IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :-   Hon'ble Justice Amrita Sinha

<u>WPA 21370 of 2024</u>

M/s. Great Sports Tech Ltd.
Vs.
The State of West Bengal & Ors.

For the writ petitioners	:-	Mr. Piyush Chaturvedi, Adv. Mr. Sayan Dev Kumar, Adv. Ms. Priyakshi Banerjee, Adv.
For State	:-	Mr. Lalit Mohan Mahata, AGP Mr. Prasanta Behari Mahata, Adv.
For SAI	:-	Mr. D.N. Ray, Sr. Adv. Mr. Sourav Halder, Adv.
Hearing concluded on	:-	21.02.2025
Judgment on	:-	25.03.2025

<u>Amrita Sinha, J.:-</u>

1. The facts of the instant case are recorded in the order dated 17th January, 2025. The petitioner prays for a direction upon the respondent authorities to release the admitted dues along with interest. Prayer has also been made for releasing the earnest money deposit and the security deposit.

2. The dues of the petitioner, though admitted by the Public Works Directorate (PWD) i.e., the authority issuing the contract, hasn't been paid because the Sports Authority of India (SAI) is not releasing payment to PWD on the ground that Customs Duty exemption has not

been obtained by PWD. Had the Customs authority permitted exemption of duty, then the amount to be paid by SAI will be reduced to some extent. Both the respondent authorities are passing the buck to the other for obtaining the exemption certificate from the Customs authority. The petitioner has been caught in the fray and is left without payment for the work done. The earnest money deposit and the security deposit are also not being refunded even though the defect liability period is long over.

3. The report of the Executive Engineer, PWD dated 7th December, 2010 clearly mentions that obtaining the Customs Duty exemption certificate is the responsibility of the owner i.e. SAI but the said exemption certificate could not be obtained by SAI. As there was urgency in relaying the synthetic athletic track at SAI, the petitioner had to import materials from other countries for which the petitioner paid the customs duty to avoid payment of demurrage charges and for timely conclusion of the offered work. A proper utilisation certificate was issued by the Executive Engineer and completion cum performance certificate was also issued in favour of the petitioner.

4. Learned senior counsel representing SAI asserts that till the exemption certificate is issued by the Customs authority, payment cannot be made in favour of PWD as the money paid to the petitioner till now, is in excess of the outstanding amount.

5. An issue has been raised by SAI with regard to the maintainability of the writ petition. It has been submitted that the writ petition is not

maintainable as the same is for recovery of money claim. The petitioner failed to avail the statutory alternative remedy to pursue with the Customs authority for obtaining the exemption certificate.

6. It has been submitted that the petitioner, in a separate contract, proceeded with the Customs authority for obtaining the exemption certificate, but in the instant case, the petitioner deliberately failed to obtain such certificate. For the petitioner's failure to obtain the exemption certificate, SAI cannot be directed to bear extra burden of Customs duty.

7. It has been stressed that public money ought not to be squandered. The petitioner's diligence in obtaining the exemption certificate has been questioned.

8. Learned senior counsel representing SAI relies on the judgment delivered by the Hon'ble Supreme Court in the matter of ***United Bank of India –vs- Satyawati Tondon & Ors.*** reported in ***(2010) 8 SCC 110*** where Court held that while dealing with petitions involving challenge to the action taken for recovery of public dues, the High Court must keep in mind that the legislation for recovery of dues is a code unto themselves. The High Court must insist that before availing remedy under Article 226, a person must exhaust the remedies available under the relevant Statutes.

9. Reliance has also been placed on the judgment delivered by the Hon'ble Supreme Court in the matter of ***Authorised Officer, State Bank of Travancore & Anr. –vs- Mathew K. C.*** reported in ***(2018) 3***

SCC 85 wherein the Court reiterated that a writ petition ought not to be entertained if alternate statutory remedy is available.

