IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.20472 of 2019

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NCC LTD. through its authorized representative Mr. Rayi Krishna Prasad aged about 43 years (M), son of Venu Gopala Swamy, resident of 1-32 Karanala Veedhi, at post Agarru, Agarru, P.S.- Palakollu, West Godavari, Andhra Pradesh.

... ... petitioner/s

Versus

1. The State of Bihar through its Principal Secretary, Water Resources Department, Government of Bihar, Secretariat, Patna, Bihar.
2. The Engineer-in- Chief (North) Water Resources Department, Government of Bihar, Patna, Bihar.
3. The Chief Engineer (Motihari) Water Resources Department, Bihar.

... ... Respondent/s

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Appearance :

For the petitioner/s	:	M/s Shoeb Alam, Sr. Advocate
		Shama Sinha, Advocate
For the Respondent/s	:	M/s Anjani Kumar, AAG 4
		Deepak Sahay Jamuar, Ac to AAG 4

CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY
ORAL JUDGMENT
Date : 31-01-2025

I.A. No. 1 of 2019

1. During the pendency of the Writ petition, the petitioner has filed I.A. No. 1 of 2019, seeking permission to add the reliefs mentioned in paragraph 2 of the interlocutory application.

2. I.A. No. 1 of 2019 is, hereby, allowed. The reliefs mentioned in paragraph No. 2 thereof would form part of the Writ petition.

I.A. No. 2 of 2019

3. During the pendency of the Writ petition, the petitioner has also filed I.A. No. 2 of 2019, seeking permission to add the reliefs mentioned in paragraph 2 of the interlocutory application.

4. I.A. No. 2 of 2019 is, hereby, allowed. The reliefs mentioned in paragraph No.2 thereof would form part of the Writ petition.

Re. CWJC No. 20472 of 2019

5. The petitioner has filed the instant application for the following reliefs:

> *"I. For Issuance of a Writ, Order or direction in the nature of a mandamus directing the respondents to pay to the petitioner in terms of Clause 41 of the General Conditions of Contract, half of the security amount retained by them under Clause 1A of the General Conditions of Contract; AND*
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> *II. For issuance of a Writ, Order or direction in the nature of declaration or any other appropriate writ declaring and*

holding that the actions and conduct of the respondents inter-alia in:

a. withholding the petitioner's retention money beyond the defect liability period in breach of Clause 41, etc.

b. illegally attempting and threatening to recover amounts without adjudication of dispute by the forum agreed under the Contract, etc. amounts to a fraudulent and illegal exercise of executive power, is arbitrary and mala fide conduct and is thus unconstitutional being in violation of Article 14 of the Constitution of India; AND

III. For issuance of a Writ, Order or direction in the nature of a declaration or any other appropriate writ declaring that Clause 25 (ii) of the General Conditions of Contract has been rendered non- est, invalid and unenforceable being in conflict with Section 12 read with Schedule VII of the Indian Arbitration and Conciliation Act, 1996, as amended; AND

IV. For Issuance of a Writ, Order or direction in the nature of a declaration or *mandamus holding and directing that the agreed dispute resolution mechanism under the contract be given effect to and the disputes be referred to and resolved through arbitration; AND*

V. For Issuance of an ex-parte ad-interim Order injuncting the respondents herein from taking any coercive steps under the contract till determination of appropriate dispute resolution forum by this Hon'ble Court and adjudication of the interim relief application by the forum so determined; AND

VI. For any other further, alternative or consequential relief(s) which this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.

6. As stated supra, the petitioner has filed I.A. No. 1 of 2019 and I.A. No. 2 of 2019 for the following reliefs respectively:-

(I) For issuance of a Writ, order or direction in the nature of certiorari and / or mandamus quashing the Order dated 30.08.2019 (Annexure P-9) issued

by the Chief Engineer, Irrigation and Water Resources Department, Motihari"

(II) For issuance of a Writ, order or direction in the nature of a certiorari and / or mandamus quashing the Orders dated 30.08.2019 (Annexure P-9), order dated 04.09.2019 (Annexure P-29) & order dated 30.08.2019 (Annexure-P35), order dated 03.08.2019 (Annexure P-37) issued by the Chief Engineer, Irrigation and Water Resources Department, Motihari"

7. The brief facts culled out of the petition are that the petitioner is a company incorporated under the Indian Companies Act, 1956, previously known as Nagarjuna Construction Corporation Ltd., and operates as a construction company. The Writ petition is filed within the territorial jurisdiction of this Hon'ble Court, as the contract was executed and the works was carried out in Bihar, where the respondents are based, and where the impugned orders were issued. On 06-08-2009, the petitioner entered into a contract with the respondents for the execution of "Restoration of Eastern

Gandak Canal System Including Gandak Barrage and Its Appurtenants Under Rashtriya Sam Vikash Yojna." The petitioner offered to perform the work at 44.53% above the estimated value of Rs. 310.54 crores, totaling Rs. 448.83 crores. A Letter of Acceptance (LoA) was issued by the Water Resources Department of Bihar on 03-07-2009 in favour of the petitioner, confirming the contract, which included General and Special Conditions of Contract (GCC and SCC). The contract was formalized on 06.08.2009.

8. It is submitted by the petitioner that the contract included General Conditions of Contract and Special Conditions of Contract, with a 25-month execution period. Despite the completion of work, the respondents failed to finalize payments. However, due to delays caused by the respondents, extensions were granted. As per Clause 6 of the General Conditions of Contract, no payment disputes could be raised after the completion of the Defect Liability Period. The Defect Liability Period was defined in Clause 11 of the special

condition of contract as a 12 months after work completion. The Defect Liability Period for the entire work ended in 2017, but the respondents did not formalize extensions until 28-08-2018. The petitioner raised concerns regarding delayed payments, including the release of pending bills and bank guarantees.

9. It is further contended on behalf of the petitioner that disputes were to be resolved through arbitration, with a sole arbitrator appointed by the Engineer-in-Chief. The respondents issued a notice to proceed with the work on 06-08-2009. The work was certified as completed by the respondents on 01-04-2015 for package No. 46, and on 22-06-2015 for package Nos. 43, 44, and 45. It is submitted that the petitioner submitted final bills for package Nos. 43, 44, 45, and 46 in the month of October 2015. The work was officially completed by 30-06-2016, and the Defect Liability Period ended on 30-06-2017. Despite this, the respondents did not release the pending payments or bank guarantees. In 2018, the petitioner requested the

respondents to settle outstanding payments, but no response was received.

