

GAHC010191042023



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

Case No. : WP(C) 4982/2023

M/s Rana Construction and Engineers Pvt. Ltd., Suraj Complex, Ulubari Chariali, Kamrup (Metro), Guwahti-781007, Assam, represented by one of its Director, Rana Zaman, aged about 52 years, S/o Alhaz Rahman Ali, R/o House No.62, Rahman Mansion, South Sarania, P.O.- Ulubari, Dist.- Kamrup (M), Assam, Guwahati-7.

.....Petitioner.

-Versus-

1. The State of Assam,

Represented by the Commissioner and Secretary to the Government of Assam, Public Works Roads Department, Dispur, Guwahati-781006.

2. The Chief Engineer,

Public Works Department (Border Roads) Chandmari, Guwahati, Assam-781003.

3. The Executive Engineer, PWRD, Morigaon District Territorial Road Division, Morigaon-782105.

4. The Secretary to the Govt. of India,

Ministry of Rural Development, Rural Connectivity (RC) Division, Krishi Bhavan, New Delhi-110001.

5. National Rural Infrastructure Development Agency, Represented by its Director General, Krishi Bhawan, New Delhi-110001.

.....Respondents.

With
WP(C) 2146/2023

M/s Rana Construction and Engineers Pvt. Ltd. Suraj Complex,
Ulubari Chariali, Kamrup (Metro),
Guwahati-781007, Assam, represented by one of its Director, Rana Zaman,
aged about 51 years,
S/o Alhaz Rahman Ali, R/o House No.62, Rahman Mansion, South
Sarania, P.O.- Ulubari, Dist.- Kamrup (M), Assam, Guwahati-7.

.....Petitioner.

-Versus-

1. The State of Assam,

Represented by the Commissioner and Secretary
to the Government of Assam, Public Works Roads Department, Dispur,
Guwahati-06.

2. The Chief Engineer,

Public Works Department (Border Roads), Chandmari, Guwahati, Assam-
781003.

3. The Executive Engineer,

PWD, Morigaon District Territorial Road Division, Morigaon, Assam.

4. The Secretary to the Govt. of India,

Ministry of Rural Development, Rural Connectivity (RC) Division, Krishi
Bhavan, New Delhi-110001.

5. National Rural Infrastructure Development Agency, Represented
by its Director General,

Krishi Bhawan, New Delhi-110001.

.....Respondents

- BEFORE -
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

For the petitioner : Mr. R. Zaman (petitioner in person)
in WP(C) 4982/2023.
Mr. S. Hoque, Advocate
in WP(C) 2146/2023.

For the respondents : Mr. B. Gogoi, SC, PWD.
Mrs. R. Devi for R 4 & 5.

Date of hearing : 12.02.2024

Date of Judgment : 17.02.2024

JUDGMENT & ORDER (CAV)

1. Heard the petitioner-in-person in WP(C) No.4982/2023, who is the Director of the petitioner company. Also heard Mr. S. Hoque, learned counsel for the petitioner in WP(C) No.2146/2023. Mr. B. Gogoi, learned Standing Counsel appears for the PWD and Mrs. R. Devi, learned CGC appears for the respondent nos.4 & 5.

2. As the subject matter in both the cases relate to the same contract work in question and the petitioner being the same in both the cases, the cases are being decided by this common judgment and order.

3. In WP(C) No.2146/2023, the petitioner has put to challenge the Speaking Order dated 10.04.2023 issued by the Chief Engineer, PWD (Border Roads) and made a prayer to allow him to deposit Performance Security and additional Performance Security in respect of Package No. AS-17-260,

PMGSY-III, Batch No.1, 2022-23 for execution of the work constructing road length of 22.65 kms. in Morigaon District. The road name being T05-Dimaruguri Kamarpur Road. The contract work includes cross-drainage works and routine maintenance works for 5 years. He has also prayed for setting aside the fresh NIT dated 28.02.2023 issued in respect of the same Package No. AS-17-260, PMGSY-III, Batch No.1, 2022-23.

In WP(C) No. 4982/2023, the petitioner has prayed for payment of his contractual bills in respect of the work done by him pertaining to the same Package No. AS-17-260, PMGSY-III, Batch No.1, 2022-23, hereinafter referred to as the "work."

