



GAHC010230182018

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

Case No. : WP(C)/7326/2018

GIRIN DEKA AND ANR.
S/O LATE BAIDAR DEKA
PROPRIETOR OF M/S GIRIN DEKA
HAVIN GITS OFFICE AND PRINCIPAL PLACE OF BUSINESS AT HOUSE
NO. 7,
TRIPURA ROAD,
KHANAPARA,
GUWAHATI-22.

2: M/S GIRIN DEKA
A PROPRIETORSHIP FIRM REP.BY ITS PROPRIETOR SHRI GIRIN DEKA
HAVING ITS OFFICE AND PRINCIPAL PLACE OF BUSINESS AT HOUSE NO. 7
TRIPURA ROAD

KHANAPARA
GUWAHATI -22

VERSUS

THE UNION OF INDIA AND 4 ORS.
MINISTRY OF ROAD TRANSPORT AND HIGHWAYS REP. BY ITS
SECRETARY HAVING ITS PRINCIPAL OFFICE AT TRANSPORT BHAWAN,
1, PARLIAMENT STREET,
NEW DELHI- 110001.

2:THE NATIONAL HIGHWAY AUTHORITY

REP. BY ITS CHAIRMAN HAVING ITS OFFICE AND PRINCIPAL PLACE OF
BUSINESS AT TRANSPORT BHAWAN I
PARLIAMENT STREET
NEW DELHI- 110001.

3:THE NATIONAL HIGHWAYS AND INFRASTRUCTURE DEVELOPMENT
CORPORATION LTD.



A FULLY CENTRAL GOVT. COMPANY UNDER MINISTRY OF ROAD
TRANSPORT AND HIGHWAYS
GOVT. OF INDIA

HAVING ITS OFFICE AND PRINCIPAL PLACE OF BUSINESS AT PTI
BUILDING
PARLIAMENT STREET
NEW DELHI-1
AND HAVING ITS BRANCH OFFICE AT GNB ROAD
AMBARI IN FRONT OF AGP OFFICE
GUWAHATI-1
REP. BY ITS EXECUTIVE DIRECTORS.

4:THE GENERAL MANAGER (PROJECT)
NHIDCL
ASSAM
SONALI JAYANTI NAGAR
JORHAT.

5:M/S CORSAN CORVIAM CONSTRUCTION S.A.
HAVING ITS HEAD OFFICE AT CABBALLERO ANDNTE
8-28021
MAIDRID
SPAIN AND REP. BY ITS DIRECTORS AND HAVING IT BRANCH OFFICE AT
1ST FLOOR
SPLENDOR TOWER

SECTOR-88
GURGAON

122018
HARYANA REP. BY ITS MD

Advocate for the Petitioner : MR. S P ROY

Advocate for the Respondent : SC, NHAI

BEFORE
HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

For the Petitioners : Shri SP Roy, Advocate.

For the Respondents : Shri PJ Saikia, Sr. Advocate for NHIDCL and
Shri CKS Baruah, CGC for Union of India.

Date of Hearing : 20.04.2023.

12.06.2023.

Judgment & Order

The instant writ petition has been filed with a claim for release of a contractual amount in respect of a work done by the petitioners. Since the scope of a writ court in matters of the present nature is limited, this Court would proceed within the parameters laid down by various judicial pronouncements to adjudicate this matter.