10. It is also contended on behalf of the petitioner that on 28-08-2018, the respondents granted a *post facto* extension of time for completion until 30-06-2016. However, in 2018, the respondents sought to recover payments related to package nos. 43, 44, and 45, as well as package 46. The petitioner contested these recoveries, arguing that there were no over payments, and requested the release of funds. Despite repeated requests, including formal representations made in 2019, the respondents issued arbitrary recovery demands without providing justifications. For example, on 14-05-2019, they demanded Rs. 4.61 crores in over payments for packages 43-45, which the petitioner denied, requesting documentation for verification. Despite multiple Letters from the petitioner denying the recovery claims and requesting resolution, the respondents continued to issue recovery notices and threatened to confiscate bank guarantees. By

30.08.2019, the petitioner had initiated arbitration proceedings for both package Nos. 43-45 and package No. 46 under Clause 25 of the General Conditions of Contract. On 30.08.2019 and 04.09.2019, the Chief Engineer rejected the petitioner's claims for payment and balance amounts, instead demanding Rs. 7.40 crores for overpayment related to package No. 46 and Rs. 4.61 crores for package Nos. 43-45. The petitioner maintained that all contractual obligations were met and disputes should be resolved through arbitration.

11. A supplementary affidavit was also filed on behalf of the petitioner, presenting relevant facts and documents for the better consideration of the matter. It is averred in the supplementary affidavit that on 20.04.2018, the petitioner wrote Letter No. NCC/GC/396/2018-19 to the respondents requesting a formal extension of time, payment of pending bills, regularization of deviation bills, and release of bank guarantees. The petitioner also requested final closure of the contract as the Defects Liability Period had long

expired. On 20.11.2018, the petitioner wrote Letter No. NCC/GC/454/18-19 to the Principal Secretary, Water Resources Department, Patna, opposing the proposed recovery related to Package No. 46. The petitioner explained that there was no over payment and requested the respondents to (i) release the wrongly recovered Rs. 2.40 crores on 02.11.2018 and (ii) issue a formal regularized deviation for Rs. 7.41 crores for dewatering. It is further submitted that on 22.02.2019, the petitioner sent a detailed Letter No. NCC/GC/469/18-19 to the Chief Engineer, Irrigation Creation, Motihari, Bihar, outlining the issues and requests regarding Package No. 46. In response to the demand from the respondents on 14.05.2019 (Annexure P-4), the petitioner denied any liability for the proposed recovery of Rs. 4.61 crores in Packages 43, 44, and 45, as no supporting details were provided. The petitioner requested the respondents to provide the necessary documents for verification and action, urging them not to take any coercive steps.

12. It is also contented on behalf of the

petitioner that instead of supplying the requested details, the respondents, in their Letter dated 22.05.2019, stated that since measurements were taken in the presence of the petitioner's representative, they considered it as consent. However, the petitioner's representative had given consent under protest. Again on 06.06.2019, the respondents informed the petitioner that the total recoverable amount for Package No. 46 was Rs. 10.80 crores, with Rs. 2.40 crores already recovered, leaving a balance of Rs. 8.40 crores to be paid. The petitioner received the said Letter on 03.07.2019.

13. It is further submitted on behalf of the petitioner that on 06.06.2019, the petitioner wrote a Letter No. NCC/GC/489/2019-20 to the Executive Engineer, Tirhut Canal Division, Muzaffarpur, requesting payment of final bills and the release of a bank guarantee of Rs. 2.825 crores, citing the completion of the Defect Liability Period on 30.06.2017. The petitioner also requested the respondents not to proceed with the recovery, stating

that the proposed recovery was unjust as per Clause 6 of the General Conditions of Contract. The petitioner sent further Letters No. NCC/GC/491/2019-20 & NCC/GC/499/2019-20 on 06.06.2019 and 22.06.2019 respectively, reiterating the requests to release the bank guarantee and make final payments, emphasizing that the sufficiency of work or material could not be questioned after the Defect Liability Period.

14. On 18.06.2019, the respondents threatened confiscation of the petitioner's bank guarantee if the recovery was not made. On 29.06.2019, the respondents wrote to the petitioner's bank, requesting an extension of the bank guarantee's validity until 31.03.2020, while simultaneously issuing an order to confiscate the petitioner's bank guarantee for Package No. 46, which the petitioner received on 18.07.2019. On 05.07.2019, the respondents sent a Letter seeking recovery of amounts for Packages 43-45 and 46, requesting a bank draft for Rs. 8.40 crores and Rs. 4.17 crores, respectively. On 09.07.2019, the petitioner wrote

again to the Executive Engineer, Don Canal Division, requesting that the respondents not proceed with recovery and release the bank guarantee. On 10.07.2019, the petitioner wrote to the Chief Engineer, Motihari, regarding the pending decision on its claim for final payments and bank guarantee release. On 24.07.2019, the petitioner extended the validity of the bank guarantee for Rs. one crore at the respondents' request. On 25.07.2019, the Executive Engineer reiterated the demand for a bank draft of Rs. 8.40 crores.

15. It is further submitted on behalf of the petitioner that on 30.07.2019, the petitioner wrote to the Chief Engineer, requesting a decision on the pending claims as per Clause 25 of the General Conditions of Contract, since the Superintending Engineer had not responded. On 04.09.2019, the Chief Engineer, Motihari, rejected the petitioner's claim for final payment, citing the recovery demand for Rs. 4.61 crores. The matter was referred to arbitration as per

Clause 25 of the General Conditions of Contract for Package Nos. 43-45. The Chief Engineer, Motihari, sent repeated Letters in September 2019 demanding recovery from the petitioner and warning of further actions if payment was not made within 10 days.

16. The respondents have filed counter-affidavits in response to the writ petition, the interlocutory applications, and the supplementary affidavit. By filing these counter-affidavits, the respondents deny any claims made in the writ petition that were not specifically admitted or that are contrary to the case records. The details of the work according to the respondents are as follows:

1. **Name of work**: Restoration of Eastern Gandak Canal System, including Gandak Barrage and its appurtenances under Rastriya Sum Vikas Yojana.
2. **Total number of packages**: 46 (Packages 01 to 46).
3. **Agency**: NCC Limited (formerly Nagarjuna Construction Company Limited, Hyderabad).
4. **Agreement No.**: 1GR/2009-10.
5. **Estimated cost**: Rs.310.55 crore.
6. **Agreement value**: Rs.448.83 crore (44.53% above estimated cost).

7. **Start date**: 06/08/2009.
8. **Completion date**: 05/09/2011.
9. **Extended dates to finish the work:**

   1st extension: 31/05/2012 (vide Letter no. 2104 dated 07/12/2011).
   2nd extension: 31/03/2013 (vide Letter no. 213 dated 21/03/2013).
   3rd extension: 31/03/2015 (vide Letter no. 599 dated 09/06/2014).
   4th & last extension: 30/06/2016 (vide Letter no. 1275 dated 28/08/2018).
   Head:- 4700

10. **Total divisions**: 13 divisions across different regions, which are mentioned in counter affidavit.

