



GAHC010060152021

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

Case No. : WP(C)/2243/2021

MONSUR AHMED
S/O NAYEEM UDIN AHMED, R/O MAIZDIHI, WARD NO. 1, SETTLEMENT
ROAD, DIST. KARIMGANJ, PIN 788712

VERSUS

THE STATE OF ASSAM AND 6 ORS
REPRESENTED BY THE COMMISSIONER AND SPECIAL SECY. TO THE
GOVT. OF ASSAM, PUBLIC WORKS (ROADS) DEPTT., DISPR, GUWAHATI
781006

2:THE CHIEF ENGINEER

PUBLIC WORKS (ROADS) DEPTT.
CHANDMARI
GUWAHATI 781003

3:THE SUPERINTENDING ENGINEER

PWD (ROADS) CACHAR CIRCLE
SILCHAR
PIN 788001

4:THE EXECUTIVE ENGINEER

PWD (ROADS)
PATHARKANDI AND RATABARI TERRITORIAL ROAD DIVISION
RAMKRISHNA NAGAR
KARIMGANJ
PIN 788166

5:CHAMED ALI



EX EXECUTIVE ENGINEER
PWD (ROADS) PATHARKANDI AND RATABARI TERRITORIAL ROAD
DIVISION
RAMKRISHNA NAGAR
KRIMGANJ
PIN 788166

6:GULZAR HUSSAIN CHOUDHURY

C/O EXECUTIVE ENGINEER
PWD (ROADS) PATHARKANDI AND RATABARI TERRITORIAL ROAD
DIVISION
RAMKRISHNA NAGAR
KARIMGANJ
PIN 788166

7:THE BRANCH MANAGER

STATE BANK OF INDIA
NEW GUWAHATI BRANCH
BAMUNIMAIDAM
GUWAHATI 78100

Advocate for the Petitioner : MR. P N GOSWAMI

Advocate for the Respondent : SC, PWD

BEFORE
HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocates for the petitioner : Shri KN Choudhury, Sr. Adv.
Shri DJ Das

Advocates for the respondents : Shri P. Nayak, SC, PWD
Shri HRA Choudhury, Sr. Adv.
Shri AT Sarkar
Shri I. Choudhury, Sr. Adv.
Shri JMA Choudhury

Date of hearing : **03.11.2022**



Date of Judgment : **30.11.2022**

JUDGMENT & ORDER

Two connected causes of action have propelled the petitioner to approach this Court under Article 226 of the Constitution of India. The petitioner, who is a contractor, is aggrieved by two aspects, the first being termination of a contract earlier allotted to him and the second being the action to settle the balance part of the work with the private respondent. Apart from contending that the impugned action is unreasonable and arbitrary, the petitioner has alleged *mala fide* which, according to the petitioner, vitiates the entire action.

2. Before delving into the issues which have arisen for determination, it would be convenient, if the facts of the case are narrated in brief.

3. Pursuant to a Notice Inviting Tender (NIT), the petitioner, who is a registered PWD contractor, vide order dated 24.01.2019, was allotted the Work of Construction and Maintenance of Anipur-Zamung NEC Road to Dakhin Rampur in the district of Karimganj. The work was under PMGSY. It is the case of the petitioner that though the work was started and substantial progress was achieved, due to the onslaught of the Covid-19 pandemic, the progress was hampered. According to the petitioner, such unprecedented conditions were "Acts of God" which were beyond the control of the petitioner. The petitioner claimed to have submitted a number of representations which were, however, not paid any heed to. On 09.12.2020, an order was passed terminating the contract work which, according to the petitioner, was without any notice. The petitioner alleges that such unilateral termination was brought to the notice of the Superintending Engineer, who had issued a letter dated 12.01.2021 instructing the Executive Engineer to allow the petitioner to continue with the work. The petitioner claims to have continued with the work.

4. The grievance of the petitioner, as indicated above, is not limited to the aforesaid

aspect of the matter of termination of the contract allotted to him. The petitioner also alleges gross illegality as well as *mala fide* in the manner of allotting the work to the respondent no. 6 vide an order dated 20.02.2021.

