

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.16863 of 2012

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M/S Mateshwari Construction, a proprietorship firm having its Office At Mamka Niwas, Chitaur Nagar, New Area Aurangabad, through its proprietor Dilip Kumar Singh, son of Late Rajdeo Singh, resident of Mamka Niwas, Chitaur Nagar, New Area, Aurangabad, District- Aurangabad

.... Petitioner

Versus

1. The State of Bihar through the Secretary, Public Health and Engineering Department, Government of Bihar, Patna
2. The Engineer-in-Chief, Public Health and Engineering Department, Government of Bihar, Patna
3. The Regional Chief Engineer, Public Health and Engineering Department, Patna Region, Patna
4. The Superintending Engineer, Public Health and Engineering Department, Sasaram Circle, Sasaram
5. The Executive Engineer, Public Health and Engineering Department, Public Health Division, Sasaram

.... Respondents

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Appearance :

For the Petitioner : Mr. Y.V. Giri, Sr. Advocate

Mr. Raj Kishore Prasad, Advocate

For the Respondents: Mr. Prashant Pratap GP6

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date: 21-09-2016

Heard learned senior counsel for the petitioner and learned counsel for the respondents.

2. The present writ petition has been filed for the following reliefs –

- (i) To issue an appropriate writ(s), order(s), direction(s) in the nature of writ of Certiorari for quashing the order communicated to the petitioner by the respondent Executive Engineer vide his Memo No. 955 dated 11.08.2012 (as contained in Annexure-12) whereby and whereunder the petitioner has been informed that the work allotted to the petitioner vide Agreement No. 14F2/2010-11 has been rescinded and security money etc. has been forfeited without actually communicating any order rescinding the contract of the petitioner and without issuance of any show-cause to the petitioner.
- (ii) To issue an appropriate writ(s), order(s), direction(s)

in the nature of writ of Mandamus directing the respondents to allow the petitioner to complete the work, as no delay has been caused by the petitioner rather the work has been delayed only on account of non-approval of the map submitted by the petitioner by the respondent authorities.

(iii) To issue an appropriate writ(s), order(s), direction(s) in the nature of writ of Mandamus directing the respondents to make payments for the work done by the petitioner and provide the approved map of water-tower which is to be constructed by the petitioner.

(iv) To any other relief or reliefs for which the petitioner is found to be entitled in the facts and circumstances of the case.”

3. At the very outset, Mr. Y.V. Giri, learned senior counsel appearing for the petitioner, states that the period of one year for completion of the work in question has elapsed long ago and in that view of the matter, part of prayer no. 1 as well as prayer no. 2 relating to rescindment of the contract are not pressed. Such prayers to that extent are accordingly dismissed as not pressed.

4. According to the petitioner, the short facts of the case are that it participated in a tender issued by the respondents for the construction of a high-yielding tubewell pump house with attendant room, stand post, distribution system and related works in the district of Rohtas, Sasaram, and was awarded the work in terms of work order dated 26.08.2010 for an estimated cost of Rs. 1,21,44,251/- to be completed within a period of 12 months. From various letters of the respondents, the last dated 12.02.2011 (Annexure-5), it would appear that there was delay in identifying and handing over the land to the petitioner. Similarly, it transpires from the letter dated 30.03.2012



(Annexure-6) that design-drawing work for construction of the water tower had also not been finalized by the respondents. Despite such delay attributed to the respondents, the petitioner was made to submit an affidavit dated 30.05.2012 stating that the work in question would be completed by 31.03.2013. Well before expiry of the said date, however, the work was directed to be re-tendered by letter dated 18.06.2012 (Annexure-8). The Superintending Engineer and the Executive Engineer accordingly started the process of preparing the revised estimate after taking final measurement of the work done by the petitioner in terms of their respective letters dated 20.06.2012 (Annexure-9) and 13.07.2012 (Annexure-10). Finally, a newspaper publication was ordered by letter dated 11.08.2012 (Annexure-12) to the effect that the petitioner's agreement had been rescinded with forfeiture of the security amount, and that the final measurement of the work done had been carried out. To this the petitioner was required to respond by 27.08.2012 at the office of the Executive Engineer.

