

GAHC010098952018



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

Case No. : WP(C)/3064/2018

UTTAM KUMAR SAHA (PROPRIETOR)
M/S. UDESHNA CONSTRUCTION, SON OF LATE MAHENDRA MOHAN
SAHA, RESIDENT OF- WARD NO. 7, P.O. DHUBRI, DIST.- DHUBRI (ASSAM),
PIN- 783301.

VERSUS

THE STATE OF ASSAM AND 4 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM, PUBLIC WORKS DEPARTMENT (ROADS),
DISPUR, GUWAHATI-06.

2:THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
DEPARTMENT OF REVENUE AND DISASTER MANAGEMENT
DISPUR
GUWAHATI-06.

3:THE DEPUTY COMMISSIONER
MORIGAON
DIST. MORIGAON
PIN- 782105.

4:THE CHIEF ENGINEER
PWD(ROADS)
CHANDMARI
GUWAHATI-03.

5:THE EXECUTIVE ENGINEER
PWD (R)
MORIGAON RURAL ROAD DIVISION
MORIGAON
PIN- 782105

Advocate for the Petitioner : MR. B RAHMAN

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY**

JUDGMENT

Date : 20-04-2023

Heard Mr. P.K. Roychoudhury, learned counsel for the petitioner; Mr. B. Choudhury, learned Standing Counsel, Public Works Department [PWD] for the respondent nos. 1, 4 & 5; Mr. A. Bhattacharjee, learned Standing Counsel, Revenue & Disaster Management Department for the respondent no. 2; and Mr. R. Talukdar, learned Junior Government Advocate, Assam for the respondent no. 3.

2. The petitioner has instituted the instant writ petition under Article 226 of the Constitution of India seeking inter alia a direction to the respondent authorities to release an amount of ₹ 39,60,520.00, which amount, according to the petitioner, has remained outstanding to be payable to him against a contract-work executed by him on behalf of the respondent authorities.
3. The background facts leading to institution of the instant writ petition can be narrated, in brief, as follows :-
4. Pursuant to a tender process initiated for a contract-work – “Restoration of flood damages to Karchowabori Goroimari Road under SDRF for the year : 2013-14 [under Jagiroad LAC]” [‘the Contract-Work’, for short] with the publication of a notice inviting tender, the petitioner participated in the same by submitting his bid. The petitioner offered a bid value of ₹ 2,07,66,479.93 against the Contract-Work and upon the petitioner having emerged as the successful bidder [L-1], the respondent no. 4 issued a notice to the petitioner to proceed with the Contract-Work vide a letter bearing Memo no. CE/Commn/45/2014-15 dated 07.03.2015. The said notice mentioned that the petitioner submitted the requisite security as stipulated in the Instructions to Bidders [ITB] and the petitioner was instructed to proceed with the execution of the

Contract-Work in accordance with the contract documents. A Contract-Agreement for the Contract-Work was executed between the respondent no. 4 and the petitioner for a Contract-Price of ₹ 2,07,66,479.93 vide Contract-Agreement no. CE[R]/Commn/SDRF/2014-15/3 dated 07.03.2015. According to the petitioner, he proceeded to execute the Contract-Work as per the work order and completed the same to the satisfaction of the respondent authorities. After completion of the Contract-Work on 25.12.2016, the respondent no. 3 visited the site of the Contract-Work on 19.12.2017 and submitted a completion report in respect of the Contract-Work stating that the Contract-Work stood completed to the extent of 100% as per the plans and estimates. The quality of the Contract-Work was certified to be satisfactory. The respondent no. 3 had, thereafter, forwarded the completion report to the respondent no. 2 vide his forwarding letter bearing no. MRR[MD] 3/2012/PT-IV/71 dated 20.12.2017. The final bills for an amount of ₹ 2,47,00,000.00 against the Contract-Work was submitted by the petitioner. In course of time, an amount of ₹ 2,07,39,480.00 was released in favour of the petitioner. The petitioner has pleaded in the writ petition to the effect that he had executed the Contract-Work to the worth of ₹ 2,47,12,659.00. But, he was paid only an amount of ₹ 2,07,66,480.00 against FOC no. RGR.446/2014/187 dated 12.06.2017 till date, thus, leaving an amount of ₹ 39,60,520.00 as outstanding till date. It is the case of the petitioner that the fact that an amount of ₹ 39,46,179.00 has remained payable as outstanding to the petitioner against the Contract-Work has been endorsed by the respondent no. 5 in his letter bearing no. MRRD/TB/SDRF/2013/14/1794 dated 13.12.2016.

