

(2024) 03 GAU CK 0007

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 1987 Of 2022

M/S J K Construction Co. And Anr

APPELLANT

Vs

State Of Assam And 5 Ors

RESPONDENT

Date of Decision : 05-03-2024

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2024) 03 GAU CK 0007

Hon'ble Judges : Michael Zothankhuma, J

Bench : Single Bench

Advocate : I. Choudhury, P. Borgohain, B. Gogoi, J. Chutia

Final Decision : Disposed Of

Judgement

1. Heard Mr. I. Choudhury, learned Senior Counsel assisted by Mr. P. Borgohain, learned counsel for the petitioner. Also heard Mr. J. Chutia, learned counsel for the respondent no.2, 4, 5 & 6. Mr. B. Gogoi, learned counsel appears for the respondent no.1 & 3.

2. The petitioner's grievance is that despite completing the contract work allotted to him, he has not been paid his outstanding bill amount.

3. The petitioner's case is that for the project work for improvement of BBDC road from Ch. 0.00 km to 30.20 km under NLCPR for the year 2008-2009, the project work was split up into 53 separate contracts. The petitioner herein was awarded 15 contracts. However, the issue in this writ petition pertains to non-payment of bills in respect of 6 contracts and the amount claimed is Rs.3,19,79,409. The petitioner was allotted 6 different contract works by the Additional Chief Engineer, PWD (R&B), Hills, Diphu, Assam and the petitioner started his 6 contract works with the "Issue of Notice to Proceed with the Work" issued by the respondents in February and March, 2015. The 6 contract works were as follows :

(i) "Improvement of BBDS Road" (Balance Work. Excavation in Hard rock,

construction of Pucca side drain, unlined surface drain and providing GSB in stretches etc. from 11th to 15th Km) under NLCPR for the year 2008-09 for the contract Price of Rs.44,00,800.00 (Rupees Forty Four Lakhs and Eight Hundred) only.

(ii) "Improvement of BBDS Road (Balance Work. Construction of Gravity type retaining wall)" at the Bid Price of Rs.75,20,073 (Rupees Seventy Lakhs and Twenty Thousands and Seventy three) only.

(iii) "Imp of BBDC Road (Repairing Works From Ch 0.00.0m to 23,000.0m)" and total amount is Rs.49,09,646.00

(iv) "Imp of BBDS Road (Balance Work. From Ch.0.00m to 10.000.0m)" Under NLCPR for the year 2008-09 at the rate of 41.5% above the SOR for the year 2008-09 and total amount is restricted to Rs.85,57,000.00.

(v) "Imp of BBDS Road (Balance Work. From Ch.16000.00m to 23,000.0m)" Under NLCPR for the year 2008-09 at the rate of 41.5% above the SOR for the year 2008-09 and total amount is restricted to Rs.71,55,000/- (Rupees seventy Five LAKHS, Fifty five Thousands) only.

(vi) "Imp of BBDS Road Under NLCPR for the year 2008-09 (Clearing of Land Slide soil, Construction of gravity retaining wall, Construction H.P. Culvert, Construction of Pucca drain etc from 11th to 14th Km) has been accepted at the bid value of Rs.11,47,610/- (Rupees Eleven Lakhs, Forty Seven Thousands, Six Hundred and ten) only.

4. Subsequent to the 6 "Issue of Notice to proceed with the Work" letters issued by the Additional Chief Engineer, PWD, six contract/tender agreements were to be executed between the parties for the above six contract works. However, there are only 5 contract agreements in the petitioners' affidavit, which are at Pages 71 and 75, and are as follows-

(i) For the contract work "Balance Work. Excavation in Hard rock, construction of Pucca side drain, unlined surface drain and providing GSB in stretches etc. from 11th to 15th Km" for an estimated amount of Rs.44,00,800.00

(ii) For the contract work "Improvement of BBDS Road (Balance Work. Construction of Gravity type retaining wall from Ch 10400.0m to 10644.0M L=244.0M)" for an estimated amount of Rs.75,20,073.00

(iii) For the contract work "Improvement of BBDS Road (Repairing Works. From Ch 0.00.0m to 23.000.0m)" for an estimated amount of Rs.49,09,646.00

(iv) For the contract work "Imp of BBDS Road (Balance Work. From Ch.0.00m to 10.000.0m)" for an estimated amount of Rs.1,21,10,126.00

(v) For the contract work "Improvement of BBDS Road under NLCPR for the year 2008-09 (Working estimate from Ch.16,000.00m to Ch.23,000.00m)" for an estimated amount of Rs.1,01,23,775.00

