IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.346 of 2023

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Lalan Kumar Son of Shri Mahendra Prasad Singh, resident of mohalla- Radha Rani Sinha Road, Adampur, P.S.- Adampur, District- Bhagalpur- 812001.

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Building Construction Department, Government of Bihar, Patna.
2. The Chief Engineer (South), Building Construction Department, Government of Bihar, Patna.
3. The Superintendent Engineer, Building Zone, Bhagalpur, Government of Bihar.
4. The Executive Engineer, Building Division, Bhagalpur, Government of Bihar.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr.Prachi Pallavi
For the Respondent/s	:	Mr.Manoj Kumar Ambastha (Sc 26)

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CORAM: HONOURABLE MR. JUSTICE A. ABHISHEK REDDY

ORAL ORDER

15 03-09-2025 Heard the learned counsel for the parties.

The present writ petition has been filed for the following relief(s):-

> "*(i) Issuance of a writ of certiorari, quashing the order dated 16.11 2022, as contained in memo no. 1838 (Annexure Page 174, passed by the Chief Engineer (South), Building Construction Department. Bihar. Patna, by which, the application of the petitioner, for payment of incentive bonus a 1 per cent per month amounting to Rs. 25,15,668/-, for early completion of work, in compliance with Clause 24 of the Agreemem No. 2 (SBD) 2018-2019 executed between the parties has been rejected on flimsy and non-est grounds.*
>
> *(ii) Issuance of a writ of mandamus, directing the respondents to*

> *comply with Clause 2A of the Agreement No. 2 (SBD) 2018-2019, executed between the parties and reimburse to the petitioner, incentive bonus a 1 per cent per month. of the tendered value amounting to Rs. 25.15,668/- with accrued interest from the date it became due till the date of actual payment, as an incentive for early completion of the work.*
>
> *(iii) To pass such other order(s), direction(s) as your Lordships may deem fit and proper in the facts and circumstances of the case."*

3. It is the case of the petitioner that the petitioner has been granted work order for the purpose of construction of D-type residential building G+3 (3 Units of D Type) in Sale Tax Campus at Adampur in the District-Bhagalpur on 31.12.2018 and an agreement was entered by the parties on 14.02.2019. That as per the said work order and the agreement, the petitioner was obligated to complete the project in 14 months i.e., by 30.06.2020. That the petitioner has completed the work by 20.02.2020 and handed over the possession on 29.02.2020 (Annexure-P/3).

4. Learned counsel for the petitioner has stated that as per terms and conditions of the contract, more specifically, Clause 2A, the petitioner is entitled for incentive bonus as he has completed the project before the stipulated date. However, the authority *vide* impugned letter dated 16.11.2022 have rejected the claim of the petitioner on a legally untenable ground. Learned counsel has taken this Court through the various clauses in the agreement entered between the parties more specifically, Clause 2A (Annexure-4 & 4/1). Learned counsel has submitted that the rejection of the incentive bonus payable to the petitioner for early completion of the work in terms of the Clause 2A of the agreement is totally illegal, bad, arbitrary exercise of powers and perverse. Learned counsel has therefore, prayed this Hon'ble Court to allow the present writ petition and direct the respondents to calculate the incentive bonus, that the petitioner is entitled to for completion of the project well before the stipulated time.

5. Learned counsel further submits that the petitioner could not submit his application within the stipulated time due to the lock down imposed by the State on account of the COVID-19 Pandemic situation. Learned counsel has stated that entire nation was under lock down from March 2020 till June 2020 under the first phase and again there were number of lock downs till end of 2021. Immediately, thereafter, the petitioner has filed his application for the grant of the incentive bonus. Learned counsel has further stated that the petitioner cannot be punished for the lapses committed by the authority in not ticking the relevant portion of the Schedule-F of the agreement. Learned counsel has stated that the authority instead of granting the incentive bonus to the petitioner are coming up with some lame excuse or the other to deny the payment of the incentive bonus.

6. Learned counsel for the petitioner has relied on the following judgments of the Hon'ble Supreme Court in support of his case.

