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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 21.07.2023

\+ W.P.(C) 8169/2023

M/S ASHOK SEHRAWAT AND CO. ..... Petitioner

Through: Mr. Deepak Kumar, Mr. Nitin Rana, Advocates.

versus

THE COMMISSIONER, MUNICIPAL CORPORATION OF DELHI & ANR. ..... Respondents

Through: Mr. Siddhant Nath, Advocate.

\+ W.P.(C) 8215/2023

MS SUNIL KUMAR SISODIYA ..... Petitioner

Through: Mr. Deepak Kumar, Mr. Nitin Rana, Advocates.

versus

THE COMMISSIONER OF MCD & ANR. ..... Respondents

Through: Mr. Siddhant Nath, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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1. The petitioners have filed these petitions under Article 226 of the Constitution for the following reliefs;

In *W.P.(C) 8169/2023*:

> *"a) Direct the Respondent No 2 to raise the bills of the contract work bearing W.O. No EE(M-WZ)- III(EE XV)/SYS/2017-2018/301 and*

thereafter release payment of the Petitioner along with 24 % P.a. interest on the said payment from its due date to the date of its actual realization

b) Direct the Respondent no. 1 to take penal action over the Respondent no 2 for said delay in raising of bills and payment of the Petitioner

c) Pass any other or further order/s as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

In *W.P.(C) 8215/2023*:

"a) Direct the Respondent No 2 to raise the bills of the contract work bearing W.O. No EE(M-WZ)-III(EE XV)/SYS/2017-2018/217 and thereafter release payment of the Petitioner along with 24 % P.a. interest on the said payment from its due date to the date of its actual realization

b) Direct the Respondent no. 1 to take penal action over the Respondent no 2 for said delay in raising of bills and payment of the Petitioner

c) Pass any other or further order/s as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. The case of the petitioners is that they were both awarded contracts by the respondent- Municipal Corporation of Delhi [hereinafter referred to as "MCD"] for improvement/development of existing rooms of MCD Store at Tilak Nagar [in WP(C) 8169/2023] and for providing and fixing of M.S. Sign Board and CC Repair in Ajay Enclave, Meenakshi Garden, Ashok Nagar, Guru Nanak Nagar, Prithvi Park, Santgarh, Old Shahpura and in various blocks of Tilak Nagar [in WP(C) 8215/2023]. The terms of the contracts required the contractors to submit their running account/final bill with measurement, after which the MCD was required to approve the final bills.

3. The grievance of the petitioners is that the MCD has not approved

the final bills despite the certification of the MCD's own engineer that work has been completed at the sites. Mr. Deepak Kumar, learned counsel for the petitioners, draws my attention to certificates dated 25.02.2022[1], which so indicate.

4. Mr. Siddhant Nath, learned counsel for the MCD, raises a preliminary objection that these are contractual disputes which cannot be adjudicated in a writ petition. He submits that several factual issues arise for adjudication, including as to limitation. Mr. Nath points out that, according to the petitioners, they had completed the work within the stipulated period of two months, i.e. in the year 2018 itself. According to Mr. Nath, therefore, their claims would now be barred by limitation.

5. Mr. Kumar, on the other hand, submits that the MCD has itself, by the letters dated 25.02.2022, acknowledged the completion of the work. He further draws my attention to the judgment of a co-ordinate Bench in *Garg Construction Company vs. North Delhi Municipal Corporation*[2], wherein the MCD was directed to release payments towards contractual dues.

6. Having heard learned counsel for the parties, I am of the view that the petitioners would have to be relegated to their civil remedies in the present cases. Although there is no absolute bar on adjudication of contractual disputes in a writ petition, the circumstances in which such a writ petition can be entertained have been elucidated by the Supreme Court in several judgments, including *inter alia* the following:-

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[1] In both the writ petitions.
[2] Judgment dated 25.01.2023 in W.P.(C) 116/2021 and connected petitions.

(a) In *ABL International Limited vs. Export Credit Guarantee Corporation of India Limited*[3], the Supreme Court summarised the principles thus:

> "**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.*
>
> ***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.) 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.*"

(b) The judgment in *ABL International*[4] was considered by the Supreme Court, alongwith several other judgments, in *State of Kerala vs. M.K. Jose*[5], wherein the Court *inter alia* held that the

[3] (2004) 3 SCC 553.
[4] *Ibid.*
[5] (2015) 9 SCC 433.

dispute in *ABL International*[6] was decided in a writ petition as the facts were "*absolutely clear from the documentary evidence brought which pertain to interpretation of certain clauses of contract of insurance*"[7].