5. The petitioners completed their contract works in the year 2015 and 2017 and accordingly, the Executive Engineer, PWD Barpathar Road Division, Silonijan (respondent no.6) issued "Completion Certificates" in the year 2015, 2016 and 2017. The Completion Certificates issued by the respondent no.6 shows that all the contract works executed had been verified by him, found them in order and as per the specification/drawing and the contract. The date of commencement and date of completion of the contract works, vis-à-vis the 6 separate contract works allotted to the petitioners are shown below as follows :

(i) "Improvement of BBDS Road" (Balance Work. Excavation in Hard rock, construction of Pucca side drain, unlined surface drain and providing GSB in stretches etc. from 11th to 15th Km) under NLCPR for the year 2008-09 for the contract Price of Rs.44,00,800.00 (Rupees Forty Four Lakhs and Eight Hundred) only.

Date of Commencement : 20.03.2015

Date of Completion : 28.04.2015

(ii) "Improvement of BBDS Road (Balance Work. Construction of Gravity type retaining wall)" at the Bid Price of Rs.75,20,073 (Rupees Seventy Lakhs and Twenty Thousands and Seventy three) only.

Date of Commencement : 20.03.2015

Date of Completion : 09.09.2015

(iii) "Imp of BBDC Road (Repairing Works From Ch 0.00.0m to 23,000.0m)" and total amount is Rs.49,09,646.00

Date of Commencement : 25.04.2015

Date of Completion : 20.10.2016

(iv) "Imp of BBDS Road (Balance Work. From Ch.0.00m to 10.000.0m)" Under NLCPR for the year 2008-09 at the rate of 41.5% above the SOR for the year 2008-09 and total amount is restricted to Rs.85,57,000.00.

Date of Commencement : 25.04.2015

Date of Completion : 25.11.2016

(v) "Imp of BBDS Road (Balance Work. From Ch.16000.00m to 23,000.0m)" Under NLCPR for the year 2008-09 at the rate of 41.5% above the SOR for the year 2008-09 and total amount is restricted to Rs.71,55,000/- (Rupees seventy Five LAKHS, Fifty five Thousands) only.

Date of Commencement : 27.03.2015

Date of Completion : 03.03.2017

(vi) "Imp of BBDS Road Under NLCPR for the year 2008-09 (Clearing of Land

Slide soil, Construction of gravity retaining wall, Constructing H.P. Culvert, Construction of Pucca drain etc from 11th to 14th Km) has been accepted at the bid value of Rs.11,47,610/- (Rupees Eleven Lakhs, Forty Seven Thousands, Six Hundred and ten) only.

Date of Commencement : 30.03.2017

Date of Completion : 05.05.2017

6. The petitioners' counsel submits that the petitioners submitted their bills on completion of the works and the respondent no.6 thereafter issued a Chart, i.e. "FS Proposal of Grant Share of NLCPR Scheme", wherein the name of the petitioner and his 6 contract works have been listed at Sl. No.3 to 7 and 11. The same also shows that part payments have been made in 5 of the 6 works to the petitioner and there were liabilities in respect of all the 6 works, which was to be paid to the petitioner.

7. The petitioners have also relied upon Annexure-C of the writ petition which is the "Demand Proposal of Grant Share of NLCPR Scheme", made by the respondent no.6, wherein the 6 contract works of the petitioner have been shown at Sl. No.32, 33, 34, 35, 38 & 41, in relation to the part payments made and the outstanding liability payment to be made to the petitioner. The petitioners' counsel submits that the State respondents in their three affidavits filed on 30.11.2022, 31.07.2023 and 15.11.2023 have tried to skirt the issue, regarding the liability payable to the petitioners' unpaid contractual bills, without directly addressing the issue regarding the balance amount payable to the petitioners.

8. The petitioners' counsel submits that there is a deliberate attempt on the part of the respondents to improve their case with the subsequent affidavits, which cannot be allowed, in terms of the judgment of the Supreme Court in the case of Mohinder Singh Gill & Another vs. The Chief Election Commissioner, New Delhi & Others, reported in (1978) 1 SCC 405. He also submits that hypothetical disputes which are not serious in nature will not disentitle a Writ Court from entertaining a writ petition and in this respect, he has relied upon the judgment of the Supreme Court in ABL international Ltd. & Another vs. Export Credit Guarantee Corporation of India Ltd. & Others, reported in (2004) 3 SCC 553.

