

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.3547 of 2013

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National Building Construction Corporation Ltd.,(A Govt. Of India Enterprises),
404, C-Block, Maurya Tower, Maurya Lok Complex, Near Dak Bunglow Road,
Patna - 800001 Through Its General Manager.

.... Petitioner/s

Versus

1. The State Of Bihar through the Secretary, Buildings Construction Department, Vishwesharaiya Bhawan, Bailey Road, Patna.
2. The Executive Engineer, Construction Division No. 2, Buildings Construction Department, Punaichak, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Satish Kumar Sinha

For the State : Mr. Sudhir Kumar, AC to AAG-2

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 19-04-2016

Heard Mr. Satish Kumar Sinha, learned counsel appearing
for the petitioner and Mr. Sudhir Kumar, learned A.C. to A.A.G.-2
for the State.

The petitioner is aggrieved by the order dated 9.11.2011
passed by the Secretary Building Construction Department,
Government of Bihar impugned at Annexure-10 to the writ petition
whereby the claim raised by the petitioner vide his representation
dated 24.5.2011 annexed at Annexure-9 to the writ petition has
been rejected and the order rescinding the contract passed by the
Executive Engineer together with the imposition of penalty and
forfeiture of security has been held justified.

The petitioner also prays for release of his Earnest
Money Deposit amounting to Rs.64,21,920/- and Security Money

Deposit to the tune of Rs.96,668/- and certain unpaid bills amounting to Rs.15,62,288/-.

Facts of the case briefly stated is that a contract was awarded to the petitioner which is a Government of India Enterprise for construction of Sports complex at Kankarbagh in the district of Patna and in which direction a work order was issued on 27.5.2003, a copy of which is placed at Annexure-1.

Following the finalization of the contract and execution of agreement that a letter was issued by the Executive Engineer enclosing the copy of agreement vide letter no.148 dated 14.2.2004 which also *inter alia* provided that the work is to be completed within 18 months. The work got delayed and while the contesting parties put blame on each other, the resultant effect is that the Executive Engineer vide his letter no.846 dated 16.9.2005 rescinded the contract in the light of the advisory issued by the Chief Engineer as contained in his letter bearing memo no.542 dated 6.6.2005 as well as the Superintending Engineer as contained in his letter bearing memo no.282 dated 16.6.2005. It is after rescinding the contract that the Executive Engineer also recommended for payment of the admissible dues to the petitioner vide his letter bearing no. 862 dated 21.9.2005 placed at Annexure-6 to the writ petition which is addressed to the Superintending Engineer but since nothing progressed that the petitioner came



before this Court in CWJC No.5717 of 2011 placed at Annexure-8 and which was disposed of on 16.5.2011 with a liberty to the petitioner to approach the Secretary, Building Construction Department, Vishwesariya Bhawan, Bailey Road, Patna along with his claims and which was to be disposed of in accordance with law. The claim was raised by the petitioner vide his representation dated 24.5.2011 placed at Annexure-9 and has been rejected by the impugned order dated 9.11.2011 vide Annexure-10. The petitioner aggrieved, is before the Court.

I have heard learned counsel for the parties and I have perused the records.

Although admittedly the claim raised by the petitioner is highly belated but considering that it has been entertained by a co-ordinate Bench of this Court in the earlier round of proceedings arising from CWJC No.5717 of 2011, disposed of on 16.5.2011 which has been acted upon by the respondents to result in the impugned order, the delay whatsoever by the petitioner in raising the claim stands explained.

The undisputed facts as noted from the pleadings on record is that the contract entered in between the parties stood rescinded vide order of the Executive Engineer bearing memo no.846 dated 16.9.2005 that is more than a decade back and the reasons for the rescinding of contract is attributed to the delay in execution of

work by the petitioner.

While Mr. Sinha, learned counsel for the petitioner has laboured hard to canvass the case of the petitioner by shifting the blame on the respondents *inter alia* on grounds of delayed execution of the agreement but such objection has been contested by Mr. Sudhir Kumar, learned counsel appearing for the respondents to submit that not only the petitioner has been casual in his approach in completion of the project, rather the petitioner has also consciously violated clause-19 of the agreement by subletting the contract to M/s Gautam Constructions. Thus even if the argument of Mr. Sinha on the delayed construction be kept in the background for a moment yet it does not absolve the petitioner of his responsibility to abide by the conditions of the contract which under clause-19 required a prior approval from the Building Construction Department before the work was sublet to any petty contractor.

