



2025:DHC:4191-DB



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 08.05.2025
Judgment delivered on: 22.05.2025

+ W.P.(C) 6153/2025 & CM APPL Nos.28026-27/2025

RAM KRIPAL SINGH CONSTRUCTION PVT LTD ...Petitioners

versus

INDIAN OIL CORPORATION & ORS.Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Jayant Bhushan, Senior Advocate with Mr. Amit Pawan, Mr. Hassan Zubari Waris, Ms. Aastha Shrestha and Ms. Shivangi, Advocates.

For the Respondents : Mr. Rajeev Sharma, Senior Advocate with Ms. Reeta Mishra, Mr. Abhishek Birthray, Mr. Kartikeya Tripathi, Ms. Shreya Sharma and Mr. Nishant Kandpal, Advocates.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

J U D G M E N T

TUSHAR RAO GEDELA, J.

1. An interesting issue has arisen in the instant writ petition, in that, can a non-party to a Notice Inviting Tender (hereinafter referred to as “*the NIT*”), challenge a clause therein and seek a writ of certiorari for quashing of the same; and simultaneously, seek a writ of mandamus for directing the respondent not to get the works completed at the risk and consequence of the said non-party.



2. The case of the petitioner is that it was awarded a contract for infrastructure/capacity expansion project by respondent no.1/Indian Oil Corporation Limited (hereinafter referred to as “*the IOCL*”) for “*Piling, Civil, Structural works alongwith associated area development and enabling works for inter-connection pipe rack (PKG 1) for capacity expansion (To 9.00 MMTPA) project of Barauni refinery of Indian Oil Corporation Limited at Barauni, Bihar*” & “*Piling, Civil, Structural works alongwith associated area development and enabling works for inter-connection pipe rack (PKG 1) for capacity expansion (To 9.00 MMTPA) project of Barauni refinery of Indian Oil Corporation Limited at Barauni, Bihar*” on 04.03.2021 and 10.03.2021 respectively, in terms of previous NIT dated 02.07.2020 and 29.09.2020 to be executed at Delhi (hereinafter referred to as “*Previous NIT*”). It is undisputed that the petitioner was, for whatever reasons not germane to the issue at hand, unable to complete the works. Certain disputes arose between the parties to the said previous contract. Clause 4.7.4.0 of the previous NIT/General Conditions of Contract provided that in case the works are not completed by the successful bidder the respondent no.1/IOCL was entitled to get the remaining works completed by another party, at the risk and consequence of the original contractor. Clause 2.9.1.0 of the previous NIT/General Conditions of Contract provided that respondent no.1/IOCL or its Engineer-in-Charge may take any decision/determination which is expressed in the terms of the NIT subject to affording an opportunity to be heard after making a representation or by way of personal hearing and consequent to recording reasons for such decision/determination, which would be final and binding upon the contractor.



3. The petitioner claims that Clause 26 of the fresh NIT dated 12.06.2024 (hereinafter referred to as “*Fresh NIT*”), to which the petitioner is not a party, fixes the responsibility of risk and consequence of the fresh NIT upon it by name and simultaneously bars its participation. Petitioner claims this establishes pre-determination of risk and consequence and the intention to recover costs *qua* the petitioner, without the respondent no.1/IOCL following the due procedure prescribed in the previous Contract/NIT. The fresh NIT in respect of the remaining works was notified by respondent no.1/IOCL at Barauni in the State of Bihar to be executed at Begusarai, Bihar. Premised on the above skeletal facts, the present writ petition is preferred seeking the following prayers:

“A. Issue a writ of mandamus directing the respondents not to get any work, or part of the work, related to (i) “Piling and Civil & Structural Works along with associated area development and enabling works for inter-connection pipe rack (Pkg-1) for capacity expansion (to 9.0 MMTPA) Project of Baruani Refinery of Indian Oil Corporation Limited at Barauni, Bihar” and (ii) “Piling and Civil & Structural Works along with associated area development and enabling works for inter-connection pipe rack (Pkg-2) for capacity expansion (to 9.0 MMTPA) Project of Baruani Refinery of Indian Oil Corporation Limited at Barauni, Bihar, executed, at the risk and cost of the petitioner; and/or

