

**WP-6576-2015**

*(M/S RAJKAMAL BUILDERS PVT. LTD THR Vs THE STATE OF MADHYA PRADESH THR)*

**17-12-2015**

**HIGH COURT OF MADHYA PRADESH  
BENCH AT GWALIOR**

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**DB:- Hon'ble Shri Justice U. C. Maheshwari  
&  
Hon'ble Shri Justice Sushil Kumar Gupta**

**Writ Petition No. 6576/2015**

M/s Rajkamal Builders Pvt. Ltd

Vs.

State of Madhya Pradesh & Others

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Shri Sanjay Shukla, learned counsel for the petitioner.

Shri Arvind Dudawat, learned Additional Advocate General & Shri Vishal Mishra, learned Deputy Advocate General for the respondents/ State.

Shri Satish Chandra Pandey, Executive Engineer, Harsi High Level Division-II, Dabra, District Gwalior is present in person.

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**O R D E R**

**(Passed on 17<sup>th</sup> day of December, 2015 )**

**Per Shri U. C. Maheshwari, J :**

On behalf of the petitioner- Company, this petition is preferred under Article 226 of the Constitution of India, for issuing the

appropriate writ against the authorities of the respondents, for the following reliefs:-

7(i) To quash and set aside order/notice dt.21/9/2015 passed by respondent no.2.

- ii. To direct respondent not to interfere and cause hindrance and obstructions so that Petitioner can construct the tunnel and further six months time to complete the entire work w. e. f. 31.12.15 be extended.
- iii. Allow this petition with costs.
- iv. Any other relief/order/ orders, direction/directions which this Hon'ble Court may deems fit and proper may kindly be granted to the Petitioner Firm including the cost of petition.

7(iv-a) That, the respondents be directed to make regular, uninterrupted payment as against work performed by the petitioner without any legal or administrative hurdle, in future.

2. Initially, the relief extending further six months period from 31/12/2015 to complete the entire work was not made in clause (ii) of aforesaid relief clause and prayer of aforesaid clause 7(iv-a) was also not made at the initial stage. The same were inserted in petition subsequently by way of amendment.

3. The facts giving rise to this petition, in short, are that the petitioner- Company (registered under the Companies Act, 1956) working as a contractor, in response of NIT of respondent No.2

dated 08/07/2010 (Annexure P/2), published on 09/07/2010 for construction of tunnel of lump sum basis for RD 73160 M to RD 75845 M (2.685 km) on Harsi High Level Canal under Sindh Project Phase II has submitted its tender for such work, on which after accepting its tender under the contract, the petitioner was granted contract work of the aforesaid tunnel for an amount of Rs.31,19,52, 310/- by work order dated 10/10/2011 (Annexure P/3). As per terms of NIT and the contract, the petitioner-Company has submitted bank guarantee of Rs.1 crore of Punjab and Sindh Bank, PY Road, Indore through letter dated 10-10-2011 (Annexure P/4) and thereafter, again submitted bank guarantee of Rs.1 crore in the month of August to carry out the contractual work, copies of such bank guarantee are also annexed collectively with the petition as Annexure P/5. In order to perform the contract, the petitioner deployed its staffs and machinery, like dumper and excavator etc. at the site for starting the contractual work, but the drawing and designs being under approval, were not given to the petitioner within time, on which the petitioner requested the respondent No.1 through letter dated 03/11/2011 (Annexure P/6) to approve the drawing and designs as early as possible to start the work. As per further case of the petitioner, the petitioner was

always remained ready to carry out the contractual complete work within time but there was always delay on behalf of the respondents, in supplying designs and drawing, in taking permission from the Forest Department and in acquiring the land for construction of tunnel and in such premises, the period to complete the contractual work was extended from time to time and lastly, the same was extended up-to 31/12/2015. Copy of such extension order, request letter and other related correspondence are annexed with the petition collectively as Annexure P/7. Apart the aforesaid, time to time the authorities of the respondents have conducted the inspection of the site and prepared the inspection reports. In such inspection report, it was found that petitioner is desirous to complete the work. The concerning correspondence are annexed collectively with the petition as Annexure P/8. As per further averments, through letter dated 10/09/2015 (Annexure P/9) the respondent No.2 had informed to the Superintending Engineer that the petitioner has constructed more than 50% work for which the amount of Rs.1627.87 lacs has been given to it and still the excavation work of tunnel is conducting by the petitioner with 1 or 2 blast daily and accordingly, there is a progress of work at the site. In such correspondence, it was also stated that *prima*

