

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.8955 of 2011

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M/S Laxmi Enterprises, a proprietorship firm through its proprietor, namely, Bireshwar Prasad Shukla, S/O Late Rameshwar Prasad Shukla, R/O Village Khanjaha Chak, P.S.- Lalganj, Distt. - Vaishali

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Road Construction Department, Vishweshwariya Bhawan, Bailey Road, Patna
2. The Joint Secretary, Road Construction Department, Vishweshwariya Bhawan, Bailey Road, Patna
3. The Engineer-in-Chief-Cum-Addl. Commissioner-Cum-Special Secretary, Road Construction Department, Vishweshwariya Bhawan, Bailey Road, Patna
4. The Chief Engineer, Road Construction Department, South Bihar, Darbhanga
5. The Superintending Engineer, Road Construction Department (R.C.C.), Saran Circle, Hajipur, Vaishali
6. The Executive Engineer, Vaishali Road Division, Hajipur, Vaishali

.... Respondent/s

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Appearance :

For the Petitioner : Mr. Shankar Dayal Singh, Advocate
Mr. Jagarnath Prasad, Advocate

For the Respondent-State : Mr. Binay Kumar Pandey, A.C. to G.A.-2

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CORAM: HONOURABLE JUSTICE SMT. ANJANA MISHRA

CAV JUDGMENT

Date: 28-06-2017

The petitioner herein, seeks to set aside the office order, bearing Memo No.5088(E) dated 10.12.2010, issued by the respondent-Engineer-in-Chief, Road Construction Department, Bihar, Patna, as contained in Annexure 1. By an interlocutory application, bearing I.A. No.3599 of 2017, the petitioner has further sought to challenge Office Memo No.1411(E) dated 15.04.2010, issued by the Engineer-in-Chief-Cum-Additional Commissioner-Cum-Special Secretary, Road Construction Department, Bihar,



Patna, whereby and whereunder the petitioner's application for extension of time has been rejected, and also Letter No.2279 dated 05.11.2012, issued by the respondent-Executive Engineer, as contained in Annexure 12 Series, whereby the aforesaid rejection order of the petitioner's application for extension of time has been shown to have been communicated to the petitioner.

2. The facts of the case succinctly stated are:

(i) The petitioner was a registered Class I Contractor conducting contract works in the respondent-Department as well as in other Department of the State of Bihar.

(ii) The petitioner was awarded with the contract work, namely, S/R to Fakuli-Lalganj Road in K.M.1st, 2nd and 8th for the year 2006-07. After due process of tendering, an agreement was executed between the respondent-Executive Engineer and the petitioner, vide Agreement No.29F2 of 2006-07 (Annexure 2) amounting to Rs.46,45,695/- and the date of commencement of the said work has been given as 09.01.2007 and the date of completion was given as 31.03.2007. As per the said agreement, the machinery, namely, 'Hot Mix Plant' was to be provided by the respondent.

(iii) The petitioner, after receiving the work order, started the work and completed the preliminary work and also purchased bitumen from the specified Indian Oil Bitumen Depot



for completing the rest bituminous work. But the Government Hot Mix Plant was not provided to the petitioner despite his letter dated 19.02.2007 (Annexure 3). On 20.02.2007, the respondent-Executive Engineer, vide his Office Letter No.283 (Annexure 4), intimated the petitioner that the departmental Hot Mix Plant was not available and, therefore, he should take appropriate steps for completing the work.

(iv) Since the said letter (Annexure 4) was issued at the fag end of the term, the work could not be completed due to the laches on the part of the respondents and hence, the respondent-Department extended the period of work plan to the next financial year under the spill over policy/decision, i.e., 2007-08. Accordingly, the petitioner completed the work in the month of February, 2008 to the best satisfaction of the respondents well within time.

(v) At the time of payment of the bill of the petitioner, the respondent-authorities deducted 10% of the amount on the entire value of the agreement as the extension of time was yet to be granted to the petitioner. The petitioner objected to the said 10% deduction, whereupon he was assured that the same would be refunded as and when he would apply for the extension of time, which was to be granted by the competent authorities of the



respondent-Department. As the delay had been caused on account of the laches of the authorities, the petitioner applied for extension of time. After accepting the running bills and on payment of final bills, he approached the Executive Engineer by means of an application duly recommended by the Junior Engineer, Assistant Engineer and the Executive Engineer also recommended on 10.06.2008 for grant of extension of time (Annexure 5 Series).

