

(2024) 04 CHH CK 0059

In the Chhattisgarh High Court

Case No : Writ Petition (C) No. 3339, 3807, 5057 Of 2023

M/S BSBK Private Limited

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision : 29-04-2024

Acts Referred:

Constitution of India, 1950 — Article 32, 226

Industries (Development and Regulation) Act, 1951 — Section 18AA(1)(a)

Citation : (2024) 04 CHH CK 0059

Hon'ble Judges : Rakesh Mohan Pandey, J

Bench : Single Bench

Advocate : Satish Agrawal, Shalvik Tiwari, Praveen Das, Shashank Thakur, Ashutosh Trivedi, Kishore Bhaduri, Pankaj Singh, Harsh Dave

Final Decision : Disposed Of

Judgement

1. Since the issue raised in the above captioned Writ Petitions filed by the petitioner bearing W.P.(C) No. 3339/2023; W.P.(C) No. 3807 of 2023 and W.P.(C) No. 5057 of 2023 are common, they are being disposed of by this Common Order.

2. The relief(s) sought in the above-stated petitions are stated herein below:-

W.P.(C) No. 3339 of 2023:-

"10.1 That, the Hon'ble Court may kindly be pleased to call for the entire records in respect of the grievance of the Petitioner kept in the possession of the Respondents, for its kind perusal;

10.2 That, this Hon'ble Court may kindly be pleased to adjudicate and declare that in the facts and circumstances of the case the petitioner is entitled to price escalation from the respondents;

10.3 That, this Hon'ble Court may kindly be pleased to direct the respondents to immediately make payment of the price escalation to the petitioner for the work executed beyond the original contract period of 36 months along with its

respective Running Account Bills;

10.4 That, the Hon'ble Court may kindly be pleased to grant any other relief which the Hon'ble Court deems fit and proper in the facts and circumstances of the present case;

10.5 That, the Hon'ble Court may kindly be pleased to grant cost of the petition to the Petitioner."

W.P.(C) No. 3807 of 2023:-

"10.1 That, the Hon'ble Court may kindly be pleased to call for the entire records in respect of the grievance of the Petitioner kept in the possession of the Respondents, for its kind perusal;

10.2 That, this Hon'ble Court may kindly be pleased to quash and set aside the impugned letters dated 26.07.2023 (ANNEXURE – P/8) 27.07.2023 (ANNEXURE – P/10) and 03.08.2023 (ANNEXURE P-12), invoking the Advance Bank Guarantee No. 0853619BG0000058, 0853619BG0000041 and declare the same to be illegal;

10.3 That, this Hon'ble Court may kindly be pleased to direct the Respondents to recover Mobilization Advance from the Petitioner on pro-rata basis from the Running Account Bills of the Petitioner till the 100% value of work so that it stands fully recovered on completion of work;

10.4 That, the Hon'ble Court may kindly be pleased to grant any other relief which the Hon'ble Court deems fit and proper in the facts and circumstances of the present case;

10.5 That, the Hon'ble Court may kindly be pleased to grant cost of the petition to the Petitioner."

W.P.(C) No. 5057 of 2023:-

"10.1 Call for the entire records in the possession of the Respondents in respect of the grievances of the Petitioner, for its kind perusal;

10.2 Quash and set aside the impugned order dated 08.09.2023 (ANNEXURE – P/40) passed by the State Government;

10.3 Adjudicate and declare that in the facts and circumstances of the case, the Petitioner is entitled to price escalation from the Respondents for all works executed beyond the original contractual period of 36 months, in line with proposals submitted in the joint representations dated 24.01.2023, 22.02.2023 and 16.03.2023 addressed by the PMAY-HFA contractors (including the Petitioner) to the State Government;

10.4 Adjudicate and declare that in the facts and circumstances of the case, the Petitioner is entitled to payment of GST at enhanced rate of 18% with effect from 18.07.2022, as prescribed vide Notification No. 3/22 dated 13.07.2022;

10.5 Grant costs of the Petition in favour of the Petitioner and against the Respondents; &

10.6 Pass such other and further orders as this Hon'ble Court may consider necessary in the facts and circumstances of the present case."

3. The facts in a nutshell are that the Municipal Corporation, Bilaspur invited bids on 24.12.2018 for the construction of 5785 Nos. of houses including water supply, sanitary and electrification works under the Pradhan Mantri Awas Yojna – Housing for all in Bilaspur, Chhattisgarh using Conventional / Monolithic / Precast Technologies including complete external infrastructure work except external electrification. The petitioner participated in the tender process and being the lowest bidder, was awarded the work vide order dated 07.03.2019 issued by respondent No. 4. The total contract value as per the work order was Rs. 2,62,11,92,000/- on a lump sum basis and the time period stipulated for the completion of the work was 36 months including the rainy season. An agreement was entered into between the petitioner and respondent No. 3 on 07.03.2019. The petitioner vide its letter dated 03.05.2019 addressed to respondent No. 3 requested for handing over of sites free from all encumbrances by the end of June, 2019. On 25.05.2019, the petitioner again wrote a letter to respondent No. 4 to hand over the sites. It was specifically stated in the letter that not handing over the sites would lead to a delay in the completion of the work. On 10.07.2019, the petitioner again requested respondent No. 4 and pointed out that out of 37 work sites, only one work site at Madhuwan had been made available and that site was also occupied by some anti-social elements. On 17.08.2019 and 15.11.2019, the petitioner again requested respondent No. 4 to provide sites enabling it to start the construction work. The petitioner vide letter dated 09.04.2020 expressed its concerns with regard to non-handing of work sites leading to delay in the project program and also incurring of financial losses. It was highlighted in the letter that only 609 Dwelling Units as against the total number of 5785 have been handed over. The petitioner wrote a letter to the State Government bringing to its notice the communication made to respondent No. 4 on multiple occasions. On 29.06.2021, the petitioner addressed a letter to respondent No. 3 making a complaint to the effect that only 1827 Dwelling Units out of 5785 have been provided. It was also specifically stated in the letter that the cost of materials and labour had increased substantially since the time of execution of the Agreement, as such, the petitioner sought provision for price escalation for the works done after the end of the contractual period, as the delay caused was not attributable to it. The petitioner also flagged the delay in payment of the latest RA Bills vide its letter dated 24.03.2021 and also raised issues of delay in handing over of work sites and delay in clearance of RA Bills again and again vide its letters dated 31.07.2021, 27.08.2021, 06.09.2021 and 23.10.2021 addressed to respondents No. 3, 4 as well as the Director, Directorate of Urban Administration and Development. The petitioner again addressed the detailed letters dated 10.11.2021 and 07.01.2022 to respondent No. 3 raising the issues of – (i) delayed handing over of work sites; and (ii) price

escalation of input costs. For the first time response was given by respondent No. 4 on 09.02.2022 wherein it was stated that according to Clause 3.26 of the Agreement, there is no provision for price escalation. It was stated in the letter that the work sites for 1058 Dwelling Units were made available for starting construction activities, whereas 2900 Dwelling Units had slums over them and would be handed over within one year. It was also stated that payment to the petitioner against pending bills would be made after receipt of funds from beneficiary grants and the State Government. The petitioner addressed a letter dated 07.02.2022 to respondents No. 3 and 4 pointing out that non-payment of its outstanding bills had constrained it to slow down the work and ultimately to suspend the same as the petitioner was unable to clear its onward liabilities. It was stated in the letter dated 09.02.2022 that the petitioner would be entitled to price escalation as the contract was being prolonged due to the non-fulfilment of contractual obligations by the Municipal Corporation. On 07.03.2022, the petitioner sought an extension of time on the instance of the respondents without levy of liquidated damages with payment of price escalation. On 23.09.2022,

