



GAHC010179882020

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

WRIT PETITION (C) No. 5398/2020

Monowar Hussain, aged about 34 years, S/o Bonijuddin, Resident of Village – Bolla Gaon, P.O. Dhaigaon, P.S. Krishnai, District – Goalpara, Assam, PIN - 783126.

.....***Petitioner***

-Versus-

1. The Union of India, represented by the Secretary, Ministry of Railways, New Delhi - 1.
2. N.F. Railways, Represented by the General Manager, Maligaon, Guwahati - 781011.
3. The Divisional Signal & Telecom Engineer, N.F. Railways, Rangia, P.O. & P.S. Rangia, PIN – 781354, District – Kamrup, Assam.
4. The Senior Section Engineer [Signal], N.F. Railways, Goalpara Town, P.O. Bhalukdubi, P.S. Goalpara [Bhalukdubi], District – Goalpara, Assam, PIN - 783101.

.....***Respondents***

3. The case projected by the petitioner, in brief, is that he completed the Contract-Work on 08.08.2018. The petitioner has contended that in addition to the Contract-Work, he was required to complete certain extra works on 01.01.2019 in relation to the Contract-Work which was worth Rs. 5,00,000/-. After completion of the Contract-Work, the petitioner submitted a Final Variation Statement with reference to Contract-Agreement no. ST-20170024 dated 23.01.2018 and the same was duly accepted and admitted by the respondent no. 5. It is claimed that in a Forwarding Report dated 09.12.2019, the respondent Railway authorities had admitted liability of an amount of Rs. 3,51,858/- after deduction of GST, cess, etc. in respect of the Contract-Work. The petitioner has contended that after completing the extra works, he submitted a final bill for the extra works amounting to Rs. 4,10,000/- to the respondent Railway authorities in respect of the Painting of Signaling and Telecom gears in CGS-RNY-NBQ & AZA-GLPT-MZQ Section of BG-I & BG-II Section of RNY Division, after deducting 18% towards GST. But the respondent Railway authorities had neither paid the bill amount entitled either in respect of the Contract-Work covered by the Contract-Agreement no. ST-20170024 nor the bill amount of Rs. 4,10,000/- towards extra works executed by the petitioner. According to the petitioner, an amount of Rs. 3,51,858/- has remained outstanding in connection with the Contract-Agreement no. ST-20170024. When despite service of Legal Notices, dated 23.07.2019 & dated 21.11.2019, the respondent Railway authorities did not disburse the said amount, the petitioner has contended that he is constrained to institute the writ petition seeking the reliefs mentioned above.

4. I have heard Mr. A. Wahab, learned counsel for the petitioner and Mr. B.

Sharma, learned Standing Counsel, N.F. Railway for all the respondents.

5. Mr. Wahab, learned counsel for the petitioner by drawing attention to the documents annexed to the writ petition, has submitted that in respect of the Contract-Agreement no. ST-20170024, the petitioner is entitled to receive an amount of Rs. 3,51,858/-. He has further contended that in respect of the extra works, for which the petitioner had submitted a bill amounting of Rs. 5,00,000/-, the petitioner is entitled to receive an amount of Rs. 4,10,000/- after deduction of taxes, etc.

6. Per contra, Mr. Sharma, learned Standing Counsel, N.F. Railway has contended that the contract price in respect of the Contract-Work was Rs. 5,14,210/- and the completion period was 90 days which started on 12.12.2017, meaning thereby, the petitioner was to complete the Contract-Work on or before 11.03.2018. The petitioner started executing the Contract-Work on and from 15.12.2017 but could not complete the works within the originally stipulated time period of 90 days. The petitioner had, thereafter, applied for extension vide two applications, dated 22.03.2018 & dated 28.06.2018. The respondent authorities after due consideration of the said two applications, extended the validity period by imposing token Liquidity Damage [LD] of Rs. 25,000/- for each extension. As a result of the two extensions, the validity period for completion of the Contract-Work was extended up to 09.06.2018. In spite of the two extensions, the petitioner could not complete the Contract-Work within the said extended period also, as disclosed from a performance report submitted by SSE/SIG/GLPT vide his letter no. GLPT/CA-Painting/1-10/12-18 dated 10.12.2018. On receipt of the said performance report on 10.12.2018, the