5. Learned senior counsel for the petitioner submits that the order rescinding the contract agreement was passed without any prior show cause notice, which renders the action of the respondents unsustainable in law. The various letters of the respondents make it evident that the delay in handing over the land and in finalizing the drawing-design for construction of the water tower were entirely attributable to the respondents. In view of the petitioner's willingness to complete the work by 30.03.2013, there was no justification for the

respondents in directing the re-tender of the work before the expiry of such period.

6. Learned counsel for the petitioner places reliance upon a decision of this Court in *N.C.C. Limited vs. State of Bihar & Others, 2013 (1) PLJR 952* to submit that the question whether the other party committed breach cannot be decided by the party alleging breach.

7. The respondents, on the other hand, vehemently oppose the writ petition. It has specifically been stated in paragraph 17 of the counter affidavit filed on behalf of the Executive Engineer (respondent no. 5) that the petitioner's agreement was rescinded with forfeiture of the security money by letter no. 790 dated 13.07.2012 addressed to the petitioner and communicated through registered post, which has not been challenged. It is further stated that even if, for arguments' sake, the petitioner's plea in respect of non-receipt of the letter be accepted, a copy of such letter was enclosed as Annexure-I to the counter affidavit, a copy of which was served on the petitioner as far back as on 09.10.2012. Yet the petitioner chose not to challenge the same. It is further stated that the petitioner was given notice to complete the work in terms of the newspaper publication dated 26.05.2011, and by letter no. 1244 dated 20.08.2011 the petitioner was warned that the agreement would be rescinded on failure to complete the work. Thereafter, a show cause notice was duly given through newspaper publication dated 29.12.2011 (Annexure-F series) with regard to rescinding of the agreement. In view of the petitioner's failure to respond to the show cause notice, the



Executive Engineer sought approval of the Regional Chief Engineer by letter dated 31.05.2012 for taking action against the petitioner by rescinding the contract with forfeiture of the security amount. Finally, the aforesaid letter no. 790 dated 13.07.2012 was issued by which the agreement was rescinded with forfeiture of the security amount which, as stated above, has not been challenged by the petitioner till date. Moreover, it has been submitted that the letters referred to by the petitioner merely relate to some delay in handing over the land to the petitioner for construction of a water tower which was but one part of the work required to be done by the petitioner under the agreement. The petitioner is completely silent with regard to its failure to complete other parts of the work. Similarly it is submitted that the duty to submit drawing-design had lain upon the petitioner. A copy of the letter dated 30.03.2012 (Annexure-6) noticing the errors in the drawing-design had been given to the petitioner on 11.04.2012, yet the petitioner did not re-submit any corrected drawing-design thereafter, hence the petitioner was responsible for the delay in that regard.

8. Having heard the parties and on careful consideration of the material on record, this Court finds that the grievance of the petitioner raises several disputed questions of fact, such as service of show cause notice prior to rescinding of the agreement, service of the order rescinding the contract with forfeiture of the security amount by letter no. 790 dated 13.07.2012, as well as the question of delay attributed by the parties to each other leading to rescinding of the

agreement. This Court is not inclined to enter into such disputed questions of fact in its extraordinary writ jurisdiction. The validity of the action of the respondents in directing forfeiture of the security deposit of the petitioner would naturally depend upon the determination of validity of termination of the agreement. All these issues can very well be agitated before the Arbitrator by taking recourse to the provisions of the Arbitration and Conciliation Act, 1996.

9. The writ petition accordingly stands disposed of with liberty to the petitioner to seek redressal of its grievances before the forum of arbitration in terms of the provisions of the Arbitration and Conciliation Act, 1996, if so advised.

10. It is made clear that in such event, the learned Arbitrator would have regard to the present proceeding being pursued by the petitioner while considering any issue relating to condonation of delay, if bar of limitation be applicable.

(Vikash Jain, J)

B.T/Chandran

AFR/NAFR	NAFR
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