IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Revision No.87 of 2014

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1. The State Of Bihar through the Secretary Road Construction Dept., Vishweshwarraiya Bhawan Bailey Road, Patna
2. The Engineer - in chief, Road Construction Department, Vishweshwarrraiya Bhawan, Bailey Road, Patna
3. The chief Engineer (North Bihar Wing) Rod Construction Department, Vishweshwarraiya Bhawan, Bailey Road, Patna
4. The Superintending Engineer, Road Construction Department, Saran Road Circle, Hazipur
5. The Executive Engineer, Road Construction Department, Road Division, Chapra

.... Petitioners.

Versus

M/s Ram Pravesh Rai Estate Privated Limited Manaing Director Shri Ram Pravesh Rai Son of Shri Kamla Rai Resident of House No. 44, Patliputra Colony, P.S.- Patliputra, District - Patna

.... Opposite Parties.

with

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Civil Revision No. 152 of 2014

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M/s Ram Pravesh Rai Estate Private Limited through its Managing Director Shri Ram Pravesh Rai S/o Shri Kamla Rai Resident of House No. 19, Patliputra Colony, P.S. - Patliputra, District - Patna

.... Petitioner.

Versus

1. The State of Bihar through the Secretary, Road Construction Department, "Vishweshwarraiya Bhawan", Bailey Road, Patna
2. The Engineer-in-Chief, Road Construction Department, "Vishweshwarraiya Bhawan", Bailey Road, Patna
3. The Chief Engineer (North Bihar Wing), Road Construction Department, "Vishweshwarraiya Bhawan", Bailey Road, Patna
4. The Superintending Engineer, Road Construction Department, Saran Road Circle, Hazipur
5. The Executive Engineer, Road Construction Department, Road Division, Chapra

.... Opposite Parties.

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Appearance :
(In C.R. No. 87 of 2014)
For the Petitioner/s : Mr. Neeraj Kumar
For the Respondent/s : Mr.
(In C.R. No. 152 of 2014)
For the Petitioner/s : Mr. Binod Kumar Singh
For the Respondent/s : Mr. SHEO SHANKAR PD. (SC10)

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CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL JUDGMENT
Date: 30-11-2015

V.Nath, J. By the impugned award dated 12.11.2013 the Bihar State Works Contract Disputes Arbitration Tribunal has disposed of the Reference Case No.113/2010 allowing the claims of the works contractor in part. The C.R.No.87/2014 has been filed by the State of Bihar and others against the part of the award allowing the claim (s) of the works contractor whereas C.R.No. 152/2014 has been filed by the works contractor-petitioner against the part of the award refusing his claim (s).

On the prayer of the learned counsel for the parties on the basis that common questions of law and fact arise for consideration, both the revision applications have been heard together and are being disposed of by this order.

For brevity, the works contractor (petitioner in C.R.No.152/2014) shall be henceforth referred to as petitioner and the State of Bihar and Others (petitioners in C.R.No.87/2014) henceforth shall be referred to as respondents.

The facts are not in dispute that by agreement no.10SBD/2007-08 the works contract was given to the petitioner for widening and strengthening the Khaira-Satarghat road from 0 Km to 28 Km. The agreement was executed on 14.09.2007 and the period for completion of the work was from 14.09.2007 up to 31.12.2008, and maintenance for three years after the completion of work. The estimated cost was Rs.20,38,72,645/-. This works contract however, was rescinded by the respondents on 26.04.2010.

On the basis of his assertions that 70% of the total work was complete and the rescission of the work was wrongly made by the respondents, the petitioner approached the Tribunal by filing the Reference Case No.113/2010 raising claim(s) against the respondents. The respondents appeared and contested the claim of the petitioner and also made counter claim. In view of the pleadings of the parties the Tribunal framed altogether seven points for determination. Upon the order of the Tribunal, a joint measurement report of the work was also carried out and the report was submitted on 29.06.2011. After considering the pleadings of the parties and the materials on record, the impugned award has been passed whereby and whereunder the part of the claim (s) of the petitioner has been allowed. The impugned award, mainly, contains the following determination:

(i) The petitioner has been held entitled to payment of unpaid bill of an amount of Rs.1,36,00,724/- (Rupees One crore Thirty Six Lacs Seven Hundred Twenty Four).

(ii) For earth work, the petitioner has been held entitled to the amount by calculating and deducting the amount compaction from the total composite amount of Rs. 49,36,008/- (Rupees Forty Nine Lacs Thirty Six Thousand Eight) .

(iii) The petitioner has been held entitled to the sum of Rs. 30,32,487.66 (Rupees Thirty Lacs Thirty Two Thousand Four Hundred Eighty Seven Sixty Six Paise) towards escalation of bitumen and cement component.

