

GAHC020002272021



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

Case No. : WA/5/2021

MR. TOSHI LONGKUMER
PROPRIETOR OF M/S T.L CONSTRUCTIONS,
C- 26/3, HALF NAGARJAN,
DIMAPUR, NAGALAND

VERSUS

THE UNION OF INDIA AND 4 ORS
REPRESENTED BY THE SECRETARY,
GOVERNMENT OF INDIA,
MINISTRY OF HUMAN RESOURCES DEVELOPMENT,
(NAVODAYA VIDYALAYA SAMITI BRANCH)
SHASTRI BHAVAN, DR. RAJENDRA PRASAD ROAD,
NEW DELHI 1

2:NAVODAYA VIDYALAYA SAMITI
REPRESENTED BY ITS GENERAL MANAGER (CONSTRUCTION)
A- 28 KAILASH COLONY NEW DELHI 110048

3:RAILWAY INDIA TECHNICAL ENGINEERING SERVICES LIMITED
(SHORTLY REFERRED TO AS RITED LTD.)
REPRESENTED BY ITS MANAGING DIRECTOR PLOT NO. 1 SECTOR
29 GURGAON 122001 HARYANA

4:THE SENIOR DEPUTY GENERAL MANAGER (CIVIL)/ CO-
ORDINATION-NVS RITES LTD. RITES BHAVAN-II PLOT NO.144
SECTOR 44 GURGAON- 122003 HARYANA

5:THE DEPUTY GENERAL MANAGER (CIVIL)/ CO-ORDINATION-NVS
RITES LTD. RITES BHAVAN-II PLOT NO.144 SECTOR 44 GURGAON-
122003 HARYANA

Advocate for the Petitioner : IMTI LONGJEM

Advocate for the Respondent : CGSC (R/1-2)

**BEFORE
HON'BLE MRS. JUSTICE MARLI VANKUNG
HONBLE MR JUSTICE KARDAK ETE**

JUDGMENT & ORDER (ORAL)

Date : 27-09-2023

(M. Vankung, J)

Heard Mr. Imti Longjem, learned counsel for the appellant along with Mr. Yangerwati, learned CGSC for respondent Nos. 1 and 2, and Mr. Pfosekho Pfotte, learned counsel for respondent Nos. 3 to 5.

2. Mr. Imti Longjem, learned counsel for the appellant submits that this appeal is preferred against the judgment and order dated 09.04.2021 passed in WP(C)/263(K)/2018. The learned counsel submits that the writ petition was filed by the present appellant seeking direction to the respondent Nos. 3, 4 and 5 to pay the petitioner's firm for the additional works carried out in the year 2012 in terms of the revised price/rate sanctioned *vide* letter dated 29.09.2011 which was communicated to the petitioner's Firm *vide* letter dated 06.01.2012.

3. The case of the appellant was that the appellant's Firm participated in the tender process for construction of Phase-A (Pkg-II) buildings for Jawahar Navodaya Vidyalaya (JNV) at Chare, District Tuensang, Nagaland. The scope of the work was mentioned in the Price Bid Document (Volume-II) of the tender document of the contract. The contract was awarded to the appellant's Firm for a total price of

₹4,36,01,897.26/- (Rupees Four crores Thirty Six lakhs One Thousand Eight hundred Ninety Seven and paise Twenty Six) only. Pursuant thereto an agreement dated 22.08.2005 was executed between the respondent No. 3 and the appellant's Firm. The appellant was to complete all the works within 10 (ten) months from the tenth day of issuance of the letter dated 20.05.2005. However, due to many factors beyond the control of the appellant the works continued up to the year 2013, wherein it is admitted by the appellant that he could not complete the construction of Kitchen and Dining Hall which was a part of the scope of the work.

4. The respondent No. 4 *vide* letter dated 25.11.2010 had in the meanwhile forwarded the Re-Revised Preliminary Estimate (Re-RPE) to the respondent No. 2 incorporating the cost details required for completion of the construction of the Phase-I works at JNV, Tuensang. This letter included additional works desired by the Principal, JNV, Tuensang. Consequently, the respondent No. 2 *vide* letter dated 29.09.2011 approved the revised estimate. The approval included the additional works which were required at the site and the project for additional works was awarded to the appellant/petitioners. Accordingly, the appellant carried out the additional works required which are construction of play field, boundary wall fencing and retaining walls.

5. Thereafter, in letter dated 12.08.2013, the contract awarded to the appellant was terminated on the ground that the work has not been completed within the stipulated period in terms of the agreement dated 22.08.2005. The letter also mentioned that the appellant will be entitled only for the works which was completed, and accordingly inventory was

prepared as per which the appellant was entitled to be paid ₹23,78,174/- (Rupees Twenty Three Lakhs Seventy Eight Thousand One Hundred Seventy Four) only for the works completed. The appellant/petitioner's firm was also informed that the earnest money and security deposits stands forfeited. Accordingly, as per the inventory prepared the petitioner's firm was entitled to be paid ₹23,78,174/- for works completed. However, the petitioner was also served with a letter dated 29.03.2016 under Section-2, Clause-3 of the Contract Agreement, stating that the petitioner's firm was to deposit before the respondent No.3 a sum of Rs.2,18,60,493/-. The said amount was towards payment of security deposits and the expenditure to be incurred to complete the remaining unexecuted buildings. The appellant being aggrieved filed WP(C)/81(K)/2016 before this court wherein in the judgment and order dated 30.08.2016, the writ petition was disposed by holding that the respondents were liable to pay the amount of ₹23,78,174/- to the petitioner.

