

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REVISION No.96 of 2018

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1. The State of Bihar
 2. The Principal Secretary, Rural Works Department, Bihar, Patna.
 3. The Engineer-in-Chief, Rural Works Department, Bihar, Patna.
 4. The Chief Engineer, Rural Works Department, Bihar, Patna.
 5. The Superintending Engineer, Rural Works Department, Magadh Division, Gaya
 6. The Executive Engineer, Rural Works Department, Works Division, Gaya.

... .. Petitioner/s

Versus

Birendra Kumar Tiwari Son of Kailash Tiwari, Resident of Mohalla Taj colony Panchayati Akhara, P.S. Kotwali, District- Gaya.

... .. Opp. Party/s

Appearance :

(In CIVIL REVISION No. 96 of 2018)

For the Petitioner/s : Mr. Manish Kumar, Advocate AC to AAG-6(EX)
(Incharge AAG-5)

For the Opp. parties : Mr. Sanjeev Kumar, Advocate
Mr. Priya Ranjan, Advocate
Ms. Chandani Kumari, Advocate

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
CAV ORDER

9 23-09-2024 Heard learned counsel for the petitioners and learned counsel for the Opposite Party.

2. This Civil Revision application under Section 13(1) of the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008 (for brevity 'the Act') has been preferred against the judgment and award dated 28.09.2016, passed by the Bihar Public Works Contracts Disputes Arbitration Tribunal (hereinafter referred to as 'the Tribunal') in Reference Case



No. 25 of 2016 whereby, the claims of the Opposite Parties has been allowed in the following terms:-

“(i) The petitioner is entitled for refund of Rs. 2,23,000/- (Two Lacs Twenty Three thousand) only deposited as earnest money in the shape of NSC, if not refunded.

(ii) The petitioner is also entitled for refund of security deposit deducted from running on account bills of Rs. 2,98,779/- (Rs. Two lacs Ninety Eight thousand Seven hundred Seventy Nine) only with simple interest @ 10% per annum from the date of filling 08.03.2016 till realization, if not refunded.

(iii) The petitioner is also entitled for the refund of performance deposit of Rs. 1,49,390/- (Rs. One lac Forty Nine thousand three hundred ninety) Only with simple interest @ 10% per annum from the date of filing 08.03.2016 till realization, if not refunded.

(iv) The petitioner is also entitled for refund of liquidation damage of Rs. 5,36,343/- (Rs. Five lacs thirty six thousand three hundred forty three) only deducted from running on account bill with simple interest @ 10% per annum from the date of filing 08.03.2016 till realization, if not refunded.”

3. The Opposite Party was allotted a contract work namely, construction of road from Wajirganj Maugrama to



Kamathia road bearing Package No. BR-12R-030, at the estimated cost of Rs. 88,97,505/-. Pursuant to that, an agreement was executed in between the Executive Engineer, RWD (W), Division, Gaya and the Opposite Party bearing agreement No. 05 (PMGSY) /9-10 on 12.10.2009 and accordingly, the work order was issued on 03.10.2009. The work was to be commenced from 03.10.2009 and date of completion of work was stated to be 02.10.2010. The Opposite Party started his work very smoothly but, one *pyne*, namely, Banshi Pale Karamdih *pyne* on which a bridge was constructed under package No. BR-12-030 was broken by the District Administration even after protest of local villagers, as a result of which, the Road for carrying the materials was damaged, and as such, the work could not be proceeded, which is apparent from the news published in daily news paper "Hindustan" dated 01.08.2012 and due to that dispute as well as non -availability of fund, Naxal problem and local hindrance, the work could not be completed in time. Hence, the Opposite Party filed a petition for extension of time, which was recommended by Junior Engineer and Assistant Engineer on 23.06.2011 and 24.06.2011 respectively. The said bridge was demolished on 01.08.2012 and after demolition of the bridge, petitioners' department did not



make any alternative arrangement and thereafter, the new bridge was constructed and opened after two and half years by another agency in place of the demolished bridge. The Executive Engineer, issued show cause notice on 12.08.2013, asking the Opposite Party to give explanation as to why only 69.97% of work was completed till 31.07.2013. The Opposite Party placed his explanation before the concerned authority on 20-08-2013, explaining therein that due to the above mentioned damage of Road and bridge and due to the non- availability of land for construction of Drain, he could complete only 70% of work and further stated therein that after the rainy season, he will complete the bitumen work.