10.10.2022 and 10.11.2022, the petitioner addressed letters to respondent No. 3 raising issues of delay / non-handing of work sites; delay in clearance of RA Bills and need for price escalation. The petitioner received a letter dated 05.12.2022 issued by respondent No. 2, wherein the status of work sites was repeated as was stated in the earlier letter dated 09.02.2022. It was also stated that the decision as to price escalation could not be taken at the level of the Municipal Corporation. The petitioner was served with final notice dated 23.12.2022 threatening termination of the petitioner's contract making allegations that the petitioner had not restarted the work despite payment of Rs. 7.92 crores. In response, the petitioner wrote a letter to respondent No. 3 on 24.12.2022 communicating that it was remobilizing the work related to 1827 Dwelling Units and would also mobilize for the work sites pertaining to 1058 Dwelling Units once the work sites are handed over free from all encumbrances. The petitioner additionally brought to the notice of respondent No. 3 to the effect that GST rates have been enhanced from 12% to 18% therefore sought payment of the additional GST under Clause 3.27 of the Agreement. The petitioner wrote letters on 24.01.2023, 22.02.2023 and 16.03.2023 to the respondents raising issues of delay in handing over of work sites, clearance of bills, escalation of costs and escalation of GST rates. On 16.02.2023, the State Government sought comments from the State Urban Development Agency (SUDA) on another joint representation made by the petitioner and other contractors. Vide letter dated 17.03.2023 addressed to the petitioner, respondent No. 4 sought a proposal from the petitioner for the extension of time along with a modified work program in view of the expiry of the original contractual period. The petitioner vide letter dated 21.03.2023 addressed to respondent No. 3 submitted a proposal for the extension of time for the construction of 1972 Dwelling Units and also submitted a modified work program. The petitioner received another letter dated

20.04.2023 issued by respondent No. 4, wherein it was stated that the issues of GST and price escalation had already been raised by the contractors before the State Government and resolution thereof could only be taken at the level of the State Government. In the same letter, it was stated that out of a total of 5785 houses, 1914 Dwelling Units proposed in slums had been curtailed and finally, the time period for completion of the work was extended till 31.12.2024 without imposition of penalty. The petitioner addressed its letter to respondent No. 3 on 25.04.2023 communicating the extension of Bank Guarantees for a period of 06 months and further seeking resolution of the outstanding issues of price escalation and GST. Vide letter dated 17.05.2023; respondent No. 3 threatened the petitioner to terminate the contract according to Clause 1.18 of the Agreement. The petitioner filed a reply to that notice on 05.06.2023. Respondent No. 4 directed the petitioner vide letter dated 13.06.2023 to complete the foundation work of incomplete houses by 30.06.2023 and that letter was responded to by the petitioner on 19.06.2023. Another notice was issued by respondent No. 4 on 20.06.2023 threatening the termination of the contract under Clause 1.18 (ii) (a) of the Agreement if 'desirable progress' was not achieved within a period of 07 days. The petitioner filed a reply to the said notice on 24.06.2023 stating that there was no breach of any provision of the Contract and also made a request for payment of escalation and reimbursement of differential amount of GST. The SUDA sought the point-wise response of the Municipal Corporation, Bilaspur pursuant to a letter dated 16.02.2023. The Municipal Corporation made an allegation of the slow progress of work by the petitioner vide letter dated 03.07.2023. The petitioner in its detailed response dated 08.07.2023 addressed to the Municipal Corporation, Bilaspur set out the dates of handing over of sites with delay from the contract date and also described the factual status at each site as on the date of the said letter i.e. 03.07.2023. The petitioner filed W.P.(C) No. 3339 of 2023 before this Court seeking issuance of direction to the respondents for grant of price escalation. After receipt of notice by the respondents, respondent No. 3 issued a letter on 26.07.2023 addressed to the petitioner invoking the Bank Guarantees submitted by the petitioner towards mobilization advance. The petitioner responded to the letter on 27.07.2023 explaining the circumstances and seeking deferment of encashment of Bank Guarantees. Respondent No. 3 vide letter dated 27.07.2023 communicated to the petitioner with regard to deferment of encashment of the Bank Guarantees subject to certain conditions. Vide letter dated 03.08.2023, respondent No. 3 deferred invocation of the Bank Guarantees till 10.08.2023, but threatened to invoke thereof after the said date. The petitioner filed W.P.(C) No. 3807 of 2023 seeking quashment of letters dated 26.07.2023, 27.07.2023 and 03.08.2023. On 25.08.2023, the counsel for the respondent-State in W.P.(C) No. 3339 of 2023 informed that the claim of the petitioner had been forwarded to the State Government and the same would be considered within a period of 10 days. Vide order dated 08.09.2023, the State Government rejected all claims of the petitioner and other contractors. Vide order dated 06.11.2023 passed in W.P.(C) No. 3339 of 2023, the petitioner was granted liberty to challenge the order dated

08.09.2023 by filing a separate petition.

4. In W.P.(C) No. 3339 of 2023, an undertaking was given by the counsel for the State that the claim of the petitioner would be considered and an appropriate decision would be taken within a period of 10 days and thereafter vide order dated 08.09.2023 the claim of the petitioner was rejected. The petitioner has already challenged the order dated 08.09.2023 in W.P.(C) No. 5057 of 2023, therefore, in the opinion of this Court, W.P.(C) No. 3339 of 2023 has become infructuous as the petitioner has raised all its grievances in the subsequent petition.

5. Mr. Satish Agrawal, learned counsel appearing for the petitioner would argue that the lump sum price was quoted by the petitioner based on the representation by the respondents that all construction sites would be handed over immediately upon execution of the Contract and completion of formalities. He would further submit that the petitioner had worked out the costs of material for the construction based on the representation that all sites would be handed over immediately after execution of the Contract and all infrastructure, plant, machinery, man-power, engineers etc. were moved by the petitioner to start the construction work at once at all the sites. The Municipal Corporation, Bilaspur, on paper, made available 36 sites under 10 projects immediately after the execution of the Contract in March 2019, but 22 sites were not handed over physically. He would also submit that running bills were not paid on time and there was a delay of 17 months and 15 months respectively in making payment of two running bills No. 5 and 6 involving the amount of Rs. 7.07 crores. He would contend that 1827 Dwelling Units were reduced out of the contractual mandated 5785 Dwelling Units and no opportunity of hearing was afforded to the petitioner at that point in time. He would further contend that the reduction in quantity has disturbed all the calculations made by the petitioner based on which the lump sum price was quoted. He would also contend that right from May, 2019 the petitioner had been writing/requesting the respondent/Bilaspur Municipal Corporation to hand over the sites for construction, but no response was given. He would argue that the respondents have not filed a return on the merits of the matter and objections have been taken about the maintainability of the writ petition on the ground of alternative remedy of arbitration. He would further argue that for the first time on 09.02.2022, just less than 30 days before the completion of the 36-month contract period, the respondent/Bilaspur Municipal Corporation responded and admitted that it had failed to provide the sites since there was a slum which was not removed. Regarding payment of the running bills, it was admitted that a request was made to SUDA to release the funds to make payment and the request for price escalation was refused on the ground that there was no provision for the same in the Agreement. He would also argue that the petitioner was advised by the Municipal Corporation to apply for an extension of time. Vide 3rd communication dated 23.12.2023, the Bilaspur Municipal Corporation threatened the petitioner to terminate the Contract alleging violation of Clause 1.18 (ii)(a) of the Contract which was without any foundation and on non-