B. Issue a writ of mandamus directing the respondents to act in terms of the mutual understanding between the parties as contained Record Notes of Discussions dated 19.12.2024 in connection with (i) “Piling and Civil & Structural Works along with associated area development and enabling works for inter-connection pipe rack (Pkg-1) for capacity expansion (to 9.0 MMTPA) Project of Baruani Refinery of Indian Oil Corporation Limited at Barauni, Bihar” and (ii) “Piling and Civil & Structural Works along with associated area development and enabling works for inter-connection pipe rack (Pkg-2) for capacity expansion (to 9.0 MMTPA) Project of Baruani Refinery of Indian Oil Corporation Limited at Barauni, Bihar; and/or

C. Issue a writ of certiorari quashing clause 26 of the Notice Inviting E-Tender Nos. BCCC245798 and BCCC245799 issued by the Respondent Indian Oil Corporation Limited (IOCL for brevity) on 12.06.2024 by which the execution of the works of (i) “Piling and Civil & Structural Works along with associated area development and enabling works for inter-connection pipe rack (Pkg-1) for capacity expansion (to 9.0 MMTPA) Project of



Baruani Refinery of Indian Oil Corporation Limited at Barauni, Bihar” and (ii) “Piling and Civil & Structural Works along with associated area development and enabling works for inter-connection pipe rack (Pkg-2) for capacity expansion (to 9.0 MMTPA) Project of Baruani Refinery of Indian Oil Corporation Limited at Barauni, Bihar, have been put to tender at the risk and cost of the Petitioner herein.;

4. At the outset it is relevant to note that prayer ‘C’ was given up leaving only prayers ‘A’ and ‘B’ for determination. It is also pertinent to note that the petitioner is not even challenging the fresh NIT.

5. Mr. Jayant Bhushan, learned senior counsel appearing for the petitioner commenced his arguments by stating that the fresh NIT has been drawn up by inserting Clause 26 which clearly demonstrates that respondent no.1/IOCL has already made up its mind to recover the damages etc., without following the due procedure prescribed in the previous NIT/General Conditions of Contract executed between the petitioner and respondent no.1/IOCL. In order to substantiate his arguments, learned senior counsel drew attention to Clause 26 of the fresh tender, which reads thus:

“26 Miscellaneous Points

- i. This agency is being lined up at the risk & cost of M/s Ram Kripal Singh Construction Pvt. Ltd. (RKSCPL), Begusarai.*
- ii. In case M/s Ram Kripal Singh Construction Pvt. Ltd. (RKSCPL) submit its bid, the same shall not be considered for evaluation and bid shall be rejected.”*

Reading the aforesaid clause, Mr. Bhushan forcefully argued that such a clause, naming the petitioner, to which it is not even a privy and putting the risk and consequence in such manner, is unknown to law. He vehemently contended that it would be understandable if respondent no.1/IOCL had followed the procedure prescribed in Clause 4.7.4.0 read with Clause 2.9.1.0 of the previous NIT/General Conditions of Contract executed between petitioner and respondent no.1/IOCL. According to him,

W.P.(C) 6153/2025



not following the due procedure prescribed in the actual governing document between the parties and simultaneously inserting Clause 26 in the fresh NIT which bars the participation of the petitioner as well as places the risk and consequence by naming the petitioner, is clearly impermissible and contrary to well established principles of law.

6. Learned senior counsel stoutly contended that Clause 2.9.1.0 of the previous NIT/General Conditions of Contract envisaged (i) issuance of show cause notice by respondent no.1/IOCL; (ii) affording an opportunity of hearing; and (iii) decision/determination with reasons, none of which have, admittedly been acted upon. According to him, Clause 26 of the fresh NIT is contrary to Clause 2.9.1.0 read with Clause 4.7.4.0 of the earlier NIT/General Conditions of Contract. He vehemently contended that as a result of such reading of the clauses, a direction not to get the works completed at the risk and consequences of the petitioner be passed, coupled with the direction to respondent no.1/IOCL to act in accordance with the mutual understanding dated 18.12.2024 entered into between the parties.

