

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Civil Revision No. 19 of 2014**

=====

M/S Anil Sharma through Its Proprietor Mr. Anil Sharma Son Of Late Ram Chandra Singh Resident Of Mohalla - North Office Para, G.S.P., P.S. Doranda, District - Ranchi, State Jharkhand.

.... .... Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Water Resources Department, 'Sinchai Bhawan', Harding Road, Patna
2. The Chief Engineer ( Middle ), Water Resources Department, 'Sinchai Bhawan', Harding Road, Patna
3. The Superintending Engineer, Water Resources Department, Water Ways Circle, Ghosi, Jehanabad
4. The Executive Engineer, Water Resources Department, Water Ways Division, Ghosi, Jehanabad

.... .... Opposite Parties

=====

**Appearance :**

For the Petitioner : Mr. Rajendra Narayan, Sr. Adv.  
Mr. Manish Sahay, Adv.  
Mr. Anil Kumar Sinha, Adv.  
For the Opposite Parties : Mr. Sheo Shankar Prasad, SC-8

=====

**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA**

**C.A.V. JUDGMENT**

**Date: 15-09-2017**

1. I.A. No. 9234 of 2016 has been filed on behalf of the petitioner for condonation of delay in filing the present civil revision. The aforesaid interlocutory application stands allowed on the grounds mentioned in the interlocutory application and accordingly, delay is, hereby, condoned.

2. This civil revision petition has been preferred against the award dated 24.09.2013 passed by Bihar Public Works Contracts Disputes Arbitration Tribunal, Patna in Reference Case No. 42 of 2011



by which and whereunder the learned Tribunal rejected the claim of the petitioner for grant of compensation as well as damages but directed the opposite parties to return the security deposit of Rs. 11,36,300/- with simple interest at the rate of Rs. 10 % per annum. However, subsequently, vide award dated 29.10.2013 the learned Tribunal reviewed the award dated 24.09.2013 and refused to refund of security deposit.

3. The brief fact, which lies to file this revision petition, is that a Notice of National Competitive Bidding Invitation ( in short “NIT”) bearing Reference No. 37 dated 18.01.2008 issued by Executive Engineer, Water Resources Department, Water Ways Division, Ghoshi, Jehanabad was published in several newspapers inviting tender for construction of certain works as mentioned in the said notice. In response to the aforesaid notice, petitioner applied for allotment of the works as mentioned in the notice and finally the construction work was allotted to the petitioner and subsequently, petitioner and opposite party no. 4 entered into an agreement on 24.03.2009 vide agreement no. 06 S.B.D. of 2008-09. The work was to be completed within twelve months from the date of execution of the agreement and the valuation of work was of Rs. 5,67,48,755/- only. The NIT vide reference no. 37 dated 18.01.2008 was also made part of the agreement and Clause 6 of the NIT contains information that site for the work was available. Furthermore,



para-18 of the NIT contains a provision that Notice inviting Tender shall form a part of the contract document. The claim of the petitioner is that he mobilized his men and machinery for execution of the work at site but came to know that work site was not available. However, the opposite parties had given assurance to him that the work site shall be provided to him as soon of earliest and having reposed faith upon them he waited for a long period but the work site was not made available to him in spite of his repeated request as the opposite parties failed to acquire the lands which had been selected for the work and in the meantime, the time fixed for completion of the work lapsed. The opposite parties also failed to rescind the contract and due to negligence and inaction of the opposite parties, the petitioner suffered huge loss. He submitted his grievance to the Chief Engineer, Water Ways Division, Gaya for settlement of his claim vide letter no. 46 dated 29.06.2010 but nothing was done. He also sent legal notice through his advocate but no action was taken and lastly, he filed the above stated Reference Case No. 42 of 2011 before the learned Tribunal basing his claim between the period from 24.03.2009 to 24.05.2010.

4. The opposite parties appeared before the Tribunal and denied the claim of the petitioner on the ground of Clause 6.3.7, Clause 7.1 of the tender document part-1 and Clause 10 of the agreement and also on Clause 3A of the contract. The opposite parties also pleaded that



the petitioner was aware of this fact that work site was not available as the land in question could not be acquired but he did not choose to rescind the contract and moreover, he laid false claim before the Tribunal on the basis of forged and imaginary documents and calculation.

