IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Revision No.232 of 2016

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1. The State of Bihar through the Secretary, Road Construction Department, Vishweshwaraiya Bhawan, Bailey Road, Patna.
2. The Chief Engineer (North Wing), Road Construction Department, Darbhanga.
3. The Superintending Engineer, Road Construction Department, Saran Road Circle, Hazipur at Vaishali.
4. The Executive Engineer, Road Construction Department, Vaishali Road Division, Hazipur at Vaishali.

...Respondents-Petitioners

Versus

M/s Pushpak Enterprises, through its Proprietor Shri Parashnath Singh, resident of Dhanauti, Post Office, Hajipur, Vaishali

... ... Claimant/Opposite party

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with

Civil Revision No. 15 of 2017

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1. The State of Bihar through the Secretary, Road Construction Department, Vishweshwaraiya Bhawan, Bailey Road, Patna.
2. The Chief Engineer(North Wing),Road Construction Department, Darbhanga.
3. The Superintending Engineer, Road Construction Department, Saran Road Circle, Hazipur at Vaishali.
4. The Executive Engineer, Road Construction Department, Vaishali Road Division, Hazipur at Vaishali.

... ... Respondents-Petitioner/s

Versus

M/s Pushpak Enterprises, through its Proprietor Shri Parashnath Singh, Resident of Dhanauli, Post Office - Hazipur, Vaishali.

….Claimants/Opposite party

Appearance :
(In both the cases)

For the Petitioner/s : Mr. Sri Ram Krishna
Mr. Akash Chaturvedi
Mr. Naresh Prasad

For the Respondent/s : Mr. Rajendra Narayan, Sr Advocate
Mr. Manish Sahay
Mr. Anil Kr. Singh

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

<u>JUDGMENT AND ORDER</u>

CAV

Date : 16-04-2018

Civil Revision No. 232 of 2016 has been filed by the State of Bihar under Section 13 of the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008, putting to challenge the award dated 27.01.2014, passed by the Bihar Public Works Contracts Disputes Arbitration Tribunal, Patna (hereinafter referred to as 'the Tribunal'), in Reference Case No. 30 of 2011, whereby the Tribunal has held the respondent to be entitled for the claim of Rs. 4,23,985/- towards the unpaid dues, Rs.5,40,000/- towards earnest money, Rs. 2,76,567/- towards deduction in respect of security deposit and Rs.5,53,134/- which was deducted as compensation for extension of time. Simple interest @ 10% per annum with effect from 17.04.2008 has also been awarded by the Tribunal till the realization of the amount.

2. A review application was filed against the said award dated 27.01.2014 of the Tribunal before the Tribunal, giving rise to Review Case No. 14 of 2014 which, too, has been dismissed by the Tribunal by order dated 22.02.2016. The said order dated 22.02.2016 passed in Review Case No.14 of 2014 has been challenged in C.R. No. 15 of 2017. This is the reason why these two cases have been heard together and are being disposed of by the present common judgment and order.

3. The dispute arose out of an agreement executed vide Agreement No.38 F2/2006-07 between the respondent and the petitioners-State of Bihar on 06.03.2007, upon acceptance of a tender in respect of S/R to Lalganj Tinpulwa to Bhagwanpur Road in Km. 5th to 13th(P) for the year 2006-07. The estimated cost of the work was Rs.1,07,41,121/-. The date of completion of the work was fixed as 31.03.2007, whereas work order was issued on 06.03.2007. It was the case of the respondent before the Tribunal that the agreement was executed on reciprocal promises whereunder the petitioners had undertaken to provide for Hot Mix Plant for bitumen work and they were under the contractual obligation to make payment of the work executed by the respondent on monthly basis under Clause 7 of the conditions of contract. The respondent asserted that the State of Bihar (petitioners herein) expressed their inability to provide the Hot Mix Plant till the stipulated date of completion of the contract i.e. 31.03.2007. The respondent alleged non-clearance of the bills due, in respect of on account bills and payments made in respect of an account, much after the payment due, in violation of the agreement. He alleged that no payment against the work executed after 31.12.2007 had been made till the measurement of the work on 22.02.2008, whereas in the

