

(2024) 02 JH CK 0077

In the Jharkhand High Court

Case No : Writ Petition (C) No. 2924 Of 2014

M/S Aditya And Rashmi Construction Pvt

APPELLANT

Vs

State Of Jharkhand And Others

RESPONDENT

Date of Decision : 27-02-2024

Acts Referred:

Bihar and Orissa Public Demands Recovery Act, 1914 — Section 3(6), 7, 29, 40

Citation : (2024) 02 JH CK 0077

Hon'ble Judges : Rongon Mukhopadhyay, J;Deepak Roshan, J

Bench : Division Bench

Advocate : Siddharth Singh, Raunak Sahay, Ahana Bhardwaj, Nehru Mahto

Final Decision : Allowed

Judgement

Rongon Mukhopadhyay, J

1. Heard Mr. Siddharth Singh, learned counsel for the petitioner and Mr. Nehru Mahto, learned A.C. to G.P.-IV appearing for the respondents.

2. In this writ application, the petitioner has prayed for quashing the order as contained in Letter No. 574/Sahibganj dated 17.05.2014 issued under the signature of the respondent no. 4, whereby and whereunder the agreement of the petitioner in Agreement No. 07/SBD/2012-13 has been cancelled without any notice or any opportunity of hearing to the petitioner. The petitioner has further prayed for quashing of the Office Order No. 1604 dated 29.12.2014 issued by the respondent no. 4 wherein an amount of Rs. 1,04,33,493/- in lieu of termination of the work contract has been sought to be recovered from the petitioner.

3. An application for amendment was preferred by the petitioner being I.A. No. 5098 of 2023, on account of certain developments which had occurred during the pendency of this writ application relating to initiation of a certificate proceeding and the said amendment application was allowed vide order dated 13.07.2023. On account of the amendment so allowed the petitioner has prayed for the following reliefs:

(a) For issuance of an appropriate writ(s), order(s), direction(s) or a writ in the nature of a writ of Certiorari quashing the order contained in Letter No. 574 / Sahibganj dated 17.05.2014 (Annexure-12) issued under the seal and signature of the Executive Engineer, Road Construction Dept., Road Division, Sahibganj whereby and whereunder, the contract of the petitioner comprised in Agreement No. 07/ (SBD)/ 2012-13 has been terminated, without giving any notice or providing any opportunity of hearing to the petitioner, on the ground of fundamental breach, negligence and slow progress whereas, on the contrary, a portion of the land on which construction was to be carried out admittedly, was never acquired by the respondent authorities and handed over to the petitioner during the subsistence of the contract;

AND/OR

(b) For a direction upon the respondents to consider the petitioner's contract for closure since the same now has become infructuous due to the efflux of time;

AND/OR

(c) During pendency of this writ petition, further proceedings or any coercive step in pursuance of the contract be kept in abeyance;

AND/OR

(d) Pass such other writ(s), order(s), direction(s) as Your Lordship may deem fit and proper.

AND/OR

(e) For issuance of appropriate writ(s), order(s) or direction(s) or a writ in the nature of a writ of Certiorari quashing the Office Order No. 1604/Sahibganj dated 29.12.2014 (Annexure

13) issued under the seal and signature of the Executive Engineer, Road Construction Department, Road Division, Sahebganj, whereby and whereunder a demand notice for recovery of an amount of Rs. 1,04,33,493/- in lieu of termination of the work contract on the ground of fundamental breach, negligence and slow progress;

AND/OR

(f) For staying the operation of the Office Order No. 1604/Sahebganj dated 29.12.2014 for recovery of an amount of Rs. 1,04,33,493/- from the petitioner company during the pendency of the writ application.

