



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

Date of decision: 6th FEBRUARY, 2024

IN THE MATTER OF:

+ **W.P.(C) 15370/2023**

PSK ENGINEERING CONSTRUCTION AND CO. Petitioner

Through: Ms. Hina Shaheen and Mr. Siddharth
Kaushik, Advocates.

versus

NATIONAL PROJECTS CONSTRUCTION CORPORATION
LIMITED & ANR. Respondents

Through: Mr. Paritosh Budhiraja, Ms. Divya
Singh and Ms. Pooja Sharma,
Advocates.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The instant writ petition has been filed with the following prayers:

a. Issue a Writ in the nature of Mandamus or any other appropriate Writ that this Hon'ble Court may deem proper, directing the Respondents to:

i. Pay a sum of Rs.1,33,95,393/- towards the balance value under the bill RAB 24th and Price Escalation RAB 4th & Final;

ii. Pay the balance value of Rs.16,14,436/- (inclusive of CGST of Rs.2,46,270/-) towards the 18th RA Bill dated 25.03.2020;

iii. Release and return the Original Fixed Deposit Receipts to the tune of Rs.14,60,000/- submitted towards Performance Bank Guarantee;



iv. Refund the Security Deposit to the tune of Rs.2,51,66,588/- lying with Respondent No. 1;

b. Issue a Writ in the nature of Mandamus or any other appropriate Writ that this Hon'ble Court may deem proper, declaring the action of the Respondents in not releasing the outstanding payments of Rs.4,16,36,417/- (Rupees Four Crore Sixteen Lakhs Thirty Six Thousand Four Hundred and Seventeen Only) for the work executed by the Petitioner, as illegal, arbitrary, malafide, unjust, oppressive, contrary to the principles of natural justice and to strike off the wordings of Clause 37 of the Contract which are arbitrary and violative inter alia of Article 14 of the Constitution of India and further direct the Respondents to pay interest at the rate of 24% per annum on the above said sums from the due date till the date of payment in full;

c. Direct the Respondents to deposit the said amount or part thereof Rs.4,16,36,417/- (Rupees Four Crore Sixteen Lakhs Thirty Six Thousand Four Hundred and Seventeen Only) in court during the pendency of this Petition;

d. Grant compensation to the Petitioner for the loss caused by the Respondents by illegally withholding the payments since 03.04.2021;

e. Pass any other or further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. The facts, in brief, leading to the filing of the instant writ petition are that the Respondent No.1/National Projects Construction Corporation Limited invited a Pre-Qualification bid on 03.07.2017 for Construction of various building and external development works at Rajiv Gandhi National



Institute of Youth Development at Sriperumbudur Post, Tamil Nadu/Respondent No.2 herein. The Petitioner participated in the bidding process and submitted its bid. The bid of the Petitioner was accepted by Respondent No.1 on 31.10.2017 and a Letter of Intent was issued to the Petitioner. Pursuant to that the performance guarantee for a sum of Rs.2,24,70,088/- and the Bank Guarantee for a sum of Rs.26,96,500/- were given by the Petitioner. On 24.11.2017, a contract agreement was signed between the Petitioner and the Respondent No.1 for the contract price of Rs.50,33,29,956.89/-. According to the Petitioner, the entire work has been completed to the satisfaction of Respondent Nos.1 and 2 and the final RA bills have been raised by the Petitioner on 03.04.2021. The defect liability period was expired on 05.09.2022. Discussion regarding the payment of amount took place between the Petitioner and the Respondent No.1 on 15.11.2022. It is stated that the IIT Madras being the expert body and whose report was sought for quality control has given its report stating that the quality of construction is satisfactory and the same is as per applicable laws and safety standards.

3. At this juncture, it is pertinent to mention the Clause 37 of the contract entered into between the parties which deals with as to how the payments are to be made. Clause 37 of the contract reads as under:

"37 PAYMENTS

37.1 The bill shall be submitted by contractor each month on or before the date fixed by the Engineer-in-charge for all works executed in previous months. The contractor shall prepare computerized bills using the program as approved by Engineer-in-charge as per prescribed format/pro-forma. The contractor shall



submit five numbers of hard copies and one soft copy of floppy/CD for all bills subject to clause 37.3 herein below, the payment due to the contractor shall be made within fifteen days of getting, the measurements verified from the Engineer-in-Charge or his subordinate/ representative and certification of bill by the Engineer-in-Charge.

