

GAHC010233692023



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

Case No. : Review.Pet./120/2023

GUNAJIT NATH
S/O- LATE JOGENDRA NATH, R/O- GALIAHATI, COLLEGE ROAD, BARPETA,
ASSAM, PIN- 781301.

VERSUS

THE STATE OF ASSAM AND 3 ORS.
REPRESENTED BY THE COMMISSIONER AND SPECIAL SECRETARY TO
THE GOVERNMENT OF ASSAM, PUBLIC WORKS (ROADS) DEPARTMENT,
DISPUR, GUWAHATI-06.

2:THE SECRETARY TO THE GOVERNMENT OF ASSAM
PWRD
DISPUR
GUWAHATI-06.

3:THE CHIEF ENGINEER
PWD (BORDER ROADS)
ASSAM
CHANDMARI
GUWAHATI-03.

4:THE EXECUTIVE ENGINEER

PWRD
BARPETA- BAGHBAR-CHENGHA TERRITORIAL ROADS DIVISION
BARPETA
P.O. BARPETA
DIST .BARPETA
ASSAM
PIN- 781301

Advocate for the Petitioner : MR. K N CHOUDHURY

Advocate for the Respondent : SC, PWD ROAD

**BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY**

JUDGMENT & ORDER

10.05.2024

The instant review petition under Chapter X of the Gauhati High Court Rules read with Article 226 and Article 215 of the Constitution of India is preferred seeking review of an Order dated 20.09.2023 passed in a writ petition, W.P.[C] no. 5183/2023.

2. I have heard Mr. K.N. Choudhury, learned senior counsel assisted by Mr. R.M. Deka, learned counsel for the review petitioner; and Mr. P. Nayak, learned Standing Counsel, Public Works Department [PWD] for all the respondents.

3. Mr. Choudhury, learned senior counsel appearing for the review petitioner has submitted that the subject-matter of the connected writ petition was a Termination Notice dated 21.08.2023, whereby, a contract-work, 'Up gradation of road from MRL-03-Mandia Palhaji Road to Salimpur via Bamundongra Road including Cross Drainage Works and Routine Maintenance of the works for 5 [five] years under PMGSY-III, Package no. AS-01-522 for the year : 2022-2023, Batch-III' [the Contract-Work', for short], awarded in favour of the writ petitioner earlier by the respondent Public Works Department [PWD], had been terminated. It has been contended that after issuance of a Letter of Acceptance [LoA] dated 01.04.2023 and a Notice to Proceed with the Work dated 04.05.2023, the writ petitioner as the Contractor proceeded to execute the Contract-Work in right earnest. In the process, the Contractor faced a number of hurdles despite mobilization of manpower, machinery, etc. as the worksite of the Contract-Work was severely damaged due to monsoon season and flood. As the site of the Contract-Work was a low-lying area, the actual execution of the Contract-Work was possible to be started only after the monsoon season and recession of flood

waters. The writ petitioner as the Contractor had therefore, asked the authorities in the PWD for a revised work programme. But instead of redressing the grievances of the Contractor and providing a revised work programme, the respondent authorities in the PWD sought to put the blame on the Contractor for the delay in execution of the Contract-Work without any basis. Finally, the Chief Engineer, PWD [Border Roads], Assam had issued the Termination Notice on 21.08.2023 purportedly in exercise of the powers under Clause no. 52.2[a][i][j]&[n] of the General Conditions of Contract [GCC] to terminate the Contract-Work alleging fundamental breach of contract. On receipt of the Termination Notice, the Contractor had submitted a Representation on 23.08.2023 before the Chief Engineer, PWD [Border Roads], Assam stating that the concerned Contract-Agreement had provided for 12-months time for completion of the Contract-Work and the time-limit was up-to May, 2024. The Contractor in his said Representation had undertaken that he was committed to honour the time-line and had sought for re-consideration of the Termination Notice. The writ petitioner had to prefer the writ petition, W.P.[C] no. 5183/2023 when the respondent authorities in the PWD without giving any consideration to the Representation dated 23.08.2023, proceeded to issue a Short Notice Inviting Tender [SNIT] on 29.08.2023 for the same Contract-Work.

