

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.223 of 2018

In

Civil Writ Jurisdiction Case No.12906 of 2016

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Vijeta Projects and Infrastructure Ltd, Regd. Office: West Morabadi Grounds, Ranchi-834008 represented through its General Manager, Shri Anurajna Kumar Rakesh S/o Shri Prabhudeo Narain Singh, Resident of Mohalla- Bariatu, P.S.- Bariatu, District- Ranchi. Appellant/s

Versus

1. The State of Bihar and Ors.
 2. The Principal Secretary, Water Resource Department, Government of Bihar, Patna.
 3. Superintendent Engineer Planning and Monitoring, Monitoring Circle- 3, Water Resource Department, G
 4. The Chief Engineer, Sinchai Srijan, Water Resource Department, Nalanda at Bihar Sharif.
 5. The Superintending Engineer, Irrigation Circle, Nalanda, Bihar Sharif.
 6. The Executive Engineer, Irrigation Division, Uderasthan Jahanabad, Bihar. Respondent/s
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Appearance :

For the Appellant/s : Mr. Vimal Kirti Singh, Advocate

: Mr. Akhileshwar Singh, Advocate

For the Respondent/s: Mr. Anjani Kumar, AAG-IV

: Mr. Brajesh Kumar, Advocate

: Mr. Shailendra Kumar Singh, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE JUSTICE SMT. ANJANA

MISHRA

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 26-03-2019

1. This appeal questions the correctness of the judgment dated 9th of January, 2018 passed in CWJC No. 12906 of 2016 whereby



the prayer of the petitioner seeking payment at the prevailing rates of the year 2012 for the excess of the contracted quantity under the agreement which entered in the year 2007 for the construction of the barrage and other allied works over Phalgu River has been declined to be entertained in the writ jurisdiction with liberty to the petitioner to invoke arbitration for the settlement of the claim of such payment. The petitioner has basically challenged the action of the respondents to be contrary to the recommendations of the competent authorities and the ultimate decisions of the State Government not to make the payments being without jurisdiction.

2. In short, the contention is that the proceedings undertaken by the respondents being without jurisdiction, the action of the State is arbitrary thereby violating Article 14 of the Constitution of India and, therefore, the writ petition was entertainable in view of the three exceptions carved out in the decisions of **Whirl Pool Corporation vs. Registrar of Trade Marks, Mumbai and Others** reported in **(1998) 8 SCC 1**. For this reliance has also been placed on the decision of the Apex Court in the case of **Srilekhas Vidyarthi vs. State of UP** reported in **(1991) 1 SCC 212** as followed in **ABL International Ltd. and Anr vs. Export Credit Guarantee Corporation of India Ltd. and Others** reported in **(2004) 3 SCC 553**. It has been urged that where fundamental rights are violated or where



the proceedings are without jurisdiction the judgment in the case of **Zonal Manager, Central Bank of India vs. Devi Ispat Limited and Others** reported in **(2010) 11 SCC 186** as well as the judgment in case of **Harbanslal Sahnia and Anr. vs. Indian Oil Corporation Ltd. and Ors.** reported in **(2003) 2 SCC 107** is also extracted.

3. It is also the submission on behalf of the appellant that the learned Single Judge has also not taken notice of a substantial change in the contract which amounts to novation of contract and consequently the extra quantity of additional work executed by the appellant should be paid at the prevailing rates when the work is executed. For this reliance has been placed on the case of **Union of India vs. Tania Construction (P) Ltd.** reported in **(2011) 5 SCC 697** and **S. Harcharan vs. Union of India** reported in **(1990) 4 SCC 647**. It is submitted that there was complete silence on the part of the respondents on the demand being immediately raised by the appellant in respect of the payments and, therefore, the terms and conditions as suggested by the appellant will tantamount to acceptance by applying the doctrine of *sub silentio*. For this reliance has been placed on the judgment of the Apex Court in the case of **Hyderabad Municipal Corporation vs. M.K. Mudaliar** reported in **(1985) 2 SCC 9** and the judgment in the case of **BPCL vs. Great Eastern Shipping Co. Ltd.** reported in **(2008) 1 SCC 503**.



4. It is the contention of the appellant that the commencement of the construction was delayed not on account of any fault on the part of the appellant but on account of the complete change in design and location of the work that was to be executed for which the respondents had themselves issued orders stopping the work immediately after the execution of the agreement in the year 2007. This is evident as the redesigning and relocation was finalized by the respondents themselves late in the year 2009 whereafter the appellant received a letter dated 16th of April, 2010 for proceeding with the execution of the work according to the deviations in the design and location of the project.

