



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

Date of decision: 16th FEBRUARY, 2024

IN THE MATTER OF:

+ **W.P.(C) 9575/2023 & CM APPLs. 36639/2023, 54152/2023**

M/S KANTI PRASHAD MITTAL

..... Petitioner

Through: Mr. Manish Gupta, Mr. Harshal Gupta, Ms. Deepti Verma and Mr. Amaresh Kumar Jha, Advocates.

Versus

UNION OF INDIA THROUGH MINISTRY OF ROAD
TRANSPORT AND HIGHWAYS & ORS. Respondents

Through: Mr. Jivesh Tiwari, SPC with Mr. Vedansh Anand, GP and Ms. Samiksha, Advocate for R-1 to 6.
Mr. Aman Preet Singh Rahi and Mr. Yogender Chauhan, Advocates for R-7.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. Vide the present Writ Petition the Petitioner seeks to challenge the Order dated 15.06.2023, passed by the Respondent No.3 herein/Executive Engineer, PWD (NH Works), Chandmari, Guwahati, Assam. The Respondent No.3 by the said Order has justified the grant of Performance Certificates to the Respondent No.7.

2. The facts, in brief, leading to the present Writ Petition, are that a Request for Proposal No. NHC/BR/21/2018/Pt/18 dated 12.09.2019 was issued by the Respondent No.1 through the Public Works Department (Govt. of Assam) to carry out: a) strengthening of pavement from Km 61/00 to Km. 69/00 and; b) widening of 1.5 meter paved shoulder on either side and strengthening from Km. 103/00 to Km. 106/00 of NH-39 under Annual



Plan for the year of 2018-19 under Golaghat NH Division in the State of Assam on EPC Mode. The Petitioner herein made his bid for the said project and a Letter of Award dated 25.10.2019 was issued to the Petitioner pursuant to which a Work Order was also issued. Consequently, the Petitioner and Respondent No.1 entered into an Engineering, Procurement and Construction Agreement on 27.11.2019. The work was to be completed by 25.12.2020. At this juncture, it is pertinent to mention that Clause 4.2 of the EPC Agreement provides that if any sub-contract or works or the aggregate of such sub-contracts with any Sub-contractor exceeds 5% of the Contract price, the Contractor shall communicate the name and particulars, including the relevant experience of the Sub-contractor, to the Authority prior to entering into any such sub-contract and the Authority shall examine the particulars of the Sub-contractor from the national security and public interest perspective and may require the Contractor, no later than 15 days from the date of receiving the communication from the Contractor, not to proceed with the sub-contract. Clause 4.2(i) provides that the Contractor, whether Joint Venture or sole, shall not sub-contract any Works in more than 49% of the Contract Price and shall carry out Works directly under its own supervision and through its own personnel and equipment in at least 51% of the Contract Price. Respondent No.3 was designated as the Authority Engineer and Authority Representative to act on behalf of the Government. On 01.12.2019 the Petitioner sent a letter to Respondent No.7 for sub-contracting of the work. The said letter reads as under:

"Ref: KPM/PIRPL/GOLAGHAT/001

Date: 01/12/2019



To

*Prachi Infra and Roads Pvt. Ltd.
Ward No-04, Barpathar
Golaghat, Assam-785602*

Reference: Strengthening of pavement from KM 61/00 to KM 69/00 and widening of 1.5 M paved shoulder on either side and strengthening from KM 103/00 to KM 106/00 of NH-39 under annual plan for the year of 2018-19 under Golaghat NH division in the State of Assam on EPC mode (Job No. 039/AS/2018-19/186) and agreement with The Chief Engineer, PWD (NH Works), Chandmari, Guwahati-3, Assam vide agreement No. 02/CE/NH(BR)/NCB 2019-20 dated 27-11-2019

Sub: Subcontract of Work on back to back basis

As per discussion held for the above referenced work regarding the various general and payment terms and conditions in respect of your proposal to execute the work, we are pleased to offer you the work on sub-contact on back to back basis.

Terms & Conditions:

This understanding is arrived between M/s Kanti Prasad Mittal hereinafter known as First Party and M/s Prachi Infra & Roads Pvt. Ltd. hereinafter known as Second Party.