*facie* it appears that the petitioner is desirous to complete the work but its progress is slow due to various reasons. As per further contention, in view of the inspection report and minutes of meeting held between the petitioner and the respondent No.2, the petitioner was confident that it would be allowed to complete the work up-to the extended time period i.e. 31/12/2015 but suddenly bolt from blue, on 21/09/2015 the petitioner was served with a show-cause notice (Annexure P/10) issued by the respondent No.2 thereby the petitioner was threatened in carrying out the excavation work of tunnel from RD 74110M to RD74184M, with information that the same would be given to some other agency on the cost and risk of the petitioner. Such notice was given to the petitioner although in the shape of show-cause notice but in fact it was merely an eye-wash and the language of such notice makes it an order because the respondent has pre-concluded and assumed that the petitioner would not be able to complete the construction work till 31/12/2015. By way of amendment, the petitioner further pleaded that the respondents already granted extension of time till 31/12/2015 for completion of work in question and the petitioner will complete the tunnel to open and operate with construction up-to 1 meter each side wall, so that water may flow

and canal may start its functioning and for rest of the work the petitioner requires six months additional time after 31/12/2015 to complete the entire construction work of contract, as was decided in the meeting dated 24/08/2015 between the petitioner and Chief Engineer of the respondents. Besides the other grounds, the impugned show-cause notice Annexure P/10 was also challenged by the petitioner, stating that the same has not been issued in speaking manner by mentioning all relevant facts and annexing photo copies of reference/ letter mentioned in the same. In the lack of such information and copy of the referred documents, such show-cause notice could not be treated to be a valid notice in the eye of law, specially in that circumstance, when after inspection of the site, the respondent No.2 vide letter dated 10/09/2015(Annexure P/9), intimated to the Superintending Engineer that the petitioner is doing the contractual work and ready to complete the same up-to 31/12/2015. When the time was extended to the petitioner to complete the work up-to 31/12/2015, then what necessity has come in existence within ten- eleven days to issue the impugned show-cause notice dated 21/09/2015 (Annexure P/10) to the petitioner. Such notice being contrary to the aforesaid internal communication /correspondence (Annexure

P/9), is not sustainable.

4. In response of the aforesaid, on behalf of the respondent No.2, by filing a short reply, the allegations made against the authorities in the petition, were denied. In addition to it, it is stated that the alleged project was sanctioned to provide irrigation facilities to the agriculturists of 165 villages of Districts Gwalior and Bhind within one year and accordingly, the competent authority has sanctioned the contract of the petitioner- Company with a specific stipulation to complete the work under the contract within a period of one year w.e.f. 10/10/2011. But, in spite of extension of time for four times, the petitioner has neither completed the awarded work nor achieved the milestones submitted by it. Due to slow progress of work executed by the petitioner, the agriculturists of about 102 villages would not get the irrigation facilities for their Rabi crops and in such premises, could not get the irrigation facilities for their Kharif crops also. In addition to it, the admission is also opposed on the ground that this petition being filed without resolution of Board of Directors of the Company, is not entertainable.

5. The prayer of the petitioner is also opposed on the ground,

stating that the petition being filed against the show-cause notice, is not sustainable because the show-cause notice does not give rise to any cause of action to the petitioner to file this petition, especially when the petitioner has a remedy for redressal its dispute in response of show-cause notice before the authority. The petition being filed by the Director without authorization by the Board of Directors of the Company, is also not maintainable. It is also stated that the detailed terms of the contract dated 10/10/2011 are having the binding effect over the petitioner and according to Clause 70.5 of the General Conditions of Contract, the petitioner has an alternative efficacious remedy of arbitration. So, in such premises, this petition is also not entertainable. In further averments, it is stated that even after extension of time for four times to complete the work to the petitioner i.e. up-to 31/12/2015, in view of revised milestones submitted by the petitioner annexed with the reply, according to which the petitioner itself undertakes to complete the work of Rs.3119.52 lacs, however, till date it is not able to achieve the same and completed only work to the tune of Rs.1627.87 lacs only as on 10/09/2015 meaning thereby, till date the



petitioner has completed 51% of the total work awarded to it. Thus, it is evident that the petitioner persistently remained failed in achieving the milestones as such the petitioner is unable to complete the work up-to 31/12/2015. In support of the contention, the revised milestones scheduled, is also annexed with the petition as Annexure R/1.

