IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.17864 of 2018

==

M/s S V S V S Projects Pvt. Ltd. through its Managing Director Namely Mr. V. Rammohan Rao, Son of V Sitaramayya (Late), Resident of SVSVS Project Pvt. Ltd. C/o Parameshwara Purbey, D.O. L.I.C., Chitragupta Colony, Ward No. 20, Stadium Road, Madhubani District- Madhubani and Registered office at Plot No. 31, 2nd floor Phase- 1, Kalyan Nagar, Hyderabad- 5000038 Telangana.

... ... Petitioner/s

Versus

1. The State of Bihar through Principal Secretary, Road Construction Department, Government of Bihar, Patna.
2. The Principal Secretary, Road Construction Department, Government of Bihar, Patna.
3. The Engineer in Chief, Road Construction Department, Government of Bihar, Patna.
4. The Superintendent Engineer, Road Construction Department, Road Division, Darbhanga.
5. The Executive Engineer, Road Construction Department, Road Division, Madhubani.
6. The Assistant Engineer, Road Construction Department, Road Division, Madhubani.

... ... Respondent/s

==

Appearance :

For the Petitioner/s	:	Mr. P.K. Shahi, Sr. Adv.
		Mr.Vikas Kumar, Adv.
For the Respondent/s	:	Mr.Raj Ballabh Prasad Yadav- Aag11
		Mr. A.K. Dubey, AC to AAG 11

==

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL ORDER

5 08-01-2019 This writ application has been preferred seeking the following reliefs:-

> *"(a).For quashing of letter NO. 1428 dated 11.08.2018, letter No.1417 dated 11.08.2018 and letter No. 1418 dated 11.08.2018 whereby and whereunder the Executive Engineer, Road Construction Department, Road Division, Madhubani has directed the petitioner to start the work within a week for maintenance of Road under OPRMC Package No. 11, OPRMC*

Package No. 12 and OPRMC Package No. 13 in the District of Madhubani otherwise after getting approval of estimate the work shall be executed on risk and cost of the petitioner.

b. For quashing of advertisement of NIT No.- RCD/Madhubani/03/2018-19 published by Executive Engineer, Road Construction Department in local daily in Dainik Bhaskar, Madhubani on 18.08.2018 by which tender has been advertised for maintenance of road for two months under OPRMC Package No. 11, OPRMC Package No. 12 and OPRMC Package No. 13.

c. For any other relief/reliefs which petitioner may be found entitled in the facts and circumstance of the case."

It is the case of the petitioner that the work for maintenance of road in the District of Madhubani under OPRMC Package No. 11, OPRMC Package No. 12 and OPRMC Package No. 13 were allotted to the petitioner in the year, 2013 itself. For all these works three separate agreements were executed on 24.01.2014, 22.01.2014 and 27.01.2014 respectively. A copy of the Agreement No. 9 M dated 22.01.2014 has been placed on record as Annexure 5 to the writ application. It is stated that all the three agreements are on similar terms.

The grievance of the petitioner is that in the month of August-September, 2017 heavy flood came in the District of Madhubani which caused damage to the road maintained by the petitioner on larger stretches, as per provisions of the agreement he submitted estimate for permanent restoration of work but as against those estimates of the petitioner a paltry amount which were not sufficient for carrying the work were sanctioned. The petitioner submits that even though, the sanctioned amount was lesser than the estimated amount the petitioner somehow continued to execute the work and submitted his bills.

According to the petitioner, the bills were not fully paid and a sum of Rupees Eight Crores approximately remained outstanding for payment. In these circumstances, when the petitioner represented to the authorities of the State and sought redressal of his grievance, instead of addressing the grievance of the petitioner the authorities of the State came out with the impugned letters and communication by which the remaining work were sought to be executed by way of a fresh tender at the risk and cost of the petitioner. At the same time, on 20.08.2018 the respondent-authorities issued an advertisement inviting tender in local daily Dainik Bhaskar for the work in question.

The petitioner has challenged the issuance of advertisement on the grounds *inter-alia* that the petitioner's agreement is still subsisting as those have not been terminated at any point of time prior to issuance of the advertisement.

Mr. P.K. Shahi, learned Senior Advocate assisted by Mr. Vikas Kumar, learned Advocate on Record has while addressing this Court made it clear that the petitioner is not looking to challenge the advertisement issued in the local daily, Dainik Bhaskar, Madhubani on 18.08.2018 by which the tender had been advertised and the limited grievance of the petitioner is with respect to that part of the communication by which the Executive Engineer, Road Construction Department, Road Division, Madhubani has informed the petitioner that work will be completed at the risk and cost of the petitioner. Learned Senior Counsel submits that the perusal of the terms and conditions of the Model Document of Bidding (MBD) would show that there is no stipulation in the contract that in case of termination of contract because of abandonment of work of the Contractor, the rest of the work shall be completed at the risk and cost of the Contractor.

Learned Senior Counsel has taken this Court through the terms and conditions of the contract particularly the Termination Clause No. 59 which provides for the termination of contract for Contractor's default and the consequences thereof. Learned Senior Counsel submits that in the present case the contract was never terminated and even before the termination of the contract if the tender was floated by the respondent-authorities, they could not have taken a decision to complete the alleged left over work at the risk and cost of the petitioner. It is submitted that in the case of ***State of Kerala and Others Versus M.K. Jose, reported in 2015 (9) SCC 433,*** the Hon'ble Supreme court has reiterated that the intention of the parties are to be gathered from the terms and conditions of the contract. It is submitted that in the present case the 'MBD' is the document which will guide relationship between the parties and in case no condition as to risk and cost is available in the MBD, at this stage, the respondent-authorities cannot bring the said condition in the contract.