- 1. First Part shall act as main contractor and second part as its sub-contractor for the execution of work.*
- 2. The scope of work shall be as defined in technical specifications, design, drawings, BOQ, instruction issued time to time and conditions as in the contract document.*



3. *The completion time limit shall be 12 months after start of work.*

4. *All men, material, machinery, tools & plants, infrastructure resource, etc. as required for timely completion of work to the required specifications shall be arrange by Second Part.*

5. *Second part shall bear all expenses of any kind in connection with work.*

6. *For the services already rendered by the first part and further administrative expenses second part will allow first part to deduct 8% on gross amount of work done which will be deduct from each running & final bill. Other expenditure already incurred or to be incurred by first part will be borne by second part and which will be deducted from the bills.*

7. *Any raw material procured by First Part in any case, which will relate to your scope of works after that the actual cost with applicable GST will be debited to your account and tax invoice for the same will be issued to your company by the first party, if applicable.*

8. *Payment as & when received by first part from concern dept. will be released to second part on receipt after making deductions as in para 6 above and any other deduction which second party has made it liable for.*

9. *TDS and other applicable taxes if any shall be deducted as per relevant laws applicable on amount of running account bills submitted by second part to first part"*

3. The said letter indicates that virtually the entire work has been sub-



contracted by the Petitioner to the Respondent No.7 which is beyond the permissible limit of 49%. The Petitioner also sent a letter dated 10.12.2019 to the Respondent No.3 informing him that they are proposing Respondent No.7 as their sub-contractor and that they wish to sub-contract the work on back to back basis to Respondent No.7. Thereafter, the Respondent No.4/Assistant Executive Engineer sent a letter to the Respondent No.3 regarding the proposal sent by the Petitioner for subcontracting the work to Respondent No.7. Vide letter dated 16.03.2020, the proposal of sub-contracting the work of strengthening of pavement from Km 61/00 to Km. 69/00 and widening of 1.5 meter paved shoulder on either side and strengthening from Km. 103/00 to Km. 106/00 of NH-39 was accepted by the Respondents.

4. On 24.03.2020 a Performance Certificate for a sum of Rs.12,89,13,850/- was issued by the Respondent No.3 to the Respondent No.7. Material on record also indicates that another Performance Certificate dated 20.09.2020 for a sum of Rs.22,31,67,000/- was issued by the Respondent No.3 to the Respondent No.7. On 25.08.2020, a completion certificate was issued to the Petitioner by the Respondent No.4.

5. It is stated that disputes arose between the Petitioner and the Respondent No.7 and a complaint was made by Respondent No.7 to the Officer in Charge, Police Station Borpathar, regarding non-payment of Rs.8,17,98,747/- by the Petitioner. Consequent to the said complaint, an FIR being FIR No.70/2020, dated 29.10.2020, was registered against the Petitioner at Police Station Borpathar for offences under Sections 406/420/506 IPC. Material on record also indicates that a completion certificate dated 16.10.2021 was issued to the Petitioner by the Respondent No.3. Material on record also discloses that the Petitioner filed an



application challenging the final report given by the Investigating Officer in FIR No.70/2020 before the Sub-Divisional Magistrate, Bokajan, Karbi Anglong, Assam. The Ld. SDM *vide* Order dated 30.11.2022 directed for further investigation by another Investigating Officer.

6. The Petitioner also gave representations to the Respondents challenging the Performance Certificate given by the Respondents No.3 & 4 to the Respondent No.7 by stating that Respondents No.3 & 4 were not the competent authorities to issue Performance Certificates. Since the representation given by the Petitioner was not being considered, the Petitioner filed W.P.(C) 7896/2023 before this Court seeking quashing of the Performance Certificates. The said Writ Petition was disposed of by this Court *vide* Order dated 31.05.2023 with a direction to the Respondents No.1, 2, 3 & 4 to treat the Writ Petition as a representation and decide the same by passing appropriate orders within six weeks from that date. Liberty was also granted to the Petitioner to approach this Court in case the Petitioner is aggrieved by the order passed by the Respondents. By Order impugned herein, the Respondent No.3 has held that the physical work execution experience completion certificate dated 10.09.2020 for a sum of Rs. 22,31,67,000/- is justified. The impugned Order discloses that the Respondent No.3 is satisfied by the execution of work by Respondent No.7. Respondent No.3 is of the opinion that there is no reasonable doubt that the complete physical execution of the above said work had been done by the sub-contractor i.e. Respondent No.7. Respondent 3 also stated that the work was completed 4 months ahead of the scheduled date of completion and that giving Experience certificate for executing the work physically to the sub-contractor is not only a recognition towards his technical experience of executing such similar civil works in future, it is also an indicator of the



experience they hold which is very much necessary in promoting competition in the field of civil construction works. Relevant portion of the said Order reads as under:

