
(2013) 03 PAT CK 0005
In the Patna High Court
Case No : CWJC No. 1162 of 2013

M/s. Spanco Limited

APPELLANT

Vs

The Bihar State Electricity Board now known as Bihar State
Power (Holding) Co. Ltd. and Others

RESPONDENT

Date of Decision : 05-03-2013

Acts Referred:

Citation : (2014) 2 PLJR 228

Hon'ble Judges : Ramesh Kumar Datta, J

Bench : Single Bench

Judgement

Ramesh Kumar Datta, J.—Heard learned counsel for the petitioner and learned counsel for the respondent Bihar State Power (Holding) Company Limited and the Power Finance Corporation as also learned Central Government Counsel. The petitioner has come up to this Court seeking quashing of the order dated 9.1.2013 issued by the Chief Engineer (R.E.) In-charge R-APDRP, Bihar State Power (Holding) Company Limited by which the contract of the petitioner has been terminated in terms of General Condition of Contract Clauses 33.1, 33.2 read with Clauses 11.1 and 11.2 of Letter of Award, Section 1 and for consequential directions.

2. The petitioner is engaged in the business of creation of Information Technology Infrastructure and Software and has been empanelled by the Ministry of Power, Government of India through the Power Finance Corporation. The respondent Bihar State Electricity Board came out with a request for proposal for appointment of Information Technology Implementation Agency (ITIA) from among the empanelled Companies with the Power Finance Corporation (PFC) on 10.5.2010. As many as eight parties participated in the bidding process and the petitioner being L-1 bidder was awarded the Letter of Intent on 29.11.2010. The contract price was approximately Rs. 159.89 crores. The period for completion of the work was 18 months from the Letter of Intent.

3. The stand of the petitioner is that the Data Centre was to be handed over to

the petitioner initially by February, 2011 and subsequently extended to May, 2011 but the same was handed over in December, 2011. It is the further stand that the respondents were also required to hand over the Disaster Recovery Centre so that the work upon it was to be started on supply of 80% of the materials, etc. and it could be commissioned after successful implementation of the scheme by its go live of at least 70% Town, i.e., 49 towns out of total 71 towns, but the disaster recovery centre has not yet been handed over to the petitioner.

4. There are also other series of complaints by the petitioner regarding lack of proper co-operation on the part of the respondents in providing the details, etc. that was sought from time to time, as also in the installation of meters which resulted in delay in installation of modems by it. It is stated that it was able to procure 2000 modems at the earliest but they could not be installed because of the said delay.

5. It is also alleged that there was delay in application of modules by the respondents which consequently resulted in delay in implementation of the project by the petitioner.

6. Further allegation is that while the petitioner had taken all steps in completing the project it was required to be given the Payment Gateway Information from the concerned Banks but the same has not been given till date. For the aforesaid reasons the matter has been delayed and the project could not be completed within 18 months period from LOI, i.e., by the end of May, 2012.

7. The respondents, on the other hand, have alleged that the petitioner itself is responsible on account of its incompetency, lack of finance and lack of co-ordination with its partners and suppliers in implementation of the project, as a result of which huge delay has occurred and even after expiry of more than two years from the grant of LOI not a single town or even the pilot town has gone live not to talk of the entire work being completed.

8. The claim of the petitioner regarding delay on the part of the respondent Board, now the Bihar State Power (Holding) Company has been denied and it is stated that the Data Centre was delayed due to not handing over of the required design of the Data Centre by the petitioner which was done in August and the handing over of the Data Centre was made on 26.12.2011. It is also submitted that apart from there being no delay on the part of the respondents in getting Data Centre ready and handing over the same, it cannot be a ground of delay in progress of the work by the petitioner for which it is solely responsible and it is evident from the work schedule that the work could have begun and continued at the proper pace without the Data Centre being handed over to it. It is also contended that despite the handing over of Data Centre in December, 2011 even after more than a year the petitioner has failed to complete the project and the progress was painfully slow. Under the said circumstances, the respondents were constrained to issue a show cause notice on 9th August, 2012 by which the