(c) In *Union of India vs. Puna Hinda*[8] also, the Supreme Court has crystalised relatively narrow grounds in which petitions under Article 226 of the Constitution would be the appropriate remedy in a contractual matter *inter alia* in the following terms:

> "***23.*** *The High Court has based its order on the ground that after five monsoons, the final measurements could not be ascertained. If the final measurements could not be done at the spot, the contemporary evidence and the measurement books prepared from time to time could be the basis for determining the liability of the appellants.* ***<u>The joint survey report is not an admitted measurement, though some officers might have signed it.</u>*** *The Report prepared after the completion of work wherein no such work done is reflected in the measurement book prepared during execution of work is an attempt to inflate the claim raised by the writ petitioner. The entire amount claimed by the writ petitioner is disputed. It has been asserted that the entire payment due as against the claim of work order had been made, as reflected from the following table:*

I	*Awarded cost of the work under the contract*	*Rs. 31.87 crores*
II	*Cost of the work already executed by the department on the same stretch before the award of work*	*Rs 0.86 crores*
III	*Cost of the work as reduced in view of prior departmental work*	*Rs 31.01 crores*
IV	*Amended cost of work under the contract*	*Rs 35.03 crores*

[6] Supra (note 3).
[7] Supra (note 5) (paragraph 18 at page No. 444).
[8] (2021) 10 SCC 690.

V	*Contract cost in revised DPR processed to Ministry of Road, Transport and Highways*	*Rs 42.27 crores*
VI	*Payment made to the contractor/respondent herein inclusive of Rs 3.86 crores as per the order dated 18-5-2017 of the Hon'ble High Court*	*Rs 42.27 crores*
VII	*Contractor's claim as per final bill dated 23-11-2015*	*Rs 71.76 crores*

> ***24.*** *Therefore, the dispute could not be raised by way of a writ petition on the disputed questions of fact.* ***Though, the jurisdiction of the High Court is wide but in respect of pure contractual matters in the field of private law, having no statutory flavour, are better adjudicated upon by the forum agreed to by the parties. The dispute as to whether the amount is payable or not and/or how much amount is payable are disputed questions of facts. There is no admission on the part of the appellants to infer that the amount stands crystallised.*** *Therefore, in the absence of any acceptance of joint survey report by the competent authority, no right would accrue to the writ petitioner only because measurements cannot be undertaken after passage of time. Maybe, the resurvey cannot take place but the measurement books of the work executed from time to time would form a reasonable basis for assessing the amount due and payable to the writ petitioner, but such process could be undertaken only by the agreed forum i.e. arbitration and not by the writ court as it does not have the expertise in respect of measurements or construction of roads.*
>
> ***25.*** *A perusal of the matter shows that collusion of some of the officers of the appellants with the contractor cannot be ruled out. Such collusion seems to be the basis of the writ petition filed before the High Court.*"[9]

7. In the present cases, I am of the view that the disputes raised by the petitioners would have to be determined factually, including the question of limitation, and the effect of the document dated 25.02.2022, relied upon by the petitioners in this connection. There is little public law

[9] Emphasis supplied.

flavour to the claims of the petitioner, which turn upon a factual assessment, including with regard to approval of their bills. It may be noted that in *Puna Hinda*[10], the Supreme Court has specifically held that correspondence signed by some officers of a public agency cannot be equated with requisite contractual documentation[11]. Analogously, in the present case, the communication dated 25.02.2022, relied upon by Mr. Kumar, cannot, in my view, *ipso facto* have taken to be approval of the bills submitted by the petitioners.

8. I am not persuaded to a contrary conclusion by the judgment in *Garg Construction*[12], relied upon by the petitioners. The relevant observation in the said judgment are reproduced below:

> *"1. By way of the present batch of petitions filed under Article 226 of the Constitution of India, **<u>the petitioners have sought release of payments due and payable to them under the bills prepared and approved by respective Assistant Engineer(s) and counter-signed by Junior Engineer(s)</u>** of the erstwhile North Delhi Municipal Corporation, East Delhi Municipal Corporation and South Delhi Municipal Corporation (hereinafter, collectively referred to as 'Corporation') against the works executed by the petitioners. The petitioners have also claimed interest @ 24% per annum from the date of approval of the bills.*
>
> *xxxx xxxx xxxx*
>
> *5. Though the Corporation had at the first instance filed a Counter Affidavit contesting the petitions, subsequently, **<u>Ms. Shilpa Shinde, Additional Commissioner (Engineering), MCD appeared before this Court on 09.09.2022 and stated that the Corporation has taken a decision to release the payments towards principal amounts.</u>** In this regard, a copy of policy dated 13.10.2022 approved by the Commissioner, MCD has been placed on record alongwith an affidavit of the aforementioned officer regarding mode and manner of disbursement.*

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[10] Supra (note 8).
[11] In that case, joint measurement books.
[12] Supra (note 2).

