(2020) 11 OHC CK 0005

In the Orissa High Court

Case No : Writ Petition (Civil) No. 11405 Of 2020

M/S. Jasoda Roadlines And Another — APPELLANT

Vs

Orissa State Warehousing Corporation And Others — RESPONDENT

Date of Decision : 18-11-2020

Acts Referred:

Constitution Of India, 1950 — Article 226
Code Of Criminal Procedure, 1973 — Section 190
Indian Penal Code, 1860 — Section 34, 120B, 407, 420
Essential Commodities Act, 1955 — Section 7
Tamil Nadu Buildings (Lease And Rent Control) Act, 1960 — Section 10(3)(c)
Contempt Of Court Act, 1971 — Section 2(b)
West Bengal Tenancy Regulation Act, 1976 — Section 2(c)

Citation : (2020) 11 OHC CK 0005

Hon'ble Judges : Mohammad Rafiq, CJ;Biswanath Rath, J

Bench : Division Bench

Advocate : A.K. Mishra, D. Mohapatra, M.R. Pradhan, J.M. Barik, P.K. Singhdeo, A.K.Panigrahi, B.K. Dash, R. Dash, S.R. Dash, R.C. Sethy, K.K. Nayak, D. Mahajan, D. Nayak, S.K. Sahu, R.C. Pattnaik, S.K. Mulia

Final Decision : Disposed Of

Judgement

Dr. B.R. Sarangi, J.

1. Petitioner no.1-M/s. Jasoda Roadlines, a proprietorship firm having its registered office at Santia, PO/PS- Jaleswar, Dist.- Balasore, Odisha, is

engaged in the business of handling and transportation, and petitioner no.2 is its proprietor. They have filed this writ petition seeking following reliefs:-

â??It is, therefore, humbly prayed that this Honâ??ble Court may graciously be pleased to issue a Rule Nisi calling upon the Opposite Parties to show cause as

to why the order of termination dated 25.04.2020 under Annexure-7 issued by the Opposite Party No.1, OSWC shall not be set aside/quashed and if the Opposite

Parties fail to show cause or show insufficient case make the said Rule absolute.

And

Be further pleased to issue a writ in the nature of Mandamus directing the Opposite Parties to continue with the respective agreements executed between the

petitioner no.1 firm and Opposite Parties.

And

Pass such other order/orders, direction/directions as this Honâ??ble Court may deem fit and proper.â??

2. The factual matrix of the case, in hand, is that Orissa State Warehousing Corporation (OSWC) issued a notice inviting e-tender on 30.01.2019 for

appointment of regular handling and transportation contractor of food grain stock at various locations for a period of two years. Subsequently, the

Corporation issued a corrigendum to the e-tender on 13.02.2019 with certain changes. The said tender notice comprised of seven zones with 21

locations and in the process the petitioner no.1 was declared L1 and successful bidder in respect of nine locations, namely Jagatpur (Internal, Jatani

(Internal & RH), Dumerpani (Internal & RH), A. Katapali (Internal & RH), Nagenpali-I (Internal & RH), Nagenpali-II (Internal & RH), Kendpali

(Internal & RH), Attabira (Internal & RH) and Godbhaga (Internal & RH). In those nine locations, the price and quantity of materials were different,

for which separate agreements in the nature of work order for specific locations were drawn for administrative convenience. But in the work order it

has been specified that the terms and conditions of the MTF would be applicable. On 21.05.2019, the Corporation issued a common work order in

favour of petitioner no.1-contractor whereby it was to operate FCI stocks at nine locations.

2.1 The Ministry of Home Affairs (MHA) issued a standing order on 07.04.2020 under the Disaster Management Act, 2005, wherein it advised all

States to take urgent steps to prevent malpractices so as to ensure availability of essential goods and also advised to take action against offenders. The

General Manager, FCI reported on 21.04.2020 that one rake was under loading from railhead Bargarh to FSD, OJM (CFDA) on the very same day

and 38 trucks loaded with Fair Average Quality (FAQ) rice stock were handed over by the Superintendent of Corporation to the Supervisor of the petitioner no.1-contractor for transportation to the railhead Bargarh and loading to wagons. At the time of loading, it was noticed that 200 bags of rice

loaded in a truck bearing registration no. OR-17C-3923, transit pass no. 538/26887, dated 21.04.2020 was found to be of non-FAQ quality (i.e. sub-

standard). The truck was initially loaded with FAQ rice stock, which was delivered by one M/s. Gitanjali Rice Mills, as intimated by the Divisional