4. The work contract for which the agreement was executed, was valued at Rs. 88,97,505/- as prepared on the basis of Detailed Project Report (for short 'DPR') wherein, 8 chainage type culvert/bridge was to be constructed and Opposite Party constructed three of all chainage culvert but, soon thereafter, the first bridge was broken/demolished by the District Administration. The DPR clearly stipulates the nature of work which was to be done by the Opposite Party, which are as follows:-



(i) Site clearance	Rs. 33,379
(ii) Earth work and erosion	Rs. 7,71,209
(iii) Base and sub-base Gr.-I Gr-II and Gr.III	Rs. 23,39,888
(iv) Bituminous work	Rs. 12, 39, 307/-
(v) Rigid pavement	Rs. 19, 52, 816/-
(vi) Cross drainage	Rs. 12,01,704/-
(vii) Line drainage	Rs. 10, 68, 602/-
(viii) Road Aperature stone & paints	Rs. 69, 187/-
(ix) Ceremony	Rs. 10,000/-

5. Further case of the Opposite Party is that he could not complete the work of line draining due to non-availability of required land. This was informed to the petitioners and this fact was mentioned in his explanation dated 20.08.2013. It is further pleaded that if the aforesaid work of line drainage is executed, then it will appear that he had completed more than 80% of the work and rest work could have been completed in very short period since only bituminous work was to be done. The further case of the Opposite party is that *vide* letter No. 871, dated 13.05.2014 and letter No. 884, dated 17.05.2014, the aforesaid contract was rescinded by the authorities concerned and the Opposite Party was informed that in terms of provisions contained in Clause 53, part of the recoverable amount has been recovered from the performance security/deposit and rest amount of Rs. 5,48,346/- was directed to be deposited by the Opposite Party.

6. In pursuance of the above said order, the Opposite



Party again submitted an application on 25.05.2014 to the petitioners Executive Engineer objecting the action of the rescindment and recovery by the Executive Engineer and explained that the liquidity damage of Rs. 5,36,343/- is still lying as liquidation damage with the petitioners authorities and moreover petitioners had been paid only Rs. 42,37,532/- by cheque against the bill of Rs. 59,75,582/- and rest amount is still lying & the Opposite Party had been advised to prepare a chart regarding payment details. The said explanation is self explanatory wherein, all details of payment, including delayed payment, delay in work due to non-availability of land, non-payment of executed work of drain, Naxal problem and local hindrance have been explained. Taking of final measurement by the petitioners authorities in absence of the Opp. Party, in which no executed work of drain was recorded by the authorities intentionally only to harass the Opposite party. The Opposite party was again served with notices on 09.06.2014 and 24.07.2014 to deposit Rs. 5,48,346/- which are totally bad and illegal. As per Clause 44.1 of the General Condition of Contract contained in SBD, the contractor shall pay liquidated damage to the employer for the period that the completion date is later date than the intended completion date, liquidity damage shall be



withheld if the contractor fails to achieve the milestone. However, in case the contractor achieves the rest milestone, the amount of liquidity damage already withheld shall be restored to the contractor by adjustment in the rest payment certificate. It is stated that the liquidity damage of Rs. 5,36,343/- has already been withheld and is still with the petitioners authorities.

7. From the aforesaid facts and circumstances, it is manifestly evident that there was no fault of the Opposite Party in completing the aforesaid work in time though he was ready to complete the said work. Moreover, from the payment details, it will manifestly be evident that the aforesaid amount of liquidity damage is still lying with the petitioners authorities and hence, direction for its recovery is totally arbitrary. The amount alleged to be recovered under item 05 of the order dated 13.05.2014, amounting to Rs. 6,00,849/- is totally bad and illegal as Opposite Party was not at fault in not completing the above said work, and as such, the above said impugned orders are not only violative of Articles 14 and 19 of the Constitution of India but, is also bad, illegal, *mala fide*, arbitrary in nature.

8. Against the said arbitrary action of the authorities, the Opposite Party was constrained to file writ petition bearing CWJC No. 1976 of 2015 and during pendency of the same, a



Certificate proceeding bearing Certificate Case No. 02/2014-15 had been preferred for recovery of Rs. 5,48,346/-. Finally, the said writ petition was heard and disposed off on 26-02-2016 by this Court with a direction to the Opposite Party to move before the learned Tribunal for redressal of the grievances.

9. Accordingly, Opposite Party filed Reference Case no. 25 of 2016 before the learned Tribunal.

10. The petitioners filed their reply by way of counter affidavit, wherein, it is specifically mentioned that the Opposite Party did not complete the said work in stipulated time, and as such, due to non-completion of work, contract has been rescinded and Opposite Party is directed to deposit Rs. 5,48, 346/- which is according to law. Hence, the same is not required to be set aside. Deduction towards liquidation damage is applicable in terms of the agreement.