measurement book the admissible amount was found to be Rs. 4,23,985/-. He also alleged that the State of Bihar made arbitrary deduction on frivolous ground of time extension, of an amount of Rs. 4,31,411/-. He asserted before the Tribunal that there was delayed payment in regard to the 3rd on account bill on 19.12.2007. The respondent expressed his willingness to complete the work under the agreement, despite the difficulties. Vide Memo No. 424 dated 20.03.2008, the Executive Engineer, Road Construction Department,Vaishali Road Division, Hajipur, Vaishali, rescinded the agreement, purportedly under Clause 3(a) of the agreement without considering his reply to show-cause notice issued earlier in this regard. He asserted that he was not liable for slow progress of the work as, at no point of time, any penalty was imposed on him under clause 2 of the conditions of the contract up-to 31.03.2007. He further asserted that the Executive Engineer had issued show-cause notice through a letter dated 13.06.2007 and subsequent reminder dated 26.07.2007. He claimed that there was rise in the price of bitumen and there was admitted fact that Hot Mix Plant was not available with the department to make the same available to the respondent. The respondent, accordingly, made a request for withdrawal of the rescinding order which was not acceded to, leading to filing of the application for referring the matter to the Arbitration Tribunal.

4. A reply in the form of a written statement was filed on behalf of the State of Bihar and its officials before the Tribunal. While accepting the execution of the agreement in respect of the work in question, the State-respondent took a plea that the time fixed for completion of work was 31.03.2007 and on 25.01.2007 the respondent was asked to submit the required amount of the security money and get the agreement done within two days, but he failed and entered into the agreement after a lapse of more than a month on 06.03.2007. The payment of security money was also made belatedly. They also took the plea that through a letter dated 20.02.2007, the respondent was asked to engage private Hot Mix Plant on rent for completing the work within the stipulated period which was not done, because of which the work had to be spilled over to the next financial year 2007-08. It was the specific case of the State that a show-cause notice was issued to the respondent, asking him to explain as to why the agreement should not be rescinded and why the security money should not be forfeited in view of F2 provision. According to the State, the measurement of value of the work done by the respondent was taken and found to be

Rs.4,23,985/-. Because the remaining work was now to be executed by the other agency for which extra expenditure was incurred by the department, the same was to be met from the cost of the respondent in terms of Clause 3(c) of the F2 agreement. They also claimed that the deduction for extension to the tune of 10% of the work done had been made from the bills of the respondent, the calculation of which came as under:-

1.	The value of total work done	:-	Rs.59,55,322/-
2.	Less	:-	Rs.4,23,985/-

Amount not paid to contractor comes to Rs.55,31,337/- and total deduction from the different bills of the contractor was made to the tune of Rs. 5,53,134/- which is 10% of the total work value payable to the contractor.

5. The decision to rescind the agreement was attempted to be justified by the State of Bihar before the Tribunal on the ground of default and failure on the part of the respondent. They denied the respondent's claim of profit for portion of the work which remained unexecuted by him.

6. The respondent, in his rejoinder before the Tribunal, asserted that the allegation of delay in signing the agreement was groundless since the work order was issued on 06.03.2007. Admittedly, the Hot Mix Plant was not provided by the State. Based on the rival pleadings, the Tribunal formulated the

following 08 points for determination:-

(I) Whether the reference is barred by limitation?
(ii) Whether the petitioner is liable for the breach of contract and whether the rescinding of the contract is in terms of the clauses of the contractor lawful?
(iii) Whether the petitioner is entitled to the claims of unpaid dues?
(iv) Whether the petitioner is entitled to payment/refund of earnest money and security deposit?
(v) Whether the petitioner is entitled to the payment of deducted amount towards time extension?
(vi) Whether the claimant petitioner is entitled to payment of contractor's profit?
(vii) Whether the claimant petitioner is entitled to payment towards transportation charge and commission charge for extension of bank guarantee as well as the overhead expenses?
(viii) To what relied or reliefs, the petitioner is entitled?

