

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.23598 of 2012

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M/S Rungta Enterprises through its Proprietor Mahesh Kumar Rungta, At-
Kahalgaon, P.S.- Kahalgaon, Distt.- Bhagalpur

.... Petitioner/s

Versus

1. The State of Bihar through, the Principal Secretary, Public Works Deptt., State of Bihar, Patna
2. That Engineer-in-Chief, Public Works Department, Bihar, Patna
3. The Chief Engineer, East Bihar Road Circle, Road Division, Bhagalpur
4. The Executive Engineer, Road Division, Bhagalpur
5. The Superintending Engineer, Road Division, Bhagalpur

.... Respondent/s

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Appearance :

For the Petitioner : Mr. Arun Kumar, Advocate
Mr. Swapnil Kumar Singh, Advocate
For the Respondent : Mr. K.K. Singh, A.C. to S.C.-10

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CORAM: HONOURABLE JUSTICE SMT. ANJANA MISHRA

CAV JUDGMENT

Date: 10-05-2017

The present writ application has been filed seeking writ in the nature of *certiorari*, for setting aside the office order, contained in Memo No.3091 dated 08.11.2012, issued under the signature of the Executive Engineer, Road Division, Bhagalpur (Annexure 5), whereby and whereunder the petitioner's request for withdrawing the security deposit has been declined on the ground that an exemplary costs of Rs12.90 lacs has been imposed on him for slow completion of allotted works of widening and strengthening of Trimohan-Ekchari-Dhanoura-Mahagama Road in KM 0 to 20.20 and other P.C.C. works for the year 2006-07. The



petitioner, by means of I.A. No. 8930 of 2016, has further sought for quashing of the orders dated 06.07.2007 (Annexure A to the 2nd supplementary counter affidavit filed on behalf of Respondent No.4), 21.05.2007 and 13.06.2007 (Annexure B series to the 2nd supplementary counter affidavit filed on behalf of Respondent No.4), passed by the then Executive Engineer, Road Division, RCD, Bhagalpur, whereunder for slow completion of works, the petitioner has been directed to deposit Rs.12.90 lacs as penalty, though the said orders were never communicated to him earlier. Thus, the petitioner seeks a writ/mandamus for refund of the security amount, which is sought to be adjusted by the respondents against the imposed penalty.

2. Learned counsel for the petitioner submits that on 14.03.2007, the petitioner-a Construction Company, after following the due procedure, was awarded the contract and accordingly an agreement was executed between the petitioner and the respondent- Executive Engineer, R.C.C. Road Division, Bhagalpur. On 09.12.2007, the respondent- Executive Engineer visited the site and directed the petitioner-Company to stop work for using 200 mm WMM works in place of 150 mm and accordingly, made entry in the site work book. As such, on 26.12.2008, the Chief Engineer on the basis of the entries made in the site work books, a



supplementary agreement was executed in addition to Agreement No.3(P)F2/2006-07 dated 14.03.2007. In view of the fresh agreement entered into between the parties, the petitioner applied for extension of time as the work could not be completed in time due to change in the nature of the work, which was duly granted to him.

3. It is submitted by the petitioner that the works were completed within the extended period of completion of work, which was approved by the respondent-authorities and accordingly payment has been made to the petitioner. It is further submitted that as per the supplementary agreement entered into between the parties, there was a provision of Defect Liability Period (hereinafter referred to as 'DLP') of three years after completion of works and the petitioner has also fulfilled the criteria and from time to time maintained the constructed roads after completion of the works undertaken by him.

4. Learned counsel for the petitioner further submitted that after completion of the DLP of three years, the petitioner claimed for refund of the security deposit as he had already completed the works and the payment of the works contract had been done, but the petitioner was issued Order No.18, bearing Memo No.3091 dated 08.11.2012, issued under the signature of



respondent-Executive Engineer, informing him that Rs.12.90 lacs has been imposed as costs upon him for slow completion of works as is evident from Letter No.672 itself.

5. Learned counsel for the petitioner submits that the penalty imposed on the petitioner came to his knowledge only in the year 2012 and at no point of time, the order imposing penalty was ever brought to his knowledge. He further submits that if at all such order has been passed, the same ought to have been done after affording an opportunity to the petitioner to show cause against the same and as such, the same cannot be saddled on the shoulder of the petitioner as being in utter violation of the principles of natural justice. Accordingly, he prays that the impugned orders dated 06.07.2007, 21.05.2007 and 13.06.2007 and also Memo No.3091 dated 08.11.2012 be quashed as being in utter violation of the principles of natural justice and are wholly unreasonably, arbitrary and against the principle of law. Accordingly, he further prays for refund of the security deposit.