5. The learned Tribunal having considered the submissions of the parties rejected the claim of the petitioner on the ground that Clause 7(1) of the agreement contain specific provision that the contractor shall collect specific information regarding the work site and furthermore, Clause 6.3.7 of the contract also contains a specific provision that the department will not be liable for any damage or compensation due to delay in start and suspension of work on account of delay in getting possession of the land or change in alignment and furthermore, Tribunal also held that petitioner failed to exercise its right under Clause 3 A of the contract though Tribunal held that petitioner was not liable for breach of reciprocal contract nor was liable for breach of contract.

6. Learned counsel appearing for the petitioner assailed the impugned award submitting that admittedly, NIT was part of agreement as it is evident from perusal of Clause 18 of NIT and Clause 6 of the NIT, specifically, disclosed that the site for the work was available but admittedly, the site for work was not made available to the petitioner though he was asked to start the work from the date of agreement i.e. on



24.03.2009 and the aforesaid work was to be completed within twelve months from the date of execution of the agreement. He, further, submitted that the Tribunal committed error in interpreting Clause 10 of the NIT because Clause 10 of the NIT (agreement) is not applicable in the present case as the aforesaid condition says that bidders were advised to inspect and examine the site and its surroundings and satisfy themselves before submitting their tenders in respect of only nature of the ground and sub-soil, the form and nature of the site, the means of access to the site the accommodation they may require. Therefore, the aforesaid term of the agreement was only in respect of verifying the nature of the land and other circumstances which are required to fulfil the contract work but it does not mean that the site was itself not available, particularly, in the circumstance when the opposite parties, specifically, mentioned in NIT that the site was available and, therefore, the learned Tribunal committed error in interpreting the aforesaid clause against the petitioner. He further submitted that it is admitted case of the opposite parties that site was not available on the day of publication of NIT but even then they, intentionally, mentioned in Clause 6 of the NIT that the site was available and the aforesaid fact has been admitted by the opposite parties in their counter affidavit. He further submitted that so far as Clause 6.3.7 of the agreement as annexed at Annexure-B to the counter affidavit is concerned, the aforesaid term is also not applicable



in the present case because the agreement shall be read in toto and then any inference can be drawn in respect of terms and conditions of the agreement. He, further, submitted that Clause 6.3.7 shall apply in those cases where NIT, specifically, says that the work site is under process of land acquisition proceeding but in the present case, at the very first instance, the department disclosed that the site was available and the department did not disclose that the site for work was under process of acquisition proceeding. He further submitted that similarly, Clause 7.1 of the agreement as annexed at Annexure-D is also not applicable in the present case because in NIT, it was specifically mentioned that the site for work was available.

7. Learned counsel appearing for the petitioner, further, submitted that so far as Clause 3 A of the agreement is concerned, the same is also not applicable in the present case because it is the duty of the Chief Engineer to take decision that the work cannot be started within  $\frac{1}{4}$  of the stipulated time for completion of the work and thereafter, the parties can close the contract but in the present case, the Chief Engineer never took decision that the work in question cannot be started due to non-availability of the work site and, therefore, there was no occasion to petitioner to request for closure of the contract but the learned Tribunal interpreted the aforesaid Clause 3 A in wrong way and held that the petitioner failed to exercise its option for closure of the



work and, therefore, not entitled for any damage.

8. Learned counsel appearing for the petitioner further submitted that decisions as cited by the learned Tribunal in the impugned award for basing his finding are not applicable in the present case and as a matter of fact, the Tribunal wrongly interpreted the provisions of Indian Contract Act and, therefore, in the aforesaid circumstance, the impugned award cannot sustain in the eye of law and liable to be set aside.

9. On the other hand, learned counsel appearing for the opposite parties refuted the above stated submissions arguing that admittedly, the agreement between the parties was executed on 24.03.2009 and the NIT was part of the agreement but as a matter of fact, the process for acquisition of the land was initiated by the concerned officer and for the purpose of acquisition of the lands the compensation amount was released and written assurance was given by the Director, Land Acquisition and Rehabilitation, Water Resources Department, Bihar, Patna to this effect that acquisition work will be completed by March 2009 and on the basis of aforesaid assurance, tender for the work in question was invited and finalized by the department but unfortunately, the land acquisition process could not be completed during the period granted to the petitioner for completion of the work and that was the reason the work site could not be handed over



to the petitioner as a result whereof, petitioner could not execute any work during the said period but without executing any work, the petitioner placed bogus claim of more than rupees six crore which is more than estimated cost of the project. He further submitted that between the period in question, the site in question was inspected by the concerned officials several times but neither any equipment nor any man of the petitioner was found on the site and that was the reason, the claim of the petitioner was rejected by the concerned department.

