IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Revision No.173 of 2014

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M/s Lakhandeo Construction Pvt. Ltd., Director Sri Anil Kumar Singh son of Late Kameshwar Pd. Singh resident of Katihar, District - Katihar

.... Petitioner

Versus

1. The State of Bihar, through the Principal Secretary, Water Resources Department, Sinchai Bhawan, Harding Road, Patna
2. The Chief Engineer, Water Resources Department, Bhagalpur
3. The Superintending Engineer, Water Resources Department, Bhagalpur Circle, Bhagalpur
4. The Executive Engineer, Water Resources Department, Ganga Pump Canal Division No. 2, Bateshwar Asthan Shivir Shivanarayanpur Kahalgaon, Bhagalpur

.... Respondents

with

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Civil Revision No. 229 of 2016

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1. The State of Bihar through the Principal Secretary, Water Resources Department, 'Sinchai Bhawan' Harding Road, Patna
2. The Chief Engineer, Water Resources Department, Bhagalpur
3. The Superintending Engineer, Water Resources Department, Bhagalpur Circle, Bhagalpur
4. The Executive Engineer, Water Resources Department, Ganga Pump Canal Division No. 02, Bateshwar Asthan Shivir Shivnarayanpur, Kahalgaon, Bhagalpur

.... Petitioners

Versus

M/s Lakhandeo Construction Pvt. Limited, Director Shri Anil Kumar Singh, Son of Late Kameshwar Prasad Singh, Resident of Garda Road, Katihar, District - Katihar

.... Respondent

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Appearance :
(In C.R. No.173 of 2014)
For the Petitioner/s : Mr. Uma Shankar Tiwary
For the Respondent/s : Mr. Sheo Shankar Prasad (SC10)
(In C.R. No.229 of 2016)
For the Petitioner/s : Mr. Harshvardhan Shivsundaram
For the Respondent/s : Mr. Uma Shankar Tiwary, Adv.

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA
CAV JUDGMENT
Date: 20-07-2017

1. Both the above stated civil revision petitions have arisen out of award dated 14.08.2014 passed by the Bihar Public Works Contract Disputes Arbitration Tribunal, Patna in Reference Case No. 105 of 2012 and accordingly, both the aforesaid revision petitions were taken for hearing together and the above stated revision petitions are being disposed of by this common order.

2. Briefly stated facts are as follows:- Parties to the above stated revision petitions entered into an agreement for execution of the work namely, Gap-filling and Rain cut from R.D.0.00 to 10.00 H.L.M.C. under Bateshwar Asthan Ganga Pump Canal Scheme vide agreement no. 1F2 of 2009-10 on 16.06.2009 which is evident from perusal of Annexure-1 to the revision petitions. The estimated cost of the said work was at Rs. 47,36,256/- whereas the agreement value of the said work was at Rs. 40,25,818/- and time of completion of the work was only two months from the date of work order. The work

order was issued on 17.06.2009. However, the work could not be completed within the period as agreed by the parties vide agreement dated 16.06.2009 and the work continued and the concerned Assistant Engineer prepared first on account bill vide M.B. No. 426 dated 02.01.2010 valued at Rs. 26,11,157/- but the aforesaid amount of Rs. 26,11,157/- was reduced and only amount of Rs. 21,42,507/- was passed on 07.01.2010. Again the Assistant Engineer prepared second on account bill vide MB No. 426 dated 15.01.2010 valued at Rs. 14,90,942/- but the aforesaid second on account bill was not paid to petitioner in C.R. No. 173 of 2014 on the ground that one Sheonandan Thakur, Junior Engineer had made complain against the Assistant Engineer as well as Executive Engineer. However, on the complaint of aforesaid Junior Engineer, the State Government constituted a flying squad to ascertain the veracity and authenticity of the complaint filed by the above stated Junior Engineer. The Flying Squad visited the office but the then Executive Engineer did not provide the required documents to Flying Squad as a result whereof the Flying Squad was not in a position to measure the actual quantity and quality of the work done by the petitioner in C.R. No. 173 of 2014.