petitioner was allowed three weeks time to complete execution of work by 31.8.2012 in respect of at least the delivery of Servers at site, installation of 2000 Modems already supplied till date and further supply of 50% of balance Modems on available Meters and Mobilization of GSP M/s. ROLTA at site to demonstrate GIS application with Pilot town data as validated by BSEB with full satisfaction and acceptance of BSEB failing which the contract with BSEB will automatically stand terminated with effect from 1.9.2012 in terms of relevant clauses of RFP including GCC clause 33.1 "Termination for Default" and GCC Clause 33.2 "Termination for Insolvency" and no further notice or communication in this regard will be required or sent to the petitioner. It was further stated in the show cause notice that all other consequence would follow thereafter.

9. It is the stand of the BSEB that none of the three tasks directed to be completely executed by 31.8.2012 was done by the petitioner. It is the further stand of the respondents, so far as the handing over of Disaster Recovery Centre is concerned, that the same has to be commissioned only after successful go live of at least 70% town, i.e., 49 towns out of total 71 towns awarded in the scope of work and even after a lapse of more than six months after total contract period of 18 months there has not been go live of even a single town so far and hence non-handing over of the Disaster Recovery Centre cannot be an excuse so far as the petitioner is concerned. It is also submitted that the Disaster Recovery Centre is ready and has not been handed over for the sole reason that insufficient progress has been made by the petitioner.

10. Regarding the delay in installation of Modem, it is submitted that as many as 14000 modems were required to be provided by the petitioner but they have procured 2000 modems and installed 500 modems till the date of termination, that too, after repeated reminders and persuasion by the respondent Board as also during the course of review in a meeting with the Ministry of Power and PFC and even after the issuance of notice of termination on 9.8.2012. It is the stand of the respondents that non-installation of Modem was on account of the petitioner having not maintained good financial relationship with their Meter Data Acquisition Service Provider (MDASP) M/s. SECURE Meters in any of the States including Bihar and for the said reason MDASP has never been continuously in the scene on the site and has always been blocking the work of supply and installation of modems on account of non-payment by the petitioner to it.

11. It is also the stand of the respondents that one of the most important reasons of delay is the failure of the petitioner to pay its partners, vendors, etc. like Microsoft for operating system, ESRI for GIS applications, M/s. Secure Meters for Modems and SIM, and M/s. ROLTA as GIS service provider. All of them have made correspondences with the Board in that regard making complaints against the petitioner.

12. Regarding the delay in development of application modules by the respondents it is stated that the same is not correct and it is lack of understanding and inability to capture the utility requirements properly that the

personnel of the petitioner require more and more iterations causing the petitioner's failure in application finalization.

13. It is the stand of the respondents that the State Bank of India has refused to extend the facility of Payment Gateway Information unless and until it was allowed to make survey of the Data Centre and related Hardware and Software for security purposes but the petitioner did not make the Data Centre ready to the extent of requirement of the Bank and thus payment gateway related delay is also on account of delay caused by the petitioner.

14. Due to the aforesaid reasons and repeatedly alleged failure of the petitioner to complete the work the respondent Power (Holding) Company ultimately by its order dated 9.1.2013 has terminated the contract and invoked the performance Bank guarantee of Rs. 12 crores.

15. Learned counsel for the petitioner has, however, taken this Court to the various charts, etc. to show that large part of the work has already been completed. It has also been sought to be impressed that in the Power Ministers Conference held on 5.2.2012 the progress made in the State has been held to be satisfactory.

16. Learned counsel further submits that this Court must quash the termination letter on account of the public interest involved in the continuance of the contract. It is submitted that the Board has acted in the matter on account of the pressure upon it because of the letter dated 8.1.2013 issued by the Government of India, Ministry of Power wherein it was stated that if the project is not completed within the time frame given, which was till March, 2013, the loan may not be converted into a grant. It is, however, asserted by learned counsel for the petitioner on the basis of resolution in the Power Ministers Conference that the period of completion of the work has been extended to December, 2013 and thus the said period is no more in existence and there is no occasion for the respondents to apprehend that the grant may be converted into loan. Learned counsel thus submits that in the public interest the Courts interfere in the matter and quash the termination letter as the petitioner is interested in completing the work within the extended time frame but it is asserted that in case the termination remains then the new ITIAs who will be appointed after fresh bidding will have to start from scratch as the work done by the petitioner till now cannot be of any use except the hand over as the solution is not available on the shelf.

