

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.3825 of 2018

M/s Kalika Swachchhanda Joint Venture Private Limited S/o- Bharat Prasad Lamichhane, resident of Mohalla- Lampati Kathmandu, Ward No.- 14, P.S.- Kalimati, District- Kathmandu, Nepal at present Ram Padarath Nagar, Ward No.- 1, Chakmahila, Sitamarhi, District- Sitamarhi.

... .. Petitioner/s

Versus

1. The State Of Bihar through the Secretary, Bihar Rural Works Department, Rural Works Department, Government of Bihar, Patna.
2. The Bihar Rural Roads Development Agency A Govt. of Bihar Undertaking, under Pradhan Mantri Gram S
3. The Engineer-in- Chief, Rural Works Department, Govt. of Bihar, Vishweswaraiya Bhawan, 5th Floor, B
4. The Superintending Engineer, Rural Works Department, Department Circle Office, Shankar Chowk, Dumra
5. The Executive Engineer, Sheohar Division- I, Rural Works Department, Bihar.
6. The Empowered Standing Committee, represented through the Engineer-in-Chief-cum-Secretary, BRRDA,
7. The Deputy Chief Executive Officer cum Secretary BRRDA, Rural Development Department, Government of

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr.Jyoti Shankar, Advocate
For the Respondent/s : Mr.Ajay, GA-5

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ARUN KUMAR JHA)

Date : 24-03-2023

Heard learned counsel for the petitioner and the learned
counsel for the respondents.

2. In the instant petition, the petitioner has prayed for
the following relief:-



***I.** To issue a writ in the nature of certiorari for quashing of the order dated 18.12.2017 passed by the Respondent No. 6 communicated through the letter dated 04.01.2018 bearing memo No. BRRDA (HQ)-PMGSY -304 / 2016-66 (Annexure-P/40), issued under the signature of the Respondent No. 7, by which the communication was made with respect to the fact that the claim of the petitioner was rejected.*

***II.** To issue a writ in the nature of certiorari for quashing of the order dated 18.12.2017 (Annexure-P/40) passed by the Respondent No. 6, by which the Respondent No. 6 in complete departure of the notice dated 17.12.2013, issued under the signature of the Respondent No. 5, by which the tender of the petitioner was rescind on the ground that the work assigned to the petitioner was not concluded within the time frame.*

***III.** To issue a writ in the nature of certiorari for quashing of the order dated 18.12.2017 (Annexure P/40) passed by the respondent No. 6, by which the Respondent No. 6 failed to appreciate that the bank guarantee provided by the petitioner was duly accorded and approved by the Departmental Tender Committee in its meeting 27.02.2009 communicated through the letter dated 02.03.2009 bearing Memo No. 38 (Annexure-*



p/5).

IV. To ask an explanation-cum-show cause from the Respondents No. 2 to 5, asking therein that under what statutory authorization, they use to change their stand in rescinding the work allotted to the petitioner.

V. To issue a writ in the nature of mandamus commanding the Respondents No. 2 to 5 to revalidate the agreement the agreement including the rate of tender work bearing S.B.D/PMGSY/1 of 2009-10 dated 16.05.2009, because the petitioner is still ready to complete the work subject to revision of rate.

VI. To stay the operational effect of the order dated 18.12.2017 passed by the Respondent No. 6 communicated through the letter dated 04.01.2018 bearing memo No. BRRDA(HQ)-PMGSY-304/2016-66 (Annexure - P/40), issued under the signature of the Respondent No. 7, because the Respondent Authorities are adamant to forfeit the bank guarantee of the petitioner.

VII. To issue a writ in the nature of mandamus commanding the Respondent Authorities from taking any coercive steps pertaining to the forfeiture of the bank guarantee provided by the petitioner.

VIII. Any other relief or reliefs.”



3. Brief facts of the case are that the petitioner entered into the agreement bearing agreement No. SBD/PMGSY/1 of 2009-10 dated 16.05.2009 with Respondent No. 5 for construction of road under the Bihar Rural Roads Development Agency in District- Sheohar. Pursuant to the deed of agreement, the petitioner provided the bank guarantee of Nepal Investment Bank bearing Bank Guarantee (BLD) Bond No. 001GAUPB09-0037 amounting to Rs. 9 lac only. The said guarantee was for performance guarantee. Thereafter, petitioner further provided bank guarantee from Laxmi Bank, Nepal towards advance mobilization. The aforesaid guarantee provided by the petitioner was approved and accorded by the Departmental Tender Committee in its meeting dated 27.02.2009, which was communicated through letter dated 02.03.2009 bearing Memo No. 1385. Meanwhile, the aforesaid agreement was terminated by the Respondents by their notice dated 17.11.2013 published in daily newspaper "Prabhat Khabar". Thereafter, the petitioner moved before this Court in CWJC No. 6389 of 2014 challenging the termination of the aforesaid agreement. The learned Single Judge vide order dated 05.11.2015 disposed of the matter while recording the fact that Clause-24 in the agreement provides elaborate provision for Dispute Redressal