37.2 All running payments shall be regarded as payments by way of advance against the final payment only and not as payments for work actually done and completed and / or accepted by NPCC and shall not preclude the recovery for bad, unsound and imperfect or unskilled work to be removed and taken away and reconstructed or re-erected or be considered as an admission of the due performance of the Contract, or any part thereof, in this respect, or the accruing of any claim, nor shall it conclude, determine or affect in any way the powers of the NPCC under these conditions or any of them as to the final settlement and adjustments of the accounts or otherwise, or in any other way vary/ affect the contract. The contractor shall submit the final bill within three months of the completion of work, otherwise NPCCs certificate of the measurement and of the total amount payable for the work accordingly shall be final and binding on contractor.

Each Running Bills should be accompanied by two sets of at-least 20 (twenty) photographs as per direction of Engineer-in-charge taken from various points depicting status of work as on Report/ Bill date along with Monthly Progress Report for the concerned month in the pro-forma to be given/ approved by Engineer-in-Charge. Intermittent progress Photographs as and when required shall also be provided by the Contractor at his own cost as per direction of Engineer-In-Charge. No payment of running account bill shall be released unless it is



accompanied by progress photographs and Monthly Progress Report as above.

37.3 It is clearly agreed and understood by the Contractor that notwithstanding anything to the contrary that may be stated in the agreement between NPCC and the contractor, the contractor shall become entitled to payment only after NPCC has received the corresponding. payment(s) from the client/ Owner for the work done by the contractor. Any delay in the release of payment by the client/ Owner to NPCC leading to a delay in the release of the corresponding payment by NPCC to the contractor shall not entitle the contractor to any compensation/ interest from NPCC.

37.4 All payments shall be released by NPCC by Payee's Account cheque from any of its offices in India directly at the address notified by the Contractor (Postage charges shall be charged to the contractors account). In case of Payments is made by Demand Draft at the request of the Contractor, Bank Commission charges shall be debited to the account of contractor."

(emphasis supplied)

4. Since the payments were not released by Respondents, the Petitioner has approached this Court for a direction to the Respondents to release the payments for the work done by the Petitioner, release of Original Fixed Deposit receipts and the security deposit. The Petitioner has also challenged the Clause 37 of the contract as it is arbitrary and violative of Article 14 of the Constitution of India.

5. Learned Counsel appearing for the Petitioner contends that the Respondents are acting in a high handed and arbitrary manner and are not



releasing the payments even though the Petitioner has completed the work to their satisfaction. She states that the IIT Madras, whose report had been sought for to ascertain the quality and standard of work, has given its report stating that the work done by the Petitioner is satisfactory and the project has been executed adhering to the applicable laws and standard and has met the safety standards.

6. Learned Counsel for the Petitioner further states that the Petitioner has no say on the terms of the contract, and therefore, Clause 37 of the contract is arbitrary, discriminatory and unconscionable. She states that since the Petitioner has no say on the terms of the contract and there was unequal bargaining power, the Petitioner cannot be penalised and the payments ought to be released in favour of the Petitioner.

7. It is also submitted by the learned Counsel for the Petitioner that the Petitioner may not be relegated to take recourse of filing a suit for release of payments. She places reliance upon various Judgments passed by the Apex Court wherein the Apex Court has held that even in the matters of contract if the State acts in violation of Article 14 of the Constitution of India, writ courts can entertain and adjudicate the dispute and should not relegate the parties to avail the remedy of filing a suit for recovery of amount.

8. *Per contra*, learned Counsel appearing for the Respondents states that the Doctrine of Unequal Bargaining Power cannot be raised in pure commercial disputes. He states that the Petitioner with open eyes has entered into the contract and accepted the terms of the contract. He states that the payment can be made to the Petitioner only after it is approved by Respondent No.2. He also states that there are disputed question of facts in the present case.



