

**HIGH COURT OF TRIPURA
AGARTALA**

WA No.85 of 2024

Sri Ratan Sarkar, son of Late Rajendra Sarkar, resident of Ramnagar Road No.4, PO- Ramnagar, PS- West Agartala, Sub-Division- Sadar, District- West Tripura, PIN-799002, aged about 52 years.

.....Appellant(s);

Versus

1. The State of Tripura, represented by the Commissioner & Secretary, Public Works Department (Roads & Buildings), Government of Tripura, having his office at New Secretariat Complex, Gorkhabasti, Agartala, PO- Kunjaban, PS- New Capital Complex, Sub-Division- Agartala, District- West Tripura
2. The Commissioner & Secretary to the Public Works Department (Roads & Buildings), Government of Tripura, having his office at New Secretariat Complex, Gorkhabasti, Agartala, PO- Kunjaban, PS- New Capital Complex, Sub-Division- Agartala, District- West Tripura
3. The Executive Engineer, Kumarghat Division PWD (R&B), Government of Tripura, District- Unakoti Tripura.
4. National Buildings Construction Corporation Limited (NBCC), a Company, incorporated under the Companies Act, 1956, having its registered office at NBCC Bhawan, Lodhi Road, New Delhi-110003, represented by its General Manager, having his office at NBCC Bhawan, Lodhi Road, New Delhi-110003
5. The General Manager, having his office at NBCC Bhawan, Lodhi Road, New Delhi-110003
6. The Senior General Manager (Engg), RBG Head- Tripura, National Buildings Construction Corporation Limited, having his office at Jackson Gate Building, 3rd floor, Lenin Sarani, Agartala-799001, West Tripura
7. The Additional General Manager, National Buildings Construction Corporation Limited, having his office at Jackson Gate Building, 3rd floor, Lenin Sarani, Agartala-799001, West Tripura.

.....Respondent(s).

For Appellant(s)	: Mr. Somik Deb, Sr. Advocate, Mr. Pranabindu Chakraborty, Advocate.
For Respondent(s)	: Mr. Kohinoor N. Bhattacharyya, G.A., Ms. Kahina Reang, Advocate.

**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR. JUSTICE ARINDAM LODH**

Order

31/07/2024

Heard Mr. Somik Deb, learned senior counsel for the appellant and Mr. Kohinoor N. Bhattacharyya, learned Government Advocate for the respondents No.1 to 3.

2. The writ petition was preferred for release of forfeited performance guarantee amounting to Rs.12,80,147/- along with interest at the rate of 12% per annum from the date of invocation of bank guarantee till its actual realization in favour of the petitioner. The learned Writ Court vide impugned judgment dated 27.06.2024 dismissed the writ petition being WP(C) No.801/2023 as it was of the view that there are allegations and counter allegations made by the parties, but the record is not sufficiently placed before the Court by both the parties. The learned Writ Court observed that it would be appropriate if the matter is resolved by both the parties under Clause 24.1 of the contract agreement wherein it is stated that if any dispute or difference of any kind whatsoever arises in connection with or arising out of that contract of the execution of works or maintenance of the works, it would be referred for settlement to the competent authority. The learned Court, therefore, directed the parties to avail the remedies under Clause 24.1 of the contract as the Court could not go into the disputed questions of fact which were not placed on record. It was left open for the parties to place all the materials in support of their claim and counter claim before the competent authority under Clause 24.1.

3. The short factual canvas necessary to be referred to in order to appreciate the case of the parties are hereunder:

Petitioner was working under a work order dated 23.08.2010 issued by the National Buildings Construction Corporation Limited [NBCC, *for short*] which is respondent No.4. The nature of the work was “Construction of Rural Roads under Pradhan Mantri Gram Sadak Yojana in Jirania Block of West District of Tripura, Package No-IV (Ph-VII-R1-W) UG, DPR No.TR-01-102” and routine maintenance of the work for five years. The work was to be executed within a period of eighteen months. Under the agreement, petitioner was required to maintain the work for the next five years. In the writ petition, his relief was confined to release of Rs.12,80,147/- which was in the nature of bank guarantee for security deposit made earlier. The bank guarantee was issued by the State Bank of India, Agartala Branch submitted in favour of the NBCC. Petitioner through his letter dated 04.06.2020 had sought release of Rs.19,36,302/- which were the amount withheld against his RA bills. He also submitted another letter to the General Manager (Engg.), NBCC Ltd. PMGSY works praying for release of the security deposit of Rs.12,63,003/-. He further pursued the matter with the Assistant General Manager, State Bank of India, Agartala Branch through letter dated 13.10.2020. Petitioner contended that after completion of the five years maintenance period, there was no reason for withholding of the security deposit in the nature of bank guarantee. However, the Additional General Manager (Engg.) vide letter dated 03/05.03.2021 [Annexure-13] issued a show cause notice asking him to