AND/OR

(g) For issuance of an appropriate writ or a writ in the nature of Certiorari quashing the notice dated 13.04.2021 issued by the District Certificate Officer, Sahibganj under Section 7 of Bihar and Orissa Public Demand Recovery Act, 1913 (now Jharkhand), whereby and whereunder the petitioner has been

summoned to appear before the court and has been directed to give clarification regarding deposit of due amount, in the Certificate Case No. 4/2015-2016, for the recovery of Rs. 1,04,33,493/- (One Crore Four Lakhs Thirty-three thousand four hundred ninety-three only).

4. Briefly stated the facts reveal that the petitioner is a Private Limited Company which had participated in a tender process consequent to a notice inviting tender floated by the respondent-authorities for construction of a High-Level Bridge over Mayurkola River at 17 Km. of Pakur-Barharwa road under Road Division, Sabibganj. The petitioner being the successful bidder was awarded the contract, the total value of which was Rs. 3,00,36,287/- and the time for completion of the said construction was 13 months i.e. upto 02.12.2013. An agreement was entered into being Agreement No. 07/SBD/2012-13 for construction of the Bridge. It is the case of the petitioner that though the agreement was entered into and for the construction of the Bridge lands were to be acquired but even after the work order was allotted the land was not acquired and compensation was not paid for the lands which was acquired and due to such obstacles, the work got delayed resulting in the petitioner representing the concerned authorities to remove such hinderance so that the construction could commence at the earliest. Since in spite of repeatedly representing the authorities for making arrangements conducive for starting the work of construction of the Bridge the same was not acted upon and since a major period had already passed the petitioner had communicated to the concerned authority requesting for taking steps for final measurement and for closure of the contract and refund of the security deposits. The agreement ultimately came to an end on 02.12.2013 with the efflux of time and even though an application was preferred by the petitioner for extension of time which was granted but within a few days the petitioner was served with a show cause notice as contained in Letter No. 483 dated 19.04.2014 as to why the contract be not terminated and the petitioner be blacklisted. The petitioner had submitted a reply but subsequently vide Letter No. 574 dated 17.05.2014 the contract of the petitioner was terminated and subsequent thereto an Office Order No. 1604 dated 29.12.2014 was issued by the respondent no. 4 wherein an amount of Rs. 1,04,33,493/- has been sought to be recovered on the ground of fundamental breach, negligence and slow progress in the work allotted to the petitioner. During the pendency of this writ application the petitioner was served with a notice u/s 7 of the Bihar and Orissa Public Demand Recovery Act, 1913 on 13.04.2021 issued by the respondent no. 5 wherein the petitioner was directed to file a clarification regarding deposit of the recovery amount of Rs. 1,04,33,493/- in Certificate Case No. 04/2015-2016.

5. It has been submitted by Mr. Siddharth Singh, learned counsel appearing for the petitioner that termination of the contract vide letter dated 17.05.2014 issued by the respondent no. 4 is in gross violation of the principle of natural justice as though a show cause notice was issued to the petitioner but no personal hearing was given prior to such termination. It has been submitted that

the entire scenario of the case would suggest that the petitioner was never at fault in delaying the work, rather it was on account of the lethargic attitude of the respondent-authorities in not acquiring the land in which the Bridge was to be built and though it has been stated that some parts of the land were acquired but compensation was not paid to the villagers which led to an agitation and which had forestalled the commencement of the construction. It has further been submitted that for the purposes of construction of a Bridge the entire land upon which such construction is to be made should have been acquired and handed over to the petitioner and merely on account of a part of the land having been acquired the same would not have served any practical purpose as part construction of a Bridge could not have commenced on account of the practical difficulties which the contractor faced on account of such part acquisition. Mr. Siddharth Singh, learned counsel for the petitioner has also submitted that since the contract mandated that the date for conclusion of the construction was 02.10.2013 and since the imbroglios which had surfaced on account of the entire land having not been acquired and compensation having not been paid to the villagers of the land which had been acquired the petitioner had clearly expressed its desire to close the contract and it was the respondent-authorities on whose insistence the petitioner had submitted an application for extension but the same resulted in a cascading effect as apart from termination of the contract the petitioner was saddled with a liability of Rs. 1,04,33,493/- and with respect to which a certificate proceeding was also initiated. Learned counsel has put reliance upon the various letters issued mostly by the respondent no. 4 while submitting that the said letters indicate the imperious nature in which the respondent-authorities have acted in terminating the contract and initiating a certificate case for realization of the damages which was unilateral and there was no adjudication prior to coming to such conclusion with respect to the quantum of damages fixed by the respondent-authorities. Mr. Singh, has submitted that the design submitted by the petitioner had also taken a considerable length of time and it can never be concluded that the construction of the Bridge could not commence on account of the fault on the part of the petitioner.

