

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.21796 of 2011

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M/S Ganga Construction Co., a Partnership Firm having its Office at East of Deepshikha Cinema, 1st Lane, Vishwanath Nagar, P.O., P.S., Town & District-Begusarai through one of its Partners, Sanjeev Kumar Singh, S/o Shri Rajeshwari Prasad Singh, Resident of At: Lohiya Nagar, P.O. Suhird Nagar, P.S.: Suhird Nagar, town & District-Begusarai

.... Petitioner/s

Versus

1. The East Central Railway through the Chief Administrative Officer (Construction), East Central Railway, Mahendru Ghat, Patna.
2. The Finance Advisor & Chief Accountant Officer [Construction], East Central Railway, Mahendru Ghat, Patna.
3. The Chief Engineer (Construction), N-1, East Central Railway, Mahendru Ghat, Patna.
4. The Dy.Chief Engineer(Construction) II, Darbhanga, East Central Railway, Darbhanga.
5. The Divisional Forest Officer, Mithila Forest Division, Darbhanga.
6. The State of Bihar through the Principal Secretary, Department of Forest, Government of Bihar, Patna.

.... Respondent/s

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Appearance :

For the Petitioner	:	Mr. Gautam Kumar Kejriwal, Advocate Mr. Atal Bihari Pandey, Advocate Mr. Mohit Agarwal, Advocate
For the Railways	:	Mrs. Nivedita Nirvikar, Advocate
For the S t a t e	:	Mr. Sarvesh Singh, AAG-13 Mr. Punit Siddhartha, A.C. to AAG-13

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CORAM: HONOURABLE JUSTICE SMT. ANJANA MISHRA

CAV JUDGMENT

Date: 23 -03-2017

The present writ application filed by the writ petitioner

M/s Ganga Construction Co. also involves similar issues and is thus being disposed of on the same rationale as was available in the writ application, being CWJC No.13020 of 2011 (Fulena Construction Pvt. Ltd. Vs. The East Central Railway and others).

2. The petitioner in the present writ application seeks



quashing letter dated 30.03.2011, as contained in Annexure-11, by which the respondents have imposed the risks and costs components in the fresh tender notice and also for declaration that no risks and costs component could be imposed. It also seeks a direction from this Court to close the contract awarded to the next petitioner.

3. The facts of the present writ application are virtually similar inasmuch as the petitioner by virtue of agreement dated 15.02.2007 commenced work for construction of a new Railway line between Sakari and Hasanpur.

4. The contention of the petitioner was that in pursuance of certain instructions received by the site Engineer of the Railways, the work came to be stopped as the site in question was covered under Panchchi Vihar and because there had been no clearance for construction of the same from the Forest Department of the State. Accordingly, the letter (Annexure 3) had been issued by the District Forest Officer, Darbhanga, by which the petitioner had received verbal instructions from the Railways to stop further construction. The petitioner had also given representation regarding stoppage of work on the basis of oral instruction but vide letter dated 06.05.2009, the petitioner had been given notice by the respondents to start work, failing



which termination would follow.

5. Learned counsel for the petitioner submitted that the petitioner, vide his letters dated 12.05.2009 and 06.02.2010, had represented to the Railways regarding unavailability of site due to water logging and standing crops and also the hindrance made by the Department of Forests, but the same remained unanswered by the Railways. The petitioner had also protested against the illegal deduction of royalty from his bills against the recession made under Clause 23.4 of the Agreement. The petitioner was granted time extension till 31.03.2011. Subsequently, on 26.03.2011, respondent had issued 48 hours' notice to the petitioner and thereafter proceeded to issue the letter dated 30.03.2011 rescinding the contract under Clause 62 of the General Conditions of Contract ('GCC', in short). Thereafter, a fresh tender was issued on 04.05.2011 with a risks and costs clause for the same work of the Railways. The said tender was opened on 06.05.2011 and the offer made by M/s Peartree Enterprises was accepted on 17.01.2012.

6. The impugned action of the Railways has been assailed by the petitioner herein, on the same issue of forest clearance and on the ground of frustration of contract being caused on account of water logging and standing crops and



illegally deduction of royalty.

7. Learned counsel appearing on behalf of the petitioner has tried to rely on Sections 56 and 67 of the Contract Act and has sought to apply the doctrine of frustration/induced frustration. The contention raised is whether the contract entered into between the petitioner and the Railways stood frustrated due to non-performance of obligation by the other party. He submitted that the petitioner was unable to perform his part of the contract in view of the fact that Government did not extend assistance with regard to the clarification sought by the petitioner as to whether the letter issued by the Forest Department was to be acted on by the petitioner or not. Thus, the contract as entered into by the petitioner stood frustrated and discharged the appellant from his obligation to perform his part of the same. In this context, he has referred to the judgment of the Apex Court in the case of *Jai Durga Finvest (P) Ltd. v. State of Haryana*, reported in (2004) 3 SCC 381. In this context, this Court after having gone through the facts of the case finds that there was no hindrance, as alleged by the petitioner. In fact, the Railways had specifically asked the petitioner to go-ahead with the construction of the Railway line as had been allotted to him and, therefore, by no stretch of imagination, it could be said that



the respondent had rendered impossible or frustrated the contract on any count whatsoever. As such, the aforementioned judgment has no application to the facts of the present case.