explain within seven days as to why action in accordance with the SBD Clause No.52.00 should not be taken against him as he had failed to complete the work within the time specified in the contract agreement. It alleged that the progress of work was very dismal and poor and because of that, large number of public were deprived from the benefits of PMGSY scheme. Petitioner submitted his reply on 22.03.2021 [Annexure-14] *inter alia* stating that he had completed consecutive five years maintenance work and, therefore, was seeking release of the total amount of Rs.31,99,305/-.

However, learned counsel for the petitioner submitted that no decision has been taken on his reply to the show cause notice. On the other hand, the Deputy General Manager (Fin.) issued letter No.NBCC/PMGSY/AGT/BG/2021/1060 dated 28.05.2021 addressed to the Branch Manager, State Bank of India, Agartala Branch on the subject of release of original bank guarantee dated 11.10.2010 for Rs.12,80,147/-.

The communication reads as under:

“Dear Sir,

Please refer to our letter no 1015 dt. 30.03.2021 wherein encashment of BG of M/s Ratan Sarkar is issued. Now NBCC had withdrawn the said letter and submitted original BG to Bank may release to Agency. Detail of BG is already given below:-

BG No-0000220BG0000041
Date of issue-17.10.2020
Valid Upto-16.10.2021
Amount-1280147/-”

Later the show cause issuing authority i.e. the Additional General Manager (Engg.) issued letter dated 18.06.2021 addressed to the Empowered Office, TRRDA, PWD (PMGSY), Agartala on the subject of release of withheld amount of Link No.T04 (Jirania to Takarjala) to the

Petitioner in connection with the said agreement. The said letter reads as under:

“Dear Sir,

The amount of Rs.19,36,302/- has been withheld from various RA Bills of M/s Ratan Sarkar for the Link No.T04 Road name Jirania to Takarjala under Jirania Block for pending ATR at construction period. Now there is no pending ATR for construction period the above said road and the road has been taken over by PWD (Jirania Division) as it is where is basis. The time detail sheet of withheld amount is attached with this letter.

Hence, it is requested that kindly release the above withheld amount to Agency as early as possible.

Yours Faithfully,

Sd. Illegible
Assistant General Manager (Engg.)”

It is not in dispute that Rs.19,36,302/- were withheld from the various RA bills of the petitioner, the computation of which also is indicated at Annexure-17, letter dated 28.05.2021 issued by the petitioner-contractor to the General Manager (Engg.), NBCC Ltd. The dispute surrounds around the release of security deposit in the nature of Bank Guarantee for Rs.12,80,147/-.

4. Based on these contentions when the writ petition was filed, upon notice respondents No.4 to 7 appeared and filed their counter affidavit. Be it also indicated that though respondents No.4 to 7 are the NBCC and its officials i.e. the General Manager; the Senior General Manager (Engg.), RBG Head-Tripura and the Additional General Manager, NBCC, West Tripura but the author of the letter dated 28.05.2021 i.e. the Deputy General Manager (Fin.), who had intimated the Branch Manager, State Bank of India, Agartala Branch of withdrawal of the encashment of bank guarantee of the petitioner vide letter No.1015 dated 30.03.2021, was not impleaded as a party. If the bank guarantee was already encashed through letter No.1015