5. The grounds of challenge formulated by the petitioner are disputed by the respondents. The respondent authorities have strictly denied that there have been any illegality or even irregularity in the process of termination of the contract by contending that the termination was done by following the due process of law. Further, the allegations of *mala fide* for allotting the balance work are categorically denied and in any case, it has been submitted that overwhelming public interest was the need of the hour to complete the work which was construction and maintenance of a road under the PMGSY.

6. I have heard Shri KN Choudhury, learned Senior Counsel assisted by Shri DJ Das, learned counsel for the petitioner. I have also heard Shri P. Nayak, learned Standing Counsel, PWD for the respondent nos. 1 to 3, Shri HRA Choudhury, learned Senior Counsel assisted by Shri AT Sarkar, learned counsel for the respondent no. 5 and Shri I. Choudhury, learned Senior Counsel assisted by Shri JMA Choudhury, learned counsel for the respondent no. 6. The counsel for the Department has also placed before this Court the records of the case.

7. Shri KN Choudhury, learned Senior Counsel for the petitioner has, at the outset, raised the issue of jurisdiction on the part of the authority to pass such termination order. According to the petitioner, the Chief Engineer of the Department, who had issued the order of allotment, is the authority who is vested with the power to terminate the contract. However, in the instant case, the termination order has been issued by the Executive Engineer of the Department and therefore, the impugned order is unsustainable in law.

8. The learned Senior Counsel submits that even on factual grounds, the impugned order of termination is wholly unjustified and unreasonable. By referring to the



relevant documents, it is submitted that by March 2020, out of total length of 5.430 km, the petitioner had completed 5.300 km. Further, it is stated that out of the two bridges, work in respect of one bridge was almost complete and piling work of the second bridge was over. In this connection, the learned counsel has referred to the additional affidavit of the petitioner filed on 02.03.2022 with which the OMMAS report is annexed. Further, even after the order of termination of contract was issued on 09.12.2020, the Superintending Engineer vide letter dated 12.01.2021 had requested the respondent no. 5 (Executive Engineer) to allow the petitioner to continue with the work which was followed by another reminder dated 25.01.2021 whereby, a status report was called for in respect of the work. The same was responded by the petitioner vide communication dated 27.01.2021 with which a detailed report with photographs was furnished. It is the case of the petitioner that despite the impugned order of termination, the petitioner kept on continuing with the work up-to 17.02.2021 and claims to have achieved substantial progress. The petitioner also alleges that the respondent no. 5 was pressurizing the petitioner to stop the work.

9. Drawing the attention of this Court to the Standard Bidding Document (SBD), the learned Senior Counsel for the petitioner by referring to Clause 52.1 has submitted that the Employer is competent to terminate the contract, in case of commission of a fundamental breach by the contractor. Section 4, Part-I of the GCC, the expression Employer is defined in the contract data from which it would be apparent that the Employer is none but the Chief Engineer, PWD (Roads) Assam.

10. Shri Choudhury, learned Senior Counsel for the petitioner submits that though it is true that as per contract dated 24.01.2019, the same was to be completed within 1 year, the entire scenario had changed due to the Covid-19 pandemic and there was declaration of total lockdown. This aspect of the matter has been ignored by the authorities. It is submitted by the petitioner that apart from the fact that the termination of the contract is not in accordance with law, the subsequent action of allotting the work to the respondent no. 6 has been done in a manner which is wholly



opposed to the standard procedure for grant of a contract. The petitioner alleges that the contract for the purported balance work has been allotted to the respondent no. 6 by taking recourse to forgery and other illegalities. According to the petitioner, there was no advertisement calling for bids and a huge amount of Rs. 1.91 crores was paid within 2 days only. It is also submitted that though an attempt has been made by the respondent no. 5 to mislead the authorities by inserting a wrong GSTIN number as 18AEMP87 which actually belonged to one, Abdul Bachit. The agreement with the said respondent no. 6 was dated 20.02.2021 and as per the affidavit-in-opposition filed by respondent no. 2, as on 24.03.2021, 90% of the work of road and 70% of the RCC bridge works were said to be completed.