17. It is further submitted by learned counsel for the petitioner that new ITIA will have to be appointed only from those on the panel of the Power Finance Corporation and such empanelled ITIAs are already facing delay in all the States in which they have been awarded the contract. It is also submitted that it cannot be said that the new ITIA will be able to complete the project within the time schedule required. It is also asserted that the project cost on the award of contract will also increase due to increase in price of dollars in the International Market. For all the said reasons it is asserted that the project may not get

completed within the extended period and the grant may be converted into loan.

18. Learned counsel also submits that if the termination is not interfered by this Court then it can only result in unnecessary litigation in which it cannot be said that the petitioner would not be able to show that it is not responsible for the delay rather the same is attributable to the respondents or both the petitioner and respondents may be equally responsible for the same and thus the respondents may not be entitled to recover any additional cost for getting the work implemented through new ITIA and the same would be a dead loss for the respondents.

19. It is asserted by learned counsel for the petitioner that given the extended period of completion of the project till December, 2013 the petitioner who has already completed substantial work as is evident from the progress chart filed in the case would be able to complete it. It is also submitted that the petitioner undertakes to complete the project within the time limit as directed by this Court.

20. Learned counsel has also sought to assail the impugned order on the issue of insolvency submitting that the petitioner has already supplied materials worth Rs. 50 crores out of Rs. 112 crores required to be invested in the project and the Bank guarantee of Rs. 12 crores is also with the respondents which would be used for making direct payment for supply of software to Microsoft and ESRI to avoid any suspicion of non-payment of License Fees due to financial crunch. It is stated that the petitioner may furnish fresh Bank guarantee if so required in the meantime. It is thus submitted by learned counsel that if the respondents assure to provide inputs to complete the applications and once they provide the input and the operating systems and software licenses are obtained then the work of loading of application will be left which can be done without any wastage of time and the project can be completed within the extended schedule and without any additional demand of price escalation, which advantages would not be available to the new ITIA as they will be starting a new work afresh. Learned counsel has also sought to assert that the petitioner company achieved the revenue of Rs. 1921.97 crores with the profit after tax of Rs. 67.12 crores and the company's net worth is more than Rs. 625 crores in the financial year ended in March, 2012 and while there may be tightness of cash flow at any particular point of time but that does not affect their solvency and therefore the termination on the ground of financial insolvency is totally uncalled for.

21. Learned counsel for the Board, on the other hand, submits that due to the slow progress made by the petitioner after the award of contract for a period of nearly 19 months, when the respondent Board was compelled to issue show cause notice on 9.8.2012 and even thereafter it is evident that the petitioner is not at all in a position to complete the project and the action of the respondents is not at all arbitrary which is the only ground on which the Court may interfere with the termination letter in writ jurisdiction, it is submitted that on the basis of the materials brought on the record it cannot be said that the Board has acted arbitrarily or whimsically in the matter. It is contended that the Board/Power

Holding Company has given sufficient opportunity to the petitioner and even permitted it to continue after 31.8.2012 but the progress made is not satisfactory as desired and it is evident so far as the respondents are concerned that the petitioner would not be able to complete the project within the foreseeable future also and the same thing will happen with one excuse or the other in the matter.

22. It is also submitted that mere mention of the progress to be satisfactory in the Brochure issued after the Power Minister Conference on 5.2.2013 cannot be of any benefit to the petitioner as the PFC Model Bid Document mentions 12 months from the date of award for completion of pilot town project which has not been done by the petitioner, not to speak of completing the entire project in 18 months period as was required under the contract into which the petitioner had willingly entered with open eyes.