17. It is averred in the counter affidavit that the work was carried out by NCC Limited in 46 packages under the agreement. The estimated cost of the project was Rs.310.55 crore, with the final agreement value being Rs.448.83 crore, which was 44.53% higher than the estimated cost. It is also averred that the work was supposed to be completed by 05/09/2011 but was extended several times, with the final completion date being 30/06/2016. It is further submitted by the respondents that the work was carried out by NCC

Limited in 46 packages under the agreement. Regarding the issues raised by the petitioner were only for payment of retention money held under Clause 1A of the General Conditions of Contract. Further requesting to declare the withholding of retention money beyond the defect liability period to be breach of Clause 41 of the General Conditions of the Contract. It is averred in the counter affidavit that the work was initially allotted to the petitioner under the agreed schedule, with the total agreement value being Rs.448.83 crore. However, the petitioner's progress of the work was found slow. Despite repeated directions of the concerned Engineers and the work was completed only by 30/06/2016. The defect liability period began on that date. Several quality control issues arose during the execution of the work, particularly with granite blocks, which did not meet the required specifications. These defects were brought to the petitioner's attention, and despite some initial assurances, the work did not meet the required standards. For example, the granite blocks did not meet the specified compressive strength, and gaps between the blocks were larger than the required size. The contractor was directed to fix these defects, but no action was taken in a timely manner.

18. The counter affidavit further disclose that the petitioner also sought for *post-facto* approvals of enhanced payments for dewatering costs and epoxy used for the granite blocks, but these proposals were rejected by the Chief Engineer due to the deviation from the original agreement and the fact that prior approvals were not obtained. Consequently, the amounts paid under these headings were found to be excessive and recoverable from the petitioner and in result thereof the the the Chief Engineer rejected the petitioner's claims for enhanced payments and identified several amounts that was needed to be recovered from the petitioner due to deviations from the original contract terms.

19. The Counter affidavit further disclose that the concerned Assistant Engineer/SDO wrote

several letters to the Project Manager of the petitioner's company highlighting several issues with the dewatering work, which had become ineffective, due to a lack of materials and proper management. On 12.05.2011, the SDO reported that the dewatering work was futile and described it as "superfluous dewatering." On 20.05.2011, he further complained vide Letter No. 96 that the work of dewatering was left to the discretion of a petty contractor. The logbook was filled up for 24 hours, even though the dewatering work was executed in only one shift. These irregularities were reported by the Chief Engineer, Irrigation Creation, Water Resources Department, Motihari, on 08.07.2017 vide Letter No. 1584 and in turn the Chief Engineer directed the recovery of excess payments from the petitioner. The contents of the counter affidavit disclose that the Chief Engineer was directed vide departmental Letter No. 742 to lodge an FIR against the concerned Engineers and frame charge against them for the recovery of the overpaid amount. An FIR was filed by the Executive Engineer, Canal Division, Ramnagar, on 01.09.2018, and charges were framed against the Engineers in a memo sent on 15.09.2018. After examination, the Executive Engineer prepared a final bill, which showed a recoverable amount of Rs.10.80 crore from the petitioner. While Rs.2.40 crore was recovered, Rs.8.40 crore remains outstanding. The Chief Engineer informed the petitioner about this on 30.08.2019 and directed them to refund the said amount. However, the petitioner flouted the said order. Consequently, the Chief Engineer instructed the Executive Engineer to send appropriate proposal for recovery of the aforesaid amount within the period of 10 days.

20. It is further submitted in the counter affidavit that with regard to the package Nos. 43, 44, and 45, the petitioner submitted a final bill on 06.10.2015, but only entered quantity of earth and amounts in the said bill without providing any

measurement report. The Executive Engineer requested the petitioner to ensure the presence of a representative for the final measurement, but the petitioner unnecessarily delayed the matter and appeared only on 04.05.2019. The final bill, based on the aforesaid measurement book, showed excess payments to the petitioner, amounting to Rs.4.17 crore, which is recoverable from the petitioner. The Executive Engineer requested the petitioner to send a bank demand draft of the aforesaid amount by 14.05.2019, and the Chief Engineer also rejected the petitioner's claims vide Letter No. 2465 dated 04.09.2019.

21. It is submitted on behalf of the respondents that as for the petitioner's request for settlement of dispute through arbitration, there is no such dispute between the parties as per the agreement. Clause 25 of the agreement (General Conditions of Contract) for a dispute redressal system, and being a party to contract, the petitioner is bound by these terms

and conditions. However, with regard to the security deposit, Rs. one crore was already released to the petitioner on 18.01.2017, but after the final bill, it was noticed that excess payments were made totaling to Rs.10.80 crore, of which Rs.2.40 crore was recovered from the security deposit. Thus, the remaining security deposit amount deducted from the running bill was not released to the petitioner.

22. It is further submitted on behalf of the respondents that in response to the petitioner's claims of illegal actions, the respondent asserts that the recovery of dues is in accordance with the contract, and there is no illegal or *mala fide* conduct. The excess payments made during the running bill were adjusted at the time of the final bill, as per the agreed procedures. There is no dispute regarding the final bill measurements, and the petitioner has accepted them. No arbitration is required, as there is no disagreement between the parties on the terms of the agreement.

23. It is averred in the counter affidavit that the respondents have not acted arbitrarily, illegally, unreasonably, or in *mala fide* exercise of the executive power of the state. But the actions taken were based on the facts provided as per the agreement. It is further submitted that despite several reminders and necessary instructions from the Chief Engineer, Valmikinagar, the petitioner during the execution of the work regarding the improvement of the quality and rectification of substandard work, the required corrections were not made within the Defect Liability Period. As a result, the defective work was rejected by the Chief Engineer via Letter no. 2512 dated 18/11/2013. In response to para 4 (vi) of the Writ petition, it is submitted that a committee was formed by the Chief Engineer, Motihari, to check the quality of work done under package No. 46. The members of the committee inspected the site, and submitted their report which indicated that the work done was not as per specifications provided in the estimate. Therefore, based on this report, the Chief

Engineer, Motihari, rejected the defective work, vide Letter No. 1584 dated 08/07/2017. In response to para 4 (viii), it is stated that the petitioner has submitted the final bill which only contains gross quantities and rates as mentioned vide Letter No. NCC/GC/144/15-16 dated 06/10/2015, but the detailed measurement was not attached with the final bill. Therefore, the respondents could not verify the quantities, and submitted the final bill, on which measurements were accepted by the petitioner's authorized person.