7. Dealing with Point No.1, the Tribunal held that the provision under the Arbitration and Conciliation Act, being the Central Act, shall predominate over the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008 and since the Central Act provides a limitation of three years after the date of the cause of action, the application could not be held to be barred by limitation.

8. Coming to the second question as to whether the

respondent was liable for breach of contract and whether rescinding of the contract was, in terms of clauses of contract, lawful; the Tribunal held that there was a breach of reciprocal promises by both the parties and reciprocal default by the parties. The Tribunal, however, held that though there was reciprocal default, rescinding of the contract was not in terms of Clause 3(a) of the conditions of contract. Before reaching the conclusion, the Tribunal taking into account the available materials, recorded the findings that whereas the date of intended completion of work was 31.03.2007 and the date of commencement of work was 06.03.2007 and though bills were passed on 18.03.2007 and 29.03.2007 and payments were made on 30.03.2007; in respect of 3rd on account bill, payment was made after nine months on 19.12.2007, in violation of Clause 7 of the conditions of contract under the F2 agreement and, therefore, held that the State of Bihar was liable for breach of conditions due to non-payment of the billed amount in time. The Tribunal thereafter noticed non-deduction of any amount under clause 2 of the conditions of contract till 31.03.2007. The Tribunal thereafter held that lump sum deduction for the time extension from 3rd on account bill to the tune of Rs.4,31,411/- and 4th on account bill to the tune of Rs. 1,21,723/- in the name of damages or compensation under clause 2 of the conditions of the contract was not in consonance with the terms of Clause- 2 of the conditions of contract which required that there should be a “rational determination by calculation according to the mode of determination provided under Clause 2.” The Tribunal accordingly held that the lump sum deduction @ 10% in the on account bills after expiry of completion period was not in accordance with Clause 2 of the terms of the contract. The Tribunal held, therefore, that rescinding of the contract was not in conformity with the requirement under Clause 3(a) of the conditions of contract. At the same time, the Tribunal held the respondent also liable, due to belated execution of agreement and concluded that whereas rescinding of the contract was not in accordance with Clause 3(a), there was reciprocal breach of promises in respect of lack of proportionate progress by the respondent. After having held so, coming to Point No.3, the Tribunal held that payment of the final bill, after measurement in respect of the work done to the tune of Rs.4,23,985/- could not be withheld.

9. Dealing with the payment of refund of earnest money/security deposit in Point No.4, the Tribunal noted that although it was difficult to fix the liability on any of the parties

as to who could be said to have prevented the other in performing the promise, concluded that no loss could be proved by the State of Bihar, though the balance work after final measurement was encrusted to the Bihar State Bridge Construction Corporation. The Tribunal held that there was no proof of legal injury or actual damage caused to the State of Bihar. Considering the said aspect and other circumstances, the Tribunal held the respondent entitled for payment of earnest money of Rs. 2,35,000/- and refund of the deduction towards security deposit for an amount of Rs. 2,76,567/-(total Rs.5,11,567/-).

10. As has been noticed, while determining Point No.2, the Tribunal held the lump sum deduction @ 10% to the tune of Rs. 4,31,411 on 3rd on account bill and Rs.1,21,723/- on 4th on account bill to be unjustified. The Tribunal thereafter proceeded to consider Point No.5. In view of the admitted fact that though no extension of time was given to the respondent and yet the respondent was allowed to work till rescinding of the contract, vide Memo No.424 dated 20.03.2008, the Tribunal held that lump sum @ 10% deduction in 3rd and 4th on account bills was not in accordance with Clause 2 of the conditions of the contract which required determination of compensation by

adopting a procedure prescribed thereunder which provided for a rational determination by releasing compensation equal to ½ % on the amount of estimated cost of the whole work. The Tribunal noticed the proviso to Clause 2 of the conditions of the contract which stipulated that the deduction should not exceed 10% of the estimated cost of the work shown in the tender. Accordingly, while holding such deduction to be unjustified, held the respondent to be entitled for payment of the deducted amount of Rs. 5,53,134/- being the sum total of the said deduction made in the name of time extension.