9. Learned Counsel for the Respondents draws attention of this Court to certain communications i.e., letters dated 20.07.2023 and 27.07.2023 between the parties showing that there are certain defects in the work which needs to be rectified. The said letters reads as under:-

Ref.No.700008/NPCC/PSK 242

Dated: 20.07.2023

The Managing Director,
PSK Engineering Construction & Co.
Nadukombai post,
Kalappanaickenpatti
Namakkal-637404

Ref: - Final TPQA report conducted by team of IIT Madras Rajiv Gandhi National Institute Youth Development, - Sriperumbudur.

Sub: - Construction of various buildings and external development works in Rajiv Gandhi National Institute of Youth development, Sriperumbudur – Rectification to be made in compliance to the observations made in final TPQA report by team of IIT Madras - reg.

Dear Sir,

With reference to the above cited subject and Final TPQA report by team of IIT Madras. Wherein, it is directed to rectify the observations made during site inspection at project site. The final TPQA report is herewith enclosed for your reference.

In view of the above, it is once again requested to attend the issue at the earliest and submit a compliance report to this office which will in turn enable us to process the 24th R.A bill and cater for smooth closure of contract.

Thanking you,

Yours faithfully

Dy. Manager (C)
RGNIYD Unit,
Sriperumbudur T.N

Copy to.

- 1) Zonal Manager, southern zone, NPCC limited, Bangalore - for kind formation please
- 2) Sr. Manager, southern zone, NPCC limited, Bangalore - for kind formation please
- 3) Manager(Works), southern zone, NPCC limited, Bangalore - for kind formation please



Ref.No.700008/NPCC/PSK/ 423

Dated: 20.07.2023

The Managing Director,
PSK Engineering Construction & Co.
Nadukombai post,
Kalappanaickenpatti
Namakkal-637404

Sub: Construction of various buildings and external development works in Rajiv Gandhi National Institute of Youth development, Sriperumbudur – **Rectification in UPS System** - reg.

Ref: 1) e-mail dated 27.05.2023
2) e-mail dated 17.07.2023
3) e-mail dated 20.01.2023
4) e-mail dated 26.04.2023
5) e-mail dated 27.03.2023
6) e-mail dated 24.02.2023

Dear Sir,

This has a reference to the above cited subject and e-mail references, wherein it was repeatedly directed to rectify the UPS system at new Class room building, 2BHK staff quarters and seminar hall. However, in spite of the several reminders the issue still remains unattended due to which the operations and working is totally hampered.

In view of the above, it is once again requested to attend the issue at the earliest and submit a compliance report to this office which will in turn enable us to process the 24th R.A bill and smooth closure of contract.

Thanking you,

Yours faithfully

Dy. Manager (C)
RGNIYD Unit,
Sriperumbudur T.N

Copy to.

- 1) Zonal Manager, southern zone, NPCC limited, Bangalore - for kind formation please
- 2) Sr. Manager, southern zone, NPCC limited, Bangalore - for kind formation please
- 3) Manager(Works), southern zone, NPCC limited, Bangalore - for kind formation please



Ref.No.700008/NPCC/PSK/ 266

Dated: 27.07.2023

The Managing Director,
PSK Engineering Construction & Co.
Nadukombai post,
Kalappanaickenpatti
Namakkal-637404

Sub: Construction of various buildings and external development works in Rajiv Gandhi
National Institute of Youth development, Sriperumbudur – Submission of GST - reg.