Manager, FCI, Sambalpur. But, however, the said truck arrived at railhead Bargarh containing sub-standard quality rice which got detected at the

railhead point. When non-FAQ rice was found in the truck (OR-17C 3923), it was detained and in lieu of that another truck without any registration

number and transit pass arrived at the railhead with 200 bags of rice. The rice bags in the truck, without registration number, were having stencil mark

of Samleshwari Rice Mill with lot no. 3 & 4 which were already issued out from the State Warehousing Corporation, Kendpali on 14.04.2020, resulting

in the material had been replaced, for which petitioner no.1-Contractor is solely responsible, as it was engaged for transportation of materials for the

godown in Kendpali to railway siding in Bargarh by the vehicle/trucks employed by it. The Corporation, on being intimated on 21.04.2020 by the FCI,

immediately lodged an FIR which was registered as Bargarh Sadar P.S. Case No. 115/2020 dated 21.04.2020 under Sections 420/407/120-B/34 IPC

and Section 7 of the Essential Commodities Act, 1955 against petitioner no.1-contractor.

2.2 The Corporation issued a show cause notice on 22.04.2020 against the H&T Contractor and called upon to explain as to why stringent measures

shall not be initiated for suspension of the H&T contract of SWC, Kendpali including other eight locations. So as to ensure that there was no disruption

of essential services to the needy States due to the illegal act of the H&T Contractor, the Corporation forthwith issued a suspension order with regard

to Kendpali site. Petitioner no.1-contractor gave its reply to the show cause notice dated 22.04.2020 and stated that it was duty of the FCI Railways

siding in-charge or representative of the Corporation to ascertain the facts, verify the receipt of the materials and make necessary entries in that

regard. The duty of petitioner no.1-contractor was to transport the materials from the godown and unload the same to the wagon at the railways siding.

Challenging the notice of show cause and order of suspension dated 22.04.2020, the petitioners moved to this Court by filing the present writ petition.

2.3 During pendency of this writ petition, reply of the petitioner no.1-contractor to the show-cause notice was thoroughly examined by a committee

constituted by the Corporation with regard to the allegations made by the FCI. The committee observed that petitioner no.1-contractor has committed

the following irregularities:-

â??(i) The H & T Contractor M/s. Jasoda Roadlines has grossly violated the terms and condition of the agreement made on 20.05.2019 as well as the terms and

condition of the Model Tender Format for handling & transportation of the goods.

(ii) The H & T Contractor has violated the condition specified the tender i.e. Clause No.XXI (Duties & Responsibility of the contractor).

(iii) He as violated the Prevention of Food Adulteration Act (iv) He has not provided proper escort at the time of dispatch of stock from SWC, Kendpalli to RH

Bargarh for which such an incident occurred.

(v) That the H & T contractor has committed criminal action by exchanging the FAQ rice to non-FAQ Rice which is meant for PDS.

(vi) The action of the H & T Contractor is not acceptable during the period of Covid-19 crisis.

(vii) The action of the H & T Contractor has tarnished the image of the OSWC. Its further continuance with the OSWC may be detrimental to the interest of the

Corporation in future.â??

After finding out the above irregularities, the committee opined that it was not satisfied with the show-cause reply submitted by petitioner no.1-

contractor in regard to its alleged involvement in the serious criminal activity in connivance with some millers and accordingly suggested that the

contracts made with petitioner no.1-contractor may be terminated in respect of all the 9 locations for the interest of the OSWC and the FCI and legal

action may be initiated against it. Pursuant to report of the committee, the Managing Director of the Corporation invoked Clause-XI(b) of the MTF and

terminated the H&T contract of petitioner no.1-contractor for all the 9 locations/ warehouses, vide order dated 25.04.2020. In pursuance thereof, the

petitioners filed two interlocutory applications; one for amendment of the writ petition and the other for grant of interim order staying operation of the

termination order.

2.4 While entertaining the writ petition on 29.04.2020, this Court passed the following order:-

â??Heard Mr. S.K.Padhi, learned Senior Advocate along with Mr.Dillip Kumar Das, learned counsel for the petitioner.

An IA is filed in Court for amendment of the writ petition, which be registered as such.

Having heard learned counsel for the petitioner, prayer for amendment is allowed.

It is submitted that consolidated copies of the writ petition have already been filed serving copy thereof on other side.

Accordingly, the I.A. for amendment is disposed of.

Issue notice.

Since Mr.Bijay Kumar Dash, learned counsel appears on behalf of the Caveator - opposite party-Orissa State Warehousing Corporation, let five extra copies of the

writ petition be served on him.