11. After considering the aforesaid facts and circumstances and the averments and material on record, the learned Tribunal has held that payments were not made in terms of agreement rather sometime limited payment and sometimes delayed payment were made by the petitioner authorities. It is apparent from the record that the work was taken by the Opposite Party beyond the agreement period. In such view of



the matter, the learned Tribunal has observed that the time is not the essence of contract in the aforesaid facts and circumstances, and as such, Section 55 of the Indian Contract Act, 1872 is attracted in this case wherein, no compensation can be levied upon the Opposite Party where time is not the essence of contract. It is further observed that from the record it also transpires that both the parties have breached the contract. The Opposite Party /contractor has breached the contract by not completing the work in stipulated time and petitioners have breached the contract by not providing clear site as well as not making payment in terms of agreement. No rational calculation has even been made while imposing liquidation damage, rather it has been imposed flatly @ 10% of the total value which is not proper in the eyes of law. The amount of earnest money deposited by the Opposite Party is Rs. 2,23,000/- (in shape of NSC) as per available record. The action of the respondents-petitioners for rescinding the said agreement and forfeiture of earnest money and security deposits and further recovery from the Opposite Party *vide* letters dated 13.05.2014 and 17.05.2014 is arbitrary illegal & beyond the settled law. Hence, Opposite Party is entitled for refund of earnest money of Rs. 2,23,000/- (in shape of NSC), refund of security deposit of Rs.



2,98,779 deducted from running on account bills, refund of performance deposit of Rs. 1,49,390/- deducted from running on account bills and also refund of liquidation damage of Rs. 5,36,343/- deducted from running on account bills. Considering the material on record, the Opposite Party is also entitled for interest as compensation for delay in payment since date of filing when the matter was brought to the knowledge of the Tribunal.

12. Being aggrieved by the aforesaid award, the State authorities filed the present Civil Revision Application for setting aside the award dated 28-09-2016, passed in Reference Case No. 25 of 2016.

13. Learned counsel for the petitioners submits that the learned Tribunal has wrongly held that that Section 55 of the Contract Act, 1872 is attracted in the instant case. It is further contended that the learned Tribunal has failed to take into consideration the provisions as contained in the Clause No. 17.1 of the Part-1 of General Conditions of Contract of the SBD, which is part of the agreement. In view of the said Clause, the completion of the assigned work on time was of prime necessity as the construction of the road has been sanctioned for the public convenience and in this manner, the time was the



essence of the contract, which the learned Tribunal has failed to take into consideration. The Opposite Party did not abide by the terms of the agreement by executing the assigned work. The Executive Engineer, RWD, Works Division, Gaya, issued show cause notice dated 12-08-2013 to the Opposite Party to reply within 07 days as to why he be not debarred from participating in the future tender as he has completed only 69.97% of work till 31-07-20213. Pursuant to which the Opposite Party filed reply to the show cause notice, which has been found dissatisfactory. In such view of the matter, Section 55 of the Act is not helping the case of the Opposite Party as the time was the essence of the aforesaid contract. The learned Tribunal wrongly held that Opposite Parties/petitioner has breached the contract by not providing clear site as well as not making payment in terms of agreement.

14. Learned counsel for the petitioners submits that there has been no impediment with the site which is also reflected from the execution of the work till the level of Grade-III, which the opposite party has executed in the whole length of the aforesaid site. Only bituminous work has to be executed by the opposite party. It is next submitted that had the site not been cleared, the opposite party could not have executed the work till



Grade-III stage at the aforesaid site. So far the plea of delay in executing the assigned work due to demolition of the bridge by the District Administration is concerned, the same is also not maintainable as the proposed route is also connected from other side. The learned Tribunal wrongly imposed liquidation damage and imposed 10% of the total value which is not proper. Learned counsel further submits that the SBD is part of the agreement and Clause 44.1 of the SBD specifically enumerates the conditions with respect to the liquidated damages, as has been laid down in Clause 21(a)(b) and (c) of the Contract Data to General Conditions of Contract. It is submitted that the learned Tribunal has failed to consider that the opposite party did not execute the work as per the terms of agreement and the opposite party has been paid for his completed work. The payment can only be released as per the execution of work and not as per the schedule of payment.