5. The petitioner stated to have approached the respondent authorities by a number of representations including one representation dated 29.01.2018 before the respondent no. 2, requesting for release of the balance amount of ₹ 39,60,520.00 but there was no affirmative action on the part of the respondent authorities towards releasing any balance amount, not to speak of the amount ₹ 39,60,520.00 claimed by him to be admitted outstanding dues.
6. When the respondent authorities were found sitting over the matter without taking any

discernible affirmative action for release of the balance amount of ₹ 39,60,520.00, the petitioner has contended that he is compelled to approach this Court by the instant writ petition seeking the relief, as mentioned above.

7. Mr. Roychoudhury, learned counsel for the petitioner has referred to the completion report submitted by the respondent no. 3 and forwarded to the respondent no. 2 by the said authority on 20.02.2017. As per the completion report submitted by the respondent no. 3, the Contract-Work was started on 07.03.2015 and the same was completed on 25.12.2016. The report further mentioned that the amount sanctioned for the Contract-Work was ₹ 2,47,22,000.00; the amount for which the Contract-Work was allotted was ₹ 2,47,21,350.00 and the amount to be paid as per bills would be ₹ 2,47,12,659.00. The respondent no. 5 had also submitted a demand proposal for fund before the respondent no. 3 vide his letter dated 13.12.2017 for an amount of ₹ 2,47,12,659.00 for making payment to the petitioner and in response, an amount of ₹ 2,07,66,480.00 was received vide FOC no. RGR.446/2014/187 dated 12.06.2017 leaving an amount of ₹ 39,46,179.00 less than the demand proposal for fund. The respondent no. 3 was thereby, requested to submit a separate demand proposal for the remaining amount of ₹ 39,46,179.00. The learned counsel for the petitioner has further referred to the endorsement made in the Contract-Agreement by the respondent no. 4 who after mentioning the original tender amount at ₹ 2,07,66,479.93, had written under his seal and signature that the modified tender amount would be ₹ 2,47,21,350.00. It is, thus, contended that since the Contract-Work was worth ₹ 2,47,21,350.00, the petitioner is entitled to the additional amount beyond ₹ 2,07,66,480.00.
8. The common submission of Mr. Choudhury, learned Standing Counsel, PWD and Mr. Bhattacharjee, learned Standing Counsel, Revenue & Disaster Management is that the Contract-Agreement was signed only for a Contract-Price of ₹ 2,07,66,479.93 vide Contract-Agreement no. CE[R]/Commn/SDRF /2014-15/3 dated 07.03.2015 and there was no subsequent or amended Contract-Agreement between the parties thereafter, for any additional works. The respondent no. 2 in its counter affidavit, has averred that

Administrative Approval for the Contract-Work was accorded vide letter no. RGR.446/2014/92 dated 10.07.2014 for an amount of ₹ 2,47,21,350.00 for implementation of the FDR Estimate for 'Restoration of flood damages to Karchowabori Goroimari Road under SDRF for the year 2013-2014 under Jagiroad LAC'. In the Administrative Approval letter, it was instructed to implement the scheme as per the approved plan and estimates. It is averred that the Administrative Approval order clearly mentioned that no upgradation of the pre-demand period would be admissible. On receipt of the completion report submitted by the respondent no. 3 vide his letter no. MRR[MD]3/2012/PT-IV/71 dated 20.02.2017, the respondent Revenue & Disaster Management Department had examined the same and made the following observations :-

- A. The Executing Department issued work order to M/s Udeshta Construction, H.N. Road, Ward no. 7, P.O. & P.S. Dhubri, Assam – 783001 at a bid price of ₹ 2,07,66,479.33 which was the original tender value of the work of the scheme vide their No. CE/Commn/45/2014-15 dated 07.03.2015 in order to implement the aforesaid FRD Scheme.
- B. But as per Tender Agreement the value of the work was shown for an amount of ₹ 2,47,21,350.00 comprising an excess amount of ₹ 39,54,870.00 by which some additional works were executed that is beyond 5% of the original estimate.
- C. The additional work was executed without revised Technical Sanction and revised Administrative Approval from the competent authority.
- D. Revised Technical Sanction and revised Administrative Approval are required as per Assam Financial Rule.
- E. For implementation of additional work beyond the approved plan and estimate prior approval of the answering Respondent Department herein is also mandatory.

