

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Revision No.47 of 2015

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1. The State Of Bihar through the Secretary, Water Resources Department Sinchai Bhawan, Harding Road Patna.
 2. The Engineer-in-Chief (North Bihar), Water Resources Department Sinchai Bhawan, Harding Road Patna.
 3. The Chief Engineer, Water Resources Department, Siwan.
 4. The Superintending Engineer, Water Resources Department, Flood Control Circle, Gopalganj.
 5. The Executive Engineer, Water Resources Department, Saran Division, Chhapra.

.... Petitioner/s

Versus

Ram Pravesh Rai Estate Pvt. Ltd., through its Managing Director Sri Ram Pravesh RAI Son of Sri Kamla Rai, resident of 19, Patliputra Colony, Police Station- Patliputra, District- Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Neeraj Kumar, Adv.

For the Respondent/s : Mr. Binod Kumar Singh, Adv.

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 21-06-2017

Heard learned counsel for the parties.

The present application has been filed under Section 13 of the Bihar Public Works & Contract Disputes Arbitration Tribunal Act, 2008 (hereinafter referred to as the 'Act') challenging the award dated 06.01.2015 passed in Reference Case No. 106 of 2010 by the tribunal.

The works contract was entered in between the petitioners and the opposite party on 08.04.2008 whereby the



opposite party was assigned the contract for raising, strengthening and construction of Black Top Road on Magarpal Chharki from 0 km to 16 km and Black Top Road on Saran Embankment from 20.15 km to 35.20 km along with construction of Quarters, Bridges, Choukidar Shed, Anti Flood Sluice Gate and Observatory Towers, Stairs etc. The work was to start from 08.02.2008 and to be completed by 31.05.2009. The time for completion of the work was extended later on upto 31.03.2010. However, by order dated 15.03.2010 passed by the petitioner-executive engineer, the work contract was rescinded.

The opposite party filed C.W.J.C. No. 5416 of 2010 before this Court questioning the sustainability of the order of rescission of the contract. This Court by order dated 06.05.2010 (Annexure-B to the counter affidavit) disposed of the said writ application directing the Principal Secretary, Water Resources Department, Government of Bihar to consider the offer of the petitioners for payment to the extent of the work done by him and resolve the issue irrespective of the rescission of the contract. This Court, however, also put the order dated 15.03.2010 in abeyance till the decision by the Principal Secretary or the person authorized by him.

It further transpires from the materials on record that a



reasoned order was passed thereafter on 09.08.2010 by the petitioner-Chief Engineer. As noticed by the tribunal in the impugned award, it has transpired from the said order dated 09.08.2010 that a committee was constituted by the petitioner-Chief Engineer by letter dated 12.08.2009 for taking measurement and the said committee took the measurement in presence of the representative of the opposite party in between 17.09.2009 to 07.10.2009. The tribunal has further noticed that the petitioner-Chief Engineer in his order dated 09.08.2010 had observed that the measurement made by the committee constituted by letter dated 12.08.2009 was acceptable. However, the petitioner-Chief Engineer constituted a new team by letter dated 10.04.2010 which admittedly took measurement in absence of the opposite party or his representative and on that basis the 10th and final bill was prepared.

In the background of the aforesaid facts, the opposite party filed the Reference Case No. 106 of 2010 before the tribunal under the Act making claim for payment against the work done and other allied heads as mentioned in the impugned award by the tribunal. The petitioners also filed counter claim raising the liability of the opposite party (petitioner in the reference case) for payment under different heads.

After careful consideration of the submissions on behalf



of the parties and perusal of the materials on record, it is apparent that the opposite party did not complete the work assigned under the contract and had come out with the explanation that the work could not be completed due to inactions on the part of the petitioners including the failure of the petitioners to remove the encroachments and obstruction on the work site as well as providing barrow area and making payment of compensation of the crops and lands to the villagers affected by the construction work. The opposite party also alleged non-preparation of the construction plan and other necessary inputs by the petitioners and asserted that the contractual work could not be completed by the opposite party even after the extension of time for the aforesaid reasons. The contract was rescinded by the petitioners. The tribunal, after considering the facts and circumstances as well as the materials, has come to the conclusion that there was reciprocal default by both the parties leading to non-completion of the work as per the terms of the contract.

So far as the total work done by the opposite party for which he claimed payment, there were different versions both by the petitioners and the opposite party as noticed in the impugned award by the tribunal where the opposite party has been mentioned to have made three different claims in respect of total work including extra item at three different stages. The petitioners, on the other hand,



formed two committees/teams for the measurement and quantification of the work done by the opposite party. It has been noticed in the award that the team constituted by the petitioner-Chief Engineer by order dated 12.08.2009 made the measurement in between 17.09.2009 to 07.10.2009 in presence of the representative of the opposite party. However, another team was constituted by the petitioner-Chief Engineer by letter dated 10.04.2010 but this team made the measurement in absence of the opposite party or its representative. It is also noteworthy that in his order dated 09.10.2010, the petitioner-Chief Engineer has observed that the measurement made by the team constituted by order dated 12.08.2009 was acceptable. However, the petitioners failed to produce the measurement report by the team constituted by order dated 12.08.2009 in compliance with the direction of the tribunal in that regard; and even thereafter one of the members of the said team appeared and testified before the tribunal the measurement report the copy of which was produced by the opposite party but the petitioners completely failed to produce before the tribunal the evaluation of the work done in respect of both the pre level and post level as per the direction. Faced with this situation, the tribunal eventually in exercise of its power under Section 26 of the Arbitration and Conciliation Act, 1996 appointed an expert for the purpose of



measurement and evaluation of the work done by the opposite party. The report was submitted by the said expert on 06.11.2014 which has been directed to be the part of the record by the Tribunal after finding the same to have been done in most descriptive and suitable manner. In the said report, the total value of the work done by the opposite party was found to be Rs. 4,63,69,905.00.

