

(2019) 11 MAN CK 0001
In the Manipur High Court
Case No : Writ Petition (c) No. 248 Of 2018

Khumanthem Khelendro Singh

APPELLANT

Vs

State Of Manipur And Others

RESPONDENT

Date of Decision : 05-11-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 32, 226, 227
Arbitration Act, 1940 — Section 9, 33, 32

Citation : (2019) 11 MAN CK 0001

Hon'ble Judges : Kh. Nobin Singh, J

Bench : Single Bench

Advocate : T. Rajendro, Momota Oinam, Beedyasaree, K. Rabei, N. Savitri

Final Decision : Dismissed

Judgement

Kh. Nobin Singh, J

[1] Heard Shri T. Rejendro, learned Advocate appearing for the petitioner; Shri Momota Oinam, learned Addl. Advocate assisted by Ms. Beedyasaree M., learned Advocate appearing for the State respondents, Shri K. Rabei, learned Advocate appearing for the private respondent and Ms. N. Savitri, learned Advocate appearing for the Chief Engineer.

[2] By the instant writ petition, the petitioner has prayed for issuing a writ of certiorari or any other appropriate writ to quash and set aside the letter dated 27-12-2017 issued by the Executive Engineer, Tamanglong Division, PWD, Manipur.

[3.1] Facts and circumstances as narrated in the writ petition, are that the petitioner is a contractor and has been doing the execution of contract works awarded to him by the State respondents with utmost sincerity and dedication. Taking into consideration of his sincere and dedicated efforts, he has been designated as the special class contractor in the year, 2013.

[3.2] In response to an invitation of tenders for the work of improvement of road from Noney to Marangching (Railway Project Road) SH-Shingling 4.85 Kms and Constructions of 900 mm dia RCC Pipe Culvert NP 3-7.5 Rm-40 Nos (hereinafter referred to as 'the work'), the petitioner submitted his tender. After his tender being accepted, the petitioner was awarded the said work vide order dated 30-03-2016 issued by the Executive Engineer, Tamenglong Division, PWD, Manipur. The estimated cost of the work was Rs.2,60,46,240/- (Rupees two crore sixty lakhs forty six thousand two hundred and forty) only and the time allowed for its execution, was twelve months which was to be reckoned from 06-04-2016. As per the schedule of the work, the same is divided into two phases.

[3.3] The petitioner immediately started executing first phase of the work by hiring a large number of skilled and unskilled workers numbering about 35 and used heavy machineries like Road Roller, Tata trucks and others for the execution of the said work. According to him, he completed about 70% of the work in respect of the 1st phase spending about Rs.85,70,714/- (Rupees eighty five lakhs seventy thousand seven hundred and fourteen) only.

[3.4] The petitioner was very much interested in completion of the said work within twelve months but due to certain reasons beyond his control, he could not complete it. Some of the reasons as stated in the petition, are that the execution could not immediately be started due to objections raised by the villagers for non-payment of their compensation towards their affected lands; that there was a heavy rainfall in the year, 2016-2017 and that there was a continuous economic blockade extending for some months which ended only in the month of March, 2017.

[3.5] The respondent No.5, the Section Officer, Sub-Division-V, Tamenglong Division, PWD, Manipur was to make entries in the measurement book for the works executed by the petitioner but he failed to do that in spite of the repeated requests being made by him. However, the petitioner received a letter dated 27-12-2017 from the Executive Engineer, Tamenglong Division, PWD, Manipur stating that the agreement towards the said work had been rescinded and consequently, the security deposit of the petitioner stood absolutely forfeited to the State Government. The reason given in the letter dated 27-12-2017 was that the petitioner had failed to complete the work within the stipulated time and he did not reply to the show cause notices dated 12-01-2017 and 19-07-2017. The petitioner did not receive personally any of the said show cause notices as he was/ is staying at Paona Bazar, Imphal which is known to the respondents.

