

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WRIT PETITION NO.40369 OF 2017

ORDER:

This Writ Petition is filed seeking writ of mandamus declaring the action of the respondents in not paying the outstanding undisputed amount of Rs.22,02,979/- arising out of the bill dated 04.08.2015 (revised on 05.07.2017) in terms of the agreement dated 12.08.2015, as illegal and arbitrary.

2. Brief facts which are necessary for disposal of the Writ Petition are as follows:

The petitioner is a team of Architects, represented by its Chief Architect, which is rendering professional service in the field of architecture across the country, since 1976 including the State Government and private projects. The first respondent had allotted a land to an extent of extent of Acs.2.00 in Survey No.844/1 of Malkajgiri Village, Marredpally Mandal, for construction of a 'Christian Bhavan' and entrusted the task of construction of building to the 2nd respondent. Accordingly, both the respondents approached the petitioner seeking necessary professional service for construction of the said building. After consultations, an agreement was entered into between the petitioner and the 2nd respondent 12.08.2015 for construction of 'Christian Bhavan'. Clause 6 deals with the fee schedule for staggered payment of the part fee at different stages of the project. Though, the petitioner has prepared two different preliminary conceptual designs basing on the extent of area available, the respondents accepted one of them, which is described as Design-II. By letter dated 12.08.2015, the 2nd respondent informed the petitioner that the 1st respondent

approved the proposed design-II for the project with certain modifications. In the same proceeding, while accepting the bill raised for first installment, the 2nd respondent sanctioned and released part payment for a sum of Rs.6,75,600/- out of the total amount of Rs.28,12,302/- due and payable for the services rendered by the petitioner. Since the proposed site is located with the air funnel i.e. the flight path of aircrafts landing and taking off from Begumpet Airport, clearance for construction of the building could not be obtained from Airport Authority of India. As the respondents could not proceed with the project at the site identified, the respondents finalized another site of Acs.2.00 in Survey No.124/1/2 of Yapral Village, Alwal Mandal. By letter dated 25.03.2017, the respondents requested the petitioner to conduct survey, prepare conceptual and architectural design etc. for new site. The petitioner informed that survey of the said land cannot be within the scope of architectural service and that the same can be procured from appropriate agency. Through letter dated 13.04.2017, the petitioner explained all the previous services rendered, the amount due and payable to them and on 09.05.2017, though fresh agreement was entered into and the respondents were requested to pay the balance amount of Rs.21,46,970/- for the service already rendered, the respondents have failed to pay the same. Aggrieved by the same, present Writ Petition is filed.

3. Counter affidavit is filed by the 2nd respondent denying some of the averments in the affidavit filed in support of the Writ Petition, stating that in view of the title dispute and as the issue was pending on account of interim order passed by this Court in

W.P.Nos.27918 of 2014 and 40593 of 2014, the petitioner agreed to receive Rs.6,75,000/- as part of first installment and hence, the petitioner is estopped from claiming Rs.28,12,302/-. It is further alleged that since the project became frustrated by reason of title dispute raised by third party, the agreement entered into by the 2nd respondent with the petitioner has become unenforceable and impossible to be performed. Subsequently, the 2nd respondent entered into agreement as per instructions of the Government under memo No.3431/Estt-I/A1/2015 dated 01.08.2015. It is further stated that the Government has made alternate arrangement of land for construction of 'Christian Bhavan' in an extent of Acs.2.00 at Survey No.124/1/2, Yaprak Village, Alwal Mandal, wherein also title dispute has been raised by one Smt. M. Gangavathi, W/o. Late Muthuswamy and two others, by filing W.P.No.42274 of 2017. It is further alleged that though the petitioner is fully aware of the impediments faced by the Government, it preferred to demand payment of amount, to which he is not entitled. Further, the petitioner orally agreed to render services for planning and designing of the 'Christian Bhavan' in the meeting held on 06.05.2017. There was no concluded contract and the proposal for construction of 'Christian Bhavan' remained stand still on account of title dispute. It is further stated that the agreement contains arbitration clause and in case of any dispute, difference or question arising out of or touching upon concerning the agreement in the execution of work, the case shall be referred for arbitration to the Council of Architecture and the Arbitrator shall be appointed by the President, Council of Architecture and the arbitration shall be conducted as per the provisions of the

Arbitration and Conciliation Act, 1996 and that the decision and award of Arbitrator shall be final and binding on the architect and the employer. Hence, the Writ Petition is not maintainable and it is liable to be dismissed.

