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

Case No. : WA/330/2023

THE NATIONAL HIGHWAYS AND INFRASTRUCTURE DEVELOPMENT CORPORATION LTD. AND 2 ORS.

REP. BY ITS MANAGING DIRECTOR (MD) HAVING ITS OFFICE AND PRINCIPAL PLACE OF BUSINESS AT PTI BUILDING, 3RD FLOOR, 4- PARLIAMENT STREET, NEW DELHI- 110001.

2: THE NATIONAL HIGHWAYS AND INFRASTRUCTURE DEVELOPMENT CORPORATION LTD.

A FULLY CENTRAL GOVT. COMPANY UNDER MINISTRY OF ROAD TRANSPORT AND HIGHWAY
GOVT. OF INDIA

HAVING ITS OFFICE AND PRINCIPAL PLACE OF BUSINESS AT PTI BUILDING

PARLIAMENT STREET

NEW DELHI- 110001 AND HAVING ITS BRANCH OFFICE AT GNB ROAD AMBARI IN FRONT OF AGP OFFICE

GUWAHATI-1. REP. BY ITS EXECUTIVE DIRECTOR (PROJECT).

4: THE GENERAL MANAGER (PROJECT)

NATIONAL HIGHWAYS AND INFRASTRUCTURE DEVELOPMENT CORPORATION LTD

PROJECT MONITORING UNIT- JORHAT

C/O SHRI. DIGANTA BORA

2ND FLOOR

CHIROTIA HAZARI LINK ROAD

PULIBOR

JORHAT

ASSAM- 785006

VERSUS

GIRIN DEKA AND 2 ORS.

S/O LATE BAIDAR DEKA, PROPRIETOR OF M/S GIRIN DEKA HAVIN GITS OFFICE AND PRINCIPAL PLACE OF BUSINESS AT HOUSE NO. 7, TRIPURA

ROAD, KHANAPARA, GUWAHATI- 781022.

2:M/S GIRIN DEKA

A PROPRIETORSHIP FIRM REP.BY ITS PROPRIETOR SHRI GIRIN DEKA
HAVING ITS OFFICE AND PRINCIPAL PLACE OF BUSINESS AT HOUSE NO.

7

TRIPURA ROAD

KHANAPARA

GUWAHATI- 781022.

3:M/S CORSAN CORVIAM CONSTRUCTION S.A.

HAVING ITS HEAD OFFICE AT CABBALLERO ANDNTE

8-28021

MAIDRID

SPAIN AND REP. BY ITS DIRECTORS AND HAVING IT BRANCH OFFICE AT

1ST FLOOR

SPLENDOR TOWER

SECTOR-88

GURGAON

HARYANA -122018

For the Appellants : Mr. P.J. Saikia, Sr. Adv.

Mr. K.J. Saikia, Adv.

For the Respondents: Mr. S.P. Roy, Adv.

Mr. J. Das, Adv.

BEFORE

**HON'BLE THE CHIEF JUSTICE
THE HON'BLE MR. JUSTICE SUMAN SHYAM**

Date of hearing : 13/08/2024 & 14/08/2024.

Date of judgement : 19/08/2024.

JUDGEMENT AND ORDER (CAV)

Suman Shyam, J

1. Heard Mr. P.J. Saikia, learned senior counsel assisted by Mr. K.J. Saikia, learned counsel appearing for the appellants. We have also heard Mr. S.P. Roy, learned counsel assisted by Mr. J. Das, learned counsel for the respondent nos. 1 & 2. None has appeared for

the proforma respondent no. 3.

