

**HIGH COURT OF TRIPURA
AGARTALA**

WP(C) No.360 of 2023

Sri Ratan Sarkar, son of Late Rajendra Sarkar, resident of Ramnagar Road No.4, P.O. Ramnagar, P.S. West Agartala, Sub-Division: Sadar, District: West Tripura, PIN-799002, aged about 51 years.

.....Petitioner(s);

Versus

1. The State of Tripura, represented by the Commissioner & Secretary, Public Works Department (Roads & Buildings), Government of Tripura, having his office at New Secretariat Complex, Gorkhabasti, Agartala, P.O. Kunjaban, P.S. New Capital Complex, Sub-Division: Agartala, District: West Tripura

2. The Commissioner & Secretary to the Public Works Department (Roads & Buildings), Government of Tripura, having his office at New Secretariat Complex, Gorkhabasti, Agartala, P.O. Kunjaban, P.S. New Capital Complex, Sub-Division: Agartala, District: West Tripura.

3. The Executive Engineer, Kumarghat Division PWD (R&B), Government of Tripura, District: Unakoti Tripura.

4. Hindustan Steelworks Construction Limited, a Company, registered under the Companies Act, 1956, having its registered office at P-34-A, Gariahat Road (South), Kolkata-700031, Represented by its Head (Project), Hindustan Steelworks Construction Limited (Tripura Unit), having his office at Banik Kutir, Sankar Chowmuhani, Krishnanagar, Agartala, District: West Tripura.

5. The Head (Project), Hindustan Steelworks Construction Limited (Tripura Unit), having his office at Banik Kutir, Sankar Chowmuhani, Krishnanagar, Agartala, District: West Tripura.

6. The Zonal Head, Hindustan Steelworks Construction Limited (Tripura Unit), having his office at Banik Kutir, Sankar Chowmuhani, Krishnanagar, Agartala, District: West Tripura.

.....Respondent(s)

For Petitioner(s) : Mr. Somik Deb, Sr. Advocate,
Ms. Simpee Saha, Advocate.

For Respondent(s) : Mr. Kohinoor Narayan Bhattacharyya, G.A.,
Mr. Kishor Kumar Pal, Advocate.

**HON'BLE THE CHIEF JUSTICE MR. M.S. RAMACHANDRA RAO
HON'BLE MR. JUSTICE S. DATTA PURKAYASTHA**

Date of hearing : **10.09.2025**

Date of Judgment & Order : **30.10.2025**

Whether Fit for Reporting : **YES**

JUDGMENT & ORDER

(M.S. Ramachandra Rao, C.J.)

1. Petitioner had entered into an agreement dt.17.12.2008 with the fourth respondent—Hindustan Steelworks Construction Limited (HSCL) for execution of certain works namely: (i) Construction and maintenance of road from Pecharthal to Laljuri, TR-03-107, L-023 (ii) Construction and maintenance of road from Andhercherra to Panisagar Kaipaya Para, TR-03-109, L-036 (iii) Construction and maintenance of road from Machmara-Kariacherra to Laljuri, TR-03-110, L-025.

2. There is no dispute that the Public Works Department of the Government of Tripura (respondent No.1) had entrusted these works to the third respondent, and the third respondent had chosen the petitioner for execution of the said works.

3. The Project Manager of the third respondent issued a letter of acceptance on 29.09.2008 in favour of the petitioner, and thereafter a notice dt.17.12.2008 was issued to the petitioner directing him to proceed with the execution of the works.

4. Petitioner contends that it had successfully completed the first work on 31.03.2012, and the 5th year maintenance work was completed on 18.11.2020. Petitioner sought refund of the security deposit amount which was refunded to the petitioner, but petitioner's request for release of performance guarantee amount of Rs.20,54,804/- was not acceded to.

