

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REVISION No.272 of 2016

1. The State of Bihar through the Principle Secretary, Road Construction Department, Vishwasharaiya Bhawan, Bailey Road, Patna.
2. The Engineer-in-Chief, Road Construction Department, Vishwasharaiya Bhawan, Bailey Road, Patna.
3. The Superintending Engineer, Road Construction Department, Road Circle, Darbhanga.
4. The Executive Engineer, Road Construction Department, Road Division, Begusarai.

... .. Petitioner/s

Versus

Devendra and Devendra Engicons Private Limited through its Director Sri Ramanuj Singh, son of late Baleshwar Singh, resident of M-448, Lakshmi Niwas, Post and Police Station- Kankarbagh, Town and District- Patna.

... .. Opposite Party/s

Appearance :

For the Petitioner/s : Mr. Ashok Kumar Dubey, AC to AAG 11
For the Opposite Party/s : Mr. Ashok Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
CAV ORDER

20 19-07-2023 This Civil Revision has been filed against the award dated 14.03.2016 passed by the Bihar Public Works Contract Dispute Arbitration Tribunal, Patna in Reference Case No. 80 of 2011 whereby the claim of the Opposite party has been allowed in following terms:

(i) The petitioner (opposite party) is entitled to get refund of earnest money in shape of bank guarantee amounting Rs. 20,36,000/- and NSC amounting Rs. 1,00,000/- as deposited at the time of the agreement.



(ii) The petitioner (opposite party) is also entitled to get Rs. 93,11,951/- only deducted from running account bills of work in question under head of security deposit along with simple interest at the rate of 10% per annum from the date of filing of this reference case i.e. 22.09.2011, till the date of realization.

2. A Reference Application bearing Reference Case No. 80 of 2011 was filed under Section 9 of the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008 for declaring rescindment order dated 09.03.2010 communicated *vide* Letter No. 295 dated 25.03.2010, Letter No. 337 dated 06.04.2010 with regard to the decision of the department regarding rescindment of the contract under clause 3 and Letter No. 1256 dated 17.08.2011, demanding Rs. 68,35,022/- as illegal, arbitrary without jurisdiction and contrary to the agreed condition of contract which is not binding upon the petitioner. It was further prayed that petitioner is entitled to 20% of the value of balance work under the agreement as contract profit and for refund of security deposit as well as the value of work executed by him but payment could not be made by respondents and also prayed that petitioner is entitled for the losses suffered due to prolongation at the work site and cost of the reference case.



3. The opposite party was allotted the work of strengthening in kilometer 7th to 25th and widening and strengthening in Km 26 to 36 of Dalsingsarai- Kaidrabad Malti Road *vide* Letter No. 1243(E) dated 01.03.2007 of the Secretary (Technical) to the Engineer-in-Chief, Road Construction Department, Government of Bihar, Patna. The Executive Engineer Road Construction Department, Road Division Begusarai *vide* his Letter No. 606 dated 07.03.2007 communicated the decision of allotment of work to the petitioner. The Opposite party entered into the agreement with petitioner (Executive Engineer). The salient features of the agreement is as follows:-

1.	Name of the work	Strengthening in km. 07 th to 25 th and widening and strengthening in km. 26 th to 36 th of Dalsinghsarai-Kaidrabad-Malti road for the year 2006-07(under plan head)
2.	Agreement Cost	Rs. 10,66,16,112/-
3.	Date of Start	07.03.2007
4.	Date of Completion as per agreement	06.09.2008
5.	Time of Completion extended	18.02.2010