3. It is pertinent to note here that claim of the petitioner in C.R. No. 173 of 2014 is that he had already completed more than 90%

work allotted to him. The aforesaid Flying Squad made responsible to Executive Engineer, namely, Dharmadeo Singh and Assistant Engineer, namely, Brentus Murmu for not supplying the relevant documents to the Flying Squad. Moreover, the aforesaid Flying Squad mentioned in its report that an imaginary measurement had been entered in measurement book in respect of the work of the petitioner in C.R. No. 173 of 2014. The government did not favour the report of Flying Squad and exonerated the Executive Engineer from the charges levelled against him. Again, the Chief Engineer on 11.02.2011 constituted a Committee comprising of Shri Jagatanand Ram, In charge Assistant Engineer of the concerned Subdivision and Shri Sheo Nandan Thakur, the concerned Junior Engineer, who had made complain as well as all the Junior Engineers of the concerned Subdivision to record the measurement of the work done by the petitioner in C.R. No. 173 of 2014. However, again the Chief Engineer constituted an another independent Committee comprising of Sri Jag Nandan Ram, S.D.O., Deo Brat Mandal, Estimating Officer and Shushant Shekhar, Estimating Officer for measurement as well as other works. The aforesaid Committee did not submit report though relevant documents had already been made available to the said Committee. The petitioner in C.R. No. 173 of 2014 gave several reminders to concerned authorities for his payment but the payment was not made and thereafter petitioner in C.R. No. 173 of 2014 filed C.W.J.C. No. 7147 of 2012 before this court for issuance of direction to concerned officials to pay his dues amount with interest. The aforesaid C.W.J.C. No. 7147 of 2012 was disposed of vide order dated 05.07.2012 directing the concerned Executive Engineer to examine the bills of the petitioner in C.R. No. 173 of 2014 in the light of work done by him and ensure release of his admissible amount of the bills. Having receipt the aforesaid direction of this court, the Executive Engineer directed the concerned S.D.O. to submit final bill/ final measurement and accordingly, on 11.08.2012 he submitted final bill to concerned Executive Engineer showing recovery of Rs. 15,51,066/- and thereafter, the Executive Engineer refused to make payment of amount of second bill vide his order dated 30.09.2012. It is also pertinent to note here that according to agreement dated 16.06.2009 the rate of earth work by mechanical means was fixed at Rs. 123.40 per M^3 and petitioner in C.R. No. 173 of 2014 executed 15358.358 earth work through mechanical means till the date of first on account measurement and the total rate came to Rs. 18,25,221/- but at the time of making payment the respondent Executive Engineer reduced the above stated rate to Rs. 87.50 per M^3 and at that rate the amount of Rs. 18,25,221/- was reduced to Rs. 13,43,856/- and the amount of first on account bill of Rs. 26,11,165/- was reduced to Rs. 21,42,507/- and accordingly lesser amount to the tune of Rs. 4,68,658/- was paid to petitioner in C.R. No. 173 of 2014 against first on account bill.

4. However, all the disputes of the parties were referred to Tribunal and the Tribunal having considered all the materials available on the record came to conclusion that petitioner in C.R. No. 173 of 2014 was entitled to the payment of amount of Rs. 4,68,458/- with simple interest at the rate of 10% per annum from 07.03.2010, the date of first on account bill, till realization and was also entitled to payment of deduction on account of time extension of Rs. 2,14,250/- with simple interest of 10% per annum with effect from 07.01.2010 till realization and was also entitled to the refund of deducted security deposit amount of Rs. 1,07,105/- with simple interest of 10 % per annum with effect from 07.01.2010 as well as to refund the earnest money / security deposit in shape of pass book amount of Rs. 2,06,000. The Tribunal further held that the department was not entitled to recovery of any amount from the petitioner in C.R. No. 173 of 2014 and the petitioner in C.R. No. 173 of 2014 was also found to be entitled to cost and counsel fee as per schedule.

5. Being aggrieved and dissatisfied by the impugned award, C.R. No. 173 of 2014 has been filed on behalf of the contractor whereas C.R. No. 229 of 2016 has been filed by the State.

6. Learned counsel appearing in C.R. No. 173 of 2014 submitted that the Tribunal failed to take note of this fact that the concerned Assistant Engineer prepared second on account bill after measurement of the work but the Tribunal rejected the aforesaid second on account bill on the ground that the aforesaid bill was without any date and except the Assistant Engineer, no one had signed the said bill and furthermore, the date of measurement was not given in the aforesaid second on account bill. He further submitted that admittedly, the Tribunal released only Rs. 4,68,458/-in favour of the contractor out of amount of Rs. 14,90,942/- but refused to release the remaining amount of the aforesaid second on account bill. He further submitted that the contractor executed earth work amounting to Rs. 42,74,646/- and after deduction of 15% below the right net amount comes to Rs. 36,33,449/- out of which Rs. 21,42,507/- had already been paid against first on account bill but the balance of Rs. 14,90,942/- against second on account bill was never paid though the second on account bill was accepted by the Executive Engineer. He also submitted that concerned Committee appointed by the

department/government found that near about 80% work had already been completed by the contractor and the aforesaid report was never doubted. Therefore, at least, contractor was entitled to get amount of 80% work done by him but the Tribunal failed to take note of the aforesaid fact. He also submitted that no doubt, the complaint was made by the then Junior Engineer against the Assistant Engineer as well as other officials and the enquiry was held and several internal correspondence were made in the concerned department but the contractor was not at all concerned with the internal correspondence and reports and even if there was any adverse remarks in the aforesaid correspondence/reports against the contractor or in respect of the work done by him, then also, the dues of the contractor could not have denied unless the measurement of the work done by the competent authority speaks against the contractor.

