
(1998) 03 PAT CK 0067

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 401 of 1998

M/s Nath and Company and another

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 24-03-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 10
Constitution of India, 1950 — Article 14, 226

Citation : (1998) 2 PLJR 363

Hon'ble Judges : B.M. Lal, C.J.; S.K. Singh, J

Bench : Division Bench

Advocate : Rama Kant Sharma and S. Prasad, for the Appellant; O.P. Agrawal, N.K. Sharma for the State and Mr. R.P. Choudhary for the respondent Corporation, for the Respondent

Final Decision : Dismissed

Judgement

B.M. Lal, C.J.—The petitioner M/s Nath and Company through its partner Sunil Kumar has approached this Court by invoking extra-ordinary jurisdiction under Article 226 of the constitution seeking a writ or writs, order or orders, direction or directions to respondents No. 2 and 3 to pay the admitted dues arising out of the works contract vide agreement No. 8 F2 of 1992-93 (Annexure 8). The short facts leading to this petition are as under: The petitioner firm is a registered company under the Companies Act and it is styled as M/s Nath and Company, it is carrying on business of construction works.

2. For the construction of Harijan hostel at Aurangabad tenders were invited by Respondents No. 2 and 3 and pursuant to that the petitioner submitted its tender. It appears that tender was opened in favour of the petitioner. After completing the required formalities i.e. entering into a contract agreement, furnishing of security/solvency certificate etc., a letter bearing No. 280 dated 2.6.92 was issued in favour of the petitioner for raising the construction of Harijan hostel at Aurangabad.

3. It is averred that according to the terms and conditions stipulated in the agreement referred to above, the construction was raised and completed, but, despite completion of construction works to the satisfaction of Respondents No. 2 and 3. payment for the construction works has been withheld. Only this non-payment of amount for the construction work has given rise to a dispute or difference between the petitioner and respondents No. 2 and 3.

4. It is also averred by giving reference to certain internal correspondence vide letters contained in Annexures 3, 4, 5 and 7 that the amount which is to be paid to the petitioner by respondents No. 2 and 3 is accepted by the department and, therefore, for the admitted claim/dues a direction may be issued to the respondents for making payment to the petitioner,

5. On a close scrutiny of the documents is referred to by the petitioners vide Annexures 3, 4, 5 and 7, it appears that the letters in question have never been addressed to the petitioners by the competent authorities with whom the agreement of contract has been arrived at by the petitioner. These documents do not show any admission of payment in favour of the petitioner. Besides this, since the letters have not been addressed or sent to the petitioners then it appears strange as to how these letters have reached in the custody of the petitioners

6. Learned counsel appearing for the petitioners has vehemently relied upon two single Bench decisions of this court in the case of M/s Dina Nath Jha v. State of Bihar and others: 1997 (1) PLJR, 306 and Pyrites Phosphates and Chemicals Ltd. Vs. State of Bihar and Others, wherein it is held by the learned single Judges that payments of admitted dues are to be made.

7. By giving reference to the decision in the case of Pyrites Phosphates & Chemicals Ltd. (supra) it is submitted that in the absence of filing a counter affidavit on behalf of the respondents it may be deemed that the averments made in the writ petition are correct and orders in terms of the relief as claimed be passed.

8. In this regard principle of order 8 Rule 10 C.P.C, appears to have been borrowed. This principle has been, taken into consideration in the case of Dineshwar Prasad Baxi v. Parmeshwar Prasad Sinha : AIR 1989 Patna, 139 and in the case of State of U. P. v. Dharam Singh Mehra : AIR 1983 Allahabad, 130 and it is held that non-filing of written statement within the time, passing of ex parte judgment is not imperative but it is discretionary for the court. However, passing of ex parte judgment should be avoided.

9. This is not all. In the case of Modula India Vs. Kamakshya Singh Deo, , considering the same issue that if written statement is not filed whether the Court may proceed for passing ex parte decree applying the deeming fiction that the averments made in the petition or complaint be deemed to have been admitted. The Apex Court while considering the provisions of Order 8 Rule 10 C. P. C. held that these rules are only permissive in nature. They enable the Court in

appropriate cases to pronounce decree on the basis of complaint and the averments contained therein though the language of Rule 10 C. P. C. Is that the Court shall pronounce judgment against him. It is obvious from the language of the rule that there is still an option with the Court either to pronounce judgment on the basis of plaint against the defendant or to make such other appropriate order as the court may think fit. Therefore, there is nothing in this rule which makes it mandatory for the Court to pass a decree in favour of the plaintiff straightway because written statement has not been filed. It is further held that Rule 5(1) can not be made use of to sustain the contention that where there is no written statement the court is bound to accept the statement contained in the plaint and pass a decree straightway.