4. Reply affidavit is filed by the petitioner reiterating the averments in the affidavit filed in support of the Writ Petition stating that the respondent has no valuable and tenable defence and intends to deny the petitioner of his legitimate remuneration on flimsy grounds, as there is no specific denial about the service rendered and the amount claimed in terms of the agreement.

5. Heard Sri V.Ravinder Rao, learned Senior Counsel appearing for Sri M.Jayaram Reddy, learned counsel for the petitioner and learned Government Pleader for Social Welfare.

6. Sri V.Ravinder Rao, learned Senior Counsel submits that merely the subject agreement contains arbitration clause, the respondents cannot contend that the Writ Petition is not maintainable. He submits that at any rate, there is no dispute with regard to the agreement entered into between the petitioner and the 2nd respondent, as the respondents themselves determined the amount as Rs.28,12,302/- in respect of the first set of work and paid Rs.6,75,600/- towards part payment. He submits that the letter dated 09.05.2017 was issued to the petitioner stating that the petitioner agreed to receive the amount of Rs.6,75,600/- for the part payment. He also submits that the agreement dated 12.08.2015 pertains to the site in respect of construction of an area of Acs.2.00 situated at Mahendra Hills, Survey No.844/1 at Malkajgiri Village of Maredpally Mandal, Hyderabad District and not in respect any other site. The agreement is very clear and

there is no dispute in rebutting the said agreement, as such, clauses 12 and 13 of the agreement need not be invoked. He also submits that the fee fixed is based on the fee fixed by the Architects Council of India, as such, the respondents cannot escape from their liability. In support of his contention, he relied on the judgment of the Apex Court in **ABL International Ltd. and Another v. Export Credit Guarantee Corporation of India Ltd. and Others**¹ and **State of Kerala and Others v. M.K.Jose**².

7. On the other hand, learned Government Pleader appearing for respondent Nos.1 and 2 submits that in view of clauses 12 and 13 of the agreement, the petitioner has an alternative remedy by way of arbitration, as such, the Writ Petition is not maintainable. He submits that petitioner agreed to execute the work at the new site.

8. In the present case, there is no dispute with regard to the extent of agreement between the petitioner and the respondents for rendering architectural services in respect of a building constructed in an area of Acs.2.00 situated at Mahendra Hills, Survey No.844/1 at Malkajgiri Village of Maredpally Mandal, Hyderabad District. There is also no dispute regarding scope of work and the services to be rendered by the petitioner and also that clause 6 provides for mode of payment. It is also not in dispute that the petitioner has completed work regarding stage-I and the fee payable on the completed work as per clause 6.1 is 30% of 5%. Since the petitioner has completed stage-I work, the respondents have determined the fees of the petitioner and paid an amount of Rs.6,75,600/- vide proceedings dated 12.08.2015 and

¹ (2004)3 SCC 553

² (2015)9 SCC 433

in the said proceedings, it is also stated that the said payment is first installment out of total payment i.e., Rs.28,12,302/-. The assertion of the petitioner that he completed the first stage of the work is also not disputed in the counter affidavit. The 2nd respondent also issued proceedings dated 12.08.2015, which reads as under:-

“M/s. Raj Expedith Associates has been appointed as Architect for the Telangana Christian Bhavan by the Government, and also approved the Design – II with some modifications with an estimated cost of Rs.20,55,77,730/- (Rupees twenty crore fifty five lakh seventy seven thousand seven hundred and thirty only).

In the reference 1st cited the Secretary to Government, Telangana State, has issued necessary instructions to release the initial expenditure from the interest accrued pending sanction/release of funds from Government.

Hence, sanction is hereby accorded for payment of Rs.6,75,600/- (Rupees six lakh seventy five thousand six hundred only) to M/s. Raj Expedith Associates as part payment of 1st installment fee Rs.28,12,302/-(inclusive of Service Tax 14%) towards First Stage of Architect Fee. The payment details are as follows:

8) The Part Payment	Rs.6,00,000/-
9) Less: IT 10%	Rs. 60,000/-
10) Net payment (1-2)	Rs.5,40,000/-
11) Service Tax 14% (on Rs.6,00,000/-	Rs. 75,600/-
12) Total payment to the Client (1+4)	Rs.6,75,600/-
13) Amount payable to the Client (3+4)	Rs.6,15,000/-
14) Amount payable to the IT Dept.	Rs. 60,000/-

The Accounts Section is instructed to release the Funds from the Interest Amount.

M/s. Raj Expedith associates is requested to acknowledge the receipt of funds.”