6. In so far as the additional works executed and completed by the petitioner's firm, the petitioner was paid only Rs.21,59,322/-. The amount so calculated was fixed at the old rate in the original agreement dated 22.08.2005 and not as per the revised rate/price contained in the letter 22.09.2011 of the respondents No.2 and the revocation letter dated 07.04.2017 which stipulated that the rates of the additional rates shall be reviewed. Aggrieved, the petitioner had file the WP(C)263/2018.

7. A gist of the contention of the appellant/petitioner before the learned Single Judge was that the rates for additional works have also

been calculated by the respondents as per the original contract agreement dated 22.08.2005 which was unfair, unreasonable and an unconscionable contractual agreement, opposed to public policy, when the additional works was carried out in the year 2012. The respondents on the other hand claimed that the appellant/petitioner was bound by the terms of agreement dated 22.08.2005 and also challenged the maintainability of the writ petition on grounds of jurisdiction, claiming that there exist an arbitral agreement in the agreement dated 22.08.2005.

8. The learned Single Judge having heard both the parties, held that, *"there seems to be only two issues in the present writ petitioner which are;*

- (i) Whether in the existence of arbitral agreement between the parties that the High Court of Delhi alone will have the jurisdiction to try the dispute arising out of the contract is enforceable in law*
- (ii) Whether unconscionable contractual agreement can be enforced in the eye of law."*

9. Thereafter the learned Single Judge disposed of the writ petitioner by holding that *"this is clear that when arbitral agreement is in existence between the parties, the Court normally do not intervene unless there are exceptional prevailing circumstances.*

There is dispute with facts and figures. There is claim and counter claim. This cannot be adjudicated by the Writ Court.

Even if the two arguments of the petitioner should survive that the matter can be brought before a Writ Court, and also, that there is an unconscionable agreement, the nature of the issues involved required leading of evidence, which explains the hesitancy of this Court's indulgence in the matter. The controversy being of nature which cannot be decided lest by proper leading of evidence, this Court is of the view that the writ Court cannot adjudicate into the matter."

10. Mr. Imti Longjem, the learned counsel for the appellant submits that the additional works awarded to the appellant/petitioners was for the play field, boundary wall fencing and retaining walls and the additional works were also sanctioned at ₹36.02 lakhs, ₹42.46 lakhs and ₹96.22 lakhs respectively in the letter 22.09.2011 of the respondent No.2 and the revocation letter dated 07.04.2017, which stipulated that the rates of the additional rates shall be reviewed. It was clearly mentioned that the additional works were to be executed as per the approved revised estimates and the appellant was shown on the site, the details of the works to be executed as per the revised estimates. At that point of time the appellant had not contemplated that he had to carry out additional works in the year 2012 as per the original contract agreement dated 22.08.2005 and the appellant has written and approached the respondents several times for payment of the additional works done by him as per the revised rates. The learned counsel submits that such additional works to be paid at the rate agreed upon in 2005 would be unfair, unreasonable and opposed to public policy and therefore in an unconscionable agreement, not enforceable. However, the Single Judge instead of going to the merits of the case had disposed of the case by

concluding that there is an arbitral agreement between the parties and the court normally do not intervene unless there is exceptional prevailing circumstances. The learned counsel submits that in the present case the arbitration is neither started nor concluded.

11. Mr. Imti Longjem, the learned counsel for the appellant submits that the learned Single Judge had erred in coming to the above conclusion, since the writ jurisdiction of the court cannot be ousted by a civil agreement. In support of his submission he has cited the following decisions of the Apex Court : **Maharashtra Chess Assn. –Versus- Union of India** reported in (2020) 13 SCC 285, **Syed Maqbool Ali –Versus- State of U.P.** reported in (2011) 15 SCC 383, in the case of **ABL International Ltd. –Versus- Export Credit Guarantee Corpn. Of India Ltd.** reported in (2004) 3 SCC 553.

12. He further submits that the learned Single Judge also erred in holding that there is “total denial of the fact by the respondents who submitted that additional works were not completed”. The learned counsel for the appellant submits that there is no disputed question of facts since the appellant admits that it is only the works awarded to him in the year 2005 which was not completed and admits that the Kitchen and Dining Hall for the JNV is not completed till date. However, with regards to the additional works he has completed the work and accordingly he has been paid a sum of ₹21,59,322/-. The respondents have not denied the fact that the appellant completed the additional works in their counter affidavit. For the above reason there is no disputed question of facts and the learned Single Judge had gone beyond the pleadings of the parties. In

support of his submission he has cited the following cases: **Naseem Bano –Versus- State of U.P.** reported in **1993 Supp (4) SCC 46**, **P.T. Shamboo Nath Tikoo -Versus- S. Gian Singh** reported in **1995 Supp (3) SCC 266**, **Ratanlal –Versus- Sundrabai Govardhandas Samsuk** reported in **(2018) 11 SCC 119**, **Avinash Gaikwad –Versus- State of Maharashtra** reported in **(2010) 11 SCC 433**, where the Hon'ble Supreme Court has held that an argument beyond the pleadings cannot be raised.

