

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

OWP No. 519/2019
[WP (c) No.1376/2019]

Reserved on:20-02-2023
Pronounced on: -03-2023

Mukhtar Ahmad Andrabi ...Petitioner(s)

Through: Mr. Javid Hamid, Advocate

Vs.

UT of JK and others ...Respondent(s)

Through: Mr. Moomin Khan, Advocate

CORAM:

HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE.

JUDGMENT

1. With the consent of learned counsel for the parties, the present petition was taken up for final disposal.
2. Heard. **Admit.**
3. The present writ petition has been filed by the petitioner for directing the respondents to release the bill amounting to Rs.40.71 lacs in favour of petitioner on account of execution of construction of two fountains at Hyderpora Crossing, Srinagar. It is the case of the petitioner, the sum due to the petitioner is an admitted liability and the respondents have no reasonable ground or any valid justification to withhold the same and withholding the same amounts to arbitrary exercise of power by the respondents.

SUBMISSIONS ON BEHALF OF PETITIONER

4. The brief case of the petitioner is that he is a Government approved fountain contractor of the respondent corporation, and in the year 2017 on the direction of respondent No.2 who had in turn been directed by the then Chief Minister of the State for beautification of the IG road, the petitioner was allotted the work of construction of two fountains at Hyderpora

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Crossing, vide Order dated 21-10-2017. A formal approval of the work was granted by Respondent No.1, vide order dated 12-10-2017. Soon after the completion of allotted work, the petitioner submitted his bills amounting to Rs 40.71 lacs which were acknowledged and admitted by the respondent corporation and to this effect respondents recommended the same to the government for release of an admitted amount of Rs.40.71 lacs in favour of the petitioner.

5. The specific stand of the petitioner is that despite the admitted liability, the respondents as on date, on one pretext or other have not released the admitted amount in favour of petitioner. Despite repeated requests to respondents for release of the bill, the respondents till date have not released the admitted amount, which is unjust and unreasonable on part of respondents.
6. Counsel for the petitioner further submitted that respondents have admitted the liability of petitioner, therefore, the respondents have neither any justification nor any reasonable ground to withhold the due payment of Rs.40.71. The withholding of due payment of the petitioner on the part of respondents is an arbitrary exercise of power and authority.

SUBMISSIONS ON BEHALF OF RESPONDENT NO.2 TO 5

7. Objections stand filed on behalf of Respondent No.2 to 5 by Mr. Moomin Khan, who represents the Srinagar Municipal Corporation, however, there is no representation on behalf of Respondent No.1.
8. The stand taken by the Respondent No.2 to 5 is that the present petition raises disputed questions of fact which cannot be gone into while exercising the writ jurisdiction under Article 226 of the Constitution of India.
9. Learned counsel appearing on behalf of respondents has taken a specific stand that no administrative approval for the construction of the work in question has ever been sanctioned by the competent authority. He has further submitted that no tendering process has been initiated for the construction of the fountains nor any formal allotment order/administrative approval was issued in favour of the petitioner by the respondent corporation.
10. The respondents have strongly refuted the claim of the petitioner that he

was ever allotted any work for construction of fountains. Learned counsel further submitted that no bills for the said work have ever been processed by the respondents nor the same have ever been submitted by the petitioner with the respondent corporation.

11. The respondents have taken a specific stand that the aforesaid construction work was never allotted by the competent authority to the petitioner and thus, there is no question of release of admitted liability as claimed by the petitioner in the present writ petition. Learned counsel, accordingly, has prayed for dismissal of the writ petition in absence of any formal allotment order or administrative approval/initiation of tendering process.
12. The respondents have further argued that the petitioner has neither placed on record administrative approval/any tendering process pursuant to which he has participated for allotment of work in question nor allotment order issued in his favour by the competent authority, therefore, it cannot be said that the respondent corporation has denied payment of admitted liability as alleged by the petitioner. In such circumstances, the instant writ petition is liable to be dismissed.