(iv) The petitioner has been held entitled to refund of earnest money of Rs. 44,00,000 (Rupees Forty Four Lacs) and security deposit of Rs. 99,38,358 (Rupees Ninety Nine Lacs Thirty Eight Thousand Three Hundred Fifty Eight) .

(v) The petitioner has been held not entitled to the adjustment of the amount of royalty .

(vi) The respondents have been held entitled to recover the mobilization T.P. advance deducted till 22.09.2011 with interest in the manner as laid down under Clause 10(iv) of the conditions of the contract till the date of recovery and with further direction to verify the amount of Rs.1,94,64,371.00 (Rupees One Crore Ninety Four Lacs Sixty Four Thousand Three Hundred Seventy One) in terms of the said clause of the contract with further entitlement to deduct /recover the total amount of mobilization T.P. advance with interest till the recovery from the petitioner.

(vii) The petitioner has been held entitled to simple interest @ 10% per annum over the amount allowed in his favour with effect from 26.04.2010 till realization.

The two revision applications have been filed under Section 13 of the Bihar State Works Contract Dispute Arbitration Tribunal Act. In C.R.No. 87/2014 filed by the respondents the main assail is to the part of the award holding the petitioner to be entitled to payment of unpaid bill of an amount of Rs. 1,36,00,724/- and the valuation of the civil revision application has also been mentioned accordingly to be Rs. 1,36,00,724/-, though in the first paragraph of the revision application, besides this amount awarded to the petitioner, the entitlement of the petitioner to the other amounts towards different heads alongwith 10% interest has also been questioned. In C.R.No.152/2014 filed by the petitioner the award has been challenged to the extent of (i) refusal to grant refund of royalty, (ii) refusal to grant refund of amount of deduction against approval of extension of time, (iii)partly allowing the price escalation benefit with respect to bitumen and cement and (iv) for holding that interest @ 6 % per annum is to be charged upon the amount of mobilization , tools and plants advance after reversing the direction in the award to charge the interest in accordance with the terms of the contract.

The scope of revision under Section 13 of the Bihar State Works Contract Arbitration Tribunal Act, 2008 (hereinafter referred to as Act) is circumscribed by the limitations envisaged in the provision itself which is akin to the revisional jurisdiction of the High Court under Section 115 of the Code of Civil Procedure as apparent from Sub Clause 2 of the said Section 13. Even otherwise also the scope and ambit of judicial review of an arbitral award has been settled and reiterated by the apex court in several decisions and it would be profitable here to take into notice the dictum laid down in the case of ***Ispat Engineering & Foundry Works Vs. Steel Authority of India Ltd., (2001) 6 SCC 347*** as follows :

> *4. "...Needless to record that there exists a long catena of cases through which the law seems to be rather well settled that the reappraisal of evidence by the court is not permissible. ………………………………..*
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> *In the event of there being no reason in the award, question of interference of the court would not*

arise at all. In the event, however, there are reasons, interference would still be not available unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. This Court went on to record that in the event, however, two views are possible on a question of law, the court would not be justified in interfering with the award of the arbitrator if the view taken recourse to is a possible view……………………………………….......”

Keeping in view the aforesaid dictum outlining the scope of judicial intervention in an award, as well as the provision of Section 13 of the Act, the rival contentions of the parties in the two civil revision applications are to be adjudged.

The first and foremost issue between the parties relates to the liability of the petitioner for the breach of contract leading consequently to the forfeiture by the respondents of the earnest money and security money. This issue has been comprised in point nos. 1 and 2 formulated by the Tribunal for determination in the impugned award. The Tribunal has recorded the conclusion that there has been reciprocal defaults both on the part of the petitioner as well as the respondents and accordingly has come to the conclusion that the petitioner is not liable for the breach of contract giving scope to the respondents to invoke the default Clause 14 and consequent forfeiture and deduction of the earnest money and security money from the bills, and held the petitioner to be entitled to the refund of the amount of earnest money and security deposits. During the course of submission the learned counsel for the respondent (as petitioner in C.R.No.87/2014) has mainly raised his contentions against this finding by the Tribunal.

It has been submitted on behalf of the respondents that the Tribunal has ignored the show cause issued to the petitioner by letter dated 30.05.2009 whereby the extension of time till 25.03.2010 only was allowed for completion of the assigned work but the petitioner even thereafter did not complete the work. It has been further pointed out that the materials on record have clearly disclosed that there was no work in progress as per the stipulated time frame and therefore the respondents had no other option but to rescind the contract in order to get the work completed by other suitable agency.