[3.6] The petitioner learnt from the reliable sources that the work had been awarded to another contractor and the amount for the 1st phase for which the petitioner had completed about 70% thereof, would be released to the new contractor and that the name of the new Contractor was not disclosed by the State respondents. Being aggrieved by the said letter dated 27-12-2017 issued by the Executive Engineer, the instant writ petition has been filed by the

petitioner on the inter-alia grounds that the letter dated 27-12-2017 issued by the Executive Engineer was in violation of the principle of natural justice; that the various clauses as contained in the booklet called "General Conditions of Contract for Public Works Department, Government of Manipur" had not been followed while issuing the letter dated 27-12-2017 and that the petitioner had been deprived of the money spent by him towards the execution of the work in part.

[4] On 29-03-2018 when this matter was listed for consideration, this Court was pleased to issue notice to the respondents. Thereafter, an affidavit dated 19-06-2018 was filed on behalf of the respondent No.1 denying the averments made in the writ petition and in addition thereto, it has been stated that the petitioner failed to start the execution of the work within the stipulated period of completion i.e., on or before 05-04-2017 and therefore, there was no question of deployment of heavy machineries for completion of about 70% of the work, as is evident from the reply dated 16-09-2017 of the petitioner to the show cause notice dated 19-07-2017 for which photographs of the road have been relied upon. The petitioner did not bring to the notice of the respondents any hindrance for seeking extension of time before the lapse of the stipulated period of completion. No entry was made in the measurement book about the progress of the work as there was nothing to enter in it due to the non-execution of the work by the petitioner. No official intimation was given by the petitioner to the Engineer-in-charge about his new address. However, the Department delivered the show cause notices, at his address, which were received by his relatives. The petitioner was given an opportunity of being heard by serving two show cause notices dated 12-01-2017 and 19-07-2017. The petitioner failed to respond to both the show cause notices within the date specified therein. Since the reasons given by the petitioner in his reply dated 16-09-2017 were unsatisfactory, the contract was rescinded. There was no violation of the principle of natural justice as the contract was terminated after the notices being given to him. As per the clause of the General Conditions of Contract for Public Works, the question of extension did not arise at all. The contract work was awarded to a new contractor through a re-tender in the interest of early completion of the work and therefore, the payment was to be made to him. In other words, after the contract work having been terminated, the work was re-tendered and was awarded to Z. Kaigailungbou, 1st Class Contractor, Langol Tarung, Lamphel. While the amount of work was Rs.2,60,46,240/- (Rupees two crore sixty lakh forty six thousand two hundred forty) only, the time to complete the same was twelve months to be reckoned from 07-03-2018. The new contractor completed 23% of the total contract work as on 19-03-2018 and accordingly, the Department proposed to release an amount of Rs.67.05 lakhs but the amount had not been released by the Department on account of the interim order dated 29-03-2018 passed by this Court. A reply affidavit was filed by the petitioner denying the averments made in the counter filed on behalf of the respondent No.1 stating that the reason as to why the contract was rescinded, was that he had failed to reply to the show

cause notices in time.

[5] An application being MC[WP(C)] No.181 of 2018 came to be filed by the petitioner praying for impleading Shri Z. Kaigailungbou as the private respondent and at about the same time, Shri Z. Kaigailungbou also filed an application being MC[WP(C)] No.206 of 2018 praying for his impleadment as the private respondent. Both the applications were allowed by this Court vide its order dated 08-08-2018 and consequently, a recast petition was filed by the petitioner. Few days thereafter, an application being MC[WP(C)] No.240 of 2018 was filed by the petitioner praying for amendment in the writ petition for the reason that the work order dated 28-02-2018 had been issued in favour of the private respondent which was issued without following due procedure prescribed in law. A notice was issued in the application and after hearing the counsel appearing for the parties, this Court allowed it on 19-12-2018 and consequently, a second recast petition was filed by the petitioner on 21-12-2018.