11. By referring to the additional-affidavit filed by the respondent no. 2 on 03.03.2022, the contention of the petitioner is that a running bill of Rs. 1.91 crore, dated 22.02.2021 had been paid to the respondent no. 6 whereas, as per the OMMAS report, the agreement with the respondent no. 6 was executed only on 20.02.2021.

12. Elaborating his submissions alleging fraud in the process of allotting the balance work to the respondent no. 6, Shri Choudhury, learned Senior Counsel for the petitioner submits that information was sought for under the RTI Act from the DIPR regarding publication of the Tender Notice. The said query was responded vide a letter dated 28.09.2021 that the purported tender notice dated 01.02.2021 was neither received nor published by the Directorate. It is also submitted that there was no newspaper publication regarding the Tender Notice for the balance work. Further submissions have been made that the Tender Id No. 2021_CEASM_102393_1 does not exist in the web portal which was verified by the Help Desk of the PWD, Assam Tender vide email dated 12.10.2021. The petitioner contends that however, the Tender Id No. 2018_CEASM_67667_31 [AS-13-278] which was for the original contract, exists in the web portal.

13. The petitioner has alleged *mala fide* as well as forgery even in the manner of



execution of the balance work by the respondent no. 6. While, it is on record that the said respondent no. 6 applied for extension for completion of the balance work vide letter dated 25.07.2021, a claim has been made by the said respondent no. 6 that the balance work was completed on 26.05.2021. Shri Choudhury, learned Senior Counsel has also referred to the photograph dated 14.07.2022 having latitude and longitude and time stamp to demonstrate the same.

14. In addition, the petitioner has also alleged that a payment of Rs.1.91 crore was made on 25.02.2021 to the respondent no. 6 in the purported head of balance work in a most surreptitious manner and public money was siphoned off without doing any work. As indicated above, it has been categorically urged on behalf of the petitioner that the balance work was awarded to the respondent no. 6 without any competitive bidding and all the illegalities were done at the behest of the respondent no. 5 who was on the verge of his retirement which was due on 28.02.2021.

15. The Senior Counsel for the petitioner had summed up his argument by referring to the Report of the Enquiry which was issued on 06.04.2022. The petitioner submits that the said report sets at rest all controversies by concluding that the entire procedure adopted was fraught by *mala fide* and abject favouritism. On the other hand, a huge amount of Rs.2,05,80,940/- is due to the petitioner for works done without taking note of the balance work. In fact, the petitioner has also submitted that appropriate proceedings under Section 193 and 195 of the Indian Penal Code be initiated alleging that false evidence in a judicial proceeding was intentionally given and fabricating false evidence for the purpose of using the same in a judicial proceeding. The petitioner also prays for drawing up contempt proceedings for making false statement and attempting to mislead this Court.

16. Shri Choudhury, the learned Senior Counsel for the petitioner accordingly prays for interference with the Termination Order dated 09.12.2020, subsequent Letter of Acceptance dated 08.02.2021 issued in favour of the respondent no. 6 and all the

consequential action thereto.

17. In support of his submission, Shri Choudhury, learned Senior Counsel for the petitioner places reliance upon the following decisions-

i. (2009) 10 SCC 103 [Branch Manager, Magma Leasing and Finance Limited and Anr. Vs. Potluri Madhavilata]

ii. (2020) 5 SCC 706 [Deep Industries Limited Vs. OIL and Natural Gas Corporation Limited and Anr.]

iii. (2020) 13 SCC 285 [Maharashtra Chess Association Vs. Union of India and Anr.]

iv. (2021) 6 SCC 15 [UP Power Transmission Corporation Limited and Anr. Vs. CG Power and Industrial Solution Limited and Anr.]

