

UNION OF INDIA & ORS.

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v.

M/S PUNA HINDA

(Civil Appeal No. 4981 of 2021)

SEPTEMBER 06, 2021

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[HEMANT GUPTA AND A. S. BOPANNA, JJ.]

Writ – High Court – Jurisdiction of – Disputed question of facts relating to recovery of money – A Notice inviting tender was issued for construction and improvement of road – The bid of the writ petitioner was accepted and work order was issued – There was an arbitration clause in the contract for resolving disputes arising between the parties – The writ petitioner submitted a final bill and claimed a sum of Rs.23,68,11,589.02 – It was asserted that payment for amount claimed in the 18 running bills was already made, but in respect of 19th and 20th running bill, entries were made in the measurement book, however, the payment was not cleared – The final bill was returned unactioned and writ petitioner was informed that the payment up to 18 running bills had already exceeded the permissible approved amount including escalation payment – The claim was refused by the appellants – Writ petition filed by the petitioner was allowed by the Single Judge of the High Court and affirmed by the Division Bench of the High Court – On appeal, held: The dispute could not be raised by way of a writ petition on the disputed questions of fact – Though, the jurisdiction of the High Court is wide but in respect of pure contractual matters in the field of private law, having no statutory flavour, are better adjudicated upon by the forum agreed to by the parties – The dispute as to whether the amount is payable or not and/or how much amount is payable are disputed questions of facts – Such process could be undertaken only by the agreed forum i.e., arbitration and not by the Writ Court as it does not have the expertise in respect of measurements or construction of roads.

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Allowing the appeal, the Court

HELD: 1. The High Court has based its order on the ground that after five monsoons, the final measurements could not be ascertained. If the final measurements could not be done at the

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- A spot, the contemporary evidence and the measurement books prepared from time to time could be the basis for determining the liability of the appellants. The Joint Survey Report is not an admitted measurement, though some officers might have signed it. The Report prepared after the completion of work wherein no such work done is reflected in the measurement book prepared during execution of work is an attempt to inflate the claim raised by the writ petitioner. The entire amount claimed by the writ petitioner is disputed. [Para 23][135-B-D]
- 2. Therefore, the dispute could not be raised by way of a writ petition on the disputed questions of fact. Though, the jurisdiction of the High Court is wide but in respect of pure contractual matters in the field of private law, having no statutory flavour, are better adjudicated upon by the forum agreed to by the parties. The dispute as to whether the amount is payable or not and/or how much amount is payable are disputed questions of facts. There is no admission on the part of the appellants to infer that the amount stands crystallized. Therefore, in the absence of any acceptance of Joint Survey Report by the competent authority, no right would accrue to the writ petitioner only because measurements cannot be undertaken after passage of time.
- C jurisdiction of the High Court is wide but in respect of pure contractual matters in the field of private law, having no statutory flavour, are better adjudicated upon by the forum agreed to by the parties. The dispute as to whether the amount is payable or not and/or how much amount is payable are disputed questions of facts. There is no admission on the part of the appellants to infer that the amount stands crystallized. Therefore, in the absence of any acceptance of Joint Survey Report by the competent authority, no right would accrue to the writ petitioner only because measurements cannot be undertaken after passage of time.
- D jurisdiction of the High Court is wide but in respect of pure contractual matters in the field of private law, having no statutory flavour, are better adjudicated upon by the forum agreed to by the parties. The dispute as to whether the amount is payable or not and/or how much amount is payable are disputed questions of facts. There is no admission on the part of the appellants to infer that the amount stands crystallized. Therefore, in the absence of any acceptance of Joint Survey Report by the competent authority, no right would accrue to the writ petitioner only because measurements cannot be undertaken after passage of time.
- E jurisdiction of the High Court is wide but in respect of pure contractual matters in the field of private law, having no statutory flavour, are better adjudicated upon by the forum agreed to by the parties. The dispute as to whether the amount is payable or not and/or how much amount is payable are disputed questions of facts. There is no admission on the part of the appellants to infer that the amount stands crystallized. Therefore, in the absence of any acceptance of Joint Survey Report by the competent authority, no right would accrue to the writ petitioner only because measurements cannot be undertaken after passage of time.
- F jurisdiction of the High Court is wide but in respect of pure contractual matters in the field of private law, having no statutory flavour, are better adjudicated upon by the forum agreed to by the parties. The dispute as to whether the amount is payable or not and/or how much amount is payable are disputed questions of facts. There is no admission on the part of the appellants to infer that the amount stands crystallized. Therefore, in the absence of any acceptance of Joint Survey Report by the competent authority, no right would accrue to the writ petitioner only because measurements cannot be undertaken after passage of time.