23. It is also urged by learned counsel for the respondents that complaints have been made against the petitioner in the other States also like Rajasthan, Gujarat as also part of Maharashtra. In Maharashtra it has been pointed out that several components have been taken away from the petitioner due to poor performance of the petitioner.

24. Learned counsel also emphasizes the fact regarding the poor relationship of the petitioner with its partners and suppliers who have made even direct complaints before the Board, some of which have also been made part of record which makes it clear that the petitioner is not at all capable to work on the project in a proper manner with any one, not only with the respondent Board/ Power Holding Company but even its own partners and associates.

25. It is also submitted by learned counsel that the ground of insolvency although it is denied cannot be ruled out as all of its partners have complained regarding non-payment by the petitioner to them as a result of which they have been coming to the Board to settle the said issue.

26. Both learned counsel for the petitioner and the respondents have relied upon several decisions in support of their stand. Learned counsel for the petitioner has relied upon the case of Tejas Constructions and Infrastructure Pvt. Ltd. Vs. Municipal Council, Sendhwa and Another, . The said decision was rendered in a very different context of eligibility of bidders in the time of bid and it has been held in the said case that except where substantial public interest is involved the writ court would not be justified in interfering with the commercial transaction in which the State is a party.

27. Learned counsel also relies upon a decision of the Apex Court in the case of Union of India (UOI) and Others Vs. Tania Construction Pvt. Ltd., . In the said case, however, termination of contract by the Railways was on failure of the respondent contractor to undertake additional work at the old rate which was held by the Apex Court to be unjustified action on the part of the Railways. Such issue does not arise in the present matter.

28. The next case relied upon by the petitioner is of Navshardul Construction Pvt. Ltd. vs. The Union of India & Ors.: 2007 (4) BBCJ 571. In the said case the Railways had terminated the contract and issued fresh tender for remaining work at the risk of the petitioner of that case which was held by this Court to be unjustified on the ground that there was admitted delay due to inaction on the part of the Railways itself. In the present matter there is no such admission by the respondents of any delay on their part rather there has been vehement denial of the same by the respondent Board/Power Holding Company.

29. Learned counsel also relies upon a Division Bench decision of the Orissa High Court in the case of Sri Padma Charan Patra Vs. State of Orissa and Others, of which it has been held as follows:--

16. The stand taken by the State Government in its counter-affidavit and the three documents vide Annexures-19, 22 and 23 respectively, which have been issued by the Opposite Parties, establish beyond any reasonable doubt that the Opposite Parties did not fulfill their obligation under the agreement and the petitioner was clearly prevented from executing the work within the stipulated time. Accordingly, the petitioner cannot be made to suffer for the admitted laches of the functionaries of the State Government. In the circumstances, the action of the State Government in seeking to rescind the contract alongwith penalty is clearly illegal and cannot be sustained. Therefore, the petitioner is entitled to payment of all his dues along with price escalation.

Accordingly, the writ petition is allowed.

The aforesaid case is also one of admitted laches and inaction of the State respondents.

30. Lastly learned counsel has placed reliance on a decision of the Apex Court in the case of Karnataka State Forest Industries Corporation Vs. Indian Rocks, of which it has been held as follows:--

38. Although ordinarily a superior court in exercise of its writ jurisdiction would not enforce the terms of a contract qua contract, it is trite that when an action of the State is arbitrary or, discriminatory and, thus, violative of Article 14 of the Constitution of India, a writ petition would be maintainable.

31. Learned counsel for the respondent Board/Power Holding Company, on the other hand, has relied upon a decision of the Apex Court in the case of Radhakrishna Agarwal and Others Vs. State of Bihar and Others, . In paragraphs-12, 15, 17, 19, 21 and 25 of the said decision it has been held as follows:--

12. The Patna High Court had, very rightly, divided the types of cases in which breaches of alleged obligation by the State or its agents can be set up into three types. These were stated as follows:--

(i) Where a petitioner makes a grievance of breach of promise on the part of the

State in cases where on assurance or promise made by the State he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Art. 299 of the Constitution;

(ii) Where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Act or Rules framed there under and the petitioner alleges a breach on the part of the State; and

(iii) Where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State.