Alluding as above, a stand has been taken by the respondent Revenue & Disaster Management Department that it had disbursed an amount of ₹ 2,07,66,480.00 against the scheme restricting to the Contract-Price. With such assertions, the learned counsel for the respondents have contended that the writ petition under Article 226 of the

Constitution of India is misconceived and is, thus, liable to be held as not maintainable entailing dismissal.

9. The State Government in the Revenue & Disaster Management Department is the employer in respect of the Contract-Work in question. In the counter affidavit filed by the Revenue & Disaster Management Department, the stand that has been taken is that if any additional work was executed, the same was without any revised Technical Sanction and revised Administrative Approval from the competent authority. It is the stand of the Revenue & Disaster Management Department that as per the value of the Contract-Agreement, some additional works were executed beyond the original estimate and the department had released only an amount of ₹ 2,07,66,480.00 against the scheme by restricting itself to the original Contract-Price/tender value.
10. Having considered the pleadings of the parties, it is found that the instant writ petition under Article 226 of the Constitution of India has been preferred seeking release of an amount of ₹ 39,60,520.00 along with interest @ 18% per annum. Admittedly, the writ petition contains a money claim. It is not in dispute that the Contract-Agreement dated 07.03.2015 is not a statutory contract but a non-statutory contract. The rights, liabilities and obligations of the parties in respect of a non-statutory contract are governed by the terms and conditions contained in such agreement, in absence of any statutory provision. It is settled position of law that in case any dispute relating to the interpretation of the terms and conditions of such a contract, the same are governed by the provisions of the Contract Act and the same are not to be agitated in a writ petition under Article 226 of the Constitution of India and the same would be matters for adjudication by a civil court or in arbitration, if provided for in the concluded contract. A copy of the complete Contract-Agreement executed between the parties herein on 07.03.2005, has not been brought on record by any of the parties.
11. The jurisdiction of the High Court under Article 226 of the Constitution of India is in wide terms and the exercise of writ jurisdiction is not subject to any restriction except the territorial restrictions provided in the Article. But at the same time, it is to be taken

into account that the writ jurisdiction is discretionary and it is not to be exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it would be exercised subject to certain self-imposed limitations. It is true that the High Court is not deprived of its jurisdiction to entertain a writ petition under Article 226 of the Constitution of India only because in order to consider the right of the petitioner to be granted the relief sought for, questions of fact have fallen for determination. In a writ petition under Article 226 of the Constitution, the High Court has jurisdiction to try issues both of fact and law. A lis arising out of contractual matter is also not beyond the purview of judicial review though such purview is limited and the discretionary jurisdiction is to be exercised on sound judicial principles. For that matter, a writ petition involving money claim is also entertainable.

11.1. In ABL International Limited and another vs. Export Credit Guarantee Corporation of India Limited and others, reported in [2004] 3 SCC 553, the Hon'ble Supreme Court after considering a number of previous decisions on the issue, has held as under :-

27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition :

[a] In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

[b] Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

[c] A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed

upon itself certain restrictions in the exercise of this power. [See : Whirlpool Corporation vs. Registrar of Trade Marks, [1998] 8 SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.

- 11.2. In Maharashtra Chess Association vs. Union of India and others, reported in [2020] 13 SCC 285, the Hon'ble Supreme Court has observed that in exercising its discretion to entertain in a particular case under Article 226, a High Court may take into consideration various factors including the nature of injustice that is alleged by the petitioner, whether or not an alternative remedy exists, or whether the facts raised a question of constitutional interpretation.
12. Admittedly, the issue raised herein by the petitioner is relatable to the Contract-Agreement dated 07.03.2015 entered into between the petitioner and the respondent authorities. At this juncture, it is apposite to refer to the observations made by the Hon'ble Supreme Court of India in Kerala SEB vs. Kurien E. Kalathil, reported in [2000] 6 SCC 293, wherein it is held as under : -

10. The learned counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract? If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of

the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration, if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have been relegated to other remedies.