11. Coming to Point No.6, as to whether the respondent could claim his entitlement to payment of contractor's profit, the Tribunal held that since there was breach of reciprocal promises, the State should not be held liable for breach of contract and, therefore, the respondent could not be held entitled to the contractor's profit as claimed by him. The Tribunal rejected the respondent's claim of commission of charge, transportation charge and overhead expenses in absence of any proof and accordingly made the following award:-

> "(i) The petitioner shall be entitled to unpaid amount of Rs 4,23,985/- (Rs. Four lacs twenty three thousand nine hundred eighty five only) with simple interest @ 10% per annum with effect from 17.04.2008 till realization.

(ii) The petitioner shall also be entitled to the payment of amount of Rs. 5,40,000/- (Rs. Five lacs forty thousand only) towards E.M. Deposit in the shape of bank guarantee and also an amount of Rs.2,76,567/- towards deduction in respect of security deposit Total Rs.5,40,000/-+2,76,567/-= Total Rs.8,16,567/-(Rs. Eight lacs sixteen thousand five hundred sixty seven only) with simple interest @ 10% per annum with effect from 17.04.2008 till realization.

(iii) The petitioner shall also be entitled to payment of an amount of Rs. 5,53,134/- (Rs. Five lacs fifty three thousand one hundred thirty four only) deducted in the name of time extension with simple interest @ 10% per annum with effect from 17.04.2008 till realization.

(iv) The petitioner shall also be entitled to cost and counsel's fee as per schedule."

12. Mr. Sri Ram Krishna, learned counsel, appearing on behalf of the State of Bihar, assailing the award of the Tribunal, has submitted that the findings recorded by the Tribunal that rescission of contract was not in terms of Clause 3(a) of the conditions of contract is erroneous in view of the clear language of the said Clause. He has also submitted that the Tribunal has wrongly held that there was violation of Clause 7 of the conditions of contract on the part of the respondent. According to him, the findings recorded by the Tribunal that there has been breach of reciprocal promises by both the parties

is without jurisdiction. He has next submitted that the findings recorded by the Tribunal are erroneous.

13. Learned counsel, appearing on behalf of the petitioner, has further submitted that the scope of scrutiny of this Court of an award of the Arbitration Tribunal under Section 13 of the Act, is much wider than the the scope under Section 34 of the Arbitration and Conciliation Act. According to him the grounds which have been taken in the present revision application are valid grounds for assailing the award of an Arbitration Tribunal under Section 13 of the Act, though such grounds may not be valid for challenging an award under Section 34 of the Arbitration and Conciliation Act, 1996.

14. Mr. Rajendra Narayan, learned Sr. Counsel for the respondent justifying the correctness of the award, has submitted that no ground for interference with the impugned award is made out in view of clear language of Section 34 of the Arbitration Act which sets out the grounds of challenging the award under the Arbitration and Conciliation Act,1996 (hereinafter referred to as 'the Contract Act') or under the Bihar Public Work Contracts Disputes Arbitration Tribunal Act, 2008 (hereinafter referred to as 'the Bihar Act'). He also submitted that no ground at all is available to the State of Bihar inasmuch

as the State of Bihar has failed to make out a case that the Tribunal has either exercised the jurisdiction vested in it by law or has failed to exercise the jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity. He has referred to Section 55 of the Indian Contract Act,1872 to submit that admittedly the respondent was allowed to perform the part of the contract even after the date of completion of work as stipulated in the contract. He has submitted that since the appellant accepted the performance of part of contract during the period of time beyond the date of completion, the State cannot claim compensation for any loss occasioned by non-performance of the contract within the time agreed since there was no notice given to the respondent to claim compensation at the time of acceptance of work, beyond completion date.