2. There are two petitioners in this petition. While the petitioner no. 1 is the Proprietor of a proprietorship firm, the petitioner no. 2 is the Firm. The petitioners claim to be manufacturers of quarry materials and other similar materials and also undertake civil engineering projects. The Ministry of Road Transport and Highways (respondent no. 1) had entered into a contract with M/S Corsan Corviam Constructions S.A. (respondent no. 5). The aforesaid respondent no. 5 (hereinafter referred to as the CCCSA) is a company from Spain which had entered into the aforesaid contract on 19.11.2014. The work was relating to the construction of four laning of Jorhat to Jhanji Section of NH 37 in the State of Assam from 453.000 to 491.050 km on

Engineering Procurement Contract (EPC). Clause 3.7 (d), (g) and Clauses No. 3.2, 3.2.1, 3.2.2, 3.2.3 and 3.4 of the aforesaid contract dated 19.11.2014 provides that the principal Contractor-CCCSA would be entitled to enter into a sub-contract with other Contractors for completion of the said project. It is the case of the petitioners that an agreement was arrived at between the CCCSA and the petitioners regarding sub-contract which was forwarded for examination by the National Highways and Infrastructure Development Corporation Ltd. (NHIDCL). Consequently, the General Manager (Project) of the NHIDCL had issued letters dated 11.03.2016, 12.05.2016, 19.10.2016 and 04.11.2016 to the CCCSA whereby, it was informed that the proposal for sub-contract was examined by the NHIDCL which was approved in principle and a length of 482.700+0487.000 for an amount of Rs. 27.52 crores; vide letter dated 12.05.2016 approval was given for km 482+700k to km 487+000 for Rs. 33.35 crores being the cost of 2.88 length of the project; vide letter dated 19.10.2016 length of 2.33 km and additional works of Rs.27 crores; vide letter dated 04.11.2016 the work of 2.33 km as additional works were done and completed by the petitioners. The petitioners claim that all the aforesaid works and additional works were duly approved by the General Manager (Project) NHIDCL on the request of CCCSA and consequently, the works done by the petitioners in terms of the agreement with the CCCSA were approved by the NHIDCL.

3. It is further projected that under Clause 2 of the sub-contract agreement dated 31.05.2016, a provision is there for consideration of the payments to be made by the Contractor to the Sub-Contractor by which the Sub-Contractor was required to execute the scope of the work as per the General Conditions of Contract (GCC).

4. While the petitioners claim to have completed the work in all respects, they could learn that the NHIDCL had issued a letter dated 07.06.2017 to the CCCSA for termination of the contract dated 19.11.2014. The said termination was done in terms

of Clause 23.1 of the contract on the ground of default and non-execution of the works by the CCCSA. The work pertained to the other portion of the main work which was not sub-contracted to the petitioners. The tripartite agreement dated 05.05.2015 which was entered as per Clause 23.1.1 of the contract was also terminated. The petitioners allege that neither the termination letter was served upon them nor any termination payments made.

5. The primary contention of the petitioners is that the petitioners had executed the work entrusted to them as Sub-Contractor by the CCCSA. Therefore, no fault, whatsoever can be attributed to the petitioners *qua* the works involved in the sub-contract. Therefore, the petitioners claim that they are entitled to the amount as per the contract in question which has been quantified at Rs. 11,06,85,770/- (Rupees Eleven Crores Six Lacs Eighty Five Thousand Seven Hundred and Seventy). However, the respondent no. 5 or the official respondents have not taken any steps for release of the amount.

6. It is the further contention of the petitioners that the petitioner no. 2 is a Small Scale Unit and is entitled to the benefits under the Micro Small and Medium Enterprises (MSME) Govt. of India Micro Small and Medium Enterprises Development Act (MSME Act) which have not been considered at all. Accordingly, the instant writ petition has been filed.

7. On the other hand, the primary defence of the contesting NHIDCL is that the principal Contractor, namely, CCCSA had defaulted in some contract works and has, in fact left the country. The said works had to be done through some other agencies at the risk and cost of the principal Contractor-CCCSA and such costs have not been recovered, as the entity was from Spain and has left the country. It is, however, on record that the works which were left undone is not the work which is connected with

the present writ petition. The stand of the respondents is also not that the petitioners did not execute the work or that there was any defect in execution of the same. The NHIDCL, accordingly submits that when amounts were entitled to by it from the principal Contractor under whom the petitioners were the Sub-Contractor, no direction is liable to be issued for release of any amount to a Sub-Contractor of the CCCSA.