6. In the counter affidavit filed by the respondent-State of Bihar, a bald statement has been made that the petitioner could not adhere to the work schedule and therefore, in the year 2007 itself, fine was imposed but it was not recovered then. Subsequently, the same was pointed out during audit and when it



came to the notice of the authority, fine was recovered, vide letter No.3091 dated 08.11.2012. It is submitted that though alterations have been made in the work and the petitioner had been directed to construct the road on 200 mm WMM in place of 150 mm WMM, but at no point of time, he ever instructed to stop the work. Thus, in terms of SBD Clause No.2, fine was imposed upon the petitioner.

7. As is evident from the averments, the respondents do not deny in their counter affidavit, that the Contractor performed his contractual obligation by maintaining the road during the DLP. However, the fine was imposed in the first week of July, 2007 itself for non-achievement of milestone, but due to inadvertence could not be deducted from his bills. However, as observed by this Court, the counter affidavit is silent as to whether any notice for showing cause has been issued to the petitioner. Hence, admittedly, it was during the audit of 2012 that the matter came to the notice after five years and the fine was deducted from the security deposit of the Contractor. It was thus contended by the learned counsel for the State that the writ application was misconceived and fit to be dismissed on this score alone.

8. Two sets of supplementary counter affidavits have been brought on the record by the State. In the supplementary counter affidavit filed by the State, an agreement dated 04.02.2009



has also been brought on record, which goes to show that the date of completion of work had been extended to 23.02.2009 (Annexure C), which is the second supplementary agreement between the parties. It appears from Annexure E to the counter affidavit that the respondents had taken measurements and the payments were directed to be made by him on 02.08.2007, which is evident from Annexure E to the counter affidavit. However, there is no finding on the record to show that the petitioner was given the notice against the delayed progress of work which led to the imposition of the costs on him to the tune of Rs.12.90 lacs.

9. By means of 2nd supplementary counter affidavit, the respondents have brought on record the impugned order of penalty dated 06.07.2007, as contained in Annexure A to the 2nd supplementary counter affidavit filed on behalf of Respondent No.4, as also the orders dated 21.05.2007 and 13.06.2007, as contained in Annexure B series to the 2nd supplementary counter affidavit filed on behalf of Respondent No.4. The respondents have also brought on record the despatch register, which goes to indicate despatch of a letter to Rungta Enterprises. However, service of notice prior to the issuance of the order and/or receipt showing service of notice is not available on the record so as to substantiate that there is no violation of the principles of natural justice.



10. Having heard learned counsel for the petitioner and the learned counsel appearing on behalf of the State, it appears that the impugned orders of penalty has been passed against the petitioner without any notice to him to show cause. It is well settled that any order imposing civil liability on the petitioner causing substantial loss to him has to be done after following the principles of natural justice and after due compliance of the principle of *audi alteram partem*.

11. It further appears from the materials on record that neither these principles have been followed by the respondents, instead after lapse of three years, the petitioner has been saddled with the impugned order, as contained in Annexure 5, purported to have been issued in pursuance of the orders 06.07.2007, 21.05.2007 and 13.06.2007, issued and brought on record under Annexures A and B series.

12. This Court also finds and holds that since the petitioner has completed the work under the extended period for completion of works, the imposition of penalty lacks rationale. At no point of time, the petitioner was ever noticed with regard to the non-completion of work, and the nature of construction to be made having been altered by the respondents, which stands corroborated by three agreements executed one after the other. Indeed, such



actions reveal that the respondents were all along coordinating with the petitioner. Furthermore, the bills having been paid to the petitioner, the imposition of penalty at the stage of refund is wholly uncalled for and fit to be deprecated.

13. In the result, the writ application is allowed. The impugned order dated 08.11.2012, as contained in Annexure 5 to the writ application and the impugned orders dated 06.07.2007 as also dated 21.05.2007 and 13.06.2007, as contained in Annexures A and B series, respectively, to the 2nd supplementary counter affidavit filed on behalf of Respondent No.4, are set aside. The respondents are directed to issue necessary orders for refund of the security deposit within a period of three months from the date of receipt/communication of a copy of this judgment/order. However, in the facts and circumstances of the case, there shall be no order as to costs.

(Anjana Mishra, J)

PNM

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