*Kerala State Electricity Board & Anr. v. Kurien E.
Kalathil & Ors. (2000) 6 SCC 293 : [2000] 1 Suppl.
SCR 581; Joshi Technologies International Inc v. Union
of India & Ors. (2015) 7 SCC 728 : [2015] 6 SCR*

- G 1042 – referred to.

Case Law Reference

[2000] 1 Suppl. SCR 581	referred to	Para 17
[2015] 6 SCR 1042	referred to	Para 18

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CIVIL APPELLATE JURISDICTION: Civil Appeal No.4981 of A
2021.

From the Judgment and Order dated 17.11.2017 of the High Court of Gauhati, Itanagar Bench in W.A. No.23 (AP) of 2017.

K. M. Nataraj, ASG, B. K. Satija, Ms. Suhasini Sen, Udai Khanna, Arvind Kumar Sharma, Advs. for the Appellants. B

Ms. Meenakshi Arora, Sr. Adv., Yoginder Handoo, Advs. for the Respondent.

The Judgment of the Court was delivered by

HEMANT GUPTA, J. C

1. The challenge in the present appeal is to an order dated 17.11.2017 passed by the Division Bench of the Gauhati High Court dismissing an intra-court appeal and affirming the order passed by the learned Single Bench on 4.8.2016.

2. The learned Single Bench of the High Court allowed the writ petition filed by the respondent – M/s. Puna Hinda¹ who had sought quashing of letters dated 27.8.2015 and 21.10.2015 and also a direction to pay Rs. 31,57,16,134/- with interest at the rate of 18% p.a. D

3. The learned Single Judge held that payment in terms of Final Joint Survey/Measurement Report dated 24.10.2013 be taken into consideration for making revised Detailed Project Report (DPR) and thus passed necessary orders for payment of the amount due to the writ petitioner within four months of the receipt of copy of the order. In an appeal filed by the appellants, the Division Bench of the High Court held that resurvey for measurement and DPR would not be just and fair at this stage since five monsoons had passed. Therefore, the only option left to the appellants was to approve the DPR and pay the pending bills on the basis of Final Joint Survey/Measurement Report dated 24.10.2013. E F

4. Brief facts leading to the present appeal is that a Notice Inviting Tender (NIT) was issued on 22.10.2008 for construction and improvement of road from 26.800 km to 47.850 km between Lumla and Tashigong under Special Accelerated Rural Development Programme (SARDP). The bid of the writ petitioner was accepted at Rs.31,87,58,950/-. The work order was issued on 15.7.2009. The said work order was amended G

¹ Hereinafter referred to as the ‘writ petitioner’ H

- A by the parties on 15.3.2012 leading to enhanced work cost at Rs. 35,03,15,695.23. The work order had provided details of the work to be carried out and the estimated amount payable for each work with rate of each work. The work was divided into three parts, such as, Formation work, which included jungle clearance etc.; Permanent work
- B which included excavation in trenches, cement concrete; and Surface work which included preparation of subgrade in soil mix boulder, laying, spreading and compacting graded stone aggregate. The measurement process for payment was specified in the General Conditions of Contract, which read as under:
- C “2.8 .1 Excavation for roadway shall be measured by taking cross Section at suitable intervals in the original position before the work starts and after its completion and computing the volumes in cum by the method of average and areas for each class of material encountered. Where it is not feasible to computes volumes by this method because of erratic location of isolated deposits, the volumes shall be computed by other accepted methods.
- D 2.8.2 At the option of the Engineer-In-Charge/QC Contract, the Contractor shall leave depth indicators during excavations of such shape and size and in such positions as directed so as to indicates the originals ground level as accurately as possible. The Contractor shall see that there remain intact till the final measurements are taken.”
- E 5. The contractor completed the formation work by 20.9.2012, the communication of which was sent by the writ petitioner on 17.10.2012. The joint survey of the works was carried out by the Board of Officers
- F on 23.1.2013. The Board of officers made the following recommendations: -

