petition was disposed of by an order dated 14<sup>th</sup> July, 2017. The operative part of the said order runs as follows :-

*‘The petitioner and the respondent no.2 had entered into a commercial contract. The impugned memo is dated January 30, 2015. By such memo, the respondent no.2 had sought to repudiate the contract. There are disputed questions of facts involved. One of the issues raised is whether or not the additional work undertaken by the petitioner comes within the purview of the contract or not. As a writ Court I am not minded to enter into such disputed questions of facts on affidavit.’*

3. Challenging the said order dated 14<sup>th</sup> July, 2017, the present appeal has been preferred by the writ petitioners/appellants.

4. Mr. Datta, learned senior advocate appearing for the appellants submits that there is no dispute that for completion of the work under the project the appellants had to undertake additional work as would be explicit from the revised layout drawing authenticated and certified by SAIL in the month of November, 2009. Such execution of additional work was also admitted in the memo dated 30<sup>th</sup> January, 2015 but the extra claim pertaining to *‘rock cutting and disposal during excavation of works reservoir’* was refused as the same was allegedly found to be not tenable by MECON. No reason whatsoever was disclosed as to why the claim was held to be not

tenable. The learned Single Judge glossed over the said issue and did not return any finding and such infirmity in the order impugned warrants interference of this Court.

5. Mr. Datta argues that ION also undertook change (additional) work for rock cutting and disposal and submitted a change order which was duly approved as would be explicit from the memo dated 12<sup>th</sup> May, 2011. Even in the realm of contract, the State and its instrumentalities are duty bound to act fairly and in consonance with the provisions of Article 14 of the Constitution. Such proposition of law, according to Mr. Datta is clearly applicable to the facts of this case inasmuch as the other consortium member, who executed additional work for the purpose of effective completion of the project was awarded the extra amount for such work without raising any dispute whatsoever. As the appellants and ION being the members of the consortium and engaged in respect of the same project, are similarly situated and had jointly executed the work in the project, SAIL cannot apply a different yardstick in respect of the appellants. The appellants have a right under the law to receive the same treatment and a writ petition under Article 226 of the Constitution of India is maintainable to enforce even contractual obligation of the State. In support of such contention reliance has been placed upon the judgments delivered in the cases of *Unitech Limited and Others -vs- Telangana State Industrial Infrastructure Corporation (TSIIC) and Others*, reported in 2021 SCC OnLine SC 99, *State of U.P. -vs- Sudhir Kumar Singh and Others*, reported in 2020 SCC OnLine SC 847.

6. Mr. Datta argues that the fact that extra work had been executed by the appellants is not disputed. In support of such contention he has drawn our attention to the averments made in paragraph 28 of the affidavit-in-opposition filed on behalf of SAIL wherein it has *inter alia* been stated that '*certification of the respondent of the work carried out by the petitioners cannot ever remotely be construed as an admission of extra work done by the petitioners*'. When no disputed question of fact is involved the Court need not relegate the parties to a suit. The additional work done is not covered by any valid and subsisting arbitration clause contained in the contract. There is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation. In support of such contention reliance has been placed upon the judgment delivered in the case of *Zonal Manager, Central Bank of India -vs- Devi Ispat Limited and Others*, reported in (2010) 11 SCC 186.

7. Alternatively Mr. Datta argues that extra work was done by the appellants non-gratuitously and that such work was accepted by the respondents. Having availed the benefit of such additional work, the respondents are bound to reimburse the appellants and that the provision of Section 70 of the Contract Act is applicable to the facts of the present case moreso when, such execution is admitted and certified by the authorities themselves and even if such work is not part of the contract. Such provision would be applicable even in the case where the relationship between the parties resembles a contract. In support of such contention reliance has been placed upon the judgment delivered in the case of *Mahanagar*

*Telephone Nigam Limited –vs- Tata Communications Limited*, reported in (2019) 5 SCC 341.

8. Mr. Gupta, learned senior advocate appearing on behalf of SAIL denies and disputes the contention of Mr. Datta and submits that first it has to be established by a party to a contract that it has a legal right and the same had been infringed. It is only when such legal right exists and there is a corresponding legal duty upon the respondents then only it can be examined as to whether the respondent being the State or its instrumentalities had acted in an unfair or arbitrary manner. In the absence of such legal right the provisions of Article 14 of the Constitution of India would not be applicable in realm of contract. Such proposition of law would be explicit from the contents of paragraph 28 of the judgment delivered in the case of *Zonal Manager, Central Bank of India (supra)* upon which reliance has been placed by Mr. Datta.