2. This writ appeal is directed against the judgment and order dated 12/06/2023 passed by the learned Single Judge in WP(C) No. 7326/2018 preferred by the respondent nos. 1 & 2 as writ petitioners whereby, a Writ of Mandamus has been issued upon the appellants to release payments due to the writ petitioners on account of execution of a contractual work as a sub contractor under the proforma respondent No 3. The writ petitioner/ respondent no. 1 Sri. Girin Dekka is the sole proprietor of the petitioner/ respondent no. 2 firm viz. M/s. Girin Dekka (here-in after referred to as the sub-contractor). The said proprietorship was engaged as a sub-contractor under the principal contractor by the proforma respondent no 3, viz. M/s. Corsan Corviam Construction S.A. (*herein after referred to as **CCCSA***). CCCSA is a company from Spain and the said company had left India before completion of the work. According to the writ petitioners since the sub-contract was entered into with the principal contractor with due consent and approval of the National Highways and Infrastructure Development Corporation Ltd. (NHIDCL), hence, in view of the provisions contained in clause 3.2 of the contract agreement, the sub-contractor has stepped into the shoes of the principal contractor. The case of the writ petitioners before the learned Single Judge was that there is no dispute about the fact that the sub-contractor has duly executed the work. In such circumstances, payment due to the writ petitioners cannot be withheld by NHIDCL merely because the principal contractor had de-faulted in completing the work. The appellants had, however, opposed the prayer made in the writ petition primarily contenting that CCCSA has failed to complete the work as a result of which, the contract agreement had been terminated. According to the NHIDCL an amount of Rs 43,73,90,000/- was recoverable from the principal contractor which included a sum of Rs 11,23,56,821 /- payable for the work done, which is required to be adjusted against the amount recoverable. As such, all payments due under the contract agreement including the component claimed by the sub-contractor have been withheld by the NHIDCL in public interest. It was also contended that since payments to the sub-contractor is to be made through the principal contractor, hence, the mere fact that NHIDCL had granted approval to engage the sub-contractor, by itself, cannot give rise to any indefeasible right on the part of the sub-contractor so as to demand release of payments directly from the NHIDCL. While rejecting such contention made on behalf of the NHIDCL, the learned single judge has opined in the

impugned order dated 12/06/2023, that the claim of the sub-contractor would be covered under section 70 of the Indian Contract Act, 1872 and accordingly, directed release of payments due to it by granting liberty to the MoRTH and NHIDCL to recover and amount from the principal contractor, in accordance with law. Hence, this appeal.

3. It appears from the materials on record that the Ministry of Road Transport and Highways (MoRTH) had entered into an Engineering Procurement and Construction (EPC) agreement with M/s. CCCSA on 19/11/2014, as the principal contractor, for execution of the work of construction of four laning of Jorhat – Jhanji section of NH 37 in the State of Assam from 453.000 to 491.050 KM. A tripartite agreement was also entered into by and in between the MoRTH, CCCSA and the appellant no.1 herein i.e. NHIDCL so as to facilitate the work. Clauses 3.2.1, 3.2.2, 3.2.3 and 3.4 of the contract agreement dated 19/11/2014 envisages the scope on the part of the principal contractor to enter into a sub-contract with other entities for completion of the project work. Accordingly, CCCSA had entered into a contract dated 31/05/2016 with the sub-contractor for execution of additional work of 2.33 Km valued at Rs 26.90 crores. However, the contract entered with the sub-contractor was to be governed by the terms of the agreement dated 19/11/2014 and tripartite agreement dated 05/05/2015.

4. According to the sub-contractor, in terms of the sub-contract agreement dated 31/05/2016, it had completed the work valued at Rs. 11,06,85,770/- and thereafter, raised bills. However, the amount due to the sub-contractor was not paid by the principal contractor, viz. CCCSA. Instead CCCSA, which is a company from Spain, had left the country leaving some of the works assigned to it as incomplete. Subsequently, the contract agreement dated 19/11/2014 was terminated by NHIDCL on 07/06/2017 by invoking clause 23.1 of the GCC. After the termination of the contract agreement dated 19/11/2014, the sub-contractor had demanded release of the payments due to it from NHIDCL. However, when no action was taken in the matter by NHIDCL, the sub-contractor had approached this Court by filing the aforesaid writ petition, seeking a Writ of Mandamus, directing the present appellants to release the payment due to it. The said prayer has been allowed by the learned Single Judge by the impugned judgement and order dated 12/06/2023, which is under challenge in this writ appeal.