“RECOMMENDATION OF THE BOARD

FORMATION WORKS

- G 20. The details of items of formation works provisioned (as per DPR), executed departmentally and balance between Km 26.800 and Km 31.00 are as under:

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21. The details of items of formation works provisioned in DPR and as arrived at after detailed Joint Survey from Km 31.000 to Km 47.850 are as under:

Location	In SMB (cum)	In SR (cum)	In HR (cum)	Embankment filling (cum)	Jungle Clearance (10 Sq m)
Km 31.000-Km 47.850					
(a) Qty of Fmn works provisioned as per dpr	633835.33	15298.87	81438.22	0.00	25275.00
(b) Qty of Fmn works as per joint survey	356166.00	182073.00	337447.00	0.00	23123.00

The quantities as arrived at after joint survey are theoretical only and after completion of formation works Total station survey shall be carried out as per Clause 18 of Special Conditions of Contract to ascertain the actual quantity executed. Hence these quantities be treated as accurate, based on theoretical calculations.

The classification of soils as shown in joint survey are based on visual appearance of soil strata. The actual classification of excavation shall be decided during execution by Engg in Charge and OC Contract as per clause 2.2.2 of Particular specification of CA at page no. 87 duly supported with photographs.

The quantities of formation works as arrived at after joint survey between Km 26.800 and Km 47.850 as per details given at Appendix 'A' are recommended for execution of ground and will form the basis of RAR payments to be made as per Contract Provision/Stipulation during execution of works under CA No. CE/VTK/03/2009-10. The final quantity shall be arrived only after completions of formation works by carrying out Total station survey. Hence, amendment in quantities of formation works is recommended only after final joint survey on completion of work.

22. Unlined drain of any shape cut to the required gradient with average sectional area 0.50 Sqm in soft rock – 2299.80 Mtrs and in Hard rock-5146.00 Mtrs as arrived at after Joint Survey are recommended for construction on ground between Km 26.800 to Km 47.850 under CA No. CE/VTK/03/2009-10.

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PERMANENT WORKS

23. Abstract of quantity of item of works for construction of permanent structures which are executed and balance between Km 26.800 and Km 31.000 and structures provisioned between Km 31.000 and Km 47.850 has been worked out and shown at

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Appendix ‘B’.

24. Permanent works to be executed under CA No. CE/VTK/03/2009-10 are as under:

(a) R/Wall: R/Walls balance between Km 26.800 and Km 31.000 and provisioned between Km 31.000 and Km 40.000

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at locations mentioned in Annexure-I to Appendix ‘B’ are recommended for execution on ground under CA No. CE/VTK/03/2009-10.

(b) RCC Culverts: RCC Culverts balance between Km 26.800 and Km 31.000 including two incomplete RCC culverts at

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locations Km 28.300 and Km 29.000 and those provisioned between Km 31.000 and Km 47.850 at locations mentioned in Annexure-II to Appendix “B” are recommended for execution on ground under CA No. CE/VTK/03/2009-10.

(c) T/Walls Below RCC Culverts: T/Walls below RCC Culverts balance between Km 26.800 and Km 31.000 and those provisioned between Km 31.000 and Km 47.850 at locations mentioned in Annexure-III to Appendix ‘B’ are recommended for execution on ground under CA No. CE/VTK/03/2009-10.

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(d) T/Walls below R/Walls: T/Walls below R/Walls provisioned between Km 26.800 to Km 31.000 and Km 31.000 to Km 47.850 at locations mentioned in Annexure IV to Appendix ‘B’ are recommended for execution on ground under CA

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No. CE/VTK/03/2009-10.

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(e) Breast Walls: Breast Walls provisioned between Km 26.800 to Km 31.000 and between Km 31.000 to Km 47.850 at locations mentioned in Annexure V to Appendix ‘B’ are recommended for execution on ground under CA No. CE/VTK/03/2009-10.

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(f) Lined drain: Lined drain for 13271.00 Mtr length of trapezoidal shape in plum concrete between Km 26.800 and Km 47.850 at locations as arrived at after Joint Survey and mentioned at Annexure-VI to Appendix ‘B’ are recommended for execution on ground under CA No. CE/VTK/03/2009-10. A

(g) Road Furniture: Road furniture provisioned between Km 26.800 and Km 47.850 as per Annexure-VII to Appendix ‘B’ are recommended for providing/fixing on ground under CA No. CE/VTK/03/2009-10. B

25. Working drawings of all permanent structures (different sizes/types) are enclosed with this Board of Officers. C

26. Construction of permanent structures at designated locations or otherwise will only be executed after obtaining prior approval of Engineer-in-Charge/OC Contract as per ground requirement.