5. The original project cost as per the tender was 66.03 Crores. Certain works for extra items with regard to the original contract was performed at the instance of the respondents at the prevailing rates for which payment of Rs. 18.57 Crores has been accepted by the appellant and there is no dispute with respect to this amount or the rate in respect thereof.

6. Upon commencement of the work vide letter dated 16th of April, 2010 the appellant is said to have sent his reply within five days on 21st of April, 2010 for which he raised his demand for payments for excess work at prevalent rates.



7. According to the appellant, as per the desire of the respondents, when the work was executed according to the revised design and location the petitioner renewed his plea for payment at revised rates in respect of the excess work done as per the rates prevalent in 2012. On this request, the communication that went on with respect to the claim of new rates have been brought on record. This claim is reflected vide letter dated 26th of May, 2014 that was forwarded to the Chief Engineer on 2nd July, 2014. The recommendations were made by the Superintending Engineer on 9th of October, 2014 that was further recommended by the Chief Engineer on 11th of October, 2014. It is these recommendations which the appellant sought enforcement contending that the appellant had agreed to perform excess work subject to the condition that the petitioner will execute the work to the satisfaction of the total original value of work of Rs. 66.03 Crores as per the old rates but the work which has been quantified in excess beyond the same should be valued at the prevalent rates keeping in view the escalated amount of prices which according to the appellant had gone up three times long after the agreement was executed in the year 2007.

8. The respondents having refused to accept this and having denied the same, their action is arbitrary and, therefore, in view of the judgments referred to hereinabove and applying the law laid down a writ petition would be maintainable hence the learned Single



Judge without recording a finding on the allegations of arbitrariness has unjustifiably dismissed the writ petition.

9. Sri Vimal Kirti Singh, learned counsel for the appellant has extensively taken the court through various documents and communication as well as the affidavits on record to contend that this was not a case where arbitration was a solution in view of the long span of time that has been undertaken by the respondents to deny a genuine claim of the appellant by exercising powers arbitrarily at the instance of the decision of a High Level Committee which had no jurisdiction to delve into the same. The decision making process being influenced by such an authority calls for a direct interference under Article 226 of the Constitution of India.

10. On the other hand, Sri Anjani Kumar, learned Additional Advocate General-IV contends that this is a clear dispute of rates which the appellant is claiming and as a matter of fact the appellant is not entitled to any such payment on the basis of recommendations which have been ultimately found by the Government to be not justified resulting in the order passed by the Engineer-in-Chief on 13th of October, 2016 on the basis of decisions of the High Level Committee dated 29th of September, 2016. The subsequent decision of the Government dated 30th of March, 2017 that was taken after a



direction was issued by the High Court on 15th of February, 2017 was clearly an exercise of authority which was well within the sovereign function of the Government and had the support of order of this Court dated 15th of February, 2017. In the circumstances, it was after considering the entire claim of the petitioner that a decision has been taken which does not suffer from any infirmity. It is submitted that the writ petition that was framed and was filed only for a direction of certain payments and consequently if the appellant was aggrieved by any such dispute it was open to it have proceeded under the relevant clauses of the agreement for appropriate action including invoking arbitration. It is urged that if there are disputes relating to deviations or even of the prevalent rates applicable then this was a clear case for arbitration where none of the fundamental rights of the appellant have been violated.

11. Sri Anjani Kumar, learned Additional Advocate General-IV contends that the appellant himself had accepted the terms and conditions and there was no silence as alleged so as to infer an acceptance on the part of the respondents. All the recommendations were subject to final decisions that were taken after due deliberations. The decisions are neither *mala fide* nor is there any material to establish that the decisions were taken deliberately to avoid the terms of the agreement or contrary to the same. In absence of any such issue arising



in the matter, the allegation of arbitrariness in the action of the answering respondents is without any basis and, therefore, the judgment of the learned Single Judge deserves to be upheld.

12. Having heard learned counsel for the parties and having perused the records, Clause 25 of the agreement has been extracted in extenso in paragraph 32 of the judgment and, therefore, need not be reproduced again. It provides for an option to the contractor to promptly submit his claim within seven days for written instruction or decision to the Superintending Engineer who is obliged to give his decision within fifteen days from the receipt of the letter of the contractor. In the event of failure on the part of the Superintending Engineer or in the event of any dissatisfaction or any decision given by him the contractor can file an appeal to the Chief Engineer within fifteen days and after affording an opportunity to the contractor he shall give his decision within thirty days. The arbitration clause comes thereafter, i.e., after the decision of the Chief Engineer when notice can be given to him for appointment of an arbitrator who would be appointed by the Engineer-in-Chief or the Administrative Head of the Public Works Department and proceedings of arbitration are to be conducted in terms of the Arbitration and Conciliation Act, 1996 with payment of fee to the arbitrator on an equal basis by both sides.