existing grounds. He would state that the petitioner and other contractors made representations on 24.01.2023, 22.02.2023 and 16.03.2023 to the State to intervene in the matter and resolve the issue of escalation, GST etc. The State intervened in the matter and asked for a response from the SUDA. He would further state that the Bilaspur Municipal Corporation made frivolous allegations against the petitioner with regard to delay and also threatened to invoke the Bank Guarantees given to secure the mobilization advance. He would also state that the order passed by the State Government dated 08.09.2023 is illegal, and arbitrary and has been passed without affording an opportunity for hearing. He submits that delay, if any, caused in the completion of the contract is attributable to the Bilaspur Municipal Corporation on account of non-providing the work sites. He further submitted that the time period stipulated for completion of the work was 36 months starting from 07.03.2019 and coming to an end on 07.03.2022, whereas the Bilaspur Municipal Corporation could not hand over the sites and a request was made by the Municipal Corporation to the petitioner to seek an extension of time. He also submitted that the prices of materials and labour costs had increased substantially in the years 2021 and 2022. He argues that the delay on the part of the Municipal Corporation in handing over work sites is writ large in the facts of the case, but at the same time, the respondent State has arbitrarily refused to grant price escalation to the petitioner. He further argues that the State Government has ignored the delay in the completion of the project on account of the intransigent attitude of the respondents which has resulted in the consequential rise of almost 30% in rates of labour and materials. It is also stated that the State Government vide order dated 08.09.2023 failed to consider the fact that the contract was executed on the basis of rates and market conditions existing in the year 2019 and the same have now undergone substantial change and it would be impracticable for the petitioner to carry out construction work in the year 2023-2024 at the rates and price of the year 2019 without any revision in or escalation of prices, despite the original contract period had ended in March, 2022. He contends that the Municipal Corporation, as well as the State Government, failed to consider the specific contractual term contained under Clause 3.26 that "time is the essence of contract" meaning thereby if work is not completed within the contractual time period, the claim of the contractor for price escalation may be considered particularly when the petitioner/contractor was not at fault. He further contends that the time period for completion of work was extended by the department without the imposition of liquidated damages and particularly, on the request of the Municipal Corporation such application was moved. He also contends that the Municipal Corporation has admitted the fact that the sites could not be handed over to the petitioner within the specific time frame. With regard to the payment of GST, Mr. Satish Agrawal would submit that the respondents failed to consider Clause 3.27 of the Agreement. It is also argued that the petitioner did not take shelter of the COVID-19 pandemic for the extension of time and admittedly there was an outburst of Corona Virus from March, 2020 to March, 2021, for more than a year. With regard to alternative remedy, he would submit that the prayer of the

petitioner with regard to price escalation cannot be considered by the arbitrator in the absence of such provisions in the Contract document. In support of his arguments, he placed reliance on the judgments passed by the Hon'ble Supreme Court in the matters of Union of India and Others Vs. Tania Construction Private Limited reported in (2011) 5 SCC 697; Unitech Limited and Others Vs. Telangana State Industrial Infrastructure Corporation (TSIIC) and Others reported in 2021 SCC OnLine SC 99; Bhaven Construction Through Authorised Signatory Premjibhai K. Shah Vs. Executive Engineer, Sardar Sarovar Narmada Nigam Limited and Another reported in (2022) 1 SCC 75; Bharat Coking Coal Limited and Others Vs. Amr Dev Prabha and Others reported in (2020) 16 SCC 759; State Bank of India and Others Vs. Rajesh Agrawal and Others reported in (2023) 6 SCC 1; Assam State Electricity Board and Others Vs. Buildworth Private Limited reported in (2017) 8 SCC 146; NTPC Limited Vs. Deconar Services Private Limited reported in (2021) 19 SCC 694 and Maharashtra State Electricity Distribution Company Limited Vs. Ratnagiri Gas and Power Private Limited and Others reported in 2023 SCC OnLine SC 1462.

6. Mr. Kishore Bhaduri, learned Senior Advocate appearing for respondent No. 5 / State Urban Development Agency, would argue that the petitions preferred by the petitioner are not maintainable as the petitioner cannot invoke writ jurisdiction involving contractual issues. He would further argue that the Company incorporated under the Companies Act cannot claim fundamental rights as available to the citizens of India. It is also argued that there is an efficacious alternative remedy available to the petitioner in the form of arbitration in terms of Clause 1.21 of the Contract document. He would submit that in the Contract document, there is no provision for a grant of escalation cost and the parties are bound by the terms of the Contract/Agreement. He would refer to Clause 3.26 of the Contract document which specifically states that "no claims of any sort with regard to escalation shall be admissible and therefore no payment whatsoever in this regard shall be made." It is further contended that the petitioner himself is responsible for the delay and he could not complete the work within the given time frame, therefore, the petitioner is not entitled to claim price escalation and other reliefs as sought in the petitions. It is also contended that the representation made by the petitioner has rightly been rejected after taking into consideration the entire material placed before the authority. He would also submit that the petitions deserve to be dismissed. In support thereof, he placed reliance on the judgment passed by the Hon'ble Supreme Court in the matters of State of Kerala Vs. M.K. Jose reported in (2015) 9 SCC 433 and Union of India Vs. Puna Hinda reported in (2021) 10 SCC 690 where it is observed by the Hon'ble Supreme Court that "writ court should ordinarily not entertain a writ petition if there is a breach of contract involving disputed questions of fact". He would further refer to the judgment passed in the matter of M.P. Power Management Co. Ltd. Vs. Sky Power Southeast Solar India (P) Ltd. reported in (2023) 2 SCC 703 where the Hon'ble Supreme Court held that "The existence of a provision for arbitration, which is a forum intended to quicken the pace of

dispute resolution, is viewed as a near bar to the entertainment of a writ petition.....” He would further place reliance on the judgment passed in the matter of Radha Krishan Industries Vs. State of H.P. reported in (2021) 6 SCC 771 where the Hon’ble Supreme Court held that “Exceptions to the rule of alternate remedy arise for the enforcement of a fundamental right; in cases of violation of the principles of natural justice; the order or proceedings are wholly without jurisdiction and to challenge the vires of a legislation.” It is further held that ‘ordinarily, a writ petition should not be entertained when an efficacious alternative remedy is provided by the law’.