7. Learned senior counsel next drew our attention to the Settlement recorded between the petitioner and respondent no.1/IOCL dated 18.12.2024, in particular, para 2, 3 and 5 to submit that descoping of the structural works was agreed to without risk and consequence for works beyond 14000 MT (approximately). According to him, once such settlement was arrived at, inserting Clause 26 in the fresh NIT is violative of and contrary to the agreed settlement terms. Learned senior counsel buttressed his arguments of clear understanding between parties regarding no risk and consequence being attributable to the petitioner by drawing attention to various documents placed on record like email dated 08.02.2025 at page 648 of the paperbook and the letters dated 23.04.2025.



He contended that it was on the basis of such assurance that the petitioner had even withdrawn the suit filed by it.

8. Mr. Bhushan, learned senior counsel also relied upon section 20 of the Specific Relief Act, 1963 to submit that the provisions thereof envisage issuance of a show cause notice in writing to the party from whom the other party seeks damages/recovery of the risk and costs involved in completion of the remaining works. Therefore, in the absence of any such notice, and given that a settlement regarding the descoping of the structural works was reached at between the petitioner and respondent no.1/IOCL on 18.12.2024, the respondent no.1/IOCL cannot fasten any liability of the risk and consequence upon the petitioner, especially by introducing a clause in the nature of Clause 26 in the fresh NIT to which the petitioner is not even a party.

9. In respect of maintainability of the writ petition in matters revolving around the breach or alleged breach of contractual terms, learned senior counsel relied upon the judgements of the Hon'ble Supreme Court in *Adi Saiva Sivacharyagal Nala Sangam vs. State of Tamil Nadu; (2016) 2 SCC 725* and *State of UP vs. Sudhir Kumar Singh; (2021) 19 SCC 706*. According to him, the petitioner need not await the actual prejudice and adverse effect and consequence thereof to institute a writ petition. Even if there is an apprehension, which is well founded, the same can constitute a cause of action. Another argument addressed on this aspect of maintainability was regarding the involvement of “*public law element*”. It is contended that where the State takes action in an *ex parte* manner, i.e., behind the back of the party, such party is entitled to challenge the infraction by instituting a writ petition premised on the violation of Article 14 of the Constitution of India, 1950 even if it is based on a contract.



10. Learned senior counsel also referred to the order dated 04.10.2022 of the Arbitral Tribunal whereby the application under section 17 of the Arbitration and Conciliation Act, 1996 was held as not maintainable and consequently was dismissed premised on the objection of very arbitrability of the dispute raised by the respondent no.1/IOCL to submit that the petitioner cannot be ousted from seeking remedies available to it in law.

11. *Per contra*, Mr. Sharma, learned senior counsel appearing for the respondent no.1/IOCL strongly refuted the submission addressed on behalf of the petitioner. At the outset learned senior counsel invited attention to letter dated 13.02.2025 issued by the respondent no.1/IOCL to the petitioner post meeting dated 18.12.2024 referred to by the petitioner. Reading the contents therein, he submitted that the petitioner failed to even abide by the terms mentioned in the minutes of the meeting dated 18.12.2024 and thus is in no position to predicate any arguments on such basis. Moreover, he contended that it was made explicitly clear that the minutes of the meeting dated 18.12.2024 were not final and that the request made by the petitioner was still under review and was not final. Learned senior counsel forcefully contended that *vide* the said communication, petitioner was put on notice that the delay in execution of works was seriously hampering the completion of the project as a whole and would fulfil the requirement of a notice as envisaged under section 20(2) of the Specific Relief Act, 1963.

12. That apart, learned senior counsel also contended that so far as the apprehension of the petitioner regarding respondent no.1/IOCL taking coercive action without issuance of notice is concerned, particularly in the event respondent no.1/IOCL is of the opinion that petitioner is to be made



liable for risk and consequence, no cause of action has yet arisen and as such Courts cannot direct any relief in anticipation.

