

(2024) 05 PAT CK 0008

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 9147 Of 2016

M/S Badal Yuvraj Construction Pvt. Ltd

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 15-05-2024

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2024) 05 PAT CK 0008

Hon'ble Judges : G. Anupama Chakravarthy, J

Bench : Single Bench

Advocate : Gautam Kumar Kejriwal, Atal Bihari Pandey, Alok Kumar Jha, Mukund Kumar, Akash, Aditya Raman, Subhash Pd. Singh, Punam Kumari Singh

Final Decision : Allowed

Judgement

1. The writ petition is filed for the following reliefs:

"(a). For quashing the notice bearing No. 492 (Anu) dated 07.05.2016 along with the reports dated 07.05.2016, whereby the petitioner was informed to invocation of risk and cost clause against the petitioner for the work of maintenance of KM 129 to 135 NH 80 in absence of any such work forming part of the contract.

(b). To issue direction restraining the respondents from seeking any work of maintenance under the contract in question during the defect liability period as the respondents have already issued work completion certificate, paid the entire bills of the petitioner against work executed by him and major part of the securities refunded without any complaint/notice regarding defects in terms of clauses 33.1 and 35.1 of the Standard Biding Document (in short "SBD") which is a pre-condition for invocation clause 36.1 i.e., the risk and cost against the petitioner.

(c). To issue direction restraining the respondents from proceeding further with any such publication of notice inviting tender on the basis of invocation of clause 36.1 of the SBD regarding risk and cost of the petitioner which is not available in

terms of the SBD as well as the certificates issued by the respondents to the petitioner and the report bearing Memo No. 597 dated 30.08.2014 issued by the respondent No. 5 himself.

(d). Further for declaration that the respondent No. 5 himself having admitted in the report bearing Memo No. 597 dated 30.08.2014 regarding the Pavement Quality Concrete (in short "PQC") work required and a need of revised estimate to be prepared and approved in the light of the undisputed fact of saving of 20% of original quantity of work and consequent inaction on the part of the respondents and attempt to penalize the petitioner by way of impugned notice invoking risk and cost against the petitioner is unreasonable, arbitrary and violative of Article 14 of the Constitution of India."

2. This Court, at the time of admission have passed the following order on 21.03.2017:

"Basic question has been raised that in the agreement between the parties there is no provision for repair and maintenance after completion of work but only liability has been attached to the contractor to remove the defect pointed out by the Engineer during the defect liability period. But what will be the period is not reflected from the terms of contract, inasmuch as it has been argued that removing the defect within the defect liability period is quite different aspect of the matter then repair and maintenance for that extra amount of fund was allotted. He has further submitted that agreements of other organization attached to this writ petition itself suggest that in such cases it requires separate allotment of fund for repair and maintenance.

However, learned counsel for the State and Union of India submit that this issue can be decided before the arbitrator.

The Union of India is directed to file a detained affidavit to explain, as to whether the agreement for construction of road includes repair and maintenance or not.

Let this case be listed after two weeks under the same heading."

3. The brief facts culled out of the petition is that the petitioner is a Limited Company, who participated in the tender of the respondents for the work of widening, strengthening and construction of cement concrete pavement in Km. 129 to 135 at NH 80, Bhagalpur and was found to be the successful bidder. The period of contract was for 15 months and the petitioner had completed the entire work to the satisfaction of the respondents by 20.05.2014 itself. The work completion certificate was also issued by the 5th respondent vide letter dated 28.06.2014, basing on which payments were made to the petitioner and security deposits were also refunded. Subsequent to the completion of the work, due to passage of heavy load vehicles on the said road, the road got damaged for which the 5th respondent had addressed a letter to its higher officials informing that there is every necessity for laying a road under the PQC (Pavement Quality Concrete). Due to damage of the said road, the other respondents addressed a

letter to the petitioner asking him to repair the road immediately as there was clause in the agreement with respect to the "defect liability". When the petitioner did not respond, the 5th respondent issued the impugned notice dated 07.05.2016 bearing No. 492 (Anu) along with the estimates and reports, whereby the petitioner was informed regarding the preparation of work estimate of Rs. 26,81,905/- to be done at the risk and cost of the petitioner, on the account of maintenance work not done by the petitioner under the 'defect liability period' inspite of reminders.

