



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 08th MAY, 2024

IN THE MATTER OF:

+ **W.P.(C) 3256/2024 & CM APPL. 13420/2024**

UP STATE BRIDGE CORPORATION LIMITED & ANR.

..... Petitioners

Through: Mr. Harpreet Singh and Mr. Anil Kumar, Advocates.

versus

NATIONAL HIGHWAYS AND INFRASTRUCTURE

..... Respondent

Through: Mr. Kunal Tandon, Ms. Niti Jain, Advocates with Ms. Sonu Sharma, Legal Officer NHIDCL.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioner has approached this Court challenging the Communication dated 09.02.2024 passed by the Respondent declaring the Petitioner as a "Non-Performer" and holding that the Petitioner will not be able to participate in any bid with the Ministry of Road, Transport and Highways or its executing agencies, till such time the name of the Petitioner is removed from the list of Non-Performers. The said Communication also clarifies that the Petitioner shall include its JV partners, promoters whose credentials were considered while qualifying them for the project of "Construction of 2 laning with paved shoulder of new Greenfield alignment from Chochenpheri at Km. 52.000 to Helipad near Menla at Km. 82.000 of Rhenoc-Menla spur (NH-717 B) Package-III on EPC basis under SARDP-NE Phase 'A' in the State of Sikkim".
2. The facts, in brief, leading to the filing of the instant writ petition are



that the Respondent floated a tender for the work of "Construction of 2 laning with paved shoulder of new Greenfield alignment from Chochenpheri at Km. 52.000 to Helipad near Menla at Km. 82.000 of Rhenoc-Menla spur (NH-717 B) Package-III on EPC basis under SARDP-NE Phase 'A' in the State of Sikkim". The Petitioner was the successful bidder and the Petitioner was offered the work. The Respondent by a letter dated 28.10.2020 gave its acceptance to the Petitioner for the contract at a bid price of Rs.532,52,00,000/-. In pursuance of the terms of the bid document, the Petitioner furnished the performance security of Rs.26,62,60,000/- and an additional performance security of Rs.3,16,82,000/- as per clause 2.21 of the RFP. The appointed date of the project was declared as 10.12.2020 and the work was to be completed within 36 months from the said date. The Petitioner started the work. Various disputes has arisen between the Petitioner and the Respondent as to whether the Petitioner has been given the Right of Way (ROW) for the performance of the work or not.

3. Material on record discloses that it is the allegation of the Respondent that the Petitioner has been exceedingly slow with the work. It is the allegation of the Respondent that as per Clause 10.2 (iv) (h) of Article 10 of the RFP, the Petitioner had to ensure that all the designs and drawings shall be approved from the Authority's Engineer which the Petitioner has failed to achieve. There are many other aspects on which the Respondent is not satisfied with the performance of the Petitioner. Material on record discloses that personal hearings were afforded to the Petitioner to explain the reasons regarding delay in the performance of the contract. Material on record also discloses that two cure notices dated 24.11.2022 and 11.10.2023 were also issued to the Petitioner. It is the case of the Respondent that despite the fact



that the Petitioner was given several opportunities to rectify the defects, the Petitioner has not shown any improvement and has been extremely slow with the performance of the contract. Since the performance of the contract in executing the work was exceedingly slow, the Impugned Notice dated 09.02.2024 was issued to the Petitioner and considering the non-professional attitude of the Petitioner on account of contractual defaults, breaches, and willful non-performance in fulfillment of contractual obligations as per the provisions of the contract agreement and blaming the authority for its own accountabilities the Petitioner was declared as a "Non-Performer". Since the Petitioner was declared as a "Non-Performer", the name of the Petitioner has been put in the name of Non-Performers list and the Petitioner has been debarred from participating in any bid with the Ministry of Road, Transport and Highways or its executing agencies, till such time the Petitioner is removed from the list of Non-performers.