10. Opposing the submission of SAI that the writ petition will not be maintainable learned counsel for the petitioner relies on the judgment delivered by the Hon'ble Supreme Court in the matter of ***ABL International Ltd. & Anr. –vs- Export Credit Guarantee Corporation of India Ltd. & Ors.*** reported in ***(2004) 3 SCC 553.*** Reference has also been placed on the judgment delivered by the Hon'ble Supreme Court in the matter of ***Unitech Ltd. & Ors. –vs- Telangana State Industrial Infrastructure Corporation (TSIIC) & Ors.*** reported in ***(2021) 16 SCC 35*** and in the matter of ***Subodh Kumar Singh Rathour –vs- Chief Executive Officer & Ors.*** reported in ***2024 SCC Online SC 1682*** on the submission that writ petition will be maintainable where the action of the State or its instrumentalities is arbitrary, unfair and in violation of Article 14 and when contractual power is being used for public purpose the action is amenable to judicial review.

11. I have heard and considered the submissions made on behalf of all the parties and have perused the materials on record.

12. The notice inviting e-tender dated 17th November, 2017 clearly mentioned that the contract work is a time bound urgent work. The period of completion is ninety days from the date of commencement with a five years defect liability period. The security deposit will be released in a phased manner. No security deposit would be refunded

for the first three years of the actual date of completion of the work. 30% of the security deposit is to be refunded on expiry of four years from the actual date of completion and the balance 70% of the security deposit to be refunded on expiry of five years from the actual date of completion of the work. There is no provision for arbitration in the contract. If there is any dispute with regard to the drawing, record or decision given by the engineer in charge, the same may be referred to the Dispute Redressal Committee. There is no provision in the contract for settlement of dispute relating to payment.

13. The contract was for relaying of synthetic athletic track at SAI, Kolkata. Formal work order was issued to the petitioner on 31st January, 2018. A completion cum performance certificate was issued by the Executive Engineer on 16th July, 2019 certifying that the work done by the petitioner was very good. Despite successful completion of work within the stipulated time period, the petitioner has not yet received payment of the contractual amount.

14. The earnest money deposit and the security deposit have also not been released. The defect liability period of five years from the date of completion of the work is long over but the security deposit has not been released yet. The Executive Engineer, PWD has admitted that the balance due to the petitioner as on 31st March, 2019 is Rs. 75,69,446/-. The Executive Engineer, PWD made repeated demands before SAI for releasing the balance fund but the same has been ignored by SAI.

15. SAI published the tender for performing the work of SAI. There is no privity of contract between SAI and the petitioner who was selected by PWD for doing the work in accordance with the tender floated. It is the primary responsibility of the tender issuing authority to arrange for payment and disburse the same to the contractor. The tender issuing authority ought not to accuse the requiring body for not releasing payment for onward transmission to the contractor/petitioner. Once the satisfactory completion certificate is issued in favour of the contractor, payment in respect of the work done ought not to be withheld for any reason whatsoever.

16. It is noted that the rate mentioned in the Notice Inviting Tender floated by the Superintending Engineer, Public Works Directorate is inclusive of the Customs duty and at the same time and in similar nature of work SAI released payment for laying of the hockey track even though customs clearance was not received. In the case at hand, Customs authority specifically refused to exempt duty, hence SAI will be liable to release payment in favour of PWD for onward transmission to the contractor. SAI can thereafter get the customs duty reimbursed from the authority in accordance with law.

17. PWD ought to appreciate that the petitioner performed the work in accordance with the work order issued by it and as the amount claimed by the petitioner is not disputed, rather admitted by the authority, there is no scope or reason to withhold payment.

18. PWD cannot be shown any leniency in making payment in proper time to the contractor as the contractor performed the work satisfactorily in accordance with the contract and will be legally entitled to receive the contractual amount. If the said amount is not paid within the due date, the tender issuing authority would be legally bound to pay interest for the delayed payment.

19. PWD, being an instrumentality of the State, cannot get the work done for another instrumentality of the State, i.e. SAI, and later on turn around and say that payment cannot be made as the party for which the work was done has not released payment. The contract signed by the petitioner and PWD do not contain any clause disclosing that payment will be made to the petitioner as and when PWD would receive payment from SAI. The payment clause did not disclose about any contingency. It could have been that the petitioner may not have been interested in the contract had the contingency factor been mentioned therein.