6. We would like to mention here that initially, the petition was filed by the petitioner stating the State of Madhya Pradesh through Chief Engineer, Water Resources Department, Office of Chief Engineer Rajghat Canal Project, Datia as respondent No.1, but on taking up the objection on behalf of the authorities of the respondents, by way of amendment such nomenclature was changed and State of Madhya Pradesh was impleaded as party through Principal Secretary, Department of Water Resources Department, Government of MP, Bhopal as respondent No.1. In response of interim order, an undertaking supported with affidavit of the Director of Company was also submitted on behalf of the petitioner as IA 6766/2015 dated 05/10/2015. On behalf of the respondents, the same was objected on various grounds by filing reply dated 07/10/2015. Such undertaking has also

not been finalized or considered by the Court till date on merits.

7. After amendment in the petition by the petitioner as stated in the earlier part of this order, the additional reply was also filed on behalf of the State authorities on 19/10/2015, in which again on the cost of repetition the objections taken in earlier reply, were taken with some additional averments, stating that the petitioner- Company is not in a position to complete the contractual work upto 31/12/2015. Thereafter, again an additional reply on behalf of the respondents was filed on 02/11/2015 in which the same contentions have been repeated with the prayer to dismiss the petition on relief clause 7(iv-a) also.

8. Petitioner's counsel Shri Sanjay Shukla, after taking us with the aforesaid factual matrix, by placing his reliance on the decisions of the Apex Court in the matter of ***M/s. Michigan Rubber (India) Limited vs. State of Karnataka & Others*** reported in ***AIR 2012 SC 2915***; in the matter of ***Seimens Ltd. Vs. State of Maharashtra & Others*** reported in ***(2006) 12 SCC 33*** and in the matter of ***Executive Engineer, Bihar State Housing Board vs. Ramesh***

***Kumar Singh & Others*** reported in **(1996) 1 SCC 327**, prayed to quash the impugned show-cause notice Annexure P/10 as the same has been issued arbitrarily and without following the principle of natural justice. He has also advanced the argument for appropriate direction under sub-clauses of 74 and Clause-75 of the Contract to extend further six months period from 31/12/2015 to complete the remaining work of excavation and the construction of inside of the wall (diameter) of the tunnel, with a further prayer to give direction to the respondents to make the regular payment of the remaining bills without any hurdle and hindrance.

9. On the other hand, responding the aforesaid argument, Shri Arvind Dudawat, the Additional Advocate General, after taking us through the response as well as the additional reply along-with annexed documents, by justifying the impugned show-cause notice Annexure P/10, has argued that the impugned petition being filed at the initial stage of show-cause notice, for want of cause of action could not be entertained. In continuation, he said that in any case, by way of terms of contract the petitioner has a remedy for redressal

of its dispute in response of the aforesaid show-cause notice before the authorities and besides this, the petitioner is also having an alternative remedy for redressal of its dispute through arbitration. Thus, the petition is not entertainable. In support of his contention, he has also placed his reliance on the decisions of the Apex Court in the matter of ***Union of India and Others vs. Tania Construction Private Limited*** reported in ***(2011) 5 SCC 697***; in the matter of ***Special Director and another vs. Mohd. Ghulam Ghouse and Another*** reported in ***(2004) 3 SCC 440*** and in the matter of ***Ulagappa and Others vs. Divisional Commissioner, Mysore and Others*** reported in ***(2001) 10 SCC 639***. In further argument, he said that the deployment of other agency to carry out the remaining work is necessary because in the available scenario, the petitioner could not complete the contractual work up-to 31/12/2015.

10. On making the specific query by the Court that after extending the period up-to 31/12/2015 and as per the report of the respondent No.2- Executive Engineer, dated 10/09/2015 ( Annexure P/9) sent to the Superintending Engineer, contending that the petitioner- contractor is ready

and willing to carry out the remaining work and has also given an undertaking to complete the excavation work up-to 31/12/2015 and the remaining work, then what was the necessity to the respondent No.2 within short period of ten - eleven days to issue the impugned show-cause notice before expiry of 31/12/2015, on which the Additional Advocate General could not satisfy us in this regard with proper reasoning. He only stated that looking to the work progress of the petitioner there was not possibility to complete the work within the period and that's why, the show-cause notice was given to the petitioner and prayed for dismissal of this petition.

11. Having heard the counsel, keeping in view the arguments advanced at length, we have carefully gone through the petition as well as the response and the additional reply, undertaking submitted by the petitioner as well as the objection filed in response of undertaking, so also the annexed papers available on record.

12. It is undisputed fact that the alleged contract to carry out the excavation/digging work of canal was given by the authorities of the respondents to the petitioner as per

contract agreement and the work order. Thereafter, the work was started and time to time, the period to complete the contractual work on sufficient cause was extended as many as four times and lastly, the period of completion of excavation work was extended up-to 31/12/2015 as stated by the respondent No.2 in its letter dated 10/9/2015 (Annexure P/9) sent to his senior authority Superintending Engineer.