LEGAL ANALYSIS

13. Heard learned counsel for the parties at length and perused the record.
14. The stand taken by the respondents in the reply can be falsified from a bare perusal of communication No.SMC/EELRWD/FM/130dated 21st October, 2017 by virtue of which concerned Executive Engineer, Left River Works Division, Srinagar Municipal Corporation has intimated the petitioner to start the work on exigency basis/war footing basis (Departmentally), pursuant to the orders of Worthy Commissioner, Srinagar Municipal Corporation.
15. By virtue of aforesaid communication which has been placed on record as annexure "I", it is manifestly clear that the then Commissioner (SMC) has observed that the fountains in question are being constructed on the directions of the then Chief Minister to beautify the IG Road, Hyderpora Chowk. Accordingly, the Commissioner has directed the Executive Engineer (LRWD) to convey the petitioner to start the work on exigency basis/war footing basis. It is not so even, by virtue of aforesaid communication, the Executive Engineer on the instructions of

Commissioner has conveyed in an ambiguous term to the petitioner that he has been entrusted with the job in view of his experience and performance shown at many places, especially recently near Mughal Darbar and, accordingly, for getting the work done, petitioner was asked to start the same without any delay which could be monitored by the Commissioner, Srinagar Municipal Corporation. Thus, from a bare perusal of the record which has been placed on record along-with the report, it is evidently clear that there has been a series of correspondence exchanged between the petitioner and the respondents, wherein, the petitioner has been asked to execute the work. The petitioner has executed the work on the strength of aforesaid communication dated 21st October 2017 and now, it does not lie in the mouth of respondents to agitate that there was no valid contract between the parties or there was no formal allotment order/administrative approval in favour of petitioner by the respondent corporation. The respondents, however, have denied allocation of work but there is no specific denial with regard to the exchange of correspondence between the parties. The work was undertaken and done by the petitioner on the strength of aforesaid communication which is evident from a bare perusal of the record produced before the Court. The respondents at no stage have ever objected to the said construction done by the petitioner on the strength of aforesaid communication dated 21st October, 2017, till the same was completed by the petitioner and the bills were raised for release of payment. It was only when the petitioner raised the bills for release of payment on account of work done by him, thereafter the respondents have taken a U-turn by denying the allotment of work in his favour.

16. Though, no formal agreement was signed between the parties nor the same has been produced on record either by the petitioner or the respondents, yet the documentary evidence which has been placed on record by the petitioner clearly proves, beyond any shadow of doubt there was correspondence between the petitioner and the respondents which shows that binding contract came into existence between the parties. Reliance has been placed on the judgment of the Hon'ble Apex Court in case titled *Rickmers Verwaltung GMBH v. Indian Oil Corporation Ltd., (1999) 1 SCC 1*, wherein it was held that

“It can be validly said that the exchange of correspondence between the parties denotes that there was a contract between them”.

17. The Apex Court in a similar case titled **Bhoruka Power Corporation Ltd. v. State of Haryana and Ors.**, AIR 2000 P&H 245, held as under:

"It is a settled proposition of law that after having laid down the standard for judging its conduct, a public authority cannot deviate from the said standard."

18. Since the petitioner has performed his part of the contract by constructing the two fountains for the beautification of the IG Road, the respondents, as such, are under legal obligation to release the payment in favour of petitioner. In this regard reliance is placed on a recent judgment passed by this Hon'ble Court in case titled **Nishat Ahmed versus Union Territory of J&K and others, decided on 02.06.2022** which is reproduced hereunder:-

“From the record, it is evident that respondents have not denied their inter se communications and rather the respondent No. 2 has placed on record the communication dated 14.03.2020. A perusal of the communication dated 14.03.2020 reveals that the respondent No. 4 though has mentioned that the work done claims of above amount, has not been prepared in light of SDRF (SOP) guidelines but the fact is that the contractor, petitioner herein has actually done the work and his claim is genuine as reported by the Executive Engineer PMGSY, Kishtwar. Once the respondents have admitted the execution of the work by the petitioner and the genuineness of the claim of the petitioner, the respondents are estopped from objecting the said claim on the ground that the work was executed without any work order or tender. Once the respondents have admitted the liability of Rs. 24.85 lacs towards the petitioner, they are bound to pay the same to the petitioner. The contention of the respondents that the claim is time barred, is misconceived as the respondents have admitted their liability and the petitioner has been continuously impressing upon the respondents to clear the liability of Rs. 24.85 lacs towards the petitioner. So far as objection of the respondents that the petitioner should have filed a civil suit is concerned, the same is also misconceived, particularly when the respondents have admitted their liability and the writ petition for grant of monetary reliefs is maintainable, provided the liability is admitted.”