10. Learned counsel appearing for the opposite parties further submitted that no doubt, in Clause 6 of the NIT, it had been mentioned that the site for work was available but even then it was incumbent duty of the petitioner in view of Clause 7.1 and Clause 10 of the agreement to verify the actual position of work site but petitioner failed to do and, therefore, petitioner was bound by the terms and conditions of the agreement and the Tribunal had no jurisdiction to go beyond the terms and conditions of the agreement. He further submitted that even if it assumed that the department failed to provide work site to the petitioner due to non acquisition of lands, then also, the petitioner had no right to claim damage in view of Clause 6.3.7 of the tender documents part-II (Technical specification and bill of quantity) which says that the department will not be liable for any damage or compensation due to delay in start and suspension of work on account of delay in getting



possession of the land or change in alignment. He further submitted that the petitioner had option to request the concerned authority for closure of the agreement under Clause 3 A of the tender document part-1 but petitioner did not make any request for closure of the contract rather vide letter no. 27 dated 11.01.2010 he expressed his willingness to do the work till the period of completion as per agreed period. He further submitted that petitioner gave exaggerated amount of damage which is admittedly more than the estimated cost whereas in view of Clause 13.3 of tender documents part-1, the aforesaid exaggerated amount was not admissible. He further submitted that the petitioner made imaginary claim and no chit of paper was produced by the petitioner before the Tribunal and moreover, the Tribunal has only jurisdiction to decide the dispute on the basis of terms and conditions of the contract and in the present case, terms and conditions of the contract do not permit the petitioner to claim damage or compensation on account of delay in completion of the work.

11. Having heard the contentions of both the parties, I went through the record. Certain facts are admitted in this case. It is an admitted position that petitioner and opposite party no. 4 entered into agreement on 24.03.2009 and the petitioner had to complete the allotted work within twelve months from the date of execution of the agreement. It is also an admitted position that NIT was published in newspaper on



18.01.2008 and the aforesaid NIT was made part of agreement. Furthermore, it is an admitted position that in Clause 6 of the NIT, it was mentioned that the site for the work was available and in the aforesaid NIT, it was nowhere mentioned that the land for the site was under acquisition proceeding. Moreover, at the time of execution of the agreement dated 24.03.2009, it was again not disclosed by the department that the land in question was under acquisition proceeding. Therefore, there is nothing in the entire contract to show that the land in question was under acquisition proceeding. No doubt, in Clause 10 of the agreement, there was an advice to the bidders for inspection and examination of the site and its surroundings and satisfy themselves before submitting their tenders as to the nature of the ground and sub-soil, the form and nature of the site, the means of access to the site the accommodation they may require and in general to obtain all necessary information as to risks, contingencies and other circumstances which may influence or affect their tender. There was also provision in the said clause that a bidder shall be deemed to have full knowledge of the site whether he inspects or not. The bare perusal of the aforesaid provision of the agreement goes to show that the aforesaid provision does not include non availability of the site because aforesaid provision says that the bidder has only to verify the nature of the site and other related things, particularly, in the circumstance when NIT contains a declaration that



site for work was available and, therefore, in the aforesaid circumstance, no prudent person shall presume that the site for work was itself not available and, therefore, in my view, the Tribunal committed error in interpreting the aforesaid provision against the petitioner.

12. Similarly, so far as Clause 7.1 of the tender document part-1 (instruction to bidders general) as annexed at Annexure-D to the counter affidavit is concerned, the same only relates to preparation of bid and entering into a contract for construction of the work and the aforesaid provision applies in the case where the site of work is available because the aforesaid clause is almost similar to the clause 10 of tender document part-1 and the aforesaid clause 7.1 relates to nature of the site of work as well as other circumstances.