After considering the materials on record including the expert report, the tribunal has reached to the conclusion that the opposite party is entitled to payment of Rs. 1,17,02,591.00 towards the work done in pursuance to the contract. As this finding of fact has been recorded by the tribunal on the basis of evidence which were acceptable and could have been relied upon, this Court is not persuaded to find the same to be unreasonable in any manner.

At this juncture, it would be relevant to mention that in the counter claim made by the petitioners, the liability upon the opposite party for payment of Rs. 3,68,95,017.00 upto 30.01.2011 with interest from 01.02.2011 was raised. As discussed by the tribunal in the impugned award, this liability against the opposite party has been raised primarily on the basis of the measurement and evaluation of the work done by the team/committee constituted by the petitioner-Chief Engineer by order dated 10.04.2010. However, the fact has not been disputed that this measurement by the



team/committee was done in absence of the petitioners or its representative. Therefore, the tribunal has rightly declined to rely upon the said exparte measurement report and has refused to allow the counter claim of the petitioners to that extent. During the course of submission before this Court, the reasons assigned by the tribunal for its refusal to allow the counter claim could not be shown or established to be perverse on behalf of the petitioners.

Further while considering the claim of the opposite party for release of the amount of security deposit deducted from the bills the finding has been recorded by the tribunal that there is reciprocal default by both the parties in performance of their respective parts of the contract and it has been found that the reasons for non-completion of the work under the contract were attributable to both the parties. On behalf of the petitioners, no material on record could be pointed out to show that the petitioners had taken appropriate actions which were required on their part for providing peaceful workable condition to the opposite party for completion of the assigned work. This fact is also corroborated when no penalty as provided in the contract was imposed upon the opposite party at any time if the progress of the contractual work was slow for the reasons attributable only to the opposite party. The fact also cannot be ignored that the time for performance of the contractual work was



extended by the petitioners upto 31.03.2010 but the order for rescission of the contract was passed in the meantime on 15.03.2010 itself. This Court, therefore, is not persuaded to align with the submission on behalf of the petitioners that there was no default on the part of the petitioners in performance of their obligation towards the contract. It is, therefore, held that the tribunal has committed no illegality in passing the award for return of the amount of security deposit in phased manner as mentioned in the award. Similarly, in absence of any evidence on behalf of the petitioners establishing adverse finding recorded at any point of time in respect of the quality of the work performed by the opposite party, the award of the amount deducted on the bills towards quality test also cannot be faulted with. It is also well settled that the bank guarantee furnished for due performance of the contractual work by the contractor could have been invoked only in case of breach of the terms of the contract on the part of the contractor alone but the invocation of the bank guarantee in a case where both parties to the contract are at default cannot be legally sustained. As aforementioned, the finding of fact has been recorded by the tribunal after appreciating the facts and circumstances of the case as well as the materials on record that both the petitioners and the opposite party were at default leading to the non-performance of the contract. The learned counsel for the



petitioners, in this backdrop, could not convince this Court to hold that the tribunal has committed illegality or material irregularity in directing for refund of the amount of the bank guarantee along with interest to the opposite party.

The perusal of the impugned award demonstrates that the tribunal has declined to allow the remaining claim (s) of the petitioners and has further allowed the remaining counter claim (s) as made by the petitioners.

The ambit and scope of jurisdiction of this Court under Section 13 of the Bihar Public Works & Contract Disputes Arbitration Tribunal Act, 2008, as apparent from the language of the said provision itself, is akin to the revisional jurisdiction under Section 115 C.P.C. of this Court and for the said purpose the well settled limitations in exercise of such jurisdiction would be attracted. One of such limitations on the revisional jurisdiction is the absence of scope of re-appreciation of evidence for the purpose of interdicting the finding of fact in the impugned award/order unless it is shown or established that the impugned award/order suffers from jurisdictional error, illegality or material irregularity. The Apex Court in the case of **Ispat Engineering & Foundry Works, B.S. City, Bokaro Vs. Steel Authority of India Ltd., B.S. City, Bokaro, 2001 (6) SCC 347** has also highlighted little scope for



reappraisal of evidence in judicial review of an arbitral award, as follows:-

“4.....Needless to record that there exists a long catena of cases through which the law seems to be rather well settled that the reappraisal of evidence by the court is not permissible.....In the event of there being no reason in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, interference would still be not available unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. This Court went on to record that in the event, however, two views are possible on a question of law, the court would not be justified in interfering with the award of the arbitrator if the view taken recourse to is a possible view.....”

In the present case, the entire submissions on behalf of the petitioners have centered around re-appreciation of evidence for the purpose of taking another view on the issues arising between the parties but without satisfying this Court that the conclusions by the tribunal in the impugned award on the issues arising between the parties were not possible conclusions or the said conclusions suffer from perversity in any manner. This Court finds that the conclusions



by the tribunal are based upon appreciation of evidence and materials on record and the impugned award does not suffer from error of jurisdiction, illegality or material irregularity.

For the reasons and discussions as above, this revision application, sans merit, is dismissed.

(V. Nath, J)

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