13. Mr. Sharma categorically contended that the issues raised and argued by the petitioner clearly demonstrate the same to be highly complex and hotly contested and disputed questions of facts which the writ Court would be loathe to interfere with. As and when the cause of action arises, the petitioner would be able to challenge the same in accordance with law. He also submitted that no contract has yet been awarded for the remaining works to be completed, thus, petitioner has no cause of action, except apprehension. That apart, the question of deduction or recovery would arise only if excess amount is expended in getting the work at risk and consequence of the petitioner. He vehemently contended that there is hardly any “*public law element*” involved at all and the disputes are factual and contractual.

14. Learned senior counsel also contended that the petitioner has concealed the fact that *vide* the judgement dated 15.12.2022, the Coordinate Division Bench had dismissed FAO(OS)(COMM) No.295/2022 noting that the contract is determinable in nature and in terms of section 20(A) of the Specific Relief Act, 1963 no injunction ought to be granted which would delay an infrastructure project. He also contended that the petitioner has also concealed a number of correspondences which are relevant to the issue at hand to mislead this Court.

15. Having heard Mr. Jayant Bhushan, learned senior counsel for the petitioner, Mr. Rajiv Sharma, learned senior counsel for the respondent no.1/IOCL and having examined the documents on record, we are unable to appreciate the submissions of the appellant for the following reasons.



16. Though on the one hand, Mr. Bhushan, learned senior counsel on instructions, stated that prayer 'C' of the writ petition in respect of challenge to Clause 26 of the fresh NIT, is not being pressed, yet the entire dispute and controversy has arisen and the subject matter of the present writ petition, is predicated on the said clause. It is not disputed that the petitioner is not privy to the fresh NIT notified by the respondent no.1/IOCL nor is it entitled to participate or submit its bid on account of bar contained in Clause 26 thereof. The only purported reason for which reliance is placed on Clause 26 is the reference by name of the petitioner in respect of whom risk and consequence of the completion of the work in the fresh NIT would be placed. In other words, the fresh NIT has been notified for the remaining works not completed by the petitioner in respect of a previous NIT under which works contract was awarded to it. It is also not disputed that Clause 4.7.4.0 of the previous NIT/General Conditions of Contract provided that if the Engineer-in-Charge at any stage is of the opinion that the performance of any work or item or work by the contractor is unsatisfactory, he would be entitled at his discretion and at the risk and cost of the contractor, appoint one or more contractor or sub contractor for the satisfactory performance thereof or part thereof and the provision of Clause 4.7.4.0 would apply *mutatis mutandis* to the action taken under this clause. In other words, for justifiable reasons envisaged in Clause 4.7.4.0, the Engineer-in-charge was entitled to get the works completed and levy damages/charges for such works falling within the definition of risk and consequences.

17. It is also not disputed that no contract as yet has been awarded pursuant to the fresh NIT containing Clause 26, till date to any successful bidder. Notwithstanding the fact that Clause 26 mentions the name of the



petitioner, the respondent no.1/IOCL is even otherwise, under clause 4.7.4.0 of the previous NIT/ General Conditions of Contract, entitled to the risk and consequences coverage which is yet to fructify. We fail to appreciate as to how the present writ petition can be instituted and maintained on a mere apprehension. It appears to be a speculative litigation since no cause of action forming the edifice of a grievance has at all arisen. Learned senior counsel for the petitioner was at pains to demonstrate that on a previous occasion the respondent no.1/IOCL has unilaterally deducted some amounts without issuing appropriate notice as envisaged under Clause 2.9.1.0 of the previous NIT/General Conditions of Contract. A purported default on a previous occasion would not render the provisions of Clause 4.7.4.0 of the previous NIT/General Conditions of Contract otiose in as much as the occasion to initiate action under the said clause has not yet arisen till date. It is well nigh possible that no such risk or liability may be fastened upon the petitioner by the respondent no.1/IOCL. The entire gamut is within the sphere of speculation and this Court cannot proceed on an apprehension which itself is based on speculation for which there is no foundational fact.