13. Clause 6.3.7 of the tender document part-II says that the department is not liable for any damage or compensation due to delay in start and suspension of the work on account of delay in getting possession of land or change in alignment. No doubt, the aforesaid Clause 6.3.7 is part of agreement but in the aforesaid clause, it has not been mentioned that the land shown in NIT was under process of acquisition and, therefore, the aforesaid clause will not help to the department because in my view, the department can take advantage of the aforesaid clause only in those cases where in the NIT it has, specifically, been mentioned that the land for the site is under process of



acquisition. In the present case, admittedly, in the NIT, it was mentioned that the site for work was available and in the aforesaid publication, it was, nowhere, mentioned that the site was under acquisition proceeding. Therefore, I am of the opinion that the Tribunal committed error in rejecting the claim of the petitioner taking help of the aforesaid clause of the agreement.

14. So far as Clause 3 A of the contract is concerned, the Tribunal has observed that the Executive Engineer had informed the Superintending Engineer about non availability of the land and copy of the aforesaid letter of Executive Engineer was sent to the petitioner giving liberty to him to exercise his option for closure of the contract but the petitioner did not exercise its option for closure of the contract. The Tribunal also observed that the decision of Chief Engineer was only to be required after the petitioner expresses his intention to close the contract.

15. Clause 3 A of the agreement has been annexed as Annexure-F to the counter affidavit. The aforesaid Clause 3 A says as follows:- “In case, the work cannot be started due to reason not within the control of the contractor as decided by the Chief Engineer within  $\frac{1}{4}$  of stipulated time for completion of the work, either party may close the contract and in such eventuality, the Earnest Money deposit and the performance Guarantee of the contract shall be refunded, but no payment



on account of interest, loss of profit or damages etc. shall be payable at all. The reasons shall be examined by the Superintending Engineer and his decision shall be final and binding.”

16. The bare perusal of aforesaid Clause 3 A goes to show that within  $\frac{1}{4}$  of stipulated time for completion of work the Chief Engineer has to decide that the work cannot be started due to reason not within the control of the contractor and after decision of the Chief Engineer, either of the parties may close the contract and, thereafter, the Superintending Engineer will take decision on that point and his decision shall be final and binding. Therefore, it is obvious from the aforesaid clause that first of all the Chief Engineer has to take decision within  $\frac{1}{4}$  of the stipulated time for completion of the work to this effect that the work cannot be started due to reason not within the control of the contractor but in the present case, admittedly, the Chief Engineer has not taken such decision rather it was Executive Engineer who informed the Chief Engineer that the land acquisition process could not be completed and there was no possibility of completion of the process till March 2009 and the copy of aforesaid letter was sent to the petitioner. Admittedly, even after receipt of the aforesaid letter of the Executive Engineer, the Chief Engineer did not take any decision on above stated point nor gave any information to the petitioner regarding his decision. Therefore, there was no occasion before the petitioner to express his option for closure of the



work and in my view, the learned Tribunal wrongly observed that after option of the petitioner for closure of the contract, the Chief Engineer was required to take decision rather after decision of the Chief Engineer, the option of the petitioner was required and, thereafter, the matter could be decided by the Superintending Engineer. No doubt, vide letter no. 27 dated 11.01.2010 petitioner expressed his willingness to do the work till the period of completion as per the agreed period but Annexure-3 to the petition, the letter dated 03.06.2010 addressed to the Executive Engineer, Ghoshi, Jehanabad given by the petitioner, goes to show that petitioner wrote the aforesaid letter under pressure of the department as the department vide letter no. 454/Ghosi dated 18.12.2009 had asked the petitioner to file certificate to do the work on agreed rate otherwise his contract shall be cancelled. Therefore, even if it assumed that the petitioner became ready to do the work, then also, it does not make any difference.