Learned counsel for the petitioner files an unnumbered IA seeking inter alia for a direction to stay operation of order of termination dated 25.04.2020 under

Annexure-7 and further not to execute any agreement with any third party in respect of handling and transportation work awarded to the petitioner No.1 Firm as

per work order dated 21.05.2019.

The said IA be registered by assigning a number.

W.P. (C) No. No. 11405 of 2020 2 Mr.Dash, learned counsel for the opposite partyCorporation seriously objects to the above prayers stating that taking into

consideration the situation and exigency of uninterrupted food supply, the Corporation after giving adequate opportunity to the petitioner, suspended and

thereafter cancelled the work order granted in favour the petitioner. It is his submission that the handling and transportation of food grains will be made

departmentally to avoid any disruption.

Upon hearing learned counsel for the parties it prima facie appears that the Corporation was haste in cancelling the handling and transportation contract of the

petitioner for all nine Warehouses without any reasonable justification although the allegation is against only one Warehouse, namely SWC, Kendpali.

Taking into consideration the exigency of pandemic of COVID-19, as an interim measure, it is directed that the petitioner shall be allowed to operate the contract

except the Warehouse at SWC Kendpali, under supervision of District Police Administration. It is made clear that the cost of supervision shall be borne by the petitioner.

The above order shall be subject to the result of the writ petition. We make it clear that we have not expressed any opinion on the FIR stated to have been lodged

by the Corporation against the petitioner. The Corporation is also free to proceed against the petitioner departmentally and to take necessary steps to 3 prevent

pilferage/substitution of grain/rice given for transportation from different warehouses to the petitioner to deliver the same in different destinations, by any

substandard grain/rice, as alleged.â??

The Corporation challenged the said interim order dated 29.04.2020 by way of SLP (C) No.6766/2020 and the apex Court, vide order date 15.05.2020,

though initially issued notice and stayed operation of the order dated 29.04.2020, but subsequently disposed of the aforesaid SLP, vide order dated

15.06.2020, by passing the following order:-

â??The order passed by this Court on 15.5.2020 shall be the interim order in the pending writ petition. We therefore allow this appeal and set aside the order

under appeal.

However, the department shall not finalize any award of tender in favour of any person till the matter is disposed of by the High Court and shall continue to do the

job of handling and transportation departmentally.â??

3. Mr. A.K. Mishra, learned counsel appearing along with Mr. D. Mohapatra, learned counsel for the petitioner argued with vehemence contending

that the order of termination dated 25.04.2020 passed by the Managing Director, Odisha State Warehousing Corporation, Bhubaneswar is not only

arbitrary, unreasonable and illegal but also suffers from gross violation of the principles of natural justice. It is further contended that even though there

is availability of alternative remedy by way of arbitration clause, that itself cannot preclude this Court to exercise power under Article 226 of the

Constitution of India. It is further contended that the allegation made against petitioner no.1-contractor relates to contract of Kendpali, but by issuing

the impugned order dated 25.04.2020 all the 9 contracts have been cancelled without due compliance of the principles of natural justice, although each

contract is separate, as would be evident from the agreements and the work orders. As such, there is no breach of terms and conditions of the contract, therefore, the termination of the same without any rhyme or reason is illegal apart from being arbitrary, unreasonable and violative of the

principles of natural justice. So far it relates to contract of Kendpali, the show-cause notice did not mention the particular clause for breach of which

the notice was issued. If clause-XXI of MTF is taken into consideration as a whole, though same has been referred as part in the order of termination,

no case is made out against petitioner no.1-contractor. It is further contended that the power vested with the Managing Director in clause-XI ought to

be exercised judiciously. Therefore, if the action taken by the opposite parties is arbitrary and unreasonable and exercised in a contractual matter, that

deserves to be set aside. It is further contended that though MTF contains arbitration clause, which is to be exercised by way of alternative remedy,

but that itself is not an absolute bar to adjudicate the matter in exercise of extraordinary jurisdiction of this Court under Article 226 of the Constitution

of India.

It is further contended that police have submitted charge-sheet wherein petitioner no.1-contractor has not been impleaded as accused. Rather,

petitioner no.1-contractor is the whistle blower, which has brought the irregularities to the notice of the authority, but it has been penalized by cancelling

the contract in respect of 9 locations. It is further contended that for the alleged error committed in respect of one location at Kendpali, the termination

made in respect of 9 locations is harsh. Thereby, the order impugned cannot sustain in the eye of law and the same should be quashed.

