IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.1509 of 2018
In
Civil Writ Jurisdiction Case No.2616 of 2017

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1. The State Of Bihar
2. The Engineer in Chief Central, Water Resources Department Govt. of Bihar, Patna.
3. The Chief Engineer, Water Resources Department Valmikinagar, West Champaran, Bihar.
4. The chief Engineer. Water Resources Department Muzaffarpur, West Champaran. Bihar.
5. The Engineer-in- Charge, Water Resources Division, Cheki-Motihari, East Champaran, Bihar

... ... Appellant/s

Versus

N C C Ltd. son of Late Venkatapathi Raju NCC House, Madhapur, Hydrabad 500008

... ... Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Vikash Kumar, Advocate
		Mr.. Shoeb Alam, Advocate
For the Respondent/s	:	Mr.Fauzia Shakil, Advocate
		Mr. Rampraveshnath Tiwari, Advocate
		Mr. P. Balaji Verma, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE RAJIV ROY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJIV ROY)
Date : 07-11-2023

Heard learned Counsel for the parties.

2. The present appeal is directed against the order and judgment dated 23.02.2018 passed by the learned Single Judge in CWJC No. 2616 of 2017 by which the writ petition preferred by the sole respondent-petitioner was allowed and the Circular No. 948 dated 13.06.2011 issued by the Principal Secretary and the order dated 22.09.2015 passed by the Secretary of the Water Resources Department were quashed.

3. The brief facts of the case as presented by the sole respondent-petitioner in the writ petition was/were as follows:-

4. The respondent-petitioner Company incorporated under the Companies Act, 1956 was formerly known as Nagarjuna Construction Corporation Ltd.

5. Pursuant to the notice inviting tender for execution of works relating to the restoration of the Eastern Gandak Canal System including Gandak Barrage under the Rashtriya Sam VikashYojna (henceforth for short 'the Yojana'), the writ petitioner offered to execute the works at an estimated tender value of Rs. 4,48,83,67,313.00.

6. Accordingly, on 03-07-2009, a letter of acceptance was issued in favour of the petitioner-company vide letter no. Gandak Cell/Tender- (5)-6/2008-Part-11-Govt. of Bihar by 'the Department' vide bid dated 04-05-2007 for 'the Yojana' [NIT No. 2 GC/2006-07] for the Contract Price of Rs. 448,83,67,313.00 Crores (Four Hundred Forty Eight Crore

Eighty Three Lacs Sixty Seven Thousand Three Hundred Thirteen).

7. In furtherance of the same, the agreement/contract dated 06-08-2009 was executed between the appellants-respondents and the respondent-petitioner for the completion of the works under the tender.

8. As per the respondent-petitioner, the tender document prepared by the appellants-respondents prior to the execution of the agreement included the "Instructions to Bidders" or the ITB which formed part of the agreement as a whole. The clause 13.1.2 of the Tender ITB clearly mentioned that all duties and taxes payable by Contractor shall be included in the rates, prices and total bid price submitted by the bidder.

9. The Chief Engineer of ‘the Department’ issued letter No. 91 (Gandak restoration) dated 06.08.2009 i.e. the notice to proceed with the work.

10. However, a circular bearing no. 948/Patna dated 13-06-2011 was issued by the Principal Secretary of ‘the Department’ for deciding the modality by which royalty was to be deducted from the Contractor's bill or realized from it. It was decided that the overall percentage rate basis of 44.53% above the scheduled rates shall be calculated after deducting the

Royalty amounts from the scheduled rates.

11. Aggrieved, the respondent-petitioner made representations on 22-06-2011 and 28-09-2011.

12. When it elicited no response, CWJC No. 22920 of 2011 was preferred before the Patna High Court for the quashing of the circular dated 13-06-2011. The same was disposed on 30-11-2012 granting liberty to file detailed representation before the 'the Department'.

13. The representation so preferred on 11.12.2012 came to be rejected on 26-02-2013. This followed CWJC No. 3711 of 2014 challenging the orders dated 26-02-2013 and the circular dated 13-06-2011.

14. It was partly allowed by quashing the order dated 26-02-2013 while remitting the matter back to the Principal Secretary of 'the Department' to take a fresh decision.

15. Aggrieved by the said order of the Learned Single Judge, the respondent-petitioner preferred LPA No. 1760 of 2015. Meanwhile, the respondent-petitioner's representation once again came to be rejected vide its order dated 22-09-2015.

