

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CIVIL REVISION No.309 of 2016**

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Classicon Construction 1 Pvt. Ltd., Through Its Managing Director Deepak Kumar Sinha son of Shiva Shankar Sinha resident of Boring Canal Road, P.S. - Sri Krishna Nagar, District - Patna.

... .. Petitioner

Versus

1. The State Of Bihar and Ors
2. The Chief Engineer, Water Resources Department, Bhagalpur at Bhagalpur.
3. The Superintending Engineer, Water Resource Department, Bhagalpur Circle at Bhagalpur.
4. The Executive Engineer, Ganga Pump Canal Division, 02, Bateshwar Asthan Shivar, Shivanarayanpur, Kahalgao, Bhagalpur

... ..  
Opposite Parties

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**Appearance :**

For the Petitioner : Mr. Uma Shankar Tiwary, Advocate  
For the Opposite Parties : Mr. Sanjay Prasad, AC to AAG-4  
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**CORAM: HONOURABLE MR. JUSTICE KHATIM REZA**  
**CAV ORDER**

16    23-03-2023                      This Civil Revision application has been filed against the Award dated 26.09.2016 passed by the learned Tribunal, Bihar Public Works Contracts Disputes Arbitration Tribunal in Reference Case No. 104 of 2012 for setting aside the impugned Award in part.

2. The petitioner's case in short is that he being the lowest bidder was allotted "Earth work for Branch Canal II and Construction of Structure" from R.D.8.20 to 20.00 R.D. (Ex. 29.70 R.D.(L) of H.L.M.C) under *Bateshwar Asthan Ganga Pump Canal Phase-I*. The petitioner entered into an agreement with the Opposite Party-Executive Engineer on 20.03.2009. The



agreement value for work was Rs. 3,60,28,141/-. The time of completion was eight months from the date of the work order. The opposite parties had issued the work order on 20.03.2009. The petitioner further submits that after receiving alignment and pre-level he started the work from 06.05.2009 with all its sources. The petitioner further claimed that he was provided pre-level measurement and alignment of the land, after lapse of more than two months. However, L-Section and Cross-section of the Earth work was not provided by the opposite parties even after the repeated request. The total land for cutting and filling of Earth was not provided to the petitioner as the same was not acquired by the land acquisition authorities even after lapse of three years. Therefore, based upon above mentioned reason he could complete only 62% of the work under the agreement, while payment was made only of 55%. The payment of remaining 7% balance i.e. Rs 24,46,232/- was not made on the basis that only 55% of the work was completed and also security deposit of Rs 15,91,300/- has been seized by the opposite parties.

3. In the aforesaid circumstances, petitioner filed detailed claim under Section 9 of (Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008) for redressal of his



grievances arising out of Agreement No. 03 SBD/2008-09 and prayed for the following reliefs:-

(i). For publishing an Award directing the Opposite Party-Executive Engineer to close the agreement and return Security Deposits (both deposited and deducted) to the claimant.

(ii). For publishing an Award directing the Opposite Party-Executive Engineer to make payment against the balance executed works amounting to Rs. 72,00,000/-.

(iii). For publishing an Award directing the opposite parties to refund the total amount to Rs. 19,00,000/- deducted against extension of time.

(iv). For publishing an Award directing the Opposite Party-Executive Engineer to pay 16% interest on the total amount that is security deposit as well as on the amounts deducted against extension of time as well as on the balance dues amount from the cause of action till the date of payment/refund.

(v). For publishing an Award directing the Opposite Party-Executive Engineer to pay substantial costs to the claimant incurred by him during the course of the Arbitral proceeding.

4. On the other hand, the case of the opposite



parties is that the work order issued on 20.03.2009 to start the work, was on the basis of pre-defined alignment. Learned counsel for the opposite parties further submits that the petitioner did not start the work till 16.05.2009 as was directed by the Opposite Party-Executive Engineer *vide* Letter No. 361 dated 26.05.2009. Learned counsel for the opposite parties further submits that total length of the canal was 11,800 feet. The length of land for which payment was not received was only 300 ft that is  $(300/11800 \text{ ft} = 2.54\%)$  2.54% as against the total length of 11,800 ft. However, the work done till date is only 55%. The learned counsel stated that the petitioner was well acquainted of this fact before filing for the tender and he was also reminded of the above agreement clause 6.3.7 *vide* Letter No. 922 dated 15.11.2010 of the Executive Engineer. Learned counsel for the opposite parties submits that the petitioner was regularly paid and has been paid up to 12<sup>th</sup> account bill dated 08.03.2011. Final measurement of the work was taken on 08.12.2012 in the presence of the contractor's agent and measurement for the 13<sup>th</sup> and the final bill has been entered into measurement book which yields to a negative sum of Rs. 32,297/- and this amount is recoverable from the contractor-petitioner. Hence, the payment has been made as per



Clause 7 of the agreement and hence, breach has not been committed by the opposite parties. The learned counsel for the opposite parties submits that the claim of the petitioner with regard to 62% of work has been completed, is eye-estimation and payment cannot be done against any eye-estimation or for any such other claim.

5. The learned counsel for the opposite parties submits that there was no land acquisition problem for 97.50% length of canal but the petitioner did not complete the work in those portion. It is also submitted that the petitioner never gave any application for extension of time. In the aforesaid reasons, the learned counsel for the opposite parties submits that the petitioner is not entitled to claim payment of 62% work.