15. It then, very rightly, held that the cases now before us should be placed in the third category where questions of pure alleged breaches of contract are involved. It held, upon the strength of *Dr. Umakant Saran Vs. State of Bihar and Others*, and *Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others*, and *B.K. Sinha Vs. State of Bihar and Others*, that no writ or order can issue under Art. 226 of the Constitution in such cases "to compel the authorities to remedy a breach of contract pure and simple".

17. Learned counsel contends that in the cases before us breaches of public duty are involved. The submission made before us is that, whenever a State or its agents or officers deal with the citizen, either when making a transaction or, after making it, acting in exercise of powers under the terms of a contract between the parties, there is a dealing between the State and the citizen which involves performance of "certain legal and public duties". If we were to accept this very wide proposition every case of a breach of contract by the State or its agents or its officers would call for interference under Art. 226 of the Constitution. We do not consider this to be a sound proposition at all.

19. We do not think that any of these cases could assist the appellants or is at all relevant. None of these cases lays down that, when the State or its officers purport to operate within the contractual field and the only grievance of the citizen could be that the contract between the parties is broken by the action complained of, the appropriate remedy is by way of a petition under Art. 226 of the Constitution and not an ordinary suit. There is a formidable array of authority against any such a proposition. In *Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others*, this Court said (at page 337):

In our opinion, any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Art. 226 of the Constitution. In *Banchhanidhi Rath Vs. The State of Orissa and Others*, this Court declared (at p. 845):

If a right is claimed in terms of a contract such a right cannot be enforced in a writ petition.

21. In the cases before us, allegations on which a violation of Art. 14 could be

based are neither properly made nor established. Before any adjudication on the question whether Art. 14 of the Constitution could possibly be said to have been violated, as between persons governed by similar contracts, they must be properly put in issue and established. Even if the appellants could be said to have raised any aspect of Art. 14 of the Constitution and this Article could at all be held to operate within the contractual field whenever the State enters into such contracts, which we gravely doubt, such questions of fact do not appear to have been urged before the High Court. And, in any event, they are such a nature that they cannot be satisfactorily decided without a detailed adduction of evidence, which is only possible in ordinary civil suits, to establish that the State, acting in its executive capacity through its officers, has discriminated between parties identically situated. On the allegations and affidavit evidence before us we cannot reach such a conclusion. Moreover, as we have already indicated earlier, the correct view is that it is the contract and not the executive power, regulated by the Constitution, which governs the relations of the parties on facts apparent in the cases before us.

25. The limitations imposed by rules of natural justice cannot operate upon powers which are governed by the terms of an agreement exclusively. The only question which normally arises in such cases is whether the action complained of is or is not in consonance with the terms of the agreement. As already pointed out by us, even if by some stretch of imagination some case of unequal or discriminatory treatment by the officers of the State of persons governed by similar contracts is sought to be made out, a satisfactory adjudication upon the unusual facts of such a case would necessitate proper pleadings supported by acceptable evidence. In that case, the interim stay order or injunction could not be justified at all because so long as a Presidential Order, under Article 359 of the Constitution is operative, the enforcement of fundamental rights falling under Art. 14 is suspended. In such cases even if a petition or suit is entertained and kept pending no stay order could be passed because that would amount to indirectly enforcing the fundamental rights conferred by Art. 14 of the Constitution. It is only where a prima facie case for an injunction or stay can be made out, quite apart from a right covered by Art. 14 of the Constitution or by any other fundamental right whose enforcement may have been suspended, that an injunction or stay could be granted at all on suitable terms. As we have already said it was on such an assumption that this Court had, apparently, granted the interim stay which must now be discharged.