19. The petitioner has also placed on record communication issued by the Executive Engineer (LRWD) Srinagar Municipal Corporation to the Joint Commissioner (Works)/SE, Srinagar Municipal Corporation, a perusal whereof reveals that the work was allotted to the petitioner which was

completed by the petitioner but the same was verbally stopped on the instructions of Commissioner (SMC) on the plea that there was no formal approval.

20. Surprisingly, the same authority had issued instructions/directions to initiate the work on exigency/war footing basis and on the strength of the aforesaid approval, the communication came to be issued by the Executive Engineer to the petitioner to start the work and subsequently once the work was completed by the petitioner, the same authority i.e., Commissioner (SMC) have taken a plea that there was no formal approval when admittedly there was approval of the competent authority. It appears that the respondents with a view to avoid the payment to the petitioner have taken the aforesaid plea as a matter of afterthought which is contrary to the record. It is not so, even the concerned Deputy Mayor has also issued a communication dated 11th January 2019 to Commissioner (SMC) to release the payment to the tune of Rs.40.71 lacs in favour of petitioner who has completed the work on the proposal submitted by the Executive Engineer vide letter dated 12th October, 2017. Since the payment was not released by the respondents the petitioner was left with no option but to file the present writ petition. The law is settled by the authoritative pronouncement that where the State behaves arbitrarily, even in the realm of contract, the High Court could interfere under Article 226 of the Constitution of India as held by the Hon'ble Supreme Court in case titled *ABL International Ltd. and Another v. Export Credit Guarantee Corporation of India Ltd. and Others'* (2004 (3) SCC 553). The controversy in question is also covered by judgment passed by coordinate Bench of this Court in case titled *Abdul Rashid Malik versus Union Territory of J&K and others, WP (C) No.873/2021 reported as 2022 (6) JKJ [HC] 129*. Reliance has also been placed in case titled in case titled *"M/s Surya Construction versus The State of U.P. in Civil Appeal No.2610/2010, dated 02.05.2010"* it is held:-

"That it is well settled, even in the realm of contract, this Court can interfere under Article 226 of the Constitution of India as held in ABL International Ltd. & Anr. Versus Export Credit Guarantee Corporation of India Ltd. & Ors. (2004 (3) SCC 553). The State while entering into contract or agreement with private individuals has to act in just, fair and reasonable manner. The contractual obligations of the State coexist with the constitutional

obligations. The work being completed long back and there being no dispute on amount and payment being admitted by the respondents, same cannot be denied when the work stands executed.

The next contention of learned AAG is that the claim raised by the petitioner is belated and, therefore, the same cannot be raised. The respondents have issued a communication dated 17.07.2020 vide which Executive Engineer has written to the Superintending Engineer on 17.07.2020 seeking allotment of funds to settle the pending claims. The respondents have, thus, acknowledged their liability for payment pursuant to the execution of works. The petitioner had submitted the bills and sought payment of the same, as such, the respondents were to process the same and the petitioner cannot be held liable for any lapse on this account.

The respondents have acted arbitrarily, unreasonably and unfairly and in this case as the liability is admitted, therefore, the petitioner is held entitled to the payment of admitted amount for the work executed by him.”

21. The next question which arises for consideration in the present case is with regard to “**obligation of person enjoying benefit of non-gratuitous act**”.
22. The issue whether there was a contract between the parties can be decided in light of Section 70 of Contract Act which is reproduced as under:-

“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 delivered¹.

