

Form No. J(2)
Item No.3

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

**Present:
THE HON'BLE JUSTICE SHAMPA SARKAR**

WPA 17053 of 2024

M/s. Krishi Ifratech Bangalore

vs.

Union of India and others

For the petitioner : Mr. Aniruddha Chatterjee,
Mr. Raja Saha,
Mr. Anujit Mookherji,
Mr. Prithish Chandra,

For the respondent nos.1, 2 & 3: Mr. Ashok Bhaumik,
Mr. Navneet Misra

Heard on : 05.07.2024

Delivered on : 05.07.2024

Shampa Sarkar, J.

1. This writ petition arises out of the termination notice dated June 24, 2024 issued by the Chief Engineer/CON/HQ/GRC. The said notice reads as follows:

“Ref: 1. CE/C/HQ/GRC’s 48 hrs’ Notice letter no. SER/CON ORGN/HQ/POST TENDER/4402/594 dt. 04.06.2024.

2. Dy. CE/C/GRC's office 7 days' Notice letter No. CE/C/South/GRC/DSPN-Nandigram/KInfratech dt.09.05.2024.

Dear Sir,

Forty-eight hours (48 hrs.) notice was given to you under this office letter of even NO.594, dated 04.06.2024; but you have taken no action to commence the work/show adequate progress of the work.

Since the period of 48 hours' notice has already expired, the above contract stands rescinded in terms of Clause 62 of the Standard General Conditions of Contract and the balance work under this contract will be carried out independently without your participation. Your participation as well as participation of every member/partner in any manner as an Individual or a partnership firm/JV is hereby debarred from participation in the tender for executing the balance work and your Security Deposit shall be forfeited and Performance Guarantee shall also be encashed."

2. The petitioner is aggrieved for the following reasons: -
 - a) The Dispute Adjudication Board had not been formed, as per the Standard General Conditions of Contract.
 - b) The arbitration clause at Clause 63 of the Standard General Conditions of Contract could not be invoked in this case.
 - c) The demand for arbitration under Clause 64(1) would also not be a bar as the order is devoid of reasons and the decision to forfeit the security deposit and encash the performance guarantee was taken without hearing the petitioner.

- d) The notice of termination does not indicate the reasons as to why the authority was not satisfied with the answers which were given repeatedly by the petitioner justifying its inability to complete the project or continue with the work at the pace which was expected from them.
- e) Correspondence with the Deputy Chief Engineer and the letter written to the Chief Engineer would indicate that the petitioner had provided the reasons as to why the balance work could not be executed on time. Reference is made to certain admissions made by the Deputy Chief Engineer with regard to the problems relating to acquisition of land etc. The railway authority was required to hand over free and clear land, free from all encumbrances, which they failed to do.

3. The learned advocate for the railway authority submits that the notices were given to the petitioner as per the Standard General Conditions of Contract. The termination was done in accordance with such procedure. Initially 7 days' notice was given, thereafter 48 hours' notice was also given.

4. It is further submitted that the petitioner ought to have approached the authority with the demand for arbitration.

5. After going through the record, this court finds that apart from the letters written to the Deputy Chief Engineer with regard to the problems that the petitioner was facing in execution of the balance work etc., the petitioner had also written a letter to the Chief Engineer South-Eastern Railways authority, with necessary

explanations. The authority terminated the contract without providing any reason. The decision to forfeit the security deposit and encash the performance guarantee was also taken without dealing with the petitioner's explanation and without quantifying the loss suffered by the railways.

6. The petitioner pointed out difficulties with regard to local agitation and contended that local people did not allow the workers to enter the site. Thus, the commencement of the earth work was delayed. The next difficulty pointed out was that the tentative drawings without any clearance of the design by the appropriate authority had been received belatedly. The seven days' notice was issued without providing a hindrance free site and approved drawings to the contractor. None of the bridges had proper approach and transportation of the construction materials such as sand, chips, TMT bars, cement, machineries, etc., was hindered. Agricultural activities by the local people were going on in the sites and they had raised a demand that unless the standing crops were allowed to be removed, the railways could not be permitted to enter the site. Finally, the local people also demanded jobs. The staff of the petitioner who were camping at the site, were assaulted.