7. Mr. Ashutosh Trivedi, learned counsel appearing for respondents No. 3 and 4 / Municipal Corporation, Bilaspur would submit that the price escalation as sought by the petitioner in the petitions is not permissible according to Clause 3.26 of the Contract document. He would further argue that there is an efficacious alternative remedy to approach the arbitrator according to Clause 1.21; therefore, the petitions would not be maintainable. Mr. Trivedi would further argue that the representation made by the petitioner before the State Government was rejected after taking into consideration all grounds raised therein by a detailed order. He would further submit that the cut-off date for completion of the project has been fixed for December, 2024 by the Central Government and since the filing of these petitions; the petitioner has stopped construction work at the sites and the same would affect the people who are waiting for their accommodation. He would further argue that the petitioner himself is responsible for the delay caused in the completion of the project. He would submit that the Hon’ble Division Bench of this Court in WPC No. 3827 of 2023, parties being M/s Shankara Enterprises Vs. State of Chhattisgarh and Others, Dated 04.03.2024, while dealing with a similar issue held that “the petitioner could not dispute the arbitration clause available in the agreement which is a part of the work order, which provides that all questions and disputes relating to the contract, designs, drawings and specifications, concerning the works or the execution of failure to execution of the same, shall be referred to the Commissioner of ULB concerned than Chief Executive Officer, State Urban Development Authority (SUDA).” He would contend that in the matter of Joshi Technologies International Vs. Union of India, reported in (2015) 7 SCC 728, the Hon’ble Supreme Court held that “In Pure Contractual matters, the extraordinary remedy of writ jurisdiction under Article 226 or 32 of the Constitution cannot be invoked.” He submitted that the petitions deserve to be dismissed.

8. Mr. Praveen Das and Mr. Shashank Thakur, learned Deputy Advocates General appearing for respondents No. 1 and 2/State would adopt the submissions advanced by learned counsel for respondents No. 3 and 4/Municipal Corporation, Bilaspur and the learned Senior Counsel for respondent No. 5/State Urban Development Agency.

9. I have heard learned counsel appearing for the parties, considered their rival submissions made hereinabove and perused the documents placed on the record.

10. Certain terms and conditions of the Agreement dated 07.03.2019 would be relevant for the disposal of these petitions. The work detail stated in the Tender Document dated 24.12.2018 is reproduced herein below:-

Sr. No.

Name of Construction Work

Estimated Cost of the work

Completion period of work including / excluding rainy season

Amount of Earnest Money Deposit

Tender Document Fee

1.

Construction of 5785 No of Houses (DU's - G+3) including Water Supply, Sanitary and Electrification works under Pradhan Mantri Awas Yojna-Housing for all (PMAY-HFA), AHP Scheme in Bilaspur, Chhattisgarh (C.G.) using Conventional / Monolithic / Precast technologies including complete external Infrastructure works except external electrification.

Rs.25497.98 Lacs

36 (Thirty Six) months from the date of written order to commence the work including rainy season (16th June to 15th October)

5.00 Lacs (Demand Draft/FDR/ TDR in favour of Commissioner, Municipal Corporation, Bilaspur (C.G.)

Rs.10000.00 (Demand Draft in favour of Commissioner, Municipal Corporation, Bilaspur (C.G.)

11. Note - 2 of Form 'F' of the tender document deals with lump sum contract, which is a part of the tender document, is relevant and it says that the quantity/ rates mentioned in the estimate are only indicative and not final and it can be considered as the basis for any claim. Note- 3 says that the rate quoted will be a lump sum but on the basis of the unit, hence actual shall be determined on the execution. Clause 34 of the tender document deals with the Modification of the Agreement. It further says modification of the terms and conditions of this Agreement, including any modification of the scope of the Services, may only be made by written agreement between the Parties. Each Party shall give due consideration to any proposals for modification made by the other Party. Clause 35 deals with the Right to Vary the Scope of the Contract and this clause permits challenge to variation/amendment in the Contract document and any claim by the bidder for adjustment may be asserted within a period of 30 days. Clause 1.15A of the Contract document says that for the delay in the completion of work by the Contractor, the Engineer-In-Charge has full power to recover Liquidated Damages. Proviso to this Clause says that if in the opinion of the Commissioner,

the contractor is entitled to any extension of time on account of the works being altered, varied or added to or on account of any delay by reason of any inclement weather or causes not under the control of the contractor(s), in consequence of orders empowered to give them in any or either of such cases it shall be competent for the Commissioner by an order in writing to extend the aforesaid period for final completion. Clause 1.17 of the Contract document says that if the contractor approaches the authority for an extension of time for completion of work on the ground of his having been "UNAVOIDABLY" such as Natural Calamities, Land Dispute, Delay in Approval of Layout, Environmental Clearance, Building Permission from local bodies hindered in its execution or on any other ground, he must apply giving all and complete details of each of such hindrances or other causes in writing to the Engineer within 30 (Thirty) days and such authority shall himself grant extension of time. Clause 1.21 deals with the Arbitration Clause. It says all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions, herein before mentioned as to thing whatsoever, in any way, arising out of or relating to the contract, designs, drawings, specifications, estimates, concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof, shall be referred to the Commissioner in writing for appointment of the arbitration committee. Clause 2.6 deals with Security Deposit. The amount of the security deposit submitted in the shape of a Bank Guarantee shall remain with the ULB during the entire currency of the contract and 50% of the value of the security deposit will be released on completion of the work, and the balance 25% value of security deposit will be released on final payment and further remaining 25% value of security deposit shall be released after successful and satisfactory defect liability period. Clause 2.7 deals with Performance Security. 5% of the value of work shall be submitted by the contractor in the shape of a Bank Guarantee as performance security. Clause 2.32 deals with Force Majeure. It says that if the contractor failed to perform his part of the contract on account of any unavoidable, inevitable or unforeseen event beyond human control, then it would be a reasonable ground for the extension of time, but at the same time, no compensation will be payable to the contractor for any loss incurred by him due to these reasons. Clause 3.1 (b) defines 'Site' and it means the land and/or other place on, into or through which work is to be executed under the contract or any adjacent land, path or street which may be allotted or used for the purpose or carrying out the contract. Clause 3.20 deals with Advances to Contractors. Clause 3.20.1 deals with Mobilization Advance and it would be 5% (Five per cent) of the contract value. At Stage 1 - 2% (Two per cent) of the contract value would be payable after the signing of the agreement and at Stage 2 - 3% (Three per cent) would be payable on receipt of the certificate from the contractor if he has established complete central and field testing laboratories and has engaged workers/technicians and has brought requisite plants and machinery at work site. The mobilization advance would be recovered from running bills. Clause 3.21 deals with the Scope of Lump Sum Cost and it shall comprise the construction, completion and

maintenance of the works and provision of all labour, materials, constructional plants, transport and all works of a temporary or permanent nature required for such construction, completion and maintenance. Clause 3.24 deals with the Schedule of Running Payment and it may be based on the break-up of the lump-sum subject to the stipulations of Clause 1.15 of conditions of contract and the detail is given in CHAPTER – V of the Contract Document. Clause 3.26 deals with Escalation. It says that it is a lump-sum contract where time is the essence of the contract. No claims of any sort with regard to escalation shall be admissible and therefore no payment whatsoever in this regard shall be made. Clause 3.27 defines Subsequent Legislation. It says if, after the last date of receipt of tenders for the Contract, there occurs in India any changes to any National or State Statute, Ordinance, Decree or other Law or any regulation or by-law of any local or other duly constituted authority, or the introduction of any such State Statute, regulation, by-law etc. by way of imposition of new taxes, duties and levies etc. or increase/reduction thereof which may cause the additional or reduced cost to the Contractor, if not taken into account in his bid, such additional or reduced cost shall, after due consultation with the Employer and the Contractor, be determined by the Engineer-in-Charge and shall be added to or deducted from the Contract Price. Clause 3.49.3 deals with Failure to Complete. If the contractor fails to complete the Design-Build prior to the Scheduled Completion period, the Employer may permit the contractor to continue the project by extending the period or terminate the contractor and may assign the work to someone else and the Employer will be entitled to recover from the contractor any direct loss incurred, including any loss resulting from the delayed operation of the works.