16. The LPA No. 1760 of 2015 was withdrawn which followed Civil Review No. 264 of 2015 that too was dismissed as having become infructuous.

17. The SLP (C) No. 17504/2016 so preferred before the Hon’ble Supreme Court was disposed of on 12.08.2016 with liberty to file writ petition before the High Court challenging the order.

18. This followed CWJC No. 2616 of 2017 for the following reliefs:-

(i) for issuance of a writ, order or direction in the nature of a declaration, declaring that the impugned circular dated 13.06.2011 is not applicable to the contract dated 06.08.2009 and cannot have the effect of overriding, novating or altering the terms of the said Contract; Or

(ii) for issuance of a writ, order or direction in the nature of certiorari quashing and setting aside the impugned circular dated 13.06.2011 issued by the Respondent no. 1; and

(iii) for issuance of a Writ, Order or direction in the nature of mandamus, directing the Respondents herein to pay strictly as per the terms of the contract; and

(iv) for issuance of a Writ, Order or direction in the nature of certiorari quashing and setting aside the impugned order dated 22.09.2015 whereby the respondent no. 1 has disposed of the petitioner's representations by non- application of mind, arbitrarily and illegally; and

(v) ad-interim ex-parte direct the respondents herein to release the amounts due and

payable to the petitioner and withheld by the respondents by placing reliance on the impugned circular during the pendency of the present proceedings;

(vi) for any other alternative or consequential relief(s) for which the petitioner is entitled by this Hon'ble Court in the facts and circumstances of the present case.

19. After hearing the parties, the learned Single Judge took note of the general conditions of the contract forming part of the agreement specially Clause IV A which followed the notice to proceed with the work vide order dated 06.08.2009 on the bid price of Rs. 4,48,83,67,313/-.

20. Clause 4 A read as follows:-

“"4A. In case of Percentage Rate Tenders, tenderers shall fill up the usual printed form, stating at what percentage below/above (in figures as well as in words) the total estimated cost given in Schedule of Quantities at Schedule-A, he will be willing to execute the work. Tenders, which propose any alteration in the work specified in the said form of invitation tender, or in the time allowed for carrying out the work, or which contain any other conditions of any sort, will be liable to rejection. No single tender shall include more than one work but contractors who wish to tender for two or more works shall submit separate tender for each. Tender shall have the name and

number of the works to which they refer, written on the envelope.

If for any special reasons, the contract provides for the payments for work done to be made at a specified percentage below or above the rates entered in the sanctioned estimate of the work (or the Scheduled of Rates) it should be stated in clear terms in the contract that the deductions or additions, as the case may be of the percentage, will be calculated on the gross, and not the net amounts of the bills for work done and in fixing the percentage it should be borne in mind that the calculations will be made."

21. The learned Single Judge accordingly held that when the agreement entered into between the parties was for a fixed amount of Rs. 448,83,67,313/- and there was no reference to the overall percentage rate basis of 44.53% above the schedule rates mentioned in the bill of quantities, the writ petitioner would be entitled to the amounts agreed upon successful performance of the contract.

22. Learned Single Judge further rejected the plea taken by the appellants-respondents in the Circular No. 948 dated 13.06.2011 was clarificatory and as it was not part of the terms of agreement, the same is impermissible.

23. In that background, learned Single Judge held that letter no. 948 dated 13.06.2011 and the order dated 22.09.2015 cannot be said to be tenable and in effect writing the contract unilateral, which is impermissible. Accordingly, circular no. 948 dated 13.06.2011 and the order dated 22.09.2015 were quashed.

24. Aggrieved, the present appeal was preferred by the appellants-respondent State.

25. We have gone through the facts of the case as also the order passed by the learned Single Judge.

26. The terms and conditions of the agreement signed on 06.08.2009 between the parties was very clear and incorporated hereinbelow:-

AGREEMENT

"This agreement, made the 6th (Sixth) day of AUGUST 2009 between 6th ***CHIEF ENGINEER, WATER RESOURCES DEPARTMENT VALMIKINAGAR*** *(name and address of Employer) (hereinafter called:* ***DEPARTMENT*** *of the one part and* ***MANAGING DIRECTOR, M/S NAGARJUNA CONSTRUCTION COMPANY LIMITED, NAGARJUNA HILLS, HYDERABAD-500082*** *(name and address of Contractor) hereinafter called "the Contractor" of the other part).*