[6] A counter affidavit was filed by the private respondent and the stand taken by him is similar to that of the respondent No.1 and therefore, the details thereof are not repeated here for the sake of brevity. It has been stated by him that the petitioner failed to start the execution of work resulting in the termination of his contract vide letter dated 27-12-2017 and thereafter, a fresh tender was floated in which three persons including the private respondent, participated and after accepting his bid, the work was awarded to him. The private respondent immediately started the execution of the work by completing 23% thereof as on 19-03-2018 and therefore, he is entitled to payment for the work done by him. The averments made in the counter of the private respondent were denied in the reply filed by the petitioner wherein it has been stated that the alleged re-tender which was claimed to be a restricted tender, was approved by the Chief Engineer without any reason and without applying his mind. As per the provisions contained in the CPW Manual, a restricted tender can be called under certain conditions mentioned therein.

[7] An affidavit on behalf of the respondent No.1 was filed wherein it has been stated that the contract work of the petitioner was rescinded pursuant to Clause 3 (ii) of the General Conditions of Contract. The measurement for the balance work was not carried out, as the petitioner had not started the work at all. A restricted tender was floated vide notice dated 08-01-2018 and the tender was opened on 24-01-2018. The financial bid submitted by the private respondent was negotiated to reduce his tender amount and on 28-02-2018, the work order was issued in favour of the private respondent who started the execution of the work as detailed in the affidavit. The writ petition was filed by the petitioner with mala fide intention which made himself liable for action under various sections of the General Conditions of Contract. An affidavit also has been filed on behalf of the respondent Nos.3, 4 and 5 wherein the stand taken by them is similar to that of the respondent No.1 and therefore, the averments made therein are not repeated here for the sake of brevity. A reply affidavit has been filed by the

petitioner to the counter filed on behalf of the respondent No.1 wherein his earlier stand has been reiterated by the petitioner.

[8] During the course of the proceedings i.e., on 23-07-2019, this Court granted one week's time to the petitioner to file an affidavit as regards the receipt of the said two show cause notices dated 12-01-2017 and 19-07-2017. In compliance with the Court's order, an affidavit dated 29-07-2019 was filed by the petitioner stating therein that the show cause notices dated 12-01-2017 and 19-07-2017 were not received personally by him. As far as the show cause notice dated 12-01-2017 is concerned, on an enquiry being made by him, his family members told him that they had not received the same. It has been stated that although seven days time was granted by the said notice dated 12-01-2017, no adverse action was taken against him even after the expiry of seven days. So far as the show cause notice dated 19-07-2019 is concerned, it was received by his family members but due to lapse of time, he could not remember the date on which it was received and after the receipt of the show cause notice dated 19-07-2017, a reply statement dated 16-09-2017 was submitted by him. In order to counter the said averments made by the petitioner, a reply affidavit dated 19-08-2019 was filed on behalf of the respondent No.1 wherein it has been stated that the show cause notice dated 12-01-2017 was sent in person by the then Section Officer, Sub-Division-V, Tamenglong Division on the same day at his place / flat at Paona Bazar, Imphal and the same was received by the family members of the petitioner. No action was taken against him because the petitioner failed to start the execution of the work and thereafter, the second reminder i.e., the second show cause notice dated 19-07-2019 was served upon him. Even after the receipt of the said two show cause notices, the petitioner had failed to start the execution of the work. In fact, he could not start the work till 16-09-2017. A reply affidavit was also filed by the respondent No.4 and the stand taken by it, is similar to that of the respondent No.1 and it has been stated that the fact that no action was taken against the petitioner despite the show cause notices being served upon him, shows that an opportunity was given to him to start the execution of the work but since he failed to execute the work, the writ petition is not maintainable. In the rejoinder affidavit filed by the petitioner, it has been stated that the second show cause notice dated 19-07-2019 suffered from various defects as only three days time was given for a reply which is totally against the Clause 3 of the General Conditions of Contract for PWD, Government of Manipur.

[9] The issues which call for consideration by this Court, are as to whether the termination of the contract, entered into between the petitioner and the State respondents, vide letter dated 27-12-2017 was in violation of the principle of natural justice and whether the restricted tender floated by the State respondents was in accordance with law ?