petitioner was served with a notice of 7 [seven] days vide letter no. N/RN/S&T/10/2017-18/Tender/11 dated 04.10.2019 in terms of Clause 62 of the Standard General Conditions of Contract [SGCC] to commence the Contract-Work and to achieve good progress. A reply letter Nil was received from the petitioner in response to the notice dated 04.10.2019. Finding the reply of the petitioner unsatisfactory, the competent authority issued a 48-hours' notice dated 14.02.2019 on the petitioner in terms of Clause 62 of the Standard General Conditions of Contract [SGCC] asking him to commence work/to make good the progress of the work, failing which the Contract-Agreement would stand rescinded and the Contract-Agreement would be terminated with forfeiture of the performance guarantee. In response, the petitioner submitted a reply on 15.02.2019 which again was found unsatisfactory, and the competent authority had thereafter, took the decision to terminate the Contract-Agreement. The decision to terminate the Contract-Agreement was conveyed to the petitioner vide letter no. N/RN/S&T/10/2017-18/Tender-420 dated 27.05.2019. The respondent authorities have, thus, denied about completion of execution of the Contract-Work or the extra works by the petitioner.

7. Mr. Sharma, learned Standing Counsel, N.F. Railway has referred to Clause 40 and Clause 41 of the Contract-Agreement to contend that in case any extra works are required to be executed by a contractor, there has to be a formal instrument in writing. He has, thus, contended that in the absence of any formal instrument in writing, there cannot be any payment for execution of any extra works. Mr. Sharma has drawn attention to the statement made in the affidavit-in-opposition of the respondent N.F. Railway authorities to the effect that the petitioner had already been found entitled for an amount of Rs. 1,37,930/-



against bill no. CC/I/Sr.DSTE/RNY/35 dated 10.09.2018 on the basis of works performed by the petitioner as the Contractor and on the basis of recorded measurements done by SSE/SIG/GLPT. After deducting the statutory taxes, etc., the petitioner was paid a net amount of Rs. 78,161/-. Mr. Sharma has further contended that the petitioner has not challenged the order of termination dated 27.05.2019 which was issued prior to institution of the writ petition. It is his contention that the writ petition involves a number of disputed questions of fact. When there are a number of disputes and differences between the parties then the same cannot be decided in a writ petition instituted under Article 226 of the Constitution of India and since the contractual arrangements of the parties were governed by the terms and conditions of a contract agreement i.e. Contract-Agreement no. ST20170024 providing for arbitration, the petitioner should have resorted to the remedy of arbitration as provided in Clause 64 thereof.

8. I have given due consideration to the submissions of the parties and have gone through the materials brought on records by the parties through their pleadings.

9. In the writ petition, the petitioner has adverted to the Letter of Acceptance [LoA] dated 12.12.2017 and execution of the Contract-Agreement no. ST-20170024 dated 23.01.2018 with contract price of Rs. 5,14,210/-. The petitioner has contended that he completed the Contract-Work with contract price Rs. 5,14,210/- on 08.08.2018 and on being entrusted, extra works worth Rs. 5,00,000/-, which he stated to have completed on 01.10.2019. The petitioner has mentioned about submission of the Final Variation Statement with reference to the Contract-Agreement no. ST-20170024, which he has claimed, stood

accepted and admitted by the Senior Section Engineer [Signal], N.F. Railway, Goalpara, through proper channel to the extent of Rs. 3,51,858/- after deduction of GST, cess, etc. In the writ petition, the petitioner has claimed that he had completed execution of the Contract-Work amounting to Rs. 5,14,210/- within the stipulated time period as per the Letter of Acceptance [LoA] dated 12.12.2017, the Contract-Agreement dated 23.01.2018 in terms of E-Tender : RN-ST-10,2017-18 as well as the extra works of Rs. 5,00,000/-. The petitioner has alleged that the respondent N.F. Railway authorities did not disburse the admitted bill amount of Rs. 3,51,858/- against the Contract-Agreement and Rs. 4,10,000/- against extra works he had executed.