In the contesting circumstances discussed above as well as the fact that it took not less than six years for the petitioner to first question the order rescinding the contract before this Court in 2011 and a period of almost more than a decade has passed since the contract was executed between the parties, I am not persuaded to interfere with the order passed by the Executive Engineer impugned at Annexure-5 rescinding the contract. The issue which



remains is whether a mere upholding of the order passed by the Executive Engineer impugned at Annexure-5 by the Secretary in the order impugned at Annexure-10 would also uphold the forfeiture of the Security Deposit, the Earnest Money Deposit as well as the non-payment of the bills submitted by the petitioner. Surprisingly, neither any proceedings were initiated by the respondents for forfeiture of the Security Deposit and Earnest Money Deposit of the petitioner nor there is any order passed in this regard by a competent authority. In other words even in absence of any order passed by the competent authority as regarding the forfeiture of the Security Money Deposit and Earnest Money Deposit of the petitioner, yet the respondents continue to withhold the same.

Unfortunately, the Secretary Building Construction Department while considering the claim raised by the petitioner in light of the order passed in CWJC No.5717 of 2011 and while proceeding to uphold the order rescinding the contract has also upheld the action of the respondent in imposing penalty and forfeiture of security as justified without bothering to satisfy himself whether any such order actually has been passed. The affirmation by the Secretary on the issue of forfeiture of Security and Earnest Money Deposit is in respect of an order which is non-existent.



Mr. Sudhir Kumar, learned A.C. to A.A.G.-2 for the State has invited the attention of this Court to the statement made in paragraph-3 of the counter affidavit which goes uncontested and in which it is stated that the pending bill of the petitioner amounting to Rs.15,62,288/- has been adjusted against the liability found outstanding against the petitioner in the light of the audit objections raised by the Accountant General, Bihar, Patna in Inspection Report No.35/09-10 which suggests a recovery of Rs.1,28,43,840/- from the petitioner. Mr. Sudhir Kumar has also invited the attention of this Court to a letter no.492 dated 22.4.2008 of the Executive Engineer addressed to the petitioner company informing him of this position which order also proceeds to adjust the Earnest Money Deposit and Security Deposit of the petitioner.

In my opinion this action of the respondent in so far as it proceeds to adjust the Earnest Money Deposit and the Security Deposit against the alleged outstandings found against the petitioner on the basis of audit objection, is a mechanical exercise for having received an audit objection, the department had to apply their mind and then initiate proceedings accordingly. Unfortunately such exercise is missing and the bills of the petitioner, the Earnest Money Deposit and the Security Deposit have been unilaterally adjusted against the amount suggested for recovery by the Accountant General.



In the undisputed circumstances discussed above and where the order passed by the Executive Engineer dated 16.9.2005 while rescinding the contract does not order for forfeiture of Security and Earnest Money Deposit, it does not lie within the jurisdiction of the respondents to withhold the said deposits of the petitioner and the order of the Secretary, in so far as it proceeds to uphold such action, is wholly illegal and without any foundation rather has been mechanically passed without application of mind. This would bring this Court to the issue of unpaid bills.

The adjustment of the pending bills of the petitioner is sought to be explained by the respondents vide a communication dated 22.4.2008 addressed to the petitioner. The order dated 22.4.2008 is not independent exercise of mind by the Executive Engineer rather is a mechanical exercise and an afterthought in consequence of the audit objection and does not confer any jurisdiction on the Executive Engineer to unilaterally adjust the unpaid bills, Earnest Money Deposit and the Security Deposit *de hors* provisions of the agreement and without opportunity to the petitioner to respond against the recovery.

In the circumstances discussed, this Court while upholding the part of the order passed by the Secretary upholding the order of rescinding of contract passed by the Executive Engineer on 16.9.2005 impugned at Annexure-5 is not satisfied with the order

in so far as it upholds the forfeiture of Security Deposit, the Earnest Money Deposit as well as unpaid bills.

This Court would thus direct the respondent-Secretary and the Executive Engineer to take steps for payment of the Earnest Money Deposit, the Security Deposit and the admissible unpaid bills of the petitioner, the details of which are given herein above within three months from the date of receipt/ production of the copy of the order. However, in the circumstances discussed I am not persuaded with the prayer of the petitioner for grant of the interest.

The writ petition is allowed with the directions aforementioned.

(Jyoti Saran, J)

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Uploading Date	
Transmission Date	