IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No. 5809 of 2020

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Mukesh Kumar Singh, aged about 45 years (male), S/o Shree Ram Balak Singh, Resident of Village- Ekderawa Masuria, P.S. Maker, District- Saran.

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Department of Road Construction Department, Bihar, Patna.
2. The Secretary, Road Construction Department (N.H. Division), Government of Bihar, Patna.
3. The Chief Engineer, Road Construction Department (NH Division), Government of Bihar, Patna.
4. The Superintending Engineer, Road Construction Department (NH Circle), Muzaffarpur.
5. The Electrical Superintending Engineer, Electricity Supply Circle, PESU (West), Patna.
6. The Executive Engineer, NH Division, Chapra.

... ... Respondent/s

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Appearance :

For the Petitioner : Ms. Siddharth Harsh, Adv.

For the Respondents : Mr. Manoj Kumar Ambastha, SC-26.

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CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

ORAL JUDGMENT

Date: 12-07-2021

The instant case has been taken up for consideration through the mode of Video conferencing in view of the prevailing situation on account of COVID 19 Pandemic, requiring social distancing.

2. The present writ petition has been filed for directing the respondents to forthwith pay the admitted dues along with earnest money and security deposit with respect to the contract work discharged by the petitioner as also to grant approval of the works already done by the petitioner apart from approving price variation.

3. The brief facts of the case, according to the petitioner, are that the petitioner, who is a contractor, was awarded contract work for construction of HL bridge (RCC) at Sariya and an agreement was entered into with the Executing Engineer, NH Division, Chapra on 13.03.2013 for construction of the aforesaid bridge wherein the time period stipulated for completion of the contract work was 16 months from the date of agreement. It is the case of t[illegible]at the bridge in question was

constructed within the stipulated time period, however, subsequently, the Executive Engineer, directed the petitioner to undertake additional work whereupon the petitioner had performed variation work, but the same was not approved. It is stated that the entire work was completed in the year 2014 itself, however, the admitted outstanding dues are yet to be paid to the petitioner.

4. Per contra, the learned counsel for the respondent State, Shri. Manoj Kumar Ambastha, SC-26 has referred to the counter-affidavit filed in the present case and has submitted that the present petition is barred by delay and latches inasmuch as the present petition has been filed after a huge delay of six years. It is further submitted that the then Executive Engineer, NH Division, Chapra had made variation in the work of BM and SDBC and prime coat without the approval of the concerned Chief Engineer, who is the competent authority for grant of approval. It is further submitted that the Assistant Engineer, N.H. Sub-Division, Muzaffarpur-III had examined the records and vide letter dated 07.08.2018, he has communicated to the Executive Engineer, NH Division, Chapra that as per the measurement book No. 238 payment has been made to the

petitioner against his eight bills totalling to a sum of Rs. 3,68,53,379.00, for the work done by the petitioner. In fact a sum of Rs. 41.07 lacs and Rs. 16.16 lacs has also been paid to the petitioner as secured advance against the 4th and 7th A/C Bills. It has also been stated in the counter affidavit that various other amounts were also paid to the petitioner on the head of secured advances, against which adjustments were made, however, in nutshell the position is that still a sum of Rs. 14,77,489/- is recoverable from the petitioner against the secured advance money which had been taken by the petitioner.

5. The learned counsel for the petitioner has, in reply, submitted that the petitioner has refuted the aforesaid statements made in the counter affidavit by filing a rejoinder affidavit.

6. I have heard the learned counsel for the parties and perused the materials on record. This Court finds that though the work was completed in the year 2014, but the petitioner has approached this Court after a huge delay of about six years for which no plausible explanation what-so-ever has been furnished by the petitioner. It is a well settled law that the High Court in exercise of its discretion does not assist the tardy and the indolent or t and the lethargic. If there is

inordinate delay on the part of the petitioner, the Court may decline to intervene and grant relief inasmuch as entertaining such a belated claim would only have the effect of inflicting hardship and inconvenience. It is equally a well settled law that stale claim is not to be adjudicated and deserve to be thrown out at the very threshold. In this regard it would be apt to refer to a judgment rendered by the Hon'ble Apex Court in the case of ***Chennai Metropolitan Water Supply & Sewerage Board v. T. T. Murali Babu*****,** reported in (2014) 4 SCC, 108, paragraph no. 16 whereof is reproduced herein below:-

> "**16.** Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the court would be under legal obligation to scrutinise whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordin[WEB COPY]only invite disaster for the litigant

> who knocks at the doors of the court. Delay reflects inactivity and inaction on the part of a litigant — a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis."