3.1. Mr. Choudhury has further submitted that the submission made by the learned counsel for the writ petitioner in the writ petition, W.P.[C] no. 5183/2023 on 20.09.2023 was without any consent from the writ petitioner. It is submitted by him that Clause 24 of the Standard Bidding Document for PMGSY had provided for a Dispute Redressal System in case of any dispute or difference of any kind whatsoever in connection with or arising out of the Contract-Agreement or the execution of the Contract-Work or maintenance of the Contract-Work thereunder, whether before its commencement or during the progress of the Contract-Work or after the termination, abandonment or breach of the contract. The writ petitioner as the Contractor vide his Representation dated 23.08.2023 had already raised a dispute under the Dispute Redressal System. Thus, it was incumbent upon the respondent authorities in the PWD, as per the Dispute Redressal System to convey its decision to the Contractor within the time-period stipulated therein. But the respondent authorities in the PWD without conveying any decision to the Contractor, proceeded to issue the SNIT on 29.08.2023. Such actions on the part of the respondent authorities in the PWD were clearly illegal and arbitrary. In view of

the Order dated 20.09.2023 passed in the writ petition, W.P.[C] no. 5183/2023, the review petitioner who was the writ petitioner therein, has become remediless.

3.2. With the aforesaid projections as regards the factual scenario, Mr. Choudhury has submitted that in such obtaining fact situation, the Court can exercise its power of review to undo the wrong caused to the writ petitioner-review petitioner due to passing of the Order dated 20.09.2023 as the Order came to be passed on the basis of submission without any consent from the review petitioner. In support of his submissions, he has referred to an Order dated 10.11.2017 passed by a Division Bench of this Court in *Review Petition no. 14/2017 [the State of Assam and another vs. All Assam Secondary Additional [Contractual] Teachers Association and others]*. On the power of review, he has referred to the decisions of the Hon'ble Supreme Court of India in *Shivdev Singh and others vs. State of Punjab and others*, reported in *AIR 1963 SC 1909*; and *Aribam Tuleswar Sharma vs. Aribam Tishak Sharma and others*, reported in *[1979] 4 SCC 389*.

4. Mr. Nayak, learned Standing Counsel, PWD appearing for the respondents has submitted that the Order dated 20.09.2023 is not an order which can be reviewed in the facts and circumstances, projected by the review petitioner. It is evident from the Order dated 20.09.2023 that the learned counsel for the writ petitioner had made the submission that the writ petitioner would not be pressing the writ petition, in order to avail appropriate remedy available to the writ petitioner under the law. In view of the legal notice issued to the respondent authorities under Section 80, Code of Civil Procedure immediately thereafter on 23.09.2023, it is evidently clear that the withdrawal of the writ petition was made with full knowledge of the writ petitioner and the submission made by the learned counsel for the petitioner before the Court on 20.09.2023 was not without the knowledge of the writ petitioner. He has submitted that the decision in *Review Petition no. 14/2017* is not applicable in the case in hand as the facts and circumstances due to which the power of review was exercised therein were completely different. Since no error is attributed to the Court, the power of review is not to be exercised in the case in hand as appropriate remedy is

available under the law to the review petitioner to seek redressal of his grievances. The other two decisions relied on by the review petitioner also do not assist his case, Mr. Nayak has submitted.

5. I have given due consideration the submissions of the learned counsel for the parties and have also gone through the materials on record.

6. The facts and circumstances leading to issuance of termination notice dated 21.08.2023 by the Chief Engineer, PWD [Border Roads], Assam have already been articulated to by the learned senior counsel for the petitioner. Therefore, the factual backdrop leading to the issuance of the Termination Notice dated 21.08.2023 and the SNIT dated 29.08.2023 are not required to be iterated.

7. The writ petition, W.P.[C] no. 5183/2023 was listed for the first occasion on 08.09.2023. On that day, the learned counsel for the writ petitioner sought listing of the case on 13.09.2023 next. When the writ petition was listed on 13.09.2023, a prayer for adjournment was made by the learned counsel for the writ petitioner and accordingly, the writ petition was ordered to be listed on 20.09.2023, as sought for. The learned Standing Counsel, PWD was present on both the occasions. When the writ petition was again listed on 20.09.2023, the learned counsel for the writ petitioner and the learned Standing Counsel for the respondent PWD authorities were heard.

8. On 20.09.2023, the Court passed the following order :-

Pursuant to a bidding process initiated by an e-Procurement Notice dated 14.11.2022, the petitioner was awarded a contract-work viz. 'Upgradation of Roads from MRL03-Mandia Palhaji Road to Salimpur via Bamundongra Road including cross drainage works and routine maintenance of the works for five years under Package No. AS-01-522, MPGSY - III, Batch 1, 2022-2023' at a contract value of Rs. 9,79,36,949/- and a Letter of Acceptance [LoA] dated 01.04.2023 was issued to the petitioner. It is stated that subsequently, a contract agreement was also executed between the petitioner and the respondent PWD. Pursuant to exchange of communications between the parties, the contract agreement has been terminated by a letter dated 21.08.2023.