8 I have heard Shri SP Roy, learned counsel for the petitioners. I have also heard PJ Saikia, learned Senior Counsel for the NHIDCL-respondent nos. 3 and 4 as well as Shri CKS Baruah, learned CGC appearing for the respondent no.1. The materials placed on records have been carefully examined.

9. Shri Roy, learned counsel for the petitioners submits that the petitioner no.2 is a Unit under the MSME and therefore, entitled to certain privileges and benefits under the MSME Act.

10. By referring to the MSME Act, the learned counsel for the petitioners has drawn the attention of this Court to Section 2 (d) which defines 'buyer'. Under Section 15 of the said Act, the liability of a buyer to make payment has been laid down. Section 16 lays down that even interest is payable on the amount entitled to by a unit.

11. It is submitted on behalf of the petitioners that once the arrangement of sub-contract has been approved by the NHIDCL, the Sub-Contractor attains the position of the principal Contractor. By drawing the attention of this Court to the contract agreement in question which has been annexed as Annexure 4 to the writ petition, learned counsel has referred to Clause 3.2 which is in connection with obligations relating to sub-contracts and any other agreements. As per Clause 3.2.1, the provision for sub-contract has been given. The provision of Clause 4.1.6 has also been pressed into service as per which the authority agrees to provide support to the contractor and

undertakes to observe comply and perform the provisions of this agreement as per law. It is submitted that Clause 24.1 makes it clear that the agreement is not to be assigned by the contractor to any person, save and except with the prior consent in writing of the authority and the said consent can also be declined by the said authority without assigning any reasons.

12. In terms of the aforesaid provision of the contract, the NHIDCL had issued a letter dated 19.10.2016 on the subject of the sub-contract given to the petitioners and his request for revised scope of the proposal against the additional payment. The letter reveals that the proposal given by CCCSA was examined in details. After such examination, the allotment of works to the petitioners were approved by citing the following reasons:

- i) The company has inducted its own crusher of capacity 250 TPH and already started crushing of material at site which was very much essential for starting the work under package Jorhat to Jhanji.
- ii) Sub-Contractor, M/S Girin Deka has also purchased WMM Plant, Batch Mix Plant recently and these plants have already been inducted at site.
- iii) M/S Girin Deka has procured desired number of vehicle/equipments/plants at site for carrying out C&G work and earth work and he has already started these work activities at site under chainages between 488.00 to 490.800 which has already been awarded to him through sub-contract.

13. Thereafter vide communication dated 04.11.2016, the NHIDCL had informed

CCCSA regarding the approval granted to the sub-contract to the petitioners on certain conditions. It was mentioned that the sub-contract will be governed by the Contract Agreement dated 19.11.2014 between the MORTH & CCCSA and the tripartite agreement between MORTH, CCCSA and NHIDCL dated 05.05.2015.

14. It has further been stipulated that in case of failure of the Sub-Contractor, action will be initiated against the Contractor-CCCSA. As regards the payment issue, it was stated that all payments would be made to the Contractor in accordance with Schedule 'H' of the contract agreement and no payment is to be released directly to the Sub-Contractor unless, the Contractor and the Sub-Contractor both jointly submit a written request to transfer the payment in the joint account of the Contractor and the Sub-Contractor.

15. Reference is also made to the details of the tax deduction at source of the petitioners for various transactions done for execution of the works in question.

16. The learned counsel for the petitioners submits that it appears that for another part of the entire project of four laning, which was also allotted to CCCSA with which the petitioners are not connected, the CCCSA had failed to execute the work. In this connection, a report was called for by NHIDCL. Accordingly, a communication dated 21.08.2017 was submitted from which, it appears that an amount of Rs. 43,73,90,000/- is recommended to be recovered from CCCSA for its default. The said communication also takes into consideration the amount payable for works done which has been quantified at Rs.11,23,56,861/- which was to be adjusted from the amount recoverable.