13. The learned counsel for the appellant also cited **Balmer Lawrie & Co. Ltd. -Versus- Partha Sarathi Sand Roy** reported in **(2013) 8 SCC 345**, and in the case of **Central Inland Water Transport Corpn. -Versus- Brojo Nath Ganguly** reported in **(1986) 3 SCC 156**, where it was held that even if there is dispute question of facts, the matter can be adjudicated by a Writ Court.

14. The learned counsel for the appellant thus submits that the judgment and order dated 09.04.2021 by the learned Single Judge in WP(C)/263(K)/2018 is therefore liable to be set aside and prayed that this court may hold that insisting on the rates which were agreed upon in 2005 for the works which were completed in 2012, would be wholly un-executable, considering the increase in rates. That the appellant needs the protection of this court from the respondents in not paying him the due amount entitled on his completion of the additional works which are the construction of play field, boundary wall fencing and retaining walls at Rs.36.02 lakhs, Rs.42.46 lakhs & Rs.96.22 lakhs respectively. That the action of the respondent No.3 and its officials to pay the appellant at the

old rate contained in the original contract agreement dated 22.08.2005 for the additional works given in the year 2012 being wholly arbitrary, unreasonable and illegal.

15. Mr. Yangerwati, learned counsel for respondent Nos. 1 and 2 submits that they had not filed any counter affidavit in the writ petition before the learned Single Judge since they are simply the proforma respondents and has nothing to submit before this court today.

16. Mr. Pfosekho Pfotte, learned counsel for respondent Nos. 3 to 5 submits that since the appellant had signed on the agreement wherein it was clearly mentioned that the rates would be as per the agreement dated 2005, the appellant has no grounds to claim the revised rates for his completed works. He further submits that there is a question whether the appellant had completed the additional works in 2012, however, this point was not mentioned in the counter affidavit filed by them. He has also, in all fairness admitted that the appellant has been paid Rs.21,59,322/- for the additional works executed by him, which was however as per the rates agreed upon in terms the original contract agreement dated 22.08.2005. That the appellant had also agreed to this by signing on Supplementary Agreement dated 11.04.2017.

17. Having heard the submissions made by both the parties, we have perused the Order passed by the learned Single Judge in WP(C)/263(K)/2018 dated 09.04.2021 and the documents on record. We have perused the decision of the Apex Court in **Maharastrate Chess Assn. (Supra)**, where it was observed that:

“19. This argument of the second respondent is misconceived. The existence of an alternate remedy, whether adequate or not, does not alter the fundamentally discretionary nature of the High Court’s writ jurisdiction and therefore does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court. The decision whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case.

20. This understanding has been laid down in several decisions of this Court. In U.P. State Spg. Co. Ltd. V. R.S. Pandey [U.P. State Spg. C.Ltd v. R.S. Pandey, (2005) 8 SCC 264 : 2006 SCC (L&S) 78] this Court held : (SCC p. 270, para 11)

”11. Except for a period when Article 226 was amended by the Constitution (Forty-Second Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy.”

22. The mere existence of alternate forums where the aggrieved

party may secure relief does not create a legal bar on a High Court to exercise its writ jurisdiction. It is a factor to be taken into consideration by the High Court amongst several factors. Thus, the mere fact that the High Court at Madras is capable of granting adequate relief to the appellant does not create a legal bar on the Bombay High Court exercising its writ jurisdiction in the present matter."

Further on perusal of the documents on record, we find that there is no specific arbitrary clause in the agreement dated 22.08.2005 nor have the parties entered into any arbitral agreement nor is there any **an** arbitral proceeding between the parties.

18. In view of the above findings, we are of the considered opinion that the jurisdiction of this court under Article 226 of the Constitution cannot be ousted by an agreement executed between the parties. We thus set aside the finding of the learned Single Judge which held that "*this is clear that when arbitral agreement is in existence between the parties, the Court normally do not intervene unless there are exceptional prevailing circumstances*".

19. We also take note of the fact that the respondents have not denied that the appellant had completed the additional work, which can also be seen from the fact that he was paid a sum of ₹21,59,322/- for completion of the additional works. For this reason since there is no dispute on the question of facts with regards to the completion of the works, we are of the view that the learned Single Judge had erred in deciding that *the*

nature of issues involved required leading of evidence and that the writ Court cannot adjudicate into the matter.”

20. We have also observed that the learned Single Judge had not touched upon the merits of the case but had disposed of the writ petition on its maintainability only. We are therefore constrained to set aside the order of the single bench dated 09.04.2021 by remanding the matter back to the Single Judge for disposal of the writ petition on merits.

21. Accordingly, WA/5/2021 stands disposed of as above.

-Sd/-
JUDGE

-Sd/-
JUDGE

Comparing Assistant