17. The case of the petitioner is that after execution of the agreement, he moved his labourers and equipments for starting the work but the site was not made available to him and when he reached on the site, he came to know that the land was not acquired and thereafter, on 26.05.2009, he wrote a letter to the Executive Engineer, Ghoshi, Jehanabad giving information about the non availability of land and also regarding the movement of his labourers and equipments. The petitioner



also gave information to the Executive Engineer that he had kept his working equipments at Village Bandhuganj and Pursottampur which are situated nearby the proposed site as he was not able to keep the aforesaid equipments on the proposed site. The aforesaid letter has been annexed as Annexure-4 to the rejoinder filed on behalf of the petitioner. The department has come with this story that the spot inspection made by the officials revealed that no equipments or labourers were found on the site when inspection was made. The spot inspection report has been annexed as Annexure-A to the counter affidavit which goes to show that the aforesaid spot inspection was made on 02.07.2009 but admittedly, much prior to aforesaid spot inspection, petitioner had already informed the concerned department vide his letter dated 26.05.2009 (Annexure-4 to the rejoinder) regarding keeping of his equipments and labourers at village Bandhuganj and Pursottampur. It is surprising enough that the concerned officials never visited to village Bandhuganj and Pursottampur to verify the aforesaid claim of the petitioner rather they made inspection of the proposed site which was, admittedly, had not been acquired till the date of inspection by the officials and it is the matter of common sense that when the aforesaid land had not been acquired, it was not possible for the petitioner to keep his labourers and equipments over the proposed site. Therefore, in the aforesaid circumstance, it cannot be said that petitioner had not moved his



equipments as well as labourers for starting the work in question.

18. The opposite parties have also relied upon Clause 13.3 of the agreement which has been annexed as Annexure-G to the counter affidavit but in my view, the aforesaid clause is not applicable in the fact of the present case because the aforesaid Clause says that “Rate should include the cost of all seen and unseen expenditure and no claim whatsoever will be entertained due to non-inclusion of any such event necessary for the completion of the item of work.” The aforesaid clause relates to seen and unseen expenditure occurred in course of the work but in the present case, admittedly, the work could not be started and the petitioner has claimed damage on account of fault of the department.

19. It has been argued on behalf of the opposite parties that dispute of the parties can only be decided on the basis of terms and conditions of the contract and in the present case, it has, specifically, been agreed by the parties that no damage or claim shall be made due to non acquisition of the proceeding. In support of his contention, he referred a decision reported in 1977(3) SCC 457 but in my view, the aforesaid decision is not applicable in the present case because in the present case, the respondents had never disclosed that the lands of proposed site was under acquisition proceeding rather they, specifically, mentioned in NIT that the site for work was available. No doubt, there was a clause in the agreement that no claim or damage can be made, if



delay is caused due to acquisition and getting possession of the lands but the aforesaid clause of the agreement appears to be redundant in specific claim of the department that the land for site was available.

20. Learned counsel for the opposite parties has argued that the petitioner has made exaggerated claim and as a matter of fact, he did not follow the procedure for making the claim but the Tribunal has not given any finding on the aforesaid point and without going into the genuineness or otherwise of supporting papers filed on behalf of the petitioner in support of his claim, the Tribunal passed the impugned award on the premises that the petitioner had no right to make claim in view of the terms and conditions of the agreement. The Tribunal relied upon the decisions referred in the judgments but the aforesaid decisions are not applicable in the present case because in the present case, there is specific case of the department at the time of publication of NIT as well as entering into the agreement that the site for work was available.

21. It is well settled principle of law that right of the parties is decided on the basis of terms and conditions of the agreement and also it is well settled principle of law that the exclusion clause of the agreement shall play an important role while deciding the right and liabilities of the parties and if there is an exclusion clause in the agreement, the said exclusion clause shall be taken into consideration while deciding the right and liabilities of the parties to the agreement. No doubt, in the



present case, there is an exclusion clause in the agreement that no claim or damage could be made, if there is delay in getting possession of the land due to delay in acquisition proceeding but as I have already stated that the aforesaid clause is of redundant nature particularly, in the circumstance, when NIT as well as agreement contain specific term that the site for work was available.

22. On the basis of aforesaid discussions, I am of the opinion that the learned Tribunal has committed error in rejecting the claim of the petitioner and this matter should be sent to the Tribunal for consideration of claim of the petitioner.

23. Accordingly, this civil revision petition is allowed and the impugned award dated 24.09.2013 is, hereby, set aside remitting the matter back to the learned Tribunal for deciding and calculating the claim of the petitioner and for passing a fresh award in this regard.

**(Hemant Kumar Srivastava, J)**

SHAHZAD/-

|                   |            |
|-------------------|------------|
| AFR/NAFR          | A.F.R.     |
| CAV DATE          | 27.07.2017 |
| Uploading Date    | 16.09.2017 |
| Transmission Date | N.A.       |