6. Mr. Nehru Mahto, learned A.C. to G.P.-IV appearing for the respondents has submitted that Clause-49 of the SBD Agreement deals with the obligation of the contractor to pay liquidated damages to the employer on account of failure of completion of the work allotted within the intended completion date or on account of the fundamental breach of the contract by the contractor. It has been submitted that it is not the case of the writ-petitioner that the entire lands upon which the construction of the Bridge was to start were not acquired; in fact a major part of the scheduled land was acquired by the State Government and merely on account of a miniscule part of the land having not been acquired during the relevant point to time the same cannot be concluded to mean that the respondent-authorities were responsible for the project not seeing the light of the day. Mr. Mahto has also submitted that if the petitioner was intending to complete the work it could have easily commenced the work as the entire lands

were subsequently acquired and an extension for completion of the project was also granted to the petitioner but the facts reveal that the petitioner had shown its apathy in not completing the work and had taken various excuses while putting the burden of not completing the project upon the respondent-authorities. Mr. Mahto has also referred to various communications to substantiate his contention that the respondent-authorities were all along assisting the petitioner so that the work of construction of the Bridge commences but the petitioner did not act upon the assurances given by the authorities and, therefore, after issuing a show cause notice the contract was terminated and as liquidated damages in terms of the contract agreement an amount of Rs. 1,04,33,493/- was imposed upon the petitioner and for recovery of which a certificate proceeding was also initiated. So far as the initiation of the proceeding is concerned, reference has once again been made to Clause 49 read with Section 29 and 40 of the SBD Agreement while making a statement that the said demand comes within the 'public demand' u/s 3(6) of the Bihar and Orissa Public Demand Recovery Act, 1914 which is recoverable as arrears of land revenue. Mr. Mahto has submitted that Plot No. 447 was wrongly notified instead of Plot No. 445 which was the only plot involved under the land acquisition process and for which a proposal was prepared and submitted to the District Land Acquisition Officer for rectification and the land owner of the said plot had also allowed the petitioner for construction of diversion over the said land.

7. From the factual aspects of the case and the submissions advanced by the learned counsel for the respective parties which we have noted above it is to be seen as to whether the petitioner was prevented by sufficient cause in not performing his contractual obligations or whether it was on account of lackadaisical attitude of the petitioner that in spite of the efforts taken by the concerned authorities the work of construction of Bridge could not be concluded. The construction of a Bridge is dependent on various factors, the most important of which is the handing over of the entire land upon which such construction is to be made. We may in such context refer to the various letters issued by the petitioner and the respondents concerned. The contract was entered into on 03.11.2012 and the intending period for conclusion of the work of construction of a Bridge over Mayurkola River was 13 months. The petitioner had intimated the respondent no. 4 vide letter dated 05.12.2012 for getting the design done in terms of the soil test report so that the work be started at the earliest. The land in question was not handed over to the petitioner for which repeated representations have been made on 04.12.2012, 15.12.2012, 07.01.2013, 16.01.2013, 17.01.2013. Apart from the delay in the design the other prominent feature appears to be the land not having been provided to the petitioner. The same also mentions about the deposit of flood water during the monsoon seasons as the area in question is adjacent to the river. The petitioner ultimately had vide letter dated 29.06.2013 intimated the respondent no. 4 stating various reasons therein while expressing its desire that the contract be closed and the security money deposited be refunded to it. This letter was responded to by the