5. Assailing the judgement and order dated 12/06/2023, the appellants have

contended that there is no privity of contract between the sub-contractor and the appellants. Therefore, the sub-contractor did not have any right to seek release of payments directly from the appellants, more so, since the contract agreement dated 19/11/2014 already stood terminated. It is the further contention of the appellants that due to the default on the part of the principal contractor (CCCSA), an amount of Rs. 43,79,90,000/- was due and recoverable by the appellants from CCCSA. The aforesaid amount includes the sum of Rs. 11,06,85,770/- claimed by the sub-contractor. Therefore, the amount claimed by the writ petitioners/ sub-contractor cannot be released by the appellants either in favour of the principal contractor or the sub-contractor, until such time, the contractual dispute by and in between the parties to the agreement dated 19/11/2014 is finally resolved.

6. Opposing the said contentions, the sub-contractor (i.e. the respondent nos. 1 & 2) have urged that engaging a sub-contractor was not only permissible under the contract agreement but it was done with the consent and approval of the NHIDCL authorities. According to the respondent nos. 1 & 2, there is no controversy regarding the fact that the sub-contractors had duly executed its part of the work to the satisfaction of the NHIDCL authorities and therefore, the amount of Rs. 11,06,85,770/- claimed by the sub-contractor is lawfully due and payable to it by the appellants. Under the circumstances, the claim of the writ petitioners cannot be defeated merely on the ground that the contract agreement entered into by the appellants had been terminated and that there is no privity of contract between the sub-contractor and the appellants.

7. Mr. P.J. Saikia, learned senior counsel for the appellants has argued that the claim of the writ petitioners is based on heavily disputed questions of fact which lie within the realm of the contract agreement. Therefore, remedy in the form of writ petition was not the appropriate remedy in such matters. According to Mr. Saikia, efficacious alternative remedy was available to the writ petitioners to approach the appropriate forum. However, the writ petitioners/ respondent nos. 1 & 2 have failed to avail such alternative remedy. As such, the learned Single Judge has committed serious error in law in entertaining the writ petition by ignoring the said aspect of the matter.

8. It is also the submission of Mr. Saikia, learned senior counsel for the appellants that the contract agreement in question having been terminated and in view of the fact that the appellants have a claim of damages and compensation against the principal contractor, there

can be no question of any contractual obligation on the part of the appellants to make payment to the sub-contractor directly nor can there be any valid ground to grant relief to the writ petitioners by taking recourse under 70 of the Indian Contract Act, 1872. Therefore, submits Mr. Saikia, the learned Single Judge was not justified in issuing a writ of mandamus directing the release of payments in favour of the sub-contractor.

9. Responding to the above arguments, Mr. S.P. Roy, learned counsel for the sub-contractor (respondent nos. 1 & 2) has argued that in view of clauses 3.2.1, 3.2.2, 3.2.3 and 3.4 of the contract agreement dated 19/11/2014, it cannot be said that there is no contractual obligation on the part of the writ appellants to clear the unpaid dues of his client. He has further argued that there is no dispute about the fact that the sub-contractor had discharged its contractual obligation to the fullest satisfaction of the authorities and had completed the work. Even otherwise, submits Mr. Roy, since the sub-contractor has lawfully discharged its part of the contract by investing heavy amounts and since the appellants have got the benefit of the work executed by his client, the rights and interest of the writ petitioners/sub-contractor would be well protected under section 70 of the Indian Contract Act.

10. In support of his above arguments, Mr. Roy has relied upon the following decisions :-

- i) Mulamchand Vs. State of MP, (1968) AIR SC 1218;
- ii) Union of India Vs. Sita Ram Jaiswal, (1976) 4 SCC 505;
- iii) Union of India Vs. J.K. Gas Plant, (1980) 3 SCC 469;
- iv) Union of India Vs. Gautam Dev Gupta, (1989) 1 GLT 67;
- v) State of Assam Vs. Mahalchand Binod Kumar, (1989) 2 GLJ 70 &
- vi) Ramakanta Deb Roy Vs. Amalendu Dutta, 1990 (1) GLR 332.

