

GAHC010014342017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1191/2017

KAMAL SINGH DUGAR
S/O LT. MULCHAND DUGAR R/O ULUBARI, SOUTH SARANIA BYE LANE
NO. 10 H/N-09 P.O. ULUBARI, GUWAHATI - 781007, DIST. KAMRUP M,
ASSAM

VERSUS

THE RUBBER BOARD and 5 ORS.
REP. BY ITS CHAIRMAN KOTTAYAM- 68009, KERALA STATE, INDIA.

2:THE DIRECTOR P and RD

THE RUBBER BOARD DEPARTMENMT
OF PROCESSING and PRODUCT DEVELOPMENT KOTTAYAM- 686009
KERALA STATE
INDIA.

3:THE JOINT DIRECTOR

THE RUBBER BOARD
DEPARTMENT OF PROCESSING and PRODUCT DEVELOPMENT
KOTTAYAM- 686009
KERALA STATE
INDIA.

4:THE JOINT RUBBER PRODUCTION COMMISSIONER

RUBBER BOARD ZONAL OFFICE
CENTRAL BLOCK-II
1ST FLOOR
HOUSEFED COMPLEX
BELTOLA

BASISTHA ROAD
GUWHATI - 781006.

5:THE DEPUTY DIRECTOR

RSS
RUBBER BOARD
HOUSEFED COMPLEX
BELTOLA BASISTHA ROAD
GUWAHATI - 781006.

6:JUNIOR ENGINEER CIVIL
RUBBER BOARD ZONAL OFFICE
CENTRAL BLOCK - II 1ST FLOOR
HOUSEFED COMPLEX
BELTOLA BASISTHA ROAD
GUWAHATI - 781006

Advocate for the Petitioner : MR.P GOHAIN

Advocate for the Respondent : MR. D NATHR-4

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY

JUDGMENT & ORDER

10.05.2023

Heard Ms. D. Borgohain, learned counsel for the petitioner and Mr. D. Nath, learned counsel for all the respondents.

2. The background facts leading to the institution of the writ petition under Article 226 of the Constitution of India can be narrated, in brief, as follows:-

2.1. Pursuant to a bidding process initiated by a Tender Document dated 30.12.2013 for a contract-work viz. 'Fencing of Experiment Farm at Sarutari in the Kamrup district, Assam' ['the Contract-Work', for short], the petitioner on being emerged as the successful bidder, was

issued a Work Order dated 19.03.2014 whereby the Contract-Work stood awarded to him. At the time of the award of Contract-Work by Work Order dated 19.03.2014, the petitioner was asked to execute a Contract Agreement and to deposit an amount of Rs. 28,850/- towards Security Deposit, being 5% of the total quoted amount for the Contract-Work after deduction of Rs. 24,000/- remitted towards Earnest Money Deposit [EMD] for the Contract-Work. A Contract Agreement was thereafter, executed on 28.03.2014. The Contract-Work was to be completed within 4 [four] months from the fourteenth day of the date of the Work Order i.e. on or before 27.07.2014.

2.2 According to the respondent Rubber Board authorities, as averred in the court affidavit, the execution of the Contract-Work got delayed allegedly due to factors attributable solely to the petitioner. With such contentions, the petitioner was served a Show Cause Notice dated 03.01.2017 whereby it was indicated to the petitioner that the respondent Rubber Board was in contemplation to terminate the Contract Agreement dated 28.03.2014, executed between them, with the condition that the respondent Rubber Board would execute the balance part of the Contract-Work at the risk and cost of the petitioner and penalty would be imposed on him as per the tender conditions. By serving the Show Cause Notice dated 03.01.2017, the petitioner was asked to provide his explanation, if any, to the Show Cause Notice within a period of 15 days from the date of receipt of the Show Cause Notice.

2.3 It is the case of the petitioner that in response to the Show Cause Notice, the petitioner submitted a Reply to the Show Cause Notice dated 03.01.2017, on 30.01.2017.

3. Aggrieved by the issuance of the Show Cause Notice and non-disbursal of the petitioner's running account bill, the petitioner has instituted the instant writ petition seeking setting aside of the Show Cause Notice dated 03.01.2017. Directions in the nature of mandamus are also sought to the respondent Rubber Board authorities to release the running account bill in respect of the portion of works completed by the petitioner in connection with the Contract-Work, as per rates shown by the petitioner including costs for additional works, and to allow the petitioner to complete the balance part of the Contract-Work and to release payment for such works including costs for additional items.