12. Judgments on the issue of alternative remedy relied on by the learned for the petitioner are as under:-

In the matter of Tantia Construction Private Limited (supra), the Hon'ble Supreme Court observed and held that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. It reads thus:-

"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 place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution."

In the matter of Unitech Limited (supra), the Hon'ble Supreme Court observed in paras – 38, 40 and 41 as under:-

"E. Analysis

E.1. Maintainability of the writ petition under Article 226

38. Much of the ground which was sought to be canvassed in the course of the pleadings is now subsumed in the submissions which have been urged before this Court on behalf of the State of Telangana and TSIIC. As we have noted earlier, during the course of the hearing, learned Senior Counsel appearing on behalf of the State of Telangana and TSIIC informed the Court that the entitlement of Unitech to seek a refund is not questioned nor is the availability of the land for carrying out the project being placed in issue. Learned Senior Counsel also did not agitate the ground that a remedy for the recovery of moneys arising out a contractual matter cannot be availed of under Article 226 of the Constitution. However, to clear the ground, it is necessary to postulate that recourse to the jurisdiction under Article 226 of the Constitution is not excluded altogether in a contractual matter. A public law remedy is available for enforcing legal rights subject to well-settled parameters.

40. This exposition has been followed by this Court, and has been adopted by three-Judge Bench decisions of this Court in *State of UP v. Sudhir Kumar and Popatrao Vynkatrao Patil v. State of Maharashtra*. The decision in *ABL International*, cautions that the plenary power under Article 226 must be used with circumspection when other remedies have been provided by the contract. But as a statement of principle, the jurisdiction under Article 226 is not excluded in contractual matters. Article 23.1 of the Development Agreement in the present case mandates the parties to resolve their disputes through an arbitration. However, the presence of an arbitration clause within a contract between a state instrumentality and a private party has not acted as an absolute bar to availing remedies under Article 226. If the state instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers of the Article 226 of the Constitution would lie. This principle was recognized in *ABL International*:

"28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions 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. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whirlpool Corpn. v. Registrar of Trade Marks* [(1998) 8 SCC 1].)

And this plenary right of the Hight Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise

the said jurisdiction.”

(emphasis supplied)

41. Therefore, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked. The jurisdiction under Article 226 was rightly invoked by the Single Judge and the Division Bench of the Andhra Pradesh in this case, when the foundational representation of the contract has failed. TSIIC, a state instrumentality, has not just reneged on its contractual obligation, but hoarded the refund of the principal and interest on the consideration that was paid by Unitech over a decade ago. It does not dispute the entitlement of Unitech to the refund of its principal.”

In the matter of Bharat Coking Coal Limited (supra), the Hon'ble Supreme Court observed in para – 28 as under:-

“(I) Maintainability of writ petition

28. The scope of judicial review in tenders has been explored in-depth in a catena of cases. It is settled that constitutional courts are concerned only with lawfulness of a decision, and not its soundness. Phrased differently, the courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon. However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills. This is especially true given our unique domestic circumstances, which have demonstrated the need for judicial intervention numerous times. Hence, it would only be the decision-making process which would be the subject of judicial enquiry, and not the end result (save as may be necessary to guide determination of the former). ”

13. Judgment on the principles of natural justice relied on by the learned counsel for the petitioner are as under:-

In the matter of Rajesh Agrawal (supra), the Hon'ble Supreme Court observed in paras – 36, 41, 42, 44, 45, 46, 68, 70, 80 and 81 thus:-

“D.2. Audi alteram partem

36. We need to bear in mind that the principles of natural justice are not mere legal formalities. They constitute substantive obligations that need to be followed by decision-making and adjudicating authorities. The principles of natural justice act as a guarantee against arbitrary action, both in terms of procedure and substance, by judicial, quasi-judicial, and administrative authorities. Two fundamental principles of natural justice are entrenched in Indian jurisprudence: (i) *nemo judex in causa sua*, which means that no person should be a Judge in their own cause; and (ii) *audi alteram partem*, which means that a person affected by administrative, judicial or quasi-judicial action must be heard before a decision is taken. The courts generally favour interpretation of a statutory provision consistent with the principles of natural justice because it is presumed that the statutory authorities do not intend to contravene fundamental rights. Application of the said principles depends on the facts and circumstances of the case, express language and basic scheme of the statute under which the administrative power is exercised, the nature and purpose for which the power is conferred, and the final effect of the exercise of that power.

41. In *State of Orissa v. Binapani Dei*, AIR 1967 SC 1269, a two-Judge Bench of this Court held that every authority which has the power to take punitive or damaging action has a duty to give a reasonable opportunity to be heard. This Court further held that an administrative action which involves civil consequences must be made consistent with the rules of natural justice: (AIR p. 1271, para 9)

“9. ... The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would therefore arise from the very nature of the function intended to be performed: it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case.”

42. In *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, a seven-Judge Bench of this Court held that any person prejudicially affected by a decision of the authority entailing civil consequences must be given an opportunity of being heard. This has been reiterated in a catena of decisions of this Court.”

44. In *Mohinder Singh Gill v. Chief Election Commr.*, (1978) 1 SCC 405, a Constitution Bench of this Court held that “civil consequences” cover infraction of

not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In that case, the Court held that denial of a democratic right to cast a vote inflicts civil consequences. In *D.K. Yadav v. J.M.A. Industries Ltd.*, (1993) 3 SCC 259, a three-Judge Bench of this Court observed that “everything that affects a citizen in his civil life inflicts a civil consequences”.

45. In *Canara Bank v. V.K. Awasthy*, (2005) 6 SCC 321, a two-Judge Bench of this Court succinctly summarised the history, scope, and application of the principles of natural justice to administrative actions involving civil consequences in the following terms: (SCC pp. 331-32, para 14)

“14. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression “civil consequences” encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.” (emphasis supplied)

46. There is a consistent pattern of judicial thought that civil consequences entail infractions not merely of property or personal rights, but also of civil liberties, material deprivations, and non-pecuniary damages. Every order or proceeding which involves civil consequences or adversely affects a citizen should be in accordance with the principles of natural justice.

68. In a decision of a three-Judge Bench of this Court in *Swadeshi Cotton Mills v. Union of India*, (1981) 1 SCC 664, the issue was whether the Central Government was required to comply with the requirements of *audi alteram partem* before it took over the management of an industrial undertaking under Section 18-AA(1)(a) of the Industries (Development and Regulation) Act, 1951. R.S. Sarkaria, J. speaking for the majority consisting of himself and D.A. Desai, J. laid down the following principles of law: (SCC p. 689, para 44)

“44. In short, the geneal principle – as distinguished from an absolute rule of uniform application – seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the *audi alteram partem* rule at the pre-decisional stage. Conversely, if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a

grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative progress or frustrate the need for utmost promptitude. In short, this rule of fair play ` must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands'. The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But, to recall the words of Bhagwati, J., the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."