> "(i) In the case of ***Bharat Petroleum Corporatin Ltd. Vs. Great Eastern Shipping Co. Ltd.*** reported in ***2008 1 SCC 503.***
>
> ***(ii)*** In the case of ***Unitech Limited Vs. Telangana State Industrial Infrastructure Corporation (TSIIC) and others*** reported in ***2021 SCC OnLine SC 99.***
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> ***(iii)*** In the case of ***Uttar Pradesh Power Transmission Corporation Ltd. and another Vs. CG Power & Industrial Solutions Ltd and another*** reported in ***(2021) 6 SCC 15***
>
> ***(iv)*** In the case of ***ABL International Ltd. and another Vs. Export Credit Guarantee Corporation of India Ltd. and others*** reported in ***(2004) 3 SCC 553.***"

7. *Per contra*, the learned counsel appearing on behalf of the respondents has vehemently opposed the very maintainability of the writ petition and the prayer sought for in the present CWJC. Learned counsel has stated that the petitioner on an earlier occasion has approached this Hon'ble Court by way of CWJC No. 4654 of 2022 and the same was disposed of *vide* order dated 22.04.2022 wherein, this Court has directed the petitioner to make a suitable representation to the Chief Engineer (South) Building Construction Department, Government of Bihar and further directed the authority to consider the same in accordance with law.

8. That the petitioner pursuant to the above said order of the High Court has filed his representation and the authority duly taking into consideration the totality of the circumstances have rejected the claim of the petitioner. Learned counsel has stated that the Clause 2A cannot be invoked by the petitioner and the same has to be read with Schedule F of the agreement. Further, it is stated by the counsel for the respondents that the applicability of the Clause 2A is also very doubtful in the present case as the agreement does not contain any indication that the said clause is applicable as the words “Yes/ No” have not been ticked in the Schedule F. Further, it is argued by the counsel that the petitioner has made his application only on 16.05.2020 which is beyond the period envisaged under the agreement. That the petitioner was obligated to file his claim application along with the completion certificate but the petitioner has failed to do so. Further, the learned counsel for the respondents has vehemently argued that the CWJC is liable to dismissed on the sole ground that a writ does not lie in respect of contractual matters and that there are disputed questions of fact involved which cannot be adjudicated under Article 226 of the Constitution of India. Learned counsel has therefore, prayed this Hon'ble Court to dismiss the present writ petition.

9. In order to appreciate the issue involved in the present writ petition, it is necessary to extract the relevant portions of the agreement, more specifically, Clause 2A which reads as under;

> *"In case, the contractor completes the work ahead of scheduled completion time, a bonus @ 1% (one percent) of the tendered value per month computed on per day basis, shall be payable the contractor, subject to a maximum limit of 5% (five percent) of the tendered value. The amount of bonus, if payable, shall be paid along with final bill after completion of work. Provided always that provision of the Clause 2A shall be applicable only when so provided in 'Schedule F'."*

10. Further, under the proforma of the Schedule which is annexed along with the said contract at pg. 108 reads as under;

> *Schedule 'F'*
> *Reference to General Condition of Contract.*
> *Name of Work: As per above Table*
> *Estimated cost of work : as per Financial Bid*
> *i) Earnest Money : Rs. 2% up to 10 Crores & 1 percent of the amount above 10 crores As per Financial Bid*
> *ii) Performance Guarantee: 2% of tendered value including earnest money.*

iii) Security Deposit : 8% of tendered value.
iv) Defect Liability period : 3 years after date of completion
v) Rate of Interest ; Prevailing rate of interest charged by RBI Bank at the time of agreement
General Rules and Direction: Officer inviting tender E.E., Building Division Bhagalpur
Maximum percentage for quantity of items of work to be executed beyond which rates are to be determined in accordance with Clauses 12.2 & 12.3 See Below
Definitions:
2(v) Engineer-in-Charge Executive Engineer Building Division, Bhagalpur
2(x) Percentage on cost of materials and labour to cover all overheads and profits.
10%
2(xi) Standard Schedule of Rates S.R. of BCD, Bihar, Patna
2(xii) Department & Employer BCD, Govt. of Bihar, Patna
9(ii) Standard PWD Contract Form PWD 2/3 as modified & corrected upto
"Clause 2
Authority for fixing compensation under Clause 2.
Clause 2A
Whether Clause 2A shall be applicable. Yes/No
…..
…..
Time Allowed for execution of work 18 Months"