dated 30.03.2021, how could it be withdrawn after two months for being released to the agency? The respondents No.4 to 7 in their counter affidavit have supported the encashment of this Bank Guarantee as the petitioner did not fulfill the contractual obligations as per the agreement. It is stated that the physical condition of the road was terrible in respect of numbers of depressions and pot holes developed at several chain ages, as a result of which vehicular movement and pedestrians were suffering tremendously. This was repeatedly raised by public representatives and the local inhabitants. As per the contractual terms, on completion of the construction work of the road, the same was to be handed over to the client after carrying out proper maintenance work for five consecutive years, but the petitioner failed to carry out the maintenance work as per provision embodied in the contract agreement. Even after several meetings and reminders from the respondents as well as TRRDA and notices served upon him, petitioner did not pay any heed to it. Therefore, the show cause notice was issued on 03.03.2021. The show cause notice refers to several letters dated 09.09.2015, 09.05.2016, 10.05.2016, 25.05.2016, 29.06.2016, 01.08.2016, 23.06.2017, 19.06.2018 and 27.01.2020 issued to the petitioner in relation to the construction and maintenance of the upgradation road under the contract. Due to non-performance of regular maintenance work and considering the gravity of the road and regular public hurdles, PWD proposed NBCC to take over the road on “As is where is basis” vide letter dated 21.05.2021 [Annexure-R/2]. As such, NBCC handed over the road to PWD on “as is where is basis”. As per clauses of the standard bidding document for

PMGSY, the respondents encashed the BG as a penalty owing to non-performance of routine maintenance work by the contractor.

4. Respondents have, while furnishing para-wise reply to the averments made in the counter affidavit, made specific statements at para 15 that on completion of the construction of the road on 31.03.2014, the road was to be handed over to the client in the year 2019 after carrying out proper maintenance work for five consecutive years. But the agency did not carry out the maintenance work as per the provisions of the contract. He did not pay any heed to the repeated notices and reminders served upon him and also several meetings held in that regard. Even after lapse of ample period of time, the road was kept without execution of periodic maintenance work. The matter was discussed with TRRDA at several occasions who were of the view that for any damage occurred due to non-execution of maintenance work as per the contract, the contractor would be held liable. On these averments, the respondents No.4 to 7 have made categorical statement that they were left with no other option but to encash the BG of the agency to the tune of Rs.12,80,147/- as per the terms of the contract agreement.

5. Mr. Somik Deb, learned senior counsel for the appellant, in course of his submission has drawn the attention of this Court to Clause 24.1 of the agreement which according to him is in the nature of a Dispute Redressal System. He has also drawn the attention of this Court to the decision of the Apex Court in the case of *P. Dasaratharama Reddy Complex v. Government of Karnataka and Another* reported in (2014) 2 SCC 201 at paragraphs 10, 14, 27 & 42. He submits that the Dispute

Redressal System under Clause 24.1 is essentially a non-adjudicatory decision of the competent authority which is subject to right of the aggrieved party to seek remedy. As such, it is not an adjudication on the dispute raised by the appellant. Moreover, in view of Clause 25.1 of the contract, there will be no arbitration for settlement of any dispute between the parties in view of Clause 24 i.e. Dispute Redressal System. As such, no purpose would be served by invoking the forum of the competent authority/the Empowered Standing Committee in respect of the instant dispute under Clause 24. Learned senior counsel for the appellant further submits that since no decision on the show cause notice dated 03/05.03.2021 has been taken despite submission of his reply, and that the same Additional General Manager (Engg.), NBCC, Agartala has vide letter dated 18.06.2021 directed release of withheld amount of Rs.19,36,302/- from the running account bills of the petitioner as there is no pending Action Taken Report (ATR) for construction period of the said road, the withholding of amount of Rs.12,80,147/- in the nature of a bank guarantee dated 11.10.2010 towards security deposit even after issuance of letter dated 28.05.2021 by the Deputy General Manager (Fin.) is without any basis and untenable. It is submitted that if there is no dispute left on the issue of satisfactory completion of the work and maintenance over a period of five years, the respondents cannot withhold the security deposit of Rs.12,80,147/- for which petitioner/appellant herein had been compelled to move this Court. It is also submitted that the learned Writ Court however, despite noticing all these facts and circumstances, surprisingly refused to grant any relief and instead

directed the parties to avail the remedies under Clause 24.1 which is in the nature of a non-adjudicatory decision by the Empowered Standing Committee.