24. In response to para 4 (xi), it is submitted that as per the direction of the Chief Engineer, Water Resources Department Motihari, the final bill was prepared by the Executive Engineer with a recoverable amount of Rs. 10,80,49,567.33/- in Package No. 46. In response to para 4 (xii), the respondents further submitted that the fourth and final extension of time was granted by the department vide Letter No. 1275 dated 28/08/2018. The final bill has been

processed as mentioned above and half of the total security deposit, which was deducted from all running bills was released to the petitioner. However, the remaining half of the security deposit amount has not been released yet, as overpayment was noticed in the final bill and the final closure of this contract was still under process. In response to para 4 (xv), it is submitted by respondents that they have found that inferior quality of work was done by the petitioner. As per the agreement, the gap between two granite blocks should be between 10 mm to 12 mm, but during inspection, the gap was found to be between 40 mm, 50 mm, 80 mm instead of 10 mm due to which, the Chief Engineer rejected the inferior quality of work vide Letter No. 2512 dated 18/11/2013, and Rs. 2.40 crore was recovered through a bank demand draft submitted by Tirhut Canal Division, Flazipur (Package Nos. 39, 40, 41, 42), with the consent of the petitioner. In response to para 4 (xv), it is submitted that the agreement provision for dewatering was Rs. 3,863,917.40 on the basis of

5% of cost of total work done below the SSWL. However, Rs. 7,418,064.0/- was paid to the petitioner as an extra item during the execution of the work. In response to para 4 (xvi) the respondents have submitted that the petitioner submitted a Letter to the Principal Secretary, Water Resources Department, Patna, on 03/01/2019, which was forwarded to the concerned Chief Engineer, Irrigation, Water Resource Department, Motihari, vide Letter No. 122 dated 24/01/2019. In reply of departmental letter, The Chief Engineer Irrigation, Motihari, responded to the department vide Letter No. 277 dated 29/01/2019. In response to para 4 (xix), it is submitted that the authorized person of the petitioner signed the level book and graph paper. Final bill was prepared based on the level book and graph, which was accepted by the petitioner. After the final bill, it was noted that the recoverable amount was Rs. 46,166,627/- in Package Nos. 43, 44, and 45. The petitioner signed on the level book, graph paper as well as final bill after verifying the measurements mentioned.

In response to para 4(xxi), it is submitted that the level book and graph paper were produced for verification, and the petitioner signed on both of them only after confirming the measurements. In response to para 4 (xxii), it is submitted that the measurements were accepted in the final bill of Package No. 46 dated 29/05/2019 by the petitioner. In response to para 4 (xxiv), it is submitted that the petitioner submitted the final bill dated 06/10/2015 in which only an abstract of costs was enclosed and detailed measurements were not attached, so it was impossible to verify the quantities mentioned in abstract of cost. The final bill was prepared by the respondents which was accepted by the petitioner in Package Nos. 43, 44, and 45. Further, in response to para 4 (xxv), it is submitted that as the final bill amount is in negative, that is the overpayment of Rs. 10.80 crore in Package 46 was done to the petitioner. The overpaid amount will be adjusted either through a bank guarantee or through a bank demand draft. In response to para 4 (xxvi), it is submitted that it is true that the Letter was not a threatening Letter but an intimation to deposit the excess payment made to the petitioner through the running account bill in Package Nos. 43, 44, and 45. In response to para 4 (xxvii), it is submitted that the petitioner wrote a Letter to the Executive Engineer, Tirhut Canal Division. In reply to this letter, the Executive Engineer clearly stated that the final measurement has been done in the presence of the authorized person of the petitioner. It is submitted in response to para 4 (xxviii) that the respondent's reply to the petitioner’s Letter No. NCC/GC/503/19-20 was denied as the petitioner states that the final bill is yet to be certified. The measurements of final bill was accepted by the authorized person of the petitioner and after the preparation of the final bill, it was noticed that overpayment had been made, and hence no further payment was due to the petitioner. In response to para 4 (xxix), it is submitted that a Letter was sent to the branch manager of Syndicate Bank, Banjara Hills, Hyderabad, to deposit an amount of Rs. 1.00 crore to the Government bank account operated by the Executive Engineer, Canal Division, Ramnagar, since over payment had already been made to the petitioner through the running bill. In response to para 4 (xxx), it is submitted that after preparation of final bill it was noticed that an overpayment of Rs. 8.40 crore and Rs. 4.17 crore has been done to the petitioner in Package Nos. 43 and 46 and 44 and 45 respectively. In response to para 4 (xxxi), it is submitted that the petitioner has failed to rectify the defective work within the defect liability period, despite receiving instructions from higher authorities during inspection of the site. Since, the final bill amount was negative, no further payments was due to the petitioner. In response to para 4 (xxxii), it is submitted that the Chief Engineer, Water Resources Department Motihari, rejected the petitioner's claim based on the failure to comply with instructions to rectify substandard work during inspection. This was further confirmed by Letters from the Superintending Engineer and Executive Engineer. In response to para 4 (xxxiii), it is clarified that the respondents have not said the petitioner is "shying away" as the final bill was prepared, and the final bill amount was negative, indicating that overpayment had been made to the petitioner. In response to para 4 (xxxiv), it is submitted that it is true that a letter was given to pay Rs. 8.40 crore to the respondents after the final bill was accepted by the petitioner.

25. In response to para 5 (B), it is submitted that the petitioner and respondent signed the agreement before starting the work and as the petitioner has accepted and agreed to the terms of the contract, including Clause 25, which provides for arbitration. If the petitioner had any objections, they should have raised it at the time of the agreement. In response to para 5 (C), it is submitted that Clause 25 of the agreement provides for the appointment of an arbitrator only by the Engineer-in-Chief, Water Resources Department or administrative head of the State. The

respondents have rejected the contractor's claim on the basis of real facts, with the final bill reflecting an over payment done to the petitioner. In response to para 5 (D), it is submitted that since Clause 25 of General Conditions of Contract is part of the agreement, the petitioner should have raised any objections to it during the time of the agreement, not after the work was completed. In response to para 5 (H) it is submitted that the action and conduct of the petitioner is illegal for raising an objection to Clause 25 of the agreement. In response to para 5 (1)(i) it is submitted that already an overpayment of Rs. 10.80 crore has already been made to the petitioner, so no further payment is due. (ii) The petitioner's demand are based on the final bill of measurements accepted by their authorized person. (iii) The petitioner's authorized person has examined the records and was well known about all activities and was explained about the facts during meetings with the Chief Engineer, Water Resources Department, Motihari. In response to para 5 (J), it is submitted that :Clause 1A of the General Conditions of Contract permits the respondents to recover any amount from the security deposit deducted from running bill and deposited at the time of agreement. If the petitioner wants to deposit recoverable amount requested to either pay by other mode i.e., through bank demand draft or e-transaction the respondents have no objection at all. In response to para 5 (K): The arbitration clause (Clause 25 of General Conditions of Contract) is available in the agreement to resolve any dispute and it was agreed upon at the time of the contract. The petitioner has no right to object to it at this stage. In response to para 5 (N): Clause 41 of the General Conditions of Contract explains about the refund of security deposit amount. It says that security deposit amount shall be repaid to the contractor after all defects have been corrected and after recovering any dues. Since, overpayment was detected, the security deposit will be adjusted accordingly. In response to para 5 (P) it is submitted that : overpayment was identified in Package Nos. 46, 43, 44, and 45. Measurements were verified at the time of the final bill and were accepted by the petitioner's authorized person. In response to para 5 (Q): The final bills for Package Nos. 43, 44, 45, and 46 were negative. As per the final bill, overpayment of Rs. 4.61 crore was done in package Nos. 43, 44 and 45 and Rs. 10.80 crore in Package No. 46, and recovery is being done as per the agreement. Response to para 5 (S): The petitioner's objection to the arbitration clause (Clause 25) is invalid since it was part of the agreement, and the petitioner should have raised any concerns at the time of signing the agreement. response to para 5 (T): it is submitted that the matter of this writ petition is not as per the agreement between the petitioner and respondents. The respondents' act is not illegal exercise of executive power but within their legal rights, as per the contract, between the petitioner and the respondents to recover overpaid amounts.