The learned counsel for the petitioner, in reply, however, has endeavoured to demonstrate that the breach of promises and want of prompt action on the part of the respondents were the main reasons for non-completion of the assigned work within time. It has been canvassed that according to the original agreement dated 14.09.2007 the work was to be completed by 31.12.2008 but no provision was made therein with regard to the repair of pots and patches and there was also undulation in the estimate which led to the preparation of the revised estimate by the respondents themselves on 04.06.2009. It has been then pointed out that even this revised estimate did not include the cost of repair of pots and patches as well as the earth work from 21 Km to 28 Km and the respondents again prepared a second revised estimate but the same could not be approved till 17.12.2009. It has thus been submitted that from the very beginning the approach of the respondents towards the works contract suffered from serious laches and negligence which could not be rectified even after the lapse of nearly one year of the stipulated period for completion of the work, and the anticipated progress in the work, thus, could not be achieved by the petitioner.

Elaborating his submissions the learned counsel has further pointed out that after giving a clear notice to the petitioner to complete the B.M. Work up to 21 Km by 31.03.2010, the respondents did not wait and had passed the order on 26.03.2010 handing over the unfinished work to the Bihar Rajya Pul Nirman Nigam Ltd on a higher rate and for a much longer period for completing the work. It has thus been submitted that the Tribunal has committed no illegality in finding that both the parties have committed reciprocal default of promises.

After considering the rival submissions as well as the discussions made by the Tribunal while considering the point nos. 1 and 2, it is manifest that though the non-competition of the work within the stipulated time by the petitioner was glaring but the various actions and the approach of the respondents in this regard were also not aboveboard. The facts regarding the undulatory nature of the first estimate and omissions therein leading to preparation of another estimate and then a third estimate in sequence which even could not be approved till 17.12.2009 have demonstrably contributed to the slow progress of the work and its non-completion within the time frame, and finally the fact of handing over the contract to another agency in the midway without notice to the petitioner and without waiting for the stipulated time to expire also dent the plea of the respondents that the Tribunal has wrongly held them to be also guilty of breach of promises. It appears that the Tribunal has considered in detail the materials on record before coming to the conclusion that both the parties were liable to breach of reciprocal promises. It has , thus , been held that the default clause 14 of the contract in the facts of the case could not have been invoked by the respondents. It is also manifest from the office order dated 26.04.2010 (Annexure-B to counter affidavit in C.R.No. 152/2014) that the forfeiture of earnest money and security deposit has been done as a measure of penalty and not by way of recompensing the State Government for the loss suffered. In this backdrop of facts, this Court is not persuaded to find that the Tribunal has acted illegally or with material irregularity in reaching to the conclusion of reciprocal default and directing for refund of the earnest money and security deposit.

The learned counsel for the respondent (petitioner in C.R.No.87/2014) has also submitted that the Tribunal has wrongly held that Rs.1,36,00,724.28 is the admitted dues of the petitioner. However, it appears from the award itself that the report after the joint measurement of the work done has been prepared and brought on record by the respondents themselves before the Tribunal and in the said report it has been unambiguously found that the aforesaid amount was the remaining amount to be paid to the petitioner towards the total work done value. It also further appears that the said figure of amount has been calculated in the report without including the entitlement and liabilities of the petitioner on other counts. The Tribunal in the award has separately considered the other heads of the accounts relating to the entitlement and liabilities of the petitioner and has given its verdict respectively. This submission on behalf of the petitioner has manifestly been made without keeping in view the findings of the Tribunal on other heads of the accounts. This Court, therefore, does not find any illegality in the finding of the Tribunal that the petitioner is entitled to the payment of Rs.1,36,00,724.28, while determining the point no.3 relating to unpaid bills towards the work done value as the same is based upon the joint measurement report brought on record by the respondents.

At this juncture, however, it would be relevant to take into notice the findings in the award on the other related sub-heads which are directly related to the claim of unpaid bills as raised by the petitioner.

The first sub-head is the claim of the petitioner for grant of price escalation benefit with regard to bitumen and cement. It appears that the petitioner has claimed Rs.50,56,977.00 as the amount of escalation benefits in this regard. The tribunal after considering the materials on record including the calculation made by the rival parties in this regard has finally awarded Rs.30,32,487.66 to the petitioner.