System through Empowered Standing Committee consisting of three members. Taking into consideration the same, the Court granted liberty to the petitioner to approach the Empowered Standing Committee within a period of four weeks from the date of the order and thereupon the Empowered Standing Committee was to proceed to dispose of the matter in accordance with law. In terms of the order passed in the writ petition, the petitioner filed his representation before the authority for constitution of Empowered Standing Committee in terms of Clause 24 of the Agreement and since no positive steps were taken by the respondents, the petitioner again preferred CWJC No. 6357 of 2016, which was disposed of on 17.03.2017. In the light of order passed in CWJC No. 6357 of 2016 along with its analgoues case, the petitioner's case was heard by the Empowered Standing Committee (for short 'the Committee'). The Committee observed that the petitioner had provided an Indian Address for communication, but the Bank Guarantee which was submitted to *Karya Pramandal, Belsand and Karya Pramandal Sheohar* belonged to the Bank situated in Nepal and the petitioner was directed to submit Bank Guarantee of a scheduled bank of Bihar as per Clause 32.2 of the Standard Bidding Document (SBD) for getting the relief. The petitioner



refused to submit the Bank Guarantee of the scheduled bank situated in State of Bihar saying that his earlier bank guarantee was accepted by the authority. The Committee, however, held that the Bank Guarantee issued from the bank situated in Nepal was not valid as per Clause 32.2 of the SBD, therefore, acceptance of the Bank Guarantee from the Bank Situated in Nepal would be against the law. Finally, the committee rejected the claim of the petitioner against termination of Agreement vide order dated 18.12.2017. Hence, the present writ petition.

4. Learned counsel for the petitioner submitted that the respondents failed to perform their duties in accordance with contract and deviated themselves from the facts and erred in giving direction to the petitioner to execute the work assigned to it. The learned counsel further submitted that without considering the ground for delay for non-performance of work within the stipulated period, the respondent-authority, in exercise of its power under Clause 52.2 of the Agreement, rescinded the contract of the petitioner. The learned counsel further submitted that the petitioner has done substantial work in adverse situation and lots of outstanding amounts are dues from the Respondents to the petitioner. Even the Bank Guarantee amounts are there and the Respondents cannot be allowed to



take advantage of their own wrongs as the agreed advance amount was not paid to the petitioner. The learned counsel further submitted that the Respondents cannot forfeit the security amount. The Respondents are liable to be restrained from blacklisting the petitioner and also from invoking the bank guarantee. It has further been submitted that the total claim of the petitioner amounting to Rs. 18,21,21,803.12/- is pending before the Respondents, which is liable to be paid by the Respondents. The rejection of claim of the petitioner by the respondent authorities is illegal and against the principles of natural justice. The order passed by the Respondent No. 6 dated 18.12.2017 was communicated through letter dated 04.01.2018 bearing Memo No. BRDA(HQ.)-PMGSY-304/2016-66. The said order was challenged before the Bihar Public Works Contract Disputes Arbitration Tribunal, Bihar, Patna, which was registered as Reference Case No. 10 of 2018. The said reference case was heard by the Bihar Public Works Contract Disputes Arbitration Tribunal, Bihar, Patna on 08.02.2018 and after hearing the counsel for the parties, the Bihar Public Works Contract Disputes Arbitration Tribunal, Bihar, Patna declined to interfere with the matter on the ground of jurisdiction and thereafter, the petitioner opted to invoke the jurisdiction of this



Court. The learned counsel further submitted that the respondents have determined to rescind the contract. The respondents are also illegally, contemplating and threatening to blacklist the petitioner company although the petitioner is not responsible for any delay to complete the work. The respondents are also taking steps to illegally invoke the bank guarantees furnished by the Investment Bank of Nepal on behalf of petitioner. If the Bank Guarantees are invoked and the amount under the bank guarantees are paid by the bank to the respondents and the petitioner is blacklisted by the Respondents, the petitioner would suffer irreparable loss and injury, which cannot be compensated in terms of money. The learned counsel further submitted that the schedule of work was not completed in May 2010 but respondent understood the fact and they have extended the completion date up-to 13.09.2013. Therefore, it is clear that there were some faults on part of respondents in performing their reciprocal duties and also admitted the problems faced by the petitioner at site and for this reason, the respondents extended the completion time of the contract. The Committee has not considered the relevant document submitted by the petitioner and the alleged termination of agreement by the respondents is illegal and liable to be set-aside.