5. The second work was completed by the petitioner on 30.04.2013, and the 5th year maintenance work was completed on 15.11.2018. According to the petitioner, only 50% of the total security deposit was released, and

balance of Rs.27,19,504/- was not released. The performance guarantee amount of Rs.27,19,462/- was also not released.

6. The third work was successfully completed by the petitioner on 31.03.2012, and all dues pertaining to the said work has been paid to the petitioner. So there is no issue regarding this work between the petitioner and the respondents.

7. Petitioner, therefore, has filed the instant Writ Petition for a direction to the respondents to release the balance amount of Rs.74,93,770/- along with interest @12% per annum from the respective dates the amounts fell due in favour of the petitioner.

The contentions of petitioner

8. The contention of the petitioner is that it had successfully completed all the three works on the dates referred to above; that after conclusion thereof it had commenced the 5th year maintenance work and after such completion, the handing over and taking over along with verification report of each of the works were also issued. Petitioner contends that at that time, since no loopholes were found on the part of the petitioner whether in regard to the completion of the execution of the work, or in terms of the quality of the work, claims of the petitioner cannot be negated and, therefore, it is entitled to release of all the balance amount forthwith.

9. Reliance is placed on Section 70 of the Indian Contract Act, 1872 by the petitioner, and it is contended that since the petitioner had delivered the services to the respondents, and the respondents had accepted the services so rendered by the petitioner, and since the petitioner had not intended to render such services gratuitously, they have to repay the amount due.

10. Since the transaction is a commercial transaction, interest @12% per annum is sought.

11. A perusal of the agreement between the parties filed as Annexure-2 read with NIT-30 indicates that in the General Conditions of Contract (GCC), there is no arbitration clause, and in fact Clause 25.1 specifies that there will be no arbitration for the settlement of any dispute between the parties.

The stand of respondent Nos. 4 to 6

12. Respondents No.4 to 6 have filed a Counter Affidavit raising a plea that there is a remedy to the petitioner under Clause 24 of the GCC of the Standard Bidding Document (SBD) for dispute redressal under the agreement for NIT-30, and so the Writ Petition is not maintainable.

13. It is further contended that apart from the three contracts covered under the subject agreement, certain other contracts relating to other roads were also awarded to the petitioner by the respondents, and the petitioner did not fulfil its contractual obligations as regards the roads under NIT-85, NIT-89 and NIT-95. It is stated that a sum of Rs.2,05,19,056/- was retained from the RA Bills of the petitioner against NIT-30, out of which security deposit amounting to Rs.1,30,25,286/- was already released by the respondent No.4, but the remaining security deposit under NIT-30 of Rs.74,93,770/- is retained by the third respondent because of non-fulfilment of contractual obligations in respect of works entrusted under other NITs referred to above as per Clause 53 of the SBD.

14. It is contended that the petitioner had concealed material facts of non-performance under the contractual terms relating to NIT-85, NIT-89 and NIT-95.

15. According to the respondents as per Clause 53, for non-performance in other projects/roads, damages caused may be recovered from the petitioner as a debt payable to the employer.

16. It is contended that petitioner abandoned two roads vide NIT-85 midway, and the contract of the petitioner was terminated in 2019 at the risk and cost of the petitioner. Therefore it is to be construed that petitioner is a habitual defaulter of obligations as per contract.

17. It is contended that petitioner has not stated whether it had followed the procedure in clause of Dispute Redressal System i.e. 24.1 to 24.5 of the GCC before approaching this Court, and so the Writ Petition is not maintainable, and is liable to be dismissed.

Rejoinder of petitioner

18. Rejoinder is filed by the petitioner contending that Clause 53 of the SBD is not applicable in the instant case.

19. It is contended that the said Clause is invocable only in case of termination of the contract in question on account of a fundamental breach of contract committed by the contractor; consequent upon such termination, the engineer of the employer shall issue a certificate, for the value of the works done and materials ordered, less liquidated damages if any, less advance payment, received up to the date of the issue of the certificate, and less the percentage to apply to the value of the work not completed, as indicated in the contract data; if the total amount due to the employer exceeds any payment

due to the contractor, the difference shall be recovered from the security deposit and performance security; and if any amount still remains outstanding, it will be recovered from any dues payable to the contractor from other works of the contractor.