17. Shri Roy, learned counsel for the petitioners further submits that the contract itself contains a clause, being Clause 27.11 regarding third parties. It states that the

agreement is intended solely for the benefit of the Parties, and their respective successors and permitted assigns. He submits that the petitioner no. 2 is a permitted assign within the meaning of the aforesaid clause. Referring to Clause 27.12, it is submitted that the said clause makes it clear that the agreement shall be binding upon and inure to the benefit of the Parties, and their respective successors and permitted assigns. Clause 23.6.3 deals with termination payment.

18. Shri Roy, learned counsel for the petitioners submits that the provision of the contract makes it clear that the arrangement for sub-contract with the petitioners were done in accordance with the provisions of the contract. He further submits that apart from the permission and approval for such sub-contract, for all practical purposes, the petitioner no. 2 was treated to be the principal Contractor and the petitioners were allowed to participate in every joint meeting. In this connection, the learned counsel has referred to the additional-affidavit filed by the petitioners dated 03.12.2020 in which, a Minutes of Meeting dated 20.09.2016 has been annexed as Annexure-5 in which, the name of the petitioner no. 1 has been recorded as one of the participants. The said Minutes has also recorded that the petitioners who were the Sub-Contractor had mobilized resource and manpower. Certain more observations made in the same meeting are also relevant which have been highlighted by the learned counsel. The observations reveal that the petitioners had brought few apparatus which were, however, required to be calibrated. It further reveals that the petitioners had established base camp at Ch. 484+950 where Batching plant was established and WMM plant had arrived. Further, the various machineries and equipments brought by the petitioners at the site have been elaborately stated. *Juxtaposed* with regard to the portion of the package from Jhanji to Demow, it was recorded that no substantial work was seen to be done. The learned counsel clarifies that the portion of the work which was entrusted to the petitioners was from Jorhat to Jhanji.

19. Shri Roy, learned counsel for the petitioners, accordingly submits that the petitioners are legally entitled to receive the payment for the works duly completed by them. He further submits that such payments cannot be withheld or declined only because of the fact that certain recoverables are there from a different entity, the entitlements of the petitioners cannot be refused.

20. The learned counsel has also relied upon Section 70 of the Indian Contract Act, 1872 as per which, when an act is done by a person for another in accordance with law, he could be entitled for compensation. For ready reference, the said section is extracted as hereunder:

"70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously; and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

21. In support of his submissions, Shri Roy, learned counsel has referred to a number of case laws and the relevant of such case laws are as follows:

- i) *Mulamchand Vs. State of MP*, (1968) AIR SC 1218;**
- ii) *Union of India Vs. Sita Ram Jaiswal*, (1976) 4 SCC 505;**
- iii) *Union of India Vs. JK Gas Plant*, (1980) 3 SCC 469;**
- iv) *Union of India Vs. Gautam Dev Gupta*, (1989) 1 GLJ 67;**
- v) *State of Assam Vs. Mahalchand Binod Kumar*, (1989) 2 GLJ 70; and**
- vi) *Ramakanta Deb Roy Vs. Amalendu Dutta*, 1990 (1) GLR 332.**

22. In the case of **Mulamchand** (*supra*), the Hon'ble Supreme Court had held that Section 70 of the Contract Act contains three conditions. It is submitted that in the present case, all the three conditions have been fulfilled.

23. In the case of **Sita Ram Jaiswal** (*supra*), it has been held that goods once delivered cannot be taken back. Similarly, in the case of **JK Gas Plant** (*supra*), it has been held that once the Government had enjoyed the benefit of the supplies, the supplier is entitled for payment.