5. On the other hand, learned counsel for the respondents submitted that in terms of the agreement, the petitioner was required to complete the said contractual work by 25.05.2010, but the petitioner did not complete the said contractual work in spite of several reminders by the respondents till 27.08.2013, thereafter the respondent-authority issued the notice vide letter No. 533 dated 14.09.2013 and the petitioner was directed to submit his show-cause as to why the agreement be not terminated. In response to the show-cause notice, the petitioner submitted his reply dated 30.09.2013 seeking extension of time till 31.03.2014. It has further been submitted that as even after lapse of more than three years, the petitioner did not complete the work assigned to him, therefore, the respondent-department took the decision to terminate the agreement. The termination of agreement was communicated vide Letter No. 687 dated 05.10.2013 fixing the date for final measurement and the petitioner was stated to remain present on the date fixed for measurement. The said letter dated 05.10.2013 was challenged by the petitioner in CWJC No. 6186 of 2014, in which, letter dated 05.10.2013 was set-aside and the respondents were granted liberty to issue fresh show-cause notice, if so advised, and to proceed against the petitioner in accordance with law. In



compliance of the aforesaid order, the Executive Engineer, Rural Work Department, Belsand vide letter No. 163 dated 16.03.2016 issued a show-cause notice to the petitioner with a direction to submit the reply within one week. Thereafter, the petitioner submitted his reply to the show-cause notice dated 16.03.2016 and finding it to be unsatisfactory and dissatisfied with the reply submitted by the petitioner, the Executive Engineer, Rural Work Department, Work Division, Belsand vide letter No. 288 dated 09.05.2016 terminated the tender agreement bearing No. ISBD/2009-2010 due to non-fulfillment of the terms and conditions of the agreement as well as for non-compliance of the contractual work. Thereafter, the petitioner preferred CWJC No. 6357 of 2016 for constitution of Empowered Standing Committee as per Clause-24 of the Agreement and he also preferred another writ petition bearing CWJC No. 9157 of 2016 in which the petitioner challenged the letter of termination dated 09.05.2016. Both the writ petitions were disposed of jointly by the learned Single Judge observing that *'Be that as it may, let the petitioner should approach to the Committee, nominate the name of any persons mentioned in the letter dated 11.07.2016 and Empowered Standing Committee will be obliged to adjudicate the dispute in between the parties'*.



Thereafter, the Empowered Standing Committee after hearing the parties including the petitioner rejected the claim of the petitioner vide order dated 18.12.2017 on the ground of non-submission of bank guarantee by the petitioner from any scheduled bank of the State as per Clause 32.2 of the SBD. Learned counsel also submitted that this writ application is devoid of any merit and is liable to be dismissed.

6. Having considered the material available on record and further considering the rival submission, the main issue involved in the present case is whether non-furnishing of bank guarantee from a scheduled bank of Bihar by the petitioner could have been condoned by the official respondents against the specific terms of the contract since other issues relate to disputed question of facts that are not amenable to writ jurisdiction of this Court.

7. It appears that as per Clause 32.2 of the SBD, the Bank Guarantee was to be from any scheduled bank situated in the State of Bihar, whereas the Bank Guarantee submitted by the petitioner came from a bank situated in Nepal. It further appears that the petitioner was granted ample opportunity for submission of the Bank Guarantee from the bank situated in the State of Bihar as per aforesaid Clause 32.2 of the Standard Bidding



Document (SBD), but the petitioner failed to do so. This intransigent approach of the petitioner led to the Committee to terminate the proceeding before it while rejecting the prayer of the petitioner to nullify the order of rescission of contract. In these circumstances, the Empowered Standing Committee after hearing the parties and considering the material available on record has rejected the claim of the petitioner vide order dated 18.12.2017. It is relevant to quote the order dated 18.12.2017, which is impugned herein:-

"18/12/2017 इस मामले की सुनवाई माननीय उच्च न्यायालय, पटना द्वारा सी० डब्ल्यू० जे० सी० सं०-6357/2016 M/s Kalika-Swachchhanda Joint Venture तथा सी० डब्ल्यू० जे० सी० सं०- 9157 / 2016 M/s Kalika Swachchhanda Joint Venture बनाम राज्य एवं अन्य में दिनांक-17.03.2017 द्वारा पारित आदेश के आलोक में की गयी। इस मामले की प्रथम सुनवाई दिनांक 21.08.2017 को की गयी थी, जिसमें योजना के नोडल पदाधिकारी को यह स्पष्ट करने का निदेश दिया गया था कि किन परिस्थितियों में संवेदक के विरुद्ध एकरारनामा विखंडन की कार्रवाई की गयी। साथ ही संवेदक को यह आदेश दिया गया था कि ये भारत के पत्राचार एवं सम्पर्क पते को शपथ-पत्र के माध्यम से समर्पित करें। दिनांक 11.09.2017 को दूसरी सुनवाई के क्रम में यह स्पष्ट हुआ कि. कम्पनी नै शपथ-पत्र के माध्यम से पत्राचार के लिए भारतीय पता तो दिया है, किन्तु उनके द्वारा कार्य प्रमंडल, बेलसंड एवं कार्य प्रमंडल, शिवहर को समर्पित की गयी बैंक गारंटी नेपाल में स्थित बैंक की है। संवेदक को यह निदेश दिया गया था कि वे न केवल यह स्पष्ट करें कि उन्हें क्या राहत चाहिए बल्कि SBD (standard bidding document) की कंडिका- 32.2 के प्रावधान के आलोक में बिहार में स्थित किसी Scheduled बैंक की बैंक गारंटी समर्पित करें।