20. It is contended that the marginal note of Clause 53 is explicit that the clause can only be invoked if the contract in question is terminated *inter alia* on the ground of non-performance of the contractual obligation by the contractor, and it cannot be pressed into service with reference to non-performance, even if any by the contractor, under any other contract.

21. It is contended that with a view to wriggle out of admitted liability under the contract in question, the respondents are trying to invoke the principles underlying 'set-off', and for invoking the said rule of set-off, there must be a suit for recovery of money, and the amount sought to be set-off must be an ascertained sum; and it must be shown that the demand and the cross demand have arisen out of the same transaction, and not different transactions.

22. It is contended that the principle of set-off is not invokable when a protracted inquiry is needed for the determination of the sum due. It is contended that the claims made by the respondents against the petitioner are on the basis of their own arbitrary assessment without any preceding adjudication, and on the basis of such unilateral assessment by the respondents of their entitlements, they cannot invoke the principle of set-off.

23. It is pointed out that the agreement in question had never been terminated by the respondents, and so Clause 53 of the SBD has no

application since admittedly the petitioner had successfully concluded the works.

24. It is contended that Clause 4 of the agreement signed between the petitioner and the employer enumerated certain letters/documents which form part of the agreement. Clause 4(v) of the agreement incorporated Special Conditions of Contract and General Conditions of Contract. Section 4 Part I prescribed the GCC, the definition provision as contained in Clause 1 defines the term 'contract' as "*the contract is the contract between the employer and the contractor to execute, complete and maintain the works.*" It consists of the documents listed in Clause 2.3.

25. It is therefore contended that for the purpose of determination of the case, the contract would mean and only mean the contract in question entered into by and between the petitioner and the employer, and excludes other contracts even though signed by and between the petitioner and the employer.

26. The claim of the respondents that the petitioner had committed certain acts with regard to the other contracts is denied. It is also contended that the reading of the Counter Affidavit of the respondents shows that they have not actually denied their liability incurred under the agreement in question namely NIT-30, and therefore they cannot contend that the petitioner should invoke the Dispute Redressal System contained in Clause 24 of the agreement.

27. Counsel for the parties reiterated their contentions.

Consideration by the Court

28. Clause 32 of the bid document deals with performance security:

“32. Performance Security

32.1 *The successful Bidder/Contractor shall provide to the Employer a total Performance security of five percent of the Contract price, for a period of 5 years and the time of completion of construction work plus additional security for unbalanced bids in accordance with clause 27.3 and 27.4 of ITB and clause 46 Part-I general Conditions of Contract.*

Within 10 days after receipt of Letter of Acceptance but before signing the contract, a Performance Security of two and a half percent of Contract Price plus additional security for unbalanced bids in accordance with clause 27.3 and 27.4 of ITB and clause 46 Part-I General Conditions of Contract shall be delivered by the successful bidder to the Employer.

The Employer shall retain remaining two and half percent Performance Security from each payment due to the contractor until completion of the whole of the construction works (except advance payment as per clause 46 of General Conditions of Contract).

32.2 *Performance Security of two and a half percent to be delivered by the successful bidder after the receipt of letter of acceptance shall be either in form of a Bank Guarantee or Fixed Deposit receipts in the name of Employer, from a scheduled commercial bank.*

If the Performance security is in the form of a Bank Guarantee, the period of validity of Bank Guarantee of two and a half percent of contract price could be one year initially, however the Bidder/Contractor shall get this Bank Guarantee extended in such a way that an amount equal to the requisite performance security is always available with Employer until 45 days after the lapse of Defect Liability Period. If the Bidder/Contractor fails to maintain above Performance Security, the Employer would recover the same from any dues payable to the Contractor.