13. The clause which deals with extra and excess work and the mode of payments are contained in Clauses 12.2, 12.3 and 12.4 of the Standard Bidding Document read with Schedule “F” thereof. The State-respondent has taken a stand that the space provided for in Schedule “F” for any limits of excess work has been left completely blank without any ceiling whereas the claim of the appellant is otherwise. Nonetheless Clauses 12.2, 12.3 and 12.4 are reproduced hereinunder for ready reference:-

“12.2 Deviation extra items and Pricing

In the case of extra item(s) the contractor may within fifteen days of receipt of order or occurrence of the item(s) claim rates, supported by proper analysis, for the work and the Engineer-in-Chief after approval from competent authority shall within one month of the receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, determine the rates as per power delegated in PWD Code and on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined.

Deviation Substituted items, Pricing

In the case of substituted items, the rate for the agreement item (to be substituted) and substituted item shall also be determined in the manner as mentioned in the aforesaid para.



(a) *If the market rate for the substituted item so determined is more than the market rate of the agreement item (to be substituted) the rate payable to the contractor for the substituted item shall be the rate for the agreement item (to be substituted) so increased to the extent of the difference between the market rates of substituted item and the agreement item (to be substituted).*

(b) *If the market rate for the substituted item so determined is less than the market rate of the agreement item (to be substituted) the rate payable to the contractor for the substituted item shall be the rate for the agreement item (to be substituted) so decreased to the extent of the difference between the market rates of substituted item and the agreement item (to be substituted).*

Deviation, Deviated Quantities, Pricing:

In the case of contract items, substituted items, contract cum substituted items, which exceed the limits laid down in Schedule F, the contractor may within fifteen days of receipt of order or occurrence of the excess, claim revision of the rates, supported by proper analysis, for the work in excess of the above mentioned limits, provided that if the rates so claimed are in excess of the rates specified in the schedule of quantities the Engineer-in-



Chief shall within one month of receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, determine the rates as per power delegated in PWD Code and on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined.

12.3 The provisions of the preceding paragraph shall also apply to the decrease in the rates of items for the work in excess of the limits laid down in Schedule F and the Engineer-in-Chief shall after giving notice to the contractor within one month of occurrence of the excess and after taking into consideration any reply received from him within fifteen days of receipt of the notice, revise the rates as per power delegated in PWD Code for the work in question within one month of expiry of the said period of fifteen days having regard to the market rates or current schedule of rate.

12.4 The contractor shall send to the Engineer-in-Chief once every three months an up to date account giving complete details of all claims for additional payments to which the contractor may consider himself entitled and of all additional work ordered by the Engineer-in-Chief after approval from competent authority which he has executed during the preceding quarter failing which the contractor shall be



deemed to have waived his right. However, the Superintending Engineer is authorized for consideration of such claims on merits.”

14. The contract with the Water Resources Department, Govt. of Bihar through its officials was entered into on 10th of April, 2007 for the construction of a barrage and other appurtenants at Uderasthan over Phalgu River. The project cost as per the tender conditions was Rs. 66.06 Crores and the time period for completion of the project was 30 months. The notice inviting tender was issued on 26th December, 2006 and the tenders were opened on 14th March, 2007. The petitioner turned out to be the successful bidder and the agreement was entered into as indicated above.

15. On 17th of October, 2007, the Joint Secretary, Water Resources Department, Govt. of Bihar issued a letter to the Chief Engineer for immediate stoppage of the project work. This was informed by the Executive Engineer on 22nd of October, 2007 after the petitioner had already commenced work for almost five months. On an inquiry, the appellant came to know that the work had been stopped as the design and drawing as prepared by the Water Resources Department was sent for vetting to the Central Water Commission at New Delhi and for Hydraulic Model Test to the Central Water Power Research Station, Pune. It was almost after two years that on 4th of December, 2009 the technical clearance was received from Pune which came to be



communicated to the appellant about the location, size and shape of the barrage structure as well as other appurtenants and consequently the appellant was called upon to execute the work after the fresh design and drawings were prepared.

16. The appellant almost after thirty months on 16th of April, 2010 was called upon to resume work with a relocation of the original site and change in design.

17. On having received this information the first communication made by the appellant is dated 21st of April, 2010 which is promptly within five days of the resumption of work. The said letter is the basis of the claim giving rise to the present controversy. The appellant therein has indicated about the novation of the contract, a major change in the shape of work, the promise to carry out the contractual obligations in so far as it related to the original agreed quantities and with a final request for making payments at prevailing market rate for further work or as per mutually agreeable or agreed rates.