27. The quantity of items of Permanent works as arrived at after Joint Survey between Km 26.800 and Km 47.850 as per details given at Table-2 of Appendix ‘B’ are recommended for execution on ground and will form the basis of RAR payments to be made as per Contract Provision/Stipulation during execution of works under CA No. CE/VTK/03/2009-10. Amendment in quantities of permanent works is recommended only during final stage of completion of permanent works. D

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SURFACING WORKS

28. No surfacing works has been executed departmentally between Km 26.800 and Km 47.850. Quantities of various items of surfacing works as arrived at after Joint Survey as per details given at Appendix ‘D’ are recommended for execution on ground under CA No. CE/VTK/03/2009-10. F

SUMMARY OF PAVEMENT WORKS AS PER JOINT SVY

Sl. No.	Items of Surfacing	A/U	Total Quantity	Surfacing Eqvt DGBR CL-9
1	Preparation of subgrade in SMB	Sqm	82943.75	0.00
2	Preparation of subgrade in SR	Sqm	14373.75	0.00

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A	3	Preparation of subgrade in HR	Sqm	21227.21	0.00
	4	Sand Blanketting 25mm	Sqm	21227.21	0.00
	5	GSB 150mm thick	Sqm	97317.50	5.90
	6	GSB 100mm thick	Sqm	64229.50	2.60
B	7	WMM 75mm thick	Sqm	256370.31	15.54
	8	Prime coat over WMM surface	Sqm	85456.71	0.00
	9	BM 50mm thick	Sqm	85456.71	10.36
	10	SDBC 25mm thick	Sqm	85456.71	5.18
		Total Surfacing	Km Eqvt Cl-9		39.58

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29. However, if the soil classification varies from the enclosed strata as shown in (Annexure-I to Appx "C"), layer combination shall be revised accordingly and be executed after prior approval of OC Contract duly supported with photographs of Soil strata.

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30. Amendment in quantities of surfacing works are recommended only during final stage of completion of surfacing works.

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**CE/VTK/03/2009-10 ON ROAD LUMLA-TASHIGONG
BETWEEN KM 26.800 TO KM 47.850**

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Sl. No.	Location		Earth Work involved in CUM			Earth work in Emban- kment	Jungle Clearance	Unlined Drain in SR (M)	Unlined Drain in HR(M)				
	From	To	Cutting										
			SMB	SR	HR								
1	26.800	31.000	18727.01	1735.04	7631.42	0.00	0	125.00	217.80				
2	31.000	47.850	356166.00	182073.00	337447.00	0.00	23123.0	2174.80	4928				

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Presiding Officer		Lt Col Dhinij Minota, OC, 117 RCC (GREF) OC Contract
Member	1	Sd/- (Comments KS, AE(Civil) Eng-in-Charge 117 RCC (GREF)
	2	Shri _____ A Holder Authorized rep of M/s Puna Hinda

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6. The writ petitioner was directed not to cut extra road formation width without obtaining proper written permission from the Competent Authority on 28.1.2013, and in case any formation work was carried out, no payment shall be made after the report of the Board of Officers.

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7. The Second in Command of the Unit sought approval of the Headquarters on 24.10.2013 after the joint survey of formation cutting

was done by the Joint Survey Team. It is the said Joint Survey Report which was rejected by the Competent Authority at the Headquarter, when the following communication was addressed to the field office with a copy to the writ petitioner. The said communication of the Commissioner on 29.10.2013 reads as under:

“Headquarters B

763 Boarder Roads Task Force

Pin-930763

C/O 99 APO

8001/715/EB C

29 Oct 2013

117 RCC (GREF)
PIN 9300117
C/O 99 APO D

CONSTRUCTION AND IMPROVEMENT OF ROAD
LUMLA TASHIGONG FROM KM 26.800 TO 47.800 SINGLE
LANE STANDARD UNDER PHASE ‘A’ OF SARDP INE IN
TWANG DISTT OF ARUNACHAL PRADESH:CA NO. CE(P)
VTK/03/2009-10 E

Refer your letter No. 804/vtk/03/2009-10/79 dated 24 Oct 2013.

