

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.3840 of 2021

Fulena Construction Pvt. Ltd. through its Director, Shashi Singh, male, aged about 66 years, R/o- Mohalla- Sri Krishna Nagar, P.O. and P.S.- Begusarai Sadar, District- Begusarai, Pin- 851101.

... ... Petitioner/s
Versus

1. The State of Bihar through Principal Secretary, Water Resources Department, Sinchai Bhawan, Old Secretariat, Government of Bihar, Patna.
2. The Principal Secretary Water Resources Department, Sinchai Bhawan, Old Secretariat, Government of Bihar, Patna.
3. The Engineer-in- Chief, Flood Control and Drainage, Water Resources Department, Government of Bihar, Patna.
4. The Chief Engineer, Flood Control and Drainage, Water Resources Department, Katihar.
5. The Superintending Engineer, Flood Control Circle, Bhagalpur.
6. The Executive Engineer, Flood Control Division Naugachia.

... ... Respondent/s

Appearance :

For the Petitioner/s : Mr. Alok Ranjan, Advocate
For the Respondent/s : Mr. Anjani Kumar, AAG-4
Mr. Deepak Sahay Jamuar, AC to AAG-4

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE MADHURESH PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 10-08-2022

The petitioner claims to be a Private Limited Company registered as a Class-I Civil Contractor under the State Government of Bihar. This writ application has been filed through its Director seeking a direction to the respondents to pay to it an admitted amount of a sum of Rs. 7,76,88,398=00 for the work done by it pursuant to an agreement bearing No. 1-



S.T.B./2007-08.

2. It is the petitioner's case that the claimed amount could not be paid by the respondents on the ground of non-allotment (paucity) of funds. In view of the petitioner's definite claim in the writ petition that the amount is admitted and has not been paid because of non-availability of fund, this Court had passed following order in this case on 22.01.2022 :-

“Considering the nature of dispute, which is being raised nearly 13 years after the petitioner is said to have completed the work in question and the stand taken on behalf of the respondents in the counter affidavit, it is considered desirable to direct respondent No. 2 to file a supplementary counter affidavit. The affidavit must be sworn by the Principal Secretary, Water Resources Department, Government of Bihar himself.

For the said purpose, list this case on 14.02.2021.”

3. In compliance of the said order dated 22.01.2022, a supplementary counter affidavit has been sworn by Mr. Sanjay Kumar Agrawal, the Principal Secretary, Water Resources Department, Government of Bihar. The averments made in the writ application regarding the petitioner's claim of its entitlement of the amount has not been specifically denied; neither in the counter affidavit which was earlier filed in the present writ application nor in the supplementary counter affidavit sworn by the Principal Secretary of the Department filed under the orders of this Court dated 22.01.2022.



4. We have considered it appropriate to notice the facts of the case as disclosed in the supplementary counter affidavit sworn by the Principal Secretary of the Department to address the petitioner's grievance as raised in the writ application, as in our opinion, these very facts not only support the petitioner's claim rather they substantiate it.

5. The relevant facts as culled out from the supplementary counter affidavit are that the petitioner had entered into an agreement with the Executive Engineer, Flood Control Division, Naugachia vide the aforesaid agreement No. 1-S.T.B./2007-08 on 18.03.2008 for execution of "*Anti Erosion works for protection of Khairpur, Raghpur, Akidatpur villages located in upstream of Vikramshila bridge from erosion of river Ganga*". The agreement value of the work was Rs. 18,77,94,163=00 that was to be completed by 31.05.2008. The work could not be completed before start of flood season as was stipulated in the agreement, rather it was completed by 07.07.2008. However, subsequently, the petitioner was granted extension of time vide departmental letter No. 2581 dated 29.09.2012. As regards payment to the petitioner against the work executed by it is concerned, it was paid a sum of Rs. 6.29 crores during the period of execution of the work through four



running account bills but 5th and final bill amount for a sum of Rs. 7,76,88,398=00 could not be paid to the petitioner. Its claim was directed to be placed before a Liability Committee of the Department vide departmental letter No. 2640 dated 13.10.2011. The Liability Committee examined the claim of the petitioner in its meeting held on 18.10.2012 and recommended for sanction of payment of the said amount to the petitioner. In the meanwhile, a report of the Comptroller and Auditor General of India (CAG for short) for the year ending on 31.03.2010 was issued. The CAG, in Clause 2.2.3 of the report, pointed out that the entire expenditure of Rs. 10.27 crores done on execution of the said work was futile. The aforesaid amount included the amount of Rs. 6.29 crores paid to the petitioner and the amount of Rs. 3.98 crores spent by the Department on the purchase of materials and other miscellaneous expenditures. Under the said circumstance, the payment of amount of the 5th and final bill of the petitioner as recommended by the Liability Committee could not be sanctioned. A reply to the said report of the CAG has been prepared by the State Government justifying execution of the aforesaid work and the expenditure made on the said work. The said reply has been sent to the Bihar Legislative Assembly, Patna vide letter dated 07.12.2021 with a request to get deleted



the aforesaid Clause 2.2.3 of the report of the CAG by the Public Accounts Committee (PAC for short) of the Bihar Legislative Assembly where the said report is under consideration.