18. In the case of ***UP Power Transmission Corporation (supra)***, the Hon'ble Supreme Court once again discussed and laid down the law relating to exercise of the jurisdiction despite availability of alternative remedy. For ready reference, the relevant paragraphs are extracted hereinbelow-

66. *Even though there is an arbitration clause, the petitioner herein has not opposed the writ petition on the ground of existence of an arbitration clause. There is no whisper of any arbitration agreement in the counter-affidavit filed by UPPTCL to the writ petition in the High Court. In any case, the existence of an arbitration clause does not debar the court from entertaining a writ petition.*

67. *It is well settled that availability of an alternative remedy does not prohibit the High Court from entertaining a writ petition in an appropriate case. The High Court may entertain a writ petition, notwithstanding the availability of an alternative remedy, particularly: (i) where the writ petition seeks enforcement of a fundamental right; (ii) where there is failure of principles of natural justice or (iii) where the impugned orders or proceedings are wholly without jurisdiction or (iv)*

the vires of an Act is under challenge. Reference may be made to Whirlpool Corpn. v. Registrar of Trade Marks and Pimpri Chinchwad Municipal Corpn. v. Gayatri Construction Co., cited on behalf of Respondent 1."

19. *Per contra*, Shri P. Nayak, learned Standing Counsel, PWD opens up his submission by questioning the very conduct of the petitioner and has submitted that the facts projected are not correct. He also raises a preliminary issue on the maintainability of the writ petition which has primarily challenged the order of termination of contract dated 09.12.2020 which is covered by an arbitration clause.

20. Attention of this Court has been drawn to clause 24 of the bidding document which lays down a dispute redressal system for resolution of any dispute for which a detail mechanism has been laid down. The learned Standing Counsel, PWD accordingly submits that there being an alternative efficacious remedy agreed to by the parties, the petitioner is liable to be relegated to the dispute redressal mechanism.

21. Even on the merits of the dispute, the Department Counsel has submitted that the tenure of the work was 12 months which had commenced from 24.01.2019. By drawing the attention of this Court to the affidavit-in-opposition wherein the Inspection Note dated 24.01.2020 has been annexed, the remark against seven numbers of Heads regarding progress of the work was "UNSATISFACTORY".

22. It is submitted that thereafter, no work was done at all and accordingly a notice was issued to the petitioner on 09.06.2020 to resume the work followed by another notice dated 18.09.2020 which was almost after nine months of the scheduled date of completion. This was followed by another notice dated 24.09.2020 before the termination and finally the contract was terminated vide the order dated 09.12.2020. It is submitted by the Department that there were fundamental breach of the contract for which the said measure was required to be taken. Shri Nayak submits that as a matter of fact, further opportunity was granted to the petitioner to resume the work even after the order of termination dated 09.12.2020. Reference to a letter dated



18.01.2021 which would establish that even as on that date, the petitioner could not resume the work as on 01.02.2021, the progress was 47.76%. He submits that all the notices were duly communicated.

23. Reacting to the contention of the petitioner on the jurisdictional issue, the learned Standing Counsel, PWD has contended that a communication dated 25.02.2010, would make it clear that powers were delegated by the Chief Engineer, PWD (Roads), Assam to the Executive Engineer, with specific reference works under the PMGSY and on the strength of such delegation, the impugned order of termination dated 09.12.2020 has been issued. The Standing Counsel also raises the issue of waiver and estoppel while relying to the aforesaid argument of jurisdiction by submitting that even other works of the petitioner were terminated by the Executive Engineer of the Department which however were not challenged and therefore, the petitioner was aware of the scope for exercise of such powers by the Executive Engineer. As a matter of fact, copies of such termination order by the Executive Engineer have been placed before this Court for perusal. Two of the works were terminated vide orders dated 03.03.2020 and 20.7.2020, both issued by the Executive Engineer.

