

GAHC010054122022



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : WP(C)/1984/2022

M/S KARBI PROJECTS PRIVATE LIMITED
A PRIVATE LTD. COMPANY REP. BY ONE OF ITS DIRECGOR MR. JUGAL
KISHORE MALPANI AGED ABOUT 72 YEARES HAVING ITS REGISTERED
OFFICE AT MALPANI COMPLEX, BENGENAKHOWA GANT, P.O. GOLAGHAT,
PIN-785702 DIST. GOLAGHAT, ASSAM

VERSUS

THE STATE OF ASSAM AND 5 ORS
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
PUBLIC WORKS (BUILDINGS AND NATIONAL HIGHWAYS) DEPTT. DISPUR,
GUWAHATI-781006

2:THE PRINCIPAL SECRETARY
KARBI ANGLONG AUTONOMOUS COUNCIL DIPHU
PIN-782460

3:THE CHIEF ENGINEER
PWD (ROADS)
CHANDMARI GUWAHATI-781003

4:THE ADDITIONAL CHIEF ENGINEER PWD (R AND B)
HILLS
DIPHU
ASSAM
PIN-782462

5:THE SUPERINTENDING ENGINEER
PWD (R AND B) DIPHU
CIRCLE-1
DIPHU
PIN-782462 ASSAM

6:THE EXECUTIVE ENGINEER
PWD
BARPATHAR ROADS DIVISION
SILONIJAN
PIN-782470
ASSA

Advocate for the Petitioner : MR. P MAHANTA

Advocate for the Respondent : SC, PWD

**BEFORE
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA**

For the petitioner : Mr. I. Choudhury
Mr. P. Mahanta. Advocates.

For the respondents : Mr. J. Chutia SC, KAAC,
Mr. M. Das, SC, PWD.

Dates of hearing : 05.02.2024

Date of Judgment : 05.03.2024

JUDGMENT AND ORDER (CAV)

1. Heard Mr. I. Choudhury, learned Senior Counsel for the petitioner, assisted by Mr. P. Mahanta. Also heard Mr. J. Chutia, learned Standing Counsel, KAAC.

2. The claim of the petitioner in this writ petition is with regard to non-payment of contractual dues.

3. The brief facts of the case is that the petitioner was allotted works under "Improvement of BBDC Road from Ch-19700m to Ch-20700.00m including construction of 1000mm dia NP3 HP Culvert No.21/1, 1200mm dia (5 Row) 21/2 under NLCPR for the year 2008-2009.

4. The petitioner's counsel submits that in terms of the "Demand Proposal of Grant Share of NLCPR Scheme" made by the Executive Engineer, PWD, Barpathar Roads Division Silonijan (respondent no.6) on 24.03.2023, the balance amount payable to the petitioner for completion of the said contract work is 14,75,040/- . He submits that despite the Completion Certificate No.1149 dated 24.09.2014 having been issued by the respondent no.6, the petitioner has not been paid the balance contractual dues till date.

5. Mr. J. Chutia, learned Standing Counsel, Karbi Anglong Autonomous Council (KAAC), on the other hand submits that though the work undertaken by the petitioner was under a Centrally Sponsored Scheme, the petitioner has not impleaded the Union of India as a party respondent in the writ petition. He submits that various notices were sent to the petitioner to complete his contract work. However, the petitioner did not complete the contract work. The contract work of the petitioner from Ch-19700m to Ch-20700.00m was amongst the 53 work groups from the one project work for improvement of the BBDC Road from CH 0.00 to 30.20km under the NLCPR Scheme. The work for the entire Ch. No. 0.00km to 30.20 Km was foreclosed on 06.10.2020 and work was allotted to another contractor, i.e., M/s M.P. Agarwalla, A.T. Road, Bokakhat, Assam, vide letter no.CE/DEV/TB/383/2020-21/9 dated 26.02.2021.

6. The counsel for the KAAC submits that the award of the construction work of BBDC Road CH.19700m to CH.20700 to the petitioner, vide Work Order No.ACEH/CH/NLCPR/48/09-10/4 dated 26.03.2010 for Rs.71,46,049/-, was not completed by the petitioner within the stipulated time period. He submits that as the uncompleted work of the petitioner had been completed by another contractor in the year 2021, the running bills submitted by the petitioner for the work executed by him are now more than 13 years old and as such, it would not be impossible to verify the work done by the petitioner after so many years have gone by.

7. Mr. J. Chutia, learned Standing Counsel for the KAAC submits that as there are disputed questions of fact, the petitioner has an alternative remedy, as disputes between the parties can be resolved through Arbitration, in terms of the contract agreement made between the parties. The respondents counsel also submits that there is a delay in filing the writ petition and as such, the writ petition should be dismissed for delay and laches.