4. The opposite party after obtaining work order dated 07.03.2007 started execution of work with all sincerity but due to several reasons including the non-availability of construction



material and early monsoon, opposite party could not complete the work within time and therefore on the request of the opposite party, the Executive Engineer, Road Construction Department granted extension time to time and *vide* Letter No. 45 dated 12.01.2010, time for completion of project (work) was extended till 18.02.2010. It is further contended that opposite party suddenly received Letter no. 295 dated 25.03.2010 from the Executive Engineer by which it was communicated that in a meeting under the chairmanship of Secretary of Road Construction Department Bihar, Patna on 09.03.2010 it was decided to rescind the agreement and *vide* Letter no. 337 dated 06.04.2010 the petitioner informed about cancellation of agreement. Thereafter date for final measurement was fixed. It is further contended that authority for taking action under clause 3 of the Contract Act is vested only in the Engineer-In-charge i.e. (Executive Engineer) on behalf of the Governor of Bihar and not in the Secretary of the Department. The decision of rescindment has not been taken by the Engineer-In-charge rather the decision has been taken at the level of the Secretary in the meeting held on 09.03.2010. Hence, it is without jurisdiction as well as contrary to the provision of agreement. Before the decision of rescindment no notices were served to the opposite



party by the Executive Engineer, who is competent to do that under the said provision of law. The opposite party further contended that *vide* Letter No. 1256 dated 17.08.2011, the Executive Engineer made an illegal payment of Rs. 68,35,022/- on the direction of his higher officials. The case of the petitioner is that the execution of the allotted work was required to be done by the petitioner positively within prescribed period and as per the work order, the date of start was 07.03.2007 and initial time of completion for the aforesaid work was 06.09.2008 i.e., 18 months from the start of work. The work of the opposite party was very slow from the beginning. It is further contended that opposite party was intimated time to time by the department to speed up the work but he did not speed up the work and completed only 51.21% of the allotted work within stipulated period. The opposite party submitted an application dated 22.10.2008 and requested for extension of time till 31.03.2009 to get the work completed. The opposite party was allowed to complete the work up to 15.01.2009. Further case of the petitioner is that the opposite party was not running as per work program. The Executive Engineer *vide* Letter No. 05 dated 03.01.2009 directed him to complete the work within extended period of time, otherwise, action would be taken as per letter no.



12974(s) dated 10.10.2008. The petitioners *vide* Letter No. 91 dated 16.02.2009, Memo No. 16 dated 18.02.2009 and 114 dated 20.02.2009 directed the opposite party to speed up the work but the petitioner failed to speed up. The Executive Engineer on 26.03.2009 issued show cause notice to the opposite party and asked him as to why he should not be debarred from participating in any tender but the opposite party did not reply. The petitioner issued an office order *vide* letter no. 373 dated 15.04.2009, debarring the opposite party from participating in any tender till the completion of allotted work. Again, time for completion was extended till 30.06.2009 *vide* Letter No. 560 dated 06.06.2009 issued by the Executive Engineer to the petitioner to get the work completed. It is further contended that several reminders were given to the opposite party to complete the work but opposite party failed to complete the work. The opposite party again submitted an application on affidavit on 11.01.2010 seeking extension of time till 31.03.2010 to complete the work and again the time was extended till 18.02.2010 with a condition that further time will be given only after considering the progress in work but the opposite party failed to give any considerable progress in work. It is further contended that due to slow progress in work, penalty



was imposed on the opposite party *vide* memo no. 147 dated 10.02.2010 and even after imposing penalty no considerable progress in work was shown by the opposite party. On 09.03.2010, at the secretary level meeting, a decision was taken to rescind the agreement and balance work would be done by the Bihar State Road Construction Corporation Limited. This action was intimated to the opposite party on 25.03.2010 by the Executive Engineer. Despite several extension of time, the opposite party could not complete the work and finally the work in question was cancelled and the department in the light of clause 3 of the S.B.D Contract, terminated the contract with the opposite party on 06.04.2010. As per clause 3 and sub-clause 3(iii) of the S.B.D. Work Contract, the Executive Engineer had the power and liberty to take the penal action against the opposite party. After termination of the contract, the work, in question, was allotted to another Contractor for completing the same and on the basis of available documents, the amount of risk and cost has been calculated and after deduction of the security deposit a notice for recovery of Rs. 68,35,022/- from opposite party has been issued. Therefore, opposite party is not entitled to any relief.