7. It would also be relevant to refer to a judgment rendered by the Hon'ble Apex Court in the case of **Karnataka Power Corpn. Ltd. vs. K. Thangappan**, reported in *(2006) 4 SCC 322,* paragraph No. 6 whereof is reproduced herein below:-

> "6. Delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article 226 of the Constitution. In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party. Even where fundamental right is involved the matter is still within the discretion of the Court as pointed out in Durga Prashad v. Chief Controller of Imports and Exports [(1969) 1 SCC 185 : AIR 1970 SC 769]. Of course, the discretion has to be exercised judicially and reasonably."

8. Thus, this Court is of the view that the present petition

is fit to be dismissed on the ground of delay and latches alone.

9. This Court further finds that the present writ petition involves disputed question of facts inasmuch as on the one hand the petitioner is claiming that admitted outstanding dues are due to be paid to him whereas on the contrary, the respondent State is making a claim that certain amounts are in fact recoverable from the petitioner. It is a trite law that disputed question of facts cannot be adjudicated in a writ petition. In this connection it would be apt to refer to a judgment rendered by the Hon'ble Apex Court in the case of ***Orissa Agro Industries Corpn. Ltd. v. Bharati Industries***, reported in (2005) 12 SCC 725, Paragraph nos. 7 to 10 and 12 whereof are reproduced herein below:-

> "**7.** A bare perusal of the High Court's judgment shows that there was clear non-application of mind. On one hand the High Court observed that the disputed questions cannot be gone into a writ petition. It was also noticed that the essence of the dispute was breach of contract. After coming to the above conclusions the High Court should have dismissed the writ petition. Surprisingly, the High Court proceeded to examine the case solely on the writ petitioner's assertion and on a very curious reasoning that though the appellant Corporation claimed that the value of articles lifted was nearly Rs 14.90 lakhs no details were finally given. From the counter-

affidavit filed before the High Court it is crystal-clear that relevant details disputing claim of the writ petitioner were given. Value of articles lifted by the writ petitioner is a disputed factual question. Where a complicated question of fact is involved and the matter requires thorough proof on factual aspects, the High Court should not entertain the writ petition. Whether or not the High Court should exercise jurisdiction under Article 226 of the Constitution would largely depend upon the nature of dispute and if the dispute cannot be resolved without going into the factual controversy, the High Court should not entertain the writ petition. As noted above, the writ petition was primarily founded on allegation of breach of contract. Question whether the action of the opposite party in the writ petition amounted to breach of contractual obligation ultimately depends on facts and would require material evidence to be scrutinised and in such a case writ jurisdiction should not be exercised. (See *State of Bihar* v. *Jain Plastics & Chemicals Ltd.* [(2002) 1 SCC 216])

8. In a catena of cases this Court has held that where the dispute revolves round questions of fact, the matter ought not to be entertained under Article 226 of the Constitution. [See *State Bank of India* v. *State Bank of India Canteen Employees' Union* [(1998) 5 SCC 74 : 1998 SCC (L&S) 1270] and *Chairman, Grid Corpn. of Orissa Ltd. (GRIDCO)* v. *Sukamani Das* [(1999) 7 SCC 298] .]

9. In the instant case the High Court has itself observed that disputed questions of fact were involved and yet went on to give directions as if it was adjudicating the money claim in a suit. The course is clearly impermissible. (See *G.M., Kisan Sahkari Chini Mills Ltd.* v. *Satrughan Nishad* [(2003) 8 SCC 639] and *Rourkela Shramik Sangh* v. *Steel Authority of India Ltd.* [(2003) 4 SCC 317 : 2003 SCC (L&S) 456])