9. The petitioners' counsel also submits that though there is an Arbitration Clause in the agreement made between the parties, for referring the matter to an Arbitrator in case of a dispute, the same does not bar a Writ Court from entertaining the present case. In this respect he has relied upon the judgment of the Supreme Court in the case of Union of India & Others vs. Tania Construction Private Limited, reported in (2011) 5 SCC 697. He also submits that a writ petition on a claim of money can be entertained as has held by this Court in the case of J. Deep Chemicals & Fertilizers (M/s) vs. State of Tripura & Others, reported in 2007 (2) GLT 173. The petitioner's counsel thus prays that the respondent authorities should be directed to pay the outstanding contractual dues of Rs.3,19,79,409/- The petitioner's counsel submits that claim made by

the petitioner amounting to Rs.3,19,79,409/- is exactly the same, as per the amount payable to the petitioner in terms of the Chart made by the respondents, which is at Annexure-C of the writ petition.

10. Mr. J. Chutia, learned counsel for the respondent no.2, on the other hand submits that Karbi Anglong Autonomous Council (KAAC) and the Union of India have not been made a party in this case and as necessary parties have not been impleaded, the writ petition should be dismissed. He submits that the work done by the petitioner was in the KAAC and the NLCPR Scheme required the Central Government to pay 90% share of the project cost, which was not released in full by the Central Government. He also submits that the amount claimed by the petitioner for the various contract works is not in tune with the estimated amount given for each contract work, as can be seen from the work orders issued to the petitioner and the subsequent claim made by them in their bills. He also submits that the work was to be completed in the year 2011 and the petitioner had completed the contract work only in 2015. As the claim made by the petitioner is not an admitted amount, the petitioner should resort to arbitration in terms of the Arbitration Clause in the contract agreement.

11. I have heard the learned counsels for the parties.

12. In the case of Mohinder Singh Gill (Supra), the Supreme Court has held that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to the Court on account of a challenge, get validated by additional grounds later brought out.

13. In the case of ABL International Ltd. (Supra), the Supreme Court on considering various other decisions of the Supreme Court, called out the following legal principles with regard to maintainability of a writ petition, in respect of contractual matters, as follows :

“(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 facts 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.”

14. In the case of Tania Construction Private Limited (Supra), the Supreme Court has held that an alternative remedy in the form of an Arbitration Clause in an agreement between parties is not an absolute bar to the invocation of the writ jurisdiction and that without exhausting such alternative remedy, a writ petition would not be maintainable. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the

Constitution.

15. In the case of J. Deep Chemicals & Fertilizers (M/s) (Supra), the Division Bench of this Court did not refer the dispute between the parties to an Arbitrator, inasmuch as, there was no serious disputes of facts involved with regard to the claim for payment of unpaid supplied bills, while deciding on the direction passed by the Single Judge to the parties to go for arbitration, in view of the arbitration clause in the agreement. No reason had been given by the State authorities as to why the remaining balance amount payable to the petitioner had not been paid. It was in the aforesaid circumstances that the Division Bench referred the matter back to the learned Single Judge for adjudication.

16. In the case of Tamsher Ali & Etc.Etc vs. State of Assam & Others, reported in 2008 (4) GauLT 1, the Full Bench of this Court was to decide the issue of non-payment of admitted contractual bills. During the pendency of the case, the Government of Assam had agreed in principle to adopt the guidelines issued by this Court in the case of Jatin Pathak vs. State of Assam & Others [WP(C) No.3354/2004], which were to the following effect :

"(1) The Public Works Department of the State of Assam shall prepare a list of contractors, in each of its Division, to whom money is admitted to be due on account of the contract works performed whether under orders of the Court or otherwise.

(2) Such lists will be prepared Division-wise in strict chronological order on the basis of the date on which payment is due.

(3) In drawing of the aforesaid list, the names of the contractors may be arranged under the separate Heads of Accounts that may be involved.

(4) That funds received by the Public Works Department under the particular Heads of Accounts and against the Division will be applied for discharge of the admitted dues in the order in which the list is prepared and maintained.

(5) All the contractors who claim money to be due will be at liberty to have their names registered in the concerned Division, which registration will be effected by the concerned authority after due verification of their entitlement to the payment claimed."

17. The decision of the Government of Assam to adopt the guidelines issued by this Court in Jatin Pathak's case was however subject to the 3 conditions set by State Government in the meeting held on 19.03.2008, which are as follows:

"i) All claims for payment of outstanding dues would be entertained for consideration provided the same are admitted by the respective departments. The admissions of liability shall have to be certified by the respective Chief Engineer in respect of Works Departments and in respect of other departments by the Head of the Departments.

ii) All claims for payment of admitted outstanding dues would be entertained for

payment provided the claims are lodged before the competent authority within a period of three years from the date of the payment becoming due.

iii) All claims for payment of admitted outstanding dues in respect of which the contractors intend or have approached the Honble Court, in such cases, the contractors must approach the Honble High Court within a period of 3 years from the date of the payment becoming due. This view has been taken as the Honble Apex Court in the State of Madhya Pradesh v. Bhailal Bhai and others reported in AIR 1964 SC 1006 at para 21 has observed that though provisions of Limitation Act do not as such apply to proceedings under Article 226, the period of limitation prescribed by Limitation Act for instituting a civil action may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured."

