

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REVISION No.132 of 2014

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1. The State of Bihar through the Secretary, Patna.
 2. The Chief Engineer, N. H. Wing, Road Construction Department, "Vishweshwarraiya Bhawan, Bailey Road.
 3. The Superintending Engineer, Road Construction Department, N. H. Works, Circle, Purnea.
 4. The Executive Engineer, Road Construction Department, N. H. Division, Purnea.

... .. Petitioners

Versus

Shri Ashok Kumar Chaudhary resident of Mirchaibari, Katihar.

... .. Opposite Party/s

Appearance :

For the Petitioners	:	Mr. Kameshwar Prasad Gupta, GP-10
	:	Ms. Deepanjali Gupta, AC to GP-10
For the Opposite Party/s :		Mr. Vinay Ranjan, Advocate

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
ORAL JUDGMENT

Date : 22-03-2023

This Civil Revision application has been filed against the Award passed by the Bihar Public Works Contracts Dispute Arbitration Tribunal, Patna in Reference Case No. 101 of 2011 on 24.01.2014 whereby the claim of the opposite party has been allowed in following terms:-

- (i) The petitioner shall be entitled to payment of unpaid dues of Rs. 48,27,181/- (Rs Forty eight lakhs twenty seven thousand one hundred eighty one) only as per 5th R.A. and 6th and final bill as unpaid dues with simple interest @10% p.a. with effect from 21.09.2011



till realization.

(ii) The petitioner shall also be entitled to payment of an amount of Rs. 24,66,824/- (Rs. Twenty four lakh sixty six thousand eight hundred twenty four) only deposited as Security Deposit and deducted from the bill with simple interest @ 10% P.A. with effect from 21.09.2011 till realization.

(iii) The petitioner shall also be entitled to payment of an amount of Rs. 1,98,816/- (Rs. One lakh ninety eight thousand eight hundred sixteen) only deducted in the name of extension of time with simple interest @10% p.a. with effect from 21.09.2011 till realization.

(iv) The petitioner shall also be entitled to cost and counsel's fee as per schedule.

2. Learned counsel for the petitioners submits that the learned tribunal failed to appreciate the fact that an agreement was executed between the Executive Engineer,



National Highway Division, Purnea and opposite Party, namely, Ashok Kumar Choudhary on 01.11.2008 for the construction of 3x24 meter H.L.R.C.C. Bridge at Mania on 33th Km of NH-81 for which work order was given *vide* letter no. 949 dated 15.07.2008 and the work was started on time. It is further submitted that the contractor was instructed to submit work programme *vide* the office letter no. 645 dated 15.05.2010. In reply to this, the opposite party submitted letter dated 24.05.2010 in which, it is mentioned that he will submit the work programme within three days of receiving of payment. The bill for payment of 3rd R.A. bill has been sent to Regional Office on 28.06.2010 and the opposite party got the payment. Further, it is submitted that the opposite party submitted the work programme *vide* letter no. NH-81/01 on 17.01.2011 in which, completion period has been mentioned as 31st of March, 2012 which is more than one year of the original agreement. It is also submitted that the revised estimate was sanctioned on 05.07.2010, the department gave a modified work programme to complete programme by 30.09.2011 *vide* letter dated 08.03.2011 but the work was stopped by the opposite party and it shows that the opposite party was not interested to proceed with the work. It is



submitted that petitioners had not undertaken to pay the altered rate to the opposite party as mentioned in the letter dated 21.02.2009 issued by the petitioner No. 2. It is also submitted that the revised estimate submitted by the Chief Engineer, National Highway Wing was modified and sanctioned for Rs. 534.40 lakhs *vide* Ministry of State Road Transport and Highways *vide* letter dated 06.07.2010. It is also submitted that in revised estimate only quantity of item was revised and not the rate. The rate will be as per agreement and new items rate will be applicable as S.O.R. at the time of tender. Further, in response to various reasons for slow progress of work given by the opposite parties, the report was submitted by the office of the Executive Engineer dated 13.11.2009 in which, the facts relating to approval of design and drawing approved by the Chief engineer, National Highway Wing, Bihar, Patna on 21.10.2008 had been narrated but the work was not started at the earlier stage. The office letter no. 1718 dated 06.12.2008 shows that the contractor was instructed to start the work in the meantime awaiting the approval of the revised design.

3. The 4th on account bill also had been paid to the opposite party. It is submitted that the opposite party had paid



up to date payment against the work on 14.03.2011, except the cost of pie difference dia 1.2 M and 1.0 M. After meeting necessary objections 5th R.A. bill had been sent to the Regional Office. The petitioner have taken the plea that the opposite party had shown no interest to complete the work and had written letter to the Chief Engineer and Secretary, Road Construction Department to close the agreement, which shows that the opposite party was not interested in completing the work, therefore, the contract was rescinded so that the work could be completed at the earliest. The rescinding order has already been sent by Memo No. 1281 dated 16.08.2011 by registered post.