To substantiate his contentions, though several citations have been mentioned in the written note of arguments submitted by learned counsel for the

petitioners, but specifically he has relied upon the judgments in Premier Printing Press, Jaipur v. State of Rajasthan, AIR 2017 (NOC) 447 (RAJ.);

Union of India v Tantia Construction Private Ltd., (2011) 5 SCC 697; Harbanslal Sahania v. Indian Oil Corpn. Ltd., (2003) 2 SCC 10;7 IOCL v.

Amritsar Gas, (1991) 1 SCC 533; and ABL International v. Export Credit Guarantee Corporation of India Ltd, (2004) 3 SCC 533.

4. Mr. A.K. Panigrahi, learned counsel appearing for opposite parties no. 1 to 4 raises preliminary objection with regard to maintainability of the writ

petition, due to availability of alternative remedy of arbitration under the MTF, and contended that in view of arbitration clause-XIX of the terms and conditions of the agreement (MTF) any dispute arising between the tenderers/ contractors and Odisha State Warehousing Corporation concerning the

contract, the same shall be decided and resolved by way of arbitration. As such, if remedy is available under the agreement itself, the petitioners,

without availing the same, could not have approached this Court by filing this writ petition. It is further contended that there is no violation of any of the

principles of natural justice and more specifically, it arises out of a contract, which is a commercial transaction and, as such, evaluating tenders and

awarding contracts are essentially commercial functions. Thereby, principles of equity and natural justice stay at a distance. If the decision relating to

award of contract is bona fide and is in public interest, Courts will not, in exercise of power of judicial review, interfere even if a procedural aberration

or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private

interest at the cost of public interest, or to decide contractual disputes.

It is further contended that petitioner no.1-contractor was communicated with the allegations and was called upon to show cause. In response thereto,

petitioner no.1-contractor submitted its reply, which was placed before a committee for consideration and the committee finding out the irregularities

suggested for termination of contracts of petitioner no.1-contractor. Consequentially, the Managing Director passed the impugned order of termination

and, thereby, there is compliance of principle of natural justice. As regards personal hearing, it was not required to be given, as petitioner no.1-

contractor had been given adequate opportunity to give reply to the notice of show cause. It is further contended that the order of termination has been

passed by the Managing Director by invoking the power under clause-XI(b), which provides for summery termination. Therefore, once it is a summary

termination and opportunity was given to petitioner no.1-contractor to give reply to the allegations made against it, in that case the Managing Director is

well justified in passing the order impugned, which does not require interference of this Court at this stage. It is further contended that out of 21

locations, petitioner no.1-contractor participated in respect of 15 locations, which arose out of one tender and was composite in nature and out of those

15 locations, petitioner no.1-contractor was selected being the L1 in respect of 9 locations, and that though separate agreements were executed in

respect of different locations because of the price, but one work order was issued in favour of petitioner no.1-contractor. Thereby, termination of the

contract in respect of 9 locations, in view of the allegations made against the location Kendpali, cannot be construed to be harsh. If it is a composite

contract and arising out of a single tender, even if error is committed in respect of one location, the tenders awarded in respect of other locations are to

be set aside and accordingly, the Managing Director has passed the order impugned, which is well within its competence, otherwise it would have

persuaded petitioner no.1-contractor to commit further mistakes in respect of other locations causing difficulties to general public who are the ultimate

beneficiaries under the PDS system.

It is further contended that there are many factual disputes available on record itself which are required to be adjudicated by invoking arbitration clause

arising out of the contract. More so, such disputed questions of fact are not susceptible to judicial review under Article 226 of the Condition of India.

As per clause-XXI, the contractor shall be responsible for the safety of the goods while in transit in his trucks/carts/any other transport vehicles and

for delivery of quantity dispatched from the railhead/godowns. If said clause is alleged to be violated, in that case petitioner no.1-conractor has to

establish that there was no such violation, which cannot be decided in a writ petition. More so, there is no violation of fundamental rights nor is there

any violation of principle of natural justice, and the order so passed or proceedings is completely within jurisdiction of the authority concerned. In that

case, this Court should not exercise the extraordinary jurisdiction under Article 226 of the Constitution of India.

It is further contended that much reliance has been placed on the charge sheet submitted in a criminal proceeding, but as a matter of fact the report

submitted by the investigating officer dated 06.07.2020 is not conclusive and it is still open to the Magistrate to take cognizance under Section 190

Cr.P.C. by rejecting the opinion of the investigating officer and, as such, these opposite parties have a right to raise protest against such report and,

thereby, no conclusion can be drawn with regard to the report submitted by the investigating officer.