11. A reading of the above provision makes it abundantly clear that in case the contractor completes the work within the time stipulated i.e. within 18 months, he is entitled for a bonus of one percent of the tendered value subject to the maximum limit of 5% of the tendered value. The contention of the respondent authority that the applicability of the Clause 2A is doubtful solely on the basis that there is no striking of the word of “Yes/ No” in the Schedule F is without any legal basis. The incentive bonus cannot be denied to the petitioner solely on the ground that the authorities at the time of entering into the contract have forgotten to tick the relevant portion of Schedule-F. The petitioner cannot be denied the said benefit due to the lapses committed by the respondents. The other contention raised by the authority that the nature of the work was very small and therefore, the Executive Engineer who has entered into the agreement providing for incentive bonus was not correct in doing so is also without any legal basis, the incentive cannot be denied on the ground that the authority intends to take some departmental action against the said Executive Engineer. Once an agreement has been entered into by the parties, the same is binding on the parties and they are bound to implement the same in true letter and spirit. More so when the works under the said contract have already been completed.

12. As rightly pointed out by the learned counsel for the petitioner, the entire country was under the grip of Covid-19 Pandemic from March 2020 till June 2020**,** the said situation continued till the end of 2021 when the total lock down was fully lifted. In that particular situation, the authorities cannot expect a person to venture out for filing the application for grant of the incentive bonus. The Hon'ble Supreme Court duly taking into consideration the Covid-19 Pandemic situation and the lock down imposed by the Government has condoned the delay in filing cases, applications, appeals, granted moratorium of the loans for the said period. Therefore, the delay in filing of the application by the petitioner cannot be a ground for denying the incentive bonus to the petitioner.

13. The Hon'ble Supreme Court in the case of ***Bharat Petroleum Corporatin Ltd. Vs. Great Eastern Shipping Co. Ltd.*** reported in ***2008 1 SCC 503*** has held as under;

> *"19. It is, no doubt, true that the general rule is that an offer is not accepted by mere silence on the part of the offeree, yet it does not mean that an acceptance always has to be given in so many words. Under certain circumstances, offeree's silence, coupled with his conduct, which takes the form of a positive act, may constitute an acceptance-an agreement sub silentio. Therefore, the terms of a contract between the parties can be proved not only by their words but also by their conduct.*
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> *20. In our view, the principle of sub silentio is clearly attracted in the present case. As noted above, after the extended period of charter party dated 6-5-1997 had come to an end on 31-8-1998 and the bids received pursuant to fresh invitation were pending finalisation, vide their letter dated 12-10-1998, the respondent had informed the appellant that they were agreeable to apply new rates for use of the vessel from 1-7-1998 provided all the nine vessels are used. However, on 31-10-1998, the appellant faxed IOC's message informing them of the extension of the existing coastal tanker*

fleet for the month of October 1998 at reduced rates viz. 80% of the charter party rates prevailing till 30-8-1998. On receipt of the said letter, the respondent vide their letter dated 5-11-1998 protested against the revision of the rates for the vessel not being considered under the new bid and stated in unequivocal terms that it was not possible for them to accept the proposal of the Oil Coordination Committee, communicated to them vide letter dated 12-10-1998. Yet again while responding to the appellant's fax dated 31-12-1998, whereby the respondent was required to sign a provisional charter party by 4-1-1999, vide their letter dated 4-1-1999, the respondent, pointed out to the appellant that usual practice is that pending finalisation of the new charter, the existing terms and conditions of the charter party continue to apply and, therefore, they were willing to sign the agreement as contemplated by the appellant based on the existing terms and conditions. It was suggested that an agreement may be signed between them for the period."