2. The documents namely base plan, details of curves and quantity calculations and cross sections have been scrutinized and found that they are not in order. F

3. Table 6.10 of hill road manual IRC:SP:46-1998 at Page No. 40 is not correctly interpreted and marked on cross section. Minimum sight distance ‘m’ (P1 ref to sketch 6.1) at Page No. 40 of hill road manual IRC SP.46-1996 is to be measured from centre line of carriage way and not from the edge of the road way. G

4. Hence, the above documents have not been approved by competent authority and cancelled herewith.

Sd/-
(MANV Prasad)
SE (Civ)
Commissioner H

A Copy to

M/S Puna Hinda,
 C/O Time Video Library
 Akash Deep Market Ganga
 B Pot Itanagar Distt. Papum Pare
 Arunachal Pradesh Pin-791111.”

8. The writ petitioner was informed vide letter dated 24.3.2014 to provide a breakup of the contract agreement amount of Rs.31.87 crores and also point out that initial joint survey was carried out by a team comprising of then OC Contract, Engineer-In-charge, JE In-charge of contract and Contractor to assess the actual quantities of earth work before commencement of the work on ground. A comparison of the contract amounts as well as amended contract amount was delineated in Table 3 which reads as thus:

D	S. No.	Description	Original CA Amount (Crs)	Amended CA Amount (Crs)	Variation /+/-/(%)
	1	Formation works	Rs.11.98	Rs.16.27	+ 35.81
	2	Permanent works	Rs.06.63	Rs.6.25	-05.73
	3	Surfacing works	Rs.13.26	Rs.12.51	-05.6.6
		Total	Rs.31.87	Rs.35.03	+09.91

E 9. It was also pointed out that the formation work was completed on 20.9.2012 i.e., not four years back but two years back, as stated by the writ petitioner. The writ petitioner was communicated that the unpaid amount on account of original formation work was Rs.74,33,631/- and Rs.4 crores (approx.) for extra widening of road beyond 7.45 m. It was communicated as under:

F “....

G (h) It is worth mentioning that vide your letter No. NCUBRO/ L-T/ADM/2013 dated 12 Jul 2013 (copy enclosed as Appx ‘D’) you claimed unpaid amount just Rs.74,33,631.00 on account of original formation work and Rs. 4.00 Crores (approximately) on account of extra widening of road beyond 7.45m which is beyond the scope of the contract and the same has already been intimated to you vide this HQ letter No. 80914/L-T/26-47/114/E8 dated 19 Aug 2013, in case you have any approval of the dept for doing extra work or if there is any amendment to work order, the same may please be forwarded for our perusal.

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3. In view of the above, it is submitted that each payment has been released to you as per claim based on joint measurement and duly accepted by you till finalization of the formations work as per clause No 18(vi) of special conditions of contract at serially page 72 of contract agreement. Hence any extra claim after fifteen months of completion of formation work is baseless not correct.”

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10. The writ petitioner communicated on 12.7.2013 that it would be bound to stop/abandon the project work and the responsibility shall be that of the department itself for projecting an indifferent attitude, if the department cannot pay the work done by it as has been claimed. It was also asserted that the department may take over the remaining work and complete it themselves. The amount claimed in the said letter was as under:

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Unseen expenditure done on works		
I	Land slide clearance during rainy season Rs.2500000 x 4 years	Rs.10000000/-
II	Earth filling on shoulders of the road without items on Boo	Rs.3000000/-
III	Local villagers donation for smooth progress of the work	Rs.5000000/-
IV	Bank Interest due to delay in payment (Ref RAR Bill)	Rs.1200000/-
V	Total	Rs 30000000/-

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11. The writ petitioner submitted a final bill on 17.6.2014 and claimed a sum of Rs.23,68,11,589.02. It was asserted therein that payment for amount claimed in the 18 running bills has been made, but in respect of 19th and 20th running bill, entries have been made in the measurement book however the payment has not been cleared yet. The final bill submitted by the writ petitioner was returned unactioned on 10.8.2014. The writ petitioner was informed that the payment up to 18 running bills had already exceeded the permissible approved amount including escalation payment and was also informed of the following deficiencies:

“3. Also, the following queries/disputes have to be resolved for finalization of the payment to be made through final bill:-

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- A (a) Supporting documents to the final bill submitted by you on 17 Jun 2014 are not found enclosed.
- (b) Documents as asked vide our letter No. 604/CE/VTK/ 03.2009-10 189/E8 dated 02 Aug 2014 have not been submitted by you.
- B (c) Claims for extra work done in respect of earth work quantities beyond scope of contract claimed through your various letters have been refuted by accepting officer in this connection please refer HQ CE(P) Vartak letter No. 80914/L-T/26.800 to 47.850/326/E8 dated 18 Jul 2014 (copy enclosed).
- C (d) Joint survey earned out in respect of formation works completed against subject CA is under scrutiny and not yet approved by competent Financial authority.
- D (e) Query in respect of escalation payment made against formation works has been raised by HQ CE(P) Vartak to HQ DGBR vide their letter No. 80914/L-T/26.800 to 47 85/286/E8 dated 28 Jun 2014 whose reply is awaited.
- E (f) As per directions received vide Par 8 of HQ DGBR/ADG Sectt letter No 71004/DGBR/25/ADG Sectt dated 25 Jul 2014 and HQ CE(P) Vartak letter No B0914/L-T/26.800 to 47.85/341/E8 dated 30 Jul 2014 (copy of both letters enclosed) recovery of amount on account of non hancing over the quantity of hard rock from the formation works executed has to be incorporated in your final bill on receipt of reply from HQ CE(P) Vartak.
- F (g) Already matter in respect of disputes relating to subject CA is with HQ DGBR.”
- G 12. An inter-departmental communication was sent to Head Quarters of Seema Sadak Bhawan (Border Road Office) on 17.4.2015 that Board of Officers were not required to be appointed and Accepting Officer may take the requisite decision. In the status report under Appendix ‘A’ to the Head Quarter vide letter dated 26.5.2015, it was noted as under:
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“6. From the above it is evident that “work claimed to have been executed” is much beyond “work ordered to the contractor”. Moreover the “excess work claimed to have been executed” by the contractor has not been ordered by Accepting Officer or Commander of work or Officer Commanding or Engineer-in-Charge.

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7. The “Joint Survey Report” on the basis of which contractor is asking additional payment has not been authenticated/admitted by the Chief Engineer(P) Vartak nor ordered by any authority. Therefore contractually contractor’s claim cannot be admitted.

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8. All payments correctly due to contractor have been already made.”

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13. The terms of reference of the Board of Officers were determined on 22.7.2015, with copy of the letter to the writ petitioner, as under:

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“3. Terms of References of the Board of Officers will be as under:

(a) To carry out Joint Survey with Tetal Station from KM 26.800 to 47.852 on Lumla-Tashigong road.

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(b) To plot the Cross Section at suitable interval and Longitudinal Section with Corresponding RL.

(c) To ascertain whether any extra work or account of Berm filing/shoulder or curves has been done.

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(d) To measure the exact length and width of road after formation cutting.”

14. The writ petitioner objected to the constitution of the Board of Officers on 12.8.2015 and claimed a sum of Rs.23,68,11,589/-, breakup of which has been reproduced hereunder. The said claim was refuted by the appellants vide communication dated 27.8.2015. The constitution of the Board of Officers was cancelled on 8.6.2015.

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A	I	Formation Work	Rs.28,55,94,528.95
		Total paid amounts [RAR Bills for formation cutting]	Rs. 16,24,41,060.00
		Balance amounts	Rs. 12,27,52,095.34
B	II	For curve improvement [as per Hill Road Manual]	Rs.4,51,04,271.98
	III	For earth filling on shoulder of road [Berm Filling]	Rs. 12,20,083.56
	IV	Price Escalation[Approx]	Rs.2, 78,41,323.42
	V	Unpaid 19 & 20 RAR Bills [for Sign Board, Mileage Stone, drainage, retaining wall etc.]	Rs.2,88,10,659.00 + Rs.1,20,83,155.00
C			Rs. 4,08,93,814.00
	VI	Total Pending Bill amounts	Rs. 23,68,11,589.00