It is further contended that clause XI(b) of the contract, by which the Managing Director has been vested with the power to terminate the contract which is summary in nature, was examined and upheld by the Delhi High Court, therefore, the contention raised that the power invoked by the

Managing Director is arbitrary, unreasonable and contrary to the provisions of law, cannot sustain in the eye of law.

Although various judgments have been referred to in the written note of submissions, but in course of argument he has relied upon the judgments in

Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517; JSW Infrastructure Ltd. v. Kakinada Seaports Ltd.(2017) 4 SCC 170 U; nion of India v. Jesus

Sales Corporation, (1996) 4 SCC 69; A.S. Motors Pvt. Ltd. v. Union of India, (2013) 10 SCC 114; P.D. Agrawal v. State Bank of India, (2006) 8 SCC

776; State of U.P. V. Bridge & Roof Company (India) Ltd., (1996) 6 SCC 2;2 Smt. Rukmanibai Gupta v. Collector, Jabalpur, (1980) 4 SCC 556; The

Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. v. Sipahi Singh, (1977) 4 SCC 14;5 Oriental Bank of Commerce v. Sunder Lal Jain,

(2008) 2 SCC 280; M/s. Radhakrishna Agarwal v. State of Bihar, (1977) 3 SCC 457 ;Whirlpool Corporation v. Registrar of Trade Marks, Mumbai,

(1998) 8 SCC 1; Bhagwant Singh v. Commissioner of Police, (1985) 2 SCC 537; Vijay Trading & Transport Co. v. Central Warehousing Corporation,

2010 SCC OnLine Del 4736; and State of U.P. v. Sudhir Kumar Singh, 2020 SCC OnLine SC 874.

5. Mr. D. Nayak, learned counsel appearing for opposite party no.5-FCI also raised a preliminary objection with regard to maintainability of the writ

petition contending that the termination order dated 25.04.2020 issued by the Managing Director arises out of a contractual matter and, as such, nothing

has been revealed in the writ petition that may justify exercise of extraordinary jurisdiction, and in absence of the same the petitioners have to pursue

the alternative remedy available under the contract, for which the writ petition is not maintainable, especially against opposite party no.5. It is further

contended that neither there is any privity of contract nor any legal relation between petitioner no.1-conractor and opposite party no.5. If at all the

petitioners seeks relief, the same is against opposite parties no.1 to 4, who entered into the contract with petitioner no.1-conractor and have legal

relationship. Thereby, the writ petition, so far as opposite party no.5 is concerned, should be dismissed.

It is further contended that opposite party no.5 is a statutory Corporation established under the Food Corporation Act, 1964 and a nodal organization of the Government of India to implement the National Food Policy to ensure delivery of food grains to every corner of the whole of India through public

distribution system. To fulfill and maintain the above objectives, FCI has to store and facilitate movement of food grains across the country. The

storage of food grains is also effected by entering into contracts with Central Warehousing Corporation (CWC) and State Warehousing Corporations

(SWCs). Thereby, the FCI hires storage space in the godowns/warehouses of the CWC or the SWCs for storage of food grains and also hires their

handling and transport. Therefore, FCI, CWC and SWCs are independent contractors. The petitioner-firm was involved in handling and transportation

of FCI rice stock stored in the OSWC godowns at 9 different locations across the State of Odisha, including the OSWC godown at Kendpali from

where rice was being transported to West Bengal from Bargarh railhead on 21.04.2020, pursuant to the Central Governmentâ??s directions, to

mitigate any risk of shortage of food grains in the country due to COVID-19 pandemic. During supervision of the rake operation at the Bargarh

railhead to transport the FCI rice stock on 21.04.2020 by the concerned FCI officials, it was noticed that there was a shortage of 200 full bags of rice

and that the quality of rice in one truck was sub-standard. After the preliminary enquiries, it was established prima facie that the entire stock in the

truck had been replaced along the way with sub-standard rice by petitioner no.1-conractor. When petitioner no.1-conractorâ??s representative on site

was informed on such facts, he brought another un-numbered truck loaded with rice bags claiming the same to be the original stock. It was also

discovered during inspection that the sub-standard stock brought on 21.04.2020 in truck number OR-17-C-3923 contained bags from a lot of rice stock

that had already been dispatched on 14.04.2020. The original rice stocks were replaced by some other stock that had escaped detection on the very

same day. Basing on this information, the OSWC, with whom the FIC had entered into a contract for storage of FCI stock and their handling and

transportation, filed an FIR and follow up action was taken by terminating the contract of petitioner no.1-conractor. It is further contended that the

action so taken against petitioner no.1-conractor by opposite parties no.1 to 4 cannot be said to be illegal, which may not be interfered with in this

proceeding.

