



GAHC010077312020

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

Case No. : WP(C)/2394/2020

MRIGEN BHAGAWATI
S/O- SRI JITEN BHAGAWATI, R/O- LEHUGAON, BISWANATH CHARIALI,
DIST.- SONITPUR, ASSAM

VERSUS

THE STATE OF ASSAM AND 3 ORS.
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM, IRRIGATION
DEPTT., DISPUR, GHY-6, DIST.- KAMRUP (M), ASSAM, PIN- 781006

2:THE CHIEF ENGINEER
OFFICE OF THE CHIEF ENGINEER
IRRIGATION DEPTT.
CHANDMARI
GHY-3
DIST.- KAMRUP (M)
ASSAM
PIN- 781003

3:THE SUPERINTENDENT ENGINEER
OFFICE OF THE SUPERINTENDENT ENGINEER
IRRIGATION TEZPUR (CIRCLE)
TEZPUR
DIST.- SONITPUR
ASSAM
PIN- 784001

4:THE EXECUTIVE ENGINEER
ITAKHOLA DIVISION (IRRIGATION)
ITAKHOLA
DIST.- SONITPUR
ASSAM



PIN- 78418

Advocate for the Petitioner : MR. A BISWAS

Advocate for the Respondent : SC, IRRIGATION

**BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY**

ORDER

Date : 06-03-2024

1. Heard Mr. A Biswas learned counsel for the petitioner and Mr. N Upadhyay learned standing counsel, Irrigation Department.
2. The present writ petition is filed assailing a speaking order dated 28.11.2019 whereby the claim for "escalation of price" made by the petitioner in execution of a contract was rejected.
3. Pursuant to a NIT dated 10.12.2004 for execution of work, namely "Bordikorai Irrigation Scheme-Extension of Spillway Road Slab, Railing etc, the petitioner was awarded the said contract on 07.03.2007. During the continuation execution of the work, the petitioner sought for escalation of price for various reasons including delay attributable to the respondents.
4. When such claim of escalation was not considered, the petitioner preferred a writ petition being WP(C) No.6162/2015. This court under its order dated 10.12.2018 disposed of the writ petition directing the Chief Engineer, Irrigation Department to treat the writ petition as a part of the representation and to dispose of the representation dated 10.05.2015 submitted by the petitioner by a speaking order. Subsequently the impugned speaking order was

passed.

5. By way of the speaking order the Chief Engineer, Irrigation Department has rejected the claim of the petitioner for the reasons quoted herein below:

1. The Executive Engineer, Itakhola Div(I) vide letter No.IID/I-I/2016-17/Pt-III/498 dt 30/10/19 has informed that schedule of rates in Itakhola Div(I) was published in 2004-2005 and 2010-2011 during the period 2002-2012. The estimate of the concerned work allotted to the contractor Sri Mrigen Bhagawati was prepared as per SR 2004-2005.

It is also to be mentioned that schedule of rate in division office usually remains workable till the publication of the next SR. Hence, there appears to be no question of claim of escalation of price materials against the work in question.

2. The work allotted to the contractor Sri Mrigen Bhagawati was to be executed and completed under one tile Addl. Central Assistance for the year 2004-05(No.M-13048/3/(AS)/2003-SP-NE, dt 10/02/2005) which was approved by planning Commission of India and this functioning does not have any specific information/guidelines as to the provision of escalation of rates.

6. The respondent Chief Engineer has filed an affidavit and has taken a stand that though formal work order was issued on 19.05.2006, however in terms of the contract the petitioner could

have completed the work on 05.03.2007. It is the further stand that the work might be halted temporarily for an enquiry by different agencies for the alleged financial irregularities committed by some officials, however, in absence of any escalation clause the petitioner cannot be allowed price variation.

7. Mr. Biswas submits that such decision is arbitrary and it is well settled that even when there is no clause for escalation of price, the petitioner is entitled for payment against such escalation of price when it is admitted that delay was due to the action of the employer of the contract. Mr. Biswas further argues that though the power of judicial review is limited in case of a private contract, however, in the backdrop of the admitted position that there was delay in execution of work for the fault of the employer, the petitioner is entitled for payment against escalation of price during such delay. In the aforesaid backdrop, this court can exercise its power of judicial review. Mr. Biswas in support of his contention relies on the judgment of the hon'ble Apex Court in the case of ***ABL International Ltd vs. Export Credit Guarantee Corporation of India Ltd*** reported in ***(2004) 3 SCC 553***.

8. Per contra, Mr. N Upadhayay learned standing counsel submits that the dispute is in the realm of private dispute and therefore this court should not entertain this writ petition.

9. In ABL International Ltd (supra), the hon'ble Apex Court laid down the following proposition of law:

(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 fact 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." However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution.

(d) The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power.

(e) This plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

10. There is no doubt that even in a dispute relating to private contract, this court is not powerless to exercise its jurisdiction under article 226 subject to certain limitation and parameters including the arbitrariness of the state action and violation of the petitioner's right under Article 14 of the Constitution of India. However, if a disputed facts are to be determined and such dispute are required to be

assessed through evidence, the court should not generally interfere in such cases.

11. This court can very well place reliance on the decision of the hon'ble Apex Court in the case of ***Joshi Technologies International Inc. Vs. Union of India and others*** reported in ***(2015) 7 SCC 728***, wherein it was held that if the contract between parties and the state or the agency of the state is under realm of private law and there is no element of public law, the normal course of the aggrieved party is to invoke the remedy provided under ordinary civil law rather than approaching the High court under Article 226 of the Constitution of India and invoking its extra ordinary jurisdiction. In case of ***State of Kerela Vs. M.K. Jose*** reported in ***(2015) 9 SCC 433***, the hon'ble Apex Court observed that a writ court should ordinarily not entertain a writ petition, if there is a disputed question of fact.

12. In the case in hand the rejection of claim against escalation of price as quoted herein above are of two fold, firstly, that the term of financial sanction of the scheme does not permit any payment against escalation. Now to determine whether such scheme permits escalation of price and whether in absence of any escalation clause, the petitioner is entitled for escalation as claimed, is a matter of fact, which is to be determined through evidence. Such course of action is not permissible in exercise of power of judicial review. Secondly, from the affidavit in opposition and from the speaking order, it is seen that it is not an unequivocal admission of the respondents that the delay in execution of the work is for the fault of the respondents authorities. Thus from the aforesaid it is clear that the claim of the petitioner



against price escalation is disputed by the respondents and in the given facts as discussed hereinabove, the determination requires assessment of evidence, the correctness of which can only be decided satisfactorily by detail evidence, examination and cross-examination of evidence and such determination cannot be conveniently or satisfactorily decided in the proceeding under Article 226 of the Constitution of India. Therefore, this court is left with no option but to dismiss the present writ petition with a liberty to the petitioner to resort to alternative remedy of civil suit as it is submitted that there is no arbitration clause in the contract.

13. Ordered accordingly.

JUDGE

Comparing Assistant