32.3 *Failure of the successful Bidder to comply with the requirement of delivery of Performance Security of two and a half percent of contract price plus additional security of unbalanced bids as per provisions of clause 32.1 shall constitute sufficient ground for cancellation of award and forfeiture of the earnest money.*

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. ”

29. Clause 43 of the SBD deals with security deposit:

“43. Security Deposit

43.1 *The Employer shall retain security deposit 5% and performance security of two and a half percent of the amount from each payment due to the Contractor until completion of the whole of the construction work. No Security deposit/retention shall be retained from the payments for Routine Maintenance of works. In case, the Contractor furnishes bank guarantee for the amount equal to performance security of two and a half percent retained from each payment due to Contractor, the same amount shall be repaid to the Contractor subject to condition that the validity of bank guarantee is as per provision of Clause 46.2 of GCC.*

43.2 *On the satisfactory completion of the whole of the construction work half the total amount retained as security deposit is repaid to the contractor, one-fourth of the total amount retained as security deposit is repaid to the contractor at the end of 2nd year after completion of the construction work and balance of the amount retained as security deposit is repaid to the contractor at the end of 3rd year after completion of the construction work subject to condition that the engineer has certified that all defects notified by the engineer to the contractor before the end of period prescribed for repayment have been corrected.*

43.3 *The additional performance security for unbalanced bids as detailed in Clause 51 of Conditions of Contract is repaid to the contractor when the construction work is complete.*

43.4 *The performance security equal to the five percent of the contract price and additional performance security for Routine Maintenance as detailed in Clause 51 of Conditions of Contract is repaid to the contractor when the period of five years fixed for Routine Maintenance is over and the Engineer has certified that the contractor has satisfactorily carried out the Routine Maintenance of the works.*

If the Routine Maintenance part of the contract is not carried out by the Contractor as per this contract, the Employer will be free to carry out Routine maintenance work and the amount required for this work will be recovered from the amount of Performance Security available with the employers and/or from any amounts of the Contractor whatever is due.

43.5 If the Contractor so desires then the Security deposit can be converted into any interest bearing security of scheduled commercial bank in the name of the Employer or National Saving Certificates duly pledged in favour of the Employer for Defect Liability Period.”

30. Clause 53 relied upon by the respondents is as under:

“53. Payment upon Termination

53.1 If the Contract is terminated because of a fundamental breach of Contract by the Contractor, the Engineer shall issue a certificate for value of the work done and materials ordered less liquidated damages, if any, less advance payments received upto the date of the issue of the certificate and less the percentage to apply to the value of the work not completed, as indicated in the Contract Data. If the total amount due to the Employer exceeds any payment due to the Contractor, the difference shall be recovered from the security deposit and performance security. If any amount is still left un-recovered it will be recovered from any dues payable to the contractor from State PMGSY works, any other State Government works including State Public Sector works executed by the contractor.

53.2. If the Contract is terminated at the Employer’s convenience, the Engineer shall issue a certificate for the value of the work done, the reasonable cost of removal of Equipment, repatriation of the Contractor’s personnel employed solely on the Works, and the Contractor’s costs of protecting and securing the Works and less advance payments received up to the date of the certificate, less other recoveries due in terms of the Contract, and less taxes due to be deducted at source as per applicable law.”

31. First we shall deal with the issue about the maintainability of the Writ Petition for recovery of amounts claimed by the petitioner against the respondents when the Dispute Redressal System mentioned in Clause 24 of the SBD is not utilized by the petitioner. The said Clause is as under:

“24. Dispute Redressal System

24.1 If any dispute or difference of any kind what-so-ever shall arise in connection with or arising out of this Contract or the execution of Works or maintenance of the Works there under, whether before its

commencement or during the progress of Works or after the termination, abandonment or breach of the Contract, it shall, in the first instance, be referred for settlement to the competent authority within 45 days of arising of the dispute or difference, described along with their powers in the Contract Data, above the rank of the Engineer. The competent authority shall, within a period of forty-five days after being requested in writing by the Contractor to do so, convey his decision to the Contractor. Such decision in respect of every matter so referred shall, subject to review as hereinafter provided, be final and binding upon the Contractor. In case the Works is already in progress, the Contractor shall proceed with the execution of the Works, including maintenance thereof, pending receipt of the decision of the competent authority as aforesaid, with all due diligence.