6. This Court heard Mr. A.K. Mishra, learned counsel appearing for the petitioners; Mr. A.K. Panigrahi, learned counsel appearing for opposite parties

no.1 to 4 and Mr. D. Nayak, learned counsel appearing for opposite party no.5 through virtual mode. Pleadings have been exchanged between the

parties, in compliance of the order passed by the apex court and with the consent of learned counsel for the parties the matter is being disposed of

finally at the stage of admission by giving opportunity of hearing to all the parties.

7. In view of preliminary objection raised by both the learned counsel appearing for opposite parties no.1 to 4 and opposite party no.5, this Court,

instead of delving into the merits, proceeded to decide the question of maintainability of the writ petition.

8. For just and proper adjudication of the above question, the relevant clauses of the instructions to the tenderers for e-procurement along with general

information to tenderers are extracted hereunder:-

â??XI. Summary Termination

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b) The Managing Director shall also have, without prejudice to other rights and remedies, the right, in the event of breach by the contractors of any of the terms

and conditions of the contract, to terminate the contract forthwith and to get the work done for the unexpired period of the contract, at the risk and cost of the

contractors and/or forfeit the security deposit or any part thereof for the sum or sums due for any damages; losses, charges, expenses or costs that may be suffered

or incurred by the Corporation due to the contractorâ??s negligence or unwork-man like performance of any of the services under the contract.

c) The contractor shall be responsible to supply adequate and sufficient labour, scales/trucks/carts/any transport vehicle for loading/unloading, transport and

carrying out any other services under contract in accordance with the instructions issued by the Managing Director or an officer acting on his behalf. If the contractor fails to supply the requisite number of labour, scales and trucks/carts, the Managing Director shall, at his entire discretion without terminating the

contract be at liberty to engage other labour, scales, trucks/carts, etc. at the risk and cost of the contractors, who shall be liable to make good to the Corporation

all additional charges, expenses, cost or losses that the Corporation may incur or suffer thereby. The contractor shall not, however, be entitled to any gain

resulting from entrustment of the work to, another party. The decision of the Managing Director shall be final and binding on the contractor.

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XIX. Laws governing the contract & dispute Resolution:

(a) The contract shall be governed by the laws of India for the time being in force.

(b) (i) Arbitration Any dispute arising between the Tenderers/ Contractors and Odisha State Warehousing Corporation pertaining to any of the matters

concerning the contract, the same shall be decided and resolved by way of arbitration.

The arbitration shall be held following the procedure prescribed under the provisions of Arbitration & Conciliation Act, 1996 as amended from time to time. The

bidder while participating in the tender process specifically agrees that the entire dispute shall be determined through Arbitration by the Sole Arbitrator to be

appointed by the Managing Director of Odisha State Warehousing Corporation keeping in view the provisions under Section-12(5) & the corresponding

SEVENTH SCHEDULE of the Arbitration & Conciliation Act, 1996. Place of Arbitration shall be in Bhubaneswar and language of Arbitration in English.

In case any dispute arises pertaining to any of the matters concerning the Contract, the affected party shall give notice to the General Manager(C) of the

Corporation for amicable resolution of the dispute sitting across the table. After receiving notice if the General Manager (C) of the Corporation fails to resolve

the dispute within a period of three months, the affected party shall give a notice of Arbitration to the Managing Director of the Corporation specifically mentioning his claims, grievances. For the purpose, the affected person shall give 30 days prior notice to the Managing Director of Odisha State Warehousing

Corporation, who on receipt of the notice shall take steps for appointment of Sole Arbitrator to decide the matter. While appointing the Sole Arbitrator, the

Managing Director of Odisha State Warehousing Corporation shall act in terms of provisions under Sectioin-12(5) and the corresponding schedule-VII of the

Arbitration & Conciliation Act, 1996.

All such notices for arbitration shall be given either by registered post or through official acknowledgment.

(ii) Jurisdiction

Any dispute that arises between the parties to this tender, the court at Bhubaneswar only shall have jurisdiction to entertain the proceedings. No other courts

except the courts at Bhubaneswar shall have jurisdiction to adjudicate any dispute, entertain any proceeding pertaining to the tender/ contract in question.