Ref: 1) 70000/NPCC/PSK/423 dated 20.07.2023
2) 70000/NPCC/PSK/242 dated 20.07.2023

Dear Sir,

With reference to the subject work, it is observed that you have filled GSTR-1 on 30.04.2023 for a total amount of Rs 1, 33, 95,393.04 (2 entries) for which no bills were raised to NPCC. Furthermore it is again highlighted that NPCC cannot finalize the bills until the clients i.e. RGNID requirements are fulfilled as per contractual obligation and the TPQA (Thirty party quality assurance) observation made by IIT MADRAS is attended which was already converged to your good office vide correspondence cited above as ref 1 & 2

In view of the above, it is once again requested to kindly look into this matter and attend the same at the earliest and reverse the same in your GST return/portal. Moreover bill will be process at NPCC as per the proper procedure & receipt of the fund from client. (Copy of GSTR-1 paid enclosed)

Thanking you,

Yours faithfully

हेमंत गेडम / HEMANT GEDAM
प्रबंधक (वित्त) / Manager (Finance)
एन.पी.सी.सी. लिमिटेड / N.P.C.C LIMITED
(भारत सरकार का उद्यम) / (A Govt. of India Enterprises)
दक्षिण क्षेत्रीय कार्यालय / Southern Zonal Office
बेंगलुरु, कर्नाटक / Bengaluru-560 079, Karnataka

Copy to.

- 1) Zonal Manager, southern zone, NPCC limited, Bangalore - for kind formation please
- 2) Sr. Manager, southern zone, NPCC limited, Bangalore - for kind formation please
- 3) Manager (Works), southern zone, NPCC limited, Bangalore - for kind formation please

10. Heard learned Counsel appearing for the Parties and perused the material on record.



11. It is well settled that the parties entering into commercial contracts are well aware of the terms of the contract and after entering into the contract, it is not open for the parties to turn around and question a particular term of the contract unless the same is arbitrary, discriminatory and unconscionable. If a person enters into a contract with his open eyes, he cannot be permitted to challenge the contract under Article 226 of the Constitution of India. Law in this regard is well settled that where the rights which are sought to be adjudicated are purely a private character and disputes based on pure contractual relationship where there is no public duty element, no writ of mandamus can be claimed.

12. The Apex Court in Kerala State Electricity Board vs. Kurien E. Kalathil, (2000) 6 SCC 293 has observed as under:

“10. We find that there is a merit in the first contention of Mr. Raval. Learned Counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in



coming to the conclusion that the contract in question was statutory in nature.

*11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. **Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition.*** (emphasis supplied)

13. A Co-ordinate Bench of this Court in MEP Infrastructure Developers Ltd. vs. South Delhi Municipal Copr & Ors, **2023 SCC OnLine DEL 2088**, while dealing with a case where a person who participated in a tender and after participating in the tender chose to turn around and question the terms



of tender, has observed as under:

*"24. But at the same time, it is also trite law that the award of contract whether by a State or by a private party is essentially commercial transaction having its own terms. The tender is an invitation to offer and if a person is interested in participating in the tender, the person, after scrutinizing all the requirements of the tender, gives his willingness to participate in the tender by bidding in the tender which is a term of an offer and the State accepts the best bidder which results in a contract. The person who bids in the tender and makes an offer with open eyes is aware of the obligations to be performed under the contract. **After participating in the tender and after being a successful bidder, it is not open for the person who is the successful bidder to then turn around and state that the clauses were unfair or have become unworkable.** If there are clauses in the tender to resolve the disputes then the parties are normally expected to invoke those clauses which in the common parlance are called as dispute resolution clauses. It is not uncommon that in executory contracts, there is an element of uncertainty and there can be events which can make the contract not viable. There may or may not be clauses in the contract which provides for warranty/guarantee in such terms. The person, who bids in the contract, has to take into account the risks that can occur in future and resort to available remedies under the contract itself. The parties can sit on a table for negotiation and may go for a novation of contract. If such discussion fails, then the parties have to invoke such remedies available under the contract and prove their case by leading oral and documentary evidence."*

(emphasis supplied)

14. It is now well settled that a writ petition does not lie for recovery of amount. Respondent No.1 can pay the amount to the Petitioner only after it



is approved by Respondent No.2. The scheme of payment has been accepted by the Petitioner with its open eyes. The Petitioner, therefore, has to file a suit for recovery of amount and satisfy the Court that the amount is due and payable. Certain correspondences as shown by the Respondents do indicate that some defects in the work are still to be cured and rectified by the Petitioner. The issue as to whether all the defects have been rectified by the Petitioner to the satisfaction of Respondent No.2 or not, is a pure question of fact which has to be established only by leading documentary and oral evidence and the writ courts cannot entertain disputed questions of facts.