18. With regard to the deviation of quantity a letter was dispatched by the Superintending Engineer on 9th of September, 2013 to the Chief Engineer for departmental sanction in respect of the excess work of the project. This document has been filed alongwith the counter affidavit of the Executive Engineer in the writ petition. The appellant on 15th of September, 2013 wrote a letter to the Executive Engineer



invoking Clause 12 of the Standard Bidding Document for appropriate amendment followed by two representations dated 22nd of October, 2013 and 5th of April, 2014. Through these representations information was given with regard to excess of the quantity beyond the original agreed quantity as also the escalation and increase in prices between 27% to 269%. On the strength thereof new rates were claimed by the appellant either based on current market rate or at least as per the latest schedule of rates. On 30th of April, 2014 the Superintending Engineer requested the Chief Engineer for consideration and appropriate action in the matter whereafter the appellant was called upon by the Executive Engineer to submit his claim keeping in view the provisions of Clause 12 and Clause 12.2 of contract for further action in the matter. Accordingly, the appellant responded vide letter dated 26th of May, 2014.

19. On an examination of the claim of the appellant, the Superintending Engineer on 9th of October, 2014 sent a communication to the Chief Engineer with regard to the claim of new rates as applicable on 1st of October, 2012. This recommendation dated 9th of October, 2014 was further supplemented by the recommendation of Chief Engineer on 11th of October, 2014 requesting for departmental sanction the recommendations being as per Clause 12.2.

20. Such recommendations do not appear to have been responded to as a result whereof the appellant again renewed his prayer



for revision of rates for the deviated quantities vide letter dated 18th of June, 2015. Having failed to receive any response the present writ petition came to be instituted in August, 2016 with a prayer for issuing a mandamus directing the respondents to take a decision on the communication of the appellant and make payments to the appellant that were based on genuine consideration.

21. During the pendency of the writ petition a High Level Committee was constituted by the respondent department and on 13th October, 2016 a decision was communicated by the Engineer-in-Chief informing the Chief Engineer that the recommendations made at the revised rates as claimed by the appellant were unacceptable for six reasons.

22. The first reason given was that the appellant had never objected to the execution of the relocated and redesigned work nor had he objected to any payments that were being received by him.

23. The second ground taken to reject the recommendation is that the appellant had raised his demand for the deviated quantity beyond the period of fifteen days which according to the department was informed on 26th May, 2014 and, therefore, the same being contrary to Clause 12.2 the request was declined.



24. The third ground for rejection is that the claim had to be presented within one month which was done on 26th May, 2014 and, therefore, being contrary to Clause 12.2 the same was unacceptable.

25. The fourth ground taken is that for an additional work the payment was being made according to new schedule rates as per the PWD Code Clause 182 (A).

26. The fifth ground taken is of payments being made according to the Standard Bidding Documents Clause 10 on the basis of escalation and the sixth ground taken is that there were no limits indicated in Schedule "F" and therefore no such claim could be made hence it was rejected.

27. During the pendency of the writ petition the High Court passed an order on 15th of February, 2017 which is to the following effect:-

"In the present case, the important issue is related to construction of Barrage/Dam at Uderasthan at Falgu River. As per the claim of the petitioner, he was allotted the work in the year 2007, but before he could start the work, the order was passed for stoppage of work and the matter was kept pending for about two years as proposed map was sent to two Expert Bodies ,i.e. Central Water Commission, New Delhi and Central Water Power Research Station, Pune for examination and giving its own opinion, both the Expert Bodies



examined proposed plan of the Project and suggested that instead of small Barrack/Dam, it should be bigger one and the construction cost has gone up from 66 crores to 138 crores.

When the matter came under consideration for allotment of the work, the Departmental Secretary has opined the work be allotted to the present petitioner and accordingly, the work was allotted. As per the petitioner, he has written a letter that he would execute the work at the old rate upto 67croresand extra work will be executed at the prevalent market rate. Time to time, he has written letter, but without any reply ,he went on to execute the work and completed 90% work, but when the matter came for the payment, the authority has taken a tangent view, the matter was placed before the Higher Level Committee to consider the case of the petitioner and the Committee did not find any merit in the case of the petitioner.

The counsel for the petitioner submits that the rate, which was prevalent in the year 2007,has gone on four times high in terms of material cost as well as the labour cost, it is very difficult to execute work in old rate maintaining standard with perfection and according to the specification.

Prima facie, the Court feels, petitioner has raised genuine and valid grievance which is required to be looked into by the competent authority. As already an order has been passed ,which is under challenge. This Court is not entering into the merit, but referring the matter to the



Principal Secretary, Water Irrigation Department, Government of Bihar, who will examine the case taking help from the Expert Bodies and will also examine that 90% work has already been completed and that Project is for the benefit of people of the locality for the irrigational purposes. If the dam is not completed, it will directly cause loss to State as well as to the general public.

