

IN THE HIGH COURT OF JHARKHAND AT RANCHI

(Civil Writ Jurisdiction)

WP(C) No. 143 of 2024

M/s A. K. Builders, a partnership firm through its partner Anil Kumar, aged about 62 years, son of Shri Ramayodhya Prasad, resident of Grand State Mod, Carrier Press, Dumka, PO, PS and District Dumka

...Petitioner

Versus

1. The State of Jharkhand through the Secretary, Water Resources Department, Government of Jharkhand, Nepal House, Doranda, PO and PS Doranda, District Ranchi

2.The Secretary, Water Resources Department, Government of Jharkhand, Nepal House, Doranda, PO and PS Doranda, District Ranchi

3.The Chief Engineer, Water Resources Department, Government of Jharkhand, PO, PS and District Deoghar

4.The Superintending Engineer, Irrigation Division, Dumka, PO, PS and District Dumka

5.The Executive Engineer, Irrigation Division, Pakur, PO, PS and District Pakur

...Respondents

**CORAM: HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE NAVNEET KUMAR**

For the Petitioner : Ms. Aparajita Bhardwaj, Advocate
Mr. Kushal Kumar, Advocate

For the Respondents : Mr. M. K. Dubey, AC to AG

Dated: 24th April, 2024

Per, Shree Chandrashekhar, A.C.J.

Aggrieved by the direction contained in the letter dated 15th February 2021 issued by the Executive Engineer requiring M/s A. K. Builders not to continue with the works under Agreement No. SBD-IFB-07/19-20, the petitioner-Firm has approached this Court.

2. In the writ petition, the following prayers have been made:

I. For quashing and setting aside the order as contained in letter no. 58 dated 15.02.2021 (Annexure-8), by the office of Executive Engineer, Irrigation Division, Pakur, respondent no. 5 whereby and whereunder the said respondent has in reference to some oral instructions given by the respondent no. 2 in the most arbitrary and illegal manner has ordered to stop the work in lieu of agreement no. SBD-IFB-07/19-20 till further orders and no order for resumption

has been passed only at the instance of the Secretary, Water Resources Department which is completely dehors the jurisdiction of the said authority moreover he is not even privy to the agreement and no law/rules or provisions gives such power to him, which is in the teeth of the pronouncements of the Hon'ble Supreme Court and the Courts of the land.

II. For constituting an independent committee to survey the site and make a detailed report on the execution of work done by the petitioner and on the said basis direct upon the respondents concerned for payment of the work executed by the petitioner in terms of agreement no. SBD-IFB-07/19-20 till the stoppage of the work.

III. For issuance of direction upon the respondents to release all the legally paid dues against the security advance deposited with the department at the time of execution of the agreement in question along with the compensation for the costs incurred upon the petitioner for the on-site machineries and labors deployed there till date in absence of any termination/order of rescission.

IV. The petitioner further prays for appropriate orders/directions commanding upon the respondents to not only recall all the punitive actions taken by them against the petitioner but to also compensate it by way of contractor's profit

And/or

For the issuance of any other appropriate writ(s)/order(s)/direction(s) for doing conscionable justice to the petitioner.

3. The petitioner-Firm was awarded the construction work of a Weir in Bansloi River for Littipura Multivillages Water Supply Scheme in the district of Pakur. On its furnishing a Performance Bank Guarantee for Rs. 17,35,000/-, the Letter of Acceptance was issued on 25th January 2020. Thereafter, the Executive Engineer executed an agreement with the petitioner-Firm on 25th January 2020 vide Agreement No. SBD-IFB-07/19-20. The petitioner-Firm has pleaded that it had started executing the work under contract but on account of the nationwide lockdown in the wake of COVID-19 pandemic further progress of the work was halted. The petitioner-Firm also indicated that one of its partners was severely impacted due to COVID-19. In paragraph no. 21 of the writ petition, the petitioner-Firm pleaded that by 4th August 2021 it had completed more than 42.50% work under contract and the same was certified by the Executive Engineer

through letter dated 4th August 2021.

4. Ms. Aparajita Bhardwaj, the learned counsel for the petitioner-Firm submits that the communication dated 15th February 2021 is arbitrary and patently illegal inasmuch as the said communication was issued in breach of natural justice and, that too, on assumption of wrong facts. According to Ms. Bhardwaj, it was incumbent upon the Employer to give a notice to the Contractor to start the work under contract but no such notice was given to the petitioner-Firm before letter dated 15th February 2021 was issued to it.

5. Clause 59 of the conditions of contract enumerates the circumstances in which the agreement shall be terminated. Under clause 59.1, the Employer or the Contractor may terminate the contract if the other party causes a fundamental breach of the contract.

6. Clause 59.1 of the condition of Contract is extracted as under:

“59.1 The Employer or the Contractor may terminate the Contract if the other party causes a fundamental breach of the Contract.”