(vi) The excess deductions from the bills as detected by the petitioner are; (a) hire charges of plant and machinery in IInd running bill has been deducted in excess of the work estimate schedule prescribed by the respondent-Department. (b) In the IIIrd running bills, the said hire charges were deducted in accordance with the work estimated schedule. The excess amount was to a sum of Rs.1.80 lacs. (c) Vide Departmental policy issued by the respondent-Joint Secretary, vide Memo No.6/Niyam-02/08 3943(S) dated 18.03.2008 (Annexure 6 Series), neutralization of cost of bitumen price has been allowed in all F2 Agreement. The aforesaid policy was to the effect that if the price of the bitumen goes up during the course of execution or completion of work, the same shall be reimbursed to the Contractor, so that construction of road work does not suffer due to hike in bitumen prices. Hence, the petitioner filed a representation along with Departmental



policy/decision to the respondent-Executive Engineer on 13.10.2009 for refund of the aforesaid amounts on both heads, namely, the excess deduction of hire charges and the difference amount of bitumen price.

(vii) The petitioner also represented on several occasions (Annexure 7 series) and a representation was filed online on 17.12.2009 (Annexure 8), upon which the respondent-Engineer-in-Chief, vide his Office Letter No.80(E) dated 08.01.2010, called upon the respondent-Executive Engineer to furnish a report to the Department. By letter dated 25.01.2010, contained in Office Letter No.94(Annu) and Office Letter No.318(Annu) dated 17.03.2010, the Executive Engineer has clearly stated that the work could not have been completed in time due to non-availability of Hot Mix Plant and also bitumen and recommended for grant of extension of time. However, the petitioner was not given any notice of such letters, especially letter dated 17.03.2010.

(viii) Constrained by the inaction of the respondent-authorities, the petitioner filed CWJC No.12711 of 2010, which was, however, disposed of on 06.08.2010 (Annexure 10), directing the respondent-Engineer-in-Chief/Principal Secretary, Road Construction Department to consider the petitioner's claim and dispose of the same within a period of four months from the date of



receipt/production of a copy of the said order. Though the petitioner represented with a copy of the aforesaid order, the Principal Secretary failed to take a final decision and though he was assured that he would be informed and heard in the matter, there was no communication whatsoever from his end and finally, vide order dated 10.12.2010 (Annexure 1), the impugned order was passed without appreciating the material facts already available with the Department and in a most arbitrary and whimsical manner the petitioner was subjected to financial victimization without any just or valid cause.

3. Learned counsel appearing for the petitioner contended that till date there was no communication from the respondents with regard to the earlier rejection of application for extension of time and there being no communication of the rejection of the said order, the respondents could not use the same as a ground for passing the impugned order, as contained in Annexure 1 to the present writ application. It was further submitted by the learned counsel for the petitioner that not only the impugned order is in complete violation of the principles of natural justice but also the delay has been occasioned on account of laches of the respondents as the work in question had spilled over to the next financial year by the respondent-authorities for their failure to make



available the Hot Mix Plant. Having failed to comply with their part of contract, it was not open to them to pass an order saddling the petitioner with such financial liability. It was thus contended that the petitioner was being victimized and he was also not provided the benefit of the said policy decision regarding neutralization of the bitumen price, which was made available to other Contractors and which clearly provided that the repayment to the Contractor of difference of price for purchase of bitumen during the course of execution of work was available in the policy.

4. A counter affidavit has been filed by the Executive Engineer, Vaishali Road Division, Hajipur, wherein it has been stated that M/S Laxmi Enterprises entered into an agreement (29 F2 of 2006-07) for S/R to Fakuli-Lalganj Road in Km 1st, 2nd and 8th for the year 2006-07. The estimated cost of the work was Rs.46,45,695.00. The agreement was signed on 09.01.2007 and the time of completion was up to 31.03.2007. For this work, the agency were provided the required D.O. letter so as to enable them to purchase bitumen from the authorized Oil Company. But the agency did not carry out the work proportional to the time frame and they did not have the requisite quantity of bitumen essential for the completion of work in time. Further, the agency submitted a letter and requested for making available the departmental Hot Mix



Plant on 19.02.2007. It is further stated in the counter affidavit that keeping in view the short time left for the completion of work (31.03.2007), a letter bearing Letter No.283 dated 20.02.2007, was issued from the Division on the very next day. The letter allowed the agency to engage any private plant so as to complete the work within the stipulated time, which was 31.03.2007. But the agency did not have the required bitumen, which is evident from the photo copies of the invoices (Annexure 1 to the writ application). Since the work was not completed within the time allowed in the agreement, the deduction of Rs.4,62,038.00 was made from the bill of the agency as the agency was on fault and which was as per the provisions.