24.2 *Either party will have the right of appeal, against the decision of the competent authority, to the Standing Empowered Committee within 90 days of decision of the competent authority if the amount appealed against exceeds rupees one lakh.*

24.3 *The composition of the Empowered Standing Committee will be:*

I. One official member, Chairman of the Standing Empowered Committee, not below the rank of Additional Secretary to the State Government;

II. One official member not below the rank of chief engineer; and

III. One non-official member who will be technical expert of Chief Engineer's level selected by the Contractor from a panel of three persons given to him by the Employer.

24.4 *The Contractor and the Employer will be entitled to present their case in writing duly supported by documents. If so requested, the Standing Empowered Committee may allow one opportunity to the Contractor and the Employer for oral arguments for a specified period. The Empowered Committee shall give its decision within a period of ninety days from the date of appeal, failing which the Contractor can approach the appropriate court for the resolution of the dispute.*

24.5 *The decision of the Standing Empowered Committee will be binding on the Employer for payment of claims up to five percent of the Initial Contract Price. The Contractor can accept and receive payment after signing as "in full and final settlement of all claims". If he does not accept the decision, he is not barred from approaching the courts. Similarly, if the Employer does not accept the decision of the Standing*

Empowered Committee above the limit of five percent of the Initial Contract Price, he will be free to approach the courts applicable under the law.”

32. A reading of the above Clause indicates that what this Clause proposes is a decision on a dispute between the parties by officers of the respondents. It is not an independent adjudicatory mechanism, such as arbitration. It also does not provide for an alternative dispute mechanism such as conciliation or mediation. In fact Clause 25 specifically prohibits arbitration in regard to disputes arising under the contract.

33. More importantly, the stand of the respondents seems to be that payments owed to the petitioner by the respondents towards 50% of the security deposit in the second contract covered by the agreement NIT-30, and performance guarantee under both contracts (i) and (ii) referred to supra have been withheld in view of alleged breach by petitioner in other contracts being NIT-85, NIT-89 and NIT-95. They place reliance on Clause 53 of the SBD.

34. A perusal of the said Clause shows that it deals with a situation of termination of contract on account of fundamental breach of the contract by the contractor.

The term ‘contract’, as pointed out by the petitioner, includes certain documents mentioned in Clause 4 to the agreement NIT-30.

In the list of documents mentioned in the said Clause, are the GCC as per the said NIT.

The term ‘contract’ is defined therein as the contract between the employer and the contractor to execute, complete and maintain the works.

35. Thus only the agreement relating to NIT-30 is the ‘contract’

which can be referred to and relied upon, and other contracts, if any, between the parties, cannot be considered.

36. So, any contract other than the contracts covered by NIT-30 even if terminated by the respondents, cannot enable the respondents to invoke Clause 53. They cannot withhold the amounts claimed by the petitioner which are in fact undisputed by the respondents, on the ground that there was some breach of contract with regard to the other contracts, particularly when there is no dispute about completion of work, and also the completion of the maintenance period of five years under all the three contracts covered under the agreement NIT-30.

37. In *ABL International Ltd. and Another v. Export Credit Guarantee Corporation of India Ltd. and Others*¹, the Supreme Court held that if on a given set of facts, the State is found to have acted in an arbitrary manner even in a matter of contract, an aggrieved party can approach the Court by way of writ under Article 226 of the Constitution; and the Court, depending on facts of the said case, is empowered to grant relief.