15. Thereafter, the writ petitioner filed a writ petition before the High Court on or about 23.11.2015 for quashing of the letter dated 27.8.2015. The writ petitioner was informed vide the said letter to process D the bills through laid down channels before DC Contract and Commander Contract. The letter dated 21.10.2015 was also challenged which is a reply to the notice under Section 80 of the Code of Civil Procedure, 1908. A writ of mandamus was prayed for to pay a sum of Rs.31,57,16,134/- with 18% interest. In reply to the said writ petition, the assertions made by the writ petitioner were controverted but also an E objection was raised that there was a clause for arbitration for resolving disputes arising between the parties, therefore, the writ petitioner should have approached the designated authority by appointment of an arbitrator.
16. The appellants in their affidavit had pointed out that after completion of the formation work, the writ petitioner had communicated F expenses of Rs.16,93,51,980/- as against provision of Rs.16,26,71,039.40. It was asserted that the writ petitioner has been paid a sum of Rs.42.27 crores as against original cost of Rs.31.01 crores whereas the contractor has claimed a total sum of Rs.71.86 crores. The letter dated 29.10.2013 G has been issued by the Headquarters, Border Road Task Force stating that the minimum distance was to be measured from center line of carriage way and not from the edge of the roadway. Thus, the entire claim was based upon imaginary and arbitrary grounds which was enhanced from time to time.
17. Mr. Nataraj, learned ASG appearing for the appellants, pointed H out that there are serious disputes about the facts in respect of authenticity

of the Joint Final Report and the work done. Therefore, such disputed question of facts could not have been adjudicated by the Writ Court as disputed question of facts relating to recovery of money could not have been entertained thereunder. Reliance has been placed upon the judgment of this Court reported as *Kerala State Electricity Board & Anr. v. Kurien E. Kalathil & Ors.*² wherein it was held 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 a 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

²(2000) 6 SCC 293

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- A 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. The contractor should have relegated to other remedies.”
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18. Mr. Nataraj also placed reliance on the judgment of this Court reported as *Joshi Technologies International Inc v. Union of India & Ors.*³ wherein the following was held:

- C “55. Law in this aspect has developed through catena of judgments of this Court and from the reading of these judgments it would follow that in pure contractual matters the extraordinary remedy of writ under Article 226 or Article 32 of the Constitution cannot be invoked. However, in a limited sphere such remedies are available only when the non-Government contracting party is able to demonstrate that it is a public law remedy which such party seeks to invoke, in contradistinction to the private law remedy simpliciter under the contract. Some of the case law to bring home this cardinal principle is taken note of hereinafter.
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59. On the basis of these facts, this Court observed that the aforesaid observations of the High Court relying upon *Ramana Dayaram Shetty case* [(1979) 3 SCC 489 : (1979) 2 LLJ 217] were not correct. Thus observed the Court, speaking through Ratnavel Pandian, J.: (*Ajai Pal Singh case* [(1989) 2 SCC 116 : (1989) 1 SCR 743], SCC pp. 125-26, paras 21-22)

“21. This finding in our view, is not correct in the light of the facts and circumstances of this case because in *Ramana Dayaram Shetty case* [(1979) 3 SCC 489 : (1979) 2 LLJ 217] there was no concluded contract as in this case. Even conceding that the BDA has the trappings of a State or would be comprehended in ‘other authority’ for the purpose of Article 12 of the Constitution, while determining price of the houses/

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flats constructed by it and the rate of monthly instalments to be paid, the ‘authority’ or its agent after entering into the field of ordinary contract acts purely in its executive capacity. Thereafter the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter se. In this sphere, they can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority (i.e. BDA in this case) in the said contractual field.

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22. There is a line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple — *Radhakrishna Agarwal v. State of Bihar* [(1977) 3 SCC 457], *Premji Bhai Parmar v. DDA* [(1980) 2 SCC 129] and *Divl. Forest Officer v. Bishwanath Tea Co. Ltd.* [(1981) 3 SCC 238 : (1981) 3 SCR 662] “

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69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, “normally”, the Court would not exercise such a discretion:

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

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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