7. Learned counsel for the contractor relied upon the decision of **M/s Raghav Construction, Singhwara, Darbhanga vs. The State of Bihar through the Secretary, Rural Development Department, Government of Bihar, Patna & Ors. reported in 2009(3) PLJR 507** wherein a co-ordinate Bench of this court has held that ***"A contractor is not supposed to look into Government procedures and files and ensure whether all internal procedures are followed or not."***

8. On the strength of aforesaid decision, learned counsel for the petitioner in C.R. No. 173 of 2014 submitted that second on account bill was prepared by the then Assistant Engineer but he left to put date of measurement at the top of aforesaid second on account bill and also left to put the date below his signature. He further submitted that admittedly, the aforesaid second on account bill was not prepared by concerned Junior Engineer but for the aforesaid irregularity the contractor could not have been made responsible and only on that ground the claim of the petitioner could not have been denied.

9. Learned counsel for the petitioner in C.R. No. 173 of 2014 further submitted that the then Assistant Engineer prepared second on account bill after taking the measurement during course of progress of the work and after that the flying Squad was constituted but the flying Squad could not succeed to measure the work done by the contractor for want of relevant documents and moreover, the measurement was done after one and half years of completion of the work.

10. Learned counsel for the petitioner in C.R. No. 173 of 2014 further submitted that the work order was issued on 17.06.2009 but the contractor wrote letter to concerned department expressing his inability to start the work due to ensuing rainy season and on the basis

of prayer of the contractor, the concerned department extended time of the work and, thereafter, after rainy season the contractor started the work and completed more than 80% work within the prescribed period and the remaining work could not be done due to non payment of second on account bill.

11. Learned counsel for the petitioner in C.R. No. 173 of 2014 further submitted that in the aforesaid circumstance, the Tribunal committed error in refusing to release the amount of second on account bill and interest to the contractor and, therefore, the impugned award is liable to be modified.

12. On the other hand, learned counsel appearing for the State refuted the above stated submissions arguing that work allotted to the contractor was not a repairing work rather new construction work was allotted to the contractor and contractor agreed to complete the work within two months from the date of issuance of work order which was issued on 17.06.2009. He further submitted that due to slackness of the contract the work could not be completed within the stipulated period though several letters and reminders were given to the contractor to start the work and accordingly, the contractor violated the Clause 2 of the agreement. He further submitted that according to Clause 2 of the aforesaid agreement, the second final

account bill was prepared and the recovery of rupees fifteen lacs and odd was rightly shown in the second final account bill but Tribunal failed to take note of this settled principle that time is the essence of the contract.

13. Learned counsel appearing for the State further submitted that according to P.W.D. Code, the entry in measurement book is made by Junior Engineer after taking measurement of the work and thereafter, the Assistant Engineer verifies the same but in the present case, it was Assistant Engineer, Brentus Murmu, who prepared and made entry in the measurement book without any previous measurement of the Junior Engineer. He further submitted that first on account bill was passed during progress of the work and since the aforesaid first on account bill was roughly prepared, the aforesaid bill was passed by the Executive Engineer but when again the second on account bill was prepared by Assistant Engineer, namely, Brentus Murmu violating the P.W.D. Code, the Executive Engineer refused to pass the aforesaid bill and thereafter, Flying Squad and several Committees were constituted time to time and it was found that the measurement mentioned in the measurement book by the then Assistant Engineer was imaginary and inflated. He further submitted that Committee took the measurement between 15.02.2011

to 29.03.2011 and submitted final bill of work on 11.08.2012 showing recovery of Rs. 15,51,066/- He also submitted that the concerned Executive Engineer passed reasoned order vide his letter no. 798 dated 30.09.2012 as per direction given by this court in C.W.J.C. No. 7147 of 2012 which is evident from Annexure-3 to the petitions. He further submitted that the contractor never applied for extension of time in prescribed form and, therefore, there was no occasion before the Chief Engineer to grant extension of time to the contractor. He further submitted that the work in question was never completed within the period as fixed by the agreement and that was the reason compensation amount of Rs. 2,14,250/- was deducted and since the contractor got executed the earth filling at manually the payment was made at the rate of Rs. 87.50 per M^3 instead of making payment at the rate of Rs. 123.40 per M^3 but the Tribunal did not take the aforesaid fact in notice while passing the impugned order. He further submitted that the security deposit was rightly forfeited and the other deductions were also rightly made from the amount of the contractor but Tribunal committed error in releasing the above stated amounts in favour of the contractor.