6. Mr. Kunal Vajani, learned Standing Counsel for the Corporation, submitted that though a decision has been taken by the Corporation to make payments due towards principal amounts, the same would be released to the petitioners in a phased manner in terms of the policy dated 13.10.2022. It was further submitted that a sum of Rs.30 crores has been allocated to be released to the contractors on a monthly basis in the ratio of 38:38:24 i.e. on the basis of geographical spread and staff strength of the erstwhile North Delhi Municipal Corporation, South Delhi Municipal Corporation and East Delhi Municipal Corporation. Learned Standing Counsel also drew attention of the Court to policy dated 13.10.2022 placed on record to submit that payments would be released as per seniority of bills according to cut out date of each erstwhile Corporation, subject to the following three conditions:- (i) The contractor shall certify that they have not received the payment earlier, either in part or in full, with respect to the claim raised by them against the Corporation, (ii) The contractor shall submit an undertaking that if any payment is erroneously made, it would be returned to the Corporation on first demand, and (iii) An affidavit to the above effect will be rendered to the Corporation before disbursement of payment under this policy.

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*9. **Although learned counsels on both sides have cited a catena of decisions, the same need not be gone into in view of the decision taken by Corporation to release the payments which are due to the petitioners towards principal amounts.***

10. On a reading of the policy dated 13.10.2022, however, it is evident that the same is in teeth of the decision of this Court in Sanjeev Kumar (Supra), which was passed in facts and circumstances akin to the present case. It is worthwhile to note that in the captioned case, applicability of queue system to payments due beyond 6/9 months, bereft of an upper time limit, was found to be unreasonable. Further, it was opined that reasonable time for making of payments of final bills in respect of work orders with tendered value up to Rs.5 lakhs shall be 6 months and work orders with tendered value exceeding Rs.5 lakhs shall be 9 months from the date when the bill was passed by the Engineer-in-Charge. In the present case, most of the bills date back to the year 2015 and reasonable time for making payment has passed long back.

11. It is apparent that by bringing out the policy dated 13.10.2022 in the present case, the Corporation, has aggravated the agony of the petitioners and other similarly situated persons, as the release of payments has been made dependent on the availability of funds with *the Corporation, among other extraneous factors mentioned in the policy. Further, not only the amount allocated for disbursement is miniscule, but also the ratio specified with regard to manner of disbursement bears no rationale. The ratio specified by the Corporation is arbitrary and unreasonable. This Court is also persuaded to take note of the fact that the policy dated 13.10.2022 fails to specify as to how many contractors are awaiting their payments from the Corporation. Insofar as the Corporation's decision to release payments in a phased manner is concerned, it is reiterated that the brunt of shortage/non-availability of funds with the Corporation shall not be borne by a contractor who has duly executed tendered works and whose bills have been approved.*

*12. **Moreover, the summary of outstanding dues/arrears of principal amounts placed on record by the petitioners has not been disputed by the Corporation, the relevant bills having been prepared and approved by officials of the Corporation itself.***

*13. **Accordingly, the present petitions are allowed and the Corporation is directed to release payments due towards principal amounts to the petitioners, against verified and approved bills**, within a period of eight weeks from the date of passing of this judgment. So far as the petitioners' prayer for interest on delayed payments is concerned, they may pursue their remedy by initiating appropriate proceedings in accordance with law.*

*14. **It is clarified that the present petitions are entertained and disposed of in the peculiar facts and circumstances, where the Corporation has taken a conscious decision to release the payments**.*"[13]

9. It is clear from paragraphs 1, 12 and 13 of *Garg Construction*[14] that the Court proceeded on the basis that the bills had already been approved by the relevant authorities of the MCD. The aforesaid extracts further record that the MCD had taken a policy decision in respect of such dues, and it is this position that weighed with the Court in allowing the writ petitions. Paragraph 14 of the judgment shows that the Court was conscious of the peculiar facts and circumstances of the cases before it,

[13] Emphasis supplied.
[14] Supra (note 2).

where the MCD had itself taken a decision to release the payment.

10. These factors make the cases of the present petitioners distinguishable from those decided in *Garg Construction*[15], and much closer to the facts in *Puna Hinda*.[16] The MCD has admittedly not approved the bills in question, and the release of amounts to the petitioners do not fall within the policy decision taken by the MCD.

11. In view of the aforesaid, I am of the view that the present petitions under Article 226 of the Constitution are not the appropriate remedy available to the petitioners.

12. The petitions are, therefore, dismissed, with liberty to the petitioners to agitate their claims by way of appropriate civil proceedings in accordance with law. The rights and contentions of both sides in such civil proceedings stand expressly reserved.

PRATEEK JALAN, J

JULY 21, 2023/*'Bhupi'/*

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[15] *Ibid*.

[16] Supra (note 8).