It has further been stated that the decisions of the PAC are required to be placed before the Bihar Legislative Assembly when the House is in session. The ensuing session of the Assembly is due to commence on 25.02.2022. As such, the assessment of amount due to the petitioner will be done in the light of the decision taken by the PAC and accordingly necessary steps shall be taken for payment to the petitioner, the affidavit states. Further, it has been stated in paragraph-12 of the said supplementary counter affidavit of the Principal Secretary of the Department that in view of the aforesaid facts this writ application may be disposed of.

6. We need not refer to the facts asserted in the writ petition in view of the admitted factual position that has emerged from the averments made in the supplementary counter affidavit filed on behalf of Respondent No. 2, sworn by the Principal Secretary of the Department.

7. We have heard Mr. Alok Ranjan, learned counsel for the petitioner and Mr. Anjani Kumar, learned Additional



Advocate General No. 4 assisted by Mr. Deepak Kumar, learned AC to AAG-4 on behalf of the State of Bihar.

8. It has been argued on behalf of the petitioner that despite repeated requests made by the petitioner the respondents declined to pay the admitted remaining amount against the work executed by it on the pretext of non-availability of fund. He has submitted that after completion of work the petitioner was given a completion certificate by the competent authority and the Liability Committee had also found the said amount of Rs. 7,76,88,398=00 payable to the petitioner.

9. Mr. Anjani Kumar, learned AAG-4 has raised a question of maintainability of the writ petition on the ground of delay and laches on the part of the petitioner in approaching this Court nearly 13 years after the amount, which is being claimed by it, had become due. He has placed reliance on the Supreme Court's decision in case of ***Karnatka Power Corporation Limited and another vs. K. Thangappan and another (AIR 2006 SC1581)***. Reliance has also been placed in support of this submission on another Supreme Court's decision in case of ***Union of India and others vs. M.K. Sarkar*** reported in **(2010)2 SCC 59**.

10. He has secondly submitted that there being an



arbitration clause in the agreement in question, the petitioner instead of filing the present writ petition ought to have invoked the provisions of Arbitration and Conciliation Act, 1996. He has thirdly submitted that as the audit report of the CAG is pending before the PAC of the Bihar Legislative Assembly, this Court should not go into a dispute which is pending consideration before the Bihar Legislative Assembly, applying the bar put under Article 212 of the Constitution of India. He has submitted that the audit report of the CAG needs to be placed before the Bihar Legislative Assembly in accordance with the constitutional requirement under Article 151(2) of the Constitution. He has urged that the claim of the petitioner should not be entertained by this Court till a final decision is taken by the PAC of the Bihar Legislative Assembly on the report in question of the CAG. He has referred to Rules 237, 238 and 239 of the Rules of Procedure and Conduct of Business in Bihar Vidhan Sabha (for short 'the Rules'), which deal with constitution of PAC and its duties. He has submitted that the report of the CAG has been placed before the PAC as required under Rule 237(1) of the Rules which is scrutinizing the same as required under Rule 238(1) of the Rules.

11. The preliminary objection taken on behalf of the



State of Bihar on the ground of delay and laches, in our opinion, deserves to be overruled in the background of the stand taken on behalf of the State of Bihar itself in its supplementary counter affidavit that the matter is under consideration before the PAC/ Bihar Legislative Assembly in the light of the report submitted by the CAG. Once the State of Bihar has pleaded that assessment of the amount due to the petitioner will be done in the light of the decision taken by the PAC and necessary steps shall accordingly be taken for payment, their objection over maintainability of the writ application on the ground of delay, in such circumstances, is unsustainable and is accordingly overruled, in the peculiar facts and circumstances of the present case.

12. The Supreme Court's decision in case of **K. Thangappan** (supra) and **M.K. Sarkar** (supra) are distinguishable on facts and do not apply in the present set of facts.

13. The other objection over maintainability of the writ application in view of the arbitration clause under the agreement has also no force in the present set of facts emerging from the pleadings on record, particularly, the supplementary counter affidavit filed on behalf of Respondent No. 2 as noted



above, for the reason that the respondent-State of Bihar has not denied the petitioner's claim for payment of the amount rather the State Government has accepted that the amount is payable. The only hurdle which is there with the State Government to clear the petitioner's claim is pendency of the matter before the PAC in the light of the submission of report by the CAG.

14. 'Arbitration agreement' has been defined under Section 2(1)(b) of the Arbitration and Conciliation Act, 1996 as an agreement referred to in Section 7 of the Act. Section 7 of the Act defines 'arbitration agreement' as an agreement by the parties to submit to arbitration 'all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship', whether contractual or not.