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XXI: DUTIES AND RESPONSIBILITIES OF THE CONTRACTOR

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21. The contractor shall be responsible for unloading/loading the wagons within the free period allowed by the Railways and also for loading/unloading the

trucks/carts/any other transport vehicles expeditiously. The contractor shall be liable to make good any compensation demurrage/wharfage as per railways rules

in force during the period of contract, or other charges or expenses that may be incurred by the Corporation on account of delays in loading/unloading of

truck/carts and loading/unloading of wagons unless the delay is for reasons beyond the contractorâ??s control. The decision of the Managing Director in this

respect shall be final and binding on the contractor.

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27. The contractor shall be responsible for the safety of the goods while in transit in his trucks/carts/any other transport vehicles and for delivery of quantity

dispatched from the Railhead/Godowns etc; as the case may be to the destination or to the recipients to whom the grain etc; is required to be transported by the

contractor. He shall provide tarpaulins on decks of the trucks, so as to avoid loss of the grain etc; through the holes/cervices in the decks of the trucks. He shall

also exercise adequate care and take precautions to ensure that the foodgrain bags are not damaged while in transit in their trucks/carts/any other transport

vehicles. He shall deliver the number of bags and the weight of foodgains etc; received by them and loaded on their trucks. The contractor shall be liable to make

good the value of any shortage, wastage losses or damage to the goods in transit at twice the average acquisition cost as applicable from time to time for all

foodgrains and commodities other than sugar and thrice the average acquisition cost as applicable from time to time in respect of sugar except when the

Managing Director (whose decision shall be final) decides that the difference between the weight taken at the dispatching and receiving ends is negligible and is

due to the discrepancies between the scales, gain or loss in moisture or other causes beyond contractors control. Such recovery shall be effected without prejudice

to the right of OSWC to initiate civil/ criminal proceedings against the defaulting contractor wherever it is suspected that the shortages/ losses occurred due to

deliberate/ willful omission, theft, misappropriation, irregularities etc. committed by the contractor or his representatives/employees.â??

9. Admittedly, there is an express arbitration clause contained in clause-XIX of the agreement (MTF) and there is no dispute that petitioner no.1-

contractor had not entered into agreement for handing and transportation contract. Thereby, any claim made by petitioner no.1-contractor shall govern

by the agreement executed between the parties and any breach thereof has to be adjudicated in terms of the said agreement. A bare perusal of the

above noted clauses would indicate that clause-XIX(b)(i) provides an arbitration clause which clearly specifies that any dispute, arising between the

tenderers/contractors and Odisha State Warehousing Corporation pertaining to any of the matters concerning the contract, shall be decided and

resolved by way of arbitration. Thereby, a mechanism has been prescribed under the contract itself to resolve the dispute arising between the

tenderers/contractors and Odisha State Warehousing Corporation.

10. By using the word â??anyâ? in the beginning of the clause, it clarifies that it has got several meanings, according to the circumstances, it may

mean â??allâ??, â??eachâ??, â??everyâ??, â??someâ??, â??or one or more out of severalâ??.

In Judicial Dictionary of Words and Phrases (Fifth Edition by John S. James), the word â??anyâ?? is defined as a word which excludes limitation

or qualification.

In Blackâ??s Dictionary (Fifth Edition), it has been specifically mentioned that the word â??anyâ?? has the following meaning- some, one out of

many; an infinite number, one indiscriminately of whatever kind or quantity; or may be employed to indicate â??allâ?? or â??everyâ?? as well as

â??someâ?? or â??oneâ??. It is often synonymous with â??eitherâ??, â?? everyâ?? or â??allâ??. This meaning has been taken into consideration

by the apex Court while considering Section 10(3)(c) of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 in the case ofS hri Balagansan

Metals v. M.N. Shanmugam Chetty, AIR 1987 SC 1668.

In Lucknow Development Authority v. M.K. Gupta, AIR 1994 SC 78,7 the use of word â??anyâ?? in the context it has been used in wider sense

extending from one to all.

In Rane Narang v. Rama Narang, AIR 2006 SC 1883, the apex Court, while considering Section 2(b) of Contempt of Courts Act, held that the word

â??anyâ?? in Section 2(b) of the Act indicates wide nature of the power under the Act.

In Associated Indian Mechanical Pvt. Ltd. v. W.B. Small Industries Development

Corporation Ltd., AIR 2007 SC 78, 8while considering Section

2(c) of the West Bengal Tenancy Regulation Act, 1976, the apex Court held that the word â??anyâ?? used in the opening part of the Section 2(c) of

the Act is a word of very wide meaning and prima facie the use of it excludes limitation.

