

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.12828 of 2016

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Kamladitya Constructions Pvt. Ltd. through its Authorized Signatory Abhay Kumar Mishra Son of Late Chandrama Mishra resident of Shankat Mochan Nagar, New Police Line, P.S. Nawada, District - Ara, Bihar

.... Petitioner/s

Versus

1. The State of Bihar, through Chief Secretary, Government of Bihar, Patna
2. The Principal Secretary, Water Resources Department, Government of Bihar, Patna
3. The Engineer - in - Chief, Head Quarter, Water Resourecs Department, Government of Bihar, Patna
4. The Chief Engineer, Water Resources Department, Siwan
5. The Superintending Engineer, Planning and Monitoring - II, Water Resources Department, Government of Bihar, Patna
6. The Executive Engineer, Saran Canal Division, Bhore, Bihar
7. The Executive Engineer, Saran Canal Division, Mairwan, Bihar
8. The Executive Engineer, Saran Canal Division, District Siwan, Bihar
9. The Executive Engineer, Saran Canal Division, Ekma, Bihar
10. The Executive Engineer, Saran Canal Division, Maharajganj, Bihar
11. The Executive Engineer, Saran Canal Division, Chapra, Bihar

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Prabhat Ranjan, Advocate

For the State : Mr. Lalit Kishore, PAAG

Mr. Anjani Kumar, AAG-4

Mr. Amit Kumar Jha, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

ORAL JUDGMENT

Date: 09-08-2016

Heard learned counsel for the petitioner and learned Principal Additional Advocate General for the State.

The writ application has been filed for quashing of the order dated 26.7.2016 by which invoking Clause 13 of Section 3 of the General Conditions of Contract under the Standard Bidding Document, the agreement of the petitioner has been closed with

immediate effect and for further consequential directions.



After a successful bid during the tender process the petitioner was awarded the work and agreement entered into with regard to Restoration Work of Western Gandak Canal System Bihar (Saran Main Canal and its Distribution System), Bihar (New Major ERM). The Scheme was divided into 9 groups and tenders were invited for each of the groups separately in which the petitioner succeeded in five of the groups and agreements were also entered into between the parties from the month of March, 2014 to March 2016 and the work itself was to be completed on different dates from June, 2017 to September, 2017. The total scope of the work amounted to Rs. 1296.43 crores. The petitioner claims to have completed about 40% of the work for which the petitioner was paid from time to time but according to the petitioner, a substantial amount remains to be paid so far as the work which has been completed. Earlier also a notice for rescinding the contract was given to the petitioner with respect to which the petitioner filed as many as six writ applications which were disposed of by order dated 18.6.2015 directing the Principal Secretary to review the matter at his level and pass appropriate directions which are required in the interest of work so assigned with the further observation that no precipitative action would be taken against the petitioner pursuant to

the notices which are impugned in all the writ applications.

It is not in dispute that a review meeting was held on 5.12.2015 under the Chairmanship of Principal Secretary in which various aspects of the work and public tender was discussed and one of the important lacuna found was that the map of the Water Courses of the spot has not been handed over to the contractors and, accordingly, the Executive Engineers were directed to give a complete set of drawings to the contractors at least with respect to the water courses which are available on the spot by 15th December, 2015 and after getting the survey done, if necessary, by hiring private Surveyor for the purpose, the complete map of the entire water courses should be prepared and if there is any problem with respect to their construction, whether of encroachment or land acquisition, then it should be marked.

Subsequently, other review meetings were also held but without the participation of the contractors and on 21.5.2016 apart from other issues, it was found that there was no provision for lining of the water courses for the work that was given and, accordingly, it was directed that through a consultant the DPR for the same should be got prepared.

On the basis of the said review meeting an order dated 6.7.2016 was issued by the Water Resources Department in which it



was indicated that without providing for lining of water courses would result in wastage of public money as the very purpose of such work, i.e., to reach water to the farmers in the fields would be lost. It was also noted therein that the progress made under the different agreement was minimum of 3% and maximum of 35% whereas there was only eight months remaining for completion of the work and thus, excluding the period of eight months remaining for doing the work, it did not appear that within the specified time the work would be completed. It was, accordingly, stated that it was necessary to revisit the provisions of the present Scheme otherwise it would lead to useless expenditure of money and the aim of providing irrigation of 1.58 hectares area for irrigation generation and resumption of irrigation in 1.47 hectares area would not be achieved. For the said purpose a Technical Committee was constituted to revisit the provisions of the current Scheme and examine the technical aspects to make the canal system effective consisting of the Engineer-in-Chief, Headquarters, Engineer-in-Chief, Irrigation Generation and Engineer-in-Chief, Flood Control and Water Drainage. The Technical Committee consisting of the three Engineers-in-Chief gave its report on 20.7.2016 in which it was reported that there was no provision for lining of the water courses whereas in the upper reaches of the canal system there was provision



for lining. It was the view of the Committee that in lining of canal system transit losses are more and therefore lining only the upper reaches of the canal system cannot take care of the transit losses. It was further of the view that water courses have an important position for reaching the irrigation facilities to the fields of the farmers and the lining work must be started from the water courses in order to make the scheme successful. It was, accordingly, held that provisions should be made in the scheme for lining of the water courses which is the more important component of the scheme. It was further recommended that to make the scheme more effective from the technical point of view the work should be done according to different components so that in one group the Sub-minor, in second group minor, in third group distributory and sub-distributory and in fourth branch canal and main canal should be kept and for the purpose of convenience one or more group could be joined together. It was also recommended that the work should be carried out simultaneously at different components only then the work would be completed in that manner. It was recommended that in the present different agreements in the item of work indicated therein and the progress made till then, it will not be possible to get the facility of irrigation available to the farmers and accordingly, it was recommended that all the nine agreements should be foreclosed in

terms of Clause 13 of Section 3 of the General Conditions of Contract of the SBD. Pursuant to the said recommendation the action has been taken for foreclosure of the agreements which is assailed in the present writ application.

