

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.9376 of 2017

M/s. S.R. Cementech Private Limited. ***Petitioner***

M/s. Ratnakar Nayak, S. Padhy,
P.C. Swain, Advocates

-versus-

National Thermal Power Corporation Ltd. & others. ***Opposite Parties***

For O.P Nos.1, 2&4 – M/s. Aditya N. Das,
N. Sarkar, E.A. Das, Advocates
For O.P. No.3 – Mr. Prasant Kishore Ray, Sr. Advocate
For O.P. No.6 – M/s. S. Pattnaik, S. Mohanty, S. Pattnaik,
S.Das, J. Mohapatra, Advocates

W.P.(C) No.9379 of 2017

M/s. Raj Rajeswari Industries. ***Petitioner***

M/s. Ratnakar Nayak, S. Padhy,
P.C. Swain, Advocates

-versus-

Power Grid Corporation of India Ltd. & others. ***Opposite Parties***

For O.P Nos.1, 2&4 – M/s. Aditya N. Das,
N. Sarkar, E.A. Das, Advocates
For O.P. No.3 – Mr. Prasant Kishore Ray, Sr. Advocate
For O.P. No.6 – M/s. S. Pattnaik, S. Mohanty, S. Pattnaik,
S.Das, J. Mohapatra, Advocates

W.P.(C) No.12420 of 2017

M/s. Laxmi Industries. ***Petitioner***

M/s. Ratnakar Nayak, S. Padhy,
P.C. Swain, Advocates

-versus-

Power Grid Corporation of India Ltd. & others. **Opposite Parties**

For O.P Nos.1, 2&4 – M/s. Aditya N. Das,
N. Sarkar, E.A. Das, Advocates
For O.P. No.3 – Mr. Prasant Kishore Ray, Sr. Advocate
For O.P. No.6 – M/s. S. Pattnaik, S. Mohanty, S. Pattnaik,
S.Das, J. Mohapatra, Advocates

W.P.(C) No.12421 of 2017

M/s. Karthik Enterprises. **Petitioner**

M/s. Ratnakar Nayak, S. Padhy,
P.C. Swain, Advocates

-versus-

Power Grid Corporation of India Ltd. & others. **Opposite Parties**

For O.P Nos.1, 2&4 – M/s. Aditya N. Das,
N. Sarkar, E.A. Das, Advocates
For O.P. No.3 – Mr. Prasant Kishore Ray, Sr. Advocate
For O.P. No.6 – M/s. S. Pattnaik, S. Mohanty, S. Pattnaik,
S.Das, J. Mohapatra, Advocates

W.P.(C) No.20752 of 2017

M/s. Kalpana Concrete Udyog. **Petitioner**

M/s. Ratnakar Nayak, S. Padhy,
P.C. Swain, Advocates

-versus-

National Thermal Power Corporation Ltd. & others. **Opposite Parties**

For O.P Nos.1, 2&4 – M/s. Aditya N. Das,
N. Sarkar, E.A. Das, Advocates
For O.P. No.3 – Mr. Prasant Kishore Ray, Sr. Advocate
For O.P. No.6 – M/s. S. Pattnaik, S. Mohanty, S. Pattnaik,
S.Das, J. Mohapatra, Advocates

CORAM: JUSTICE S. PUJAHARI

ORDER
11.02.2022

Order
No.

08. **1.** Due to commonality of issues involved in these writ petitions, all of them have been taken up together for disposal.
- 2.** Heard the learned counsel for the parties.
- 3.** The opposite party-PSUs, namely, NTPC, PGCIL and NESCL engaged M/s. ICOMM Tele Limited for the rural electrification works in various districts of Odisha under Rajiv Gandhi Gramin Vidyut Yojana (RGGVY). During execution of the said project, the petitioners supplied pre-stressed concrete poles to M/s. ICOMM. As stated by the petitioners, since their dues remained outstanding, they approached the opposite party-PSUs for several times for direct payment, inasmuch as at the time of supply of the articles they had issued comfort letters undertaking to make the payment directly to the petitioners. It is further stated that on the approach of the petitioners to the Department of Energy,

Government of Odisha, the Addl. Secretary of the said Department had also directed NESCL vide letter dated 12.06.2013 to take immediate steps for payment, and the PGCIL also held meetings with M/s. ICOMM advising them to settle the dues of the petitioners and release the payment. It is further submitted by the petitioners that M/s. ICOMM also made communication to the PGCIL and NTPC for making direct payment to the petitioners from and out of its bills. Despite the above exercise and efforts, when the admitted outstanding due of the petitioners was not paid, they have approached this Court seeking remedy under Article 226 of the Constitution of India.

4. This Court in W.P.(C) No.12421 of 2021 also passed an interim order on 30.06.2017 directing PGCIL not to release any amount including the security deposit and other dues of M/s. ICOMM without leave of the Court.