4. On institution of the writ petition, notices were issued to the respondent authorities by Order dated 01.03.2017. While issuing notices, it was observed that it shall not be a bar for the respondent authorities to consider and dispose of the Representation i.e. the Reply to the Show Cause Notice dated 30.01.2017 during the pendency of the writ petition. The respondent Rubber Board authorities have filed their counter affidavit on 20.07.2021 annexing therewith an Order of Termination dated 03.04.2017 [Annexure-3] whereby the respondent Rubber Board authorities had terminated the Contract Agreement dated 28.03.2014 with immediate effect.

5. By the Order of Termination, the petitioner was sought to be apprised that the Contract-Work allotted to him, as per the Contract Agreement dated 28.03.2014, had been terminated with immediate effect. The Earnest Money Deposit [EMD] and the Security Deposit were also forfeited. It had been intimated that the balance part of the Contract-Work would be done at the risk and costs of the petitioner, as per the terms and conditions contained in the Contract Agreement dated 28.03.2014. The petitioner was also requested to be present for a joint measurement at the work site on 20.04.2017 failing which, the respondent Rubber Board authorities would proceed to take measurements in the absence of the petitioner and the same would be binding on him.

6. In the backdrop of the aforesaid sequence of events, the learned counsel for the parties have made their submissions.

7. The learned counsel for the petitioner has submitted that since the petitioner had completed a major part of the Contract-Work, he is entitled for the amount for such completed work in terms of the Contract Agreement. Ms. Borgohain has submitted that the Show Cause Notice had been served upon by the respondent Rubber Board authorities with a pre-determined and as such, the same is bad and arbitrary.

8. Mr. Nath has, at first, submitted that the writ petition filed against a Show Cause Notice is not maintainable. It is further submitted by him that the Order of Termination dated 03.04.2017 is not a subject-matter of challenge.

8.1 Mr. Nath, learned counsel for the respondent Rubber Board authorities has further submitted that the petitioner was asked to be present for joint measurements after termination of the Contract Agreement by the Order dated 03.04.2017. But the petitioner did not turn out at the work site for such joint measurements in spite of being aware about the same. It was in the absence of the petitioner, the respondent Rubber Board authorities had to finalize the measurements of the portion of works completed by the petitioner till the Order of Termination on 20.04.2017 and as such, there is no question of making any joint measurement now as in the meantime, the balance part of Contract-Work was re-tendered and the contractor awarded with the balance work of the Contract-Work at the risk and cost of the petitioner, had already completed the same.

9. In response, Ms. Borgohain, learned counsel for the petitioner has submitted that if the petitioner is entitled to any amount in the backdrop of above fact situation then he should be paid accordingly for that part of the Contract-Work, which he had completed.

10. Having regard to the facts and circumstances of the case, as found out of the above discussion, this Court is of the considered view that the writ petition is not maintainable for a number of reasons.

10.1. Firstly, by issuance of the Show Cause Notice, the noticee was simply asked to respond to the proposed action. The petitioner has not assailed the validity of the Show Cause Notice on the ground of jurisdiction or otherwise. It is not a case that the legality or validity of the Show Cause Notice has been questioned by the petitioner on the ground that the respondent Rubber Board authorities have no jurisdiction to issue the Show Cause Notice. Had it been the case, the petitioner would have been well within his right maintain a writ petition to challenge the Show Cause Notice on that ground and this Court in that event would have the occasion to examine the legality or validity of the Show Cause Notice. In the absence of any such challenge, this Court would not embark upon to examine the issue. With the issuance of the Show Cause Notice, the rights and obligations of the parties have not been decided finally. The event of issuance of Show Cause Notice is a step towards taking a final decision in

the matter by the competent authority. A tentative view taken in the process cannot be deemed to be the final view taken in the matter. The final view is dependent on the response received from the noticee and if the noticee is able to show sufficient cause as to why no action as contemplated under the Show Cause Notice should be taken the final view may altogether be different. Thus, this Court does not find any justification to exercise the extraordinary jurisdiction under Article 226 of the Constitution of India because it is only against the final decision and not against a tentative view, the power of judicial review is exercisable.