15. I have perused carefully the award made by the Tribunal impugned in the present proceeding. This has to be kept in mind that the Arbitration and Conciliation Act, 1996 is the Central Act which has been enacted, inter alia, to consolidate and amend law relating to domestic arbitration. Enactment of Arbitration and Conciliation Act is in the background of adoption of United Nations Commission for International Trade Law (UNCITL). This being the Central Act, would certainly

prevail over the State Act in the matter of determination of an arbitration or challenge to an award or in respect of any other matter for which provision has been made under the Act.

16. Section 34 of the Arbitration and Conciliation Act lays down the ground for setting aside an arbitral award and reads thus:-

> "34 - Application for setting aside arbitral award:-
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> (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
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> (2) An arbitral award may be set aside by the Court only if-
>
> (a) the party making the application furnishes proof that-
>
> (i) a party was under some incapacity, or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it

contains decisions on matter beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation._ Without prejudice to the generality of sub-section (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on

which the party making that application had received the arbitral award, or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months if may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

17. It cannot be the case of the State of Bihar that arbitral award has dealt with any dispute not contemplated by or not falling within the terms of the submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration. It cannot be the case of the petitioner that making of the award was induced or affected by fraud or corruption. Sub-section 2(a) of Section 34 permits a party to

question an arbitral award on the ground that it is vitiated by patent illegality appearing on the face of the award. The said provision is an exception in view of proviso thereto which states that an award shall not be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence. In my considered opinion, the State of Bihar has not been able to make out any ground for setting aside the award, in question, as enumerated under Section 34 of the Act.

18. In all fairness to the learned counsel for the State of Bihar, I must take note of section 13 of the Bihar Public Works Contract Disputes Arbitration Tribunal Act, 2008 which, inter alia, lays down the ground on which the High Court can exercise power under the revisional jurisdiction against an award or interim award reviewed by an Arbitral Tribunal. Section 13 of the said Act reads thus:-

> "13. Revision.- (1) The High Court may, suo motu at any time or on an application made to it within three months from the date on which the award or interim award is made or reviewed under this Act, by any party aggrieved by the award or interim award so made or reviewed, call for the record of any case in which an award or interim award has been made or as the case may be reviewed and if the Tribunal appears-
>
> (a) to have exercised a jurisdiction

> not vested in it by law, or
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> (b) to have failed to exercise a jurisdiction so vested, or
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> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,
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> the High Court may make such order in the case as it thinks fit.
>
> (2) For the purpose of exercising its powers of revision under this section, the High Court shall have the same powers as it has, and as far as may be, follow the same procedure as it follows, under the Code of Civil Procedure, 1908 while exercising its powers of revision under Section 115 of the Code and for that purpose the Tribunal shall be deemed to be a Court subordinate to it."

19. In my view, it cannot be said that the Tribunal by making the award has exercised its jurisdiction not vested in it by law or has acted in exercise of its jurisdiction illegally or with material irregularity. On the other hand, I notice that the Tribunal has duly considered the rival stands taken by the parties and, upon adequate discussion of the material and appreciation of evidence available in the arbitration proceeding, the impugned award has been made.

20. I do not find any legal infirmity in the award dated 27.01.2014 which would require interference by this Court in revisional jurisdiction. Consequently, I do not find any merit in

Civil Revision No. 15 of 2007 as in my opinion, for the foregoing reasons, the Tribunal rightly rejected the review application filed by the State of Bihar, the appellants.

21. These applications are meritless and are accordingly dismissed.

(Chakradhari Sharan Singh, J)

HR/-

AFR/NAFR	NAFR
CAV DATE	20.11.2017
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