5. During pendency of these writ petitions, however, M/s. ICOMM has been declared as Insolvent

by the National Company Law Tribunal (for short “the NCLT”), Hyderabad and pursuant to the resolution plan approved on 17.10.2019 in course of the Insolvency proceeding, M/s. ICOMM has been taken over as a going concern by the resolution applicant – M/s. Mega Engineering & Infrastructure Limited. During the resolution process, the petitioners have also been paid 5% each of their total admitted dues.

6. In the factual scenario as above, the petitioners seek for a direction to the opposite party-PSUs for release of the dues of the petitioners, on the grounds, inter-alia, that there is no dispute regarding their dues outstanding on account of supply of the materials in implementation of the Project executed by the PSUs through M/s. ICOMM and the security deposit of M/s. ICOMM in shape of Bank Guarantees on being encashed is lying with the PGCIL since before the commencement of the Insolvency resolution process.

7. Mr. P.K. Ray, the learned senior counsel appearing for M/s. ICOMM, the opposite party no.3 has

advanced manifold arguments challenging the maintainability of the writ petitions. According to him, even assuming for sake of argument that there has been breach of contract, it is the common law which can be taken recourse of, but not the writ jurisdiction of this Court, inasmuch as no contractual right can be sought to be enforced under Article 226 of the Constitution of India. It is his further submission that since the petitioners have not entered into any contract with the opposite party-PSUs, a writ of mandamus cannot be issued to enforce any private right, such as, the contractual rights, if any, of the petitioners against M/s. ICOMM, especially when a money claim does not come within the domain of any fundamental right. It is his further argument that the petitioners being the purported operational creditors of M/s. ICOMM having already subjected themselves to the insolvency resolution process under Insolvency Bankruptcy Code, 2016 (for short "IBC, 2016"), and to the jurisdiction of NCLT, and the order of the said Tribunal approving the resolution plan having not been challenged by the

petitioners under Section 61 of IBC, 2016, the petitioners without exhausting the remedy available under the said special statute, cannot invoke the writ jurisdiction of this Court. In the context, the learned senior counsel also invites a reference to the non-obstante clause under Section 238 of IBC, 2016, to submit that the petitioners have no remedy under any other law than the said special statute.

8. Arguing in favour of maintainability of the writ petitions, the learned counsel appearing for the petitioners submitted that even if there is no privity of contract between the contractee and the sub-contractors, that would not away with the principle of transfer of property by the sub-contractors by employing the same on the property of the contractee. He has placed reliance on a decision of the Apex Court in the case of ***State of Andhra Pradesh and others vrs. Larsen and Toubro Limited and others***, reported in (2008) 9 SCC 191. In the said case, the Apex Court has been pleased to rule as follows:-

“16. By virtue of Article 366(29-A)(b) of the Constitution, once the work is assigned by the contractor (L&T), the only transfer of property in goods is by the sub-contractor(s) who is a registered dealer in this case and who claims to have paid taxes under the Act on the goods involved in the execution of the works. Once the work is assigned by L&T to its sub-contractor(s), L&T ceases to execute the works contract in the sense contemplated by Article 366(29-A)(b) because property passes by accretion and there is no property in goods with the contractor which is capable of a retransfer, whether as goods or in some other form.

17. The question which is raised before us is whether the turnover of the sub-contractors (whose names are also given in the original writ petition) is to be added to the turnover of L&T. In other words, the question which we are required to answer is whether the goods employed by the sub-contractors occur in the form of a single deemed sale or multiple deemed sales. In our view, the principle of law in this regard is clarified by this Court in *Builders’ Assn. of India* as under: (SCC p. 673, para 36)

“36. Ordinarily *unless there is a contract to the contrary* in the case of a works contract, the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed, when the goods or materials used are incorporated in the building.” (emphasis supplied by us)

18. As stated above, according to the Department, there are two deemed sales, one from the main contractor to the contractee and the other from sub-contractor(s) to the main contractor, *in the event of the contractee not having any privity of contract with the sub-contractor(s)*.

19. If one keeps in mind the abovequoted observation of this Court in *Builders' Assn. of India* the position becomes clear, namely, that even if there is no privity of contract between the contractee and the sub-contractor, that would not do away with the principle of transfer of property by the sub-contractor by employing the same on the property belonging to the contractee. This reasoning is based on the principle of accretion of property in goods. It is subject to the contract to the contrary. Thus, in our view, in such a case, the work executed by a sub-contractor, results in a single transaction and not as multiple transactions. This reasoning is also borne out by Section 4(7) which refers to the value of goods at the time of incorporation in the works executed. In our view, if the argument of the Department is to be accepted, it would result in plurality of deemed sales which would be contrary to Article 366(29-A)(b) of the Constitution as held by the impugned judgment of the High Court. Moreover, it may result in double taxation which may make the said 2005 Act vulnerable to challenge as violative of Articles 14, 19(1)(g) and 265 of the Constitution of India as held by the High Court in its impugned judgment."