5. Learned counsel for the petitioners submitted that



the date of start of work was 07.03.2007 and date of completion was 06.09.2008. The petitioner authority granted extension three times but opposite party failed to complete the work. Therefore, decision was taken in Secretary level meeting on 09.03.2010 and the work of opposite party was terminated and earnest money and security deposited was forfeited as per clause 3 of the agreement. It is further submitted that balance work was completed by allotting it to another contractor at risk and cost of the opposite party. The opposite party failed to obey the clauses of the agreement. Hence, after adjusting the earnest money and security deposit amounting Rs. 46,50,719/- the opposite party has been directed to deposit Rs. 68,35,022/- in shape of draft in the office of Executive Engineer. The petitioner further submitted that since the opposite party has failed to comply the terms and conditions of the agreement, he is not entitled to get any benefit, rather, he is liable to pay a sum of Rs. 68,35,022/- to the respondents.

6. Learned counsel for the petitioners further submitted that the learned Tribunal failed to appreciate that despite several extension of time the opposite party failed to complete the work. The learned Tribunal failed to consider that the Secretary of Department has every right to review the



progress of the work and he can direct the Executive Engineer with regard to action to be taken by the Engineer-in-Charge. Learned Tribunal also failed to consider the provision of clause 3 (iii), (iv) and (v) of the condition of contract. It is further contended that learned Tribunal did not consider that the opposite party has completed only 51.21% of the allotted work within stipulated period. However, the petitioner submitted an application dated 22.10.2008 and requested for extension of time till 31.03.2009 to get the work completed. The petitioner was allowed to complete the work till 15.01.2009. Despite the extension of time, opposite party was not running as per work programme. Thereafter, petitioners *vide* letter dated 16.02.2009, 18.02.2009 and 20.02.2009 directed the opposite party to speed up the work but the opposite party failed to speed up the work.

7. Learned counsel for the petitioner further submitted that Executive Engineer issued show cause notice on 26.03.2009 to the opposite party and asked him as to why he should not be debarred from participating in any tender but the opposite party did not reply. Consequently, respondents issued office order dated 15.04.2009 debarring the petitioner from participating in any tender till the completion of work. Again, time for completion was extended till 30.06.2009 *vide* letter dated



06.06.2009 to the opposite party to get the work completed. It is further submitted that several reminders were given to the opposite party to complete the work but the opposite party failed to complete the work. On the request of the opposite party, the department extended the time up to 31.12.2009 and opposite party was directed to complete the work within extended period failing which stern action would be taken against the opposite party. Again, letter dated 11.01.2010 was submitted by the opposite party for seeking extension of time till 31.03.2010 to complete the work and again time was extended till 18.02.2010 but opposite party failed to speed up the work. Due to slow progress in work, penalty was imposed on the opposite party vide memo no. 147 dated 10.02.2010 and even after imposing penalty, no considerable progress in work was shown by the opposite party. Under the aforesaid circumstances the authorities are constrained to take decision at the Secretary level meeting and decided to rescind the agreement and balance work would be done by Bihar State Road Construction Corporation.

8. In the aforesaid facts and circumstances, the opposite party is not entitled to any relief which has not been considered by the learned Tribunal.

9. Learned counsel for the opposite party filed counter



affidavit in this case and submitted that on the request of opposite party the Executive Engineer Road Construction Department granted extension time to time and lastly on 12.01.2010 extension of time was granted for completion of project work till 18.02.2010. All of a sudden, a letter dated 25.03.2010 from the petitioner-Executive Engineer was sent by which it was communicated that a meeting was held under the Chairmanship of the Secretary of the Road Construction Department, Bihar, Patna on 09.03.2010, wherein, it was decided to rescind the agreement which was communicated *vide* Letter No. 337 dated 06.04.2010. Learned counsel for the opposite party further submitted that the authority for taking action under clause 3 of the contract is vested only in the Engineer-in-Charge i.e. Executive Engineer on behalf of Governor of Bihar and not in the Secretary, of the department. Therefore, the decision of rescindment of contract taken by the Secretary of Road Construction Department was completely without jurisdiction and contrary to the provision of contract. It is contended that the award passed by the learned Tribunal is just and proper.