4. It is this Communication dated 09.02.2024 which is under challenge in the present writ petition.

5. Learned Counsel appearing for the Respondent has appeared on advance notice.

6. It is the contention of the learned Counsel for the Petitioner that the Impugned Communication dated 09.02.2024 has been passed on the basis of a Circular dated 06.10.2021 whereas, the letter of award was issued on 28.10.2020 and, therefore, the Respondent did not have the power to impose any sanction on the Petitioner because the signing of the contract agreement is prior to the date of issuance of the Circular dated 06.10.2021 which is not applicable to the contract. It is further stated that the Impugned Communication has been passed without following the principles of natural



justice. It is stated that on the one hand the Petitioner has been asked to continue with the existing contract and on the other hand the Petitioner has been debarred from participating in any bid with the Ministry of Road, Transport and Highways. It is stated that the Respondent cannot be permitted to take contradictory stands at the same time. It is also stated that the Respondent has not performed its part of the obligations and since there is a failure of reciprocal obligations on the part of the Respondent, the Petitioner cannot be asked to perform its part of the contract within a specific time period.

7. *Per contra*, learned Counsel appearing for the Respondent raises the question of maintainability of the writ petition inasmuch as, there is an arbitration clause in the contract. It is also stated that the Impugned Communication is appealable before the Appellate Authority, which is the Secretary, Road Transport and Highway Development, under clause 7 of the Circular dated 06.10.2021. He states that in view of the fact that an alternate efficacious remedy is available to the Petitioner, this Court ought not to entertain the present writ petition. Apart from raising the issue of maintainability of the writ petition, the learned Counsel appearing for the Respondent has also highlighted various deficiencies on the part of the Petitioner like Design and Drawing of 3.340 km out of 4.470 km of viaducts have not been submitted by the Petitioner. It is also stated that achievement of project milestone II is also delayed and the financial progress as on 19.11.2023 is only 24.04% which in fact ought to have been 30%. It is stated that despite several opportunities and personal hearing being afforded to the Petitioner and also issuing cure notices, no action has been taken by the Petitioner. It is stated that the decision making process has been fair and



therefore, this Court ought not to exercise its discretion under Article 226 of the Constitution of India.

8. Heard the Learned Counsels for the Petitioner and the Respondent No.2 and perused the material on record.

9. The material on record and the stand taken by the learned Counsel for the Petitioner and the Respondent reveal that there are disputed questions of facts as to whether the progress of the work is exceedingly slow on the part of the Petitioner or not. On the contrary, a categorical stand has been taken by the Petitioner that the Respondent has not performed its part of the obligations and since there is a failure of reciprocal obligations on the part of the Respondent, the Petitioner cannot be asked to perform its part of the contract. There are also serious disputes regarding the quantum of work done by the Petitioner and also a dispute as to whether the reasons for slow progress is bonafide or not.

10. At this juncture, it is relevant to extract the arbitration clause. Article 26 of the contract agreement deals with the dispute resolution mechanism. Article 26 provides that any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties should, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure, failing which the matter shall be referred to arbitration. Clauses 26.3 and 26.4 of the contract agreement are being reproduced as under:

"26.3 Arbitration

(i) Any dispute which remains unresolved between the parties through the mechanisms available/ prescribed in the Agreement, irrespective of any claim value,



which has not been agreed upon/ reached settlement by the parties, will be referred to the Arbitral Tribunal as per the Arbitration and Conciliation Act.

(ii) Deleted

(iii) The Arbitral Tribunal shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 26 shall be final and binding on the Parties as from the date it is made, and the Contractor and the Authority agree and undertake to carry out such Award without delay.

(iv) The Contractor and the Authority agree that an Award may be enforced against the Contractor and/or the Authority, as the case may be, and their respective assets wherever situated.

(v) This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder. Further, the parties unconditionally acknowledge and agree that notwithstanding any dispute between them, each Party shall proceed with the performance of its respective obligations, pending resolution of Dispute in accordance with this Article.

(vi) In the event the Party against whom the Award has been granted challenges the Award for any reason in a court of law, it shall make an interim payment to the other Party for an amount equal to 75% (seventy five per cent) of the Award, pending final settlement of the Dispute. The aforesaid amount shall be paid forthwith upon furnishing an irrevocable Bank Guarantee for a sum equal to 120 % (one hundred and twenty per cent) of the aforesaid amount. Upon final settlement of the Dispute, the aforesaid interim payment shall be adjusted and any balance amount due to be paid or



returned, as the case may be, shall be paid or returned with interest calculated at the rate of 10% (ten per cent) per annum from the date of interim payment to the date of final settlement of such balance.