It held that there is no ouster of the power of the High Court under Article 226 to grant relief in matters relating to contract.

It also noted the absence of an arbitration clause in the contract as a situation where relief can be granted under Article 226 of the Constitution of India.

Where respondents are a State or instrumentalities of the State, and they are discharging public duty or a public function and they have acted

¹ (2004) 3 SCC 553

arbitrarily, relief can be granted even in respect of money claims. In Para 27, it summed up the principles as under:

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

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

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

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.”

38. This principle has been consistently followed in many cases by the Supreme Court such as in ***Unitech Limited and Others v. Telangana State Industrial Infrastructure Corporation (TSIIC) and Others***². In that case, it was reiterated that writs under Article 226 are maintainable to ascertain contractual rights against the State, or its instrumentalities, as defined under Article 12 of the Indian Constitution.

It held that in the matter of principle, jurisdiction under Article 226 is not excluded in contractual matters.

It held that if the State instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under Article 226 of the Constitution of India would lie.

It held that the jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of State power or the misuse of authority, and that the State and its instrumentalities are not exempt from their duty to act fairly, merely because in their business dealings they have entered into the realm of contract.

² (2021) 16 SCC 35

39. The judgment in *N.G. Projects Limited v. Vinod Kumar Jain and Others*³ cited by respondents was a case of award of tender for a road construction contract, and was not a case of a claim against the State or instrumentality of State for recovery of money under a contract, which has been withheld arbitrarily. Therefore, the said decision is not relevant.

40. The judgment in *K. Jayaram and Others v. Bangalore Development Authority and Others*⁴ is also not relevant as it deals with suppression of certain facts by the party therein in connection of fraud, which would normally disentitle a party to the equitable remedy under Article 226 of the Constitution of India.

41. In the instant case, all the facts relating to the subject contract has been placed on record by the petitioner, and there is no suppression of facts and there is no fraud. Failure of the petitioner to mention about the other contracts which are not subject matter of the agreement NIT-30 cannot be said to be a suppression of fact because it was not necessary for the petitioner to refer to the same.

42. In the facts and circumstances of the case, we are of the opinion that the refusal of the respondents to pay to the petitioner the amounts owed to the petitioner towards security deposit and performance guarantee in respect to the NIT-30 contract on the pretext that some other contracts which the petitioner had entered into with the respondents had not been satisfactorily completed by the petitioner, is patently arbitrary, unreasonable and violative of Articles 14 and 300A of the Constitution of India.

³ (2022) 6 SCC 127

⁴ (2022) 12 SCC 815

43. Clause 53 cannot be invoked in the facts and circumstances of the case because admittedly the petitioner has completed the three contracts covered by the subject agreement NIT-30, and even the maintenance period of five years has already elapsed long back.

44. Clause 24 relied upon by the respondents is not an alternative remedy at all, as it makes the respondents, judges in their own cause, and the petitioner is not obligated to subject himself to any decision made by the persons nominated by the respondents as mentioned in Clause 24, and he is entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution of India.

45. There are also no disputed questions of fact except the interpretation of Clause 24 and Clause 53 of the SBD, and there is no impediment to this Court to exercise jurisdiction under Article 226 of the Constitution of India.

46. Accordingly, the Writ Petition is allowed and the respondents are directed to refund to the petitioner the sum of Rs.74,93,770/-. Since the transaction is a commercial contract, they are directed to pay interest @12% per annum from the respective dates on which the amounts fell due in favour of the petitioner upto the date of payment. The entire payment shall be made to the petitioner by 31.12.2025. The respondents No.1 & 3 each shall also pay cost of Rs.25,000/- to the petitioner on or before 31.12.2025.

47. Pending application(s), if any, shall stand disposed of.

(S. DATTA PURKAYASTHA, J) (M.S. RAMACHANDRA RAO, CJ)

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