4. On the other hand, a counter affidavit has been filed by the opposite party, stating therein the main grievances of the opposite party that due to delay of about two years in sanction of changed design the rate of material increased so, the changed rate during the time carrying the work should be given, but despite several representation the Executive Engineer did not respond. Thereafter, the opposite party made request to close the agreement upon which the Executive Engineer without negotiating or considering the fact rescinded the contract and forfeited the security deposit and fixing the



date 25.08.2011 for final measurement *vide* letter dated 16.08.2011. It is further stated by the opposite party that the revised estimate was not sanctioned as per the enforceable S.O.R. at the time of sanction. The Executive Engineer failed to justify his action. The revised estimate submitted by the Chief Engineer, National Highways on 21.02.2009 was sanctioned by the Ministry on 06.04.2010 after about three years of original sanction and this fact has been admitted by the petitioners. It is submitted that the claimant was not paid as per work done and since the rates were not decided for the changed items the payment made to the claimant was always less. The petitioner's authority insisted on completing the work by 30.09.2011 without intimating the opposite party about the revised rates of agreement and due to faulty work programme prepared by the petitioners-authorities, the reply regarding making up to date payment as alleged, is wrong. It is further submitted that the 5th R.A. bill has not been paid besides the final bill.

5. On the basis of the case of the parties, the learned Tribunal framed issues, which are as follows:-

(I). Whether the termination of the contract and the forfeiture of the Security Deposit are in accordance with the



terms and condition of the agreement?

(II). Whether the petitioner is entitled to the payment of unpaid bills?

(III). Whether the petitioner is entitled to the recovery of the Security Deposit and also the refund of deduction made towards Security Deposit?

(IV). To what relief or reliefs, the petitioner is entitled?

6. After analyzing the case, learned tribunal has held that the petitioner's authority i.e., the Executive Engineer by its letter dated 06.12.2008 addressed to the Assistant Engineer and Junior Engineer had directed that the contractor shall execute the work according to the revised drawing and design much before the above sanction. A copy of the aforesaid direction had been sent to the contractor *vide* Memo No. 1718 dated 06.12.2008, but the contractor was given payment in the old rate up to the 4th on account bill. It appears that the respondents (petitioners) imposed the penalty of ½% for slow progress on 22.05.2009 and the applicant/opposite party was instructed *vide* Office Letter No. 645 dated 15.05.2010 to submit work programme in response to the aforesaid letter, in which completion period was mentioned as 31.03.2012. The



respondent-petitioner had contended that this work programme was more than one year than the completion period of the original agreement. It appears that the revised estimate was sanctioned on 06.07.2010 but the petitioner-opposite party was not given the rate of revised estimate. The learned tribunal further held that the work order was given on 15.07.2008, whereas the required drawing was prepared on 20.10.2008. The direction of the Executive Engineer *vide* letter dated 06.07.2008, a condition was imposed that in anticipation of the revised estimate, the work may be executed according to the revised design. Learned tribunal further held that there appears to be no supplementary agreement with regard to the extra items due to changed design and specification and there was difficulty in payment to the claimant/petitioner. It is also discussed about the rescinding order that the learned tribunal held that the reason provided is mainly slow progress and also attributed to unilateral decision of the contractor to repudiate the works contract, this works contracts is based on F2 agreement and in order to attract the provision of rescinding the contract and forfeiture of Security Deposit, conditions of contract provide for liability of the contractor to pay compensation amounting the the whole of



the Security Deposit and in that case, one of the courses open was to rescind the contract and forfeiture of Security Deposit. Only provision laid down in respect of payment of compensation is under clause-2 which provides for the procedure regarding the payment of compensation for the amount equal to $\frac{1}{2}\%$ on the amount of the estimated cost of the whole work as shown by the tender for every day that the work remains uncommenced or unfinished after the proper date and further to ensure good progress during the execution of the work. Learned tribunal further held that no proof has been provided by the respondent-petitioner in respect of the mode adopted in assessing the compensation. The mode of deduction as provided in clause 2 has not been adopted at all. Further, it is held that no ground has been made out under clause 3 as procedure under clause 2 has not been followed. Petitioner-opposite party shall be entitled to payment of the unpaid bill for an amount of 48,27,181/- as per the 5th R.A. and 6th final bill. It is also held that rescinding of the contract and also the forfeiture of the Security Deposit was not according to the terms and condition of the contract. The petitioner-opposite party shall be entitled to refund of Earnest Money/Security Deposit including the deduction towards



Security Deposit from the on account bill. Towards the Security Deposit, the amounts together the petitioner-opposite party shall be entitled to payment of an amount of Rs. 24,66,824/- being the sum total of the deposited Security Deposit amount and deduction. The repudiation of the contract by the petitioner-opposite party was lawful and there was no breach of contract on the part of the petitioner-opposite party. It is further held that the petitioner-opposite party shall be entitled to payment of an amount of Rs. 1,98,860/- deducted towards the penalty for the extension of time besides amount towards extension of time is not liable to be deducted and the final bill is dated 21.09.2011, which is the date of cause of action. The petitioner-opposite party shall be entitled to payment of simple interest @ 10% P.A. with effect from 21.09.2011 over the amounts in respect of each item as discussed above.

7. After considering the submissions and perusal of the impugned Award, it is manifest that the revised rate has not been sanctioned despite revised estimate and contractor-opposite party has been directed to work according to the revised design and specification and also no payment had been made to the contractor-opposite party towards the



revised work and the petitioners had not discharged their legal obligation. It is also apparent from the records that the petitioners-authorities have not fulfilled their reciprocal promises for not providing the changed design and specification in time and payment had not been made according to the changed design. Therefore, repudiation of the contract by the contractor-opposite party was justifiable and there was no breach of contract on the part of opposite party (contractor).

8. In view of the above facts and circumstances, I am not inclined to interfere in the Award passed by the learned Tribunal. There is no irregularity or gross jurisdictional error in the impugned Award.

9. Accordingly, this Civil Revision Application is dismissed.

(Khatim Reza, J)

Gaurav Kumar/-

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	05.04.2023
Transmission Date	N.A.

