

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.10860 of 2024

Deodhari Yadav S/o- Sri Butai Yadav Resident of Village Aura, P.O.- Sahdew
Khap, P.S.- Magadh University, Bodh Gaya, District- Gaya.

... .. Petitioner/s

Versus

1. The State of Bihar through the Secretary, Road Construction Department, Government of Bihar, Patna.
2. The Secretary, Road Construction Department, Government of Bihar, Patna.
3. The Engineer in-chief, Road Construction Department, Government of Bihar, Patna.
4. The Chief Engineer, South Road Construction Department, Government of Bihar, Patna.
5. The Executive Engineer, Road Construction Department, Road Division, Bihar Sharif, District- Nalanda.
6. The District Magistrate, Nalanda.
7. The Circle Officer, Silao, District- Nalanda.
8. The Chief Manager of the Panjab National Bank, Rai Kashinath More Branch, Gaya, District- Gaya.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Naval Singh, Advocate Mr. Onkar Kumar, Advocate
For the Respondent/s	:	Mr. P. K. Shahi, Advocate General
For the PNB	:	Mr. Mritunjay Kumar, Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE PARTHA SARTHY

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 23-07-2024

The petitioner is aggrieved by Annexure-P/1 issued by the 5th respondent, wherein the 8th respondent-bank has been directed to encash the bank guarantee provided by the petitioner as Earnest Money Deposit (hereinafter referred to as 'EMD') on



account of forfeiture of the Earnest Money Deposit carried out by the respondent.

2. The learned counsel for the petitioner argued that contract could not be commenced since there were many impediments at the site. The petitioner had submitted repeated representations for removal of encroachments and the other impediments which were not responded to favorably by the respondents. There is no reason to forfeit the Earnest Money Deposit, is the submission.

3. The learned Advocate General, who appeared for the respondent, on the other hand submitted on instructions that the petitioner had not executed the agreement and in such circumstances, the forfeiture of earnest money deposit is an automatic consequence, as is provided under clause 16.6 of the Standard Bidding Document, produced as Annexure-2.

4. Admittedly, the agreement was not executed. The petitioner had applied under a tender for the Widening, Strengthening & Construction of Noorsarai to Silao (Begampur to Silao) from 13.120 kms to 22.170 kms for the year 2023-24. The petitioner also admits that he was the lowest bidder when the financial bid was opened after he and other tenderers qualified in the technical bid. The work was awarded to him but



many reasons are stated, as to why agreement was not entered into and the furnishing of performance security were not complied with. The petitioner's only contention is that when the site was inspected, there were a lot of impediments which was requested to be removed. In fact, the petitioner ought to have executed the argument and then approached the authorities for removal of the impediments.

5. As per Annexure-2, clause 16.6 speaks of forfeiture of EMD and in the case of a successful bidder, as per clause (c), if the bidder fails within the specified time limit to sign the agreement or furnish the required performance security, the EMD would be forfeited. We find absolutely no reason to entertain the writ petition under Article 226 especially since whether there were impediments in the construction, which alone was the reason for not executing the agreement, will have to be factually resolved. The petitioner also has a contention that even before the agreement was executed, he had collected men and materials to commence the work which has also put him to financial strain.

6. Looking at clause 16.6, we find no reason to interdict the forfeiture of EMD, which is an automatic consequence of the agreement not being executed. If the



petitioner has any claims against the respondents then necessarily it would have to be agitated before the Civil Court or by way of arbitration.

7. The learned Advocate General indicated that when there was no agreement executed, there is no question of arbitration.

8. We only notice the judgment of the Hon'ble Supreme Court in ***SLP(C) No.20427 of 2023 M/S Prabh Dayal Om Prakash Infrastructure Ltd. v. Patna Municipal Corporation*** dated ***03.01.2024***. A similar contention of contract/ agreement having not been executed was raised and the Hon'ble Supreme Court held so:-

In our view, these are all aspects and issues which are to be determined and decided by the Arbitrator, who will also be entitled to examine the question of existence of the arbitration agreement and the underlying contract in terms of the recent judgment of this Court in "In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899"³ and the earlier decision in "Vidya Drolia & Ors. v. Durga Trading Corporation"⁴.

The fact that we are allowing the application under Section 11 of the Arbitration and Conciliation Act, 1996 will not be treated as binding conclusion on the existence of the arbitration agreement and the underlying contract. We have, on the other hand, followed the principle - when in doubt - refer and apply the prima facie test. Our view is tentative.

9. We cannot but observe that we have not held on



the validity of a claim for arbitration, which will have to be considered when such claim is raised. If, however, there is found to be no arbitration clause then the remedy would be to approach the Civil Court.

10. We find absolutely no reason to entertain the writ petition under Article 226 of the Constitution of India. The writ petition stands dismissed.

(K. Vinod Chandran, CJ)

(Partha Sarthy, J)

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AFR/NAFR	
CAV DATE	
Uploading Date	24.07.2024
Transmission Date	