9. Drawing our attention to clause 1.4.4, 7.2 and 7.5.2 of the contract agreement, Mr. Gupta submits that the contractor has to ascertain himself '*by a visit to the site, the actual site conditions, local factors etc. before submitting his offer, and no extra claim on account of site conditions & local factors is admissible during execution of contract*' and that the scope of the work shall cover complete civil engineering work for the proposed plant including relocation, demolition and modification of any existing facility that may interfere in the execution process of the plant. No extra claim whatsoever, on account of site condition/non-availability of data shall be entertained after acceptance of tender and it shall be presumed '*that the*

*Contractor has already inspected the site and satisfied itself about the actual site conditions and has collected any other information which may be required by the Contractor. All necessary soil tests over and above those carried out by the Employer are to be undertaken by the Contractor and no extra claim on this account shall be admitted’.*

10. Mr. Gupta submits that prior to entering into the contract it was incumbent upon the contractor to conduct necessary inspection and to ascertain the extent of work and then to submit its bid. In the event of acceptance of such bid SAIL would be under an obligation to pay the entire bid amount irrespective of the fact that the quantum of work executed by the tenderer is lesser than the quantum of work ascertained at the time of inspection. However, in the present case additional claim was raised under three heads as would be explicit from the memo dated 30<sup>th</sup> January, 2015 being *‘(a) Additional excavation of work due to change in alignment of sight; (b) rock cutting and disposal during excavation of works Reservoir; (c) Building up of additional embankment as per instructions of ISP/Mecon’*. Such claim was duly examined by MECON as well as SAIL, as would be explicit from the resolutions dated 8<sup>th</sup> October, 2014, 19<sup>th</sup> November, 2014 and 30<sup>th</sup> January, 2015 as annexed to the supplementary affidavit filed on behalf of the respondent nos.2 to 5. Upon due consideration the appellants’ claim under clauses ‘a’ and ‘c’ in the memo dated 30<sup>th</sup> January, 2015 was allowed but the claim under clause ‘b’ was refused. There had been no arbitrary exercise of any discretion on the part of the authorities. The appellants’ claim was

duly considered upon hearing the appellants and part of such claim was allowed.

11. According to Mr. Gupta, the extra work executed by ION was proposed by the employer and was required for total completion of the project. Upon execution of such work ION submitted change order and the same was approved *vide* memo dated 12<sup>th</sup> May, 2011. The additional work executed by ION was, thus, a requirement for total completion of the work and it had a legal right to claim the same. The appellants and ION are not similarly situated and as such the allegation of arbitrariness levelled against the SAIL authorities is absolutely unfounded.

12. Mr. Gupta further argues that it was incumbent upon the appellants to get acquainted with the site conditions and to deploy suitable measure for the purpose of carrying out such work. There was no contemporaneous correspondence from the end of the appellants intimating SAIL of any work purporting it to be an extra work. By a letter dated 20<sup>th</sup> June, 2011, the appellants lodged a claim for extra work. A further representation was submitted by them on 29<sup>th</sup> September, 2014 for payment against extra work. The claim was scrutinised by MECON and views were communicated *vide* memo dated 30<sup>th</sup> July, 2014. The issue was thereafter considered by the competent committee and it was *inter alia* observed that certain quantitative changes occurred and as the change was at the request of the employer due to change in location of the excavation site and as the genesis of the claim arose from a change due to interference of HT line over the designated area, the appellants' claim for extra work pertaining to

*'additional excavation work due to change in alignment at site'* and *'building up of additional embankment as per instructions of ISP/Mecon'* was allowed. However, the claim for rock cutting/unforeseen soil condition was not accepted in view of clause 7.5.2 of the contract. Such alleged rock cutting work was not at the behest of SAIL and as such did not come under clause 41.1 of the contract. Thereafter a Site Issue Redressal Committee was set up by SAIL and the said committee in its meeting dated 19<sup>th</sup> November, 2014 again considered the appellants' claim towards extra work in the presence of the appellant no.2 and observed that the claim towards rock cutting was not acceptable. Such decision was accepted by the appellants, however, they sought for review of the rates for superfluous excavation and building up of embankment. Accordingly, to consider such revision, they were requested to attend a meeting of the Deviation Committee on 30<sup>th</sup> January, 2015 and upon detailed discussion the Committee agreed and accepted the amount claimed by the appellants towards superfluous excavation and building up of embankment. The claim towards rock cutting was not urged in the said meeting. In the said conspectus, the appellants are estopped from claiming payment for rock cutting by filing the writ petition.

13. Mr. Gupta submits that the appellants had to undertake additional excavation work due to change in alignment at site and for building additional embankment. For such additional work the appellants' payment had been approved. Execution of work does not automatically bring such work within the ambit of extra work. The alleged work of rock

cutting was not proposed by the employer. Such claim had been accordingly refused and there is no infirmity in such decision.