20. The contention of SAI that the petitioner ought to have availed statutory alternative remedy is not accepted by the Court. It is not for the petitioner to run around from one forum to the other chasing for payment for the work performed by it satisfactorily. There is no reason as to why a contractor has to approach Court for receiving payment when there is no dispute either with the quality of the work performed or the contractual amount to be paid. It is obligatory for the requiring body to pay for the work done by the contractor. If SAI was reeling

under an impression that the petitioner ought to have approached the statutory alternative remedy, then the same is an absolutely misconceived notion. There is no contract between SAI and the petitioner and SAI is not vested with the authority to advise the petitioner.

21. It is settled law that the State cannot exploit people for getting work done without payment being made. In fact, the State ought to have been the best pay master and should have made timely payment. It was for the State to take up the matter with SAI and, if required, with the Customs authority also. The petitioner ought not to have been dragged into the infighting between the two authorities who qualify as 'State' under Article 12 of the Constitution and, consequently, not release payment to the contractor.

22. In Satyawati Tondon (supra) the Court was dealing with the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. In such context the Supreme Court held that when statutory remedy is available under the Act, writ petition ordinarily ought not to have been entertained as the remedies available under the SARFAESI Act are both expeditious and effective.

23. In the instant case, the petitioner does not have a statutory alternative efficacious remedy. The contract between the petitioner and PWD also does not contain any arbitration clause for settlement of dispute

regarding payment. The only remedy available to the petitioner may be to file a civil suit for recovery of the dues. It is no gain saying that remedy before the civil forum will certainly not be an efficacious one. On the contrary, the petitioner may be required to wait for years together for recovery of its admitted dues. The petitioner will be required to invest a considerable sum of money and energy to recover its legal dues. Similarly, there will be expenditure on the part of the State to defend the claim of the petitioner.

24. It will result in sheer injustice if the petitioner is relegated to the civil court for recovery of admitted dues from the State. The State will be miserably failing in its duties if admitted dues are not released in favour of the contractor. The same will amount to unjust enrichment of the State and wrongful loss to the contractor.

25. In Mathew K. C. (supra) similar proposition has been laid down. I am of the considered opinion that none of the aforesaid two precedents can be made applicable in the facts and circumstances of the instant case and none comes to the aid of SAI.

26. In ABL (supra) the question before the Court was whether a writ petitioner under Article 226 of the Constitution of India is maintainable to enforce a contractual obligation of the State or its instrumentality by an aggrieved party. The Court held that in an appropriate case writ petition against a State or its instrumentality arising out of contractual obligation is maintainable. A writ petition involving a consequential relief of monetary claim is also maintainable.

27. In Unitech Limited (supra) the Court held that jurisdiction under Article 226 cannot be out stead only on the basis that the dispute pertains to the contractual arena. The State and its instrumentalities are not exempt to act fairly merely because in their business dealings they have entered into the realm of contract.

28. In Subodh (supra) the Court reiterated the scope of judicial review in matters pertaining to contractual disputes. The Court held that although disputes arising out of contracts are not amenable to writ jurisdiction yet keeping in mind the obligation of the State to act fairly and not arbitrarily or capriciously, it is amenable to judicial review.

29. PWD is contractually bound to pay the dues of the petitioner as the same has been admitted. At a time when getting works done by contractors in a time bound manner is becoming a challenge and there are instances galore when re-tender is required to be conducted to finish and complete the tendered work resulting in financial loss to the State, it amounts to absolute breach of trust if the State authority withholds payment of a contractor who performed the work satisfactorily. On the contrary, the State ought to have released timely payment so as to encourage contractors to perform diligently or else the standard of the contractors participating in open bidding process is bound to fall and the citizens of the State will be the ultimate sufferers.

30. In view of the above, PWD is directed to release to the petitioner the admitted dues of Rs. 75,69,446/- along with simple interest @ 7% p.a.

calculated on and from the date of successful completion of work till the date of actual payment. The earnest money deposit and the security deposit shall also be released along with simple interest @ 7% p.a. calculated on and from the due date till the date of actual payment. The aforesaid sum shall be released at the earliest but positively within a period of four months hereof.

31. In the event the aforesaid payment is not made within the time limit stipulated above, the petitioner will be entitled to receive the due amount along with additional simple interest of 2% p.a. i.e. 7+2=9%.

32. The writ petition stands disposed of.

33. No costs.

34. Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)