10. The petitioner has not made any mention of the fact that he had applied for extension of the time period due to his inability to complete the Contract-Work within the time period. It is the respondent N.F. Railway authorities who have mentioned in their affidavit-in-opposition, filed on 05.04.2023, that the petitioner made applications for extension on two occasions vide two applications, dated 22.03.2018 & dated 28.06.2018. The respondents have mentioned that on the basis of the said two applications, the time period for completion of the Contract-Work was extended on two occasions vide approval letter dated 21.06.2018 and approval letter dated 11.07.2018 respectively. By the approval letter dated 21.06.2018, the completion period of the Contract-Work was extended by the competent authority for another period of three months from 12.03.2018 to 09.06.2018 with imposition of liquidated damage of Rs. 25,000/- as token penalty. By the approval letter dated 11.07.2018, the competent authority extended the completion period of the Contract-Work for another period of two months from 10.06.2018 to 08.08.2018 by imposing a

token penalty of Rs. 25,000/- as liquidated damage. The respondent N.F. Railway authorities have contended that despite the extensions granted on two occasions, the petitioner could not complete the Contract-Work within the extended period. No disclosure is made by the petitioner that the measurements of the works executed by the petitioner in connection with the Contract-Work were done in 2018 and the petitioner was entitled for an amount of Rs. 78,161/- only against the Contract-Work the contract price of which was Rs. 5,14,210/-. Such non-disclosure of relevant and material facts is suggestive of a situation of deliberate suppression of material facts on the part of the petitioner. Performance of the petitioner as the Contractor was assessed and a performance report was prepared and submitted on 10.12.2018 by the Senior Section Engineer [Signal]. On the basis of the performance report submitted by the Senior Section Engineer [Signal], the petitioner was served with the notice of 7 [seven] days on 04.10.2019.

11. Clause 62 of the GCC has provided *inter alia* to the effect that if the Contractor persistently disregards the instructions of the Engineer or contravenes any provision of the contract or fails to adhere to the agreed programme of work by a margin of 10% of the stipulated period, then the Engineer on behalf of the Railway can serve the Contractor with a notice in writing to that effect and if the Contractor does not within 7 [seven] days after delivery to him of such notice proceed to make good his default in so far as the same is capable of being made good and carry on the work or comply with such directions as aforesaid of the entire satisfaction of the Engineer, the Railway shall be entitled after giving 48-hours' notice in writing under the hand of the Engineer, to rescind the contract as a whole or in part or parts and after expiry

of 48-hours' notice, a final termination notice can be issued.

12. In response to the notice dated 04.10.2019, the petitioner submitted a written reply. Immediately thereafter, finding the reasons assigned therein by the petitioner not satisfactory, the Railway authorities proceeded to serve the notice of 48 – hours on 14.02.2019. Though in response to the notice of 48 – hours, the petitioner submitted a reply on 15.02.2019, the respondent Railway authorities found that the petitioner did not take any action to commence the work to show adequate progress of the work. It was observed that the petitioner did not even request for extension of the validity of the Contract-Agreement. It was subsequent to service of the notice of 48-hours, the final termination letter was issued to the petitioner on 27.05.2019 whereby the Contract-Agreement executed between the petitioner and the N.F. Railway authorities stood rescinded. The petitioner was informed thereby, that the balance part of the Contract-Work would be carried out independently without his participation and the security deposit would be forfeited apart from encashment of the performance guarantee.