[10] Before considering the issues as mentioned above, this Court proposes to deal with the preliminary issue raised by the respondents during the course of

proceedings as regards the maintainability of the writ petition. It has been submitted by the counsel appearing for the respondents that since the issue involved herein relates to the termination of a contract, this Court ought not to interfere with it and moreover, in view of the arbitration clause contained in the agreement, the petitioner ought to have exhausted the alternative remedy before approaching this Court under Article 226 of the Constitution of India. They have relied upon the decisions rendered by the Hon^{ble} Supreme Court in *Sterling Computer Ltd. Vs. M/S M & N Publication Ltd & ors*, AIR 1996 SC 51; *Asia Foundation & Construction Ltd Vs. Trafalgar House Construction (I) Ltd.*, (1997) 1 SCC 738; *Raunag International Ltd. Vs. IVR Construction Ltd. & ors*, AIR 1999 SC 393; *Kishan Sahkari Chini Mills Limited Vs. Vardan Linkers & ors*, (2008) 12 SCC 500. On the other hand, it has been submitted by the counsel appearing for the petitioner that there is no averment in their affidavits as regards the maintainability of the writ petition and in the absence of such a pleading about it, it shall not be entertained by this Court, for which he has relied upon the decision rendered by the Hon^{ble} Supreme Court in *Bharat Singh & ors Vs. State of Haryana*, AIR 1988 SC 2181. Relying upon the decision of the Hon^{ble} Supreme Court in *Harbanslal Sahnja Vs. Oil India Corporation Ltd.*, (2003) 2 SCC 107, it has been submitted by him that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. The contention of the learned counsel appearing for the petitioner is not fully correct for the reason that in the affidavit filed by the respondent No.4, it has been stated that the writ petition is not maintainable, as the petitioner has no locus standi because he has not participated in the tender. It cannot be said that there is no pleading at all as regards the maintainability of the writ petition and therefore, the law laid down in *Bharat Singh* case (*supra*) will have no application to the facts of the present case. As regards the contention of the counsel appearing for the respondents that the petitioner has not exhausted his alternative remedy, it may be correct but that itself shall not preclude this Court from entertaining the writ petition. In *M/S Niraj Cement Structures Vs. Union of India & ors*, WP(C) No.1219 of 2018, this Court has the occasion to examine a similar issue as regards the maintainability of the writ petition. In *M/S Radhakrishna Agarwal & ors. Vs. State of Bihar & ors*, (1977) 3 SCC 457, the Hon^{ble} Supreme Court held:

"10. It is thus clear that the Erusian Equipment & Chemicals Ltd's case (*supra*) involved discrimination at the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all. At this stage, no doubt, the State acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises for violation of Article 14 or of any other constitutional

provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract."

In *Smt. Rukmanibai Gupta Vs. Collector, Jabalpur & ors*, (1980) 4 SCC 556, the Hon'ble Supreme Court held:

"10. Arbitration Act, 1940, is a self-contained and exhaustive code. It provides for filing arbitration agreement to the jurisdiction of court, appointment and removal of arbitrator by court, making award a rule of court, remitting or setting aside an award etc. Where the arbitrator has made an award it can be questioned under Section 33. Section 32 bars a suit on any ground whatsoever for contesting an award and further provides that no award shall be enforced, set aside, amended, modified or in any way affected otherwise than as provided in the Arbitration Act itself. Thus, Arbitration Act, 1940, is a self-contained exhaustive code. Relief sought by the appellant by involving extraordinary jurisdiction of the High Court under Article 226 could have been obtained by proceeding in accordance with the relevant provisions of the Arbitration Act. In this situation, if the High Court declined to entertain the writ petition, no exception can be taken to it. Further the indenture of lease constitutes a contract between the parties. Right to excavate limestone from leased area and obligation to pay royalty under the relevant Minor Mineral Rules arise from the contract. The contract provided for resolution of dispute arising out of the carrying out of contract. The writ jurisdiction of the High Court under Article 226 of the Constitution is not intended to facilitate avoidance of obligation voluntarily incurred, (see *Har Shankar v. Dy. Excise & Taxation Commissioner*)."