Let the Principal Secretary examine this matter, take decision and communicate to this Court. While considering the case, the Principal Secretary will not be influenced by the impugned order dated 13.10.2016.

For the convenience, the Principal Secretary will hear both sides and take decision by a reasoned order.

Let this case be listed under the same heading after six weeks, maintaining its position.”

28. A perusal of the aforesaid order would indicate that the Principal Secretary, Water Resources Department, Govt. of Bihar was directed to take a fresh decision without being influenced by the decision of the High Level Committee dated 13th October, 2016.

29. The Principal Secretary, Water Resources Department, Govt. of Bihar on 30th of March, 2017 took a decision rejecting the claim of the appellant by the following order:-

GOVERNMENT OF BIHAR

WATER RESOURCES DEPARTMENT



Order No. 11/mu-06-09/2016-510

/Patna, dated 30.03.17

ORDER

The following is the report after examination of the matter as directed by Hon'ble Court in CWJC No. 12906/2016 vide order dated 15.02.2017, in regard to the claim made by Vijeta Project Infrastructure Limited (VPIL) for payment of quantities in excess of the agreed amount at the rates then prevailing.

A representation has been submitted on behalf of Vijeta Project Infrastructure Limited (VPIL) which is marked as Annexure-I of the report. The matter was heard on 28.03.2017 in the presence of the representatives of the applicant and learned counsel representing them.

The various grounds taken by Vijeta Project Infrastructure Limited (VPIL), hereinafter referred to as applicant may be summarized as follows :-

- i) That there has been change of the location of the scheme and vast variation of the quantities therefore the present contract is virtual novation of the existing contract.
- ii) That the applicant had in the year 2010 (16.04.2010) informed the Executive Engineer that for the work further to agreed quantities it should be paid as per prevailing market rate or as per mutually acceptable rate.
- iii) During process of execution of work, the applicant firm vide their letter 22.10.2013, 05.04.2014 and 26.05.2014 requested the Executive Engineer for revision of rates for items in excess of agreed quantities.
- iv) The concerned Executive Engineer & Chief Engineer recommended vide their letter 09.02.2014 and 11.02.2014 for allowing new rates for excess quantities. A further point has been stressed that the Chief Engineer in-terms of Clause 25 of the general conditions of the contract has been authorised to



settle the disputes and chief Engineer having recommended the applicant case, such demand has been stated to be in inconsonance with the provisions of standard bidding document and thus the justification.

v) A number of citations and reported judgments have also been referred to in support of claim for revised rates for quantities over and above the agreed quantities.

The various points raised by the applicant firm described above is discussed as hereunder, pursuant to their examination in view of provisions of standard bidding document, provisions in PWD code and provision under various executive instructions issued from time to time.

1) As far as the point regarding novation of the contract is concerned, this term is not defined anywhere in the rule which govern the execution of the contract. Further novation of contract is always preceded by fresh tender. Any work carried out under existing agreement, which the contractor has himself agreed to execute with changed quantities and even change in location, would not be treated as novation of the contract. In this case the applicant agency agreed to execute with work with all facts and repercussions known to them. If the agency had not agreed the department would have issued a fresh tender and whichever agency qualified would be required to execute a new contract. As such the present arrangement of work executed cannot be termed as novation of contract.

2) The Standard bidding document which governs various aspects of the agreement, in Chapter III, clause 12 of general conditions of contract, deals with deviations/variations extent and pricing.

3) In course of execution of work normally two eventualities arise :

a) the quantities of agreed item exceeds



b) new items of work as integral part of original work may have to be executed. As far as eventualities of category (b) is concerned, ie., for new extra items, the prevailing market rates have been given to the applicant agency. This aspect is not in dispute.

4) However, under (a) which is quantities in excess of agreed quantities that this dispute has come up. The standard bidding documents provide that in schedule – F relating to contract data entry about the maximum percentage for excess quantity of items may be mentioned beyond which rates are to be determined in accordance with Clause 12.2 and 12.3. At the stage of tender, under this entry a certain percentage may be mentioned. If that entry is kept blank, then in normal practice a general interpretation is that the contractor will not be entitled to rates to be determined in accordance with Clause 12.2 and 12.3 for excess quantities whatsoever. In the present case also since entry against this item in schedule –F is blank therefore, the usual interpretation has been followed ie., for excess quantities without any ceiling no enhancement of rates have been found payable to the agency.

5) It may be clarified that the contractor is executing work under an agreement wherein the benefit of price escalation has been provided for in Clause 10 cc of the general condition of the contract, the benefit of which has been allowed to the agency. The applicant agency has been paid the difference in price variation for labour component, cement component, Steel component, fuel and lubricant component, plant and machinery spare component and also for the remaining material component. These variations in the value, as resulting from the difference in the prevailing whole sale price index of those items and the prices taken at the time of agreement is accounted for and the agency is paid the excess difference amount resulting on account of change in prices of various materials as well as the labour at the time of actual execution of work. This price



enhancement clause is part of the contract and the agency has at all stages availed himself of all these benefits.