18. So far as the reliance upon section 20(2) of the Specific Relief Act, 1963 by the petitioner is concerned, we are of the considered opinion that the same envisages issuance of a notice in writing to the party in breach (in the present case the petitioner), by the party which requires the rectification of the breach (in the present case respondent no.1/IOCL). We have no means to ascertain today as to whether a condition where respondent no.1/IOCL would need to issue such notice will or will not arise in future. In such circumstances, reliance upon section 20(2) of the Specific Relief



Act, 1963 on the basis of a mere apprehension is unpersuasive and unmerited.

19. From the above controversy and the fact submitted by the parties, we have no hesitation in concluding that there are hotly contested disputed questions of facts arising from terms and conditions and breaches thereof in contractual matters. Equally, apart from the facts leading to the aforesaid firm conclusion, are the references to the minutes of the meeting dated 18.12.2024 which according to the petitioner is a settlement agreement whereas according to the respondent no.1/IOCL, is a request which is still under review of its competent authority, which also appears to be a fatal dispute. During arguments, in respect of descoping of works recorded in the minutes of the meeting dated 18.12.2024, there apparently appeared to be dispute regarding compliances by the petitioner in terms thereof. Though we need not have referred in detail to the disputes as such, yet to give a flavour as to the disputed questions of facts arising in the present petition, it would be apposite to reproduce hereunder some such correspondences, which read thus-

Email dated 08.02.2025:-

*“Subject: EPCM-21 & 22 CONTRACTS_CONFIRMATION
REQUIRED W.R.T THE DE-SCOPING REQUEST OF
RKSCPL*

Dear Sir,

This has reference to your meeting with IOCL at RHQ, New Delhi on 18.12.2024 and your subsequent Letter NO.EPCM-21-TS-L-6405-299 Dtd. 30.12.24 wherein you have requested for de-scoping of structural jobs in certain segments from the EPCM-21 and EPCM-22 Contracts without imposing risk & cost provisions.



In the above connection, we are in the process of obtaining certain approvals from Management against your request.

In order to facilitate the approval process, you are requested to submit a letter confirming that you will not be seeking any compensation from IOCL

(notwithstanding the provisions under clause no. 2.6.2.0 of GCC) for any de-scoping (of piling jobs/civil jobs / structural steel jobs) from the said contracts provided that such de-scoping is done by IOCL without any risk & cost implication.

A sample content for the required letter also is attached for your reference and convenience.

You are requested to submit a proper letter in this regard at the earliest please.

Regards,

G S Sibilal

DGM-PJ

IOCL-BR Site.”

Letter dated 23.04.2025:-

“To,

M/s. Ram Kripal Singh Construction Pvt. Ltd.,

BR-09 Expansion Project,

IOCL Barauni Refinery,

Begusarai, Bihar-851114.

Attn.: Mr. Manoj Kumar, Project Director

Sub: Piling, Civil & Structural Works along with associated area development & enabling Works etc. (Package 1) awarded vide WO Nos. 26749015 dated 10.12.2020- Descoping in Segment - 10 and Segment- 13.

Dear Sir,



2025:DHC:4191-DB



This is to bring to the kind notice of the CONTRACTOR that due to inadequate progress in the activities /jobs in segments particularly in Seg-10, Seg-13, OWNER / PMC has descoped all the further works in these two segments.

The de-scoping action shall be un-conditional and without any financial implication in the form of risk & cost to the CONTRACTOR.

CONTRACTOR is advised to submit the measurement sheets pertaining to these segments to PMC for verification.

This is for your necessary action.

Thanking you

Very truly yours,

For Toyo Engineering India Private Limited.

sd/-

(Ashok Parmar)

Resident Construction Manager”

Letter dated 23.04.2025:-

“To,

M/s. Ram Kripal Singh Construction Pvt. Ltd.,

BR-09 Expansion Project,

IOCL Barauni Refinery,

Begusarai, Bihar-851114.

Attn.: Mr. Manoj Kumar, Project Director

Sub: Piling, Civil & Structural Works along with associated area development & enabling Works etc. (Package 2) awarded vide WO Nos. 26859669 dated 04.03.2021 - Descoping in Segment - 29 and Segment- 33.

Dear Sir,



This is to bring to the kind notice of the CONTRACTOR that due to inadequate progress in the activities/ jobs in segments particularly in Seg-29, Seg-33, OWNER / PMC has descoped all the further works in these two segments.