11. Applying the above meaning to the present clause-XIX(b)(i), it can be safely construed that any dispute in relation to such clause indicates wide

nature of power and, as such, it excludes the limitations. Thereby, any matter arising out of the contract can be adjudicated in an arbitration

proceeding.

12. In Smt. Rukmanibai Gupta (supra), the apex Court in paragraph-10 held as under:-

â??10. â?¦â?¦â?¦â?¦Arbitration Act, 1940, is a self- contained exhaustive code. Relief sought by the appellant by invoking 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 lime stone 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 . The Dy. Excise and Taxation Commissioner).â??

13. In Bridge & Roof Company (India) Ltd. (supra), theÂ apexÂ CourtÂ inÂ paragraph-21Â heldÂ as follows:-

â??There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter a1ia for settlement of

disputes by reference to arbitration [Clause 67 of the Contract]. The Arbitrators can decide both questions of fact as well as questions of law. When the contract

itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and

invoke the extra-ordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the court to decline to exercise its extra-ordinary jurisdiction under Article 226. The said Article was not meant to supplant

the existing remedies at law but only to supplement them in certain well-recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus

was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory

obligation cast upon the appellants. Indeed, the very resort to Article 226 - whether for issuance of mandamus or any other writ, order or direction - was

misconceived for the reasons mentioned supra.â??

14. The law laid down by the apex Court clearly indicates that when a contract provides for resolving the dispute arising out of a contract, there is no

reason why the party should not follow and adopt that remedy and invoke the extra ordinary jurisdiction under Article 226 of the Constitution of India.

The existence and effect of alternative remedy in the present case is provided in the contract itself under clause-XIX(b)(i). Therefore, there is no

justifiable reason to interfere with the same by invoking extra-ordinary jurisdiction of this Court.

15. In Sudhir Kumar Singh mentioned supra, the apex Court clearly laid down the principles of natural justice summarized as follows:-

â??The principles of natural justice can be summarised as follows: (i) it is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice.

The breach of the audi alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused. (ii) Where procedural and/or

substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. The prejudice must be

caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest but also in public interest. (iii) No

prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by

reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the court finds on facts that no real

prejudice can be said to have been caused to the person complaining of the breach of natural justice. (iv) In cases where facts can be stated to be admitted or

indisputable, and only one conclusion is possible, the court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This

conclusion must be drawn by the court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person. (v) The prejudice

exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact or be based upon a definite

inference of likelihood of prejudice flowing from the non-observance of natural justice.â??

16. In the facts of the present case, it cannot be said that there was breach of natural justice. Therefore, it would be futile to exercise the writ

jurisdiction under Article 226 of the Constitution of India. As a matter of fact, in the present case, when irregularities were brought to the notice of the

authority, consequentially show cause was called for from petitioner no.1-contractor, who in response thereto submitted reply, and the matter was

placed before the committee for adjudication. Thereafter, the committee, after due adjudication, came to a conclusion that irregularities were

committed by petitioner no.1-contractor and on that basis invoking clause-XI(b) the Managing Director has passed the order impugned. It is of

relevance to note that nomenclature of clause-XI is â??summary terminationâ?. The word â??summaryâ? prefixed to â??terminationâ? has got its

own meaning.

17. As per Webster Dictionary, â??summaryâ?? is defined to mean short, concise, reduced into a narrow compass or into a few words.

In Mohanlal v. Kartar Singh, (1995) Supp. (4) SCC 684, the apex Court held that the word â??summaryâ?? implies a short and quick procedure

instead of or, as an alternative to, the more elaborate procedure ordinarily adopted or prescribed for deciding a case.

18. In the above premises, this Court is of the considered view that since disputed questions of fact are involved in the matter and more so the matter

arises out of a contract and, as such, when the contract itself provides a forum for adjudication by way of reference to arbitrator, this Court should

refrain from exercising the extraordinary jurisdiction under Article 226 of the Constitution of India.

19. In the facts and circumstances of the case as well as the settled position of law, as discussed above, since there is availability of an alternative

efficacious remedy available to the petitioner, this Court, without expressing any opinion on the merits, disposes of the writ petition permitting the

petitioners to approach the appropriate forum, by availing alternative remedy under the contract itself, in accordance with law.

20. The writ petition is thus disposed of. There shall be no order as to costs.

As lock-down period is continuing for COVID-19, learned counsel for the parties may utilize the soft copy of this judgment available in the High

Courtâ??s official website or print out thereof at par with certified copies in the manner prescribed vide Courtâ??s Notice No.4587 dated

25.03.2020.

