
(2017) 03 MP CK 0141
In the Madhya Pradesh High Court
Case No : 18075 of 2015

MOHAN KUMAR VISHWAKARMA

APPELLANT

Vs

PARMANAND PRAJAPATI

RESPONDENT

Date of Decision : 22-03-2017

Acts Referred:

Citation : (2017) 03 MP CK 0141

Hon'ble Judges : Ms.Vandana Kasrekar

Bench : Single Bench

Advocate : Sankalp Kochar, Manoj Kushwaha

Judgement

1. The petitioner has filed the present writ petition challenging the demand notice dated 23/09/2015 issued by respondent No.3.

2. The petitioner is a company registered under the provisions of Companies Act. The petitioner-company is duly registered with PWD Department as a Class-A Civil Contractor. A contract was awarded to the petitioner-company for the earth work on bund, pitching construction of spill and approach channel, head sluice, waste weir and chute fall of Noghati Tank Scheme. The contract was for the period of 15 months including rainy season along with defect liability period of one year thereafter. However, due to non-handing over of site extension were duly granted to the petitioner without any demur or penalty. Thereafter the petitionercompany had successfully completed the said contract on 15/01/2011 and further successfully completed the defect liability period on 15/01/2012. The work completion certificate was issued on 28/05/2013 and thereafter a final bill of Rs.16,65,366/- was paid to the petitioner on 27/08/2012 and security deposit was released on 03/09/2013. Thereafter the respondents have issued an order dated 23/09/2015 whereby the petitioner has been asked to deposit Rs.23,00,000/- within 15 days, failing which coercive consequences shall be taken against the petitioner. Thereafter second letter was issued on 23/09/2015 in which a reference has been made to the letter dated 01/05/2014 which has never been received by the petitioner. Being aggrieved by these letters, the

petitioner has filed a detailed reply on 07/10/2015.

3. Learned counsel for the petitioner submitted that the impugned order dated 23/09/2015 is illegal and arbitrary. He further submitted that the amount which is sought to be recovered from the petitioner is without there being any adjudication on the same and without there being any dispute between the parties. He further submitted that no notice or any step for termination of contract has been taken by the respondents. It has further been submitted that no defect being pointed out during the defect liability period and the impugned action has been taken after more than three years of completion of defect liability period i.e. 15/01/2012. He further submitted that by the impugned order, the respondents are sought to recover an amount of independent contract which is without any authority of law.

4. The respondents have filed their reply and they have stated that contract No.2/2008-09 was awarded to the petitioner and after completion of the work, a completion certificate was issued by the Executive Engineer on 28/05/2013. As per Clause 4.3.17.1, the contractor is liable for damage done and for imperfections for 12 months after issuance of completion certificate. In the present case, the completion certificate was issued on 28/05/2013 and, therefore, the period of 12 months would be counted from 28/05/2013. The petitioner has contended that he has completed the work on 15/01/2011, therefore, the default liability period got over on 15/01/2012 is totally misconceived. It has further been submitted that Superintending Engineer, Water Resources Circle, Shahdol inspected the Nanghati Tank site on 19/02/2014 and in the said inspection, imperfection was found, therefore, a letter was issued to the petitioner for making good the imperfection. The engineer Incharge within 12 months after issuance of completion certificate, issued notice to the petitioner for making good the default but the petitioner completely failed to discharge the duty as per the terms and condition of the contract. When the petitioner failed to comply with the direction of Engineer Incharge i.e. Executive Engineer, WRD had no option but to complete the damage work by the other independent agency and for making good imperfection the cost was measuring as Rs.23 lakh, therefore, an order dated 23/09/2015 was issued for recovering the said amount from the petitioner. It has further been stated that before passing the order dated 23/09/2015, the first notice was issued to the petitioner on 22/02/2014 and second was issued on 01/05/2014 i.e. prior to expiry of the period of defect liability period of 12 months. The other contention raised by the petitioner that the respondents are making endeavour to recover the amount from other independent contract which is improper in law and which is also in violation of order passed by the Division Bench of this Court in the case of S.K. Jain Vs. M.P. Rural Road Development Authority wherein the Division Bench of this Court restrained the authorities from recovery dues of one contract from other independent contract. The respondents have stated that judgment passed by the Division Bench of this Court is not applicable in the present case because in the case of S.K. Jain (supra) there was no condition in the contract which empowers

the authority to recover the amount from other contract. But, in the present case, in clause 4.3.17.1, the engineer Incharge empowers to deduct the expenses which may cause the same to be made good by other contractor from any sum made due to the contract, therefore, the judgment relied by the petitioner is not applicable in the present case. It has further been stated that the petitioner has a remedy of approaching to the Superintending Engineer under Clause 4.3.29.2 against the order dated 23/09/2015 passed by the Executive Engineer. In view of aforesaid, learned counsel for the respondents submitted that the writ petition may be dismissed.

5. The petitioner has filed rejoinder and submitted that the contention of respondents that action has been taken by the respondents against the petitioner within a period of 12 months after completion certificate is issued to the petitioner is misconceived. The petitioner has stated that the petitioner has successfully completed the contract on 15/01/2011 and thereafter successfully completed the defect liability period on 15/01/2012. Thereafter a final bill was paid to the petitioner on 27/08/2012 and the security deposit was released on 03/09/2013. Thus, it is clear that the impugned order has been passed after a lapse of more than four years and eight months from the date of completion of contract. Recovery which is sought to be made by the petitioner is without adjudication of dispute without a claim being raised by the respondents in accordance with the dispute resolution clause.