4. The petitioner's grievance is that despite having completed 10% of the work, in terms of the NIT dated 21.05.2022 issued by the Chief Engineer, PWD (Border Roads), Assam and the Letter of Acceptance dated 06.08.2022, the petitioner has not been paid his pending bills amounting to Rs.1,98,11,912/-.

5. The facts of the case, as can be culled out from the pleadings herein, is that the petitioner had taken part in the Short NIT dated 21.05.2022 pertaining to Package No. AS-17-260, PMGSY-III, Batch No.1, 2022-23, for execution of the work construction of road length of 22.65 kms in Morigaon District, the road name being T05-Dimaruguri Kamarpur Road, including cross-drainage works and routine maintenance works for 5 years.

6. The petitioner being the lowest bidder for the said contract work, he was given a Letter of Acceptance dated 06.08.2022 by the Chief Engineer,

PWD (Border Roads). However, he was requested to furnish Performance Security for an amount of Rs.45,98,000/- and additional Performance Security of Rs.2,12,29,000/-, for quoting 17.86% below the estimated construction cost.

7. The petitioner being aggrieved by having been requested to furnish additional Performance Security of Rs.2,12,29,000/- filed WP(C) 5301/2022, challenging the condition for submission of the additional Performance Security. This Court dismissed WP(C) 5301/2022, vide order date 07.02.2023. Being aggrieved, the petitioner filed an Appeal which was registered as WA 86/2023. The same was also dismissed by the Division Bench of this Court , vide order dated 20.03.2023.

8. Situated thus, the petitioner thereafter submitted a representation dated 22.02.2023 to the respondent authorities, seeking that the additional Performance Security sought by the State respondents should be adjusted with the pending Security Deposit as well as the royalty. A further offer was made in the petitioner's representation, for increasing the rate of reduction of the Security Deposit from 7.5% to 16.5%, which would, in the calculation of the petitioner, take care of the State respondents' demand for additional Performance Security. As the petitioner's representation was not been considered, the petitioner filed WP(C) No.1057/2023 before this Court.

9. The petitioner in the meantime, in the absence of any work order or contract agreement being signed between the parties, had started construction of the road. He thereafter filed WP(C) 1725/2023, praying that

his pending bills from other contract works should be adjusted against the additional Performance Security that was to be deposited by him, for being awarded the contract under Package No. AS17260. The petitioner also made an offer that he was willing to pay the additional Performance Security as requested by the respondents. This Court, while observing the submission of the counsel for the PWD that the contract work had been re-tendered, disposed of WP(C) No.1725/2023, vide order dated 27.03.2023, by directing the respondents to reconsider the case of the petitioner for payment of the additional Performance Security pertaining to Package No. AS17260.

10. This Court closed WP(C) No. 1057/2023, as the same was not pressed by the petitioner, due to the subsequent filing of WP(C) No.1725/2023. The same was allowed by this Court vide order dated 27.03.2023.

11. Consequent to the order dated 27.03.2023 passed in WP(C) 1725/2023, the Chief Engineer, PWD (Border Roads) issued Speaking Order dated 10.04.2023, stating that the petitioner was not entitled to start physical execution of the work, without receiving a "Notice to Proceed with the Work" and accordingly ordered that the department was not in a position to accept the Performance Security and additional Performance Security from the petitioner. Further, the department was not in a position to award the work under Package No. AS17260 to the petitioner.

12. The petitioner being aggrieved with the Speaking Order dated 10.04.2023 passed by the Chief Engineer, PWD (Border Roads), has put to challenge the Speaking Order in WP(C) 2146/2023.

13. IN WP(C) No. 4982/2023 the petitioner has prayed for payment of the pending bills he had submitted to the PWD, with respect to 10% of the road work he has alleged to have constructed in relation to Package No. AS17260, despite no contract agreement being signed between the parties and no work order being issued to the petitioner. The petitioner has also submitted the photocopy of "Minutes of the Joint Verification/Measurement" held on 14.12.2023 by the representative of the petitioner and the respondent No.3, in relation to the road constructed by the petitioner, which is signed by the Executive Engineer, Morigaon District Territorial Road Division (respondent No.3), showing that measurement of the petitioner's work has been done.