26. A rejoinder to the counter affidavit was filed on behalf of the petitioner, and reiterates that no

amount of money recoverable from them, and the respondents have no right to recover any amount of money. The petitioner asserts that the work done was not of inferior quality, and all payments made to the petitioner were valid, legal, and justified. It is submitted by the petitioner that the respondent No. 3 was under contractual liability to make these payments, is now attempting to illegally and arbitrarily recover huge amount of money from the petitioner under the false and belated pretext of inferior quality of work and over payment. The petitioner categorically denies the content of paragraphs 6, 9-19, and 23 of the counter affidavit dated 13.11.2019, and further denies the contents of paragraph Nos. 25-30, 33, 37, 39, 41-46, 49-70, 71, 81, 82, 84-88, 91, 93, 95 and 98 of the counter affidavit, which contain respondent No. 3's replies to the writ petition.

27. It is submitted in the rejoinder that in response to paragraph 20, the petitioner acknowledges that an amount of Rs. 2,40,36,320/- has been recovered

from the petitioner, however, the same was done illegally, and vehemently denies any amount recoverable from them. In response to paragraph Nos. 22, 28, and 56, the petitioner clarifies that its representative signed the measurement book under protest, as the revised measurements in the final bill are disputed and unacceptable to petitioner. However, the petitioner's representative signed it under pressure and coercion by the officials of respondent No. 3. Therefore, the signature should not be considered as an acceptance of the revisions. The petitioner further denies all content in the counter affidavit that pertains to the merits of the dispute, which should be adjudicated by an arbitrator appointed by this Hon'ble Court as prayed for in the writ petition. Regarding paragraph Nos. 24, 74-76, 77, 78, 80, 83, and 92 of the counter affidavit, where respondent No. 3 claims that since the petitioner agreed to the General Conditions of Contract, therefore, they cannot question Clause 25 (arbitration clause) as illegal and unenforceable. In response to this, the petitioner submits the following:

"The Respondent No. 3 has not denied that although both the parties intended to arbitrate, the arbitration clause, especially the process of appointment of an arbitrator, is illegal, being in violation of Section 12(5) read with Schedule VII of the Arbitration and Conciliation Act, 1996. Therefore, this amounts to an admission on the part of Respondent No. 3 of Grounds A-G raised by the Petitioner in the present writ petition."

In paragraph No. 74, respondent No. 3 admits that "*As per agreement (Clause 25) Engineer in Chief North Water Resources Department or administrative head of the department is the competent authority to appoint an arbitrator*".

28. The petitioner contends that an illegal arbitration agreement cannot bind a party through estoppel. As the agreement was a standard form contract, the petitioner had no negotiating power to alter the arbitration clause, and thus it should be interpreted

in favour of the petitioner as per the C*ontra Proferentem Principle*. The agreement was entered into in the year 2009 and the amendment to the Arbitration and Conciliation Act, 1996 in 2015, rendered the arbitration clause illegal, after insertion of Section 12(5) and Schedule VII. These amendment even applies to agreement entered into before 23.10.2015 as long as, arbitration proceedings commenced after 23.10.2015, as held by the **Supreme Court in BCCI v. Kochi Cricket (P) Ltd.** reported in **(2018) 6 SCC 287**. Therefore, the objection that the petitioner should have raised the issue at the time of entering the agreement is unsustainable.

29. In response to paragraph Nos. 24, 28, and 29 of the counter affidavit, respondent No. 3 claims there is no dispute under the contract to arbitrate as the present case is of recovery of overpaid amount and the petitioner denies this assertion. The respondent No. 3 cannot unilaterally decide whether there is any dispute or not, especially when the petitioner is aggrieved by the certain actions and inactions of respondent No. 3 under

the contract. These actions, including withholding bank guarantees and security deposits and seeking to recover amounts, after the completion of the Defect Liability Period, were in breach of the contract and they must be adjudicated by an arbitrator. The petitioner further asserts that it is undisputed that the Defect Liability Period for the project ended on 30.06.2017, and as per Clause 6 of the General Conditions of Contract, the respondents cannot claim or dispute regarding payment on account of sufficiency or measurement of work after the completion of the Defect Liability Period. The petitioner also notes that respondent No. 3 has failed to explain why they seek to recover amounts from the petitioner on the allegation of inferior quality of work and over payments after the Defect Liability Period ended. Furthermore, respondent No. 3 has not adequately addressed to the breach of other contractual terms, such as Clauses 1A and 41 of the General Conditions of Contract and Clause 6 of the Special Conditions of Contract. Therefore, the Respondent No.

3's actions are in violation of its contractual obligations as well as under Article 14 of the Constitution of India, as submitted by the petitioner in the grounds J-R of the Writ petition.

30. A counter affidavit to Interlocutory Application has also been filed on behalf of respondent No. 3. Counter affidavit disclose that the statements made by the petitioner in the Interlocutory Application are misleading and misconceived, and hence vehemently denied. It is averred in the counter affidavit that the respondent has carefully considered every aspect presented by the petitioner and has passed the order accordingly, adhering to the Principles of Natural Justice. It is further submitted by the respondent that the concerned Chief Engineer has followed the provisions of Clause 25 of the General Conditions of Contract and passed the order in accordingly. Therefore, the claim that the provisions of Clause 25 were not followed is false. Regarding the Principles of Natural Justice, it is submitted that these principles are flexible

and in the absence of real prejudice, mere non-grant of hearing shall not necessarily affect the order. Natural justice is a flexible tool in the hands of judiciary to remedy injustice in appropriate cases. The breach of the *audi alteram partem* rule alone does not automatically lead to the conclusion that prejudice caused occurred; prejudice caused must be demonstrated. The respondents further submit that violations of procedural or substantiate provisions of law embody the Principles of Natural Justice do not automatically invalidate an order unless prejudice to the litigant is caused. In cases where no prejudice is proven, the order remains valid unless the law mandates otherwise. Prejudice cannot be based merely on apprehension of a litigant; it must be a definite inference drawn from the situation.

31. In support of their contention, the Learned counsel for the respondents placed reliance on the decision of Hon'ble Supreme Court in the case of **Managing Director, ECIL v. B Karnakumar** reported in **(1993) 4 SCC 727**, in which the Hon'ble Apex Court

held that the Principles of Natural Justice are not to be invoked automatically but should be examined in the context of each case. If it is found that the denial of a report did not affect the ultimate findings or punishment, the court should not interfere with the order. Courts should assess whether the non-supply of the report made a significant difference to the result.