Whereas the Employer is desirous that the Contractor execute ***RESTORATION OF EASTERN***

GANDAK CANALSYSTEM INCLUDING GANDAK BARRAGE AND ITS APPURTENANTS UNDER RASTRIYA SAM VIKASH YOJNA (INCLUDING PREPARATION OF OVERALL IMPLEMENTATION SCHEDULE) *(name and identification number of Contract) (hereinafter called "the Works") and the Employer has accepted the Bid by the Contractor for the execution and completion of such works and the remedying of any defects therein, at a cost of Rs. 448.8367313 Crore* ***(Rupees Four hundred forty eight Crores eighty three lakhs sixty seven thousand three hundred thirteen)*** *only.*

NOW THIS AGREEMENT WITNESSETH as follows:

1. In this agreement, words and expression shall have the same meanings as are respectively assigned to them in the conditions of contract hereinafter referred to and they shall be deemed to form and be read and construed as part of this Agreement.

In consideration of the payments to be made by the Employer to the Contractor as hereinafter mentioned, the Contractor hereby covenants with the Employer to execute and complete the works and remedy and defects therein in conformity in all aspects with the provisions of the contract

3. The Employer hereby covenants to pay the Contractor in consideration of the Execution and completion of the Works and the remedying the defects wherein Contract Price or such other sum as may become payable under the provisions of the Contract at the times *and in the manner prescribed by the Contract.*

4. The following documents shall be deemed to form and be ready and construed as part of this Agreement viz.

i. Letter of Acceptance

ii. Notice to proceed with the work

iii. Contractor's Bid (Kept in Tender file of Division)

iv. Condition of Contract: General and Special

v. Contract Data

vi. Drawings (it will be seen in the office of concerned Executive Engineer)

vii. Bill of Quantities and

viii. Invitation for bids (IFB)

ix. Notice Inviting Tender (NIT)

x. Instruction to bidders (ITB)

xi. Technical Specifications

xii. The letters exchanged between employer and the contractor after receipt of Tender, but before award of the contract. (Kept file)

xiii. Any or all addenda or modifications to the above.

xiv. Any other documents listed in the Contract Data as forming part of the Contract.

In witnessed whereof the parties there to have caused this Agreement to be executed the day and year first before written.

The Common Seal of both parties namely as above was hereunto affixed in the presence of:"

27. A bare perusal of the said agreement would show that an amount of Rs. 448,83,67,313/- was specifically incorporated in the agreement and there was no reference to the overall percentage of rate basis of 44.53% as the appellant-respondents later started claiming.

28. The learned Government Advocate strenuously argued before us that the Royalty was to be paid by the contractors and reimbursed by the Department. This is so since the work is of the Department and Royalty payment is the liability of the Department. The contractor carries on the work on behalf of the Department. In fact, the agreement makes every duty tax and levy the liability of the contractors. The counter-affidavit filed also speaks of the deduction of Royalty from the bills raised, if not paid by the contractor. The bid amount reckons the Royalty to be paid in execution of the work which though the liability of the awardee-Department has to be satisfied by the awardee-contractor. Hence, definitely it will be reimbursed by the Department through the bills raised. However, if the Royalty is deducted from the scheduled rates to determine the percentage rate, above the scheduled rates, then the Royalty will have to be borne by the contractor. The condition in the contract making the contractor liable to the every tax, duty and levy is to caution the contractor-tenderer to reckon the same at the time of making the bid.

29. Thus, the learned Single Judge was perfectly justified in holding that once the parties signed an agreement and the bidder took up the work fully convinced that he is entitled to an amount of Rs. 448,83,67,313/-, subsequently, the appellants-respondents cannot be allowed to rewrite the contract unilaterally and/or without taking the bidder into confidence.

30. We do not see any error in the order passed by the learned Single Judge and the appeal accordingly stands dismissed.

31. Since the matter has lingered for long and the sole respondent-petitioner has been derived of the contract amount, we direct the appellants-respondents to pay the dues within a period of four months from today alongwith an interest @ 6%. Failure to clear the same within the aforesaid period, the sole respondent-petitioner shall be entitled to an additional interest @ 9% till the payment is made and the State shall be free to recover the additional 3% from the Officers/Officials who defaulted the payment hereinabove within the stipulated period.

(K. Vinod Chandran, CJ)

(Rajiv Roy, J)

Jagdish/-

AFR/NAFR	AFR
CAV DATE	N/A
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