7. The Deputy Chief Engineer (Con) replied to the said letters, *inter alia*, stating that it was factually correct that some of the stretches had faced resistance from the local villagers on the land

acquisition issue which were being sorted out by the competent land acquisition authority, but those stretches which were hindrance free were available for the contractor to continue with the job. The contractor had not done so. The drawings had been supplied in respect of bridge Nos.5, 7, 10 in the first week of February and bridge Nos.22, 23, 24 and 25 as well. The bridge work for bridge No.25 started on March 4, 2024 and the casting of PI was done on March 30, 2024 which itself showed slow place of work. The other bridge drawings would be prepared later as per the soil test reports. The authority also alleged that for making the trial bed with the use of Geocell, the Geocell was given on February 15, 2024, but EV2 testing of trial bed had not been done.

8. With regard to the construction of a temporary bridge across the irrigation canal, an alternative approach was directed to be sorted out with the local administration. The authority was of the specific view that the progress achieved on daily basis was far behind the required quantum and the daily progress of earth work was in the range of about 300 cum to 500 cum per day. The work was required to be expedited.

9. Several correspondences between the parties indicate that the Deputy Chief Engineer (Con) had indicated that the work was slow. The authority pointed out that the issues with regard to the acquisition over certain stretches would not be a hindrance for

execution of some of the works in respect of other stretches, bridges, etc.

10. It is not in doubt that the authorities invoked the provision of Clause 62. Seven-days show-cause notice and 48 hours' notice as per the standard general conditions were accordingly issued. However, the order impugned does not disclose that the Chief Engineer/Con/HQ/GRC had at all considered the contentions of the petitioner in the letters addressed to him as replies to the seven days' notice and 48 hours' notice. The petitioner explained the difficulties and reasons for the delay in answer to the notices issued by the Chief Engineer/Con.

11. In my opinion, rescission of the contract, encashment of the performance guarantee and forfeiture of the security deposit visits the petitioner with civil consequence. The penal provision of forfeiture has been invoked without hearing the petitioner. Thus, the authority ought to have considered the problems put forward by the petitioner and dealt with them in the order. The authority was open to decide whether the contentions of the petitioner were factually correct or not. By not dealing with any of the grounds taken by the petitioner in answer to the seven days notice and 48 hours notice, the authority has violated the principles of natural justice. The reason shown for termination was vague and the same is quoted below:-

“Taken no action to commence the work/show adequate progress.”

12. Thus, the authority did not mention the breach committed by the petitioner. The alleged breach, the failure of the contractor and the loss suffered by the authorities should have been stated in the order. Moreover, the reasons are separated by a slash, which means either/or.

13. Compliance with the General Conditions cannot be an empty formality. The contractor is afforded an opportunity to explain the delay or inability to execute work as per the terms of the contract. The contentions of the Deputy Chief Engineer in his replies indicate that the authority accepted that there were agitations and problems with the acquisition of land and approval of drawings. When such correspondence was going on between the Deputy Chief Engineer (Con.) and the petitioner, the Chief Engineer/Con/HQ/GRC issued the notices, rescinded the contract, decided to forfeit the security deposit and encashed the performance guarantee. Reasons should have been afforded to the petitioner. The petitioner should have been informed as to why the authority did not accept the explanations given in his answers to the show cause notices.

14. The Hon'ble Apex Court, in ***Maharashtra Chess Assn. v. Union of India***, reported in **(2020) 13 SCC 285**, while considering

whether the existence of an alternate remedy bars a High Court from exercising its writ jurisdiction, discussed several other cases and, *inter alia*, held the following:-

“19. This argument of the second respondent is misconceived. The existence of an alternate remedy, whether adequate or not, does not alter the fundamentally discretionary nature of the High Court's writ jurisdiction and therefore does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court. The decision whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case.”

15. In the matter of ***M.P.Power Management Co. Ltd vs Sky Power Southeast Solar India (P) Ltd.***, reported in ***(2023) 2 SCC 703***, the Hon’ble Apex Court held as follows:-

“**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] .

82.7. 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.