15. On the other hand, learned counsel for the Opposite party submits that the view taken by the learned Tribunal is reasonable and award has been passed in accordance with law. It is submitted that time was not the essence of contract as the contract provides for extension of time as well as for liquidated damages. It is apparent from the record that bridge was



demolished on 01-08-2012 and no alternative arrangement was made available to the Opposite Party for carrying the work. It is also submitted that the Opposite Party could not complete the work of line draining due to non-availability of required land which was explained by the opposite party in his explanation dated 20-08-2013. It is also admitted fact that the contract in question was rescinded under the provisions of Clause 53 of the General Condition of Contract contained in SBD, and the amount was recovered from the performance deposit and security deposit and also Opposite Party was directed to deposit the rest amount of Rs. 5,48,346/- It is also mentioned that the work was not completed in stipulated time due to lapses on the part of the Opposite Party and if the land had been made available then the work would have been completed in time by the Opposite Party. It is also submitted that all details of payment, including delayed payment, delay in work due to non-availability of land, non-payment of executed work of drain has been explained in his explanation.

16. The claimant -Opposite Party has placed reliance in the case of *The State of Bihar & Ors. Vs. M/s Kumar Construction Company*, reported in *2013 (4) PLJR 239*. This court in the aforesaid judgment at paragraph no. 26 has held as



under:-

*“26. 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 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”.*

17. The claimant-Opposite Party has placed further reliance on the judgment in the case of **Bihar Industrial Area**



Development Authority & Ors. Vs. Rama Kant Singh reported in ***2022 (2) BLJ SC 387***, wherein, the Hon'ble Apex Court, at paragraph no. 14, has held as under:-

"14. As can be seen from Section 13 of the 2008 Act, the scope of revision is limited. A perusal of the judgment of the High Court shows that it has considered and interpreted some of the clauses in the agreement between the parties. High Court found that the Arbitration Tribunal had the jurisdiction to make the award and that the award does not suffer from manifest illegality and material irregularity. The High Court rightly found that the scope for interference with the award of the Arbitration Tribunal in Revisional jurisdiction was very narrow. In the absence of any perversity, the High Court could not have given a different interpretation to the clauses in the agreement from the one provided by the Arbitration Tribunal."

18. In view of the above discussion as also the decision of the Hon'ble Supreme Court as well as decisions of this Court, this Court finds that the impugned Award has rightly been passed by the learned Tribunal. So far question that time is essence of contract, the Hon'ble Tribunal, at the outset, held that merely having a clause in the contract making time the essence of it would not be determinative; rather, an overall view having



regard to all the terms of contract are to be taken into consideration. Further, contracts containing provision for extension of time or payment of penalty on default would dilute the obligation of timely performance and render the clauses imbuing time as essence of the contract ineffective. The learned Tribunal also noted that generally, under construction contracts, time is not the essence. Learned Tribunal has held that from the records also it transpires that “payments were not made in terms of agreement rather sometime limited payment and sometimes delayed payment were made by the respondents-petitioners to the petitioner- opposite party. Evidently, when the work was taken by the petitioner beyond the agreement period, the time is not the essence of contract, and as such, Section 55 of the Indian Contract Act, 1872 is attracted in this case wherein, no compensation can be levied upon the petitioner-opposite party where time is not the essence of contract. From the records also it transpires that both the parties have breached the contract. The petitioner has breached the contract by not completing the work in stipulated time and respondents have breached the contract by not providing clear site as well as not making payment in terms of agreement (sometime limited payment and sometime delayed payment). No rational



calculation has even been made while imposing liquidation damage, rather it has been imposed flatly @ 10% of the total value which is not proper in the eyes of law.

19. In the case of *Welspun Specialty Solutions Limited (Formerly Known As Remi Metals Gujarat Ltd.) Versus Oil And Natural Gas Corporation Ltd.* & its analogous cases reported in **(2022)2 SCC 382**, the Hon'ble supreme Court, in its concluding paragraph No.42 of the judgment, held that 'time was not essence of contract' and other aspect also which are as follows:-

“42.1 The Arbitral Tribunal's interpretation of contractual clauses having extension procedure and imposition of liquidated damages, are good indicators that “time was not the essence of the contract”.

42.2. The Arbitral Tribunal's view to impose damages accrued on actual loss basis could be sustained in view of the waiver of liquidated damages and absence of precise language which allows for reimposition of liquidated damages. Such imposition is in line with the 2nd para of Section 55 of the Indian Contract Act.

42.3. The Arbitral Tribunal was correct in distinguishing the dictum of this Court in Saw Pipes, which validated imposition of liquidated damages in a similar contract.



42.4. The High Court and District Court strayed beyond the limitation under Sections 34 and 37 of the Arbitration Act.

42.5. Other aspects of the award also do not require interference of this Court, in view of the law laid down in the NHAI v. M. Hakeem.”

20. In the light of the aforesaid decision and fact of the case, there is no error apparent on the face of record in the impugned award as well as there is no irregularity or gross jurisdictional error in passing the impugned award. This Court finds no merit in the Revision application.

21. Accordingly, this Civil Revision application is dismissed.

(Khatim Reza, J)

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