

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Review No.245 of 2016

Arising out of

Civil Writ Jurisdiction Case No. 4086 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 the Principal Secretary, Water Resources Department, Government of Bihar, Patna.
2. The Chief Engineer, Water Resources Department, Dehri, District Sasaram, Bihar.
3. The Superintending Engineer, Water Ways Circle, Bhabhua, District Sasaram, Bihar.
4. The Executive Engineer, Sone High Level Canal Division, Bhabhua, District Sasaram, Bihar.

.... Respondent/s

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Appearance :

For the Petitioner/s :

For the Respondent/s :

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CORAM: HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH

ORAL JUDGMENT

Date: 08-08-2017

Heard Mr. S. D. Sanjay, learned senior counsel along with Mr. Prabhat Ranjan, learned counsel for the petitioner and Mr. Lalit Kishore, learned Advocate General along with Mr. Vikas Kumar, learned A.C. to A.G. for the State.

2. The present application seeks review of the order dated 28.03.2016 passed in C.W.J.C. No. 4086 of 2016 by which the writ petition has been dismissed, pursuant to order dated 28.04.2016



passed in L.P.A. No. 686 of 2016 by which the petitioner had moved against the order under review and the Letters Patent Appeal was disposed off as withdrawn with liberty to file review petition.

3. Learned counsel for the petitioner submitted that the Court had dismissed the writ petition primarily on the basis of the stand taken by the State where notice dated 04.09.2015 was sought to be projected as a show cause notice by the authorities to rescind the contract. Learned counsel further submitted that the challenge in the writ petition was to the order contained in Letter No. 255 dated 15.02.2016 rescinding the agreement No. 01-SBD-2014-15 dated 01.07.2014 in favour of the petitioner. It was submitted that the Court, at the relevant point of time, was not aware of the fact that two documents of the authorities i.e., Letter No. 1750 dated 21.09.2015 and Letter No. 107 dated 11.01.2016, which were also not within the knowledge of the petitioner at the relevant time, had been brought on record by the State authorities in the counter affidavit filed by them in C.W.J.C. No. 567 of 2016. Learned counsel submitted that the said two letters would indicate that notice dated 04.09.2015 was not a notice for rescinding the contract and pursuant to the same, the authorities had taken decision to impose liquidated damages for delay of work @ 2% per month under Clause II of the SBD which was communicated by letter dated 21.09.2015. He further submitted that



by order dated 11.01.2016, the Chief Engineer had also directed for closure of the contract and for getting the final measurement done. Learned counsel submitted that in view of the two letters of the authorities, the action of rescinding, based on the notice dated 04.09.2015, was not justified. It was further submitted that action for rescinding, which was impugned in the writ petition, has visited the petitioner with civil consequences since it automatically entails blacklisting for 10 years. Coming to the scope of the present review application, learned counsel submitted that a fit case is made out for review of the order on the ground that the Court was persuaded to form an opinion in absence of the two letters which have now been brought on record. Learned counsel drew the attention of the Court to the fact that the letter written by the petitioner addressed to the Executive Engineer dated 10.06.2015 with copy of the same to the Chief Engineer and the Superintending Engineer, which the State authorities had denied receiving, was later on found to have been received by them, for the same was referred to by the Superintending Engineer to his subordinate for taking appropriate action, and this fact was brought on record by the State in C.W.J.C. No. 567 of 2016. It was contended that in the present case the stand was that the petitioner had replied to the notice whereas in C.W.J.C. No. 567 of 2016 and C.W.J.C. No. 9879 of 2016, it was submitted that the petitioner had



not replied to the notice and thus 2% of liquidated damages had been imposed. Coming to the issue of maintainability of the present review application, learned counsel submitted that this is a fit case for interference for the reason that apparently the Court had formed an opinion based on limited material available at that point of time which may have indicated towards laches on the part of the petitioner. It was submitted that even the petitioner was not aware of certain relevant documents of the authorities themselves and subsequently when the same was served on him by way of counter affidavit filed by the State authorities in another writ petition, the same vindicating the stand taken by the petitioner with regard to action of rescinding being arbitrary, stands confirmed. It was submitted that had the said documents been before this Court, it may have been inclined to interfere in the order of rescinding as the same indicated that no specific notice was given making the petitioner aware that the contract may be rescinded in terms of Clause III of the SBD. For such proposition, learned counsel has relied upon a Full Bench judgment of this Court in the case of **High Court of Judicature at Patna vs. K. K. Choubey** reported as **2015 (4) PLJR 328**, the relevant being at paragraphs no. 12 and 13, in which it has been held that justice must prevail over all barriers and that the rules, procedures or technicalities of law must, if necessary, bend before justice and that such a situation



may arise, when a Court finds that it has rendered a decision, which it would not have rendered, but for an assumption of fact, which in fact, did not exist and its adherence to such a faulty decision would result in miscarriage of justice, in such cases, nothing can prevent a Court from rectifying its own error. It has further been held that ground for review is now no more restricted to discovery of new and important mater or evidence. Learned counsel also relied upon the decision of the Hon'ble Supreme Court in the case of **J. G. Engineers(P) LTD. v. Union of India** reported as (2011) 5 SCC 758, the relevant being at paragraph no. 19, for the proposition that the question whether the other party committed breach cannot be decided by the party alleging breach and the contract cannot provide that one party would be the arbiter to decide whether he committed breach or the other party committed breach and such declaration can only be decided by an adjudicatory forum i.e., a Court or an Arbitral Tribunal. It was submitted that in the present case, the authorities have not acted fairly and even after taking action under Clause II of the SBD, have further proceeded to take action against Clause III of the SBD without there being notice of the same to the petitioner, as mandated by law. Before summing up his arguments, learned counsel took a stand that even at this stage, he is prepared to be relegated to the Arbitral Tribunal constituted by the State Government for such purpose with the limited



protection that the rescinding order may not prejudice him from being eligible to apply and participate in tenders outside the State of Bihar and other Departments in the State of Bihar.