24. With regard to the Enquiry Report which was forwarded vide letter dated 06.04.2022 and is a part of the affidavit-in-opposition dated 18.08.2022, Shri P. Nayak, learned Standing Counsel, PWD has submitted that whatever anomaly has been detected would be taken up seriously by the Department. However, at the same breath, the learned Standing Counsel has submitted that the anomalies pertain mostly to the allotment of the balance work to the respondent no. 6 and not to the issue of termination of the contract with the petitioner vide order dated 09.12.2020. Shri Nayak submits that both the issues being distinct and separate, the petitioner who himself failed to execute the work and had caused inordinate delay in execution of the work cannot raise any issue regarding allotment of the balance work and completion of the same by a third party.



25. In support of his submission, Shri P. Nayak, learned Standing Counsel, PWD places reliance upon the following case laws:

- i. (1998) 8 SCC 1 [Whirpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others.]***
- ii. Order dated 23.09.2013 passed by the Hon'ble Division Bench of this Court in WA/171/2019 (National Highways & Infrastructure Development Ltd. Vs. TK Engineering Consortium Pvt. Ltd. and Ors.)***
- iii. Judgment dated 21.03.2022 passed in Civil Appeal No. 2093/2022 [Gujarat Housing Board and Anr. Vs. Vandemataram Projects Private Limited].***

26. The case of ***Whirpool Corporation (supra)*** has been cited to bring home the contention that the exceptions carved out for exercising the powers of judicial review even after availability of an alternative forum are not there in the present case and therefore, the petitioner is not able to overcome the first hurdle of maintainability.

27. The case of ***National Highways & Infrastructure (supra)*** has been cited to bring home the contention that for contracts which are determinable in nature, the remedy is only by way of damages if such termination is held to be illegal.

28. The case of ***Gujarat Housing Board (supra)***, the Hon'ble Supreme Court has reiterated that invocation of Article 226 of the Constitution of India for a contractual matter where there exists any alternative dispute mechanism, the appropriate remedy cannot be before the High Court.

29. Shri I. Choudhury, learned Senior Counsel for the respondent no. 6 has questioned the *locus* of the petitioner to maintain the present challenge. Drawing the attention of this Court to the prayers of the writ petition, the learned Senior Counsel has submitted that the reliefs prayed for are not supported by justifiable grounds. By referring to the work order dated 24.01.2019 which was allotted to the petitioner, the



completion period was given as 12 months. Fully endorsing the submissions of Shri Nayak, learned Departmental Counsel, the learned Senior Counsel has submitted that though the work order was of 24.01.2019, after completion of one year i.e. 24.01.2022, the percentage of work was completed was only 40%. By referring to the communication dated 07.04.2020, the learned Senior Counsel has submitted that a general extension was granted for the pandemic up to 05.06.2020. However, it is pointed out that after the said period, there is nothing on record to show that there was any application by the petitioner for extension. On 09.06.2020, though a notice was issued to the petitioner to resume the work, nothing was done and accordingly a show-cause notice was issued as to why the work should not be terminated and at that time, the progress was 47.7% only. The petitioner however, chose not to respond to the show-cause notice and these facts are not rebutted in the affidavit filed on behalf of the petitioner. Ultimately, on 09.12.2020, the work order with the petitioner was terminated which was issued by the Executive Engineer. The learned Senior Counsel submits that though at the stage of argument, the authority of the Executive Engineer has been questioned, there is no pleadings in the writ petition to that effect.

30. Shri I. Choudhury, the learned Senior Counsel for the respondent no. 6 further submits that the aforesaid ground of challenge questioning the authority of the Executive Engineer is clearly an afterthought inasmuch as, on previous occasion also, such termination orders were issued by the Executive Engineer, PWD; one instance being an order dated 07.04.2020 by which a similar contract with the petitioner was terminated. It is therefore, submitted that the petitioner being aware of such arrangements and situations, the first ground of challenge is wholly unsustainable in law.

31. The learned Senior Counsel for the respondent no. 6 has also made extensive arguments on the alternative dispute redressal mechanism and has referred to Clause 24 of the Tender Document in this regard.