23. Section 70 is based on the premise that something was done by one party for another and that the work so done voluntarily, was accepted by the other. Therefore, as a corollary, the plea that there was a subsisting contract in the nature of business transactions, is antithetic to the very essence of section 70. This is why section 70 forms part of Chapter V of the Indian Contract Act, which is titled as “Of certain relations resembling those created by contract”. In **State of West Bengal v. B.K. Mondal & Sons, AIR 1962 SC 779** is a landmark case in the arena and stated the above-mentioned legal position.
24. Since there were a series of communications between the parties which have not been denied by the respondents and accordingly it can safely be concluded that there was a binding contract between the parties and the respondents cannot escape from their liability of making the payment to the petitioner arising out of the said binding contract. In this regard I am fortified by the judgment of the Hon’ble Apex Court in case titled **Rickmers**

Verwaltung GMBH v. Indian Oil Corporation Ltd., (1999) 1 SCC 1, in which it has been held as under:

"An agreement, even if not signed by the parties, can be spelt out from correspondence exchanged between the parties. It is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence, it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence."

25. The jurisdiction of the High Court while exercising the powers under Article 226 of the Constitution of India is not restricted only to the review of the administrative actions and executive decisions of the State and in the light of the extended applicability of the "*doctrine of promissory estoppels*" of which the whole object is to see that the Government strikes to its promise and abides by it. I am supported by the law laid down in this regard in case titled Tapri Oil Industries and Anr. etc. v. State of Maharashtra and Ors., AIR 1984 Bom. 161, the Court held that:

"The jurisdiction of the High Court under Article 226 of the Constitution is not restricted only to the review of the administrative actions and executive decisions of the State and in the light of the extended applicability of the doctrine of promissory estoppel of which the whole object is to see that the Government strikes to its promise and abides by it."

Further, the Court held that:

"The law may, therefore, now be taken to be sensed as a result of this decision (Anglo Afghan Agencies Case) that where the Government makes a promise knowing or intending that it would be acted on by the promisee and in fact the promisee acting in reliance on it, alters his position, the Government would be held

bound by the promise and the promise would be enforceable against the Government."

26. The Apex Court in case titled **Union of India and Ors. v. Godfrey Philips India Ltd., (1985) 4 SCC 369**, has held as under:

"There can, therefore, be no doubt that the doctrine of promissory estoppel is applicable against the Government in the exercise of its governmental, public or executive functions the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel."

"The doctrine of Promissory estoppel represents a principle evolved by equity to avoid injustice and though commonly named promissory estoppel; it is neither in a realm of contract nor in the realm of estoppel."

27. Since the respondents have taken a specific plea with regard to the fact which has been disputed by the respondents in contract matters. Although, stand taken by the respondents is contrary to record, yet I will deal with the powers of the Writ Court to deal with the question of fact. There is no dispute with regard to the proposition that in certain cases even a disputed questions of fact can be gone into by this Court by entertaining he petition under Article 226 as has been held in case titled **ABL International Ltd. and Another v. Export Credit Guarantee Corporation of India Ltd. and Others' (2004 (3) SCC 553)**].

28. The perusal of the aforesaid judgment clearly shows that the writ petition involving serious disputed questions of fact which requires consideration of evidence which is not on record, will not normally be entertained by the Court in exercise of its jurisdiction under Article 226 of the Constitution of India but the said decision in my opinion does not lay out an absolute bar in all cases involving disputes questions of fact by relegating the partition to a civil suit. I am supported by the judgment passed by the Hon'ble Supreme Court in case titled Smt. Gunwant kaur & others versus Municipal Committee, Bhatinda and others [1969 (3) SCC 769 while dealing with such a situation vis-à-vis disputed questions of fact while exercising the writ jurisdiction of the Court has been pleased to hold as under: -

"This observation of the Court was made while negating a contention advanced on behalf of the respondent-Municipality

which contended that the petition filed by the appellant- company therein apparently raised questions of fact which argument of the Municipality was accepted by the High Court holding that such disputed question of fact cannot be tried in the exercise of the extraordinary jurisdiction under Article 226 of the Constitution. But this Court held otherwise. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Smt.Gunwant Kaur (supra), this Court even went to the extent of holding that in a writ petition, if facts required, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and or involves some disputed questions of fact.”