32. Learned counsel for the respondents has also relied upon a Full Bench decision of this Court in the case of Pancham Singh Vs. The State of Bihar and Others of which it has been held as follows:--

18. Learned Advocate General, appearing for the State, in view of the aforesaid judicial pronouncements could not contend that as the dispute relates to contractual obligations between the petitioner and the State, a writ application under Article 226 of the Constitution is not maintainable, where grievance has

been made about arbitrariness and lack of fair play on the part of the State violative of Article 14 of the Constitution. But according to the learned Advocate General in none of the cases referred to above, any formal agreement had been executed in terms of Article 299 of the Constitution and, as such, any observation or direction in connection with those contractual obligations shall not be applicable to the facts of the present case. In other words, this case is covered by category (iii) mentioned in the case of Radhakrishna Agarwal (supra). It was also pointed out on behalf of the respondents that in the case of Radhakrishna Agarwal (supra) Supreme Court held that once the State or its agents have entered into the field of ordinary contract, no question of violation of Article 14 or of any other constitutional provision arises. In this connection reference was made to the following observations:--

But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Art. 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.

19. It is true that in none of the cases referred to above any formal agreement had been executed between the persons concerned and the State; the observations in respect of applicability of Article 14 of the Constitution, in connection with contractual obligations has been made in connection with the contracts in general. But at the same time the observation in the case of Radhakrishna Agarwal (supra) that once the State or its agents have entered into the field of ordinary contract no question arises of violation of Article 14 or any other constitutional provision, must be read in connection with the grievances referable to breach the terms of duly executed agreement. I have already pointed out above, that there will be difference, where the cancellation is because of the breach of any of the terms of the contract and where cancellation of the contract, is on a ground de hors the terms of the contract. In my view, where an agreement executed in accordance with Article 299 of the Constitution is cancelled on a ground which is not referable to any of the terms of the contract, and is per se violative of Article 14 of the Constitution, this Court can exercise the jurisdiction under Article 226 of the Constitution. This can be appreciated by an example. After execution of an agreement in accordance with Article 299 of the Constitution, the contractor is asked by the authority concerned not to proceed with the construction of the project on the ground that later it has been discovered that such contractor is not resident of the district in which the project is to be constructed. Can it be urged in such a situation, that as the contractor has entered into an agreement with the State Government he cannot invoke the jurisdiction of this Court under Article 226 of trite Constitution

and he should be directed to knock the door of Civil Court for damages or specific performance of the contract although the order is per se violative of Article 14 of the Constitution?

33. I have considered the submissions of learned counsel for the parties. It is evident from the various decisions cited at the Bar that while in the exercise of writ jurisdiction by this Court the terms of a contract cannot be enforced but when an action of the State is arbitrary and discriminatory and therefore violative of Article 14 of the Constitution of India a writ petition can be entertained. In the present matter, one has to consider that the case of the petitioner falls in the third category of a contract which has not been entered into in the exercise of any constitutional, executive or statutory power and the respondent Board is not a statutory body any more after the new Electricity Act, 2003 nor has been given power of contract by the Electricity Supply Act, 1948 in specific terms and thus its powers in that regard are like that of any other legal person to enter into a contract, as has been held by this Court in CWJC No. 20965 of 2012 Reported in HCL Infosystems Limited Vs. The Bihar State Electricity Board, Patna and Others, . by judgment dated 18.2.2013 and therefore this case squarely falls under third category as enumerated in Radhakrishna Agarwal's case (supra). Prima facie the respondents thus seem to be acting in terms of the contractual provisions in terminating the contract of the petitioner. However, the same would still be open to question on the ground of arbitrariness or discrimination as there cannot be any doubt that the Board/Power Holding Company is a State within the meaning of Article 12 of the Constitution of India.

34. From a consideration of the materials on the record and the submissions of learned counsel for the parties it is evident that there is no admission by the respondent Board/Power Holding Company of any delay or default on its part. On the other hand, "serious charges of lack of financial soundness of the petitioner, etc. have been leveled by the respondent Board against the petitioner and the same has also been sought to be supported on the basis of various correspondences received from the project partners and suppliers of the petitioner who have complained regarding the conduct of the petitioner and for the said reason they have not come forward in the matter until the commercial issues are settled by the petitioner with them.