Learned counsel for the petitioner submits that the impugned decision is absolutely contrary to the terms of the agreement and the pre-requisites for closing the agreement are absent. It is submitted that in fact, the respondents have decided to proceed with the work with increased scope and not of enhancing the scope of work which is one of the pre-conditions for closing the contract. It is also submitted that the petitioner is not questioning the decision to get the water courses lined and the petitioner is itself agreeable to do the said work. The ground of closure, according to learned counsel for the petitioner, which is stated in the decision, is arbitrary.

It is further submitted by learned counsel that for getting the lining done, there is no need for foreclosure of the contract and the work would be done by deviation which is part of the agreement itself. It is submitted that even in the present agreement extra necessary work beyond the agreement as was directed, has been done by the petitioner.

Learned counsel for the petitioner further submits that



the petitioner is agreed to do the work of lining of the canal at the rates specified in the agreement without claiming any escalation which would save sufficient costs of the respondents. It is submitted that the decision is contrary to public interest as any new agreement would lead to increase of cost by at least by Rs. 450 crores from the present Rs. 2100 crores. It is submitted that merely on account of some fresh work of lining of water course, the whole contract should not have been closed and the action of the respondents is contrary to public interest.

On the other hand, learned Principal Additional Advocate General submits that the decision has been taken in public interest after getting the matter examined by a high level technical committee consisting of three Engineers-in-Chief and thus it cannot be said that there is no element of public interest involved in the said decision. It is submitted that the manner in which the tender has been floated and work has been allotted it was found that would not achieve the purpose for which the same has been done, namely, to reach the irrigation water in the field of the farmers. It was only for the said reason that it was decided to proceed bottom up in the matter so that canals would be operative in proper manner. In this regard he refers to para-10 of the counter affidavit which clearly mentions the fact that the order for closure has been issued due to abandonment of

the work in the present scope as the work executed without providing lining of the water courses would result in wastage of public money.

It is further stated therein that it would not be feasible to subsequently provide lining of the water courses as the gradient has to be provided upto the higher units, i.e., minor, distributaries, branch canal and not otherwise; it was therefore, imperative to abandon the work to prevent further damage to the overall scheme. It is also highlighted that the decision has been taken in the light of the recommendation submitted by the three-member high level technical committee which recommendation was accepted in totality in the interest of farmers and it was decided to prepare a fresh DPR as per the recommendation of the Technical Committee.

An issue has also been raised by the petitioner that under the terms of the agreement the petitioner would be paid only for the works done but huge amount of materials have been stocked at the different sites of work and the same would result in huge loss to the petitioner.

Upon instruction received from the Principal Secretary of the Water Resources Department, learned Principal Additional Advocate General undertakes that the petitioner will be paid for the entire materials which had been brought by it to the sites including the cost of carriage as per the decision with regard to the

materials that have already been supplied and for which payments have been made and such materials would thereafter become the property of the State.

I have considered the submissions of learned counsels for the parties. This Court normally does not interfere in a case of closure of contract unless the decision is shown to be arbitrary. Although learned counsel for the petitioner has tried to show that the conditions of closure are not available in the present matter, but this Court would not like to interfere in the said matter as it pertains to the conditions of contract and it is well settled that the writ court does not enforce the terms and conditions of the contract.

So far as the decision making process is concerned, the same is clearly brought out in the counter affidavit filed on behalf of the respondents and this Court does not find that it is in any way arbitrary or discriminatory.

So far as the public interest is concerned, it is true that any later tender made would lead to increase of cost but considering the documents and statements made in the counter affidavit, this Court is of the view that it cannot be said that the action of the respondents is against the public interest. Ostensibly, action has been taken to ensure that the water reaches the field of the farmers for whom the entire scheme is being carried out. At the same time

expertise for the same definitely belongs to the respondents and the issue of gradient has been enumerated in the recommendation of the three-member committee and placed before this Court.

From the counter affidavit it is evident that it is not merely a case where the water courses have to be lined rather the entire gradient has to be provided so that the water actually goes through the lined water courses.

Without observing one way or the other as to the feasibility or otherwise of the recommendations, this Court would leave it to the wisdom of the respondents in the matter.

So far as the petitioner is concerned, by the closure of the contract, it is not penalized and would be entitled to receive the entire payments which the respondents must ensure shall be made within a period of three months from today, after completing the necessary measurements, etc. and the petitioner shall co-operate in the matter.

It is made clear that payments shall also be made for the materials which have been brought on the site by the petitioner in terms of the undertaking given by learned Principal Additional Advocate General No. 1 after obtaining necessary instructions from the Principal Secretary, Water Resources Department.

It is submitted by learned counsel for the petitioner

that the petitioner may be permitted to file his upto date claim within a period of two weeks from today. Let him do so. It is also made clear that it shall be open to the petitioner to make any claims arising out of the contract in accordance with law before the appropriate forum.

The writ application is disposed of in terms of the aforesaid observations and directions.

(Ramesh Kumar Datta, J)

S.Pandey/-

AFR/NAFR	
CAV DATE	
Uploading Date	22.9.2016
Transmission Date	