Though there was some controversy with regard to what would constitute payment becoming due in the 3rd condition laid down in the proposal made by the State Government, the Full Court observed that the term "payment becoming due" would be construed depending upon the terms and conditions of the individual work orders and/or the contract and as may be applicable in law.

18. The Full Court also observed that the strict principle of limitation of 3 years as may be application as per the Limitation Act may not be applicable with its rigidity, rigor and inflexibility as the Writ jurisdiction was essentially a public law remedy. It was also observed that the conditions for considering all claims for payment of outstanding dues would be entertained for consideration, provided the same were admitted by the respective departments and certified by the respective Chief Engineer in respect of the Works Department and in respect of other departments by the Head of the Department. The Full Bench accordingly disposed of Tamsher Ali (Supra) by holding that as a broad agreement had been arrived at between the parties, the writ petition was disposed of in terms of the directions passed in Jatin Pathak (supra) and the 3 conditions that had been made by the State Government in the meeting held on 19.03.2008.

19. The law laid down by the Supreme Court and this Division Bench of this Court clearly show that a contractual matter can be decided by a Writ Court, provided that the outstanding liabilities are admitted amounts and is certified as such by the concerned Chief Engineer of the Public Works Department and in respect of other departments, by the Head of the concerned Department.

20. In the present case, the issue is whether the parties should approach an Arbitrator for settling their disputes or whether this Court should direct the State respondents to verify the claim of the petitioners, with regard to non payment of their contractual bills. As can be seen from the pleadings, there is some anomalies with regard to the work order issued to the petitioners and the subsequent contract agreements made between the parties. While 6 work orders have been issued to the petitioners, only 5 contract agreements have been annexed to the petitioner's affidavit. Further the estimated amount of the

contract works in 2 of the contract works is not similar to the estimated amount in the contract agreements relating to "Imp of BBDS Road (Balance Work. From Ch.0.00m to 10.000.0m)" and "Improvement of BBDS Road under NLCPR for the year 2008-09 (Working estimate from Ch.16,000.00m to Ch.23,000.00m)."

21. The above being said, completion certificates has been given by the respondent No.6 against all the contract works done by the petitioners, wherein it has been stated that the works executed had been verified and found to be as per specification. On the other hand, the State respondents have taken a plea in their 3 affidavits that the Central share of the funds, for the project in question, have not been released by the Central government to the State government. Further, the work was to be completed on June, 2011 and that the construction work was eventually completed by another contractor.

22. It is not understood as to how the petitioners could have been expected to complete the contract work in the year 2011, when the work orders had been issued only in the year 2015. Further, the question of whether the Central government had released their share of the funds for the work in question, is not the concern of the petitioners, inasmuch as, the State respondents had awarded the work orders to the petitioners. There is nothing in the work orders issued to the petitioners or in the contract agreements, stating that payment of the dues of the petitioners would be subject to release of funds by the Central government. In that view of the matter, if there is any admitted amount payable by the State respondents to the petitioners, the excuse that the Centre did not release funds to the petitioners cannot come in the way of payment of the admitted liability. The only problem is that while the petitioners have relied upon the chart made by the respondent No.6, i.e., "FS Proposal of Grant Share of NLCPR Scheme" and the "Demand Proposal of Grant Share of NLCPR Scheme", in support of their claim for payment of the admitted liability, the same respondent No.6 has denied that the petitioners had completed the contract works, thereby implying that the proposals made by the respondent 6 for funds is not an admitted liability.

23. I also find that the stand taken by the respondents that the work not being completed by the petitioners and the same having been completed by some other contractor, is not supported by any documents, i.e., the State respondents have not submitted any documents showing that they terminated the contract works of the petitioners.

24. On perusing the "FS Proposal of Grant Share of NLCPR Scheme" and the "Demand Proposal of Grant Share of NLCPR Scheme", which is in the affidavit of the petitioners, the respondent No.6 has clearly given the balance amount payable to the petitioners, which is in Sl. Nos. 3-7 & 11 in the "FS Proposal of Grant Share of NLCPR Scheme" and in Sl. Nos. 32, 33, 34, 35, 38 and 41 in the "Demand Proposal of Grant Share of NLCPR Scheme". However, in the affidavits of the same respondent No.6 and the Additional Chief Engineer, PWD(R&B), Diphu, the State respondents do not make any admission regarding the

respondents' contract/bill liabilities.