4. Aggrieved by the said notice, the present writ petition was filed. It is the specific contention of the Learned counsel for the petitioner that the defects were not noticed by the respondents prior to the completion of work and work completion certificate was also issued for the work executed by the petitioner. Furthermore, the petitioner received payments for the said work executed by him and the securities were also refunded. No defects were detected in the work done by him. It is also the specific contention of the Learned counsel for the petitioner that the work done by him relates to KM 129 to 135 on NH 80 which is busiest stretch falling in the Main town and almost 5000 heavy-loaded trucks will pass on the said road per day, carrying stones, grit and sand. Due to the vehicular movement of the heavy loads, damage was caused to the road. It is further contented that the agreement which was entered into between the petitioner and the respondents did not contain any clause relating to maintenance of road, subsequent to the completion of work and it is an undisputed fact that there was no maintenance agreement between the petitioner and the respondents and, therefore, he is not liable to carry any works under the clause of the 'defect liability' and, therefore, prayed to quash the impugned notice.

5. On the other hand, respondent No. 4 and 5 have filed a detailed counter affidavit denying the allegation made in the writ petition. At paragraph 20 of the counter affidavit, it is admitted by the respondents that the definition of word "defect" means "a defect in any part of the works not completed in accordance with the contract therefore, it reflects the defect occurred prior to completion of the work and not after the completion of the work". It is also admitted in the said paragraph that the petitioner had completed the work in the month of June, 2014 and, therefore, the definition of work "defect" will not be applicable in the present case, and as the work in question has already been completed. However, the word "Defect Liability Period", was incorporated in the agreement. The respondents contends that the petitioner has to carry the repairs of the road.

6. In paragraph No. 24 of the counter affidavit also it is admitted by the respondents that since the work in question was already completed in June, 2014 itself, therefore, the question of issuance of notice under clause 33.1 i.e., pointing out defect, as provided under clause 1.1, defining the word "defect" in the original work does not arise in this case.

7. Heard the rival contentions of the learned counsel for the petitioner as well as

learned counsel for the respondents.

8. On perusal of the agreement, which was entered into between the petitioner and the respondents, it is evident that the word "defect" and "Defect Liability Period" are mentioned at clause 1.1, which reads as follows:-

"Clause 1.1

Defect- A defect in any part of the works not completed in accordance with the contract.

Defect Liability Period- The Defect Liability Period is the period named in the Contract Data and calculated from the Completion Date.

Clause 33 Identifying Defects

Clause-33.1 The Engineer shall check the Contractor's work and notify the Contractor of any Defects that are found such checking shall not affect the Contractor's responsibilities. The Engineer may instruct the Contractor to search for a Defect and to uncover and test any work that the Engineer considers may have a Defect.

Clause-35 Correction of Defects

Clause 35.1 The Engineer shall give notice to the Contractor of any the Defects before the end of the Defects Liability Period, which begins at Completion and is defined in the Contract Data. The Defects Liability Period shall be extended for as long as Defects remain to be corrected.

Clause 35.2 Every time notice of a Defect is given, the Contractor shall correct the notified Defect within the length of time specified by the Engineer's notice.

Clause 36 Uncorrected Defects.

Clause 36.1 If the Contractor has not corrected a Defect within the time specified in the Engineer's notice, the Engineer will assess the cost of having the Defect corrected and the Contractor will pay this amount."

9. On perusal of the aforesaid clauses, it is evident that any defect which is noticed prior to the completion of the work by the Engineer, then the petitioner has to repair the roads and the clause of defect liability will come into force.

10. Clause 36.1 specifically speaks about the risk and cost from the date of completion of the work upto three years and maintenance has to be done in case of defect as per the defect liability.

11. In the present case no defect was noticed by the respondents prior to the completion of the work and a certificate was also issued by the respondents subsequent to the completion of work. Due to passage of heavy-load vehicles damaged was caused to the road.

12. Admittedly, the respondents have not entered into any agreement with the

petitioner for the maintenance of the road. Even the present agreement also do not contain any clause regarding maintenance, therefore, this Court is of the considered view that the impugned notice dated 07.05.2016 is illegal and arbitrary and it has to be set aside/quashed.

13. Accordingly, impugned notice dated 07.05.2016 is hereby set aside/quashed.

14. In result, the writ petition is allowed.

15. Interlocutory application(s), if any, shall stand disposed of.