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

9. As can be seen from the stand taken by the parties, there are disputed questions of fact, as to whether the work was completed by the petitioner and whether verification of the work done by the petitioner can be done at this stage.

10. With regard to the question as to whether the petitioner had completed the contract work, the Completion Certificate No.1149 dated 24.09.2014 issued

by the respondent no.6 shows that the work was started on 08.04.2010 and it was completed on 20.08.2014, though the scheduled completion date was 30.09.2011. The Completion Certificate also shows that the original tender value was Rs.71,46,049/- and the value of the completed work was Rs.71,35,424/-. Though the State respondent have taken the plea that the petitioner did not complete his contract work, there is no document showing that the contract work given to the petitioner had been terminated by the respondents. Further, if the work was not completed, there was no question of issuing a completion certificate.

11. The averments made by the petitioner regarding the Completion Certificate issued by the respondent no.6 is reflected in paragraph-6 of the writ petition. The affidavit-in-opposition filed by the respondent no.6 makes a reply to the contents of paragraph nos.2 - 7 of the writ petition, by stating that the respondent no.6 reiterates the averments made in paragraph nos.4 – 10 of the affidavit-in-opposition. A perusal of paragraph nos.4 – 10 of the affidavit-in-opposition shows that the petitioner was given notices to re-start the contract work time and again. Further, the petitioner left the work in an incomplete stage. Paragraph-4 to 10 of the affidavit-in-opposition further states that the order dated 06.10.2020 was issued foreclosing the work under the NLCPR scheme for improvement of the BBDC Road from CH 0.00 to 30.20 Km and that the contract work was allotted to another contractor, vide letter dated 26.02.2021, who eventually completed the work.

12. 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 18(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.”*

13. 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 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."

14. In the case of ***Mohinder Singh Gill & Another vs. The Chief Election Commissioner, New Delhi & Others***, reported in **(1978) 1 SCC 405**, 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.

15. In the case of ***ABL international Ltd. & Another vs. Export Credit Guarantee Corporation of India Ltd. & Others***, reported in **(2004) 3 SCC 553**, 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.”*

16. In the case of ***Union of India & Others vs. Tantia Construction Private Limited***, reported in **(2011) 5 SCC 697**, 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.

17. In the case of **J. Deep Chemicals & Fertilizers (M/s) vs. State of Tripura & Others**, reported in **2007 (2) GLT 173**, 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.

18. 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."*

19. 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.

20. 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.

21. 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.

22. Though the petitioner's affidavit contains a Certificate "To Whom It May Concern", which does not have the year of issue by the Executive Engineer, PWD Roads, Barpathar, Silanijan, stating that a sum of Rs.44,81,040/- is due against the petitioner's bill for Rs.71,35,424/-, the same Executive Engineer in his additional affidavit has stated that the work for construction of BBDC road Ch. 19700m to Ch. 20700m was issued vide work order No. ACEH/CS/NLCPR/48/09-10/4 dated 26.03.2010 dated 26.03.2010, which the petitioner did not complete within the stipulated time. Further, works executed by the petitioner being more than 9 years old, the execution of the petitioner's work could not be verified. It was also stated by the respondent No.6 that the Central government had not released the Central share for the project work and as such, claims could not be entertained due to the above reason.

23. The stand of the respondents that the Central government had not released their share of the funds for the work in question is not a concern of the petitioner, inasmuch as, the State respondents had awarded the work to the petitioner and as such, the State respondents would have to make arrangement for payment of any outstanding amount payable to the petitioner.

24. The State respondents have not taken a stand that the Completion Certificate No.1149 dated 24.09.2024 are fabricated documents. They have skirted the issue and have taken a stand in their affidavit that the petitioner did

not complete the contract work, which required the entire project to be completed by a different contractor. As there are disputed questions of facts, this Court is of the view that the alternative remedy available in terms of the Arbitration Clause should be resorted to, to decide the dispute between the parties. Accordingly, the writ petition stands dismissed, with liberty being given to the petitioner to invoke the arbitration Clause.

25. In view of the conflicting stands of the parties and the fact that there are disputed questions of facts, which requires evidence to be led, this Court is of the view that the writ Court cannot dispose of the writ petition in terms of the judgment of the Supreme Court in the case of ***ABL International Ltd. (Supra)*** and the Full Bench decision of this Court in the case of ***Tamsher Ali (Supra)***. Accordingly, as there is an arbitration clause 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 provided in the contract agreement, as held by the Supreme Court in ***Puna Hinda (supra)***.

26. The writ petition is accordingly disposed off.

JUDGE

Comparing Assistant