Assistant Engineer in his letter dated 24.07.2013 wherein it has been mentioned that in the construction site some part of the land is required to be acquired but a majority of the land has already been acquired in which work for construction of a Bridge can commence. Thereafter at the insistence of the authorities the petitioner had made an application for extension of the period for completion of the construction vide letter dated 09.01.2014. This was followed by a show cause notice issued by the respondent no. 4 vide letter dated 19.04.2013 and a subsequent termination of contract and recovery of an amount of Rs. 1,04,33,493/- as liquidated damages after which a certificate case was also initiated under the Bihar and Orissa Public Demand Recovery Act, 1914.

8. It is the consistent case of the petitioner that unavailability of the land despite making repeated requests had prevented the petitioner in its endeavour to construct the Bridge as ordained by the contract which was entered into between both the parties. Though in the counter affidavit a statement has been made that the entire land was made available to the petitioner but the letter dated 24.07.2013 issued by the Assistant Engineer clearly suggests that a part of the land was under the process of acquisition which in fact vindicates the assertion of the petitioner of its inability to complete the construction work due to unavailability of the entire land over which the construction work was to have been done. Moreover, the petitioner also seems to have brought to the notice of the authorities regarding the agitation made by the villagers on account of compensation having not been received by them but there does not seem to be any specific reply by the respondent-authorities to the said claim. Mere acquisition of the land without extending the compensation to the land holders would automatically lead to disruption in the construction process and, therefore, the version of the respondent-authorities regarding acquisition of the land and a part of the land being under the process of acquisition would in fact fortify the stand of the petitioner with respect to the hindrance which had forced the petitioner to ultimately requesting the authorities for closure of the contract and refund of the security deposit.

9. The other aspect of the matter appears to be the termination of the contract vide impugned letter dated 17.05.2014. It is no doubt true that a show-cause notice was issued to the petitioner to show-cause as to why the contract executed in its favour should not be terminated but at the same time there does not appear to be any opportunity of personal hearing given to the representative of the petitioner prior to termination of the contract. The initiation of the process of termination of the contract seems to be within a few weeks from the date when the petitioner at the insistence of the authorities had given an application for extension of the contract. It is no doubt true that this Court has a limited power of review and can do so only when the entire exercise is found to be arbitrary and unreasonable which from the facts of the present case does reveal an arbitrary action on the part of the concerned authorities in neither closing the contract nor refunding the security deposit but straightaway terminating the contract and subsequently demanding an amount of Rs. 1,04,33,493/- towards

liquidated damages.

10. Mr. Siddharth Singh, learned counsel for the petitioner has submitted that there has to be a prior adjudication after which the amount could be determined, in support of which, he has referred to the case of "State of Karnataka versus Shree Rameshwara Rice Mills. Thirthahalli", reported in (1987) 2 SCC 160, wherein it has been held as follows:

"7. On a consideration of the matter we find ourselves unable to accept the contentions of Mr Iyenger. The terms of clause 12 do not afford scope for a liberal construction being made regarding the powers of the Deputy Commissioner to adjudicate upon a disputed question of breach as well as to assess the damages arising from the breach. The crucial words in clause 12 are "and for any breach of conditions set forth hereinbefore, the first party shall be liable to pay damages to the second party as may be assessed by the second party". On a plain reading of the words it is clear that the right of the second party to assess damages would arise only if the breach of conditions is admitted or if no issue is made of it. If it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions the wording of clause 12 would have been entirely different. It cannot also be argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages, as pointed out by the Full Bench, is a subsidiary and consequential power and not the primary power. Even assuming for argument's sake that the terms of clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the officer party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of clause 12."

11. Similarly in the case of "J.G. Engineers Private Limited versus Union of India and Another", reported in (2011) 5 SCC 758, it has been held as follows:

"19. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal.