14. The Hon'ble Supreme Court in the case of ***Unitech Limited and Ors. Vs. Telangana State Industrial Infrastructure Corporation (TSIIC) and Ors.*** reported in ***2021 SCC OnLine SC 99.***

"E.1. Maintainability of the writ petition under Article 226

38 Much of the ground which was sought to be canvassed in the course of the pleadings is now subsumed in the submissions which have been urged before this Court on behalf of the State of Telangana and TSIIC. As we have noted earlier, during the course of the hearing, learned Senior Counsel appearing on behalf of the State of Telangana and TSIIC informed the Court that the entitlement of Unitech to seek a refund is not questioned nor is the availability of the land for carrying out the project being placed in issue. Learned Senior Counsel also did not agitate the *ground that a remedy for the recovery of moneys arising out a contractual matter cannot be availed of under Article 226 of the Constitution. However, to clear the ground, it is necessary to postulate that recourse to the jurisdiction under Article 226 of the Constitution is not excluded altogether in a contractual matter. A public law remedy is available for enforcing legal rights subject to well-settled parameters.*

39 A two judge Bench of this Court in ABL International Ltd. v. Export Credit Guarantee Corporation of India7 [ABL International] analyzed a long line of precedent of this Court8 to conclude that writs under Article 226 are maintainable for asserting contractual rights against the state, or its instrumentalities, as defined under Article 12 of the Indian Constitution. Speaking through Justice N Santosh Hegde, the Court held:

> *"27. ...the following legal principles emerge as to the maintainability of a writ petition:*
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> *(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."*

40. This exposition has been followed by this Court, and has been adopted by three judge Bench decisions of this Court in State of UP v. Sudhir Kumar9 and Popatrao Vynkatrao Patil v. State of Maharashtra10. The decision in ABL International, cautions that the plenary power under Article 226 must be used with circumspection when other remedies have been provided by the contract. But as a statement of principle, the jurisdiction under Article 226 is not excluded in contractual matters. Article 23.1 of the Development Agreement in the present case mandates the parties to resolve their disputes through an arbitration. However, the presence of an arbitration clause within a contract between a state instrumentality and a private party *has not acted as an absolute bar to availing remedies under Article 226.11 If the state instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers of the Article 226 of the Constitution would lie. This principle was recognized in ABL International:*

> *"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.***
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> ***(emphasis supplied)"***

41. Therefore, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the *simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked. The jurisdiction under Article 226 was rightly invoked by the Single Judge and the Division Bench of the Andhra Pradesh in this case, when the foundational representation of the contract has failed. TSIIC, a state instrumentality, has not just reneged on its contractual obligation, but hoarded the refund of the principal and interest on the consideration that was paid by Unitech over a decade ago. It does not dispute the entitlement of Unitech to the refund of its principal."*

15. In this particular case, there are no disputed questions of fact involved which require any evidence to be adduced by the parties. The date of agreement, date of completion of the work, date of handing over possession, the recommendation of the Executive Engineer are not denied by the respondents. The issue that has to be decided is on the basis of the interpretation of clauses in the agreement and there is no ambiguity with the same. Therefore, the contention of the counsel for the respondents that the CWJC is liable to be dismissed on the ground that in respect of contractual matters, writ petition will not lie is totally misplaced and misconceived. The Hon'ble Supreme Court in the above cited judgments has clearly stated that in respect of contractual matter also the writ petition can be entertained by the High Court.

16. Having regard to the above mentioned facts and circumstances, the writ petition is allowed and the impugned order dated 16.11.2022 is set aside consequentially, there shall be a direction to the respondent authority to calculate the incentive bonus payable to the petitioner as per the terms of Clause 2A. The authority shall pay the same to the petitioner as expeditiously as possible preferably within a period of eight weeks from the date of receipt of a copy of this order.

17. In case the authority does not pay the amount within the stipulated time, the petitioner would be entitled to simple interest at the rate of 6% per annum from the date of submission of his application for the incentive bonus till the date of actual payment.

(A. Abhishek Reddy, J)

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