32. The Learned counsel further placed reliance in the case of **State Bank of Patiala v. S.K. Sharma** reported in **(1996) 3 SCC 364**, in which the Hon'ble Supreme Court emphasized that violations of procedural rules in disciplinary proceedings do not automatically invalidate the proceedings. The Court or Tribunal must examine whether the violation caused prejudice to the employee or whether it was a mere technicality that did not affect justice. The Court must distinguish between violations of procedural rules that are substantive and those that are procedural. If the violation of a procedural provision is of a mandatory character and causes prejudice, the order may be set

aside. However, in cases where the violation is not mandatory and does not cause prejudice, the order may still stand. Additionally, where there is no formal statutory requirement, but only an implied obligation to observe natural justice, the court must consider whether the person was given a fair hearing. If the violation was merely technical and did not affect the fairness of the hearing, the order should not be set aside. In conclusion, when applying the rule of *audi alteram partem*, the primary objective is to ensure a fair hearing and prevent a failure of justice. Courts must carefully consider whether the violation of procedural rules has led to a real injustice, and balance this against the public interest and other relevant factors.

33. The Learned counsel for the respondents further placed reliance on the decision of Hon'ble Supreme Court in the case of **P.D. Agrawal v. State Bank of India** reported in **(2006) 8 SCC 776**, in which their Lordships observed that the Principles of Natural Justice have evolved over time. It held that the

violation of these principles does not automatically render an order invalid. The Court emphasized that real prejudice must be shown, rather than merely asserting a technical breach. The principle of *audi alteram partem* (the right to a fair hearing) should be applied based on the facts of the case and not in a rigid, formulaic manner. In the case of **Union of India v. Alok Kumar (2010) 5 SCC 349**, it is clarified that the breach of natural justice should not automatically lead to a presumption of prejudice. Instead, prejudice must be a definite inference arising from the circumstances, not merely an apprehension. In cases where the rule is directory and not mandatory, actual prejudice needs to be proven. Similarly, in **State of U.P. v. Sudhir Kumar and others (2020 SCC OnLine 847)**, the Apex Court reiterated that a breach of natural justice does not automatically result in prejudice. The court must assess whether real prejudice was caused, based on the facts and circumstances of each case.

34. Learned counsel for the respondents submits that in the present case, the petitioner failed to demonstrate as to how he has been prejudiced by not being granted an opportunity of hearing. The petitioner further submitted an application on 30.07.2019 before the Chief Engineer, Water Resources Department, Motihari under Clause 25 of the General Conditions of Contract and prayed for settlement and final bill for package No. 8, enclosing the agreement, final bill, and three Letters as supporting documents. The petitioner was present at the time of the final measurement, and petitioner's representative signed on the final measurement report. The final bills revealed that the petitioner has received an excess amount. It is submitted that the Chief Engineer, after considering all the evidence, issued an order dated 30.08.2019, stating that an amount of Rs. 51,02,349 was recoverable from the petitioner. The Chief Engineer's decision was based on documentary evidence, and even on non granting of opportunity of personal hearing, no prejudice was

caused to the petitioner. Therefore, there was no violation of the Principles of Natural Justice.

35. It is averred in the counter affidavit that the petitioner also made an application on 30.07.2019 regarding payments for package Nos. 39, 41, and 42 and after reviewing the documentary evidence, the Chief Engineer rejected the claims on 30.08.2019, stating that the claim of price escalation was not maintainable. It is submitted that the Chief Engineer followed the Principles of Natural Justice, and the petitioner was not prejudiced by the lack of personal hearing. Additionally, it was noted that the petitioner failed to complete the work within the stipulated time period and the work quality was substandard and inferior. Final measurements of the work was done, in the presence of the petitioner's representative and the final bill revealed that excess payments were made to the petitioner and these amounts were recoverable from him and despite repeated requests, the petitioner failed to refund the

excess amount. The Chief Engineer, after careful consideration of all relevant evidence, found that the petitioner's claim is unsustainable and the respondents have followed the Principles of Natural Justice. The petitioner's request for personal hearings did not demonstrate how their case would improve or how they were prejudiced. Hence, the Principles of Natural Justice were adhered to, and there was no need to quash the order.

36. Heard the Learned Senior counsel for the petitioner as well as the Learned counsel for the respondents.

37. The issue in these proceedings is whether the respondent's action in withholding 50% of the retention money is contrary to Clause 41 of the General Conditions Contract of the contract, and whether a Writ of mandamus should be issued directing the respondent to release the retained Security Amount under Clause 1A of General Conditions of Contract.

38. In this context, the Learned Senior counsel for the petitioner submitted that the Hon'ble Apex Court has consistently held that any violation of contract terms by a State Authority can be challenged in the Writ jurisdiction under Article 226 of the Constitution of India, and the High Courts can issue directions to prevent arbitrary actions by the State, and in this case, the respondent's action is in clear violation of the contract, necessitating intervention by the Hon'ble Court to direct the release of the withheld 50% of the security deposit.

39. It is further submitted by the Learned Senior counsel for the petitioner that the respondent's attempt to make claims against the petitioner after the completion of the works and the Defects Liability Period appears to be a mere afterthought, aimed at coercing the petitioner into forgo the amount due under the contract, including retention money under Clause 41. This action, being without proper adjudication as per

the contract terms, constitutes an illegal exercise of executive power that is arbitrary, *mala fide*, and in violation of Article 14 of the Constitution of India.

40. In respect of Clause 25 (Settlement of Disputes and Arbitration) of General Conditions of Contract, the Learned Senior counsel for the petitioner submitted that Clause 25 (Settlement of Disputes and Arbitration) of the General Conditions of Contract is in conflict with Section 12 of the Arbitration and Conciliation Act, 1996, and is therefore invalid and unenforceable. The issue also involves the applicability of the Arbitration Clause in Clause 25 of the General Conditions of Contract and which mandates arbitration for dispute resolution, except when the Engineer-in-Chief, North Water Resources Department, cannot appoint an arbitrator for any reason.

41. In 2015, amendments to Section 12 of the Arbitration and Conciliation Act, 1996, along with its VII Schedule, made it impermissible for one party

(Engineer-in-Chief North, Water Resources Department) to appoint an arbitrator unilaterally without the other party's consent. However, Clause 25 excludes arbitration if the respondents are unable to appoint an arbitrator, which now conflicts with the amended law. While the parties intended to resolve disputes through arbitration, Clause 25 is now inconsistent with the amended law, as the Engineer-in-Chief can no longer unilaterally appoint the arbitrator without the petitioner's agreement.

42. It is further argued by the Learned Senior counsel for the petitioner that the petitioner cannot avail the remedy under Section 11 of the Arbitration and Conciliation Act, 1996, for the appointment of an arbitrator. Under Section 11, an application can be made only if a party "fails" to take the necessary steps as outlined in the section. Only when the parties fail to agree within thirty days of a request, or when a party fails to act under the agreed

procedure, or when the appointed arbitrators or a designated person fail to perform their duties. The relevant portion of Section 11 is as follows:

> *"11. Appointment of arbitrators. – If the parties fail to agree on an arbitrator within thirty days of a request by one party, the appointment shall be made by the Supreme Court or High Court, or any designated person or institution."*

43. Additionally, if any party, appointed arbitrators, or a designated person fails to act, a party may request the Court to take the necessary action.