20. In *State of Karnataka v. Shree Rameshwara Rice Mills* [(1987) 2 SCC 160] this Court held that adjudication upon the issue relating to a breach of condition of contract and adjudication of assessing damages arising out of the breach are two different and distinct concepts and the right to assess damages arising out of a breach would not include a right to adjudicate upon as to whether there was any breach at all. This Court held that one of the parties to an agreement cannot reserve to himself the power to adjudicate whether the other party has committed breach. This Court held: (SCC p. 164, paras 7-8)

"7. ... Even assuming for argument's sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12.

8. We are, therefore, in agreement with the view of the Full Bench that the powers of the State under an agreement entered into by it with a private person providing for assessment of damages for breach of conditions and recovery of the damages will stand confined only to those cases where the breach of conditions is admitted or it is not disputed."

12. In the case of "*Inox Air Products Limited versus Steel Authority of India Limited*", reported in (2015) SCC OnLine Jhar 3278, it has been held as follows:

"20. In the instant case, from the documents available on record, it appears that the respondent-SAIL had determined the alleged breach against the petitioner. In my view, the respondent-SAIL is not competent to determine the aforesaid question.

21. The Hon'ble Supreme Court in the *State of Karnataka v. Shree Rameshwara Rice Mills* reported in (1987) 2 SCC 160, at paragraph nos. 7 and 8 held as under:

"7.....Even assuming for argument's sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract.

The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12.

8. We are, therefore, in agreement with the view of the Full Bench that the powers of the State under an agreement entered into by it with a private person providing for assessment of damages for breach of conditions and recovery of the damages will stand confined only to those cases where the breach of conditions is admitted or it is not disputed.”

22. The same view reiterated by the Hon’ble Supreme Court in J.G. Engineers Private Limited v. Union of India reported in (2011) 5 SCC 758, at paragraph no. 19, which runs as follows-

“19. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal.

23. Thus, the question whether the petitioner was responsible or the respondent was responsible for committing breach of terms and conditions of the contract is required to be adjudicated either by a Court or by an Arbitral Tribunal. The same cannot be decided by the respondent-SAIL, who alleges that petitioner had committed such breach.”

13. What could be culled out from the judgments under reference is that whether either of the parties were responsible for committing breach of the terms and conditions of the contract has to be adjudicated upon by a Court or a Tribunal and it cannot be decided unilaterally by one of the parties to the contract. Even otherwise the question of liquidated damages would arise only when the contract is terminated on account of breach of the terms and conditions of the contract and when the termination of the contract itself is held to be bad in law the consequences which follow which may include liquidated damages or initiation of a certificate proceeding for recovery of the amount in question as in the present case automatically ceases to exist. As we have observed in the present case the non-completion of the construction of Bridge over Mayurkola River for which an agreement was entered into between the petitioner and the respondent-authorities could not be completed solely on account of the laches on the part of the authorities which they have admitted to a certain extent regarding non-providing of the entire land required for such construction and keeping silent with respect to payment of compensation amount to the villagers on account of such acquisition which also was a reason for non-completion of the construction of the Bridge and, therefore, it can be deduced that the circumstances repeatedly brought by the petitioner to the knowledge of the concerned authorities did not

evoke any response and, therefore, when the onus is upon the respondent-authorities to act as per the contract and which they have failed to do so the question of termination of the contract vide letter dated 17.05.2014 cannot be sustained and accordingly, Letter No. 574/Sahibganj dated 17.05.2014 issued under the signature of the respondent no. 4 is hereby quashed.

14. Consequent to the quashment of the Letter No. 574/Sahibganj dated 17.05.2014 the Office Order No. 1604/ Sahibganj dated 29.12.2014 for recovery of an amount of Rs. 1,04,33,493/- as liquidated damages as well as the entire certificate proceedings for recovery of the said amount being Certificate Case No. 04/2015-2016 are also hereby quashed and set aside.

15. This writ application is allowed.

16. Pending I.A., if any stands closed.