10. Learned Tribunal after scrutinizing the material on record and submissions raised by the parties has held that the



clauses in the clause 3 of the agreement relating to imposition of penalty and extension of time, it seems to be clear that time (12 months) was never intended by the parties to be essence of the contract. From the letter of the Executive Engineer by which the contract was rescinded, it appears that the stipulation of 12 months period was waived, the Contractor having been allowed to do some more work, after the expiry of the period, about at his risk. The extension of time in the present case was given three times. Therefore, time was not the essence of contract. The termination was not done as per clause 3 of the agreement and held that opposite party is entitled to get refund of earnest money and NSCs amounting to Rs. 1,00,000/- and further directed that security deposited deducted amounting to Rs. 93,11,951/- only from running account bills of security deposit is also to be refunded to the opposite party.

11. After scrutinizing the impugned Award and pleadings and submissions of the parties, firstly I will consider the scope of ambit of revisional jurisdiction of this Court under Section 13 of the Bihar Public Works Contract Disputes Arbitration Tribunal Act, 2008 which has been dealt with in paragraph No. 26 of the judgment in the case of **State of Bihar through Chief Secretary and others Vs. M/s Kumar**



Construction Company reported in **2013 (4) PLJR 239**, wherein, a Bench of this Court after considering the judgment of the Hon'ble Supreme Court in the case of **Rabindra Kumar Gupta Vs. Union of India** reported in **2010 (1) PLJR (SC) 145** has observed in Paragraph No. 26 as follows:-

“Even while the scope of judicial review of an award stands circumscribed to the eventualities set out in Section 13 of the Act, there has been extensive arguments by both sides on the merits of the issue. The Supreme Court in paragraphs 9 to 14 of the judgments passed in the case of Rabindra Kumar Gupta (Supra) has referred to a catena of judgments on the scope and ambit of judicial review of an arbitration award. The opinion expressed in the judgment so referred makes it manifestly clear that unless there is a jurisdictional infraction by the Arbitral Tribunal in making of the award or the award suffers from manifest illegality or material irregularity, it is not to be interfered with, in a routine manner. In fact merely because there exists a possible second view also cannot be a ground for interference with an Arbitral Award. It is also well settled that the High Court in exercise of powers of judicial review would not sit as a Court of appeal to reappreciate the evidence led by



the parties. Thus, unless the finding of the Tribunal is hounded with the perversity or is based on a wrong preposition of law, the High Court would not interfere with the award merely for a different possible view”.

12. After considering the submissions and perusal of the impugned award, this court finds that action under Clause 3 of Contract is specifically mentions that it is possessed in the Engineer-in-Charge i.e. Executive Engineer on behalf of the Governor of Bihar and not in the Secretary of the Department. It is admitted fact that the Secretary of the department was not delegated power by the Governor of Bihar. Therefore, the action taken by the said Secretary is without jurisdiction. Hence, the rescindment of contract is without jurisdiction. Extension of time granted by the Executive Engineer to the opposite party is in accordance with clause 3 (iii) (iv) (v) of the agreement. It is apparent from the material on record that no notice was given to the Contractor before the cancellation of the contract. The authority has not followed the procedure laid down in clause 3 (iii) (iv) (v). Since the aforesaid formalities have not been followed, the authority would not be entitled in the circumstances to forfeit the earnest and the security amount.



13. In view of the nature of objection raised in the instant revision application, which amounts to adjudication of disputed facts between the parties and also considering the fact that there is no error apparent on the face of the record of the impugned award as well as there is no irregularity gross or jurisdictional error in passing the impugned award, this court finds no merit in this revision application.

14. Accordingly, this Civil Revision Application is dismissed.

(Khatim Reza, J)

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