Mr. XXX, Learned counsel for the petitioner has submitted that the petitioner will not be pressing this writ petition, in order to avail appropriate remedy available to the petitioner under the law.

Mr. XXX, Learned Standing Counsel, PWD has not objected to the submission of Mr. De.

In view of the above submission made by Mr. XXX, Learned counsel for the petitioner, the writ petition is dismissed, on withdrawal, reserving the liberty to the petitioner to avail appropriate remedy permissible under the law.

9. It is evident from the Order dated 20.09.2023 that on that day, the learned counsel for the writ petitioner had submitted that the writ petitioner would not be pressing the writ petition, in order to avail appropriate remedy available to the writ petitioner under the law. In view of such submission made by the learned counsel for the writ petitioner, the writ petition was dismissed, on withdrawal, reserving the liberty to the writ petitioner to avail appropriate remedy permissible under the law.

10. At the cost of repetition, it may be stated that the writ petitioner in the writ petition, W.P.[C] no. 5183/2023 is the review petitioner herein.

11. Immediately after the passing of the Order dated 20.09.2023, the writ petitioner-review petitioner through his lawyer got issued a notice of suit under Section 80, Code of Civil Procedure on 23.09.2023 to the concerned respondent authorities in the PWD, Assam. In the said notice, it was conveyed that the writ petitioner-review petitioner would be constrained to institute a suit against them in a court of competent jurisdiction, after expiry of two months after service of the notice unless reliefs claimed therein were not granted to him within the said period of two months. Alleging the actions of the respondent authorities in the PWD as unreasonable, illegal and arbitrary which affected the writ petitioner-review petitioner prejudicially and claiming that substantial investment was already made by him for execution of the Contract-Work, the writ petitioner-review petitioner in the said notice had claimed that he would be entitled to amounts of [a] Rs. 75,00,000/- towards damages on account of loss of finance; [b] Rs. 2,00,00,000/- towards damages on account of loss of reputation; and [c] Rs. 1,00,00,000/- towards damages on account of mental agony, torture and physical harassment. The notice further stated that the respondent authorities in the PWD should

either allot the Contract-Work to the writ petitioner-review petitioner or pay the damages, quantified therein, failing which he would take recourse to appropriate legal remedies.

12. It is stated at the Bar that no suit has, however, been filed pursuant to the notice dated 23.09.2023 issued under Section 80, CPC till date. Instead, the instant review petition has been filed.

13. There is no dispute to the principles laid down in *Shivdev Singh* [supra] and *Aribam Tuleshwar Sharma* [supra]. The Constitution Bench in *Shivdev Singh* [supra] has held that there is nothing in Article 226 of the Constitution of India to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. The decision in *Aribam Tuleshwar Sharma* [supra] has explained the definitive limits to the exercise of the power of review. It has been observed that the power of review may be exercised on the discovery of new and important matter of evidence which, after the exercise of the due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; and it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits as that would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manners of errors committed by the subordinate court.

14. In view of such position in law, the present exercise invoking the review jurisdiction is to be kept limited to order the review of which is sought for. An elaborate discussion on the background facts is not necessary.

15. By the review petition, the review petitioner-writ petitioner has sought for review of the Order dated 20.09.2023 and has also sought for a direction to the respondents to allow the review petitioner-writ petitioner to continue with the Contract-Work. In other words, the review petitioner-writ petitioner has sought reviewing of the Order dated 20.09.2023, which

would restore the writ petition, W.P.[C] no. 5183/2023 and with such restoration of the writ petition, the writ petition is to be heard on merits. But the second prayer, that is, direction to the respondents to allow the review petitioner-writ petitioner to continue with the Contract-Work cannot be in the review petition when the Contract-Work had already been terminated vide the Termination Notice dated 21.08.2023.

16. A writ petition after its institution, can be withdrawn by the writ petitioner. There is, however, a distinction between withdrawal of a writ petition with liberty and withdrawal of a writ petition without liberty. In *Sarguja Transport Service vs. State Transport Appellate Tribunal, M.P., Gwalior and others*, reported in [1987] 1 SCC 5, the point for consideration was whether a petitioner after withdrawing a writ petition filed by him in the High Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that Article. It has been held that there is no justifiable reason in such a case to permit a writ petitioner to invoke the extra-ordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in a High Court under Article 226 of the Constitution of India without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res-judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the writ petitioner in respect of the cause of action relied in the writ petition when he withdraws it without such permission. It has been made clear therein that such a view may not be considered as being applicable to a writ petition involving the personal liberty of an individual which the writ petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the right guaranteed under Article 21 of the Constitution of India since such a case stands on a different footing altogether. Following *Sarguja Transport Service* [supra], it has been observed in *Upadhyay & Co. vs. State of U.P. and others*, reported in [1999] 1 SCC 81, that when once a writ petition filed in a High Court is withdrawn by a party concerned, he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court and he cannot file a writ petition for the cause once again. In the case in hand, the writ petition, W.P.

