

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.1208 of 2024

M/s Vijay Kumar Construction Pvt. Ltd. having its Registered Office at North Mandiri Chhakkan Tola, P S Budha Colony Patna, Bihar through its Director, Manish Kumar aged about 36 Years, Male, Son of Sri Vijay Kumar Singh, Resident of Nort Mandiri, Chhakkan Tola, P.s. Budha Colony, Patna, Bihar.

... Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Eural Works Department, Government of Bihar, Patna.
 2. The Engineer in Chief, Rural Works Department, Government of Bihar, Patna.
 3. The Chief Engineer, Rural Works Department, Government of Bihar, Patna.
 4. The Superintending Engineer, Rural Works Department, Works Circle, Nalanda, District Nalanda, Bihar.
 5. The Executive Engineer, Rural Works Department, Works Division, Harnaut, District Nalanda, Bihar.
- ... Respondents

Appearance :

For the Petitioner : Mr.Prabhat Ranjan, Adv.
For the Respondents : Mr.Addl. Advocate General 4

CORAM: HONOURABLE MR. JUSTICE A. ABHISHEK REDDY
ORAL ORDER

5 09-09-2024 Heard the learned counsel for the parties.

2. Learned counsel for the petitioner has stated that the impugned Letter No. 419/2023, dated 14.03.2023 (Annexure P/9) passed by the authority is contrary to the terms of the agreement entered between the parties on 24.02.2021. It is stated that the impugned order of rescinding the contract and cancellation passed by the Executive Engineer, who is not competent to pass the order. That the impugned order is passed without putting the petitioner on show cause notice or giving him an opportunity of filing his explanation. Learned counsel has drawn the attention of the Court to Clauses 3 and 14 of the



Agreement entered between the parties to buttress his contentions. That the impugned order passed by the Executive Engineer is liable to be set aside on the ground that the Executive Engineer did not have the jurisdiction and also on the ground of violation of principles of natural justice and equity. Further learned counsel has relied on the judgment of the Division Bench of this Court passed in C.W.J.C. No. 3241 of 2020, dated 21.04.2023 (Annexure P/25) in support of his case.

3. In order to decide the issue in the present case it is necessary to extract the provision of the Agreement more particularly Clause 3 and Clause 14 :

3. Clause 3 of the Agreement reads as under :

“Clause 3 : Subject to the other provisions contained in this clause the Engineer-In-Charge may, without prejudice to his any other rights or remedy against the contractor in respect of any delay /inferior workmanship, any claims for damages and/or any other provisions of this contract or otherwise, and whether the date of completion has or has not elapsed, by notice in writing absolutely determine the contract in any of the following cases:

i) It the contractor having been given by the Engineer-in-Charge a notice in writing to rectify,



reconstruct or replace any defective work or that the work is being performed in dissent or otherwise improper or unworkman like manner shall omit to comply with the requirement of such notice for a period of seven days thereafter

ii) If that contractor being a company shall pass a resolution or the court shall make an order that the company shall be wind up or if a receiver or a manager on behalf of a creditor shall be appointed or if circumstances shall arise which entitle the court or the creditor to appoint a receiver or a manager or which entitle the court to make a winding up order.

iii) If he contractor has, without reasonable cause, suspended the progress of the work or has failed to proceed with the work with due diligence so that in the opinion of the Engineer-In-Charge (which shall be final and binding) he will be unable to secure completion of the work by the date of completion and continues to do so after a notice in writing of seven days from the Engineer-in-Charge.

iv) If the contractor fails to complete the work within the stipulated date or items of work with individual date of completion, if any stipulated, on or before such dater(s) of completion and does not complete them within the period



specified in a notice given in writing in that behalf by the Engineer-in-Charge.

v) If the contractor persistently neglects to carry out his obligations under the contract and/or commits default in complying with any of the terms and conditions of the contract and does not remedy it or take effective steps to remedy it within 7 days after a notice in writing is given to him in that behalf by the Engineer-in-Charge.

vi) If the contractor commits any acts mentioned in Clause 21 hereof :

vii) If the work is not started by the contractor within 1/ha of the stipulated time subject to the maximum of 45 days.

When the contractor has made himself liable for action under any of the cases aforesaid, the Engineer-in-Charge on behalf of the Governor of Bihar shall have powers :

a) To determine or rescind the contract as aforesaid (of which termination or rescission notice in writing to the contractor under the hand of Engineer-in-Charge shall be conclusive evidence). Upon such determination or rescission the Earnest Money Deposit, Security Deposit already recovered and Performance



Guarantee under the contract shall be liable to be forfeited and shall be absolutely at the disposal of the Government.

b) After giving notice to the contractor to measure up the work of the contractor and to take such whole, or the balance or part thereof as shall be un-executed out of his hands and to give it to another contractor to complete the work. The contractor, whose contract is determined or rescinded as above, shall not be allowed to participate in the tendering process for the balance work.