14. The petitioner in person, who appears in WP(C) No.4982/2023 and the petitioners' counsel, Mr. S. Hoque, who appears in WP(C) No.2146/2023, submit that as per the "minutes of the joint verification/measurement" made by the Executive Engineer dated 14.12.2023, the following note has been made by the respondent No.3:- "The extra work of GSB and WBM Grade II from Ch. 15550.00 m to Ch.18150.00 m (LHS) and Ch.18150.00 m to Ch. 19150.00 m (LHS+RHS) as claimed by the petitioner's representative was not found as per specification as well as proper spreading of materials, rolling compaction not done which was later rectified by replacing with new graded materials." They submit that though the petitioner has submitted his bills for the work done and for which the Letter of Acceptance had been issued to the petitioner, the petitioner has not been paid his contractual bill amounting to Rs.1,98,11,912/-.

15. The petitioner in person and Mr. S. Hoque admit the fact that as the

petitioner could not pay the additional Performance Security, the Letter of Acceptance, which was issued on 06.08.2022, had been cancelled on 10.04.2023.

16. The counsels for the respondents, on the other hand, submit that a part of the contract work has been done by the petitioner on his own volition and without any information being given to the State respondents. No permission was given to the petitioner, to start the work without receiving the Formal Work Order (FWO). Further, if any work has been done by the contractor, it was at his own risk, for which the Department was not liable. The respondent's counsel submit that as there was no existing contract between the parties, the respondents have no liability towards the petitioner.

17. I have heard the learned counsels for the parties.

18. As can be seen from the submissions made, in addition to the contents of the pleadings, it is seen that the NIT for the work had been issued on 21.05.2022. The petitioner being the lowest tenderer was issued the Letter of Acceptance dated 06.08.2022, with the condition that he had to submit the Performance Security of Rs.49,98,000/- and additional Performance Security of Rs.2,12,29,000/-, for quoting 17.86% below the estimated construction cost as per the ITB Clause No. 26 and special condition of contract Clause No. 1.2 of Section 4, Part- II, within 10 days from the date of receipt of the Letter of Acceptance. The same was to be valid up to 45 days from the date of expiry of the defects liability period and the contract was to be signed as per the Letter of Acceptance dated 06.08.2022. On failure of

the petitioner/contractor to submit the total Performance Security and to sign the contract within the stipulated period, action was to be taken in terms of Clause 30 of the ITB.

19. Thereafter, notice dated 16.02.2023 was issued to the petitioner asking him to submit the Performance Security along with additional Performance Security within 25.02.2023, the failure of which would necessitate the respondents to act in terms of Clause 30 of the ITB, which states as follows-

“Failure of successful bidder to comply with the requirement of delivery of Performance Security of two and a half percent of Contract Price plus additional security for unbalanced bids as per provisions of Clause 30 shall constitute sufficient ground for cancellation of award and forfeiture of the Bid Security. Such successful bidder who fails to comply with the above requirements is liable to be debarred from participating in bids under PMGSY for a period of one year.”

Instead, the petitioner made a challenge to the dismissal of WP(C) No.5301/2022 before the Division Bench of this Court vide W.A. No. 86/2023. W.A. No. 86/2023 was dismissed vide order dated 20.03.2023.

20. As the petitioner did not submit the total Performance Security even after 6 months of issuance of the Letter of Acceptance, the Letter of Acceptance was cancelled by the respondents on 10.04.2023.

21. The petitioner, thereafter, filed WP(C) No. 1725/2023 claiming for payment of contractual bills, as he had completed 10% of the work that had been tendered vide the NIT dated 21.05.2022. Further, he made a challenge

to the re-tendering process that the respondents had initiated.

22. This Court had disposed of WP(C) No.1725/2023 vide order dated 27.03.2023, by directing the Chief Engineer, PWD (Border Roads) to reconsider the offer made by the petitioner regarding his willingness to pay the entire additional Performance Security pertaining to Package No. AS-17-260 as an exceptional case. The operative portion of the order dated 27.03.2023 passed in WP(C) No.1725/2023 is reproduced hereinbelow as follows-

“The petitioner had raised a grievance on the issue of requirement of additional performance security in the works on certain grounds which however have not been accepted by this Court. Thereafter, though there have been other developments, in this case the petitioner has expressed his willingness to make the said deposit which has been rejected only on the ground that the work in question has been re-tendered. Though the rejection by the authorities per se does not appear to be wholly unreasonable as the work has already been put to re-tender, considering the peculiar facts and circumstances, this Court in exercise of its equitable jurisdiction, as an exceptional case directs the authorities in question namely the Chief Engineer, Public Works Department, Border Roads to reconsider the offer made by the petitioner regarding his willingness to pay the entire amount of the Additional Performance Security only for the work in question namely Package No. AS-17-260. The learned Counsel for the petitioner has also conceded that the offer made is only in respect of the said work and for the other three works, he is not in a position to make such offer.