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- A 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.
- B 69.4. Money claims *per se* particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.”
- C 19. It was thus argued that in view of the arbitration clause available to resolve the disputes, the order of the High Court was unwarranted and untenable. It was also argued that the High Court in the impugned order has held that resurvey was not possible as five monsoons have passed, therefore, the appellants were directed to approve the DPR and pay the pending bills on the basis of Final Joint Report.
- D 20. The letter dated 27.8.2015 was issued by the Chief Engineer, Project *Vartak* denying the allegations levelled by the writ petitioner and informing the writ petitioner that the Board of Officers is being cancelled at his request. It was also pointed out that the Board of Officers was constituted at the request of the writ petitioner to resolve the matter. The letter dated 21.10.2015 was in fact reply to the notice served by the petitioner under Section 80 of Code of Civil Procedure, 1908.
- E 21. Ms. Meenakshi Arora, learned senior counsel for the writ petitioner, contended that the officer who had written such abovementioned letter was not the competent authority to write the same. Such argument was based upon an averment in the memorandum of appeal. The memorandum of appeal was signed by the panel counsel and was not supported by any affidavit of an officer of the appellant. We do not find any merit in the said argument raised. The letter itself stated that it has been approved by the Competent Authority. It appears that the decision was taken by the competent authority but the communication was issued by an officer on behalf of the competent
- F authority. The basis of Joint Survey Report itself has been found to be fallacious. This Report appears to be a friendly act of some of the officers of the appellant, to grant benefit to the writ petitioner, though even not claimed by the petitioner at an early stage. The claim of Rs.23,68,11,589.02 in the letter dated 17.6.2014 has swelled into an amount of Rs. 35,51,80,651 as per the notice under Section 80 of the Code.
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Therefore, for the purposes of these proceedings, the communication dated 29.10.2013 cannot be permitted to be disputed by the writ petitioner.

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22. The Board of Officers convened its meeting but the same was cancelled vide communication dated 8.6.2015. Thus, an attempt by the appellants to resolve the disputes regarding the measurements by constituting Board of Officers was scuttled by the writ petitioner for the reasons best known to him.

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23. The High Court has based its order on the ground that after five monsoons, the final measurements could not be ascertained. If the final measurements could not be done at the spot, the contemporary evidence and the measurement books prepared from time to time could be the basis for determining the liability of the appellants. The Joint Survey Report is not an admitted measurement, though some officers might have signed it. The Report prepared after the completion of work wherein no such work done is reflected in the measurement book prepared during execution of work is an attempt to inflate the claim raised by the writ petitioner. The entire amount claimed by the writ petitioner is disputed. It has been asserted that the entire payment due as against the claim of work order had been made, as reflected from the following table:

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I	Awarded cost of the work under the Contract	Rs.31.87 Crores
II	Cost of the work already executed by the department on the same stretch before the award of work	Rs.0.86 Cr.
III	Cost of the work as reduced in view of prior departmental work	Rs.31.01 Crores
IV	Amended cost of work under the Contract	Rs.35.03 Crores
V	Contract cost in revised DPR processed to Ministry of Road, Transport and Highways	Rs. 42.27 Crores
VI	Payment made to the contractor/respondent herein inclusive of Rs.3.86 Crores as per the order dated 18.05.2017 of the Hon'ble High Court	Rs.42.27 Crores
VII	Contractor's claim as per final bill dated 23.11.2015	Rs. 71. 76 Crores

- A 24. Therefore, the dispute could not be raised by way of a writ petition on the disputed questions of fact. Though, the jurisdiction of the High Court is wide but in respect of pure contractual matters in the field of private law, having no statutory flavour, are better adjudicated upon by the forum agreed to by the parties. The dispute as to whether the amount is payable or not and/or how much amount is payable are disputed questions of facts. There is no admission on the part of the appellants to infer that the amount stands crystallized. Therefore, in the absence of any acceptance of Joint Survey Report by the competent authority, no right would accrue to the writ petitioner only because measurements cannot be undertaken after passage of time. Maybe, the resurvey cannot take place but the measurement books of the work executed from time to time would form a reasonable basis for assessing the amount due and payable to the writ petitioner, but such process could be undertaken only by the agreed forum i.e., arbitration and not by the Writ Court as it does not have the expertise in respect of measurements or construction of roads.
- B 25. A perusal of the matter shows that collusion of some of the officers of the appellants with the contractor cannot be ruled out. Such collusion seems to be the basis of the writ petition filed before the High Court.
- C 26. In view of the above discussion, we deem it appropriate to allow the present appeal while dismissing the writ petition filed by the writ petitioner before the High Court.

Ankit Gyan

Appeal allowed.