13. It is also apparent that the respondent No.2 by aforesaid letter (Annexure P/9) informed to the senior authority that the petitioner is ready and willing to carry out the remaining excavation/digging work of the canal and performing the work regularly but speed of the work is slow and subsequent to such correspondence, in presence of the representative of the petitioner or its Director, no inspection of the site was carried out and only after 11 days contrary to the aforesaid communication, the reasons best-known to the authorities of the respondent No.2 and its superior officials with intention to carry out the remaining contractual work of excavation and construction of such canal through some other agency in very arbitrary manner and contrary to the principle of natural justice, the impugned show-cause notice (Annexure P/10) in

non-speaking manner without considering the prayer for extension of further time, was issued. In spite of making efforts, we could not gather any material circumstance from the record and the arguments of the Additional Advocate General that what was the necessity to issue show-cause notice to the petitioner within short period of near about ten - eleven days from the date of sending the communication by the respondent No.2 to his superior official - the Superintending Engineer/respondent No.1. In any case, the show-cause notice being issued before expiry of the extended period up-to 31/12/2015 to complete the excavation work, could not be deemed to be *bona fide*, on the contrary, it appears that the same was given in arbitrary manner with pre-plan and in prejudicial manner. Thus, the same deserves to be quashed.

14. True it is, in the contract agreement there is a clause of arbitration according to which on arising the dispute, relating to the contract, the party has a remedy of redressal of his disputes through arbitration. But in our view, the clause of arbitration in the contract is not only sufficient ground to throw out the petition of the petitioner specially when the

alleged show-cause notice was given by the authority in arbitrary manner and without taking into consideration the available circumstances and work position of the alleged contract, then this petition requires consideration to quash the impugned show-cause notice. As such the action of the authorities of the respondents shall be deemed to be *mala fide* on the ground that after the communication dated 10/09/2015 (Annexure P/9) on what basis the superior authorities of the respondent No.1 had decided in item No.70 in Annexure P/11 *the tunnel balance 75m/2685m, 24% above USR Rajkamal, complete work by giving to any other tunnel specialized agency*. It shows that without considering the circumstance, such arbitrary action was taken by the Engineer-in-Chief in Annexure P/11 only on his own whims and assumptions and such arbitrary decision was communicated to the petitioner through show-cause notice Annexure P/10 in a non-speaking manner and without supplying the copies of referred documents in the same to the petitioner, enabling it to understand the entire position and situation to file the reply of the same. So, in such premises, such show-cause notice (Annexure P/10) being



issued contrary to the principle of natural justice and without application of mind in arbitrary manner, is not sustainable and deserves to be set aside.

15. So far as the arguments of Additional Advocate General that in view of availability of alternative forum of arbitration as per the contract this petition is not entertainable under Article 226 of the Constitution of India is concerned, we are of the considered view that in spite of availability of alternative forum of arbitration for redressal of dispute, if the show-cause notice itself was issued contrary to law and the principles of natural justice, with preplanned and arbitrary manner to rescind the contract of the petitioner, then by entertaining the petition under Article 226 of the Constitution of India such show-cause notice and its proceedings could be quashed by the Court in the light of the principle laid down by the Apex Court in the matter of **Siemens Ltd (supra)**, in which it was held as under:-

“Although ordinarily a writ Court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction, but the question herein has to be considered from a different angle viz. when a notice is issued with premeditation, a writ petition would be maintainable. In such an

event, even if the Court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose. It is evident in the instance case that the respondent has clearly made up its mind. It explicitly said so both in the counter-affidavit as also in its purported show-cause notice.â

Apart from the aforesaid, our view is also fortified by the principle laid down by the Apex Court in the matter of **M/s Michigan Rubber (India) Limited (supra)**, which was held as under:-

"19) From the above decisions, the following principles govern judicial review in contractual matters:-

- (a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
- (b) Fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;
- c. In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious

and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.â

16. Besides the aforesaid, in the matter of **Tantia Construction Private Limited (supra)**, the Apex Court has held as under regarding the maintainability of writ petition:-

â 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 innovation 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 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. Notwithstanding the provisions relating to the arbitration clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the writ petition filed on behalf of the respondent- Company.â

