

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.13020 of 2011

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Fulena Construction Pvt. Ltd., a Company incorporated under the provisions of Companies Act, 1956, having its Registered Office at Shree Krishna Nagar, Power House P.O., P.S., Town & District- Begusarai through one of its M. Director Shashi Singh, S/o Late Ramdeo Singh, Resident of Shree Krishna Nagar, P.S & 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. Anant Prasad Singh, S.C.-15 Mr. Awinash Kumar, A.C. to S.C.-15

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CORAM: HONOURABLE JUSTICE SMT. ANJANA MISHRA

CAV JUDGMENT

Date: 23-03-2017

The present writ application has been filed for quashing letter dated 30.03.2011, as contained in Annexure 12, by which the petitioner's contract has been rescinded and by the said letter, the risks and costs component in the fresh tender notice has been attached on the shoulders of the petitioner. The petitioner seeks a further declaration that no risks and costs



component can be imposed on him.

2. Shorn of unnecessary details, the brief facts of the case are that in response to a tender notice issued in 2005-2006, the petitioner was awarded a contract for conducting several works for construction of the new railway line between Sakari and Hasanpur. The petitioner accepted the said contract and executed an agreement dated 15.02.2007, after which he commenced to perform the contract by undertaking the works in connection thereto.

3. Thereafter, an instruction was issued to the petitioner by the site Engineers to stop work at site area as the same had fallen within the area of Panchchi Vihar, as there was no clearance from the Forest Department of the State. The said instruction was issued orally to him on the basis of Annexure 3, which is a letter from the D.F.O., Darbhanga to stop construction. However, after the said oral instruction, no further direction from the respondent-Railways was issued to the petitioner, whereupon he made a representation on 28.03.2009 for further guidance. By letter dated 06.05.2009, a notice was issued by the respondents to the petitioner to start work, failing which termination would follow, which he responded to by his reply dated 12.05.2009. On 06.02.2010, the petitioner, once



again, represented explaining the probability of unavailability of site due to water logging. Thereafter, again on 30.11.2010, the petitioner made a similar representation pointing out the difficulty of water logging, but the same was again not answered by the respondent-Railways. In the meanwhile, the respondent-Railways deducted some royalty and as such, the petitioner protested, vide his letters dated 25.11.2010 and 15.12.2010, against illegal deduction of royalty.

4. It appears that the petitioner was granted extension of time till 31.03.2011, vide letter dated 19.08.2010, but the petitioner did not resume work as he had been protesting against the illegal deduction of royalty vide his letter dated 18.03.2011.

5. The petitioner received a reply on 26.03.2011 stating that the respondent had the right to deduct royalty and soon thereafter on the same day, the petitioner was served a 48 hours' notice by the respondents to complete the work as per schedule. Finally, vide letter dated 30.03.2011, the impugned order of recession was issued under Clause 62 of General Conditions of Contract ('G.C.C.', in short). Soon thereafter on 04.05.2011, a fresh tender has been issued with a risk and cost clause, which, according to the petitioner, is not permissible after five years.

6. Further on 12.10.2011, an offer was made to one



M/s Peartree Enterprises and on 17.01.2012, the letter of agreement was issued to the new applicant by the respondents for construction of the aforementioned stretch of railway line, originally allotted to the petitioner.

7. It has been submitted by the learned counsel for the petitioner that the petitioner had started work in full swing after the site was cleared from water logging, but the work was stopped orally by the Engineers of Railways on the ground that the area and the work in which the construction was to be done had fallen under the circulating area of Panchchi Vihar and, therefore, the State Government (Forests) had prohibited the execution of work in the area and that work could be done only after clearance had been given in that area.