7. Ms. Aparajita Bhardwaj, the learned counsel for the petitioner submits that not providing the mobilization fund which is dealt with under clause 51 shall amount to fundamental breach of the contract. It is submitted that the petitioner-Firm entered into the contract having a bonafide belief that advance payment as indicated under clause 51 shall be made to it so as to start the work under contract.

8. Clause 51 of the condition of Contract is extracted as under:

“51. Advance Payment

51.1 The Employer shall make advance payment to the Contractor of the amounts stated in the Contract Data by the date stated in the Contract Data, against provision by the Contractor of an Unconditional Bank Guarantee in a form and by a bank acceptable to the employer in amounts and currencies equal to the advance payment. The guarantee shall remain effective until the advance payment has been repaid, but the amount of guarantee shall be progressively reduced by the amounts repaid by the contractor. Interest will not be charged on the advance payment.

51.2 The Contractor is to use the advance payment only to pay for Equipment, Plant and Mobilization expenses required specifically for execution of the works. The Contractor shall demonstrate that advance payment has been used in this way by supplying copies of invoices or other documents.

51.3 The advance payment shall be repaid by deducting proportionate amounts from payments otherwise due to the Contractor, following the schedule of completed percentages of the works on a payment basis. No

account shall be taken of the advance payment or its repayment in assessing valuations of work done, variations, price adjustments, or liquidated damages.”

9. Mr. M. K. Dubey, the learned State counsel however refers to communication dated 14th March 2020 to submit that clause 51 as regards providing advance payment to the Contractor shall be deemed to have been deleted and not operative vide memo no. 496 dated 19th February 2020. However, this decision was not brought on record and there is no reference of that decision in any official communication.

10. Even so, the issue which falls for consideration is whether by communication dated 15th February 2021 the Employer could have asked the Contractor to stop work, without a notice to him. Under sub-clause (d) to clause 59.2 of the condition to contract, it is provided that the Engineer shall give a notice to the Contractor to rectify a particular defect.

11. Sub-clause (d) to clause 59.2 of the condition to contract is extracted as under:

“59.2 (d) the Engineer gives Notice that failure to correct a particular Defect is a fundamental breach of Contract and the Contractor fails to correct it within a reasonable period of time determined by the Engineer.
.....
.....”

12. The powers under Article 226 of the Constitution of India are exercised in furtherance of public good. The exercise of powers by the High Court under Article 226 of the Constitution is discretionary and therefore in appropriate cases the High Court may refuse to entertain the writ petition. The learned counsel for the petitioner referred to “*Jagdish Mandal v. State of Orissa*” (2007) 14 SCC 517 where the Hon’ble Supreme Court held that the power under Article 226 of the Constitution shall be exercised where the action of the executive authority is found arbitrary, unjust and whimsical. In “*Jagdish Mandal*” the Hon’ble Supreme Court held as under:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice

stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

13. In “*Mahabir Auto Stores v. Indian Oil Corporation*” (1990) 3 SCC 752, the Hon’ble Supreme Court held that even in contractual matters the State and its instrumentalities are required to follow the Constitutional mandate of equality and demonstrate fairness in action. In “*Mahabir Auto Stores*” the Hon’ble Supreme Court held as under:

“12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in *Radha Krishna Agarwal v. State of Bihar* [(1977) 3 SCC 457] . It appears to us, at the outset, that in the facts and circumstances of the case, the respondent company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. See *Radha Krishna Agarwal v. State of Bihar* [(1977) 3 SCC 457] at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for

judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration; it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to *E.P. Royappa v. State of Tamil Nadu* [(1974) 4 SCC 3 : 1974 SCC (L&S) 165] , *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248] , *Ajay Hasia v. Khalid Mujib Sehravardi* [(1981) 1 SCC 722 : 1981 SCC (L&S) 258] , *R.D. Shetty v. International Airport Authority of India* [(1979) 3 SCC 489] and also *Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay* [(1989) 3 SCC 293] . It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.”

14. The statement made by the petitioner-Firm in paragraph no.21 that it had completed 42.50% work under contract is not controverted by the respondents in the counter-affidavit. The letter dated 4th August 2021 by the Executive Engineer who certified execution of the work by the petitioner-Firm to the extent of 42.50% is also not disputed. Quite apparently, the reason for issuing a direction to the petitioner-Firm to stop the work under the contract vide letter dated 15th February 2021 on a premise that it did not even start the work is arbitrary and without any foundation and therefore the same is quashed.

15. However, having regard to long lapse of time, we are not inclined to issue a direction for the award of the remaining work to the

petitioner-Firm. The Secretary, Water Resources Department shall ensure refund of Performance Bank Guarantee of Rs.17,35,000/- to the petitioner-Firm within four weeks.

16. A further direction is issued to the respondent no.4 that within four weeks the final measurement of the work executed by the petitioner-Firm shall be taken and payment to the extent of work done shall be made to the petitioner-Firm.

17. This writ petition is allowed in the aforesaid terms.

(Shree Chandrashekhar, A.C.J.)

(Navneet Kumar, J.)

Tanuj/