44. The Learned Senior counsel for the petitioner further submits that from the above, it is clear that an application under Section 11 can only be filed if a failure occurs on the part of either party, as per the conditions laid down in the section. In this case, no such failure has occurred. Therefore, an application under Section 11(6) is not maintainable in the present matter.

45. The Learned Senior counsel for the

petitioner further submits that the Court must adopt a pragmatic approach and not a pedantic one, while interpreting arbitration clauses and faced with an unworkable clause, it is the duty of the Court to make it workable while staying within the boundaries of law, ensuring the parties' intention to arbitrate is upheld. The Learned Senior counsel placed reliance on the judgment of the Hon'ble Supreme Court in ***Enercon (India) Ltd. v. Enercon Gmbh*** **(2014) 5 SCC 1**, in which their Lordships have held as follows:

> *"88. In our opinion, the courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause. Therefore, when faced with a seemingly unworkable arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law, without stretching it beyond the boundaries of recognition. In other words, a common sense approach has to be adopted to give*

effect to the intention of the parties to arbitrate…."

46. The Learned Senior counsel placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd.*** **(2022) 1 SCC 75,** in which their Lordships have held as follows:

> *"18. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a constitutional right. In Nivedita Sharma v. COAI5, this Court referred to several judgments and held: (SCC p. 343, para 11)*
>
> *"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation L.*

Chandra Kumar v. Union of India6. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

(emphasis supplied)

It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in *exceptional rarity, wherein one party is left remediless under the statute or a clear "bad faith" shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient."*

47. The Learned Senior counsel further placed reliance on the judgment of the Division Bench of Jharkhand High Court in the case of **Jharkhand Urja Vikas Nigam Ltd. v. Rites Ltd. (2024 SCC Online Jhar 1786)** in which their Lordships have appointed an arbitrator while dealing with a petition under Article 226 of the Constitution. Therefore, it is argued that, this indicates that in exceptional cases, like the present one, where a party is left without any remedy, the Court can exercise jurisdiction under Article 226.

48.The Learned Senior counsel further placed reliance on the judgment of the Hon'ble Supreme Court in **B C Chaturvedi v. UOI (1995) 6 SCC 749** wherein their Lordships have held that the High Court's power under Article 226 is wide enough to do complete justice between the parties. Even in the absence of a provision like Article 142, the High Court has the authority to mold relief to achieve the ends of justice.

49. The Learned Senior counsel for the petitioner submits that in exceptional cases, where arbitration becomes unworkable due to legal changes, the petitioner can invoke the extraordinary writ jurisdiction under Article 226. This constitutional power, a part of the basic structure of the Constitution, cannot be restricted by statutory provisions.

50. The Learned Senior counsel for the petitioner further submits that in the present case, the arbitration clause cannot be strictly enforced due to changes in law. The petitioner does not consent to the unilateral appointment of the arbitrator by the respondent. Therefore, the writ petition is maintainable and ought to be allowed.

51. In the aforesaid facts and

circumstances, the petitioner has prayed that this Hon'ble Court may be pleased to declare the action of the respondent in withholding the amounts payable under the contract as illegal and arbitrary. Further, petitioner seeks a direction in the nature of Mandamus directing the respondents to release the withheld amounts, including retention money in the form of the following Bank Guarantee Nos. 0195617IPG000105 dated 04.07.2017 valid upto 30.10.2025, 053417IGPER0089 dated 30.09.2017 valid upto 30.09.2025, 377BGPG162440001 dated 31.08.2016 valid upto 30.09.2025 and 377BGPG170890005 dated 28.03.2017 valid upto 27.03.2025 for total value of amounting to Rs. 6,03,50,000/- in addition to a further sum of Rs. 2,99,00,000/- deposited by way of security. The petitioner also prays for the release of the withheld amount of Rs.3.61 crores in terms of the contract, particularly, under Clause 41 of the General Conditions of Contract and seek further appropriate orders.

52. It is further prayed that this Hon'ble

Court may be pleased to declare that Clause 25 of the General Conditions of the Contract as non-est, invalid and unenforceable, being in conflict with Section 12 read with Schedule VII of the Arbitration and Conciliation Act, 1996 as amended. Alternatively, it is prayed that the agreed dispute resolution mechanism under the contract may be given effect to and that all the claims of the respondents be referred for resolution through Arbitration, as the period of contract is completed and the Defects Liability Period is already completed.

53. The Learned counsel for the respondents submits that while the Writ petition initially sought for various reliefs, but during course of submissions, only the following relief were submitted for consideration before this Court i.e., (i) to declare that Clause 25 (ii) of General Conditions of Contract in conflict with Section 12 read with scheduled VII of Arbitration Act, (ii) direction for resolution of disputes

through Arbitration (iii) Grant of an interim order until dispute resolution.

54. In response to the submissions made by the Learned Senior counsel for the petitioner, the Learned counsel for the respondents submits that the NIT for the restoration of the Eastern Gandak Canal system, including the Gandak Barrage under the Rashtriya Sam Vikas Yojana, was issued in 46 packages across 13 Divisions. The agreement was executed on 06.08.2009, with a completion period of 25 months from the work order. The Chief Engineer directed the work to proceed, and the completion date was set as 05.09.2011.

55. Further, the Learned counsel for the State submits that the writ petitioner has now limited their prayer to the issue of arbitration, and, therefore, details of the case are not elaborated in these submissions. During measurements conducted in the presence of the petitioner's representative, it was found

that Rs. 10,80,49,567.33/- was recoverable, of which Rs. 2,40,36,320/- has already been recovered, leaving a balance of Rs. 8,40,13,247/-. Clause 7 of the Agreement (at page 132 of the counter affidavit) stipulates that any certificate issued by the Engineer-in-charge concerning work or materials may be modified by subsequent certificates, including the final certificate by a competent authority. Rule 294 of the Bihar Public Works Department Code (Annexure-K/1 at page 134) grants power to the Executive Engineer, however, Rule 294(iv) restricts the Executive Engineer from sanctioning amounts in excess of the revised estimates approved by higher authorities.

56. It is further submitted by the Learned counsel for the respondents that in the present writ case, Clause 25 has been challenged. Clause 25 prescribes certain formalities that must be completed before an arbitrator can be appointed. It is submitted by the Learned counsel for the respondents that in the case

of **Nirman Engicon Pvt. Ltd. v. The State of Bihar (Request Case No. 105 of 2019)**, Clause 25 was reviewed, and it was held that a petition under Section 11(6) of the Arbitration and Conciliation Act for the appointment of an arbitrator was not maintainable. The petitioner was directed to follow the mechanism prescribed under Clause 25 of the Agreement. It is further submitted that a similar order was passed in other Request Cases by Hon'ble the Chief Justice, with the judgment in Request Case No. 105 of 2019 was relied upon.