15. Here is a case where the State of Bihar, which is a party to the agreement is not raising any dispute in respect of the petitioner's claim as being raised in the writ petition, rather the State of Bihar is admitting its liability to pay in most uncertain terms as can be easily discerned from the averments made in the supplementary counter affidavit. The supplementary counter affidavit goes to the extent of stating that the State Government has prepared a reply in respect of the report in question of the CAG justifying execution of the work and the expenditure done



on the said work and a request has been made by the State of Bihar to delete Clause 2.2.3 of the report of the CAG.

16. Admittedly thus, the State Respondents have in clear terms admitted its liability to pay to the petitioner the amount which the petitioner is claiming. The State Government is not denying that the petitioner had not executed the work in question and that the petitioner is entitled to payment against the fifth and final bill.

17. In the Court's opinion, it is not a case of dispute which could have become a subject-matter of arbitration as there is no dispute which exists and, therefore, there is no question of any arbitrable dispute arising out of the agreement. It is rather a case of admission of liability by the State respondents which it failed to discharge because of an objection raised by the CAG.

18. The argument made by Mr. Anjani Kumar, learned Additional Advocate General No. 4, that this Court should not entertain the writ petition in view of the bar under Article 212 (1) of the Constitution of India, as the matter is pending before PAC, is completely misconceived. Article 212 (1) of the Constitution reads as under:-

“212. Courts not to inquire into proceedings of the Legislature.



(1) The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.”

19. In the present case, no validity of any proceeding in the legislature of a State has been called in question on the ground of any alleged irregularity of procedure. The petitioner's claim is against the State Government of Bihar for payment of dues arising out of a contract, which is admitted. Admittedly the State Government has made a request for deletion of clause 2.2.3 of CAG report. After having admitted these facts, the State Government cannot deny its liability to pay. The State-respondent cannot be allowed to approbate and reprobate in the same transaction. The doctrine of approbate and reprobate has been lucidly summarized by the Supreme Court in a recent decision in case of *Union of India and Ors. Vs. N. Murugesan and Ors* reported in (2022) 2 SCC 25 paragraph 26 of which reads thus:-

“The phrases “approbate and “reprobate” are borrowed from the Scots law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he



objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. The principle has to be applied with more vigour as a common law principle if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in its principle. It is also a species of estoppel dealing with the conduct of a party.”

20. While laying down the law, the Supreme Court in case of ***N. Murugesan*** (supra) has noticed various previous decisions rendered by the Supreme Court including the one in case of ***Rajasthan Industrial Development and Investment Corporation and Anr. Vs. Diamond and Gem Development Corporation Limited and Anr.*** reported in ***(2013) 5 SCC 470***, wherein the Supreme Court has laid down that a party cannot be permitted to “blow hot-blow cold”, “fast and loose” or “approbate and reprobate”. The Supreme Court has held that where one knowingly accepts the benefits of a contract, he is estopped from denying the validity of, or binding the effect of such contract.

21. We need not reiterate the settled legal position that



even in contractual matters, the public authorities have a duty to act fairly, justly, and reasonably, which is requirement of Article 14 of the Constitution of India. In the present case, the respondent-State of Bihar appears to have denied payment to the petitioner even after having utilized its services for the purpose of execution of work on a ground, not germane for denial of the petitioner's claim.

22. It was the authorities who considered the anti-erosion work necessary. Notice Inviting Tender for the works in question was also issued by the authorities. This Court would observe that even if the PAC on consideration of the appropriation accounts and finance accounts were to sustain the CAG report, that the work was "futile", the same would be inconsequential for the petitioner's dues.

23. The petitioner participated in the tender, emerged successful and has admittedly completed the works in question. He, therefore, has a right to receive payment of the amount due and admissible for the same. Petitioner's right, in the Court's opinion, is independent of PAC's consideration of clause 2.2.3 of the CAG report.

24. In view of the above-noted admitted facts, we are of the view that the respondents cannot be permitted to delay the



payment of admitted dues to the petitioner any further. At this stage, we take note of an order passed by a learned Single-Judge of this Court on 24.08.2021, in this case, whereby this Court while asking the respondents to file counter affidavit had directed for payment of admitted outstanding dues to the petitioner.

25. Though the respondents-State of Bihar did not dispute its liability to pay to the petitioner the amount claimed by it, they have chosen to resist the petitioner's claim on technical grounds as noted above.

26. In view of the admitted facts and the aforementioned discussions, in our opinion, this writ application deserves to be allowed. The Principal Secretary, Water Resources Department, Government of Bihar is hereby directed to ensure that the amount which is admittedly payable to the petitioner is paid within a period of three months from the date of receipt/production of a copy of this order. We were inclined to allow the petitioner adequate interest for inordinate delay in payment of the amount by the respondents without any valid reason. We have, however, refrained ourselves from doing so in the present facts and circumstances.

27. This application is accordingly allowed with the



directions and observations as noted above.

(Chakradhari Sharan Singh, J)

I agree.
Madhuresh Prasad, J

(Madhuresh Prasad, J)

Rajesh/-

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| AFR/NAFR | NAFR |
| CAV DATE | 05.04.2022 |
| Uploading Date | 12.08.2022 |
| Transmission Date | NA |