In *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & ors.*, (1998) 8 SCC 1, the Hon'ble Supreme Court held:

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the

principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

In *Harbanslal Sahnia & anr. Vs. Indian Oil Corporation Ltd & ors.*, (2003) 2 SCC 107, the Hon'ble Supreme Court held:

"7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See *Whirlpool Corpn. v. Registrar of Trade Marks*) The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.

In *Empire Jute Company Ltd. & ors. Vs. Jute Corporation of India Ltd. & anr.*, (2007) 14 SCC 680, the Hon'ble Supreme Court held:

"14. Construction of the contract entered into by and between the parties is in question before us. There exists an arbitration agreement. The arbitration agreement is of wide amplitude; by reason whereof not only the dispute relating to quality of the jute sought to be supplied by Respondent 1 may be gone into, the construction, meaning and operation and effect of the contract or breach thereof, if any, would have also fallen for determination of an arbitrator.

15. It is not correct to contend that Clause 8.0 provides for procedure for claim settlement. The said provision in regard to the quality of jute supplied has in our opinion nothing to do with Clause 9.0. The arbitration agreement entered into by and between the parties is independent of Clause 8.0. It is now well settled that when there exists an arbitration agreement, the writ court ordinarily would not exercise its discretionary jurisdiction to enter into the dispute."

In *Union of India & ors. Vs. Tania Construction Private Ltd.*, (2011) 5 SCC 697 the Hon'ble Supreme Court held:

"33. Apart from the above, even on the question of maintainability of the writ petition on account of the arbitration clause included in the agreement between

the parties, it is now well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes places, has to be struck down as an anathema to the rule of law and the provisions of the constitution.

In *S.J.S Business Enterprises (P) Ltd Vs. State of Bihar & ors.*, (2004) 7 SCC 166, the Hon^{ble} Supreme Court held that the existence of an adequate or suitable alternative remedy available to a litigant is a factor which a court entertaining an application under Article 226 of the Constitution will consider for exercising the discretion to issue a writ under Article 226. But the existence of such remedy does not impinge upon the jurisdiction of the High Court to deal with the matter itself, if it is in apposition to do so on the basis of the affidavits filed. In *L. Chandrakumar Vs. Union of India & ors.*, (1997) 3 SCC 261, the Hon^{ble} Supreme Court held that the jurisdiction conferred upon the High Courts under Articles 226/ 227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basis structure of our constitution. While this jurisdiction cannot be ousted, other courts and tribunals may perform a supplemental role in discharging the powers conferred by articles 226/227 and 32 of the Constitution. In *Asia Foundation & Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. & ors.*, (1997) 1 SCC 738, the

Hon^{ble} Supreme Court held that though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract, power has been exercised for any collateral purpose.

In *Noble Resources Ltd. Vs. State of Orissa & ors.*, (2006) 10 SCC 236, the Hon^{ble} Supreme Court held:

"15. It is trite that if an action on the part of the State is violative of the equality clause contained in Article 14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Article 14 of the Constitution. While exercising contractual powers also, the government bodies may be subjected to judicial review in order to prevent arbitrariness or favouritism on their part. Indisputably, inherent limitations exist, but it would not be correct to opine that under no circumstances a writ will lie only because it involves a

contractual matter.

18. It may, however, be true that where serious disputed questions of fact are raised requiring appreciation of evidence, and, thus, for determination thereof, examination of witnesses would be necessary; it may not be convenient to decide the dispute in a proceeding under Article 226 of the Constitution of India.

27. Contractual matters are, thus, not beyond the realm of judicial review. Its application may, however, be limited."

In *Shriram City Union Finance Corporation Ltd. Vs. Rama Mishra*, (2002) 9 SCC 613, the Hon'ble Supreme Court held that a party is bound either by provisions of the Constitution, statutory provisions or any rule or under the terms of any contract which is not against public policy. It is open for a party for his convenience to fix the jurisdiction of any competent court to have their disputes adjudicated by that court alone. In other words, if one or more courts have the jurisdiction to try any suit, it is open for the parties to choose anyone of the two competent courts to decide their disputes. In case parties under their own agreement expressly agree that their dispute shall be tried by only one of them, then the parties can only file the suit in that court alone to which they have so agreed. The said decision has been followed in *New Moga Transport Co. Vs. United India Insurance Co. Ltd & ors.*, (2004) 4 SCC 677. In *Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited & ors.*, (2017) 7 SCC 678, the Hon'ble Supreme Court held:

"20. It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. For an exhaustive analysis of the case law, see *Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.* This was followed in a recent judgment in *B.E. Simoes Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd.* Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. The appeals are disposed of accordingly."