57. The petitioner's supplementary affidavit (Annexure-P/28) claims to have involved Clause 25 of the General Conditions of Contract before the Chief Engineer. However, the petitioner is now challenging the validity of Clause 25, which cannot be done after the agreement was executed and commencement of work. The Writ petition was filed in 2019, and raising such a challenge in 2025 is not maintainable, therefore, the

prayer should be rejected. The appointment of the arbitrator falls within the jurisdiction of the Hon'ble Chief Justice of the Patna High Court in accordance with the 2015 amendment to the Arbitration and Conciliation Act. Accordingly, the Writ court, exercising its jurisdiction on Article 226, cannot directly appoint an arbitrator, especially when the petitioner has already invoked under Clause 25 of the Agreement.

58. It is further submitted by the Learned counsel for the respondents that the judgment in ***Jharkhand Urja Vikas Nigam Ltd. v. Rites Ltd.* (2024 SCC Online Jhar 1786)**, holds only persuasive value and is not directly applicable to the present case, as the facts differ significantly. In contractual matters, the terms of agreement are binding, and the stipulations therein must be adhered to. Therefore, the present Writ petition is fit to be rejected.

59. In dealing with the issue of arbitration, this Court deems it appropriate to reproduce Section 11

of the Arbitration and Conciliation Act, 1996 for a better appreciation of the relevant legal provision:

> *"11. Appointment of arbitrators.-(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.*
>
> *2)Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.*
>
> *(3)Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.*
>
> *(3A)[The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I, for the purposes of this Act:*
>
> *Provided that in respect of those High Court jurisdictions, where no graded arbitral institution are available, then, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be an arbitral institution for the*

purposes of this section and the arbitrator appointed by a party shall be entitled to such fee at the rate as specified in the Fourth Schedule:

Provided further that the Chief Justice of the concerned High Court may, from time to time, review the panel of arbitrators.]

(4) If the appointment procedure in sub-section (3) applies and

(a)a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b)the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

[the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be]

(5)Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree [the appointment shall be made on

an application of the party in accordance with the provisions contained in sub-section (4).] [Substituted by Act No. 33 of 2019, dated 9.8.2019.].

(6)Where, under an appointment procedure agreed upon by the parties.

(a)a party fails to act as required under that procedure; or

(b)the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c)a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

[the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be] [Substituted by Act No. 33 of 2019, dated 9.8.2019.] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

*(6A)[***] [Omitted*

(6B)[The designation of any person or institution by the Supreme Court or, as the case may be, the High

Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.] [Inserted by Act No. 3 of 2016 dated 31.12.2015.]

*(7)[***] [Omitted '(7)*

(8)[[The arbitral institution referred to in sub-sections (4), (5) and (6)] [Substituted by Act No. 3 of 2016 dated 31.12.2015.], before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to-

(a)any qualifications required for the arbitrator by the agreement of the parties; and

(b)the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.]

(9)In the case of appointment of sole or third arbitrator in an international commercial arbitration, [the arbitral institution designated by the Supreme Court] [Substituted 'the Supreme Court or the person or institution designated by that Court' by Act No. 33 of 2019, dated 9.8.2019.] may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

*(10)[***] [Omitted '(*

(11)[Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to different arbitral institutions, the arbitral institution to which the request has been first made under the relevant sub-section shall be competent to appoint.

(12)Where the matter referred to in sub-sections (4), (5), (6) and (8) arise in an international commercial arbitration or any other arbitration, the reference to the arbitral institution in those sub-sections shall be construed as a reference to the arbitral institution designated under sub-section (3A).

(13)An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party.

(14)The arbitral institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal subject to the rates specified in the Fourth Schedule.

Explanation. - For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitration's (other than international commercial arbitration) where parties have agreed for determination of fees as *per the rules of an arbitral institution.]"*

60. From the facts and circumstances stated above, it is undisputed that as per the Clause 41 of the General Terms and Conditions of the Contract the respondent was under obligation to release 50% of the Security Deposit deducted in the running account bills upon completion of the project with the remaining 50% is to be released after completion of the Defect Liability Period. Since no defects remained unrectified, thereafter, and the respondent released 50% of the retention money, on completion of the project. However, the remaining 50% has not been released by the Respondent till date, despite of completion of the Defect Liability Period in the year 2017. For the aforesaid, purpose the petitioner has made multiple representations to the respondent seeking the release of the balance 50% of the retention money which is in the form of a Bank Guarantee and deposit however, the same remained unconsidered.

61. A Division Bench of this Court in

Ramadhar Sah Vs. The State of Bihar & Ors. passed in **CWJC No. 5589 of 2024** (paragraph Nos. 2, 5 and 6) vide judgment dated 08.05.2024 held as follows:

> *7. We do not find ourselves persuaded to uphold the forfeiture of EMD on the basis of a Letter which was not incorporated in the NIT. If the conditions in the Letter was incorporated in the NIT, definitely the consequence of forfeiture could have visited the petitioner. Clause 16.6 as we extracted from the NIT does not contemplate a situation of false representation resulting in forfeiture of the EMD.*
>
> *"8. On the above reasoning, we find the forfeiture to be illegal and not in consonance with the NIT. Annexure-P-10 order to the extent it forfeits the EMD is set aside. The petitioner shall be returned the EMD within a period of one month from today, failing which interest @ 6% shall be levied."*

62. In the aforesaid case, the Hon'ble

Division Bench opined that forfeiture of Bank Guarantee is illegal.

63. On perusal of entire record, considering the submissions and the contents of the written arguments filed by both the parties, it is evident that payments were made to the petitioner for package Nos. 43 – 45 as well as package No. 46 i.e., after defects liability period. Later, respondents retained 50 % of the security deposit of the petitioner, without the consent of the petitioner, with a contention that overpayments were done.

64. In the light of aforementioned facts and circumstances particularly regarding the withheld amounts, including the retention money in the form of a Bank Guarantee, this Court is of the considered opinion that the respondent's failure to release the retention and withheld amounts, to which the petitioner is legally and contractually entitled, is illegal and arbitrary in nature. This is because the works assigned to the petitioner by

the respondents have been duly completed by him. Further, the respondents did not mention any defect of the work, within the defect liability period. Admittedly, the final bill was prepared by the respondents for which payments were made. Any dispute between the parties has to be resolved by an Arbitrator. In view of the amendment in Arbitration Act, Clause 25 of the agreement is not valid in the eye of law. Therefore, the respondents are directed to refund the withheld amounts, including the retention money in the form of a Bank Guarantee, forthwith.

65. With regard to the resolution of other disputes, in question, through arbitration, this Court is of the considered view that it as appropriate to direct the petitioner to move appropriate application under Section 11 of the Arbitration and Conciliation Act, 1996, Appointment of Arbitrators by the Chief Justice of Patna High Court Scheme, 1996 and also under Article 226 of the Constitution of India. As per the above rule

and law, the Hon'ble Chief Justice is only empowered to appoint an Arbitrator.

66. In view of the above discussion, the Writ petition is partly allowed.

67. Interlocutory Application(s), if any, shall stand disposed of.

(G. Anupama Chakravarthy, J)

Spd/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	07.02.2025
Transmission Date	