9. As it appears, the ratio of the afore-cited case has no application to the present cases. The question before the Apex Court was whether the turnover of the sub-contractors was to be added to the turnover of the contractor, or whether the goods employed by the sub-contractor occurred in the form of a single deemed sale or multiple deemed sales. Keeping in view the observation made earlier by the Apex Court in the case of **Builders' Association of India vrs. Union of India**, reported in (1989) 2 SCC 645 (Para-36), the principle of accretion of property was followed in the case of **State of Andhra Pradesh (supra)**, and it was held that even if there is no privity of contract between the contractee and the sub-contractors, that would not do away with the principle of transfer of property by the sub-contractor by employing the same on the property belonging to the contractee, subject to the contract, if any, to the contrary. It was, ultimately, held that the work executed by a sub-contractor results in a single transaction and not as multiple transactions. The aforesaid ruling was rendered in the context of taxation

with a view to avoid double taxation. In paragraph-20 of the judgment in the case of ***State of Andhra Pradesh (supra)*** it was further clarified that where a VAT dealer awards any part of the contract to a registered sub-contractor, no tax shall be paid on the consideration paid for the sub-contract.

10. The next contention of the learned counsel for the petitioners is that even though there is no express contract between the petitioners and the opposite party-PSUs, there can be assumed an implied contract between them, inasmuch as the work was done by the petitioners for those opposite parties, and the petitioners deserve to be reasonably paid by application of the principle of *quantum meruit*, especially when the money is lying with the PGCIL, being kept out of the purview of the insolvency proceeding, and when the dues of the petitioners are not in dispute. The argument so advanced is not relevant to the present cases, inasmuch as here the question involved is not as to reasonableness of the dues claimed, but regarding the question of liability of the opposite party-PSUs,

particularly PGCIL to pay the dues of the petitioner-sub-contractors in absence of any contractual obligation. The stated intervention of the Energy Department, Government of Odisha, in settlement of dues of the petitioners vis-à-vis the contractor, or issuance of comfort letters by the PSUs or any of them undertaking to make direct payment to the petitioners cannot be interpreted as giving rise to any employed contract. The undertaking, if any, given by the PSUs to make direct payment to the petitioners (sub-contractors) was nothing but a mode of payment adopted consensually by the contractee and the contractor, and the same cannot put the petitioners in the position of a party to the understanding thus made between the contractor and the contractee, or as a party to the contract existing between them. In that view of the matter, the aforesaid undertaking given by the opposite party-PSUs or any of them to make direct payment to the petitioners did not vest the petitioners with any right to sue the PSUs for realization of the dues, inasmuch as the PSUs never owed to the

petitioners for the articles supplied by them to M/s. ICOMM, the contractor.

11. Admittedly, the petitioners have subjected themselves to the insolvency proceeding under IBC, 2016, and in course of the resolution process undertaken, they have already been paid 5% each of their total dues. It is, however, the contention of the petitioners that since there is no dispute from the side of the opposite party-PSUs regarding their outstanding dues and money of M/s. ICOMM is lying with the PGCIL which is outside the purview of the insolvency proceeding, there may not be any legal impediment for issue of a direction to the PGCIL to release the money towards payment of the admitted outstanding dues of the petitioners. Relying on a decision of the Apex Court in the case of ***ABL International Ltd. and another vrs. Export Credit Guarantee Corporation of India Ltd. and others***, reported in (2004) 3 CC 553, which has been referred to with approval in the case of ***Karnataka State Forest Industries Corporation vrs. Indian Rocks***, reported in (2009) 1 SCC 150, the

learned counsel for the petitioners submits that when an action of the State is arbitrary or discriminatory, a writ petition would be maintainable to enforce the terms of a contract qua contract.

12. In the case of ***Karnataka State Forest Industries Corporation (supra)***, the Apex Court held as follows:-

“38. Although ordinarily a superior court in exercise of its writ jurisdiction would not enforce the terms of a contract qua contract, it is trite that when an action of the State is arbitrary or discriminatory and, thus, violative of Article 14 of the Constitution of India, a writ petition would be maintainable. (See *ABL International Ltd. v. Export Credit guarantee Corpn. of India Ltd.*)

39. There cannot be any doubt whatsoever that a writ of mandamus can be issued only when there exists a legal right in the writ petition and a corresponding legal duty on the part of the State, but then if any action on the part of the State is wholly unfair or arbitrary, the superior courts are not powerless. xxxx xxxx xxxxxx ”

13. In the present cases, neither there exists any legal duty on the part of the opposite party-PSUs corresponding to any legal right of the petitioners, nor is

there any material on record to show that there has been any arbitrary or discriminatory action on the part of those PSUs against the petitioners, violative of Article 14 of the Constitution of India.

14. Further, this Court finds merit in the submission of the learned senior counsel appearing for M/s. ICOMM that when the petitioners have already subjected themselves to the insolvency proceeding, conceding to the order of the NCLT, and agreed to go by the resolution plan, they cannot invoke the writ jurisdiction of this Court on the same subject-matter.

15. In view of the discussion made hereinbefore, the writ petitions are found to be not maintainable. Hence, all the writ petitions stand dismissed.

Urgent certified copy of this order be granted on proper application.

(S.Pujahari)
Judge

MRS