[C] no. 5183/2023 was not withdrawn with any liberty to file a writ petition again. Liberty was sought for to avail appropriate remedy available to the writ petitioner under the law.

17. From a perusal of the Order dated 20.09.2023, it is evidently clear that the learned counsel for the review petitioner-writ petitioner had made a submission that the writ petitioner would not be pressing the writ petition, in order to avail appropriate remedy available to the petitioner under the law. Accordingly, the writ petition was dismissed, on withdrawal, reserving the liberty to the writ petitioner to avail appropriate remedy permissible under the law. There is, therefore, no doubt, that the writ petition, W.P.[C] no. 5183/2023 was withdrawn without the permission to institute a fresh writ petition in this Court once again. The present review petition presents a situation of restoration of a writ petition, dismissed earlier on withdrawal, instead of filing of a fresh writ petition. Though the ratio laid down in *Sarguja Transport* [supra] is not applicable on all fours, it appears to have certainly presented a situation to examine the applicability of the maxim, 'what cannot be done directly cannot be done indirectly' to the case in hand. A petition for review is not an appeal but a request to the same Court to recall or reconsider its decision on the limited grounds prescribed for a review.

18. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in a judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call the attention of the very judge[s] who had made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such steps is taken, the matter must necessarily end there [Ref : *State of Maharashtra vs. Ramdas Shrinivas Nayak and another*, [1982] 2 SCC 463]. It is not the case of the review petitioner-writ petitioner that the submission made by the learned counsel of the writ petitioner in the writ petition, W.P.[C] no. 5183/2023 on 20.09.2023 was wrongly recorded by the Court in the Order dated 20.09.2023. It is also pertinent to note that the present review petition is filed without following the observations

made by the Hon'ble Supreme Court in the decisions in *M. Poornachandran and another vs. State of Tamil Nadu and others*, reported in [1996] 6 SCC 755 and *Tamil Nadu Electricity Board and another vs. N. Raju Reddiar and another*, reported in [1997] 9 SCC 736. It has been sought to urge that the learned counsel for the writ petitioner had made such submission for withdrawal of the writ petition to avail appropriate remedy under the law, without any prior permission of the writ petitioner. No material has been brought on record to indicate that aggrieved by the submission of his engaged counsel on 20.09.2023, the review petitioners-writ petitioners has brought such action to his notice. It, thus, appears that the present review petition is an action which has not been brought with prior notice of the said learned engaged counsel or with his participation.

19. In *ALL Assam Secondary Additional [Contractual] Teachers Association* [supra], the State of Assam sought review of an order dated 04.04.2016 passed in a writ appeal, Writ Appeal no. 360/2014 whereby a Division Bench dismissed the appeal having been rendered infructuous. The Government of Assam in the Education Department framed a scheme in the year 2010 to engage additional teachers on contractual basis in Secondary Schools in Assam. The process of selection and engagement of contractual teachers culminated with engagement of 7764 nos. of contractual teachers. The recruitment of teachers and their conditions of service were governed by a set of rules, Assam Secondary Education [Provincialised] Services Rules, 2003 [‘the Rules, 2003’] framed under the proviso to Article 309 of the Constitution of India. By an amendment, requirement of passing in Teachers Eligibility Test [TET] as an eligibility condition for appointment as a teacher in such Secondary Schools, in conformity with the NCTE Regulations, had been brought in the Rules, 2003 in 2012. In 2014, an advertisement was published to conduct a Special TET for the contractual teachers engaged under the scheme. When the said advertisement was challenged in a writ petition, the writ petition was allowed by the learned Single Judge holding that such contractual teachers were not required to appear in the Special TET. Aggrieved by the Judgment and Order of the learned Single Bench, the State preferred the writ appeal, Writ Appeal no. 360/2014. During the pendency of the appeal, the State Cabinet took a decision to regularize the services of all the contractual teachers without insisting on