10.2. In *Union of India and another vs. Kunisetty Satyanarayana*, reported in [2006] 12 SCC 28, the Hon'ble Supreme Court of India has held as under :-

13. It is well settled by a series of decisions of this Court that ordinarily no writ lies against a charge-sheet or show-cause notice vide *Executive Engineer, Bihar State Housing Board vs. Ramesh Kumar Singh*, reported in [1996] 1 SCC 327, *Special Director vs. Mohd. Ghulam Ghouse*, reported in [2004] 3 SCC 440, *Ulagappa vs. Divisional Commissioner, Mysore*, reported in [2001] 10 SCC 639, *State of U.P. vs. Brahm Datt Sharma*, reported in [1987] 2 SCC 179, etc.

14. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of anyone. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.

10.3. Secondly, it is also settled that an order not challenged in a writ petition is not to be

quashed in exercise of the writ jurisdiction under Article 226 of the Constitution of India. The Show Cause Notice dated 03.01.2017 and the petitioner's Reply to the Show Cause Notice dated 30.01.2017 were followed by the Order of Termination dated 03.04.2017, which is made part of the counter affidavit filed by the respondent Rubber Board authorities. Despite being aware about the Order of Termination dated 03.04.2017, the petitioner has chosen not to challenge the same even by filing any pleadings to the said counter affidavit of the respondent Rubber Board authorities.

10.4. Thirdly, the relationship between the petitioner and the respondent Rubber Board authorities are governed by the terms and conditions contained in the Contract Agreement dated 28.03.2014 executed between them. The case in hand is, thus, based on a concluded contract, which is not a statutory contract. It is trite law that any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated in a writ petition since it is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Neither a matter/dispute relating to a concluded and non-statutory contract, like the case in hand, can be agitated nor the terms and conditions of such a contract can be enforced through the writ jurisdiction under Article 226 of the Constitution of India. A writ court cannot be a forum to seek any relief based on terms and conditions incorporated in the concluded contract by the parties, in the absence of any public law element.

10.5. For the afore-mentioned reasons, the present writ petition is found not maintainable. It is accordingly held so.

11. Having considered the submissions of the learned counsel for the parties, this Court which is also a court of equity, is of the considered view that notwithstanding non-maintainability of the writ petition challenging the Show Cause Notice and in absence of any challenge to the Order of Termination, the petitioner is entitled for payment in respect of that part of the Contract-Work which he had completed pursuant to the Contract Agreement dated 28.03.2014 according to the terms and conditions contained therein.

12. As per the terms and conditions of the Contract Agreement, the Earnest Money Deposit and the Security Deposit deposited by the petitioner were forfeited. The matter of payment to the petitioner is subject to the following conditions of the tender document :-

11. TERMINATION OF CONTRACT

11.1 Notwithstanding anything herein contained, if the Contractor commits any breach of any of its obligations under the Contract, the Owner shall give notice in writing to the Contractor and in case the Contractor fails, within seven days of receipt thereof to rectify the same or to satisfy the Owner that effective steps have been taken to rectify the same, the Owner may without further obligation and without prejudice to any of its other rights and remedies, forthwith terminate the Contract and its further operation wholly or in part.

11.2. Notwithstanding anything herein contained, the Owner shall also have the right, to terminate the Contract and its further operation wholly or in part by giving the Contractor one month's notice in writing.

11.3. In the event of the Contract being terminated under either of the conditions of the immediately preceding paragraphs, all items and sub-items of the Contract Work already executed including materials used therein shall be deemed to have become the absolute property of the Owner and Owner shall be at liberty to cause the remaining part of the Contract Work to be completed by retendering the same or otherwise as the Owner may, in its absolute discretion, decide and the Contractor shall, if the Contract is terminated under paragraph 11.1 above, be liable to the Owner in respect of all additional cost and expenses that may have to be incurred by the Owner for so completing the Contract Work or part thereof, in addition to the Contractor's liability to compensate the Owner for delay under clause 3.3 herein.

13. Since the joint measurement of that part of the Contract-Agreement, executed by the petitioner, had already been taken and the respondent Rubber Board authorities are aware about the additional costs and expenses, if any, incurred by them for completion of the balance part of the Contract-Work work at the risk and cost of the petitioner, the respondent Rubber Board authorities shall undertake the exercise to find out the amount payable to the petitioner, if any, following the above terms and conditions of the Tender Document and the

Contract Agreement dated 28.03.2014. If after such exercise, any amount is found payable to the petitioner, the same shall be disbursed to the petitioner within a period of 6 [six] weeks from the date of receipt of a certified copy of this order at the office of the respondent no. 4 from the petitioner. There shall be no order as to cost.

JUDGE

Comparing Assistant