10. In *National Highways Authority of India* v. *Ganga Enterprises* [(2003) 7 SCC 410] it was observed by this Court that the question whether the writ petition was maintainable in a claim arising out of a breach of contract should be answered first by the High Court as it would go to the root of the matter. The writ petitioner had displayed ingenuity in its search for invalidating circumstances; but a writ petition is not an appropriate remedy for impeaching contractual obligations. (See *Har Shankar* v. *Dy. Excise and Taxation Commr.* [(1975) 1 SCC 737 : AIR 1975 SC 1121] and *Divisional Forest Officer* v. *Bishwanath Tea Co. Ltd.* [(1981) 3 SCC 238 : AIR 1981 SC 1368])

12. Above being the position the High Court's judgment is clearly unsustainable and is set aside. However, our interference in the matter shall not stand in the way of the writ petitioner seeking any other remedy as is available in law."

10. It would also be apposite to refer to a Judgment rendered by the Hon'ble Apex Court in the case of **Babubhai Muljibhai Patel v. Nandlal Khodidas Barot**, reported in (1974) 2 SCC 706, paragraphs no. 18 and 19 whereof are reproduced herein below:-

> "10. It is not necessary for this case to express an opinion on the point as to whether the various provisions of the Code of Civil Procedure apply to petitions under Article 226 of the Constitution. Section 141 of the Code, to which reference has been made, makes it clear that the provisions of the Code in regard to suits shall be followed in all proceedings in any court of civil jurisdiction as far as it can be made applicable. The words "as far as it can be made applicable" make it clear that, in applying the various provisions of the Code to proceedings other than those of a suit, the court must take into account the nature of those proceedings and the relief sought. The object of Article 226 is to provide a quick and inexpensive remedy to aggrieved parties. Power has consequently been vested in the High Courts to issue to any person or authority, including in appropriate cases any government, within the jurisdiction of the High Court, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. It is plain that if the procedure of a suit had also to be adhered to in the case of writ petitior urpose of having a quick and

inexpensive remedy would be defeated. A writ petition under Article 226, it needs to be emphasised, is essentially different from a suit and it would be incorrect to assimilate and incorporate the procedure of a suit into the proceedings of a petition under Article 226. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right of relief, questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is no doubt discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises complex questions of fact, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute should not appropriately be tried in a writ petition, the High Court may decline to try a petition (see *Gunwant Kaur* v. *Bhatinda Municipality* [(1969) 3 SCC 769 : AIR 1970 SC 802]). If, however, on consideration of the nature of the controversy, the High Court decides, as in the present case, that it should go into a disputed question of fact and the discretion exercised by the High Court appears to be sound and in conformity with judicial principles, this Court would not interfere in appeal with the order made by the High Court in this respect."

11. I have heard the learned counsel for the parties and perused the nrd. It is a trite law that a High

Court does not entertain a petition under Article 226 of the Constitution of India to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimant and the same is required to be left to the aggrieved party to agitate the said question in a civil suit to be filed for that purpose. Reference in this connection be had to a judgment rendered by a Full Bench of this Court, reported in AIR 1977 Patna 65 (**M/s Radha Krishna Agrawal & Ors. vs. The State of Bihar & Ors**.), paragraphs no. 18 and 19 whereof are reproduced herein below:-

> "18. Learned counsel appearing on behalf of the petitioners submitted that, on the facts and in the circumstances of the case, there has been no contravention of the terms of the agreement by the petitioner and as such the order of termination of the lease is void. Now the question is as to whether the allegation regarding the breach of the terms of the agreement, either by the petitioner or by the respondent State can be examined by this Court in exercise of its writ jurisdiction. According to the learned counsel appearing for the petitioners the impugned actions are in exercise of executive powers by the State under Article 298 of the Constitution, which are amenable to the jurisdiction of this court. Whether under the writ jurisdiction such dispute can be agitated and decided has been th of controversy. Such disputes can

be put under three groups for the purpose of answering the question:

(i) Where a petitioner makes a grievance of breach of promise on the part of the State in cases wherein assurance or promise made by the State he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Article 299 of the Constitution;

(ii) Where the contract entered into between the person aggrieved and the State is in exercise of a power under certain Act or Rules framed thereunder and the petitioner alleges a breach on the part of the State; and

(iii) Where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State.