"23. Further, it was the moral duty of M/s Kanti Prashad Mittal being the prime Contractor at that particular time that wherever earlier they used the certificates dated 25.08.2020 and dated 16.10.2021 for claiming technical capacity value, they should have claimed only 51% of the total work value because as per earlier knowledge of the department they have paid to the subcontractor M/s Prachi Infra and Roads Private Limited for executing the above reference work physically upto 49% only. But based on the above present evidences and facts about who executed the reference work physically and facts about the payment received by M/s Prachi Infra and Roads Private Limited from M/s Kanti Prashad Mittal for sub-contract physical execution on reference work, it is a speaking fact that comes out that sub-contractor M/s Prachi Infra and Roads Private Limited has done the complete 100% physical execution of reference work for M/s Kanti Prashad Mittal."

7. The Respondent No.1, thereafter, wrote a letter to Respondent No.3 on 10.07.2023 stating that the Petitioner had not sought any prior permission from Respondent No.1 before sub-contracting the work to the Respondent No.7. It is pertinent to mention that the completion certificate dated 16.10.2021 given to the Petitioner has been withdrawn by a letter dated 17.07.2023 on the ground that the Petitioner could not have subcontracted more than 49% of the work.

8. The Petitioner has filed the present Writ Petition challenging the Order dated 15.06.2023.

9. It is the contention of the Petitioner that the Performance Certificate



ought not have been given to the Respondent No.7 because Respondent No.3 was not the Authority to issue Performance Certificates. Petitioner has relied on letter dated 10.07.2023 issued by Respondent No.1 wherein the Chief Engineer has objected to the sub-contract.

10. The stand of Respondent No.3 is that it has the authority to permit the sub-contract of the work. Ld. Counsel for Respondent 3 referred to a letter dated 28.09.2019 issued by Respondent 1 to Respondent 3 appointing him as the Authority Representative. He therefore stated he was the competent authority to approve the sub-contract of Respondent 7 under the contract.

11. Learned Counsel for Respondent No.1 has taken this Court through letter dated 16.06.2023, issued by the Respondent No.1 to Respondent No.3 seeking documents regarding the approval provided by him. It is stated by the learned Counsel for the Respondent that the said letter has been responded to and that the Respondent No.1 had been given all the necessary letters and has subsequently complied with by Order dated 10.07.2023.

12. Heard the Counsels for the parties and perused the material on record.

13. Respondents No.1 & 3 are taking contrary stands. The Union of India has appointed only one counsel to represent Respondents No.1 to 6. The completion certificate dated 16.10.2021 has been withdrawn by a letter dated 17.07.2023. The Deputy Secretary (B&NH), Govt. of Assam, sought for the details of correspondence between the Petitioner and the Respondent No.3. Respondent No.1 has replied to the said letter categorically stating that more than 49% of the work could not have been subcontracted.

14. As it stands today, the completion certificate given to the Petitioner had been withdrawn by the letter dated 17.07.2023 on the ground that he could not have subcontracted more than 49% of the work. The letter dated 17.07.2023 which has been issued by the Executive Engineer, PWD after



filing of the writ petition reads as under:



GOVT. OF ASSAM
OFFICE OF THE EXECUTIVE ENGINEER, P.W.D. GOLAGHAT NH DIVISION
GOLAGHAT

No: GNH/COM/250/325

Dated: - 17.07.2023

To,

M/s Kanti Prasad Mittal
H.O.165, Gupta Colony, Transport Nagar
Meerut, Uttar Pradesh

Subject: - Strengthening of pavement from km 61/00 to km 69/00 and widening of 1.5 m paved shoulder on either side and strengthening from km 103/00 to km 106/00 of NH-39 under Annual Plan for the year of 2018-19 under Golaghat NH Division in the State of Assam on EPC Mode (Job No- 039/AS/2018-19/186) (Reg: - **Withdrawal of the Certificate, having No. GNH/COM/250/416 dated 16-10-2021 issued by the office of the undersigned.**)

Reference: - 1) The SPEAKING ORDER dated: 15-06-2023 passed in compliance to the Hon'ble High Court of Delhi Order dated 31.05.2023.
2) Certificate having No- GNH/COM/250/416 dated 16-10-2021 issued by the office of the undersigned.