8. The other decision cited by the petitioner in the case of *Md. Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.*, reported in (2004) 9 SCC 619, also relates to Section 56 of the Contract Act and the frustration of contract arising out of impossibility of fulfilling contractual obligation. In the said case, the Apex Court has clearly held as follows:

“In the said circumstances, the onus to prove that the frustration of contract was a self-induced one lay on the party making such allegation.”

9. On the other hand, the Railways have submitted that the petitioner's approach to performing his part of his contract was not positive from the very beginning as again and again the petitioner prayed of extension of contract period but failed to complete the work despite having been given ample opportunity for more than one occasion. It was contended by the Railways that the petitioner always tried to shift its failure over others; first, taking the shelter of the letter of Forest Department, which was a matter between the Railways and the Forest Department and had nothing to do with the petitioner.



10. Learned counsel for the Railways further submitted that the petitioner was allotted the work from kilometers 32.300 to 49.049 whereas the restricted area is from kilometers 25.360 to 28.660. Thus, no area of the forest fell within the zone of operation of the petitioner, but he failed to complete his work raising pretext of restraint having been put by the Forest Department. Furthermore, in the very said area, other contractors, who have been awarded the said work, have already completed the same, which was not done by the petitioner over a span of almost five years. The section from Neuri to Biraul, which was part of the work of the petitioner, has now been completed and open to traffic.

11. It was submitted that the contract of the petitioner deserved to be terminated much earlier, but the petitioner, vide his letter of undertaking dated 02.07.2010, had submitted that they would complete the work on the same rate, terms and conditions stipulated in the tender document and would not claim for any escalation, compensation or damage for the extended period. It was further clarified by the petitioner in his representation that if his work is not completed by 30.03.2011, the respondents could terminate the contract. It was on the basis of such undertaking that the Railways, once again,



extended the terms of agreement to 31.03.2011. But once again the petitioner miserably failed to execute the work even after the extension was granted to him up to 31.03.2011. As such, the Railways proceeded with rescinding the petitioner's contract, issuing fresh tender and awarding the same to another contractor, who has since then completed the work on the same stretch. Thus, there is no illegality in the impugned actions of the respondents and the writ application is fully misconceived and fit to be dismissed.

12. I have heard the parties and I have also perused the documents annexed with the writ application as well as those which form part of the counter affidavit. It appears that the Forest Department had indeed issued a letter to the said effect, but was subsequently clarified and the Railways in its letter had clearly informed the petitioner to resume work and complete it within the time frame fixed therein. However, the said letter from the Forest Department came into existence only in the year 2008 whereas the petitioner had been dilly-dallying from the time the tender was allotted to him in the year 2006 till 2008. Subsequently, also after the Railways clearly stated to the petitioner that the Panchi Vihar fell outside the stretch which was required to be constructed by him. It was further submitted that over and above



the aforementioned reason, the petitioner also took the plea of other hindrances, such as water logging, non-payment of 'on account' bill and also deduction of royalty from his own bills to dishonour his part of the contract. As such, the Railways had no option but to proceed further and was fully justified to cancel the contract awarded to the petitioner and proceed to issue further tender and award it to one other such contractor who has since completed the construction of railway line.

13. It appears that under such circumstances alone, the contract awarded to the petitioner was rescinded in terms of Clause 62 of the GCC and the risk and the cost clause has been imposed on the petitioner making him liable to payment thereof, which, in the considered opinion of this Court, is wholly legal and valid.

14. A counter affidavit has been filed by the Divisional Forest Officer, Mithila Forest Division, Darbhanga- Respondent No.5 and 6, in which they have stated that since the construction of new railway line Sikri-Hasanpur was to be made through Kusheshwar Asthan i.e., Kusheshwar Asthan Bird Sanctuary, which has been notified by Notification No.881E dated 05.07.1994 of the State Government as a Sanctuary under Wildlife (Protection) Act, 1972, as a protected area, the



Divisional Forest Officer by his letter dated 24.12.2008 stopped the present work of passing through the sanctuary area. For the construction of the said area, the East Central Railway, Samastipur, vide letter dated 10.01.2012, submitted proposal on prescribed format for obtaining Wildlife clearance for railway project between Sakri and Hasanpur Road via Kusheshwar Asthan and the matter is under consideration by the Ministry of Environment Forest and Climate Change, Government of India. However, the petitioner's area of construction was beyond the Forest area.

15. Having considered the rival submissions and also noticing the repeated evasion made by the petitioner in performing his part of the contract despite the generous approach taken by the Railways, this Court is of the considered opinion that if the subsequent tenderer could have completed the work in the same set of given facts and circumstances, the petitioner's non-performance of the work under the very circumstances was wholly uncalled for. This Court also finds with certainty that the petitioner, for the reason best known to him and for no cogent and justifiable reason, had failed all along to perform his part of contract. Consequently, the Railways after affording him ample opportunity had proceeded to rescind the contract issued in favour



of the petitioner at its own risk and cost. As such, the impugned order does not stand vitiated on any count.

16. In the result, I find no merit in this writ application. The impugned order dated 30.03.2011, as contained in Annexure 11, is wholly legal and valid and does not warrant interference under Article 226 of the Constitution of India and is, accordingly, upheld. The writ application is, thus, dismissed. However, in the facts and circumstances, there shall be no order as to costs.

(Anjana Mishra, J)

PNM

AFR/NAFR	NAFR
CAV DATE	10.02.2017
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