32. Coming to the factual aspect, Shri Choudhury, the learned Senior Counsel for the respondent no. 6 has submitted that due to the utter default of the petitioner to make adequate progress, there was widespread agitation of the public against the petitioner as day-to-day communication was adversely affected. As regards the report of the Chief Engineer dated 06.04.2022 which is a part of the affidavit-in-opposition dated 08.08.2022, the learned Senior Counsel for the respondent no. 6 has submitted that there is no allegation that the balance work carried out has suffered from any faults.

33. Summarizing his arguments, Shri I. Choudhury, learned Senior Counsel for the respondent no. 6 has submitted that firstly, the petitioner lacks *locus* to maintain the present challenge; secondly, the balance work done by the said respondent no. 6 was allotted to him in accordance with law which he had completed. Finally, he argues that a practice has been uniformly followed whereby the Executive Engineer has been exercising the powers of terminating his contract by following the due process of law. Short tender notice is also recognized mode for allotment of work by tender.

34. Shri Choudhury, learned Senior Counsel for the respondent no. 6 has placed reliance upon the following case laws-

- i. ***(1992) Suppl. (1) SCC 584 [N. Suresh Nathan and Anr. Vs. Union of India and Anr.]***
- ii. ***(2007) 5 SCC 535 [Shailendra Dania and Others. Vs. S.P. Dubey and Others.]***

35. Both the aforesaid two cases have been cited to bring home the concept that construction of a Statute or Rule should be in consonance with long standing practice prevailing in the concerned Department. In fact, in the case of ***Shailendra Dania (supra)***, the following has been laid down-

“36. ...If we find that two views are possible after interpreting the Rule, then the Rule would be interpreted keeping with the practice followed in the



Department for a long time and thus the practice practically acquired status of rule in the Department.”

36. Shri HRA Choudhury, learned Senior Counsel has appeared for the respondent no. 5, namely, the Executive Engineer, who had issued the termination order of the petitioner and allotted the work to the private respondent no. 6. The said respondent no. 5 is made party by name, as *mala fide* and bias have been alleged against him. The learned Senior Counsel for the said respondent no. 5 while endorsing the submissions of the learned counsel for the other respondents has refuted all the allegations against him. He has contended that all his actions were *bona fide* and in accordance with law. He further submits that the respondent no. 5 had retired even before filing of the writ petition and accordingly questions the action of the petitioner to arraign him in this proceeding.

37. Shri KN Choudhury, learned Senior Counsel for the petitioner in his reply submits that the ground urged on behalf of the respondents on the maintainability of the writ petition is without any basis inasmuch as, alternative remedy cannot be an absolute bar. As regards the submission regarding acceptance of a long standing practice as a Rule, the learned Senior Counsel for the petitioner submits that when the practice is contrary to the Rules, the question of its acceptance will not arise at all. He further contends that an Executive Engineer does not have any authority to release any amount to the contractor. It is also contended that Clause 44 of the Tender contemplates levy of Liquidated Damage (LD) and termination of contract should not have been taken recourse to at the first instance.

38. The rival contentions of the learned counsel for the parties have been duly considered and the materials placed before this Court have been duly perused.

39. The first challenge of the petitioner is against the order of termination dated 09.12.2020. The primary ground of challenge is that there is a jurisdictional error in issuance of the same as such jurisdiction is conferred upon the Chief Engineer



whereas the respondent no. 5, who had issued the termination order is an Executive Engineer. It is further submitted that no proper notice was served upon the petitioner before such termination.

40. To appreciate the issue, certain relevant facts need to be taken into consideration. The work order was dated 24.09.2020 with a completion time of 12 months. The materials on record would however show that as on 24.01.2020 i.e. completion of the stipulated period, the progress was only 40%. No progress could be achieved till 05.06.2020 when a general extension was granted on account of the world-wide pandemic. What intrigues this Court is that even after the completion of the extension period, no application for further extension was submitted by the petitioner. In spite of this a notice was issued by the Department on 09.06.2020 to the petitioner directing him to resume the work. Further, the termination of the contract dated 09.12.2020 is admittedly followed by a notice to show-cause as to why the contract should not be terminated for not being able to perform.