70. In *Mangilal v. State of M.P.*, (2004) 2 SCC 447, a two-Judge Bench of this Court held that the principles of natural justice need to be observed even if the statute is silent in that regard. In other words, a statutory silence should be taken to imply the need to observe the principles of natural justice where substantial rights of parties are affected: (SCC pp. 453-54, para 10)

"10. Even if a statute is silent and there are no positive words in the Act or the Rules made thereunder, there could be nothing wrong in spelling out the need to hear the parties whose rights and interest are likely to be affected by the orders that may be passed, and making it a requirement to follow a fair procedure before taking a decision, unless the statute provides otherwise. The principles of natural justice must be read into unoccupied interstices of the statute, unless there is a clear mandate to the contrary. No form or procedure should ever be permitted to exclude the presentation of a litigant's defence or stand. Even in the absence of a provision in procedural laws, power inheres in every tribunal/court of a judicial or quasi-judicial character, to adopt modalities necessary to achieve requirements of natural justice and fair play to ensure better and proper discharge of their duties. Procedure is mainly grounded on the principles of natural justice irrespective of the extent of its application by express provision in that regard in a given situation. It has always been a cherished principle. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice where substantial rights of parties are considerably affected. The application of natural justice becomes presumptive, unless found excluded by express words of statute or necessary intendment. ... Its aim is to secure justice or to prevent miscarriage of justice. Principles of natural justice do not supplant the law, but supplement it. These rules operate only in areas not covered by any law validly made. They are a means to an end and not an end in themselves." (emphasis supplied)

80. *Audi alteram partem* has several facets, including the service of a notice to any person against whom a prejudicial order may be passed and providing an opportunity to explain the evidence collected. In *Tulsiram Patel*, (1985) 3 SCC

398, this Court explained the wide amplitude of audi alteram partem: (SCC p.476, para 96)

"96. The rule of natural justice with which we are concerned in these appeals and writ petitions, namely, the audi alteram partem rule, in its fullest amplitude means that a person against whom an order to his prejudice may be passed should be informed of the allegations and charges against him, be given an opportunity of submitting his explanation thereto, have the right to know the evidence, both oral or documentary, by which the matter is proposed to be decided against him, and to inspect the documents which are relied upon for the purpose of being used against him, to have the witnesses who are to give evidence against him examined in his presence and have the right to cross-examine them, and to lead his own evidence, both oral and documentary, in his defence. The process of a fair hearing need not, however, conform to the judicial process in a court of law, because judicial adjudication of causes involves a number of technical rules of procedure and evidence which are unnecessary and not required for the purpose of a fair hearing within the meaning of audi alteram partem rule in a quasi-judicial or administrative inquiry."

(emphasis supplied)

81. Audi alteram partem, therefore, entails that an entity against whom evidence is collected must: (i) be provided an opportunity to explain the evidence against it; (ii) be informed of the proposed action, and (iii) be allowed to represent why the proposed action should not be taken. Hence, the mere participation of the borrower during the course of the preparation of a forensic audit report would not fulfill the requirements of natural justice. The decision to classify an account as fraud involves due application of mind to the facts and law by the lender banks. The lender banks, either individually or through a JLF, have to decide whether a borrower has breached the terms and conditions of a loan agreement, and based upon such determination the lender banks can seek appropriate remedies. Therefore, principles of natural justice demand that the borrowers must be served a notice, given an opportunity to explain the findings in the forensic audit report, and to represent before the account is classified as fraud under the Master Directions of Frauds."

14. Judgment on price escalation relied on by the learned counsel for the petitioner are as follows:-

In the matter of Assam State Electricity Board (supra), the Hon'ble Supreme Court observed in paras – 13, 14 and 17 as under:-

"13. The arbitrator has taken the view that the provision for price escalation would not bind the claimant beyond the scheduled date of completion. This view of the arbitrator is based on a construction of the provisions of the contract, the correspondence between the parties and the conduct of the Board in allowing the completion of the contract even beyond the formal extended date of 6-9-1983 up to 31-1-1986. Matters relating to the construction of a contract lie within the

province of the Arbitral Tribunal. Moreover, in the present case, the view which has been adopted by the arbitrator is based on evidentiary material which was relevant to the decision. There is no error apparent on the face of the record which could have warranted the interference of the court within the parameters available under the Arbitration Act, 1940. The arbitrator has neither misconducted himself in the proceedings nor is the award otherwise invalid.

14. The view which has been adopted by the arbitrator is in fact in accord with the principles enunciated in the judgments of this Court. In *P.M. Paul v. Union of India*, 1989 Supp (1) SCC 368, a Bench of two learned Judges of this Court has held that: (SCC p. 372, para 12)

"12. ... Escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. The arbitrator has held that there was delay, and he has further referred to this aspect in his award. ... After discussing the evidence and the submissions the arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20% of the compensation under Claim I, he has accordingly allowed the same. This was a matter which was within the jurisdiction of the arbitrator and, hence, the arbitrator had not misconducted himself in awarding the amount as he has done.

This Court held that the contractor was justified in seeking price escalation on account of an extension of time for the completion of work. Once the arbitrator was held to have the jurisdiction to determine whether there was a delay in the execution of the contract due to the respondent, the latter was liable for the consequence of the delay, namely, an increase in price."

17. The award comports with principles of law governing price escalation firmly established by the decisions of this Court. For these reasons, we find merit in the contention of the learned counsel appearing on behalf of the claimant that the award does not suffer from any error apparent on the face of the record insofar as the aspect of price escalation is concerned."

In the matter of *NTPC Limited* (supra), the Hon'ble Supreme Court observed in paras – 15, 18 and 20 that:-

"15. Coming to the facts at hand, it is an admitted fact that there was substantial delay attributable to the appellant in handing over the sites for the 68-B, C and D quarters to the respondent. The appellant has not contested this finding before us.

18. The second issue pertains to the grant of escalation charges for work done by the respondent beyond the scheduled period of the contract. It is significant to note herein that the arbitrator only allowed a part of the claim made by the respondent under this head. In Civil Appeal No. 6483 of 2014, the arbitrator awarded a sum of Rs.17,86,212 against a claim of Rs.66,98,773, while in Civil Appeal No. 6484 of 2014, the arbitrator awarded a sum of Rs.3,03,419 as

against a claim of Rs.42,20,261. The arbitrator took a view on the construction of the clauses of the contract that the firm price clause operated only with respect to the period for which the contract subsisted, and would not subsist beyond the scheduled period of the contract. The arbitrator also noted that the appellant accepted the work undertaken by the respondent beyond the period of the contract without objections. The arbitrator also carefully assessed the period of delay attributable to the appellant and awarded escalation to the respondent only for the same.

20. We are of the opinion that the above holding of this Court is directly applicable to the present case. The arbitrator in the present case has constructed the present contract, and the fixed price clause, in the same manner. This construction was on the basis of the evidence on record and the submissions of the counsel before him. The arbitrator has carefully delineated the period of delay attributable to the appellant, and has granted the claim of the respondent only to that limited extent."

15. It would be worthy to take note of the fact that the answering respondents have not filed a para-wise reply or detailed reply to the petitions filed by the petitioner and they confined their reply to the maintainability of the Writ Petitions on account of the availability of alternative remedy of arbitration. Respondents No. 3 and 4 who floated the tender and entered into an agreement have filed certain documents to demonstrate that the sites were handed over to the petitioner within the contract period. Respondents No. 3 and 4 have annexed Annexure R 3-4/1 to the reply showing the current status of sites allotted to the petitioner on 24.01.2023. This Chart would show that out of 3871 Dwelling Units, work is in progress at 1871 Dwelling Units only and for the rest of the 2000 Dwelling Units, work is yet to be started. Respondents No. 3 and 4 on 12.03.2024 filed additional documents as Annexure R-2/4 reflecting dates on which the possession of sites was handed over to the petitioner. This Chart shows that the sites were handed over to the petitioner pertaining to items No. 1 to 8, 12, 13 & 14 in the year 2019 and in support thereof, Panchnamas have been attached. The possession of sites was handed over to the petitioner as under:-

- (i) Items No. 9, 10, 27, 28, 29 & 30 in the year 2021;
- (ii) Items No. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 & 33 in the year 2020;
- (iii) Items No. 29, 31 & 32 in the year 2022; and
- (iv) Items No. 25 & 26 in the year 2023.