6) The recommendations made by the Executive Engineer & Chief Engineer favoring market rates for quantities in excess of the agreed quantities also needs to be discussed as this particular point has been strongly stressed by the applicant agency in favour of their claim for extra payment.

A reference may be made to Clause 25 of chapter – III of standard bidding document wherein power of Superintending Engineer and Chief Engineer are defined, in the contract, where point of dispute arises between contractor and the State Government as parties to the agreement. The opening line of clause 25 is reproduced below :

“Except where otherwise provided in the contract...”

From a bare reading of the above, it would be apparent that this clause does not govern the rates of payment because the rate part of the contract is very clearly provided in other parts of the contract document. Clause 25 mostly deals in disputes which relate to quantities of work whether agreed or extra or other relating to design, drawing and specification etc. etc. whenever change in them are directed as also about the quality of work.

7) The rates in the contract are decided at the tender stage itself and it is tender committee which determines the rate of contract for all items mentioned in the schedule of rates. The tender committee for works in excess of 2 crore is headed by Secretary and the other members are internal finance advisor, Engineer-in-Chief and concern Chief Engineer. The rates for scheduled items as fixed by the tender committee is valid through out the contract with the addition of cost escalation terms of Clause 10 CA or 10 CC as the case may be. It is only for new items of work that Superintending Engineer of the concerned circle has the



power to decide the rates which is based on the market rate of the material and the analysis for the item of work in question. Clause 12 does deal with a situation where after execution of definite percentage above the agreed quantities prevailing market rates may become applicable. In this case the applicant agency neither objected to the blank entry in schedule-F at the time of agreement or even earlier at the tender stage. As such at this stage it cannot be allowed to take advantage of the lacunae of the contract document.

From the above discussion it would be manifest that clause 25 deals with only such issues which are issue other than rate for execution of various items of work. As such the recommendation of the Chief Engineer or the Executive Engineer about allowing enhanced rate is not consistent with scheme laid down in standard bidding document. Such a recommendation without any support of legal provision of the contract cannot be acted upon.

8) It is true that there is not statutory high level task force to decide the issue of contract but all issues especially the one referred to above, in which there is a recommendation from Executive Engineer and Chief Engineer on an issue beyond the provision in Standard Bidding Document, at the level of department, senior most technical officers are allowed to have a meeting and decide such issue. The high level task force took a decision in this extra ordinary background. It being clarified that the decision of high level task force is not being relied upon here.

9) As a conclusive points of discussion it has been found that the agency has continued receiving the payment even after the year 2012, for cost escalation in terms of Clause of 10 cc of the agreement. If the applicant agency was persistent about its claim, it should not have received the payment as calculated on the basis of price escalation under clause 10 cc and from the stipulated date should have asked for revised rates rather than the accept the payments thus



calculated. The applicant agency have continued to receive, the payment for almost 4 years under the above arrangement and under the principle of acquiescence it cannot now go back and demand for new rates.

10) In the light of the above discussion the claim of the applicant agency is not found maintainable.

(Arun Kumar Singh)
Principal Secretary”

30. Both the orders dated 13th of October, 2016 of High Level Committee as well as the order dated 30th of March, 2017 of the Principal Secretary, Water Resources Department were assailed before the learned Single Judge through amendment applications contending that the orders are arbitrary, without jurisdiction, contrary to the terms and conditions of the contract and clearly designed to deny a genuine claim which otherwise the appellant was entitled to receive under the terms of the agreement.

31. The learned Single Judge after having examined the entire material on record came to the conclusion that there were grey areas which require leading of evidence and deeper considerations and consequently the exceptions available in the decisions of the Apex Court (Whirl Pool Corporation Case) would not apply and, therefore, the arbitration clause should be invoked. The writ petition was dismissed for getting the dispute settled through arbitration.



32. Sri Singh contends that the principal ground of arbitrariness has not been answered by the learned Single Judge on any of the issues that were raised in the writ petition. He submits that there were no disputed questions of fact inasmuch as the recommendations of all the Field Officers who were under the contract entitled to take decisions had accepted the claim of the appellant. In this regard, on inquiry the learned counsel has taken the court through the conditions of the contract, a copy whereof has been brought on record through the supplementary affidavit of the petitioner dated 29th of August, 2016. In Clause 2(iv) the word Engineer-in-Charge has been defined as follows:-

“The Engineer-in-Charge means the Engineer Officer who shall supervise and be in-charge of the work and who shall sign the contract on behalf of the Governor of Bihar as mentioned in Schedule “F” hereunder.”