8. The contention of the petitioner is that he was shown a letter (Annexure 3) from the Office of the Divisional Forest Officer, Mithila Forest Division, Darbhanga that such construction was to have adverse impact on the birds and such construction work was prejudicial to the environment and the provisions of the Forest Conservation Act. The said letter (Annexure 3), having been communicated orally to the petitioner, restrained the petitioner from performing his part of the contract and that despite there being several reminders to the



respondents to issue fresh guidance which had failed to evoke response, the petitioner's letter dated 28.03.2009 was responded to by the Railways, vide letter dated 06.05.2009, wherein the respondents had thrown the burden of delay in the completion of the work on the petitioner without addressing itself to the question of non-availability of site due to heavy water logging and the restraint placed on him by the letter of the Divisional Forest Officer.

9. It was further the case of the petitioner that since the respondent had not released the third 'on account' bill of the petitioner and had deducted the royalty against the terms of the contract, the petitioner could not proceed further.

10. It was contended by the learned counsel for the petitioner that on account of oral instructions issued by the respondent-Railways, the petitioner, who had started work, suffered huge losses as he had mobilized his machinery and man force by making investments, due to the delayed tactics adopted by the Railways. As such, in the wake of non-feasibility of conclusion of work, the contract at best could have been closed with no liability on either side. Further, the petitioner could not be attributed the fault for the breach of contract, much the less levied the amount of royalty from the bills of the petitioner nor



could they invoke the risks and costs clause to the detriment of the petitioner. It is submitted that under the G.C.C., only six months was available after the expiry of the original period of completion of the contract for imposing the risks and costs clause. When the so-called extension of time was not granted within the period when the contract was in existence, but after expiry of the period with retrospective effect, like after 30.04.2009 (which is the period when the contract was supposedly valid) and when the so-called extension was granted only on 19.08.2010 with effect from 01.05.2009, therefore, strictly speaking, the so-called extension of time was granted much after the contract had expired. Thus, the risks and costs clause could have been invoked only till six months after 30.04.2009. As such, the impugned action of carrying out the risks and costs clause, vide letter dated 30.03.2011, could not sustain in the eyes of law. Therefore, according to the petitioner, the illegal invocation of the risks and costs clause infringes the fundamental rights and legal rights guaranteed to the petitioner under Articles 14, 9(1) (g) and 300A of the Constitution of India. As such, the action of the respondent-Railways directly affects the livelihood of the petitioner and is violative of his fundamental rights.



11. 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 submission advanced is that 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.

12. In this context, learned counsel for the petitioner 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. However, this Court after having gone through the facts of the case holds 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.

13. 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.”

14. In the instant case, the petitioner has miserably failed to prove his *bona fide* in performing the contractual obligation as the Railways have conclusively brought on record that the petitioner was given sufficient indulgence to perform his contractual obligation and there was no such circumstance which could have frustrated the contract. Thus, the petitioner also cannot avail the benefit of the present decision.

15. Mrs. Nivedita Nirvikar, learned counsel appearing for the respondent-Railways, however, contends that in response



to the notice for the period 2005-06 by the East Central Railways, the petitioner was granted tender on 25.01.2006 (Annexure 1) for filling the embankment between Harinagar and Kusheswarnath Station in connection with the construction of new railway line between Sakari and Hasanpur. The said tender involves construction for the stretch 28 to 32 and the date for completion of the same was 23.11.2006 i.e., within six months of the tender. The petitioner did not complete the tender work within the aforesaid period and took the plea that non-completion of the railway lines being constructed through the Panchchi Vihar was on account of the restraint placed by the Forest Department, vide Annexure 3. It was submitted by the learned counsel appearing on behalf of the Railways that the letter (Annexure 3) was the communication between the Forest Department and the Railways and the petitioner has nothing to do with this letter as it was never communicated/issued to him by either the Forest Department or by the Railways nor was any direction issued by the Railways to the petitioner to stop the work even temporarily. The petitioner could not complete the work right from 2006 to 2008, which is the date of Annexure 3, the respondent-Railways had no option but to issue a seven days' notice dated 21.03.2009, whereupon the petitioner replied,



vide Annexure 4, accepting that they are ready to re-start the work in full swing. Seeing that the petitioner was not making any further development towards construction of the project, the Railways once again, vide letter dated 06.05.2009 (Annexure 5), lastly extended the contract up to 30.04.2009 stating that if they did not start the work immediately, the Department would proceed for termination of the contract. This was the last/final notice by the Railways affording a last opportunity to the petitioner to conclude the work. It was further submitted that vide letter dated 05.05.2009 (Annexure E), it was specifically clarified to the petitioner that the Forest area has fallen within the chainage 25-28 whereas the petitioner's Section start from chainage 28-32 and hence there are no restrictions with regard to the work to be undertaken by the petitioner.