19. So far as the cases under categories (i) and (ii) are concerned, it is almost settled that the person aggrieved can invoke the writ jurisdiction of this Court. In Union of India v. M/s. Anglo Afghan Agencies, (AIR 1968 SC 718), Century Spinning and Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council, (AIR 1971 SC 1021) and Roberts f Pensions, ((1949) 1 KB 227), it

was pointed out that public bodies are as much bound as private individuals to carry out representations of facts and promises made by them relying on which other persons have altered their position to their prejudice and in such cases even if the contract has not been embodied in the form prescribed, it can be enforced by a writ in appropriate cases in equity. Similarly, in K. N. Guruswamy v. State of Mysore, (AIR 1954 SC 592), D. F. O. South Kheri v. Ram Sanhi Singh, (AIR 1973 SC 205) and Shree Krishna Gynoday Sugar Ltd. v. State of Bihar, (AIR 1975 Pat 123), it has been held that, even if the right to relief arose not of an alleged breach of contract, but the action of the authority which was being challenged was of a public authority vested with statutory power, this court, in exercise of its writ jurisdiction, can grant relief to the aggrieved person. On the other hand, in case falling under category (iii), where there is no question of exercise of any statutory power and the rights of the parties flow from mere terms of the contract entered into by the authorities of the State, a party to such agreement should not be allowed to invoke the writ jurisdiction of this Court for the purpose of finding out as to whether there has been a breach of contract on the part of the State or on the part of such person. It is apparent that in such cases there cannot be adjudication without evidence on the point. There is no question of infraction of any rules or statutes. Courts have always called upon such petitioners to seek their remedy ourt. In this connection reference

can be made to a Bench decision of this Court in B. K. Sinha v. State of Bihar, (AIR 1974 Pat 230), where Untwalia, C. J. (as he then was) after making a reference to the Supreme Court in Umakant Saran v, State of Bihar, (AIR 1973 SC 964): and Lekhraj Sathram Das v. N. M. Shah, (AIR 1966 SC 334) observed;

> "Here in the very nature of the contract in question the petitioner had no right to claim its specific performance. The Statute did not impose any legal duty on the authorities concerned that if they thought that the petitioner should not be allowed to complete the work even assuming they thought so wrongly- they could not stop the work..... A writ of mandamus cannot issue to compel the authorities to remedy a breach of contract pure and simple."

In the same case at page 231 it was further observed:-

> "I am, therefore, definitely of the view that until and unless in the breach is involved violation of certain legal and public duties or violation of statutory duties to the remedy of which the petitioner is entitled by issuance of a writ of mandamus, mere breach of contract cannot be remedied by this Court in exercise of its powers under Article 226 of the Constitution."

12. The [redacted] ıent rendered by a Full Bench of

this Court was upheld by the Hon'ble Apex Court by a judgment reported in AIR 1977 SC 1496 [**M/s Radhakrishna Agrawal & Ors. vs. State of Bihar & Ors**.], paragraphs no.11, 19, 21 and 25 whereof are reproduced herein below:-

> "11. In the cases before us the contracts do not contain any statutory terms or obligations and no statutory power or obligation which could attract the application of Art. 14 of the Constitution is involved here. Even in cases where the question is of choice or consideration of competing claims before an entry into the field of contract facts have to be investigated and found before the question of a violation of Art. 14 could arise. If those facts are disputed and require assessment of evidence of the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Art. 226 of the Constitution. Such proceedings are summary proceedings reserved for extraordinary cases where the exceptional and what are described as, perhaps not quite accurately, "prerogative" powers of the Court are invoked. We are certain that the cases before us are not such in which powers under Art. 226 of the Constitution could be invoked.
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> 19. We do not think that any of these cases could assist the app[illegible]all relevant. None of these cases

lays down that, when the State or its officers purport to operate within the contractual field and the only grievance of the citizen could be that the contract between the parties is broken by the action complained of, the appropriate remedies by way of a petition under Art. 226 of the Constitution and not an ordinary suit.

There is a formidable array of authority against any such a proposition. In Lekhraj Sathramdas v. M. M. Shah, (AIR 1966 SC 334) (supra) this Court said (at page 337):

"In our opinion, any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Art. 226 of the Constitution."