15. The contention of the Petitioner that there is an unequal bargaining power in the contract, and therefore, Clause 37 of the contract should be struck down cannot be accepted. The Apex Court in S.K. Jain v. State of Haryana, (2009) 4 SCC 357 has observed as under:

“8. It is to be noted that the plea relating to unequal bargaining power was made with great emphasis based on certain observations made by this Court in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] . The said decision does not in any way assist the appellant, because at para 89 it has been clearly stated that the concept of unequal bargaining power has no application in case of commercial contracts.” (emphasis supplied)

16. The Apex Court in Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd., (2011) 10 SCC 420 has observed as under:

“31. The applicants have not pleaded that there has been any kind of misrepresentation or fraud or coercion on the part of the respondents. Nor is it their case that payment was sent by the respondents without



any settlement/agreement with the applicants, and was a unilateral act on their part. The applicants reached the final settlement with their eyes open and instructed their banker to accept the money as proposed by the respondents. The proposal itself was on the basis of Clause 5 of the purchase contract which provided for price adjustment. For a period of three months after acceptance of the money under the full and final settlement, the applicants did not raise any dispute in respect of the agreement of price adjustment. In such a fact situation, the plea that instructions were given by the applicants to the banker erroneously, being an afterthought, is not worth acceptance.

32. The transaction stood concluded between the parties, not on account of any unintentional error, but after extensive and exhaustive bilateral deliberations with a clear intention to bring about a quietus to the dispute. These negotiations, therefore, are self-explanatory steps of the intent and conduct of the parties to end the dispute and not to carry it further.

33. In R.N. Gosain v. Yashpal Dhir [(1992) 4 SCC 683 : AIR 1993 SC 352] this Court has observed as under : (SCC pp. 687-88, para 10)

“10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that ‘a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage’.”



34. A party cannot be permitted to “blow hot and cold”, “fast and loose” or “approve and reprobate”. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide Nagubai Ammal v. B. Shama Rao [AIR 1956 SC 593] , CIT v. V.MR.P. Firm Muar [AIR 1965 SC 1216] , Maharashtra SRTC v. Balwant Regular Motor Service [AIR 1969 SC 329] , P.R. Deshpande v. Maruti Balaram Haibatti [(1998) 6 SCC 507 : AIR 1998 SC 2979] , Babu Ram v. Indra Pal Singh [(1998) 6 SCC 358 : AIR 1998 SC 3021] , NTPC Ltd. v. Reshmi Constructions, Builders & Contractors [(2004) 2 SCC 663 : AIR 2004 SC 1330] , Ramesh Chandra Sankla v. Vikram Cement [(2008) 14 SCC 58 : (2009) 1 SCC (L&S) 706 : AIR 2009 SC 713] and Pradeep Oil Corpn. v. MCD [(2011) 5 SCC 270 : (2011) 2 SCC (Civ) 712] .)

35. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approve and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.” (emphasis supplied)

17. Applying the aforesaid law in the facts and circumstances of the present case, the Petitioner and the Respondent No.1 entered into a contract. There is a specific clause in the contract as to how payments have to be made. If the Petitioner was not satisfied with terms of the payments in the



contract it could have chosen not to enter into the contract. There was no coercion or misrepresentation on the part of the Respondents. After entering into the contract and being fully aware of the terms as to how the payments have to be made, the Petitioner accepted it and, therefore, now the Petitioner cannot challenge the very same contract. This is not a case of unequal bargaining power. The contract has been entered into between the parties on principle to principle basis.

18. It is equally well settled that for recovery of money under a contract, the correct remedy is to file a suit. It cannot be said that it was a statutory duty of the Respondent Nos.1 and 2 to make payments under a contract and that too when the facts of the present case due indicate that there are some disputes regarding removal of defects which have to be substantiated by leading evidence.

19. Resultantly, the writ petition is dismissed, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

FEBRUARY 06, 2024

S. Zakir