In **State of Kerala and Others v. M.K.Jose** (2 supra), the Hon’ble Apex Court held as under:-

“17. In *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.* [(2004) 3 SCC 553] , a two-Judge Bench after referring to various judgments as well as the pronouncement in *Gunwant Kaur* [(1969) 3 SCC 769] and *Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council* [(1970) 1 SCC 582] , has held thus: (*ABL International case* [(2004) 3 SCC 553] , SCC pp. 568-69 & 572, paras 19 & 27)

“19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of *Gunwant Kaur* [(1969) 3 SCC 769] this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

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.”

While laying down the principle, the Court sounded a word of caution as under: (*ABL International case* [(2004) 3 SCC 553] , SCC p. 572, para 28)

“28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whirlpool Corpn. v. Registrar of Trade Marks* [(1998) 8 SCC 1] .) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.”

18. It is appropriate to state here that in the said case, the Court granted the relief as the facts were absolutely clear from the documentary evidence brought which pertain to interpretation of certain clauses of contract of insurance. In that context, the Court opined: (*ABL International Ltd. case* [(2004) 3 SCC 553] , SCC p. 578, para 51)

“51. ... The terms of the insurance contract which were agreed between the parties were after the terms of the contract between the exporter and the importer were executed which included the addendum, therefore, without hesitation we must proceed on the basis that the first respondent issued the insurance policy knowing very well that there was more than one mode of payment of consideration and it had insured failure of all the modes of payment of consideration. From the correspondence as well as from the terms of the policy, it is noticed that existence of only two conditions has been made as a condition precedent for making the first respondent Corporation liable to pay for the insured risk, that is: (i) there should be a default on the part of the Kazak Corporation to pay for the goods received; and (ii) there should be a failure on the part of the Kazakhstan Government to fulfil their guarantee.”

And it eventually held: (SCC pp. 578-79, para 51)

“51. ... We have come to the conclusion that the amended Clause 6 of the agreement between the exporter and the importer on the face of it does not give room for a second or another construction than the one already accepted by us. We have also noted that reliance placed on sub-clause (d) of the proviso to the insurance contract by the Appellate Bench is also misplaced which is clear from the language of the said clause itself. Therefore, in our opinion, it does not require any external aid, much less any oral evidence to interpret the above clause. Merely

because the first respondent wants to dispute this fact, in our opinion, it does not become a disputed fact. If such objection as to disputed questions or interpretations is raised in a writ petition, in our opinion, the courts can very well go into the same and decide that objection if facts permit the same as in this case.”

20. We have referred to the aforesaid authorities to highlight under what circumstances in respect of contractual claim or challenge to violation of contract can be entertained by a writ court. It depends upon facts of each case. The issue that had arisen in *ABL International*[(2004) 3 SCC 553] was that an instrumentality of a State was placing a different construction on the clauses of the contract of insurance and the insured was interpreting the contract differently. The Court thought it apt merely because something is disputed by the insurer, it should not enter into the realm of disputed questions of fact. In fact, there was no disputed question of fact, but it required interpretation of the terms of the contract of insurance. Similarly, if the materials that come on record from which it is clearly evincible, the writ court may exercise the power of judicial review but, a pregnant one, in the case at hand, the High Court has appointed a Commission to collect the evidence, accepted the same without calling for objections from the respondent and quashed the order of termination of contract.”

Though in the counter affidavit, it is contended that there is no concluded contract between the petitioner and 2nd respondent cannot be accepted, for the reason that the 2nd respondent had made part payment. Moreover, the respondents have categorically admitted in their counter affidavit that first stage of work is completed and they have also made part payment. These facts goes to show that there is no dispute regarding completion of first stage of work, as such, the petitioner need not be driven to arbitral proceedings. In ***Harbanslal Sahnia v. Indian Oil Corpn. Ltd.***,³ the Hon’ble Apex Court held

“7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See *Whirlpool Corpn. v. Registrar of Trade Marks* [(1998) 8 SCC 1] .) The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.”

³ (2003) 2 SCC 107

In view of the principle laid down in the aforesaid judgment, there is no bar in entertaining Writ Petition under Article 226 even though there is an arbitration clause in the contract/agreement. Therefore, the argument of the learned Government Pleader that the Writ Petition is not maintainable, since there exists arbitration clause in the agreement, cannot be accepted. As such, the Writ Petition liable to be allowed.

Accordingly, the Writ Petition is allowed, directing the respondents to process and pay the bill of the petitioner to the extent of work executed by the petitioner. There shall be no orders as to costs. Miscellaneous applications, if any, pending shall stand closed.

(A.RAJASHEKER REDDY, J)

17th June 2019
RRB/kvs