Dear Sir,

With reference to the above Speaking Order dated 15.06.2023 under **Reference No- 1** where the complete fact findings, evidences and factual positions have been mentioned in detailed with interpretation in compliance to Hon'ble High Court, Delhi order dated 31.05.2023, the undersigned now hereby withdraws the certificate having No- GNH/COM/250/416 dated 16-10-2021 issued to you by the office of the undersigned. The above certificate value was required to be claimed only 51% since it was known during the work execution that you will get maximum 49% value of subject work execution by the sub-contractor and has paid only 49% amount for it.

But, It has come to the knowledge based on the evidences and fact findings that you i.e. M/s Kanti Prasad Mittal, the prime Contractor has got more than 49% of subject work physically executed through the sub-contractor M/s Prachi Infra and Roads Private Limited and the said act has also been ratified by you by paying more than 49% of amount to the sub-contractor for the subject work execution. The GST Tax invoices for sub-contract code and Income Tax TDS certificates for sub-contract payment for subject work are one of the many evidences submitted and available on record. Further, you have also failed on all the previous occasions to provide any documentary evidences of material purchase in your name which could prove that the material was purchased by you for the subject work and was utilized by you only on the subject work. Instead of purchasing and using the material on subject work, it has been found through evidences that you have sold the material to your sub-contractor only.

Your above act of getting more than 49% of work execution and making payment of more than 49% for sub-contract execution to the sub-contractor have led to the breach of the contract clause 4.2(i) which states that **"The Contractor, whether Joint Venture or sole, shall not sub-contract any Works in more than 49% (forty nine per cent) of the Contract Price and shall carry out Works directly**

Handwritten signature and date 16/7/2023

Signature Not Verified

Digitally Signed By: HARIOM
SINGH KIRMOJIYA
Signing Date: 19.02.2024
19:16:28

W.P.(C) 9575/2023

Page 9 of 15



31 521
nder its own supervision and through its own personnel and equipment in at least 51% (fifty one per cent) of the Contract Price."

Thus for the reasons above, the undersigned hereby withdraws the certificate under Reference No- 2, having No. GNH/COM/250/416 dated 16-10-2021 issued to you with immediate effect.

Yours faithfully,

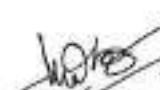

(NIRUPAM BORTHAKUR)
Executive Engineer, P.W.D.
Golaghat NH Division, Golaghat
Cum
Authority Representative (Job No- 186)

Memo No: GNH/COM/250/325-A

Dated: - 17.07.2023

Copy to:-

- ✓ 1. The Chief Engineer PWD, (NH Works) Assam, Chandmari, Guwahati- 3 for favour of kind information.
2. The Regional Officer, MoRT&H, Rajgarh Road, Chandmari, Guwahati- 3 for favour of kind information.
3. The Superintending Engineer PWD, Dibrugarh NH Circle, Dibrugarh cum Authority Representative (Job No- 186), for favour of kind information.
4. The Asst. Executive Engineer PWD, Barpathar NH Sub-Division, Barpathar cum Authority's Engineer (Job No- 186) for information and necessary action.


(NIRUPAM BORTHAKUR)
Executive Engineer, P.W.D.
Golaghat NH Division, Golaghat
Cum
Authority Representative (Job No- 186)

17/07/2023

15. Since the completion certificate issued in favour of the Petitioner stands withdrawn, consequently, the Performance Certificate given to Respondent No.7 also cannot survive and the impugned Order dated 15.06.2023 has become infructuous. The Performance Certificate to Respondent No.7 is automatically rendered nullified once the completion



certificate granted to the Petitioner, who is the main contractor, has been withdrawn.

16. Be that as it may, what troubles this Court is that when the subcontract was given on 16.03.2020, the Respondent No.3 was aware that it is more than the permissible limit. Respondent No.1, being the Chief Engineer cannot say that it was not aware as what was happening in the project. When W.P.(C) 7896/2023 was filed, no objections were raised by the Respondents No.1 to 6 regarding the subcontract of Respondent 7. It is only when Respondent No.1 wrote letter questioning the subcontract, the completion certificate has been withdrawn.

17. The facts of the present case cry loud of the foul play in the department. The Respondents have conferred an advantage to Respondent No.7 by permitting sub contract beyond the permissible limit.

18. The material on record indicates of corruption in the matter of awarding sub-contracts. Respondents No.1 & 3 are speaking in completely different tune but are represented by the same Counsel.

19. Admittedly, what has been sub-contracted is completely contrary to the terms of the contract. Respondents No.1 to 6 cannot be absolved of their duties and they are all collectively responsible for the work and the pecuniary advantage given to the Respondent No.7.