Admittedly, the period of the contract came to an end in the month of March, 2022. Respondents No. 3 and 4 have not filed/annexed orders or letters to demonstrate that the possession of all sites was handed over to the petitioner in the year 2019 or 2020. An undated Panchnama annexed on page No. 12 of the additional documents filed by respondents No. 3 and 4 would show that survey No. 203/1 admeasuring 1689 sq.m.; survey No. 214 admeasuring 1290 sq.m.;

and, survey No. 215/1 admeasuring 600 sq.m. are recorded in the name of one Rajesh Sarkar and the above plots were demarcated in the presence of the Municipal Authorities. The Panchnama dated 24.09.2019 shows that the land reserved for the Economically Weaker Section at Grih Nirman Sahakari Samiti bearing survey No. 1260/2 admeasuring 1.60 acres was recorded in the name of Press Club Sahakari Samiti, but it is nowhere stated that the possession was handed over to the petitioner. As per the certificate dated 24.09.2019, the lands bearing survey Nos. 882/1 & 883/1 admeasuring 0.561 hectares are recorded in the name of Shivam Grih Nirman Samiti and the same was demarcated, but again nowhere it is stated that the possession was handed over to the petitioner. Likewise, respondents No. 3 and 4 have filed/annexed only Panchnamas. A certificate annexed on page No. 24 dated 08.03.2021 would show that the lands reserved for Economically Weaker Section bearing survey Nos. 350/2, 397 and 357/1 were in possession of M/s Mahaveer Builders and Promoters. It is stated in the letter that the available lands admeasuring 2.23 acres would be registered in favour of the Municipal Corporation after payment of compensation. Likewise, the certificate dated 01.12.2021 shows that the land is still in the possession of Sanjay Kumar Agrawal, Village Chilhaati, Bilaspur and the Municipal Corporation had to pay compensation before registration. The possession certificate dated 17.01.2022 says that 0.80 acres of land of Indu Enterprises would be registered with the Municipal Corporation after payment of compensation. Vide Annexure R-2/8 a notice was issued to the Proprietor (Director), Prosperity Builders, Private Limited and Rajesh Kumar Sonthaliya for payment of compensation against certain survey numbers. The Joint Director, Town and Country Planning, Bilaspur vide letter dated 23.03.2022 approved the Layout of Dwelling House of Pradhan Mantri Awas Yojna meaning thereby till 23.03.2022 Layout was not sanctioned with regard to certain projects. A letter dated 27.06.2022 which was issued after the end of the contract period by the Joint Director, Town and Country Planning, Bilaspur to the Commissioner, Municipal Corporation with regard to approval of the Layout of government land of Chantapara Mission School would depict that the sites were not handed over to the petitioner till 27.06.2022. Another letter was issued by the Joint Director, Town and Country Planning, Bilaspur on 23.05.2022 to the Commissioner, Municipal Corporation with regard to the site of Village Ameri, Tehsil Sakri, District Bilaspur for approval of Layout. Vide letters dated 04.02.2022 and 05.02.2022 the Joint Director, Town and Country Planning approved the Layout of Village Sakri, District Bilaspur.

16. On 14.03.2024, the petitioner filed certain documents whereby possession of certain sites was handed over to it. Vide letter dated 29.12.2021 a notice was issued to one Rajesh Sarkar for registration of land and payment of compensation with regard to sites situated at Village Koni, District Bilaspur admeasuring 18.36 acres. Notices were issued to Ajay Kumar Singh on 18.11.2021; Smt. Sandhya Sharma on 29.10.2021; Mrityunjay Jaiswal on 07.09.2021 and S.R. Sahu, Geetanjali Construction on 16.08.2021, which reflects that till the end of 2021, various sites were not in possession of the

Municipal Corporation. The order dated 03.08.2019 passed by the learned Civil Judge Class-II, Takhatpur, District Bilaspur in Civil Suit No. 27A/16 on an application filed under Order 39 Rules 1 and 2 of CPC reveals that there was a dispute between one Rajvinder Singh Beli and Chhattisgarh Shashkiya Karmchari Grih Nirman Samiti and others.

17. From a perusal of the documents filed by the petitioner, it is quite evident that immediately after the execution of the Agreement, the petitioner wrote a letter to the Municipal Corporation, Bilaspur for handing over sites free from all encumbrances. The first letter was addressed to Respondent No. 3 on 03.05.2019. Thereafter, the petitioner continuously wrote letters to the Municipal Authorities on 25.05.2019; 10.07.2019; 17.08.2019; 15.11.2019; 09.04.2020; 29.06.2021; 31.07.2021; 27.08.2021; 06.09.2021; 23.10.2021; 10.11.2021 and 07.01.2022, but no response was given for the reasons best known to the Authorities of the Municipal Corporation, Bilaspur. The petitioner also requested price escalation and payment of running bills. For the first time, respondent No. 4 vide letter dated 09.02.2022 stated that as per Clause 3.26 of the Agreement, the claim of the petitioner for price escalation cannot be accepted. In that letter, it was specifically stated that at 15 sites, construction of 1827 Dwelling Units is in progress whereas at 16 sites, 1058 Dwelling Units have been handed over to start the construction work. It is further stated that at 06 sites, 2900 Dwelling Units are in the slum area and it would take 01 year to make available those sites. From the letter dated 09.02.2022 which was issued 01 month prior to the completion of the contract period, it is apparent that it was admitted by the Municipal Corporation that on that date possession of entire sites was not handed over to the petitioner and the Corporation had shown its inability.

18. The petitioner vide its representation dated April 09, 2020, had described the status of sites and on that date, out of 5785 Dwelling Units, only 609 Dwelling Units were provided for construction. The letter issued on April 09, 2020, has not been disputed or denied by any of the respondents. Vide letter dated November 10, 2021, the petitioner sought price escalation on the grounds - (i) on account of delay in handing over of work sites; and, (ii) price escalation of the input costs including material and labour. It was stated in the representation that an agreement was entered into between the petitioner and respondent No. 3 in the month of March, 2019 and the prices of material and labour costs have increased substantially since the time of execution of the Agreement, however, again no response was given by respondents No. 3 and 4.

19. Respondent No. 3 vide letter dated 29.06.2021 addressed to respondent No. 4 reduced 1827 number of Dwelling Units out of 5785 Dwelling Units. This letter would show that no opportunity of hearing was afforded to the petitioner. Various representations were made by the petitioner for payment of running bills as stated in the letter dated 09.02.2022 issued by respondent No. 3 that pending bills would be cleared after receiving the contribution from the State Government. The letter dated 09.02.2022 shows that the running bills were not

paid regularly. Though the sites were not provided, there was a reduction in the number of Dwelling Units, despite these facts; respondent No. 3 threatened the petitioner to terminate the contract making the allegation that the petitioner could not restart the work after payment of 7.92 crores. In the opinion of this Court, there was no reason or occasion for the respondent authorities to extend threatening to terminate the contract when the petitioner was not at fault. The notices were also issued to the petitioner for revocation of the Bank Guarantees but with the intervention of this Court, no action was taken.