4. Clause 14 of the Agreement reads as under :

If the contractor:

“i) at any time makes default in proceeding with the works or any part of the work with due diligence and continues to do so after a notice in writing of 7 days from the Engineer-in-Charge; or

ii) Commits default to comply with any of the terms and conditions of the contract and does not remedy it or take effective steps to remedy it within 7 days after a notice given to him in that behalf by the Engineer-in-Charge or

iii) Fails to complete the works of items of work with individual dates of completion, on or before the



date(s) of completion, and does not complete them within the period specified in a notice given in writing in that behalf by the Engineer-in-Charge, or

iv) Shall offer or give or agree to give to any person in Government service or to say other person on his behalf any gift or consideration of any kind as an inducement reward for doing or forbearing to do or for having done or forborne to do any act in relation to the obtaining or execution of this or any other contract for Government, or

v) Shall enter into a contract with Government in connection with which commission has been paid or agreed to be paid by him or to his knowledge, unless the particulars of any such commission and the terms of payment thereof have been previously disclosed in writing to the Accepting Authority/Engineer-in-Charge, or

vi) Shall obtain a contract with Government as a result of wrong tendering or other non-bonafide methods of competitive tendering, or

vii) Being an individual, or if a firm, any partner thereof shall at any time be adjudged insolvent or have a receiving order or order for administration of his estate made against him or shall take any proceedings for liquidation or composition (other than a voluntary liquidation for the purpose of



*amalgamation or reconstruction) under any Insolvency Act for the time being in force or make any conveyance or assignment of his effects or composition or arrangement for the benefit of his creditors or purport so to do, or if any application be made under any Insolvency Act for the time being in force for the sequestration of his estate or if a trust deed be executed by him for benefit of his creditors;
or*

*viii) Being a company, shall pass a resolution or the Court shall make an order for the winding up of the company, or a receiver or manager on behalf of the debenture holders or otherwise shall be appointed or circumstances shall arise which entitle the Court or debenture holders to appoint a receiver or manager,
or*

*ix) Shall suffer an execution being levied on his goods and allow it to be continued for a period of 21 days,
or*

x) Assigns, transfers, sublets (engagement of labour on a piece-work basis or of labour with materials not to be incorporated in the work, shall not be deemed to be subletting) or otherwise parts with or attempts to assign, transfer sublet or otherwise parts with the entire works or any portion thereof without the prior written approval of the Competent Authority,



The Competent Authority may, without prejudice to any other right or remedy which shall have accrued or shall accrue hereafter to Government, by a notice in writing to cancel the contract as a whole or only such items of work in default from the Contract.

The Engineer-in-Charge shall on such cancellation by the Competent Authority have powers to:

- (a) Take possession of the site and any materials, constructional plant, implements stores, etc., thereon; and/or*
- (b) Carry out the incomplete work by any means at the risk and cost of the contractor.*

On cancellation of the contract in full or in part, the Engineer-in-Charge shall determine what amount, if any, is recoverable from the contractor for completion of the works or part of the works or in case the works or part of the works is not to be completed, the loss of damage suffered by Government. In determining the amount, credit shall be given to the value of the work executed by him up to the time of cancellation, the value of contractor's materials taken over and incorporated in the work and use of plants and machinery belonging to the contractor

Any excess expenditure incurred or to be incurred by Government in completing the works or part of the



works or the excess loss or damages suffered or which may be suffered by comment as aforesaid after allowing such credit shall without prejudice to any other available to Government in law be recovered from any moneys due to the contractor on any account, and if such moneys are not sufficient the contractor shall be called upon in writing and shall be liable to pay the same within 31 days.

If the contractor fails to pay the required sum within the aforesaid period of 30 days Engineer-In-Charge shall have the right to sell any or all of the contractors unused is constructional plant, implements, temporary buildings, etc. and apply the proceeds of the sale thereof towards the satisfaction of any sums due from the contractor under the contract and if thereafter there be any balance is outstanding from the contractor, it shall be recovered in accordance with the provisions of the contract.

Any sums in excess of the amounts due to Government and unsold materials, construction plant, etc., shall be returned to the contractor, provided always that if cost or anticipated cost of completion by Government of the works or part of the works is less than the amount which the contractor would have been paid had he completed the works of part of the works, such benefit shall not accrue to the contractor.”



5. The order of the Division Bench passed in C.W.J.C. No. 3241 of 2020, dated 21.04.2023, reveals that the Executive Engineer is not competent to pass the impugned order. Further the impugned order is also liable to be set aside as the petitioner was not put on prior notice before passing of the said order and the same is contrary to the principles of natural justice and equity. Clause 3 of the Agreement entered into by the parties clearly stipulates that the petitioner has to be given prior notice and within seven days the contractor has to rectify, reconstruct or replace any defective work. As per Clause 14 of the Agreement, the petitioner has to be put on notice by the Engineer-In-Charge. The Hon'ble Division Bench of this Court while dealing with similar matter has set aside the impugned order challenged in that particular case and remanded the matter back to the concerned authority granting liberty to the concerned/competent authority to take action in accordance Clause 14 of the Agreement.

6. Having regard to the above mentioned facts and circumstances the Writ Petition is allowed and the impugned order is set aside. However, liberty is granted to the competent authority to invoke the Clause 14 of the Agreement for taking any action in accordance with law if they are so advised. Any



action proposed to be taken, can be taken within a period of three months from the date of receipt of a copy of this order.

7. With the above directions, the Writ Petition stands allowed.

(A. Abhishek Reddy , J)

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