6. The learned tribunal after perusing the records and the material available before him held that the opposite party should have handed over the total site to the petitioner but at the same time, petitioner should have completed the work in the land handed over to the petitioner. The learned tribunal finds that the breach has been committed by both the parties and further held that though the claimant has claimed for payment of 62.5% work done amounting to Rs 2,23,37,448/- whereas, he has completed only 55% of work. The 13<sup>th</sup> Bill was measured in



the presence of the authorized agent of the petitioner on 08.12.2012 and as per work done, Bill was prepared of a negative value of Rs 32,297/- which is recoverable from the petitioner. It has held that the Bill cannot be prepared on the basis of eye-estimation and it should be based on a measurement taken on entry made in measurement Book. Hence, the claim of 62.5% of work is not justified. The learned Tribunal in its Award held that the petitioner is entitled to get refund of the security deposit only with 10% simple interest per annum against 16% per annum as claimed by the petitioner. The learned Tribunal came to conclusion that there is no doubt that petitioner as well as opposite parties, both parties have committed breach of the contract and passed the Award which is as follows:-

(i). The petitioner is entitled to get refund of earnest money of Rs 8,52,000/- (Eight lacs fifty two thousand rupees only) if not paid.

(ii). The petitioner is also entitled to get refund of security deposit of Rs 15,91,300/- (Fifteen lacs ninety one thousand and three hundred rupees only) with 10% simple interest per annum from the date of filing i.e. 14.12.2012 till payment if not paid.

(iii). The petitioner is also entitled to get refund of



Rs 19,17,753/- (Nineteen lacs seventeen thousand seven hundred and fifty three rupees only) deducted in the name of extension of time with 10% simple interest per annum from 14.12.2012 till payment if not paid.

(iv). The petitioner will deposit Rs. 32,297/- (Thirty two thousand two hundred and ninety seven rupees only) to the Opposite Party-Executive Engineer against the negative bill of 13<sup>th</sup> final bill.

(v). Memo of cost may be prepared accordingly.

7. Learned counsel for the petitioners argued that the learned tribunal failed to consider the statement regarding physical and final progress against the work under completion submitted to the opposite party no. 2 by opposite party no. 4 on 30.11.2012 wherein, he has accepted that the petitioner has executed 62% of the work under agreement. The learned counsel for the petitioner further argued that the observation of the learned tribunal that petitioner has breached the terms of contract by closing the work is against the material on record. The learned tribunal has failed to consider the materials on record which shows that opposite party no. 4 did not provide total land even after lapse of three years and finally argued that Tribunal should have awarded admitted dues amount against



13<sup>th</sup> final Bill.

8. The learned counsel for the opposite parties argued that the learned tribunal has rightly denied the claim of 62% work on the basis of material available on record. Learned counsel for the opposite parties further submits that under Section 34 of the Arbitration Act, it provides for setting aside Award only on very limited grounds, such grounds being contained in sub-Section (2) and (3) of Section 34. It is further stated that there is no provision to modify an Arbitral Award. Learned counsel for the opposite parties relied upon a citation reported in **2021 SCC Online 473 : (2021) 9 SCC 1** where it has been observed that under the scheme of the Arbitration Act 1996, it could not be admissible to modify the Award passed by the learned Arbitrator based on materials available on record in proceeding emanating from Section 34 of the Act, 1996. In the aforesaid reason the learned counsel for the opposite parties has argued that petitioner had completed 62% work is not sustainable in the eye of the law.

9. It is manifest from the physical and final progress report dated 30.11.2012 signed by the Executive Engineer opposite party no. 4 that progress in percentage mentioned 62.5% of the work having been completed but the



work done in lacs mentioned Rs. 1,98,91,000/- which on scrutiny amounts to only 55% of the agreement amount of Rs. 3,60,28,141/- and therefore in view of this court on calculation the amount arising out of 7% of remaining work is required to be paid.

10. On perusal of the impugned order and materials on record the petitioner in the instant Revision petition claiming on the basis of physical and final progress report dated 30.11.2022 signed by the Executive Engineer opposite party no. 4. The report under column 5 under the heading “ Progress in %” clearly states that 62.5% of the work has been completed. However, “The work done in lacs” is reported only Rs. 1,98,91,000/- which amounts to 55% of the agreement amount of Rs. 3,60,28,141. It is apparent from the said report that 62.5% of the work has been executed by the petitioner against which only 55% payment has been made. The judgment cited in ***(2021) 09 SCC 1 Para 43 : 2021 SCC Online SC 473 Project Director National Highways Authority of India Vs. M. Hakeem and another (2021 09 SCC 1)*** which reads as follows:-

*“As to assimilate the Section 34 jurisdiction with the revisional jurisdiction under Section 115 of the Code of Civil Procedure, 1908(“CPC”), is again fallacious. Section 115 CPC expressly sets out the three grounds on which a revision may be entertained and then states that the High Court may make “such*



*order as it thinks fit". These latter words are missing in Section 34, given the legislative scheme of the Arbitration Act, 1996."*

11. The judgment relied by the opposite parties clearly shows that the High Court has the power to interfere with the Award under Section 115 of the Code of Civil Procedure and therefore, in view of the observations made above, this Civil Revision is allowed.

12. Accordingly, Award dated 26.09.2016 whereby learned Tribunal *vide* Column (iv) has directed the petitioner to deposit Rs. 32,297/- (Thirty two thousand two hundred and ninety seven rupees only) to the Executive Engineer against the negative bill of 13<sup>th</sup> final bill is set aside and the opposite parties authorities are directed to pay on calculation the amount arising out of 7% of remaining work to the petitioner.

**(Khatim Reza, J)**

***Prabhat/-***

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