12.1. In *Union of India and others vs. Puna Hinda*, reported in [2021] 10 SCC 690, a Notice Inviting Tender [NIT] was issued for construction and improvement of road under Special Accelerated Rural Development Programme [SARDP]. The bid value of the petitioner was accepted at ₹ 31,87,58,950.00 and the work order was issued. The said work order was amended by the parties on 15.03.2012 leading to enhanced work cost at ₹ 35,03,15,695.23. The work order had provided the details of the work to be carried out and the estimated amount payable for each work with rate of each work. The work was divided into three parts and the measurement process for payment was

specified in the general conditions of the contract. The contractor completed one part of the work and a joint survey of the work was carried out by a board of officials. However, the said joint survey report was rejected by the competent authority at the Headquarter. The contractor filed a writ petition after submitting a final bill, claiming a sum of ₹ 23,68,11,589.02. The High Court allowed the writ petition and the matter was carried to the Hon'ble Supreme Court of India by appeal. The appellant Union of India contended that there were serious disputes about the facts in respect of the authenticity of the joint final report and the work done and therefore, such dispute in questions of fact could not have been adjudicated by the writ court as disputed questions of fact relating to recovery of money could not have been entertained by the High Court under the writ jurisdiction. The Hon'ble Supreme Court of India had allowed the appeal with the following observations :-

24. Therefore, the dispute could not be raised by way of a writ petition on the disputed questions of fact. Though, the jurisdiction of the High Court is wide but in respect of pure contractual matters in the field of private law, having no statutory flavour, are better adjudicated upon by the forum agreed to by the parties. The dispute as to whether the amount is payable or not and/or how much amount is payable are disputed questions of facts. There is no admission on the part of the appellants to infer that the amount stands crystallized. Therefore, in the absence of any acceptance of joint survey report by the competent authority, no right would accrue to the writ petitioner only because measurements cannot be undertaken after passage of time. Maybe, the resurvey cannot take place but the measurement books of the work executed from time to time would form a reasonable basis for assessing the amount due and payable to the writ petitioner, but such process could be undertaken only by the agreed forum i.e. arbitration and not by the writ court as it does not have the expertise in respect of measurements or construction of roads.

13. A full bench of this Court in Writ Appeal no. 484/2005 [Tamsher Ali and others vs. State of Assam and others], and similar other 194 writ petitions, reported in 2008 [4] GLT 1 [FB], has observed that a writ petition involving contractual liability can be

considered only in the event there is admission of liability certified by the respective Chief Engineer in the Works Department and in respect of other departments by the Head of the Departments.

14. A writ petition is ordinarily decided on the basis of affidavits. In the course of the writ proceedings, the Court has to consider as to what facts are in dispute and what facts are not in dispute and such a stage comes only after the exchange of pleadings in the form of affidavits amongst the parties is complete. From the discussion above, it is clear, in the absence of any admission of liability by the Head of the Department herein, that the claim of the petitioner as regards the amount of ₹ 39,60,520.00 or any other amount has not been crystallized with any admission of liability. The basis of the petitioner's such claim for the amount of ₹ 39,60,520.00 or any other amount is on the premise of an endorsement made in the Contract-Agreement by the respondent no. 4 who after mentioning the original Contract-Price of ₹ 2,07,66,479.93, had written under his seal and signature that the modified tender amount would be ₹ 2,47,21,350.00. The said claim has been refuted by the respondent authorities on the ground that the additional work, if any, was executed without revised Administrative Approval and revised Technical Sanction from the competent authority. Thus, it is for the petitioner to establish that the additional works, simultaneously or subsequently executed by him, was with the consent, knowledge or approval of the competent authority and that he is entitled to be paid the amount of ₹ 39,60,520.00 or any other amount. Thus, the burden lies on the petitioner to establish that there is breach of contract on the part of the respondent authorities. In view of such fact situation obtaining in the case, this Court is of the considered view that a number of disputed questions of fact are involved in the process of adjudication of the writ petition. This Court does not generally embark upon determination of questions of fact which demand elaborate examination of evidence to establish the right to enforce which the writ is claimed. As these factual disputes have fallen for determination, the same would require appreciation of evidence, both oral and documentary, in a full-fledged trial proceedings. Such disputed questions of rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence

which may be led by the parties in a properly instituted civil suit or in arbitration, if provided for in the contract, rather than by this Court in its writ jurisdiction. For the said reasons, the writ petition is found not to be entertainable and it is accordingly, not entertained. It is, however, made clear that non-entertainment of the writ petition shall not preclude the writ petitioner in initiating appropriate proceedings before the civil court or by way of arbitration, if provided for by the contract, for the amount claimed and/or damages/losses, if any, suffered by him and in the event any such proceedings is initiated by the petitioner the same is to be considered in accordance with law and on its own merits and on the basis of the evidence to be led.

15. At this stage, Mr. Roychoudhury, learned counsel for the petitioner has made an alternative submission that according to the petitioner, the Contract-Agreement dated 07.03.2015 stood modified with the endorsement, referred above, made by the respondent no. 4, and it was on the basis of such bona fide belief, the petitioner had diligently pursued the writ petition. It is his submission that the Limitation Act, 1963 has provided for a period of 3 [three] years for a suit involving money claim. As the petitioner had pursued the writ petition since the year 2018 diligently on a bona fide belief and in good faith and the petitioner is now relegated to seek his remedy in appropriate proceedings, the petitioner might suffer prejudice on the issue of limitation.
- 15.1. In this connection, it is apposite to refer to the provision contained in sub-section [1] of Section 14 of the Limitation Act, 1963, which provides for exclusion of time of proceeding bona fide in a court without jurisdiction. Section 14[1] states that in computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

- 15.2. The true purport of the words, 'other cause of like nature', appearing in Section 14[1] of the Limitation Act, 1963, came to be considered by the Hon'ble Supreme Court of India in *Union of India v. West Coast Paper Mills Ltd.*, reported in [2004] 3 SCC 458. It has been held therein to the effect that Section 14 of the Limitation Act, 1963 is wide in its application, inasmuch as it is not confined in its applicability only to cases of defect of jurisdiction but it is applicable also to cases where the prior proceedings have failed on account of other causes of like nature. In *Roshanlal Kuthalia v. R.B. Mohan Singh Oberoi*, reported in [1975] 4 SCC 628, it has been held by the Hon'ble Supreme Court of India while considering the words, 'other cause of like nature', to the effect that Section 14 of the Limitation Act, 1963 is wide enough to cover such cases where defects are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance, legal or factual, which inhibits entertainment or consideration by the court of the dispute on merits comes within the scope of Section 14 and a liberal approach is to be adopted in interpreting the provision of Section 14 of the Limitation Act, 1963 so as not to deprive the person aggrieved to avail the remedy if he has a right. In a three-judge Bench decision in *Rameshwarlal vs. Municipal Council, Tonk*, reported in [1996] 6 SCC 100, the Hon'ble Supreme Court while considering the import and purport of the words, 'other cause of a like nature', appearing in Section 14 of the Limitation Act, 1963 has held that if the High Court has declined to grant relief relegating the petitioner to a suit in the civil court, the petitioner cannot be left remediless. Accordingly, the time taken in prosecuting before the High Court, if pursued diligently and bona fide, needs to be excluded. In *Shakti Tubes Limited vs. State of Bihar and others*, reported in [2009] 1 SCC 786, it has been observed by the Hon'ble Supreme Court of India that the provision of Section 14 of the Limitation Act, 1963 should be construed liberally.
16. As observed above, the writ petition is not entertained, reserving the liberty to the petitioner to institute appropriate proceedings. Thus, in the event the petitioner institutes any such proceedings before the appropriate forum, it is observed that the said forum shall consider the issue of limitation qua the period during the writ petition before this Court liberally in the light of the observations made hereinabove with

regard to the provisions contained in Section 14 of the Limitation Act, 1963 if any delay is occasioned in availing the remedy and thereafter, shall proceed to consider the claim of the petitioner on its own merits and in accordance with law. There shall, however, be no order as to cost.

JUDGE

Comparing Assistant