33. In Schedule “F” Engineer-in-Charge has been defined under Clause 2(v) as Executive Engineer, Water-ways Division, Jehanabad. Thus, the Executive Engineer is the Engineer-in-Charge and who had signed the agreement on behalf of the Governor.

34. The nature of work of contract according to the pleading of the parties did result in alteration of the project. The question is, did the same amount to a novation of contract or not? In this regard, the appellant had on the resumption of work on 16th of April, 2010



immediately responded within five days claiming payments at prevailing market rate on 21st of April, 2010. We, therefore, do not find any justification for the High Level Committee decision communicated on 13th of October, 2016 to have recorded that no objection had been raised by the appellant. The reasons so given therefore does not appear to be correct inasmuch as the communications made by the appellant have been completely ignored that were between 2010-2013. It was after the letter of the Superintending Engineer dated 9th of September, 2013 that renewed representations were made referring to the earlier claim on 22nd of October, 2013 and 22nd of April, 2014. It is, therefore, a continuity of the claim that was registered in the letter of the appellant dated 21st of April, 2010 and not a delayed claim as suggested in the impugned decision dated 13th of October, 2016.

35. The question of novation of contract had to be understood in the light of any substantial variation of work resulting in the alteration, increase or decrease of the scope of work. The increase or decrease is only a consequence which is dependent upon any substantial alteration. The claim of the appellant is not only the relocation of the site but also the entire design that was heavily altered which obviously resulted in increased quantity of various items due to such change in design. This is further evident from the letter dated 14th of December, 2009 of the Joint Secretary, Water Resources Department, Govt. of Bihar



which indicates the change of location as well as the change in design on the basis whereof the revision was required.

36. In this regard, the comment made by the Principal Secretary in the order dated 30th of March, 2017 that there was no novation of contract may require an adjudication. Merely because the appellant had agreed to continue the work does not affect the change which has been brought about in the project itself. The order of the State Government nowhere indicates or even discusses the extent of change of location and the substantial change in design of the project which is indicated in the documents of the respondents and which was also indicated in the repeated claims of the appellant referred to above. As a matter of fact, the chronology of events discloses that the respondent themselves had restrained the execution of the work as the design required a vetting from the Central Water Commission, New Delhi and had also to undergo the Hydraulic Model Test at Pune whereafter the location and the design were both altered. Neither the decision of the High Level Committee dated 13.10.2010 and the Principal Secretary dated 30.03.2017 anywhere delves into this aspect of substantial change and, therefore, the conclusion drawn that there was no novation of contract is based on a non-consideration of such material.

37. The second area where also the consideration appears to be not in accordance with law is with regard to the



interpretation of Schedule “F” that was left blank. In this regard, the finding recorded is that the appellant never objected to the blank entry in Schedule “F” and, therefore, at this stage the appellant cannot be allowed to take advantage of the lacuna of the contract document. The question as to whether a blank space allows advantage to the appellant or results in a disadvantage as suggested in the impugned order dated 30th of March, 2017 can be adjudicated only on the basis of the intention of the parties. While passing the impugned order the Principal Secretary has nowhere discussed the representation of the appellant upon resumption of the contract in the year 2010 and thereafter. It is not at the stage of the decision being taken by the Principal Secretary that the appellant was trying to claim any advantage. To the contrary, he had staked his claim way back on 21st of April, 2010 itself.

38. The Principal Secretary has further opined that the recommendation of the Executive Engineer and Chief Engineer were beyond the provisions of the Standard Bidding Document. For this, the Principal Secretary has also opined that he was not relying on the conclusions drawn by the High Level Committee on 13.10.2016.

39. We fail to find any justification for the Principal Secretary to have arrived at such a conclusion without specifying as to how the Executive Engineer or the Chief Engineer had made



recommendations beyond the provisions of the Standard Bidding Document.

40. The Principal Secretary has also admitted that there was no provision for any High Level Committee to decide any issue of contract, but at the same time has taken a decision which in tenor is a reproduction of the opinion expressed by the High Level Committee with an additional comment on the issue of the novation of contract. We, therefore, find that the decision making process overlooks the provisions of Clause 25 on the issue of jurisdiction and does not appear to have appropriately dealt with the facts on the basis whereof the claim was raised, thus arriving at a wrong decision.

41. At this stage, we may, however, clarify that there is a distinction between an arbitrary action and a wrong decision. An arbitrary action is one in which the decision maker has taken no guide other than his own will or pleasure and the decision is not fixed by any rule or which is not based on a disclosure of discernible principle. It is something unpredictable being whimsical and capricious.