26.4 Adjudication by Regulatory Authority, Tribunal or Commission

In the event of constitution of a statutory regulatory authority, tribunal or commission, as the case may be, with powers to adjudicate upon disputes between the Contractor and the Authority, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 26.3, be adjudicated upon by such regulatory authority, tribunal or commission in accordance with the Applicable Law and all references to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or court of competent jurisdiction, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law."

11. The learned Counsel appearing for the Petitioner very strenuously contends that existence of arbitration clause is not a bar for this Court to entertain the present writ petition and if the Impugned Communication is not stayed, the Petitioner would be barred from participating in further contracts which amounts to civil death.

12. Learned Counsel appearing for the Petitioner places reliance upon the Judgment of the Apex Court in U.P. Power Transmission Corpn. Ltd. v. CG Power & Industrial Solutions Ltd., (2021) 6 SCC 15. Paragraph No.67 of the said Judgment reads as under:



"67. It is well settled that availability of an alternative remedy does not prohibit the High Court from entertaining a writ petition in an appropriate case. The High Court may entertain a writ petition, notwithstanding the availability of an alternative remedy, particularly: (i) where the writ petition seeks enforcement of a fundamental right; (ii) where there is failure of principles of natural justice or (iii) where the impugned orders or proceedings are wholly without jurisdiction or (iv) the vires of an Act is under challenge. Reference may be made to Whirlpool Corpn. v. Registrar of Trade Marks [Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1 : AIR 1999 SC 22] and Pimpri Chinchwad Municipal Corpn. v. Gayatri Construction Co. [Pimpri Chinchwad Municipal Corpn. v. Gayatri Construction Co., (2008) 8 SCC 172] , cited on behalf of Respondent 1."

13. A perusal of the above paragraph states that the High Court may entertain a writ petition, notwithstanding the availability of an alternative remedy if the writ petition seeks enforcement of a fundamental right; where there is failure of principles of natural justice; where the impugned orders or proceedings are wholly without jurisdiction or the vires of an Act is under challenge. It is well settled that Courts while exercising jurisdiction under Article 226 of the Constitution of India normally do not interfere with when there is an alternate efficacious remedy available and when the parties have themselves agreed to resolve their dispute through arbitration.

14. This Court is of the opinion that in the present case, there are disputed questions of facts. The disputed questions of facts can be established only by adducing both oral and documentary evidence by both sides and the same



cannot be established only by leading evidence on affidavit.

15. The Apex Court in Empire Jute Co. Ltd. v. Jute Corpn. of India Ltd., (2007) 14 SCC 680 has observed as under:

"18. The power of judicial review vested in the superior courts undoubtedly has wide amplitude but the same should not be exercised when there exists an arbitration clause. The Division Bench of the High Court took recourse to the arbitration agreement in regard to one part of the dispute but proceeded to determine the other part itself. It could have refused to exercise its jurisdiction leaving the parties to avail their own remedies under the agreement but if it was of the opinion that the dispute between the parties being covered by the arbitration clause should be referred to arbitration, it should not have proceeded to determine a part of the dispute itself.

19. Similar question arose for consideration in Bisra Lime Stone Co. Ltd. v. Orissa SEB [(1976) 2 SCC 167 : AIR 1976 SC 127] wherein it was held that the High Court may refuse to exercise its jurisdiction, if there exists a valid arbitration clause stating: (SCC p. 174, para 24)

"24. It is then submitted that this Court should not use its discretion in favour of arbitration in a matter where it is a pure question of law as to the power of the Board to levy a surcharge. This submission would have great force if the sole question involved were the scope and ambit of the power of the Board under Sections 49 and 59 of the Act to levy a surcharge, as it was sought to be initially argued. The question in that event may not have been within the content of Clause 23 of the agreement. But all questions of law, one of which may be interpretation of the agreement, need not necessarily be withdrawn from the domestic forum because the court has discretion under Section 34 of the Arbitration Act or under Article 226 of the



Constitution and that the court is better posted to decide such questions. The arbitration Clause 23 is a clause of wide amplitude taking in its sweep even interpretation of the agreement and necessarily, therefore, of Clause 13 therein. We are, therefore, unable to accede to the submission that we should exercise our discretion to withhold the matter from arbitration and deal with it ourselves.”