11. We have considered the arguments advanced at the Bar and have gone through the materials available on record.

12. At the very outset, it deserves to be mentioned herein that there is no dispute about the fact that the sub-contractor is a proprietorship firm registered as an enterprise under the *Micro Small and Medium Enterprises Development Act, 2006* (herein after referred to as the *Act of 2006*). It is also the admitted position of fact that the sub-contractor was engaged by the principal contractor CCCSA with the knowledge and approval of the appellants. The fact that the contract agreement dated 19/11/2014, more particularly, clauses 3.2.1, 3.2.2, 3.2.3

and 3.4 of the contract agreement dated 19/11/2014, did permit engaging sub-contractors by the principal contractor is also not in dispute. Not only that, the fact that the sub-contractor had executed the work valued at Rs. 11,06,85,770/- has also been categorically admitted by the appellants in their counter -affidavit filed in the writ petition. Paragraph 11 of the counter -affidavit filed on behalf of the NHIDCL authorities is reproduced herein below for ready reference :-

“11. That, with regard to statement made in paragraphs 27 & 28 of the writ petition, the answering deponent begs to state that in consequence to the termination of contract of 4 laning from Jorhat to Jhanji section of NH-37 due to gross default on the part of previous EPC Contractor M/s. Corsan Corviam Construction S.A., authority’s Engineer determined the valuation of unpaid work (completed/uncompleted) as per the provision of Clause 23.5 of Article 23 of the Contract Agreement.

The gross valuation of unpaid EPC WORK (completed/uncompleted) determined by the authority’s Engineer is Rs. 12,26,35,331/- (Rupees Twelve Crore Twenty Six Lakhs Thirty Five Thousand Three Hundred and Thirty One only). Out of which executed under scope of sub-contractor M/s. Girin Deka is Rs. 11,06,85,770/- (Rupees Eleven Crore Six Lakhs Eighty Five Thousand Seven Hundred and Seventy only) and under scope of other Sub-Contractor is Rs. 1,19,49,561 (One Crore Nineteen Lakhs Forty Nine Thousand Five Hundred Sixty One only),”

13. A perusal of the letter dated 30/07/2018 issued by the Team Leader cum Sr Highway Engineer of NHIDCL also clearly indicates that the sub-contractor has executed work valued to the tune of Rs 11,06,85,770/-. The fact that the sub-contract entered into by the principal contractor was duly approved by the competent authorities of NHIDCL vide letter dated 04/11/2016 is also admitted by the appellants. It is in the backdrop of these admitted facts that this Court is called upon to examine the legality and validity of the impugned judgement and order dated 12/06/2023 passed by the learned Single Judge.

14. It is *trite* that in a matter involving contractual disputes, remedy in the form of a writ petition would not be the appropriate remedy, more so, if there are disputed question of facts involved in the matter. Disputes arising within the realm of the contract agreement ought to be resolved by seeking remedy before the forum designated by the contract agreement. In

the present case, clause 26.3.1 of the contract agreement dated 19/11/2014 contains an Arbitration agreement, according to which, disputes and difference between the parties to the contract is required to be resolved by referring the disputes to Arbitral Tribunal. However, the fact remains that the sub-contractor is not a signatory to the agreement dated 19/11/2014 and therefore, clause 26.3.1 would not be applicable to it.

15. Clause 27.11 of the contract agreement dated 19/11/2014 deals with rights of third parties which lays down that the agreement is solely for the benefit of the parties to the agreement and the same shall not create any duty or liability towards any person which is not a party to the agreement. As such, since the sub-contractor is not a party to the agreement dated 19/11/2014, hence it is obvious that no right under the said agreement can be recognized in favour of the sub-contractor.