4. Learned counsel for the State took a preliminary objection and submitted that the grounds urged for review are misconceived. He submitted that in the present case, the Court has taken a view and arrived at a conclusion giving finding of facts based both on self appraisal of notice dated 04.09.2015 and also on the conduct of the petitioner, and thus, even if further documents which have been brought on record in the present review application are taken into consideration, any interference would amount to the Court retracting from its original opinion and coming to a fresh conclusion, which is not the scope of a review application. It was submitted that had the Court relied only upon the interpretation given by the State and would not have arrived at its own interpretation and finding, upon perusal of the document itself, and also with regard to the conduct of the petitioner, which is an admitted position, there could have been some scope for argument available to the petitioner to seek review of the judgment and order dated 28.03.2016. He submitted that the scope of review has been dealt with by the Hon'ble Supreme Court in a recent decision in the case of **Sasi v. Aravindakshan Nair** reported as **(2017) 4 Supreme Court Cases 692**, the relevant being at



paragraph 5 onwards. Learned counsel submitted that the Court has held that the scope and ambit of power to review be exercised on the fact that error has to be self evident and has not to be found out by a process of reasoning. It was submitted that in the present case when the reasoning initially given by the Court dismissing the writ petition was not limited to the stand of the State but rather to an independent finding arrived at by the Court itself, based on the language of the notice dated 04.09.2015 as well as the conduct of the petitioner, the same shall not be a ground or a condition to justify review of the order dated 28.03.2016. Learned counsel also relied upon the decision of the Hon'ble Supreme Court in the case of **Inacio Martins v. Narayan Hari Naik** reported as **(1993) 3 Supreme Court Cases 123**, the relevant being at paragraph 6, to contend that the prayer of the petitioner to be relegated to the Arbitral Tribunal cannot be allowed at this belated stage for the reason that initially, at the very outset, when he had the discretion to avail of a forum by electing for any one of them, he having chosen one forum, now, after adjudication, it is not open to him to seek liberty for moving before the alternative forum. Coming to the factual aspects, learned counsel submitted that the contention of learned counsel for the petitioner that the State authorities had wrongly taken the stand that the letter dated 10.06.2015 was never received by the authorities as it is contradicted



by the endorsement of the Superintending Engineer on the letter of the Chief Engineer dated 21.09.2015, the same is erroneous, for the reason that the letter of the petitioner dated 10.06.2015 was submitted before the authorities but by way of being annexed along with his reply dated 19.09.2015. This, according to learned counsel, was the finding arrived at after the matter was directed to be looked into and an enquiry conducted and communicated under Memo No. 1565 dated 20.07.2017.

5. Having considered the rival contentions, the Court would only indicate that the matter, though heard in detail, both on facts and law, does not give the Court discretion to consider the merits *de novo*. The issue basically revolves as to whether the notice dated 04.09.2015 can be construed to be a notice for the purposes of rescinding of the contract, as has been done, or by the order directing for 2% liquidated damages, no further action against the petitioner could be taken in terms of the said notice dated 04.09.2015. Learned counsel for the petitioner has brought on record certain documents which were not before the Court in the first round of litigation at the time when the order under review was passed on 28.03.2016, which may give the petitioner some scope of argument, but the basic issue remains that the Court had also independently gone through the notice dated 04.09.2015 and had formed an opinion that the same being a show



cause, the power of the authorities could not be restricted, and the Court was further persuaded to dismiss the writ petition taking into consideration the conduct of the petitioner, which is also noted in the order dated 28.03.2016. Thus, taking another view, based on the same show cause, and forming an opinion contrary to that formed at the time of passing of the order dated 28.03.2016, would amount to re-hearing and re-considering the matter afresh, which is not the scope of review. Had the Court not arrived at a conclusion based on its independent appreciation and interpretation of the notice dated 04.09.2015, the fresh materials brought on record may have been of some relevance. Any interference, at this stage, would, thus, amount to the Court changing its opinion with regard to the finding based on the appreciation of the contents of the notice dated 04.09.2015 itself and the conduct of the petitioner, in which there has been no change or variation, as on these two aspects the position today remains the same and unchanged to that on 28.03.2016. At least to that extent, that is, with regard to the contents of the notice dated 04.09.2015 and the conduct, as recorded by the Court, relating to the petitioner, there has been no change in the factual position. Thus, the Court is not persuaded to form a different opinion and record a different finding on the basis of materials now brought before the Court, as it had taken a view forming an opinion directly from the materials on record and



the notice dated 04.09.2015 and the conduct of the petitioner which is well documented and recorded in the order dated 28.03.2016. Moreover, even after hearing the parties, the Court still holds the view taken by it on 28.03.2016.

6. Accordingly, the review application stands dismissed.

7. Coming to the issue relating to the petitioner being permitted to move before the Arbitral Tribunal, the Court is again unable to accede to such prayer for the reason that once the matter relates to review of the order dated 28.03.2016 dismissing the writ petition on merits, and the same not having been interfered with, the Court, at this stage, cannot grant permission to the writ petitioner to move before the Arbitral Tribunal as it would amount to doing something indirectly which cannot be done directly, inasmuch as, once the order of dismissal of the writ petition has been upheld by dismissal of the present review application, the permission or liberty to move before the Arbitral Tribunal would, in effect, amount to the order under review having been modified/recalled to such extent, which would be beyond jurisdiction and thus impermissible.

(Ahsanuddin Amanullah, J)

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