41. In view of the aforesaid discussion, it is apparent that the order of termination dated 09.12.2020 was preceded by a number of opportunities including a show-cause notice dated 28.09.2020. However, it appears that in spite of the numerous opportunities, no noticeable improvement could be achieved by the petitioner. Therefore, it cannot be said that there has been any violation of the principles of natural justice and the reasons for issuing the order of termination are germane and relevant.

42. With regard to the second ground of challenge namely, the authority of the Executive Engineer to issue the termination order, it is the contention of the petitioner that such power is vested upon the Chief Engineer of the Department. It is further contended that the letter from which such powers have been sought to be delegated is not a part of the contract and therefore, could not have been taken into account. On the other hand, the records of the case would show that all along the



correspondence with the petitioner was being made by the Executive Engineer including the show-cause notice dated 28.09.2020. The decision to terminate the contract is not a decision of a particular officer but of the Department and in this case it is seen that the said decision has been conveyed by the Executive Engineer. In the considered opinion of this Court, though the same may be held to be deviation, such deviation would not go to the root of the case inasmuch as, it is the decision of the Department which has been conveyed. This Court cannot also ignore the communication dated 25.02.2010 issued by the Chief Engineer, PWD Roads giving authority to the Executive Engineer to issue termination notice. Another pertinent factor is that the said communication dated 25.02.2010 is with regard to all PMGSY works and the present work is also under the PMGSY and therefore, it cannot be said that the said communication is wholly out of context.

43. Further, even assuming that though essentially the said communication dated 25.02.2010 is not a part of the contract, the said has been acted upon uniformly and even in the case of the petitioner there has been earlier instances where termination order dated 07.04.2020 has been issued for another work entrusted to the petitioner and the said termination order is not the subject matter of challenge in any proceedings. This Court finds force in the contention made on behalf of the respondents that a practice uniformly followed can be accepted if it is in consonance with law, as held by the Hon'ble Supreme Court in the cases of ***N. Suresh Nathan (supra)*** and ***Shailendra Dania (supra)***.

44. While adjudicating the above issue, one cannot lose sight of the fact that the issue involved concerns immense public importance. As indicated above, the work is a construction of a road which during the pendency of this writ petition has been completed.

45. The second issue which has been raised by the petitioner is the issue regarding completion of balance work by a third party. It is the contention of the petitioner that

the re-tendering process was vitiated by fraud, forgery etc. It is submitted that there was no advertisement prior to the said allotment and a huge amount of Rs.1.91 Crores (approx.) was paid within two days.

46. Heavy reliance have been placed on the report of the Chief Engineer dated 06.04.2022 which has been made a part of the proceeding vide the affidavit-in-opposition dated 18.08.2022 filed by the Chief Engineer. It is contented on behalf of the petitioner that the aforesaid report vindicates the allegations of the petitioner. The signature of one officer of the Department, Shri Shyamal Das was forged which was reiterated by the said officer by way of filing an affidavit in this proceeding.

47. The Department however contended that a communication was issued on 31.01.2021 by the Chief Engineer directing to invite tender for the balance work. Pursuant thereto, NIT was issued and the work was allotted to the respondent no. 6.

48. The version of the Department as projected in the affidavit-in-opposition is however inconsistent with the report dated 06.04.2022 of the Additional Chief Engineer which has been prepared pursuant to the order of this Court and subsequently brought on record vide the affidavit dated 18.08.2022.

49. The Enquiry Report prepared by the Additional Chief Engineer, PWRD makes certain startling revelation, more particularly with the manner of allotting the balance part of the work after the order of termination. In particular, the observations made against paragraph nos. 11, 12 and 16 are of grave importances which are extracted hereinbelow. It is however, not to be understood that the rest of the observations are no less important and are to be acted upon as a follow up action.