10. Besides the above judicial pronouncements, we may observe that if on account of non-filing of a counter affidavit or written statement, without taking in to consideration the merits / prima facie case of the plaintiff/petitioner and passing of a decrees straightway only on the basis of averments made in the petition or plaint in terms of prayer made there in, the likelihood of causing great injury to the defendant/respondent can not be ruled out. Therefore, in our considered opinion, it is not proper or safe to pass an order against the respondent straightway only on the ground of nonfiling of the counter affidavit.

11. Thus the decision rendered in Pyrites Phosphates & Chemicals Ltd. (supra) is contrary to the view expressed by this court in Dineshwar Prasad Baxi case (supra) and that rendered by the Apex. Court in the case of Modula India (supra) and, therefore, the decision in Pyrites Phosphates & Chemicals Ltd. (supra) is of no avail to the petitioner.

12. As far as the decision in the case of Dina Nath Jha (supra) which has been relied upon by the petitioner is concerned it is also of no avail to the petitioner inasmuch as this decision does not say for payment of bills which have not been admitted. In this regard, we have expressed in the fore-going paragraphs by giving reference to Annexures 3, 4, 5 and 7 that the respondents, particularly respondents No. 2 and 3 have not admitted any payment of dues to be paid to the petitioner. Therefore, how the decision in Dina Nath Jha case (supra) will be applicable to the facts of the present case, we fail to appreciate.

13. No doubt if dues are admitted then nothing remains to be disputed. That is way for a lis, existence of a dispute between the parties is an essential condition to take action against the erring party, the dispute denotes of certain claim and if the same is not admitted in writing by the competent: authority of the department, repudiation of the claim may be inferred expressly or impliedly by the conduct of silence, which essentially requires close probe and adjudication to sort out the differences raised by the respective parties on multi disputed facts and the same can not be done in writ jurisdiction.

14. Learned counsel also strongly relied upon the decision in the cases of Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, and in the

case of *Sterling Computers Ltd. v. M/s M N Publications Ltd. and others* : 1993 (2) PLJR. 12 (S.C.) contending that in exercise of powers of judicial review in respect of contract entered into on behalf of the State, if there is infirmity in the decision making process, the Court under Article 226 of the constitution may examine the same whether the decision making process was reasonable, rational and arbitrary or violative of Article 14 of the Constitution. Thus, it is contended that in a petition under Article 226 of the constitution, the State or its agency can be commanded to fulfill contractual obligations, may be in respect of contractual dues, if the same is found due against the State or its agency.

15. The cases cited by the learned counsel narrated in the preceding paragraph of this judgment have no nexus with the facts of this case where the relief is sought for seeking a direction for admitted dues payment whereas *Mahabir Auto Stores* (supra) and *Sterling Computers Ltd.* (supra) deal with about granting of contract, Government action should satisfy the tests viz, non-arbitrariness, action with reasons and action in public interest. If the action of the State or its instrumentalities is found to be unreasonable, arbitrary or not in public interest that has to be struck down. Thus the above referred cases speak of the stage of granting of contract when equality clause of Article 14 shall not be violated. These cases do not talk of payment of money decree arising out of Government contract, which appertains to the realm of private contract. That is why in *Mahabir Auto Stores* (supra) it is held that Article 14 does not permit judicial review of State action after a contract has been entered into. Similar is the case of *Sterling Computers Ltd.* (supra). Therefore, these citations are of no consequence for the petitioners after the contract is materialised and now a dispute in respect of payment arose.

16. It will not be out of place to mention here that it is a matter of great concern that these days the writ Courts are being flooded and over burdened on account of filing of writ petitions relating to money matters by-passing the well settled norms and without exhausting the alternative efficacious remedy. So now it is high time that the Court should take judicial notice of overburdening of the writ Courts and deprecate the practice of entertaining the writ petitions relating to money claim or for such other claims in respect of which statutory remedy is available and yet the same has not been exhausted before invoking writ jurisdiction which is a discretionary one.

17. In this regard it is needless to say that existence of effective alternative remedy also includes arbitration. In *State of U. P. v. Bridge and Roof Co. (India) Ltd.*: JT 1996 (7) S. C, 395 the Apex Court held that existence of effective alternative remedy includes arbitration clause in the contract agreement as well.

18. In the instant case it is relevant to mention that in the contract agreement (Annexure 8), clause 23 thereof, speaks of arbitration that in case of any dispute or difference arising between the parties, the same may be referred to the Superintending Engineer of the Circle and his decision there on shall be final, conclusive and binding on all the parties. This being so, it is not that the

petitioner is remedy-less but according to the terms of the contract agreement, by now he ought to have availed of the arbitration clause and should have approached to the Superintending Engineer of the Circle instead of rushing to this Court in writ jurisdiction as before the Superintending Engineer the petitioner would get adequate opportunity to prove his case in respect of works done and also with respect to non-payment.

19. This being so, we do not feel inclined to interfere in such matters where allowing of such prayer would result in granting money decree in respect of a contract which is not a statutory contract but appertains to the realm of private law. Thus for the foregoing discussions, this writ petition fails and is hereby dismissed. There shall be no order as to costs.

S.K. Singh, J.

21. I agree.