16. It would be noteworthy that the sub-contractor has admittedly executed the work in question in discharge of its contractual obligation towards CCCSA under the agreement dated 31/05/2016. Therefore, the right/ claim of the sub-contractor, if any, would arise only under the sub-contract agreement dated 31/05/2016 and too against CCCSA . The agreement dated 19/11/2014, in the opinion of this court, merely envisages a supervisory role of the appellants *vis- a -vis* the bi-lateral contractual relationship between the principal contractor and the sub-contractor within the ambit of the agreement dated 31/05/2016 so as to ensure that the project work is proceeding the right direction and no further. The fact that under the agreement dated 19/11/2014 payments to the sub-contractor is also to be made through the principal contractor further establishes the fact that NHIDCL did not have any contractual obligation towards the sub-contractor.

17. Coming to the question of applicability of section 70 of the Indian Contract Act, 1872, it is to be noted here-in that the present is not a case where the work was executed by the sub-contractor *dehors* any contract agreement. Rather, it is clearly established from the facts of the case that the sub-contractor has executed the work in question in discharge of its contractual obligation towards the principal contractor under the agreement dated 31/05/2016. It is CCCSA which was the employer of the sub-contractor and not the appellants. Therefore, contractual obligation towards the sub-contractor was also that of CCCSA. Having regard to the facts of the case, we are of the opinion that since there was a subsisting contract with CCCSA under which, the sub-contractor had executed the work, it

cannot be said that the appellants have voluntarily accepted the work executed by the sub-contractor. Section 70 of the Contract Act, it must be borne in mind, operates on the basis of a legal fiction, which envisages existence of a *quasi contract* between the parties to the *lis* in such cases, where there is no subsisting contract governing the subject matter of the dispute. Section 70 is not founded on a concluded contract but on the equitable principles of restitution and un-just enrichment.

18. In the present case since the sub-contractor has admittedly executed the work under the agreement dated 31/05/2016, hence, regardless of the fact as to who is the ultimate beneficiary of the executed work, the sub-contractor must be deemed to have acted exclusively in discharge of its contractual obligation towards CCCSA and not the appellants. Therefore, the question of fastening any liability upon the appellants for the work done by the sub-contractor, by taking recourse to section 70 of the Indian Contract Act would not arise in this case. We, therefore, hold that the conditions precedent for invoking section 70 of the Contract Act had not been fulfilled by the sub-contractor so as to maintain the writ petition against the appellants.

19. Moreover, it is also to be noted herein that obligation of the appellants, if any, *qua* the sub-contractor, could at best be *via* the principal contractor and that too, on the strength of the agreement dated 19/11/2014. However, as noted above, the contract agreement dated 19/11/2014, has already been terminated. As such, until such time the contractual dispute with CCCSA is resolved, by taking recourse to the provisions of the Indian Contract Act, the appellants cannot be compelled to act in any manner contrary to the terms of the contract agreement, in purported discharge of their contractual obligation of CCCSA towards the sub-contractor.

20. For the reasons stated above, we are of the opinion that the impugned judgement and order dated 12/06/2023 is un-sustainable in law and hence, liable to be set –aside by this court.

21. Having held as above, we are also conscious of the fact that the sub-contractor M/s. Girin Deka, is a proprietorship firm registered under the Micro, Small and Medium Enterprises Development Act, 2006 (here-in-after referred to as the Act of 2006). The Act of 2006 has been enacted by the Parliament for the purpose of facilitating promotion, development and enhancing the competitiveness of Micro, Small and Medium Enterprises and for matters

connected therewith or incidental thereto. From the object clause of the Act of 2006, it is apparent that the object of the Act of the 2006 is to protect and promote the interest of Micro, Small and Medium Enterprises.

22. Section 2(d) of the Act of 2006 defines 'buyer', which reads as follows :-

“‘Buyer’ means whoever buys any goods or receives any service from a supplier for consideration.”

23. There is no dispute about the fact that the sub-contractor comes within the definition of “supplier” as provided in section 2(n) of the Act.

24. A careful analysis of the admitted facts of this case, in our opinion, *prima facie* establishes a “*Buyer-Supplier*” relationship between the appellant no. 1 (NHIDCL) and the sub-contractor falling within the scope and ambit of the Act of 2006.