In Bachhanidhi Rath v. State of Orissa, (AIR 1972 SC 843 at p. 845) this Court declared (at p. 845) :

"If a right is claimed in terms of a contract such a right cannot be enforced in a writ petition."

In Har Shankar v. Dy. Excise and Taxation Commr., (1975) 3 SCR 254 at p. 265 : (AIR 1975 SC 1121 at p. 1126), a Constitution Bench of this Court observed (at p. 265) (of SCR) : (at p. 1126 of AIR) : "The appellants have displayed ingenuity in their search for invalidating circumstances but a writ petition is not an appropriate remedy for impeaching contractual obligations."

21. In [redacted]re us, allegations on which a

violation of Art. 14 could be based are neither properly made nor established.

Before any adjudication on the question whether Art. 14 of the Constitution could possibly be said to have been violated, as between persons governed by similar contracts they must be properly put in issue and established. Even if the appellants could be said to have raised any aspect of Art. 14 of the Constitution and this Article could at all be held to operate within the contractual field whenever the State enters into such contracts, which we gravely doubt, such questions of fact do not appear to have been urged before the High Court. And in any event, they are of such a nature that they cannot be satisfactorily decided without a detailed adduction of evidence, which is only possible in ordinary civil suits, to establish that the State, acting in its executive capacity through its officers, has discriminated between parties identically situated. On the allegations and affidavit evidence before us we cannot reach such a conclusion. Moreover, as we have already indicated earlier, the correct view is that it is the contract and not the executive power, regulated by the Constitution, which governs the relations of the parties on facts apparent in the cases before us.

25. The limitations imposed by rules of natural justice cannot operate upon powers which are governed by the terms of an agreement exclusively. The only question which arises in such cases is whether the action

complained of is or is not in consonance with the terms of the agreement. As already pointed out by us, even if by some stretch of imagination some case of unequal or discriminatory treatment by the officers of the State of persons governed by similar contracts is sought to be made out, a satisfactory adjudication upon the unusual facts of such a case would necessitate proper pleadings supported by acceptable evidence. In that case, the interim stay order or injunction could not be justified at all because so long as a Presidential Order, under Article 359 of the Constitution is operative. the enforcement of fundamental rights falling under Art. 14 is suspended. In such cases even if a petition or suit is entertained and kept pending no stay order could be passed because that would amount to indirectly enforcing the fundamental rights conferred by Art. 14 of the Constitution. It is only where a prima facie case for an injunction or stay can be made out, quite apart from a right covered by Art. 14 of the Constitution or by any other fundamental right whose enforcement may have been suspended, that an injunction or stay could be granted at all on suitable terms. As we have already said it was on such an assumption that this Court had, apparently, granted the interim stay which must now be discharged."

whereof are reproduced herein below:-

> "6. On the first point, we are of opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax. We have been referred to cases in which orders had been issued directing the State to refund taxes illegally collected, but all such cases had been those in which the petitions challenged the validity of the assessment and for consequential relief for the return of the tax illegally collected. We have not been referred to any case in which the Courts were moved by a petition under Article 226 simply for the purpose of obtaining refund of money due from the State on account of its having made illegal exactions. We do not consider it proper to extend the principle justifying the consequential order directing the refund of amounts illegally realised, when the order under which the amounts had been collected has been set aside, to cases in which only order for the refund of money are sought. The parties had the right to question the illegal assessment orders on the ground of their illegality or unconstitutionality and therefore could take action under Article ection of their fundamental right,

and the courts, on setting aside the assessment orders, excerised their jurisdiction in proper circumstances to order the consequential relief for the refund of the tax illegally realised. We do not find any good reason to extend this principle and therefore hold that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right.

9. We therefore hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction."

14. Considering the facts and circumstances of the case and for the reasons mentioned hereinabove in the preceding paragraphs as also taking into account the well settled principle of law laid down by the Hon'ble Apex Court in a catena of decisions, as referred to hereinabove, this Court finds that since the present case involves disputed question of fact and the respondents have denied their liability arising out of the contract, the p on, filed under Article 226 of the

Constitution of India, is not maintainable, hence, the same stands dismissed.

(Mohit Kumar Shah, J)

Tiwary/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	
Transmission Date	N/A