35. In this regard I may also refer to the fact brought to the notice of the Court when it was sought to be argued by learned counsel for the petitioner that the IBM which is the software supplier in the present case is now charging double the price from the petitioner for the same material than what it had charged in Punjab. In the said circumstances, the petitioner offered change of the specification so as to bring in HP which is also approved/authorized supplier as per the panel prepared by the Power Finance Corporation but the Board, according to the petitioner, did not accept any change in the specification, as a result of which IBM taking advantage of the situation pressurized the petitioner

for payment. It is submitted that the difference to be paid is in the range of Rs. 17-18 crores. It was pointed out by learned counsel for the Board/Power Holding Company that it is the petitioner itself which in its tender papers agreed to supply IBM software as per the specifications made therein and it is not open to the petitioner to turn around and seek a change at a belated stage which the Board does not permit. It is thus submitted that all the allegations made by the petitioner in this regard against the respondent Board could be of little avail as the petitioner itself has filed the tender papers showing IBM as its choice of software supplier and if the software was not made available then it was a problem between the petitioner and IBM; it was for the petitioner while filing its tender papers to look into all aspects of the matter which relates to the manner in which it has to conduct its business while carrying out a contract.

36. Same is the position with regard to the complaints by the other companies as enumerated above. Thus this is not a case where it is open to the petitioner to say that the delay in completion of the project is on account of the delay or inaction on the part of the officials of the respondent Board. The project has been delayed prima facie because the petitioner itself is responsible for the delay in the matter although there may have been some default on the part of the respondent Board also.

37. On a consideration of the materials and affidavits before this Court and considering that the matter is being looked into in its writ jurisdiction it is not possible for this Court to reach a firm and final conclusion in the matter, which can be looked into in appropriate proceedings either before the civil court or the arbitral tribunal as a large number of disputed facts have been raised herein. Moreover the explanations on behalf of the Board are not without any basis and can at least support the contention of learned counsel for the Board prima facie that there has been no arbitrariness on the part of the officials of the respondent Board while terminating the contract of the petitioner.

38. So far as the issue of extension of time is concerned, learned Central Government Counsel has submitted that there is no such formal order extending the period of completion of the project from March, 2013 to December, 2013.

39. The only issue that now remains to be considered is as to whether the public interest would be served by this Court interfering in the matter and fixing time limit to complete the project by the petitioner keeping in view the various parameters which learned counsel for the petitioner has argued above. It is evident from the submission made by learned counsel for the petitioner that if by the interference of this Court the project is continued then it will be completed in time only when the respondents assure to provide the inputs and the operating systems and software licenses are received and only thereafter the work of loading of application will be left which can be done without any wastage of time and the project can be completed. Thus, any such direction giving extension of time to the petitioner to complete the project would be likely to meet the same fate as happened to the project during the period of more than two years when

the petitioner was carrying out the same. The petitioner claims to have completed a large part of the work but on specific query from this Court it is submitted by learned counsel for the petitioner that at the very least it would take at least six months time to complete the work of loading applications that too after the respondents have provided the inputs to complete the applications and thus once they provide the input and the operating systems and software licenses are obtained then the work of loading of application will be done. Under such circumstances, this Court does not consider it appropriate to interfere and issue any such direction to the parties to allow the petitioner to complete the project.

40. The petitioner has been brought into the picture by the action of the respondent Board and it is their responsibility to see that the project is implemented to the satisfaction of the Government of India which is funding the project through the Power Finance Corporation which is monitoring the same. Even the reviews made from time to time during the process of monitoring by the Power Finance Corporation as also by the Ministry of Power, Government of India, they have found that the contractor has been lacking behind on several counts and warnings even to the extent of termination had also been issued to the petitioner.

41. Thus, in the light of the aforesaid discussions this Court does not find any occasion to interfere with the action of the respondent Board/Power Holding Company.

42. The writ application is, therefore, dismissed. It is, however, made clear that any observation made by this Court in the present order is only prima facie for the purpose of decision of the writ petition and shall not adversely affect the petitioner in case it chooses to approach the appropriate forum, whether a court or an arbitral tribunal, in the matter in support of its claims under the contract.