14. Having heard the rival contentions of both the parties, I went through the record as well as impugned award dated 14.08.2014.

Certain facts are admitted in this case. The date of agreement, the nature of work, the date of issuance of work order, the preparation of first on account bill by the Assistant Engineer of Rs. 26,11,165/- and the payment of Rs. 21,42,507/- against first on account bill, the preparation of second on account bill in the month of October 2010 by the then Assistant Engineer are admitted facts. The dispute between the parties is in respect of extension of time for construction of work as well as entitlement of contractor in respect of payment of second on account bill as well as the quality of work of the contractor. It is an admitted position that the work order was issued on 17.06.2009 and there was a Clause in the agreement that the work was to be completed within two months from the date of issuance of work order. However, it is also an admitted position that first on account bill was prepared on 02.01.2010 and subsequently payment was made on 07.01.2010. After that second on account bill was prepared but the payment was subsequently refused by the concerned Executive Engineer. The contractor brought a letter before the Tribunal for proving this fact that he had requested the concerned officials to extend time for the work as he was unable to start the work due to rainy season. However, the department denied the aforesaid letter on the ground that no such letter was found on the records of the department and the said letter was not in proper format. The Tribunal did not accept the denial of the department and came to conclusion that there was no determination of deduction of amount of Rs. 2,14,250/- towards the heading of time extension in the shape of compensation under Clause 2 of the agreement nor there was recital of the contract and, therefore, the department was not entitled to deduct the amount of Rs. 2,14,250/- towards time extension. Therefore, it is obvious from the aforesaid finding of the Tribunal that the Tribunal rejected the claim of non extension of time of the department. However, it is well known fact that rainy season in State of Bihar ends till the month of September and it is an admitted position that the contractor started the work after end of rainy season. Therefore, the Tribunal rightly directed the department to make payment of deducted amount of Rs. 2,14,250/- with simple interest of 10 % per annum which was deducted on account of time extension and the Tribunal also rightly directed the department to refund the earnest money and security deposit to the contractor.

15. The grievance of the contractor is that the entire amount of second on account bill was not paid to him though the aforesaid second on account bill was accepted by the department on the ground that more than 80% work had already been completed by

the contractor. In course of hearing, learned counsel appearing for the contractor tried to convince me that an amount of Rs. 4,68,658/- of second on account bill was released in favour of the contractor but I am not at all convinced with the aforesaid submission because the Tribunal directed the department to release the amount of Rs. 4,68,658/- towards first on account bill as the first on account bill was prepared to the tune of Rs. 26,11,165/- which was reduced to Rs. 21,42,507/- and subsequently, the aforesaid amount was paid to the contractor but the Tribunal came to conclusion that the department illegally deducted the amount of Rs. 4,68,658/- from first on account bill as the department had no right to change the rate of the work as agreed by the parties through the agreement. Therefore, it is obvious that the amount of Rs. 4,68,658/- was never part of second on account bill .

16. It is an admitted position that second on account bill was prepared by the Assistant Engineer violating the P.W.D. Code as the aforesaid second on account bill was never signed by the Junior Engineer and the aforesaid second on account bill was directly prepared by the Assistant Engineer. It is also an admitted position that an enquiry was conducted in respect of the aforesaid second on account bill on the complaint of Junior Engineer and the Committee

found that the imaginary measurement and inflated amount had been made in the aforesaid second on account bill. No doubt, the actual physical measurement was made after one and half years of completion of the work in question but after physical measurement the committee did not find the work satisfactory and accordingly, the department refused to release the second on account bill. The Tribunal also doubted the genuineness of second on account bill on the basis of materials placed before the Tribunal. The aforesaid finding of Tribunal is finding on the fact and, therefore, in my view, that finding cannot be disturbed by this court while exercising the power of revisional court unless the finding in question is perverse. Therefore, in my view, there is no occasion for this court to disturb the finding recorded by the Tribunal in the impugned award.

17. On the basis of aforesaid discussions, both the above stated civil revision petitions stand dismissed.

(Hemant Kumar Srivastava, J)

SHAHZAD/-

AFR/NAFR	NAFR
CAV DATE	23.06.2017
Uploading Date	21.07.2017
Transmission Date	N.A.