25. Section 15 of the Act of 2006 reads as follows :-

“15. Liability of buyer to make payment.-

Where any supplier, supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:

Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.”

26. Section 16 of the Act lays down the procedure for recovery of interest and the dues payable to the Micro, Small and Medium Enterprises, which reads as follows :-

‘16. Date from which and rate at which interest is payable.-

Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.”

27. Section 17 of the Act of 2006 creates an obligation on the buyer to pay the amount

due to the supplier along with the interest thereon. Section 17 reads as follows :-

“17. Recovery of amount due.-

For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16.”

28. Section 18 of the Act of 2006 lays down the procedure to be followed for the purpose of making a reference to Micro, Small and Medium Enterprises Facilitation Council. Section 18 is reproduced herein below for ready reference :-

“18. Reference to micro and small enterprises facilitation council.-

- 1. Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.*
- 2. On receipt of a reference under sub-section (1), the Council shall either itself conduct mediation itself or refer the matter to any medication service provider as provided under the Medication Act, 2023.*
- 3. The conduct of mediation under this section shall be as per the provisions of the Mediation Act, 2023.*
- 4. Where the mediation initiated under sub-section (3) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternative dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996), shall, then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.*
- 5. Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternative dispute resolution services shall have jurisdiction to act as an Arbitrator or Mediator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.”*

29. From a plain reading of the provisions of the Act of 2006, it is thus apparent that the Act of 2006 is a Special Statue, enacted by the Parliament with the objective of protecting the right of the Micro, small and Medium Enterprises. The fact that section 18 of the Act of 2006

begins with a *non-obstante* clause is sufficient to indicate that the entitlement of the Micro, Small and Medium Enterprises to recover its lawful dues by taking recourse to the mechanism provided under the Act, would have an overriding effect over any other law for the time being in force. Therefore, in the event, any MSM Enterprise, coming within the ambit of the Act of 2006, is wrongfully denied payment for the goods delivered or services rendered by it, than in that event, regardless of any other law for the time being in force to the contrary, the enterprise will be entitled to recover its dues by taking recourse to section 18. Section 18 of the Act of 2006, in our view, not only provides an adequate and efficacious remedy to the MSM Enterprise to recover its legitimates dues but the same also provides an opportunity to fast-track the resolution of all such disputes.

30. In the present case, as has been noted herein above, the fact that the sub-contractor is a Micro, Small and Medium Enterprise and had supplied goods and/or rendered services, which was availed by the appellant no. 1 as a buyer, within the meaning of the Act of 2006, is not in dispute nor is there any controversy regarding the fact that the value of the work executed by the sub-contractor (writ petitioner nos. 1 & 2) is Rs. 11,06,85,770/-, which amount has been specifically admitted by the appellants by filing affidavit. In view of the above, we are of the considered opinion that the right of the sub-contractor under the Act 2006 to recover payments for the goods and services rendered by it would be independent of the terms and conditions contained in any contract agreement to the contrary. In other words, the contract agreements dated 19/11/2014 or 31/05/2016, in our view, cannot create any legal obstacle for the sub-contractor to recover its dues from the "buyer" in accordance with the procedure prescribed under the Act of 2006.

31. We, therefore, set aside the judgement and order dated 12/06/2023 passed by the learned Single Judge.

32. This writ appeal is being disposed of by granting liberty to the sub-contractor (respondent Nos 1 & 2 here-in) to invoke section 18 of the Act of 2006 for recovery of its dues. The matter be, accordingly, referred to the Micro, Small and Medium Enterprises Facilitation Council, having jurisdiction over the dispute, for resolution of the same in accordance with the scheme of the Act of 2006.

33. Steps, as may be necessary under the law, be initiated within a period of 30(thirty) days from the date of receipt of a certified copy of this order.

- 34.** Writ appeal stands disposed of accordingly.
There shall be no order as to costs.

JUDGE

CHIEF JUSTICE

Sukhamay

Comparing Assistant