20. *A similar view was taken by this Court in Sanjana M. Wig v. Hindustan Petroleum Corpn. Ltd. [(2005) 8 SCC 242] holding: (SCC p. 247, paras 12-13)*

“12. The principal question which arises for consideration is as to whether a discretionary jurisdiction would be refused to be exercised solely on the ground of existence of an alternative remedy which is more efficacious. Ordinarily, when a dispute between the parties requires adjudication of disputed question of facts wherefor the parties are required to lead evidence both oral and documentary which can be determined by a domestic forum chosen by the parties, the Court may not entertain a writ application. (See Titagarh Paper Mills Ltd. v. Orissa SEB [(1975) 2 SCC 436] and Bisra Lime Stone Co. Ltd. v. Orissa SEB [(1976) 2 SCC 167 : AIR 1976 SC 127] .)

13. However, access to justice by way of public law remedy would not be denied when a lis involves public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief.”

21. Relying on some of the earlier decisions of this Court, this Court held: (Sanjana M. Wig case [(2005) 8 SCC 242] , SCC p. 248, para 18)

“18. It may be true that in a given case when an action of the party is de hors the terms and conditions



contained in an agreement as also beyond the scope and ambit of the domestic forum created therefor, the writ petition may be held to be maintainable; but indisputably therefor such a case has to be made out. It may also be true, as has been held by this Court in Amritsar Gas Service [Indian Oil Corpn. Ltd. v. Amritsar Gas Service, (1991) 1 SCC 533] and E. Venkatakrishna [E. Venkatakrishna v. Indian Oil Corpn., (2000) 7 SCC 764] that the arbitrator may not have the requisite jurisdiction to direct restoration of distributorship having regard to the provisions contained in Section 14 of the Specific Relief Act, 1963; but while entertaining a writ petition even in such a case, the court may not lose sight of the fact that if a serious disputed question of fact is involved arising out of a contract qua contract, ordinarily a writ petition would not be entertained. A writ petition, however, will be entertained when it involves a public law character or involves a question arising out of public law functions on the part of the respondent.”

22. The legal position has undergone a substantial change, having regard to Section 5 of the Arbitration and Conciliation Act, 1996 vis-à-vis provisions of the Arbitration Act, 1940. The said provision reads as under:

“5. Extent of judicial intervention.— Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.” (emphasis supplied)

16. As stated above, since there are disputed questions of facts and the questions regarding the reciprocal promises, this Court is not inclined to entertain the instant writ petition. Arbitration clause as extracted above shows that it has been decided by both the parties to opt for arbitration to



decide questions that may arise between the parties. This Court in a number of Judgments has held that when there is an arbitration clause exists then the writ courts must not exercise jurisdiction under Article 226 of the Constitution of India [Refer: Gail (India) limited vs. Gujarat State Petroleum Corporation Limited, (2014) 1 SCC 329, Nirmal Software Services Private Limited vs. Dr. Babasaheb Ambedkar Marathwada University and Others, (2019) 7 SCC 356].

17. Learned Counsel for the Petitioner contends that till the Petitioner files an application under Section 9 of the Arbitration and Conciliation Act, the Impugned Communication must be stayed.

18. This Court is of the opinion that the Petitioner has not been able to make out a *prima facie* case in its favour. In any event, when this Court is not inclined to entertain the writ petition on the facts of the case then it is not proper for this Court to grant stay on the operation of the Impugned Communication as it is open for the Court of competent jurisdiction under Section 9 of the Arbitration and Conciliation Act to decide the issue on the merits of the case.

19. In view of the above, this Court is not inclined to entertain the writ petition on the ground that alternate efficacious remedy is available to the Petitioner.

20. Resultantly, the writ petition is dismissed, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

MAY 08, 2024

S. Zakir