आज की सुनवाई में संवेदक ने यह स्पष्ट रूप से समर्पित किया कि वे नेपाल के बैंक के द्वारा निर्गत बैंक गारंटी



के स्थान पर राज्य के किसी Scheduled बैंक से निर्गत बैंक गारंटी जमा नहीं करेंगे। उन्होंने यह दावा किया कि जब पूर्व में नेपाल के बैंक के द्वारा जारी बैंक गारंटी को अनुमान्यता दी गयी है तो अब उसके स्थान पर बिहार के किसी Scheduled बैंक गारंटी मांगने का कोई औचित्य नहीं है। जब उन्हें SBD की कंडिका-32.2 का उद्धरण देकर बताया गया कि स्थिति पूर्व की त्रुटि के निराकरण के बगैर इस मामले में आगे की कोई भी कार्रवाई नहीं कर सकती तब भी उन्होंने यह स्पष्ट किया कि वे बिहार के किसी Scheduled बैंक की बैंक गारंटी समर्पित नहीं कर सकते हैं। उन्होंने यह भी कहा कि उनके विरुद्ध कार्यपालक अभियंता, शिवहर के आदेश ज्ञापांक 901 दिनांक 11.11.2013 एवं कार्यपालक अभियंता, बेलसंड के आदेश ज्ञापांक 285 दिनांक 09.05.2016 अवैधानिक हैं।

सभी पक्षों को सुनने तथा SBD की प्रश्नगत कंडिका-32.2 का अवलोकन करने से यह पूरी तरह स्पष्ट हो गया है कि यद्यपि पूर्व में नेपाल के बैंक के द्वारा निर्गत बैंक गारंटी को स्वीकार किया जाना विधिसम्मत नहीं था, तथापि उस त्रुटि का निराकरण किये बगैर आगे इस मामले में किसी प्रकार की कार्रवाई जारी रखना विधि के प्रतिकूल होगा।

उक्त परिस्थितियों में संवेदक के असहयोगात्मक आचरण के कारण समिति के समक्ष कार्यवाही जारी रखने का कोई औचित्य नहीं है। तदुसार इस समिति के द्वारा M/s Kalika-Swachchhanda Joint Venture द्वारा कार्यपालक अभियंता, कार्य प्रमंडल, शिवहर के आदेश ज्ञापंक-901 दिनांक 11.11-2013 एवं कार्यपालक अभियंता कार्य प्रमंडल, बेलसंड के आदेश ज्ञापंक-285 दिनांक 09.05.2016 के एकरारनामा विखण्डन आदेश को निरस्त करने के अनुरोध को अस्वीकार किया जाता है।

ह.(18.12.2017)	ह.(18.12.2017)	ह.(18.12.2017)
(शंकर प्रसाद सिंह)	(मदन प्रताप सिंह)	(विनय कुमार)
अभियंता प्रमुख	सेवानिवृत्त अभियंता प्रमुख	सचिव
ग्रामीण कार्य विभाग,	पथ निर्माण विभाग	ग्रामीण कार्य विभाग,
बिहार, पटना।	बिहार, पटना।	बिहार, पटना।

8. If the petitioner has failed to abide by the specific terms of SBD, we do not think that the impugned order needs any interference. Thus, the petitioner has not made out a *prima*



facie case, so as to interfere with the order dated 18.12.2017 passed by the Committee.

9. It is well settled principle of law that the constitutional courts are expected to exercise restraint in interfering with the administrative decisions and they ought not to substitute their views substituting that of the administrative authority.

10. In the light of aforementioned facts and circumstances of the case, in our opinion, no illegality or irregularity has been committed by the respondents in passing the impugned order rejecting the claim of the petitioner and the reasons assigned for the same are well justified, which do not require interference by this Court.

11. Accordingly, this writ petition stands dismissed reserving liberty to the petitioner to raise all other disputed issues before the competent authority in terms of agreement especially clause 24 of the SBD.

(P. B. Bajanthri, J)

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	06.04.2023
Transmission Date	N.A