25. In view of the conflicting stand taken by the parties with regard to whether the petitioners had completed their contract works, this Court is not going into the issue of whether the petitioners had completed their contract works, even though completion certificate had been issued by the respondent No.6. Though the respondent No.6 has categorically spelt out the balance amount payable to the petitioners in the "FS Proposal of Grant Share of NLCPR Scheme" and the "Demand Proposal of Grant Share of NLCPR Scheme", the same respondent No.6 is silent about the same in his affidavit.

26. As stated in the foregoing paragraphs, the affidavit of the petitioners contains the completion certificate and the liability statement of the respondents issued by the respondent No.6. However, the respondent No.6 and the Additional Chief Engineer, PWD (R&B), Diphu have kept completely silent as to whether the completion certificates and the balance payable to the petitioners in the "FS Proposal of Grant Share of NLCPR Scheme" and the "Demand Proposal of Grant Share of NLCPR Scheme" are correct or not. In fact, there is denial to the fact that the petitioners had completed the contract works allotted to them. On perusing the various judgments of the Supreme Court and the Full Bench of this Court in *Tamsher Ali (Supra)*, it is quite clear that if there is admission of an outstanding liabilities by the State respondents, the disputes raised regarding non payment of contract liabilities can be decided by a writ Court. However, in this case, the conflicting stands in the petitioners affidavit and the respondents' affidavit raises serious disputed questions of fact. As such, this Court is of the view that this Court cannot decide the present case and the parties would have to resolve their dispute in terms of the dispute resolution mechanism provided in the arbitration clause between the parties.

27. The Arbitration Clause in the Contract Agreement made between the parties, in terms of Clause 25.3 of the General Conditions of Contract (GCC), provides as follows :

"25.3 (a) In case of Dispute or difference arising between the Employer and a domestic contractor relating to any matter arising out of or connected with this Agreement, such dispute or difference shall be settled in accordance with the Arbitration and Conciliation Act. 1996. The parties shall make efforts to agree on a sole arbitrator and only if such an attempt does not succeed and the Arbitral Tribunal consisting of 3 Arbitrators one each to be appointed by the employer and the Contractor and the third Arbitrator to be chosen by the two Arbitrators so appointed by the parties to act as Presiding Arbitrator shall be considered. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Council, Indian Roads Congress.

(b) The Arbitral tribunal shall consist of three Arbitrators one each to be

appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties, and shall act as a presiding arbitrator. In case of failure of the two arbitrators by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed consequently, the Presiding arbitrator shall be appointed by the Council, Indian Roads Congress.

(c) If one of the parties fails to appoint its arbitrator in pursuance of sub-clause (a) and (b) above within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the Council, Indian Roads Congress shall (d) appoint the Arbitrator. A certified copy of the order of the Council, Indian Roads Congress, making such an appointment shall be furnished to each of the parties.

(d) Arbitration proceedings shall be held in India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(e) The decision of the majority of Arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the Arbitral Tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc. of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself.

(f) Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor by the owners shall not be withheld, unless they are the subject matter of the arbitration Proceedings."

28. In the case of *Union of India and Others vs. Puna Hinda*, reported in (2021) 10 SCC 690, the Supreme Court has held that there is no absolute bar to the maintainability of a writ petition even in contractual matters or where there are disputed questions of fact or even when a monetary claim is raised. It however held that the High Court would not normally exercise its discretion in the following circumstances, laid out in paragraph 69.1 to 69.4, which are as follows :

"69.1 The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims per se particularly arising out of contractual obligations are

normally not to be entertained except in exceptional circumstances.”

29. In the present case, the disputed questions of fact requires evidence to be led. For instance the estimated amount in the work orders are different from estimated amount given in some of the contract agreements. Further, only 5 contract agreements have been annexed while there are 6 work orders. Besides the above, as stated in the foregoing paragraphs, there is a contradiction in the documents purportedly made by the respondent No.6, which is in the writ petition vis-a-vis the affidavits filed by the respondent No.6 and the Additional Chief Engineer, PWD. In view of the reasons stated above, this Court is not inclined to exercise its discretion in the present case, keeping in view the judgment of the Supreme Court in the case of Puna Hinda (Supra). The arbitration clause being provided in the contract agreement between the parties, for resolution of any dispute between them, the parties are given the liberty to avail the arbitration clause made in the contract agreement.

30. The writ petition is accordingly disposed off.