13. From an analysis of the respective contentions of the parties, it has clearly emerged that a number of disputed questions of fact are involved in the case and the same would require determination. It has been settled by a long line of decisions that the jurisdiction of the High Court under Article 226 of the Constitution of India is couched in wide terms and the exercise thereof is not subject to any restriction except the territorial jurisdiction which are expressly provided in the Article. But the exercise of the jurisdiction is discretionary and it is not to be exercised merely because it is lawful to do so. The very amplitude of



the jurisdiction demands that it will be exercised subject to certain self imposed limitations. It is also settled that the High Court is not deprived of its jurisdiction to entertain a writ petition under Article 226 of the Constitution of India merely because in order to consider the right of the petitioner to be granted the relief sought for questions of facts fall to be determined. In a writ petition under Article 226 of the Constitution of India, the High Court has jurisdiction to try issues both of fact and law. In the process, the Court has to consider as to what facts are in dispute and what facts are not in dispute and such a stage comes after the exchange of pleadings in the form of affidavits amongst the parties is complete, since a writ petition is ordinarily decided on the basis of affidavits filed by the parties. A lis arising out of contractual matter is also not beyond the purview of judicial review though such purview is limited and the discretionary writ jurisdiction in such matters is to be exercised on sound judicial principles. When a writ petition raises a number of disputed questions of fact requiring appreciation of evidence, both oral and documentary, and for determination of such disputed questions of fact, examination of witnesses would be necessary then it may not be proper and appropriate to decide such disputes in a proceeding under Article 226 of the Constitution and then in such a case, the Court may decline to adjudicate a writ petition involving a number of disputed questions of fact. The case in hand is clearly such a case which require determination of several disputed questions of fact through both oral and documentary evidence from the parties and the present writ proceeding is not found to be proper and appropriate proceeding to determine such kind of disputed questions of fact. The writ petition has been filed, as has been noted above, for a direction in the nature of mandamus to the respondents to disburse amounts of Rs. 3,51,858/- against the Contract-Work and Rs. 4,10,000/- against



extra works completed by the petitioner for the respondent Railway authorities. But both the claims have been seriously disputed by the Railway authorities stating *inter alia* that the Contract-Work was terminated due to failure on the part of the petitioner to complete the same and no extra works were entrusted to the petitioner at any point of time. To refute the contention of the respondent Railway authorities that the petitioner was unable to show any formal instrument in writing whereby any extra works were entrusted to him, the petitioner was not brought any cogent materials on record to draw a prima facie inference that such extra works were perhaps entrusted. Thus, it is clear that the dispute as to whether those amounts are payable or not and or how much amount is payable are disputed questions of fact in the absence of any admission on the part of the respondent Railway authorities to infer that the amounts stand crystallized.

14. The Contract-Agreement has contained provisions for settlement of disputes. Clause 63 of the Standard General Conditions of Contract [SGCC] has provided for settlement in respect of 'excepted matters' [matters not arbitrable] whereas Clause 64 of the Standard General Conditions of Contract [SGCC] has provided for arbitration. It is settled that the interpretation and implementation of clauses in a contract cannot ordinarily be subject-matter of a writ petition. Any dispute relating to interpretation, implementation or enforceability of the terms and conditions of a contract of nature involved herein, cannot be agitated in a writ petition. Whether any amount is due to the petitioner from the respondent Railway authorities under the Contract-Agreement or whether the Contract-Agreement had been validly terminated by the respondent authorities or whether refusal to pay any amount by the respondent Railway authorities to the



petitioner is justified, or not, are not matters which should be agitated in or adjudicated upon in a writ petition. Such matters are for adjudication by a civil court or in arbitration, if provided for in the contract.

15. For the reasons mentioned hereinabove, the writ petition is dismissed subject to observations made hereinabove. It is, however, observed that notwithstanding the dismissal of the writ petition, it is open for the petitioner, if he so chooses, to either raise a dispute and ask for reference of the dispute to arbitration as provided by the Contract-Agreement or to approach the civil court according to law, as the case may be. There shall, however, be no order as to cost.

JUDGE

Comparing Assistant