6. I have heard learned counsel for the parties and perused the record. From perusal of the record, it appears that a contract has been awarded to the petitioner in respect of earth work on bund, pitching construction of spill and approach channel, head sluice, waste weir and chute fall of Noghati Tank Scheme. The contract was for a period 15 months including the rainy season along with defect liability period of one month thereafter. Thereafter a work completion certificate was issued in favour of the petitioner on 28/05/2013 and the final bill of Rs.16,65,336/- was paid to the petitioner on 27/08/2012. As per clause 4.3.16, 4.3.17.1, 4.3.17.2 and 4.3.17.3, any defect is to be pointed out or recovery is to be made as per the tender document within 12 months after the contract period is over. However, in the present case after a period of four years of completion of work a notice was issued to the petitioner on 23/09/2015 by which he was asked to deposit Rs.23 lakh within 15 days. Being aggrieved by that, the petitioner has submitted a representation on 07/10/2015. The petitioner has challenged the said notice on the ground that it has been issued after completion of work as well as the defect liability period and the respondents authorities are making endeavour to recover the said amount from other independent contractor which is impermissible in law. For the said purpose, learned counsel for the petitioner has relied on the judgment passed by the Division Bench of this Court in W.P. No.17901/2011 (M/s S.K. Jain Vs. M.P. Rural Road Development Authority and another and other connected writ petitions). The Division Bench of this Court in para-6 has held that if the contract does not contain any clause which empowers the authority to recover the amount in the

event of termination a particular contract from other contracts awarded to the same contractor, the mode of payment upon termination of contract is provided in the above quoted clause 53.1 and, therefore, it must be strictly followed by both the parties to a contract. If the total amount due to the authority exceeds any payment due to the contractor, the difference shall be recovered from the security and performance security of that particular contract. The expression "if any amount is still left unrecovered, it will be a debt payable to the employer" in clause does not authorize the authority to recover the amount automatically from other contracts of the same contractor. Thus, the debt is neither a decree nor an award. The authority, therefore, has to first initiate either arbitration proceedings or file a suit for recovery of debt and it cannot automatically recover the amount as debt by withholding the payment in respect of other contract works of other packages as there is no provision of this nature in the contract. In the present case, Clause 4.3.38.1 reads as under : "4.3.38.1. Recovery of dues from the contractor :- Whenever any claim, against the contractor for the payment of a sum of money arise out of or under the Contract, Government shall be entitled to recover such sum by appropriating, in part or whole, the Security deposit of the contractor and to sell any Government promissory note, etc., forming the whole or part of such security. In the event of the security being insufficient or if no security has been taken from the Contractor, then the balance or the total sum recoverable, as the case maybe, shall be deducted from any sum then due or which at any time thereafter may become due to the contractor under this or any other contract with Government. Should this sum be not sufficient to cover the full amount recoverable from the contractor then it shall be recovered from him as arrears of land revenue."

Thus, this clause specifically provides that in the event of security being insufficient or if no security has been taken from the Contractor, then the balance or the total sum recoverable, as the case maybe, shall be deducted from any sum then due or which at any time thereafter may become due to the contractor under this or any other contract with Government. Thus, the sum is not sufficient to recover the full amount recoverable from the contractor then it shall be recover from him as arrears of land revenue. In the present case, there is a specific clause in the agreement that if the sum is to be recovered from the contractor is not sufficient, then the same can be recovered from any other contract with the Government.

7. The second submission made by learned counsel for the petitioner is that before issuing demand notice, the respondents should have referred the matter to the Superintending Engineer in light of Clause 4.3.29.2. The said clause reads as under : "4.3.29.2. Except where otherwise specified in the contract, for the claims valued at Rs.50,000/- or more the decision of the S.E. Of the Circle for the time being in respect of all questions and disputes relating to the meaning of the specification designs, drawings and instructions hereto before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right matter or thing whatsoever, in any way arising out of,

or relating to the contract designs, drawings, specifications, estimates, instructions, orders or those conditions or otherwise concerning the work of execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be final, provided that the S.E. shall before giving his decision in writing in the matter gives an opportunity of being heard to the parties to the contract.

If any party to the contract is dissatisfied with the final decision of the S.E. in respect of any matter, he may within 28 days, after receiving notice of such decision, may refer such dispute to the Arbitration Tribunal constituted under the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1982."

As per the said clause, the dispute is to be referred to the Superintending Engineer and the decision of the Superintending Engineer is final. If any party to the contract is dissatisfied with the final decision of the S.E. in respect of any matter, then he, within 28 days after receiving the notice of such decision, may refer such dispute to the Arbitration Tribunal constituted under the M.P. Madhyastham Adhikaran Adhiniyam, 1982. Thus, from perusal of the aforesaid clauses, it is clear that before issuing the demand notice to the petitioner, the respondents should have referred the matter to the Superintending Engineer and thereafter a demand notice has to be issued to the petitioner.

8. The Full Bench of this Court in the case of B.B. Verma and another Vs. State of M.P. and another reported in 2007(4) MPLJ 610 in para-14 has held as under : "14. After considering the aforesaid decisions of the Supreme Court in Union of India Vs. Raman Iron Foundry and State of Karnataka Vs. Rameshwar Rice Mills Thirthahalli (supra), we have no doubt in our mind that clause 4.3.28.1 does not confer any power on the State Government or its officers to recover any amount that is disputed by the contractor as payable under the contract to the State Government prior to the decision of the S.E. or of the Tribunal under the Adhiniyam."

9. Thus, in light of the aforesaid judgment passed by the Division Bench of this Court, the writ petition is disposed of with direction to the parties to submit a representation to the Superintending Engineer within a period of 15 days from the date of receipt of certified copy of this order. The Superintending Engineer shall thereafter decide the matter and pass an appropriate order.

10. Till the decision by the Superintending Engineer, operation of the impugned notice of demand dated 23/09/2015 shall remain stayed.