In *ABL International Ltd & anr. Vs. Export Credit Guarantee Corporation of India Ltd & ors.*, (2004) 3 SCC 553, the Hon'ble Supreme Court held:

"23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent. In this context, we may note that

though the first respondent is a company registered under the Companies Act, it is wholly owned by the Government of India. The total subscribed share capital of this Company is 2,50,000 shares out of which 2,49,998 shares are held by the President of India while one share each is held by the Joint Secretary, Ministry of Commerce and Industry and Officer on Special Duty, Ministry of Commerce and Industry respectively. The objects enumerated in the memorandum of association of the first respondent at para 10 read:

"To undertake such functions as may be entrusted to it by the Government from time to time, including grant of credits and guarantees in foreign currency for the purpose of facilitating the import of raw materials and semi-finished goods for manufacture or processing goods for export."

Para 11 of the said object reads thus:

"To act as agent of the Government, or with the sanction of the Government on its own account, to give the guarantees, undertake such responsibilities and discharge such functions as are considered by the Government as necessary in national interest."

In *Municipal Corporation, Ujjain & anr. Vs. BVG India Limited & ors.*, (2018) 5 SCC 462, the Hon'ble Supreme Court held:

"9. The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by this Court in *Tata Cellular v. Union of India*, wherein this Court observed that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose, the exercise of that power will be struck down.

10. The modern trend points to judicial restraint in administrative action. The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision without the necessary expertise which itself may be fallible. The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or a quasi-administrative sphere. However, the decision must not only be tested by the application of the

Wednesbury principle of reasonableness, but must also be free from arbitrariness and not affected by bias or actuated by mala fides. [See the judgment in *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.*]

15. It is well settled that the award of contract, whether it is by a private party or by a public body or by the State, is essentially a commercial transaction. In arriving at a commercial decision, the considerations which are of paramount importance are commercial considerations. These would include, inter alia, the price at which the party is willing to work; whether the goods or services offered are of the requisite specifications; and whether the person tendering the bid has the ability to deliver the goods or services as per the specifications. It is also by now well settled that the authorities/State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation.

16. The State, its corporations, instrumentalities and agencies have a public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary power under Article 226 with great caution and should exercise them only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere. (See the judgment in *Air India Ltd. v. Cochin International Airport Ltd.*)."

In *K.D. Sharma Vs. Steel Authority of India & ors.*, (2008) 12 SCC 481, the Hon^{ble} Supreme Court held:

"34. The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the writ court must come with clean hands, put forward all the facts before the court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the court, his petition may be dismissed at the threshold without considering the merits of the claim."

From the aforesaid decisions rendered by the Hon^{ble} Supreme Court, it is well settled that the alternative remedy has been consistently held by it not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In the present case, the allegation made by the petitioner is that while issuing the letter dated 27-12-2017, the principle of the natural justice has been violated by the respondents. Therefore, the contention of the counsel appearing for the

respondent as regards the maintainability of the writ petition is not tenable.