The reconsideration directed to be made may be done expeditiously and preferably within a period of 10 (ten) days from today. It is further directed that till such decision is arrived at and communicated, no steps be taken in the process of re-tendering of the job in question.

With those observations, the instant writ petition is disposed of."

23. The Speaking Order dated 10.04.2023 passed by the Chief Engineer (Border Roads) states that the Department was not in a position to accept the Performance Security and additional Performance Security and award the work to the petitioner, as the said issue had been decided and dismissed by this Court. Further, the petitioner's Bid Security had been forfeited on 28.02.2023 and the petitioner's Bid Security had been automatically transferred to the State's Programme Fund account under the head "Fines/Forfeiture" in the online e-tendering portal. Intervention and the forfeiture process would invite an audit issue in the e-tendering process, as well as in the accounting system. Further, the petitioner was not eligible to start physical execution of the work without "Notice to proceed with the work."

24. As can be seen from the above facts, no work order had been issued to the petitioner and no contract had been executed between the parties for the contract work in question. The Letter of Acceptance had also been cancelled and the Bid Security had been forfeited. In the absence of any work order or "Notice to proceed with the work", the petitioner had, on his own volition, apparently done the work, which was at his own risk. No right of the petitioner can be said to be violated, in view of the fact that his challenge in relation to the payment of the additional Performance Security has been dismissed by this Court.

25. As the question of deposit of Performance Security and additional Performance Security has already been decided by the respondents and this

Court, the petitioner cannot have any enforceable right to demand the deposit of Performance Security and additional Performance Security. Further there is no challenge to the cancellation of the Letter of Acceptance on 10.04.2023. As the petitioner has no enforceable right to claim deposit of Performance Security and additional Performance Security before this Court at this stage, the petitioner has no right to challenge the subsequent NIT dated 28.02.2023. No enforceable right of the petitioner having been violated, the petitioner cannot be said to be an aggrieved person, in terms of the judgment of the Hon'ble Supreme Court in ***Ayaubkhan Noorkhan Pathan Vs. State of Maharashtra and Others.***, reported in **(2013) 4 SCC 465.**

26. In respect of WP(C) No. 4982/2023, the Letter of Acceptance not having fructified into any contract agreement, the petitioner should not have started the contract work at his own risk. Further, as stated by the Chief Engineer (Border Roads) in the Speaking Order, wherein it has been stated that the petitioner could not have started execution of the work in the absence of "Notice to proceed with the work", the petitioner cannot claim that any enforceable right of his has been violated. The work allegedly done by him was at his own risk. The minutes of the joint verification/measurement dated 14.12.2023, which the petitioner has produced, does not give any right to the petitioner to claim any amount from the respondents. The respondents, however, can consider the claim of the petitioner for payment for the work done by him, as per their own discretion. It is also noticed that the Speaking Order dated 10.04.2023 has not been put to challenge.

27. The above being said, the manner in which the petitioner has tried to get the contract work done, in the absence of any contract agreement etc., shows that the petitioner has been trying to bulldoze his way through, by not being fair. On considering the facts and circumstances of this case, this Court is of the view that it would be an anomalous situation if a person, who by his own conduct, precludes the coming into existence of a contract, then tries to take advantage of his own wrong doing, by doing a part of the contract work, in the absence of any work order or any contract agreement being executed. A person, who does not have any intention to enter into a valid binding contract, by fulfilling the conditions demanded by the author of the tender, cannot be allowed to take any undue benefit, in the absence of any work order, permission to start the contract work or contract agreement. If this type of activity of a tenderer is allowed, the same would create chaos, if other tenderers were to follow suit, in respect of future tenders.

28. In view of the reasons stated above, this Court does not find any ground to allow the writ petitions.

29. The writ petitions are accordingly dismissed.

JUDGE

Anupam

Comparing Assistant