In C.R.No.152/2014 the petitioner has questioned the grant of the aforesaid amount by the Tribunal and has claimed that he is entitled to adjustment of escalation in price of bitumen and cement to the tune of Rs.50,56,977/- but the Tribunal has wrongly allowed only Rs.30,32,487.66. From the discussions made in the award, it is transparent that the Tribunal has relied upon the calculation submitted by the respondents wherein the total amount towards the adjustment of escalation in price of bitumen and cement has been found to be

Rs.89,02674.66 out of which the adjustment of Rs.5870187.00 has already been granted to the petitioner which fact has been found to be borne out by the entries at Page 43 of the M.B. 2803. No material on record has been pointed out on behalf of the petitioner to show that the calculation by the respondents in this regard finding total Rs.89,02,674.66 as a total amount in this regard was erroneous. From the averment made in paragraph-12 and 17 of the Civil Revision Application No. 152/2014, the petitioner's grievance in this regard appears to be on the basis that the Tribunal has not considered the escalation of bitumen and cement price for the work done from 21 Km to 28 Km. But from the materials on record it has been found by the Tribunal that the petitioner has done only earth work from 21 Km to 28 Km but without compaction. Demonstrably therefore, no bitumen and cement were used in the stretch of the road from 21 Km to 28 Km. This Court, therefore, does not find any reason to interdict the finding of the Tribunal that the petitioner shall be entitled to payment of Rs.30,32,487.66 as the amount of adjustment for escalation in price of bitumen and cement over the total work done up to 21 Km.

The next sub-head relates to the adjustment of the amount of mobilization, tools and plants advances in the amount of unpaid bills for the value of the total work done. The Tribunal has noticed that the total balance amount of mobilization, tools and plants advance, according to the calculation of the petitioner is Rs.1,15,17,523 whereas according to the respondents this amount is Rs. 1,94,64,971/-. It has been submitted on behalf of the petitioner that in accordance with the Clause 10(B)(iv) of the contract, the prevailing rate of simple interest charged by the scheduled bank is to be realized but the calculation of the amount by the respondents under this head discloses that the interest @ 12.75 % per annum has been charged. It has been further submitted that the Tribunal has failed to exercise its jurisdiction in not determining the rate of interest and has wrongly left the said issue to be decided by the respondents.

From the perusal of the impugned award it appears that the Tribunal has expressed its inability to ascertain the rate of interest charged by the respondents as only the figure of Rs.1,94,64,971/- containing the principal amount under this sub head alongwith interest has been provided by the respondents. In this backdrop the Tribunal appears to have refrained from embarking upon calculating the quantum of legitimate interest amount out of the principal amount of mobilization, tools and plants advance but nonetheless the Tribunal has laid down the manner in which the respondents are to adjust the amount of advance with interest under this sub head. The endeavour has been made by the learned counsel for the petitioner to persuade this Court to overturn the direction of the Tribunal in this regard by holding that the simple interest @ 6% per annum is chargeable and the particular emphasis has been made that the amount under this sub-head taken by the petitioner is not by way of commercial loan but for the welfare work of the State. This Court, however, is not persuaded to align with the submissions on behalf of the petitioner to record a finding of fact with regard to the chargeable rate of interest as it necessarily involves recording a finding of fact after appreciation of evidence as well as pleadings of the parties and more so when it does not appear that the Tribunal has committed any error of jurisdiction or material irregularity in concluding that the amount of mobilization, tools and plants advance with interest thereupon to be charged in the manner as laid down under Clause 10(B)(4) of the conditions of the contract which does not in any way prejudice the claim of the petitioner.

The next submission on behalf of the petitioner relates to the claim of refund of the amount of royalty which has been deducted by the respondents from the running on account bill. The petitioner has claimed that altogether an amount of Rs.12,88,016/- has been deducted by the respondents by way of royalty. The tribunal has considered the claim in point no.5 and has not allowed this claim on the ground of absence of evidence in this regard.

It has been submitted by the learned counsel for the petitioner that in terms of sub Rule 10 of Rule 40 of the Bihar Minor Mineral Concession Rules 1972, the petitioner is entitled to the refund of amount of royalty as he has already furnished the affidavit in Form-'M' with particulars in Form 'N' as required by the said Rule. It has been posited that non-refund of the amount of royalty would definitely lead to the situation where the petitioner has been twice charged the royalty in the manner that firstly at the time of purchasing the materials, the royalty was charged and the same amount has also been deducted from the running on account bill.

For ease of reference, the provision of Sub Rule 10 of Rule 40 of Bihar Minor Mineral Concession Rules 1972 is noticed herein.

> ***Sub Rule 10**- To prevent evasion of royalty it is provided that the works contractor shall purchase the minerals from lessee/ permit holder and authorized dealers only and no Works Department shall receive the bill which the works contractors submit to recover cost etc of mineral used by them in completion of the works of the Works Department under any agreement from the works contractor if the said bill is not accompanied by an affidavit in Form-*

'M' with particulars in Form-'No' of these Rules alongwith a photo copy of the said affidavit and particulars . It shall the duty of the officer who receives or on whose behalf the said bill is received to send the photo copy of the Affidavit and particulars to the District Mining Officer/Assistant Mining Officer within whose jurisdiction the mineral was allegedly purchased, for verification.