14. In reply, Mr. Datta, learned advocate appearing for the appellants submits that the extra work for rock cutting was undertaken on the basis of the field inspection certificate issued by MECON and such work was entirely outside the work under the contract which entitles the appellants the additional payment pertaining to such work. The site was filled with heterogeneous slag/plant waste of varying thickness which extended up to 25 meters from the trace level but at the time of excavation work it was found that hard rocks are present in the sides of the reservoirs and the appellants had to cut and dispose of 66160.615 cubic meter of hard rock upon deploying rock breaking equipment. Such site condition was not disclosed in the tender documents. For the extra work of rock cutting, necessary for completion of project, the employer had earned actual benefit and as such they are under an obligation to make additional payment in favour of the appellants. The term '*extra*' is generally used in relation to the works. For such extra work benefit has been earned by the employer and as such the employer is under an obligation to provide extra money. The scope of extra work undertaken by ION is similar to that of the appellants but in respect of the appellants a different yardstick had been applied and such act is unfair and arbitrary.

15. Heard the learned advocates appearing for the respective parties and considered the materials on record.

16. Records reveal that by a memo dated 30<sup>th</sup> January, 2015, the appellants' extra claim towards '*rock cutting and disposal during excavation of works reservoir*' was not accepted. However, the appellants' extra claim towards '*additional excavation work due to change in alignment at site*' and '*building up of additional embankment as per instructions of ISP/Mecon*' were found to be admissible. Accepting the said order a change request was issued *vide* memo dated 24<sup>th</sup> April, 2015 and a change order was issued *vide* memo dated 2<sup>nd</sup> June, 2015 pertaining to authorised price: extra job for Rs.11101283/- (inclusive of all taxes and duties) was stipulated to be Rs.5958320/- and Rs.5142963/- towards '*superfluous work of excavation and building up of embankment at original location of reservoir*' and '*building of embankment on the south side of reservoirs*' respectively. Such sequence of facts would be evident from a memo dated 2<sup>nd</sup> June, 2015 issued by the respondent no.5 on behalf of SAIL. Records further reveal that prior to issuance of the memo dated 30<sup>th</sup> January, 2015, repeated meetings were held on 13<sup>th</sup> September, 2014, 8<sup>th</sup> October, 2014, 19<sup>th</sup> November, 2014. The appellants were heard, their claims were considered and the claim towards '*rock cutting and disposal during excavation of works reservoir*' was refused. The issue as to whether the work of rock cutting was beyond the terms of the contract and as to whether the work of rock cutting was tenable for the purpose of total completion of the project work and the extent of such rock cutting are all questions of facts which can be determined upon tendering evidence. Subsequent to refusal of the appellants' claim for rock cutting *vide* memo dated 30<sup>th</sup> January, 2015, the appellants submitted a request for

conciliation *vide* memo dated 11<sup>th</sup> May, 2017 and thereafter invoked the arbitration clause. No explanation is forthcoming as to why the extra work pertaining to rock cutting was segregated and separated and a writ petition was preferred on a purported ground of discriminatory practice on the part of SAIL.

17. The existence of a right and infringement thereto are the foundation of exercise of jurisdiction under Article 226 of the Constitution of India. Tender matters are not tested by running a fine tooth-comb over the process to discover which 'i' has not been dotted and which 't' has not been crossed. The conditions incorporated in the contract agreement need to be considered together and not in isolation. A particular clause cannot be picked up and highlighted. It appears from the materials on record that specific instructions were given to the contractors to ascertain themselves by visiting the site the actual site conditions and local factors before submitting their offer and it was specifically stated that no extra claim on account of site conditions and local factors would be admissible during execution of the contract. The contract document also appointed MECON as the project consultant. The appellants' claim was found to be not tenable by the said consultant and the reasons thereof were also disclosed in the resolutions adopted by the appropriate authority. The claim for extra work submitted by ION was approved about four years prior to rejection of the appellants' claim. There was no contemporaneous correspondence during the said period by the appellants. As regards the amount payable to the appellant for alleged extra work, appropriate standards of probity and accountability is

required to be on record. As the appellant's claim is in respect of public money of a State instrumentality, the same needs to be categorically established and this Court cannot come to any conclusion, in the absence of appropriate evidence on record. The judgments upon which reliance has been placed by the appellants are all distinguishable on facts.

18. From the sequence of facts it is explicit that the appellants' claim was not abruptly rejected. The issue was deliberated upon and discussed in the meetings of various authorities. There is also no error in the decision making process. Invitation to tender is in the realm of contract. It is not a case that the final decision was taken by the authorities in a perfunctory manner. No *mala fide* can be attributed to such action of the authorities. The appellants have also failed to establish any arbitrariness or unreasonableness against the respondents.

19. For the reasons discussed above, no interference is called for in the present appeal and the same along with the connected application are dismissed.

20. There shall, however, be no order as to costs.

21. Urgent Photostat certified copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

**(Partha Sarathi Chatterjee, J.)**

**(Tapabrata Chakraborty, J.)**