20. It is trite law that a High Court while exercising its powers under Article 226 of the Constitution can direct an inquiry by the CBI to investigate matters where there exists sufficient material to come to a prima facie opinion that there is a need to call for an inquiry, and where there is a question of absolute justice.

21. In Secretary, Minor Irrigation & Rural Engineering Services, U.P. vs. Sahngoo Ram Arya and Anr., (2002 SCC OnLine SC 580) a Division



Bench of the Apex Court noted that the High Court can direct CBI inquiry when there is a sufficient material to come to a prima facie conclusion of corruption. Relevant Portion reads as under:

“5. While none can dispute the power of the High Court under Article 226 to direct an inquiry by CBI, the said power can be exercised only in cases where there is sufficient material to come to a prima facie conclusion that there is a need for such inquiry. It is not sufficient to have such material in the pleadings. On the contrary, there is a need for the High Court on consideration of such pleadings to come to the conclusion that the material before it is sufficient to direct such an inquiry by CBI. This is a requirement which is clearly deducible from the judgment of this Court in the case of Common Cause [(1999) 6 SCC 667 : 1999 SCC (Cri) 1196] . This Court in the said judgment at paragraph 174 of the Report has held thus : (SCC p. 750, para 174)

“174. The other direction, namely, the direction to CBI to investigate ‘any other offence’ is wholly erroneous and cannot be sustained. Obviously, direction for investigation can be given only if an offence is, prima facie, found to have been committed or a person's involvement is prima facie established, but a direction to CBI to investigate whether any person has committed an offence or not cannot be legally given. Such a direction would be contrary to the concept and philosophy of ‘life’ and ‘liberty’ guaranteed to a person under Article 21 of the Constitution. This direction is in complete negation of various decisions of this Court in which the concept of ‘life’ has been explained in a manner which has infused ‘life’ into the letters of Article 21.”

6. It is seen from the above decision of this Court that the right to life under Article 21 includes the right of a



person to live without being hounded by the police or CBI to find out whether he has committed any offence or is living as a law-abiding citizen. Therefore, it is clear that a decision to direct an inquiry by CBI against a person can only be done if the High Court after considering the material on record comes to a conclusion that such material does disclose a prima facie case calling for an investigation by CBI or any other similar agency, and the same cannot be done as a matter of routine or merely because a party makes some such allegations. In the instant case, we see that the High Court without coming to a definite conclusion that there is a prima facie case established to direct an inquiry has proceeded on the basis of “ifs” and “buts” and thought it appropriate that the inquiry should be made by CBI. With respect, we think that this is not what is required by the law as laid down by this Court in the case of Common Cause [(1999) 6 SCC 667 : 1999 SCC (Cri) 1196].”

22. The same was followed by a decision by a Constitutional Bench of the Apex Court in State of West Bengal and Ors v. Committee for Protection of Democratic Rights, West Bengal and Ors, **2010 SCC OnLine SCC 297**, has stated that the High Courts while exercising their jurisdiction under Article 226 of the Constitution of India can initiate an enquiry. Relevant portion reads as

“69. In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an



obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly.70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these constitutional powers. The very plenitude of the power under the said articles requires great caution in its exercise. Insofar as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.”

23. It is evident from the directions by the Hon'ble Apex Court in Sahngoo Ram Arya (supra) and Committee for Protection of Democratic Rights (supra) that the High Courts have the power to direct an inquiry, and the present case also fits within the guidelines laid down by the Apex Court.

24. It is an admitted position by all the respondents that the subcontract for more than 49% of the work order was given and executed by respondent



7. Material on record also discloses that during the execution of the project, none of the respondents raised suspicion over the subcontract either being above the prescribed limit or raise any contentions regarding the subcontract not being approved by a competent authority. It is only after this court's directions in **W.P.(C) 7896/2023** that the above-mentioned contentions have been raised. It is evident from the discussion that the respondents are hand-in-glove and the officers of the department are engaging in corrupt practices.

25. Material on record also discloses that an FIR No. No.70/2020 was registered at PS Bosparthar, investigation of which had to be reordered by a different Investigating Officer and is still pending despite a lapse of more than 3 years.

26. In view of the above, this Court is of the opinion that this is an exceptional situation and directs the CBI to conduct an enquiry into the issue of the subcontracting of the work in question to the Respondent No.7 and also to take action in the matter in accordance with law and submit a report to this Court.

27. With these directions, the Writ Petition is dismissed. Pending applications, if any, also stand dismissed.

SUBRAMONIUM PRASAD, J

FEBRUARY 16, 2024

Rahul