20. The petitioner also claimed enhanced GST according to Clause 3.27 of the Agreement on the ground that the Government of India had enhanced the rate of GST from 12% to 18% vide Notification No. 3/22 dated 13.07.2022 effective from 18.07.2022, but the same has not been considered yet by the respondents. The petitioner and other contractors of Pradhan Mantri Awas Yojna made representation before the State Government and in turn, the representation of the petitioner and other contractors was rejected on 08.09.2023.

21. After considering the input of the department with regard to price escalation, it was observed in the order impugned that the issue is formal and there is no need to take any action. With regard to allotment and handing over of the sites, it was observed that though the sites were not provided, the period of the contract has been extended without any penalty. Further, with regard to price escalation, it was stated that there is no such provision in the Agreement and according to Arbitration Clause 1.21 and Clause 3.26 price escalation is not permissible. With regard to GST, the claim of the petitioner and other contractors was turned down.

The order impugned would show that no opportunity of hearing was afforded to the petitioner and only on the basis of inputs called from the concerned department; the representation of the petitioner was rejected in a cryptic manner without assigning sufficient reasons. The respondents in their reply have not denied any of the allegations or pleadings of the petitioner. They adopted a shortcut and the sum and substance of their reply is that the petitions are not maintainable and the claim of the petitioner for price escalation, GST etc. cannot be considered in the absence of such provisions in the Agreement/Contract Document. Further, the respondents could not produce any document to demonstrate that all sites were handed over to the petitioner within the contract period from 07.03.2019 to 07.03.2022 as the period of the contract was 36 months. The documents brought on the record by the respondents would show that the sites were not allotted and still there are some disputes between the Municipal Corporation and the encroachers at various sites. It is admitted in the reply filed by respondents No. 3 and 4 that some of the sites were handed over to the petitioner in the months of November– December, 2021 or January– February, 2022. It is not possible for the petitioner to complete the construction of Dwelling Units within a period of 03 or 04 months at those sites. According to the Agreement, the Municipal Corporation ought to have handed over the

possession of the sites at the earliest, but the Municipal Corporation did not respond to the representations made by the petitioner.

Note – 2 of Form 'F' of the tender document says that the quantity/rates mentioned in the estimate are only indicative and not final and it can be considered as the basis for any claim. Note – 3 says that the actual rate shall be determined on the execution, whereas Clause 3.26 says that no claims of any sort with regard to escalation shall be admissible. This clause also says that the time is the essence of the contract.

When the time is essence of the contract, respondents No. 3 and 4 ought to have handed over all Dwelling Units within the stipulated time frame and if they failed to comply with the terms and conditions of the Contract, they cannot take benefit of Clause 3.26 to deny the claim of the petitioner concerning price escalation. Further, the Contract Document is to be read in its entirety. Note – 2 of Form 'F' or Note – 3 clearly says that the rates are only indicative and further, actual rates shall be determined on the execution meaning thereby though there is no provision for price escalation, if work is not completed within the contract period and the delay is not attributable on the part of the contractor/petitioner, such contractor shall be entitled to price escalation.

22. The Hon'ble Supreme Court while dealing with the issue of price escalation in the matter of Assam State Electricity Board (supra) held that escalation is a normal incident arising out of a gap of time in this inflationary age in performing any contract. It is also held that the contractor is justified in seeking price escalation on account of an extension of time for the completion of work.

In the matter of NTPC Limited (supra), the Hon'ble Supreme Court held that there was substantial delay attributable to the appellant in handing over the sites. The price escalation granted by the arbitrator was upheld by the Hon'ble Supreme Court in that matter.

In the present case also, the petitioner was asked to apply for price escalation by the Municipal Corporation itself, therefore, in the opinion of this Court, the petitioner shall be entitled to get price escalation.

23. With regard to payment of GST as the rate of GST was increased from 12% to 18% by the Government of India vide Notification No. 3/22 dated 13.07.2022 therefore according to Clause 3.27 of the Agreement; the petitioner shall be entitled to get GST refund.

24. Now coming to the issue of alternative remedy. In the matters of M.K. Jose (supra) and M.P. Power Management Co. Ltd. (supra), the Hon'ble Supreme Court observed and held that in case of the existence of a provision for arbitration; the writ court should ordinarily not entertain a writ petition if there exists a provision for arbitration.

The present petition has been filed mainly for price escalation. Clause 1.21 deals with arbitration. It says that all questions and disputes relating to the meaning of

the specifications, designs, drawings and instructions arising out of or relating to the contract, concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof, shall be referred to the Commissioner. In the present case, there is no dispute between the parties with regard to the specifications, designs, drawings and instructions of the Contract. Clause 3.26 of the Contract Document specifically bars price escalation but since this issue is not included in the arbitration clause, the matter cannot be referred to the arbitrator.

25. In the matter of Tania Construction Private Limited (supra), the Hon'ble Supreme Court held 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 the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. It is further said that injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law.

In the matter of Unitech Limited (supra), the Hon'ble Supreme Court while referring to the judgment passed in the matters of State of UP v. Sudhir Kumar and Popatrao Vynkatrao Patil v. State of Maharashtra held that Article 226 is not excluded in contractual matters. If the State instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers to Article 226 of the Constitution would lie. Therefore, in the opinion of this Court, the writ petitions filed by the petitioner are maintainable and the exception to alternative remedy would not attract when there is discrimination, or arbitrariness on the part of the respondents. In the matter of Bharat Coking Coal Limited (supra), the Hon'ble Supreme Court has held that allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills.

The opportunity of hearing was also not afforded to the petitioner while rejecting representation and in a very cryptic manner; the State Government rejected the representation of the petitioner.

26. With regard to the principles of natural justice, the Hon'ble Supreme Court in the matter of Rajesh Agrawal (supra) held the principles of natural justice are not mere legal formalities. It is further held that it must be followed by decision making and adjudicating authorities. The principles of natural justice act as a guarantee against arbitrary action, both in terms of procedure and substance, by judicial, quasi-judicial and administrative authorities.

27. Taking into consideration the above-stated facts and the law enunciated by the Hon'ble Supreme Court, the order impugned dated 08.09.2023 passed by the State Government pertaining to the petitioner is liable to be and is hereby quashed. The petitioner shall be entitled to get a price escalation and GST refund. The amount of GST shall be refunded to the petitioner according to Clause 3.27 of the Contract Document.

With regard to price escalation, the petitioner shall be entitled to get price escalation pertaining to the sites which were handed over to the petitioner in the year 2022 and thereafter.

The Secretary, Department of Urban Administration and Development / respondent No. 1 is directed to critically examine the matter and prepare a report within a period of sixty days with regard to the allotment of sites to the petitioner. The aforesaid authority shall afford the proper opportunity of hearing to all concerned. Respondent No. 1 after considering the rate of inflation shall pass an appropriate order with regard to price escalation, particularly for sites handed over to the petitioner in the year 2022 and thereafter. The entire exercise shall be completed by respondent No. 1 within a further period of sixty days. For a period of 120 days, no coercive steps shall be taken against the petitioner.

28. With the aforesaid observation(s) / direction(s), these petitions are hereby disposed of. No order(s) as to cost(s).