“11. Henceforth, Sri Chamed Ali, the then Executive Engineer, PWRD, Patharkandi & Ratabari Territorial Road Division, Ramakrishna Nagar preparing the Running Bill amounting to Rs.1,91,18,264.00. During enquiry to the above Running Bill in favour of Shri Gulijar Hussain Choudhury for the balance work of PMGSY Package No. AS 13-278 the following observations were made:



a) *The measurement for the balance work of PMGSY Package No. AS 13-278 was recorded in MB No. 0170 & in MB No. 171.*

b) *Date of commencement recorded in the MB is 08/02/2021 (which is actually the date of issue of LOA).*

c) *Date of last measurement recorded in the MB is 22/02/2021.*

d) *Signatures on MB & Running Bill by SO (Measuring Officer) and AEE on 22.02.2021*

e) *Passing of the bill by then Executive Engineer Shri Chamed Ali is 24/02/2021.*

In this context, it is seen that the measurements for executed work was tackle (sic.) from the date of issue of LOA i.e. 08/02/2021 where as the actual work order was issued on 20/02/2021.

*Further, when the concerning officer were asked as to how the recorded and submitted such a Running Bill amount to Rs.1,91,18,264.00 within a such short period of time, the Shri Chamed Ali, the then Executive Engineer, PWRD, Patharkandi & Ratabari Territorial Road Division, Ramakrishna Nagar and Shri Sahidur Rahman Laskar, SO concerned submitted written replies **(copies enclosed-Annexure-XV)** stating that the work was actually started from 11/12/2020 as per the verbal instructions of higher authorities and as such the quantum of progress as measured were achieved.*

12. *Further, after termination of the original contract, SE, PWD Cachar Road Circle asked, EE, PWD, Hailakandi District Territorial Road Division, Hailakandi to inspect the work and accordingly EE, inspected the site on 09/01/2021 and submitted the report of the details of works executed by the contractor Sri Monsur Ahmed (original contractor) and details of works executed by Sri Gulijar Hussain Choudhury (Balance Work). In this inspection report, it is clearly mentioned that Contractor for the balance work Sri Gulijar Hussain Choudhury*

had executed some quantities of work till the inspection date as engaged by the Executive Engineer after withdrawal of work from the original contractor.

*Copies of the above enclosed as per **Annexure-XIII**.*

16. The entire works of PMGSY package No. AS13-278 has been completed on 26/05/2021 and the Running Bill for the balance work amounting to Rs.1,91,18,264.00 was prepared and has been paid with necessary deductions to Contractor on Sri Gulijar Hussain Choudhury till date. Though the work has been completed (completed on 26.05/2021), final bill has not been prepared and payment could not be made as Hon'ble Gauhati High Court has allowed payment of 50% of the balance work value till disposal of the matter. Completion details are available in the OMMS website."

50. Since, public money is involved, the findings arrived at by the Additional Chief Engineer in his report dated 06.04.2022 are required to be followed up scrupulously.

51. In view of the above discussions, this Court is of the opinion that while the first challenge pertaining to the termination of contract is not liable to be interfered with, the second aspect of allotting the balance work to the respondent no. 6 would require certain intervention from this Court as it involves huge amount of public money and the work in question is undoubtedly of immense public importance. However, since questions of facts are involved, this Court cannot play the role of primary authority. At the same time, there being glaring anomalies in the said allotment, as would reveal from the fact finding enquiry of the Additional Chief Engineer, PWRD dated 06.04.2022, appropriate action be taken against the erring officials, more particularly, the respondent no. 5 against whom specific allegations have been made which are also substantiated in the Enquiry Report. Appropriate steps may also be taken against any other officials involved including the beneficiaries, in view of the *prima facie* finding in the Enquiry Report dated 06.04.2022. It is needless to state that the action to be taken has to be strictly in accordance with law by giving a fair opportunity to the



persons arraigned.

52. The writ petition accordingly stands disposed of.
53. Interim order passed earlier stands vacated.
54. No order as to cost.

JUDGE

Comparing Assistant