29. The next issue that needs to be dealt with in the present writ petition is with regard to maintainability of writ jurisdiction in contractual matters.

30. It has been contended by the respondents that writ petition is not maintainable with respect to contractual matters but the contention of the respondents can be negated by the observations of the Hon'ble Supreme Court in recent case titled Maharashtra Chess Association versus Union of India and others, Civil Appeal No.5654 of 2019,(2020) 13 SCC 285 in which Hon'ble Supreme Court, while dealing with the powers of the High Courts under Article 226 was candid in expressing that the text of Article 226 (1) provides that:-

“a High Court may issue writs for the enforcement of the fundamental rights in Part III of the Constitution, or "for any other purpose". A citizen may seek out the writ jurisdiction of the High Court not only in cases where her fundamental right may be infringed, but a much wider array of situations.

This brings us to the question of whether Clause 21 itself creates a legal bar on the Bombay High Court exercising its writ jurisdiction. As discussed above, the writ jurisdiction of the High Court is fundamentally discretionary. Even the existence of an alternate adequate remedy is merely an additional factor to be taken into consideration by the High Court in deciding whether or not to exercise its writ jurisdiction. This is in marked contradistinction to the jurisdiction of a civil court which is governed by statute.¹⁴ In exercising its discretion to entertain a particular case under Article 226, a High Court may take into consideration various factors including the nature of the injustice that is alleged by the petitioner, whether or not an alternate remedy exists, or whether the facts raise a question of constitutional

interpretation. These factors are not exhaustive and we do not propose to enumerate what factors should or should not be taken into consideration. It is sufficient for the present purposes to say that the High Court must take a holistic view of the facts as submitted in the writ petition and make a determination on the facts and circumstances of each unique case.”

31. The Hon'ble Supreme Court in another recent judgment on an Appeal arising out of judgment dated 1st April 2019 of the Division Bench of the High Court of Telangana relating to development agreement between APIIC, Unitech and Nacre Garden Hyderabad Limited (**Unitech Limited and Ors. v. TSIIC and Ors, Civil Appeal No. 317 of 2021**) observed that:-

"...the jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract.”

32. Thus, from a bare perusal of the record and on careful analysis of the judgments cited above, I hereby conclude that law does not put any bar or any fetters on the High Court in respect of exercising its writ jurisdiction in contractual matters. The judgments which have been cited hereinabove clearly prove that there has been paradigm shift in the approach of the Courts in exercise of its Writ Jurisdiction in the matters of contractual disputes with State and its authorities. The law regarding the exercise of judicial review in contractual matters with State or its instrumentalities has definitely evolved over the years and the ordinary citizens can, in appropriate cases, approach the High Courts for exercise of Writ Jurisdiction.

33. To sum up, the underlying principle is that *“in matters of contractual dispute with the State and its instrumentalities there is no absolute bar to exercise the writ jurisdiction and the High Court should take a holistic*

view and make a determination as to whether it would be proper to exercise its writ jurisdiction.”

CONCLUSION

34. Thus on a careful analysis of the record and the stand taken by the parties, it can safely be concluded that the petitioner was allotted work by the respondents on the directions of competent authority i.e., Commissioner, Srinagar Municipal Corporation and the petitioner in compliance to directions issued, executed the work within a time frame and accordingly, the respondents are under legal obligation to release the admitted liability/payment in favour of petitioner to the tune of Rs.40.71 lacs in respect of construction of 2 No. of fountains at Hyderpora Crossing Srinagar (which has already been verified/admitted by the respondents), within a period of four weeks from today and in case, if the payment is not released within the aforesaid period the petitioner will be held entitled to the interest @ 6% from the date the said payment was due and not released by the respondents. In light of the aforesaid discussions, the present writ petition is allowed in the manner as indicated hereinabove.

35. Disposed of.

(WASIM SADIQ NARGAL)
JUDGE

SRINAGAR
.03.2023
"Shameem H."

Whether the judgment is reportable:

Yes