TET qualification and an Office Memorandum dated 03.03.2016 to that effect was issued. When the writ appeal, Writ Appeal no. 360/2014 came up for consideration before the Division Bench on 04.04.2016, a submission was made by the learned departmental counsel that in view of the Officer Memorandum dated 03.03.2016, the writ appeal had become infructuous. Taking note of the aforesaid submission of the departmental counsel, the writ appeal was closed as infructuous by the order dated 04.04.2016. It was urged that in the subsequent period, it was found that the Cabinet decision and the consequential Office Memorandum dated 03.03.2016 were not in conformity with the amended Rules, 2003 and the law laid down by Hon'ble Supreme Court of India in the Constitution Bench judgment in *State of Karnataka vs. Uma Devi* [3], [2006] 4 SCC 1 and the Full Bench decision of this Court in *Jitendra Kalita and others vs. State of Assam and others*, 2006 [2] GLT 654. It was in the above backdrop, the Division Bench allowed review of the order dated 04.04.2016 observing that even a misconception of fact or law by a court or even an advocate would come within the expression, 'sufficient reason' appearing in Order XLVII Rule 1 of the Code of Civil Procedure. The Court observed that the case of the writ petitioner was that the concession which led to the closure of the writ appeal was based on a mistaken understanding of fact and law and the same was detected subsequently. It was opined that a bona fide concession made by a litigant or its counsel that subsequently turned out to be legally untenable, could be a valid ground for reviewing an order if it could be shown that such concession was founded on a mistake of fact or law and was the sole basis of the court terminating the */is*. It needs to be iterated that the Cabinet decision and the consequential Officer Memorandum dated 03.03.2016 were found to be incongruous to the amended Rules, 2003, the Constitution Bench judgment in *Uma Devi* [3] [supra] and a Full Bench judgment in *Jitendra Kalita* [supra] and non-recalling of the order dated 04.04.2016 would have led to miscarriage of justice.

20. No such situation, as mentioned in the decision in *ALL Assam Secondary Additional [Contractual] Teachers Association* [supra], is found to be present in the case in hand. From the events mentioned in the preceding paragraph no. 11, it does not transpire, in any manner, that the submission made by the learned counsel for the writ

petitioner in the course of proceedings on 20.09.2023 was without the approval of the writ petitioner as close on the heels of passing of the Order dated 20.09.2023, the review petitioner-writ petitioner issued the Notice under Section 80, CPC on 23.09.2023. In the said legal Notice issued under Section 80, CPC, the review petitioner-writ petitioner had indicated the reliefs he was likely to seek by instituting appropriate proceedings. Such appropriate proceedings indicated therein can only be a proceedings other than the writ proceedings.

21. This Court has the power of review, but it must be exercised within the framework of Section 114 read with Order XLVII of the Code of Civil Procedure. Thus, a review petition is maintainable on [i] discovery of new and important matters or evidence which, after exercise of due diligence, were not within the knowledge of the review petitioner or could not be produced by him when the order was passed; [ii] on account of some mistake or error apparent on the face of the record; or [iii] for any other sufficient reason. The review petitioner-writ petitioner in this review petition has not urged anything with regard to ground [i]. A judgment or order can be reviewed if there is a mistake or an error apparent on the face of the record. The mistake or error must be apparent on the face of the record and not one which is required to be searched out. The present case is not a case where there is any manifest mistake or error in the Order dated 20.09.2023 and as such, the second ground, indicated above, is not found applicable in the case in hand. It has been observed in *Lily Thomas vs. Union of India*, reported in [2000] 6 SCC 224, that the words, 'any other sufficient reason' appearing in Order XLVII Rule 1 of Code of Civil Procedure means 'a reason sufficient on grounds at least analogous to those specified in the rule'. Error apparent on the face of the proceedings is an error which is based on clear ignorance or disregard of the provisions of law. Finding that the order dated 04.04.2016 had fallen within the scope and ambit of the above parameters, the order in *ALL Assam Secondary Additional [Contractual] Teachers Association* [supra] was passed. But, the present case, in the considered view of the Court, does not come within the ground, 'any other sufficient reason' as no correlation is found with to the other analogous grounds specified in the Rule.

22. It has been fairly submitted by Mr. Choudhury, learned senior counsel appearing for the review petitioner that after the Termination Notice dated 23.08.2023, the process initiated

by the SNIT dated 29.08.2023 and/or subsequent SNIT for the balance part of the Contract-Work has already been culminated in issuance of a Notice to Proceed dated 28.12.2023, a copy of which is placed before the Court for perusal. Meaning thereby, another contractor has already been awarded to execute the balance part of the Contract-Work on 28.12.2023. The said fact is clearly suggestive of creation of rights of a third-party, in the meantime, in so far as the Contract-Work is concerned.

23. In view of the above obtaining fact situation and for the reasons discussed hereinabove, the present review petition is found to be not merited. Thus, the review petition is liable to be dismissed. Hence, it is accordingly dismissed.

JUDGE

Comparing Assistant