17. Having perused the aforesaid legal position, in the

available factual scenario of the case at hand as stated by the petitioner in the petition and also reflected from the circumstances of the case that when the application prayer of the petitioner for extension of period to complete the contractual work was pending for consideration before the authorities of the respondents and after carrying out the inspection of the site, the respondent No.2 had prepared the departmental communication on 10/09/2015 and sent to the Superintending Engineer in which the progress report of work was reported with the averments that more than 51% work has been completed and the petitioner- Contractor is still doing the work and is ready and willing to complete the same, with an intimation that *Bachanpatra* (undertaking) given by it to complete the work up-to 31/12/2015. In such premises, before 31/12/2015 there was no occasion with the authorities of the respondents to give show-cause notice to the petitioner for cancellation of contract, with further intimation that the remaining work shall be carried through some other agency, on the risk and cost of the petitioner. From Annexure P/11, it appears that after extending the period with consent to complete the work up-to 31/12/2015 in

arbitrary manner with *mala fide* intention contrary to departmental communication dated 10/09/2015 (Annexure P/9), on some assumption, whims and with ulterior motive to rescind the contract, the impugned show-cause notice Annexure P/10 was given to the petitioner within eleven days from the date of aforesaid communication Annexure P/9. So, in the light of the aforesaid decisions of the Apex Court, in spite availability of alternative forum of arbitration for redressal of dispute this Court has a jurisdiction under Article 226 of the Constitution of India to quash the impugned show-cause notice issued in arbitrary manner with *mala fide* intention to rescind the contract without sufficient cause and following the principle of natural justice, in non-speaking manner without annexing the copies of referred documents to the petitioner.

18. We are of the considered view that in any case before 31/12/2015, the authorities of the respondents did not have any authority to issue show-cause notice for cancellation of contract unless some new circumstance comes in existence before expiry of such extended period and in that regard, no averments are made in the impugned show-cause notice

although it appears from the record that the prayer of the petitioner for extending the further period of six months from 31/12/2015 to complete the work was pending before the authority of respondent No.2. In such premises, the impugned show-cause notice Annexure P/10 deserves to be and is hereby quashed.

19. It is also apparent from the papers placed on the record that even after filing this petition under the authority of interim order of this Court the remaining excavation/digging work of tunnel was/is being carried out by the petitioner but payment of running bills was not made within time to the petitioner to meet the necessary expenses to pay the wages to the labourers and to maintain the deployed machinery and in such premises, it could be said that due to late payment or non-payment of running bills of the petitioner within time it could not manage the requisite infrastructure to carry out the work. In such premises, we direct the authorities to make the regular payment of running bills to the petitioner within time in accordance with the procedure without any hurdle or hindrance to carry out the remaining work within the prescribed and extended period.

20. In the available scenario, it is apparent that due to non-cooperation of the respondents- authorities till some extent and unnecessary process of the show-cause notice Annexure P/10 issued contrary to the Departmental communication Annexure P/9 and on account of non-making the payment of the running bills regularly within time, the petitioner could not complete the work of contract within time. It also appears that the excavation work of tunnel is almost near to be completed. The same may be completed within some period and on such reasons, the petitioner appears to be entitled for extension of the period of further six months under the relevant clauses and terms of the contract. Such observation is being made, keeping in view that if by rescinding the contract of the petitioner, the authorities of the respondents proceed to carry out the remaining work through some other agency, then again long time would be required for NIT process and finalization of contract and issuing the work order and in that circumstance, the remaining work of the contract could not be completed in short period and consequently, the public work will suffer and the agriculturists could not get the water for irrigation of their field in early

days. So, in such premises, we deem fit and direct the respondents- authorities to consider the prayer of the petitioner and extend the period for further six months from 31/12/2015 to complete the remaining contract work of tunnel by adopting sympathetic view in the welfare of the public fund and public at large.

21. So far as the other case-laws cited on behalf of parties are concerned, there is no dispute in respect of the principle laid down in such cases but the same being distinguishable on peculiar facts, are not applicable in the present matter.

22. Consequently, by allowing this petition the impugned show-cause notice dated 21/09/2015 (Annexure P/10), is hereby quashed and the authorities of the respondents are directed to permit the petitioner to carry out the remaining work according to its contract, with a direction to consider its prayer for extension of further period of six months after 31/12/2015 and extend such period in the welfare of the scheme as well as public and beneficiary of the scheme at large and if the period is not extended as per the terms and conditions of the contract and if any obstruction is created by the authorities of the respondents in carrying out the



remaining work after 31/12/2015, then in that circumstances, the petitioner shall be at liberty to approach the appropriate forum permissible under the law for redressal of its dispute. The authority is also directed to make the payment of running bills to the petitioner within time in accordance with the contract and procedure of the Department without any hurdle and hindrance. There shall be no order as to the costs.

**(U. C. Maheshwari)**  
**Gupta)**  
**J u d g e**  
**17/12/2015**  
**17/12/2015**

**(Sushil Kumar**  
**J u d g e**

**MKB**