16. The petitioner responded to the said letters dated 05.05.2009 and 06.05.2009, raising a new plea that they are having financial crunch and was also facing water logging vide letter dated 25.05.2009 (Annexure 5A) and the plea of water logging vide letter dated 06.02.2010.

17. It is submitted by the learned counsel for the respondent-Railways that the Railways had been overindulgent with the petitioner as vide letter dated 19.08.2010 (Annexure 8),



the contract was again extended from 1.5.2009 to 31.03.2011. Learned counsel for the respondent, further submitted that the petitioner had himself written to the Department of Railways seeking extension and further stating that if by 31.03.2011, the work is not completed, the tender in question may be terminated. However, once again the Department, vide letter dated 26.03.2011, wrote to the petitioner stating that the petitioner is not interested to execute the work due to the reasons best known to himself. But the petitioner failed to respond to the same and accordingly, a 48 hours' notice was issued, which was ultimately led to the impugned order dated 30.03.2011 rescinding the contract of the petitioner, vide Annexure 12. Consequently, vide Annexure 13 dated 06.05.2011, a fresh tender was floated and executed in favour of M/S Narayan Das, who has completed the work, allotted to him (paragraph 10, Page 243 of the supplementary counter affidavit filed by the Railways). It was thus submitted that the entire writ petition has, thus, become infructuous and no effective relief can be granted to the petitioner as in paragraph 12 of his own rejoinder, the petitioner himself has conceded that he is not contesting the termination of the contract, but is also challenging the risks and costs of the tender clause, which, according to the petitioner, is



wholly illegal.

18. Learned counsel appearing on behalf of the Railways has further clarified that the Railways have brought to the notice of this Court in reply to the assertion made by the Forest Department regarding the railway line between Sakari to Hasanpur and Harinagar to Kusheswarnath stating that the stretch comprises of 75.8 Kms. The petitioner was granted work between Kms. 28 to 32 but when they failed to complete it after several extensions granted in their favour, a fresh tender was floated and awarded to M/s Narayan Das, who has since completed the work allotted to the petitioner. It has further been submitted that only a small portion of 600 meters falls within the vicinity of Forest Department but a large section of 3 Kms. was free but the petitioner chose not to complete it on one pretext or the other. However, the same stretch was completed by the subsequent tenderer in the same set of circumstances. Even assuming that the petitioner had a valid ground for non-completion of the tender, even then it can be well stated that the petitioner having been granted the tender in the year 2006 was required to complete the same on 23.11.2006 whereas the letter from the Forest Department was issued only on 24.12.2008, and despite several extensions given to him right from the year 2006



to 30.03.2011, the petitioner chose not to complete the work, as a result of which the Railways has also suffered substantial loss of public money. As such, the risks and costs clause has been correctly imposed on him in terms of the contract. It was thus contended that the petitioner's case has no merit and is fit to be dismissed for the aforementioned reasons.

19. 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 (Annexure-'E') 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.

20. 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.

21. A counter affidavit has also been filed by the Divisional Forest Officer, Mithila Forest Division, Darbhanga- Respondent No. 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. 881 E 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.

22. 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 cause, 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 and does not warrant interference under Article 226 of the



Constitution of India.

23. In the result, I find no merit in this writ application. The impugned order dated 30.03.2011, as contained in Annexure 12, is held to be wholly legal and valid and does not warrant interference 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
Uploading Date	27.03.2017
Transmission Date	N.A.