24. The Gauhati High Court in the cases of **Mahalchand Binod Kumar** (*supra*) and **Gautam Dev Gupta** (*supra*) had reiterated the requirement of fulfillment of the three conditions of Section 70. It is submitted that in the present case, the conditions under Section 70 being fully met, payments cannot be refused on any ground. It is submitted that in the case of **Gautam Dev Gupta** (*supra*), it was also held that even in absence of a formal contract, the price of the goods can be realized.

25. In the case of **Ramakanta Deb Roy** (*supra*), this Court had held that Section 70 of the Contract Act would apply in a case where there is no subsisting or valid contract and the claim is based on the equitable doctrine and to prevent unjust enrichment.

26. Shri Roy, learned counsel for the petitioners has also referred to the meaning of 'Assignment' as would appear from the Black's Law Dictionary. He submits that 'Absolute Assignment' has been defined to be an assignment that leaves the assignor no interest in the assigned property or right. He, accordingly submits that by the sub-contract which was duly approved by the authorities, the petitioners have stepped into the shoes of the principal contractor *qua* the portion of the work of the main contract which was entrusted to the petitioners.

27. *Per contra*, Shri PJ Saikia, learned Senior Counsel for the NHIDCL has, at the outset, submitted that affidavits-in-opposition have been filed by the respondent nos. 3 and 4 as well as by the respondent no. 2 whereby, the claim of the petitioners has been refuted and the action of withholding the payments has been defended.

28. He submits that the reason for withholding the payment is public interest. The learned Senior Counsel fairly submits that there is no denial that the work was done by the petitioners, however, such work was done only in the capacity of a Sub-Contractor and not as an assign.

29. He submits that though communication dated 04.11.2016 has been relied upon by the petitioners, the same does not vest any indefeasible right in favour of the petitioners. Shri Saikia submits that the said communication contains several conditions and unless and until, the said conditions are fulfilled, no right would accrue upon the petitioners to claim any amount.

30. The learned Senior Counsel for the respondents-NHIDCL, by referring to Clause 3.2 with regard to the obligations relating to sub-contracts submits that the said clause and sub-clauses are conditional and unless and until, the conditions are fulfilled, works done by a Sub-Contractor may not be held to have been executed by following the due process.

31. The learned Senior Counsel for the respondents submits that there is a huge amount recoverable from the principal Contractor-CCCSA which is more than the amount claimed by the petitioners in the instant case and therefore, release of the amount to the petitioners may not be justified. He further submits that even the payment to a Sub-Contractor is required to be made only through the Contractor.

32. Rejoining his submission, Shri Roy, learned counsel for the petitioners reiterates that the communication 04.11.2016 issued by the NHIDCL would demonstrate that the Sub-Contractor (petitioner no. 2) was held eligible for execution of additional work and further that the sub-contract would be governed by the contract agreement signed between MORTH and the contractor-M/S CCCSA on 19.11.2014 and the tripartite agreement which included the NHIDCL on 05.05.2015. He submits that under those circumstances, the respondents cannot be allowed to take a volte-face to the prejudice of the petitioners. He submits that for executing the work in question, the petitioners had taken huge bank loans of about Rs. 1 crore and because of the present situation, the petitioners are unable to pay the loan and are facing a SARFAESI proceeding.

33. The rival submissions made by the learned counsel for the parties have been duly considered and the materials placed before this Court carefully examined.

34. From the facts and circumstances which have been discussed above, the following position, which are also admitted by the parties, emerge:

- i) The contract agreement in question dated 19.11.2014 permits sub-contracts;
- ii) The sub-contract to the petitioners was given after approval from the concerned respondents;
- iii) Various reports which are part of the records would demonstrate that the work which was entrusted to petitioners was completed in all respects. In fact, this fact is also admitted by the learned counsel for the

respondents.

iv) There are various clauses in the contract from which the petitioners appear to be the assigns of the principal Contractor.

v) Numerous communications, including communication dated 04.11.2016 fortify the stand of the petitioners;

vi) The respondent nos. 3 and 4 in the affidavit-in-opposition dated 26.02.2019 has made the following admission in paragraphs 11 and 12 which are extracted hereinbelow:

*“11. That, with regard to statement made in **paragraphs 27 and 28**, of the Writ Petition the answering Deponent bets to state that in consequence to the termination of contract 4 laning from Jorhat to Jhanji section of NH-37 due to gross default on the part of previous EPC Contractor M/s Corsan Corviam Construction SA, Authority’s Engineer determined the valuation of unpaid work (completed/uncompleted) as per the provision of Clause 23.5 of Article 23 of the Contract Agreement.*

The gross valuation of unpaid EPC WORK (completed/uncompleted) determined by the Authority’s Engineer is Rs. 12,26,35,331/- (Rupees Twelve Crore Twenty Six Lakhs thirty Five Thousand Three Hundred and Thirty one only) out of which executed under scope of Sub-Contractor M/s Girin Deka is Rs. 11,06,85,770/- (Rupees Eleven Crore Six Lakhs Eighty Five Thousand Seven Hundred and Seventy Only) and under scope of other Sub-Contractor is Rs. 1,19,49,561/- (One Crore Nineteen



Lakhs Forty Nine Thousand Five Hundred and Sixty One Only).

*12. That, with regard to statement made in **Paragraph 29**, the Deponent begs to state that the work done by M/s Girin Deka, which had been assessed and certified by Authority's Engineer, letter no. AE/TL/GDCL/NH/-37/JJ/2018/1463 dated 30.08.2018 has been accounted for in the termination payment of M/S Corsan Corviam Construction SA."*

vii) The only reason discernible for refusing payments is that the principal contractor-CCCSA did not perform a portion of the work leading to termination of the contract at the risk and cost of the Contractor. However, the gross valuation of the unpaid work was calculated to be Rs. 12,26,35,331/- which was executed, out of which, the work done by the petitioners was of Rs. 11,06,85,770/-; and

viii) The amount in question is admitted by the respondents.

35. The background facts, as narrated above, would show that there was no default in execution of the work by the petitioners which was admittedly completed in all respects. The question which would therefore arise is whether the petitioners can be made to suffer for the fault of the principal Contractor which is a foreign entity for default of another work under the respondent authorities with which the petitioners are not connected at all.

36. The records reveal that it is only in relation to the portion of the work of four laning of the National Highway which has been sub-contracted to the petitioners as the petitioners are connected with Contractor-CCCSA. There is no allegation of any

manner that the petitioners have any other commercial connection with the foreign entity, except the work in question. The matter would have been different if a claim of the present nature was made by a subsidiary or a sister concern of the principal Contractor. However, in the instant case, it is seen that the role of the petitioners was at par with the role of the principal Contractor *vis-a-vis* the work in question.

37. This Court finds force in the contentions made on behalf of the petitioners by relying upon Section 70 of the Indian Contract Act, 1872 as per which, three conditions are required to be fulfilled by a party who claims compensation for work done for the benefit of a second party which is not gratuitous. The case laws cited by the petitioners make it clear that compensation in the form of payment cannot be refused if a person lawfully does the work.

38. In the instant case, the assignment of the work appears to be done by following the due process of law, including the agreement dated 19.04.20214 and the tripartite agreement dated 05.05.2015. Further, the execution of the work by the petitioners is not in dispute.

39. Under those circumstances, this Court is of the considered opinion that withholding the amount of the bills submitted by the petitioners for the works done by them for default caused by another entity is not justified.

40. Therefore, the instant writ petition stands allowed by directing release of the payments to the petitioners for the works done immediately as, in the meantime, almost 8 years have passed. It is further made clear that the MORTH as well as the NHIDCL would be at liberty to pursue their remedies to recover any amount from the principal Contractor-M/S CCCSA in accordance with law without affecting the petitioners.



41. The writ petition is accordingly disposed of.

JUDGE

Comparing Assistant