While referring to the counter affidavit and the stand taken therein by the respondent-authorities, learned Senior Counsel has taken this Court through Clause 33 of the MBD which reads as under:-

> *"33.1.The Employer carries the risks which this Contract states are Employer's risks, and the remaining risks are the Contractor's risks."*

It is pointed out that the respondent-authorities are relying upon Clause 33 of the MBD to submit that the risk and cost condition is present in the contract but a bare perusal thereof would show that Clause 33.1 does not talk of risk and cost rather it refers to the risks which are mentioned as employers risks in the contract and presupposes that there are remaining risks which will be Contractor risks. It is submitted that nowhere in the contract the risks present in the contract have been pointed out or provided in, therefore, by merely drawing inference the petitioner cannot be made liable to suffer risk and cost in the facts of the present case.

On the other hand, learned counsel representing the State submits that since the petitioner failed to complete the work despite repeated reminders, the Department had no option but to get the work done through another Contractor. Referring to the various correspondences mentioned in the counter affidavit, learned counsel submits that despite repeated reminders when the petitioner failed to start the work then only the tender process was initiated. It is stated that an amount of Rs.1,85,58,902/- is required to be adjusted against the petitioner. Out of Rs.1,85,58902/-, Rs.15,00,000/- was earlier deducted from the current running account bill and the remaining is still required to be deducted from the running account bill from time to time. It is submitted that the writ application is not maintainable in the given facts and circumstances of the case particularly when an arbitration clause is available in the agreement. In this connection Clause 6.2.1 has been referred to. Apart from this, the submission is that, the nature of dispute could have been agitated by the petitioner in terms of Bihar Public Works Arbitration Tribunal Act and the grievance of the petitioner could have been redressed by the Arbitral Tribunal.

Learned counsel representing the State relies upon Clause 33.1 of the MBD to submit that in terms of the said Clause, the petitioner being the Contractor runs the risk of non-completion of work and in case those incomplete works are required to be undertaken by a fresh tender process, the employer i.e., the respondent-State would be within it's authority to realize the cost involved therein by applying the risk and cost concept. It is thus submitted that in terms of Clause 33.1 the respondent-authorities have rightly taken a decision to go for the fresh tender process on risk and cost basis.

Having heard learned Senior Counsel representing the petitioner and learned counsel representing the State, this Court is of the considered opinion that now in the changed circumstance where the limited issue raised by the petitioner pertains to application of risk and cost, the writ application may be disposed of on the basis of the materials available on the record.

In the present circumstance, it is not required to relegate the parties to the Arbitral Tribunal because in the opinion of the Court no disputed question of fact is involved while deciding the issue raised. In course of hearing, learned counsel for the State has relied upon Clause 33 of the MBD which has already been taken note of hereinabove. Save and except, the aforesaid Clause, the contract document nowhere talks of the kind of risk which may be put in the category of remaining risk against the Contractor in case of termination of contract.

Clause 59 of the contract document deals with different situation under which a contract may be terminated. According to the conditions envisaged therein, a contract may be terminated either for the Contractor's default or in case the employer takes a decision in the changed facts and circumstance. What is apparent from the record is that while Clause 59 and its various sub-Clauses provide for the consequences of termination of contract for Contractor's default, it is nowhere provided that in such cases the fresh tender shall be invited at the risk and cost of the Contractor. Learned counsel for the State is unable to demonstrate that there is any specific condition providing for risk and cost.

In the opinion of this Court, Clause 33.1 is a condition too vague to construe that it permits the employer i.e., the respondent-authorities to go for a fresh tender at the risk and cost of the contractor. A bare reading of Clause 33.1 gives an impression to this Court that it talks of the risks which are involved in the contract and are forming part of the stipulation of the contract but the Court is unable to find from the contract document anywhere that the 'risks' mentioned in Clause 33.1 have been identified and mentioned in the contract document. In the opinion of this Court clause 33.1 is vague and cannot be interpreted to the detriment of one of the parties to the contract. The Court is, therefore, unable to accept the contention of the learned counsel for the State that Clause 33.1 permits the employer to go for a fresh tender at the risk and cost of the petitioner. It is not denied that prior to initiation of tender process afresh the three contracts in question were not terminated. The court would however not go into the legality and validity of fresh tender in view of the limited prayer made on behalf the petitioner.

In result, the part of the communication as contained in Annexures 1, 2 and 3 wherein it is stated that decision has been taken to get the work done at the risk and cost (emphasis supplied) of the petitioner cannot sustain and is required to be quashed and canceled. Accordingly, this Court quashes the said part of the communication wherein decision has been taken to get the work done at the risk and cost of the petitioner.

Learned Senior Counsel for the petitioner has made it clear that he would have no issue with the Department if the Department wants to get the work completed through fresh tender process as he would not be interested in the work in question. Thus, now the respondent-State shall be free to proceed with the tender process for award of work and get the work completed but it will not be at the risk and cost of the petitioner. So far as other disputes with regard to payments etc are concerned, learned Senior Counsel for the petitioner has submitted that he would seek his remedy with regard to those grievances in accordance with law. For that, liberty will be there to the petitioner.

This application is allowed to the extent indicated hereinabove.

(Rajeev Ranjan Prasad, J)

R.R.Ojha/-

U			