42. A wrong decision is one which may not necessarily be arbitrary and may be based on the strength of inferences which can be described as incorrect without any element of *mala fides* or irrationality. Such a decision falls within the realm of interpretation and may also be an outcome of error of judgment which is predictable.



43. A wrong decision may therefore necessarily may not be an outcome of sheer arbitrariness. In a given situation, there may be two views possible. One may be right whereas the other may prove to be ultimately wrong or vice-versa. A decision of this nature that may be ultimately wrong may not necessarily be arbitrary as both views may be predictable. To gather arbitrariness one has to arrive at the conclusion that the decision is absolutely unreasonable which no prudent man can ever arrive at. Reasonableness and prudence are subjective in nature but in the administrative decision making process they are construed to mean that there is rationality and an assessment where the thought process has some rationale which may be right in one situation and wrong in another depending upon the facts and circumstances of a case. Further, the perception with which the decision making authority has proceeded to take an action, has also to be assessed as to whether it was motivated or the outcome of a mere whim or was it with the plain intention of taking an impartial and uninfluenced decision. In arriving at a conclusion, a correct or incorrect appreciation based on existing material will make the decision right or wrong but if the decision is without any rational perception and is whimsical then it becomes arbitrary.

44. In the instant case, the department has interpreted the entire lapse of period, the communications and recommendations vis-a-



vis the terms of the contract to conclude that the appellant was being given payment with regard to escalation of prices which he has accepted. This is not an issue inasmuch as the escalated amount has been accepted by the appellant but the contention is with regard to payment at prevalent rates in respect of excess work against the original bill of quantity.

45. In our opinion, this therefore first raises a dispute as to whether there was a novation of contract or not. Secondly, whether there was a prompt claim by the appellant in terms of the contract in respect of any additional quantity of work or excess work which could be termed to be included under the terms of the original contract. This in turn would further be dependent upon the interpretation of the blank space in Schedule "F" and as to whether it is being wrongly interpreted by the respondents or would require the acceptance of the claim of the appellant who contends that there were recommendations in his favour of all the Field Officers and there was complete silence by the Government on this issue throughout this period. This further calls for an adjudication as to whether there was an acquiescence on the part of the appellant to continue to execute the work which he contends was under protest and a specific request for payment at prevalent market rates with regard to the excess quantity of work.

46. We are, therefore, of the opinion that keeping in view the provisions of Clause 25 of the terms of the agreement there was



no occasion for any third adjudicatory forum to be created by the respondent-State in the shape of High Level Task Force which is also admitted by the Principal Secretary in his order dated 30th of March, 2017. We even otherwise do not find any justification for the said High Level Committee to have skipped over the facts that formed the basis of the claim of the appellant including the registration of his claim on 21st of April, 2010 and onwards. We are also not convinced about the conclusion drawn on the issue of novation of contract as held by the Principal Secretary in the order dated 30th of March, 2017 where there is no discussion about the extent of change in the design, the plan and the original project work. In the absence of any such factual foundation a mere conclusion that there is no novation of contract does not appear to be justified and the decision making process is clearly vitiated.

47. The decision of the High level Task Force/Committee being a process alieu to the terms of the contract, particularly Clause 25, cannot have a binding force. The conclusions arrived at therein are clearly questionable as observed above. The decision contains reasons that can be logically reversed, but at the same time reasons do exist based on the inference drawn that do not appear to have been arrived at on a correct appreciation of facts. The same is the case with regard to the order dated 30.03.2017 passed by the Principal Secretary.



48. Consequently, for all the aforesaid reasons, the order dated 13th of October, 2016 and 30th of March, 2017 that have been challenged by way of an amendment in the writ petition have to be declared as wrong decisions. To that extent, the writ petition succeeds but in so far as the conclusion drawn by the learned Single Judge is concerned, we are of the firm view that the issues of dispute which have arisen and which raise the question of interpretation of the terms of the contract, the intention of the parties, the conduct of the parties during the period of execution and the question of revision of rates on the strength of the decisions which have been relied at the bar, require investigation of facts by the adjudicatory forum as provided for under the contract itself.

49. We, therefore, partly allow this appeal but at the same time we uphold the view of the learned Single Judge that the matter deserves to be resolved through arbitration.

50. We may also observe that apart from arbitration, a new law, namely The Commercial Courts Act, 2015 is in place that takes care of providing a forum for the adjudication of all commercial disputes and for this additional reason also, it will not be appropriate for the High Court to entertain a writ petition.

51. The appeal is disposed off subject to the above leaving it to the appellant to invoke the arbitration Clause and in the



event of such revision is made the same shall be processed and carried out keeping in view the provisions of Arbitration and Conciliation Act, 1996.

(Amreshwar Pratap Sahi, CJ)

(Anjana Mishra, J)

Vikash/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	31.03.2019
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