The de-scoping action shall be un-conditional and without any financial implication in the form of risk & cost to the CONTRACTOR.

CONTRACTOR is advised to submit the measurement sheets pertaining to these segments to OWNER /PMC for verification.

This is for your necessary action.

Thanking you

Very truly yours,

For Toyo Engineering India Private Limited.

sd/-

(Ashok Parmar)

Resident Construction Manager”

It is thus clear from the above that there are various complex issues and disputed questions of facts which cannot be appreciated and considered in a proceeding under Article 226 of the Constitution of India. (See: ***S.P.S. Rathore vs. State of Haryana; (2005) 10 SCC 1***).

20. After having examined the aforesaid points of law and facts, if the prayer at ‘A’ and ‘B’ of the writ petition is taken into consideration, it is absolutely clear that the petitioner is attempting to seek pre-emption of any action to be undertaken by respondent no.1/IOCL under the provisions of Clause 2.9.1.0 or Clause 4.7.4.0 of the previous NIT/General Conditions of Contract. That too, without any factual or foundational facts having arisen in the interregnum.



21. Since the petitioner has already given up the challenge to Clause 26 of the fresh NIT, we need not render any opinion as to the competence or otherwise of the respondent no.1/IOCL in engrafting such clause naming the petitioner against whom the risk and consequence of the completion of the works is envisaged in the fresh NIT.

22. The petitioner relied upon the judgment of the Hon'ble Supreme Court in *The State of Uttar Pradesh (supra)*, particularly paragraph 26, to submit that though this case is in respect of a contract or breach thereof, yet it involves a case of “*public law element*”, in as much as the petitioner purports alleged violation of rule of *audi alteram partem*. In the facts as obtaining above, we do not think that the ratio laid down in the said judgment would at all accrue in favour of the petitioner. In that case, the Managing Director of the appellant State held an ex-parte inquiry into the complaints lodged by certain persons against respondent no.1 therein and proceeded to cancel the previous tender dated 01.04.2018, wherein the respondent no.1 was awarded the contract. It was on that premise that the Hon'ble Supreme Court held that even if it was a matter pertaining to contractual term, the non-issuance of a show cause notice or a hearing to the respondent no.1 therein, tantamount to violation of rule of *audi alteram partem* and falling within the ambit of “*public law element*”. In the present case, no such violation of such nature has occurred yet. Thus, the ratio of the judgment will not enure to the benefit of the petitioner.

23. So far as the reliance upon the judgment of the Hon'ble Supreme Court in *Adi Saiva (supra)* particularly para 11 and 12 is concerned, the petitioner submits that the institution of a writ proceeding need not await actual prejudice and adverse effect and consequence since a mere apprehension of such harm, if the same is well founded, can furnish a cause



of action for moving the Court. It was contended by the petitioner that the mere reference of the name of the petitioner in Clause 26 of the fresh NIT itself is a real and *in praesenti* apprehension which gives the foundational cause of action to institute the present writ petition. We do not agree with the said submission. This is for the reason that the petitioner firstly, has not challenged Clause 26 of the fresh NIT and has actually given up the said challenge contained in para 'C' of the prayer clause and secondly, the right of the respondent no.1/IOCL to issue a notice under Clause 2.9.1.0 of the previous NIT/General Conditions of Contract for coverage of risk and consequences as envisaged in Clause 4.7.4.0 of the previous NIT/General Conditions of Contract has not even arisen yet. It is not the apprehension but the speculation of such apprehension which seems to be substratum of the present writ petition. This Court cannot countenance such speculation or apprehension as a foundational fact which can form the edifice of cause of action for filing the present writ petition. Therefore, the reliance of the petitioner on *Adi Saiva (supra)* is wholly fallacious and misplaced.

24. In view of the above, we find no reasons much less any reason whatsoever to exercise our powers of judicial review vested under Article 226 of the Constitution of India.

25. Resultantly, the writ petition is dismissed alongwith pending applications though without any order as to costs.

TUSHAR RAO GEDELA, J

DEVENDRA KUMAR UPADHYAYA, CJ

MAY 22, 2025/rl/kct