16. In the matter of ***Jaipur Vidyut Vitran Nigam Ltd. & Ors. Vs MB Power (Madhya Pradesh) Limited & Ors.*** reported in **(2024) 1 SCR 273**, the Hon'ble Apex Court held as follows:-

“27. The principles of law which emerge are that:

27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

27.3. Exceptions to the rule of alternate remedy arise where : (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.

27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.”

17. According to the principles laid down by the Hon'ble Apex Court in ***Gorkha Security Services v. Govt. (NCT of Delhi)***, reported in **(2014) 9 SCC 105**, it is now a well-established legal principle that any order that adversely affects another person must comply with natural justice principles, unless a statutory provision expressly or by necessary implication prohibits the use of any standard of natural justice. In this instant case, the General

Conditions require issuance of a seven day show cause notice and thereafter a 48 hour show cause notice. The very purpose of insertion of such requirements in the General Conditions is to enable the contractor to explain the reason as to why he could not either commence or perform the work according to the pace or the speed specified or required by the tendering authority. When the petitioner had responded to the Chief Engineer's notices the concerned authority should have dealt with the explanations and given proper reasons to justify why the explanations of the petitioner were not found to be satisfactory.

18. The Hon'ble Apex Court, in Chairman, ***Board of Mining Examination and Chief Inspector of Mines v. Ramjee***, reported in ***(1977) 2 SCC 256*** held as follows:-

“**13....**Natural justice is no unruly horse, no lurking landmine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt — that is the conscience of the matter.”

19. In this case, there existed ongoing communication between the petitioner and the respondent authorities. The petitioner answered to the show cause notices. No reply was received. Instead, the authority

rescinded the contract and decided to forfeit the security deposit.

Thus, alternative remedy of arbitration will not be a bar.

20. The test of real prejudice is also a well settled test in law. While deciding whether the court should set aside an order which was passed without hearing the party affected, the court has to ascertain what was the real prejudice. In ***Haryana Financial Corpn. v. Kailash Chandra Ahuja***, reported in **(2008) 9 SCC 31**, the Hon'ble Apex Court held that:-

29. In the leading case of *A.K. Kraipak v. Union of India* [(1969) 2 SCC 262] , Hegde, J. stated: (SCC pp. 272-73, para 20)

“20. ... What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case.”

30. Again, in *R.S. Dass v. Union of India* [1986 Supp SCC 617 : (1987) 2 ATC 628] , this Court said: (SCC p. 635, para 25)

“25. It is well established that rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and the background of statutory provision, nature of the right which may be affected and the consequences which may entail, its application depends upon the facts and circumstances of each case.”

31. At the same time, however, effect of violation of the rule of audi alteram partem has to be considered. Even if hearing is not afforded to the person who is sought to be affected or penalised, can it not be argued that “notice would have served no purpose” or “hearing could not have made difference” or “the person could not have offered any defence whatsoever”. In this connection, it is interesting to note that under the English law, it was held few years before that non-compliance with

principles of natural justice would make the order null and void and no further inquiry was necessary.”

21. In this case, the petitioner has suffered real prejudice in the form of rescission of the contract, forfeiture of security deposit and encashment of performance guarantee. The penal consequences of termination were invoked.

22. Under such circumstances, the order impugned dated June 21, 2024 is set aside. As the performance guarantee was encashed during pendency of the writ petition, the money received by the authorities upon encashment of the performance guarantee shall be kept in a separate interest-bearing account. The Chief Engineer/Con/HQ/GRC is directed to revisit the matter upon granting the petitioner an opportunity of being heard.

23. Needless to mention, a reasoned order shall be passed and communicated to the petitioner within a month from date of communication of this order.

24. This order will not entitle the petitioner to resume work. The money which shall lie in the separate account shall be subject to the final decision of the authority. Status quo with regard to the work will be maintained till such decision is taken by the authority.

25. Since no affidavit has been called for, the factual allegations against the railway authorities made in the writ petition are deemed to be denied.

26. This order is being passed only on the ground that the termination order has been passed in violation of the principles of natural justice, without dealing with the petitioner's explanations. The writ court has intervened to prevent miscarriage of justice.

27. The writ petition stands disposed of.

28. There shall be no order as to costs.

24. All the parties are directed to act on the basis of the server copy of the order.

(Shampa Sarkar, J.)

srm/s.biswas