If contents of the said affidavit on verification by the concerned District Mining Officer /Assistant Mining Officer is found to be false either wholly or partly it shall be presumed that the concerned mineral was obtained by illegal mining and in that event the said District Mining Officer/Assistant Mining Officer shall take the action as prescribed in these rules against the maker of the said affidavit.

Provided that if the works contractor deposits or pays the royalty in respect of the mineral so consumed/supplied by him as shown *in the aforesaid affidavit and particulars the said District Mining Officer/Assistant Mining Officer in his discretion may not take action as prescribed in this rule..."*

The aforesaid provision has been explicitly made to prevent evasion of royalty. The case of the petitioner that he has submitted the affidavit and the particulars as required by Sub Rule 10 has not been denied. In this view of the matter, the petitioner's entitlement to the refund of the amount of royalty as deducted from his bills cannot be in dispute, if the affidavit and particulars as submitted by the petitioners are not found to be false either wholly or partly. The Tribunal has failed to exercise its jurisdiction in not allowing the claim of the petitioner for refund of the amount of the royalty only on the ground that there is absence of evidence on behalf of the petitioner in this regard. It has been wrongly observed by the Tribunal that it has not been led into the question of verification of the materials mandated under the aforesaid provision inasmuch as it was not for the Tribunal to enter into the question of verification of the materials which is to be done by the District Mining Officer/Assistant Mining Officer. As such, this Court does not find any impediment in allowing this claim of the petitioner for refund of the amount of royalty. The finding by the Tribunal in this regard is accordingly set aside and the petitioner is held entitled to the refund/adjustment of the amount of royalty in accordance with the Rules.

The last submission on behalf of the petitioner is with regard to the non-consideration of the claim of the petitioner for refund of the amount of penalty deducted from the running on account bills for extension of time. It has been submitted that a total sum of Rs.15,13,505/- was deducted up to the 15th running on account bill when the fact is that the time was extended up to 31.03.2010 as evident from the letter dated 25.03.2010 and the time was also extended for lifting of bitumen till 30.06.2010. It has also been urged that even before the expiry of the said period the work was handed over to another agency on 26.03.2010 itself and therefore the petitioner cannot be held liable for the penalty for extension of time.

The learned counsel appearing for the respondents has submitted that this issue has not been raised by the petitioner before the Tribunal and therefore no point for determination in this regard has been framed. It has been further submitted that the petitioner cannot escape this liability as the respondents acted under compulsion for extension of time in view of the non-performance by the petitioner himself as evident from the repeated letters annexed with the counter affidavit.

From the award it does not appear that any point for determination of the claim of the petitioner with regard to refund of the penalty amount due to extension of time has been framed. However, it appears from page-7 and 23 of the award that the petitioner has made claim for refund of the amount deducted by way of penalty for extension of time. Though, the points for determination formulated by the Tribunal have encompassed the claims made by the petitioner under various heads, the claim of refund under this head is not included. It is not the case of the petitioner that this claim was pressed by the petitioner before the Tribunal for consideration but the Tribunal has omitted to do so. The submission on behalf of the petitioner is that this claim of the petitioner shall be deemed to have been included in the residuary point no.7 relating to other relief (s) to which the petitioner is entitled. This Court, however, is not persuaded to align with this submission and hold on this basis that the Tribunal has committed error of jurisdiction in not determining this claim of the petitioner. The residuary point for determination is always meant to grant such other relief(s) which relates to the main relief and cannot be interpreted to include an independent claim requiring independent evidence for determination. It does not appear from the records nor it is the case of the petitioner that at any point of time during the course of hearing or before passing of the award the prayer was made before the Tribunal to include this claim also as one more claim for determination. It also does not appear that even after passing of the award the petitioner has approached the Tribunal with his grievance that this part of his claim has remained undecided. In this backdrop, this Court in revisional jurisdiction cannot adjudicate this claim of the petitioner for refund of the penalty amount for extension of time deducted from the bills by embarking upon the appreciation of evidence and giving the finding of fact. The petitioner, however, is at liberty to pursue his remedy available to him in accordance with law in this regard.

For the aforesaid reasons and discussions, this Court does not find any merit in C.R.No.87/2014, which is, accordingly, dismissed. However, C.R.No.152/2014 is allowed in part to the extent as above mentioned.

(V. Nath, J)

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