

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.346 of 2006

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The State of Bihar through Executive Engineer, Western Koshi Canal
Division Kunauli, District- Supaul.

... .. Appellant/s

Versus

M/S Hardeo Singh, resident of village + P.O. Bathnaha District- Purnea.

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr.Ajay Kumar Sharma, ALC to AG
For the Respondent/s	:	Mr. P.K Sahi, Senior Advocate
		Ms. Roona, Advocate

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT

Date : 11-02-2019

Heard learned counsel for the parties.

2. This appeal has been preferred, under Section 39 of the Arbitration Act, 1940, against the judgment dated 08.06.2006 passed in Title Suit No. 14 of 1990 by the Court of learned Subordinate Judge-IV, Supaul, whereby the learned Subordinate Judge has made the award passed by the arbitrator on 19.04.1991 the rule of the Court.

3. A brief background of the matter is that the appellant entered into an agreement with sole opposite party M/s. Hardeo Singh for construction of silt ejector at point “0.45 KM” of the Western Koshi Canal Division No.1, Birpur. The formal agreement bearing No.10F2 of 83-84 was executed in this regard on 03.09.1983. When the respondent started work at the agreed point, the government decided to shift the



construction at 0.35 KM. On completion of the work within time, a dispute arose as the respondent put forward claim of additional amount which was incurred by him in shifting of the project as well as labour charges. The dispute was referred to the Arbitrator, i.e., the Superintending Engineer of the concerned circle, Western Kosi Canal Circle, Nirmali, in term of Clause 23 of the agreement. The Arbitrator made an award for Rs.16,65,000/- against claim of the respondent of rupees one crore eighty-eight lacs and odd. The award was filed in the Court of learned Subordinate Judge, Supaul on 16.06.1990. On receipt of the award the Subordinate Judge issued notice to the parties. The parties appeared through their counsel. While contractor filed objection stating that the Arbitrator had to decide the entire dispute between the parties which was not decided. No objection was filed on behalf of the State of Bihar.

4. By order dated 20.02.1990, the learned Subordinate Judge remitted the matter to the arbitrator for reconsideration. On 19.04.1991, the arbitrator submitted a fresh award in the Court of learned Subordinate Judge. This time the Executive Engineer of the concerned department admitted the claim of the respondent before the Arbitrator by making statement that the department had no objection in allowing the



claim of the respondent. On 19.04.1991, the Arbitrator made a fresh award of Rs.31.45 lacs (rupees thirty-one lac and forty-five thousand only) against all the items, namely, payment for escalation price cost to the labours, payment for difference in rate of diesel and payment for extra cost of de-watering due to change in location of the structure.

5. On receipt of the award of the Arbitrator the Subordinate Judge issued notice to the parties. The parties appeared through their respective lawyer. This time the contractor did not file any objection; rather the State of Bihar filed objection on 02.09.1992 alleging that the Arbitrator had misconducted the proceeding and the award was a procured one. After the state filed its objection, the contractor filed its rejoinder on 03.09.1992, in paragraph-11 it was stated that the Executive Engineer has given his written consent to the award and specifically mentioned that he has no objection against the revised award.

6. The learned Assistant Government Pleader attending the civil suit stated before the Court that if the Executive Engineer has no objection then he has nothing to say against the award. In the circumstances, the Subordinate Judge by judgment and order dated 08.09.1992 made the award rule of



the Court.

7. Thereafter, the State of Bihar preferred Miscellaneous Appeal No.39 of 1994. By judgment and order dated 06.08.1996 the Miscellaneous Appeal was dismissed. Thereafter, the State of Bihar filed Civil Review No.175 of 1996 in this Court for review of the judgment and order dated 06.08.1996 passed in M.A. No.39 of 1994.

8. By judgment dated 22.09.1999, the civil review was allowed and the matter was remitted back to the learned Court-below with a direction to proceed afresh in accordance with law on the basis of the objection filed by the State on 02.09.1992 under Section 30 of the Arbitration Act.

9. One page objection petition dated 02.09.1992 contains two paragraphs:

“ I. That the Arbitrator had misconducted the proceeding.