5. It was further submitted in the counter affidavit that the work had spilled over on account of fault of the agency as they did not carry out the work proportionally within the time allowed to them and thus deductions were made from the bills as per the provisions of the agreement. They further submitted that the time is the essence of the agreement and the agency has violated and faced the consequences.

6. A supplementary counter affidavit was also filed on 24.04.2017 by Respondent Nos.5 and 6, duly sworn by the Executive Engineer, Vaishali Road Division, Hajipur, wherein they



have placed on record Memo No.1411(E) dated 15.04.2010 (Annexure A), whereby and whereunder after due consideration, the petitioner's application for grant of extension of time, which was sent to the Office of the Engineer-in-Chief-Cum-Additional Commissioner-Cum-Special Secretary, Road Construction Department, was rejected. The said letter was also communicated to the petitioner by Helpline through which he had also made a complaint on 18.12.2009. Furthermore, the respondent-Executive Engineer has also placed on record Letter No.2279 dated 05.11.2012, communicated to the petitioner on 06.11.2012, which is in response to the petitioner's letter dated 30.10.2012, seeking information regarding extension of time. Thus, it was contended that at all point of times, the impugned orders have been brought to the knowledge of the petitioner. Letter No.2279 dated 05.11.2012 (Annexure B) appears to have been received by the petitioner on 06.11.2012 (Annexure C).

7. The aforesaid letters contained in Annexures B and C have now been challenged in I.A. No.3599 of 2017 by the petitioner stating that the impugned order contained in Office Letter No.1411(E) dated 15.04.2010 and also the impugned Office Letter No.2279 dated 05.11.2012 have never been communicated to the petitioner and it was only during the pendency of this writ



application, the respondents have come up with the said letters. The said letters clearly reveal that they have been passed without reasonable application of mind by the respondents as they have failed to appreciate that the work could not have been concluded within the time frame fixed due to the laches on the part of the respondents themselves. Though the application for extension of time was rejected in 2010 itself, yet even in the previous writ application, the same was not communicated to the petitioner and as such, can be treated to be a mere eyewash. Furthermore, a bare reading of Annexure A and B of the supplementary counter affidavit, also impugned in the I.A., reveals the clear contradiction of the office memo and creates a serious cloud on their genuineness.

8. Having heard learned counsel for the petitioner and the learned counsel appearing on behalf of the State and considering the gamut of circumstances available on record, it appears that the respondents have strung along the petitioner for a considerable length of time. The agreement clearly stipulated that the Hot Mix Plant was to be provided by the respondents, but it was only after lapse of a substantial period of the agreement that the petitioner was informed regarding the lack of availability of the same, as a consequence thereof, the work spilled over into the



following financial year, which was permitted to be performed by the petitioner and it was duly completed. The application for extension of time had also been recommended by the authorities, who had permitted the continuance and completion of the work and thus there arose no question as to why the petitioner's application for extension of time be rejected. More so, the said rejection order has not been communicated to the petitioner and it was only under orders of this Court that the same has been brought on the record. Furthermore, the authorities have not given an opportunity to the petitioner to explain the circumstances of the delay, which indicates gross violation of the principles of natural justice.

9. Under the circumstances, this Court is not persuaded to accept the arguments advanced by the respondents regarding the proportionality of completion of the work within the time frame set up in the agreement. The respondents have also not placed the relevant documents at the time the order was being passed by the earlier writ Court, which directed disposal of the representation vide its order dated 06.08.2010.

10. As such, this Court is persuaded to accept the prayer of the writ petitioner and direct the release of the amount due to him along with interest at the market rate from the date it fell due to the date of actual payment. The authorities shall refund the amount



so withheld being Rs.4,62,038/- (Four lacs sixty-two thousand thirty eight only) and other such prayers referred to in paragraph 1 of the writ application, within a period of three months from the date of receipt/production of a copy of this judgment.

11. In the result, the writ application is allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

(Anjana Mishra, J)

PNM

AFR/NAFR	NAFR
CAV DATE	15.05.2017
Uploading Date	02.07.2017
Transmission Date	NA