6. Mr. Deb, learned senior counsel for the appellant, has further relied upon at paragraph 82 of a decision rendered by the Apex Court in the case of *M.P. Power Management Company Limited, Jabalpur v. Sky Power Southeast Solar India Private Limited and Others* reported in (2023) 2 SCC 703 and submitted that there is no prohibition for the Writ Court in deciding disputed questions of fact particularly when the dispute surrounds demystifying of documents only. Since the claim of the petitioner was based on undisputed facts and interpretation of the construction of the terms of agreement such as Clause 24 & 25 which are non-adjudicatory decisions of the Empowered Standing Committee and which bars recourse to arbitration, the learned Writ Court ought not to have relegated the petitioner to the same forum instead of deciding the issue. As such, this Court in writ jurisdiction can grant relief to the appellant even in a contractual matter like this where there are no outstanding differences or dispute on the question of release of bank guarantee. Therefore, the impugned judgment may be set aside. Respondents-NBCC may be directed to release the bank guarantee of Rs.12,80,147/- in his favour.

7. Mr. Kohinoor N. Bhattacharyya, learned Government Advocate appears for the respondents-State authorities. He submits that the entire claim of the appellant is directed against the NBCC. The NBCC has filed a

counter affidavit before the Writ Court where they have denied the claim on a number of grounds which also indicate existence of factual dispute between the parties.

8. We have considered the submission of learned senior counsel for the appellant and learned Government Advocate for the respondents-State, and gone through the materials placed from the record. We have also perused the impugned judgment and taken note of the decisions cited on behalf of the appellant.

The canvas of facts and documents which have been referred to in the foregoing part of this judgment creates an impression that for failure to maintain the road for a period of five years after its completion in the year 2014, appellant has been served with a show cause notice on 03/05.03.2021 giving references to at least nine such letters issued upon him from time to time. The show cause notice is related to poor performance and progress of the work. Appellant though has submitted his reply to the show cause notice on 22.03.2021, but it appears that the decision on his reply is either not taken or placed on record. On the other hand, the Additional General Manager (Engg.), the show cause issuing authority has, vide letter dated 18.06.2021, directed release of Rs.19,36,302/- from the running account bills of the petitioner which were against 3rd RA bill, 4th RA bill, 5th RA bill and the final bill. However, this letter which has been relied upon on behalf of the appellant indicates release of only the withheld amount against running account bills and not release of the bank guarantee which is in the nature of a security deposit. The letter dated 28.05.2021 issued by the Deputy General

Manager (Fin.) addressed to the Branch Manager, SBI, Agartala Branch indicates that the bank guarantee submitted by the appellant for Rs.12,80,147/- was already encashed by the NBCC vide letter No.1015 dated 30.03.2021. As such, withdrawal of the letter dated 30.03.2021 by letter dated 28.05.2021 issued by the Deputy General Manager (Fin.) after two months is difficult to understand and defies logic. A bank guarantee which already stood encashed two months back could not be restored by withdrawal of the letter of encashment.

9. The learned Writ Court while appreciating the case of the parties, therefore, appears to be right in observing that there are allegations and counter allegations made by the parties but the record was not sufficiently placed before the Court. In the absence of an undisputable state of affairs as to the admissibility of the security deposit amount of Rs.12,80,147/- in favour of the petitioner, no writ in the nature of Writ of Mandamus or direction could be issued for payment of the amount in favour of the petitioner. The counter affidavit of the respondents further makes it clear that the security deposit amount had been encashed due to poor performance of the maintenance work of the petitioner/appellant herein. As such, the arena of dispute in the facts and circumstances of the case discussed above is not undeniable.

10. The Court in writ jurisdiction even in cases of claims arising under a contract may in the facts of a case exercise its discretionary jurisdiction to direct release of admissible amounts which are undisputed by

the parties. It may also enter into construction of salient terms and conditions of the contract if the factual arena does not suffer from any disputed questions. But when the claim involves issues which are not only disputed on the face of record but the pleadings and documents placed by the parties are insufficient to demystify the disputes surrounding those documents, it would indeed be unwise to accept the prayer of the appellant and direct payment of the amount of security deposit already encashed by the NBCC. The appellant may be right that Clause 24.1 provides for a non-adjudicatory decision by the Empowered Standing Committee, but in that case his remedy lies before the competent Court of civil jurisdiction since the issue involves determination on disputed questions of fact apart from construction of the terms of the agreement. Going by the ratio rendered by the Apex Court in the case of ***M.P. Power Management Company Limited*** (supra), we do not find that the relief prayed for by the appellant under writ jurisdiction can be granted in the facts and circumstances of the case. Therefore, the appeal being devoid of merit is dismissed.

11. Pending application(s), if any, shall stand disposed of.

(ARINDAM LODH), J

(APARESH KUMAR SINGH), CJ

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