II. That the award was a procured award.”

10. The learned Court-below considered both the aspects i.e., misconduct of the Arbitrator in proceeding and procurement of the award in the impugned judgment dated 8th June, 2006 in paragraph-13 onwards. The relevant portion is reproduced below:



“The objector (appellant herein) states that the arbitration award was passed fraudulently by concealment of facts. This fact should be proved. and on proving it is necessary that there must be proved that the arbitrator had personal interest in the subject matter or he has any relation with the defendant, but in the present case the plaintiff has neither proved nor produced any witness. As far as the question of arbitrator's relation, this fact is not in the present case because appointment of arbitrator is mentioned in Clause-23 of the arbitration agreement, which provides that the arbitrator should be the Superintending Engineer of the department in the concerned circle. As far question of the interest of the arbitrator in the subject matter, this is not considerable because he is not related with the defendant and he has no personal interest on the subject matter. The plaintiff has not succeeded to prove from any kind of documentary evidence as well as oral testimony and the objection raised, as per Section 36 of the Arbitration Act misconduct of the arbitrator in arbitration proceeding.”

11. Thereafter, the court below has continued to discuss the circumstances under which the incomplete work was shifted to some other site and the examination of the claim of the respondent by the arbitrator after going through the different



documentary evidence produced. The court below has clearly recorded that it could not be considered that learned arbitrator has made any kind of misrepresentation of fact. The court below further negated the claim of procurement of the award and made the award the rule of the Court.

12. Learned counsel for the appellant submits that since the arbitrator was not appointed with the consent of the State of Bihar, therefore, the conduct of arbitration proceeding by him also amount to misconduct.

13. Clause 23 of General Rule and Direction for the guidance of Contractors, which was part of the agreement between the parties reads as follows:-

“ Clause 23 :- In case any dispute or difference shall arise between the parties or either of them upon may question relation to the meaning of the specifications, designs, drawing and instructions hereinbefore mentioned or as to the quality of workmanship or materials used in the work or as to the construction of any of the conditions or any clause or thing therein contained or as to any question claim rights or liabilities of the parties or any matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawing specifications estimates, instructions other or



these conditions or otherwise concerning the work, the execution or failure to execute the same whether arising during progress of the work. As alter the completion or abandonment thereof or as the breach of this contract, then either party shall forthwith give to the notice of such dispute or difference and such dispute or difference shall be referred to the Superintending Engineer of the Circle and his decision thereon shall be final, conclusive and binding on all the parties.”

14. Apparently, the Superintending Engineer of the circle was chosen as arbitrator by both the parties in the agreement itself. Therefore, it cannot be argued that without consent of the State the arbitrator was appointed nor the State appellant has taken such objection before the arbitrator; rather fully participated in both the arbitration proceeding without making any objection on the appointment of the arbitrator.

15. Before taking the matter to the arbitration, the respondents had filed representation before the appellant authorities claiming additional amount for the reasons aforesaid. Therefore, there is no substance in the submission that in the present case the arbitrator was appointed without consent of the State Government and there is non-compliance of terms of



agreement before going for arbitration.

16. Next contention of the appellant is that the respondent contractor on completion of the work had already received consideration amount in different installments. Hence, he was estopped from claiming more amount and approaching for arbitration. The aforesaid issue is squarely covered by the judgment of the Hon'ble Supreme Court in **R.L Kalathia and Company v. State of Gujarat** reported in (2011) 2 SCC 400, wherein the Hon'ble Supreme Court categorically stated that merely because the contractor had accepted final bill, it cannot be deprived of its right to claim damages, if it had incurred additional amount. Therefore, there was no bar for the respondent to raise his grievance of additional claim arising out of shifting of the work.

17. Next contention of the learned counsel for the appellant is that the Executive Engineer was not the person authorized to give consent or no consent on the claim of the respondent before the arbitrator. However, nothing has been brought on the record to substantiate as to who was authorized on behalf of the department to represent before the arbitrator. Moreover, this appeal brought by the same Executive Engineer speaks of against the defence of the appellant. Further, once the



Executive Engineer of the department appeared before the arbitrator it gave prima facie colour that he was authorized by the State Government to appear and plead for the State. Moreover, the learned counsel, who had filed Vakalatnama before the court below, specifically stated that if the Executive Engineer has no objection he has nothing to say against the award.

18. In the result, I do not find any of the grounds raised in this appeal tenable for interfering with the impugned judgment of the court below whereby the award of tribunal has been made rule of Court.

19. Hence, this appeal stands dismissed as devoid of merit. However, without cost in the facts and circumstances of the case.

(Birendra Kumar, J)

Mkr./-

AFR/NAFR	NAFR
CAV DATE	NA
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