[11] As regards the first issue, it has been submitted by the counsel appearing for the petitioner that while issuing the letter dated 27-12-2017, the principle of the natural justice has been violated by the respondents and therefore, the same is liable to be quashed and set aside. But in the counter affidavit on behalf of the respondent No.1, it has been stated that two show cause notices dated 12-01-2017 and 19-07-2017 were issued to the petitioner prior to the termination of the contract and since the petitioner failed to respond to them within the stipulated time and his reply was unsatisfactory, the contract was rescinded by the respondents. The copies of the said show cause notices have been filed along with the counter and in addition to that, a copy of the reply dated 16-09-2017 of the petitioner has also been filed by the respondent No.1. From these documents, it is evident that the petitioner appears to have not come before this Court with clean hands. The petitioner's allegation that the principle of natural justice has been violated, is totally incorrect and baseless because he did file a reply in response to the notice dated 19-07-2017. This fact has been suppressed by him while filing the writ petition. It is not clear as to whether the show cause notice dated 12-01-2017 has been received by the petitioner or not but the same is referred to in the second show cause notice dated 19-07-2017 and the petitioner in his reply dated 16-09-2017 has not mentioned anything about the non-receipt thereof. In compliance with this Court's order dated 23-07-2019, an affidavit has been filed by the petitioner stating that when his relatives being inquired by him, he was informed that it was not received by them, while in the affidavit filed on behalf of the State respondent, it has been stated that the show cause notice dated 12-01-2017 was handed over to the relatives of the petitioner at his residence, although no acknowledgment thereof was obtained in writing from them. Be that as it may, the fact remains that after the receipt of the show cause notice dated 19-07-2017, the petitioner did file his reply dated 16-09-2017. The stand of the State respondents is that his reply was not submitted in time, nor was it satisfactory. Therefore, the contention that the principle of natural justice has been violated, is incorrect and is untenable.

[12] After the first issue being decided against the petitioner, there is no need of going into the second issue but since the counsel appearing for him has advanced his argument on this issue as well, this Court deems it appropriate to deal with it. It is the submission of the counsel appearing for the petitioner that the re-tender as allegedly floated by the respondents, has not been floated in accordance with law and in other words, if it was a restricted tender, it ought to have been done in terms of clause 15.6.1 of the CPWD Manual. Since it has not been done so, it is bad in law. Combating it, it has been contended by the counsel for the respondents that the petitioner was not a participant in the process of the said re-tender and therefore, he has no locus standi to question it. It is not in dispute that the petitioner has not participated in the re-tender or in other words, he has not submitted his bids pursuant to the notice issued by the State respondents. Moreover, it is the petitioner who has failed either to start the

work as alleged by the respondents or has failed to complete the work in terms of the contract entered into between the petitioner and the State respondents, because of which the re-tender was to be floated by the State Government. It is the petitioner who has created the problem for himself. He got the opportunity to execute the work but he failed to take the advantage of it. After his being unable to execute the work, he started questioning the validity and correctness of the re-tender, which is impermissible. The contention of the State Government appears to be correct to the extent that the petitioner has no locus standi to challenge the validity and correctness of the re-tender. After the private respondent's bid having been accepted by the State respondents, he has started executing the work, for which he is entitled to his payment.

[13] One aspect which the counsel for the petitioner has emphasised, is that in respect of the first phase, the petitioner has completed about 70% of the work and he is entitled to payment for it. Any payment made by the State respondents in favour of the private respondent for the work done by him, will be unfair and unreasonable. In this regard, the stand of the State respondents is that the petitioner had never started the work till the expiry of 12 months from the date on which he ought to have completed the work. This being a disputed question of facts, it may not be proper for this Court to go into it. Moreover, the petitioner has failed to produce materials to show prima facie case in his favour. He has assigned some reasons in his reply dated 16-09-2017 as to why he could not complete the execution of the work in time and accordingly, a request was made to allow him to do the needful. There is no material on record to show that he had ever informed the authority concerned of the State Government about the difficulties being faced by him while executing the work. No request was made by him to extend the time period as specified in the work order. The progress of work, if any made by him, was not entered in the measurement book and assuming that it was not done by the Section Officer or the Assistant Engineer as the case may be, the petitioner did not lodge any complain against them. In view of the aforesaid circumstances, this Court is of the opinion that it may not be appropriate for this Court to go into the disputed question of facts.

[14] For the reasons stated hereinabove, the instant writ petition is dismissed as devoid of any merit with no order as to costs. Interim order, if any, passed by this Court stands vacated. However, it is open to the petitioner to approach the appropriate forum for redressal of his grievance as regards the non-payment of any amount towards the alleged execution of work by him in part in respect of the first phase.