

(2007) 04 PAT CK 0055
In the Patna High Court
Case No : CWJC No. 3033 of 2005

M/s Shiv Shankar Construction Company (P) Ltd.	APPELLANT
Vs	
The State of Bihar and Others	RESPONDENT

Date of Decision : 24-04-2007

Acts Referred:

Citation : (2007) 3 PLJR 51

Hon'ble Judges : Mridula Mishra, J

Bench : Single Bench

Advocate : Amaresh Kr. Singh, for the Appellant;

Final Decision : Allowed

Judgement

Mridula Mishra, J.—Heard the counsel for the parties. Petitioner is a body corporate and registered in the Irrigation Department, earlier as Grade I and now as Grade II super contractor for two decades.

2. This application has been filed by the petitioner M/s Shiv Shankar Construction Company (P) Ltd. for quashing following letters:

(i) Letter No. 678, dated 14.2.2004, issued by the Chief Engineer, Water Resources Department, Flohtas (respondent No. 3) whereby stay has been imposed on the payment of legal dues of the petitioner relating to contractual works.

(ii) Letter No. 12001/2003 communicated by Memo No. 2666, dated 19.5.2004, issued by the Secretary, Water Resources Department, Government of Bihar (respondent No. 2).

(iii) Letter, dated 20.5.2004, issued by respondent No. 3, the Chief Engineer, Water Resources Department, Rohtas, whereby respondent No. 5, the Executive Engineer, Durgawati Dam Division No. II, Bhitri Bandh, Karamchat, Kaimur, as been asked to work as Arbitrator in the matter of contract and other consequential matters.

3. The Irrigation Department, Government of Bihar, invited tender for doing work under Durgawati Project. 2/3rd of the total work was allotted to the petitioner and remaining 1/3rd was given to the Bihar State Construction Corporation. Agreement No. 26F-2 of 1987-1988 was executed in between the petitioner and the respondent authorities for removal of over burden in Durgawati Spillway between Chanin No. 02.57 down stream of spill way access. The Bihar State Construction Corporation failed to execute the work under its agreement and remaining 1/3rd work was also allotted to the petitioner under Agreement No. 11-2 of 1988-1989. The completion time under the Agreement F-2 of 1987-1998 was extended up to 30.07.1988. The last payment for the work done under this agreement was made on 23.12.1989. Altogether Rs. 33 lacs were involved under this agreement and it was paid to the petitioner. The amount involved in other Agreement IF-2 of 1988-1989 was Rs. 10.70 lacs, out of which Rs. 5.94 lacs was paid to the petitioner. The last payment under this agreement was made on 5.12.1989. After ten years of the completion of this work, petitioner received a letter from the Joint Secretary, Water Resources Department, Government of Bihar, Patna, dated 17.12.1999, asking to explain the excess payment received by the petitioner for the works done, in collusion with the officer of the Department. On 28.12.1999 petitioner submitted his detailed explanation clarifying allegations levelled against him. Petitioner's case was that he carried out the work as per agreement and received money for the work in terms of the agreement, as such, the allegations are unfounded. For three years there was complete silence from respondent side. Suddenly a show cause notice, dated 5.11.2002, contained in letter No. 3027 was issued to the petitioner asking him why not his name be listed in the list of black listed contractors as he has received excess payment of rupees ten lacs in connivance with the officers of the Department. On 5.11.2002 vide letter No. 377 petitioner submitted his show cause denying all allegations. Since there was direction for recovery of rupees ten lacs from the petitioner, C.W.J.C. No. 3100 of 2003 was filed by the petitioner against this order. During the pendency of the writ application, requisition for initiating certificate proceeding was filed and the certificate proceeding was initiated. The writ application was allowed by order, dated 1.9.2003. The recovery was held to be Illegal and the requisition for initiating certificate proceeding was also quashed. The finding recorded in the order was, "there is nothing to indicate, what kind of enquiry was held and whether the petitioner was given an opportunity to present it's side of the case". Subsequently, respondent No. 3 issued letter No. 5250, dated 24.9.2003, imposing stay on the payment of the petitioner's bill for other works done relating to other contracts unconnected with the contract of 1987-1988. This order was passed for the reason that petitioner has already been paid his dues against 1987-1988 contract. Thereafter, against the order passed in the writ application, respondent filed L.P.A. No. 326 of 2004 which was dismissed by order, dated 11.03.2004, but in the last line of the order it was mentioned "the balance which remains is always available to the State to seek its remedy in an ordinary civil action or arbitration". Taking advantage of this line in the order, the Joint Secretary, Water

Resources Department, Government of Bihar, vide letter No. 12001 of 2003 communicated the respondent No. 5 that the Department has decided to settle the dispute under Clause 23 of the agreement and Respondent No. 4, the Superintending Engineer, Durgawati Construction Circle Bhirta Bandh, Kaimur, was directed to work as Arbitrator. Respondent No. 4 accepted the same and vide its letter, dated 20.5.2004, fixed the date of hearing on 9.6.2004. Petitioner filed his objection quashing the maintainability of arbitration proceeding vide letter No. 450, dated 9.6.2004. In spite of that respondents continued with the arbitration, as such, petitioner has filed this application for quashing all orders mentioned in paragraph 1 of the writ application.

4. Petitioner's case is that in spite of the order of this Court in C.W.J.C. No. 3100 of 2003, dated 1.9.2003, respondent No. 3 vide his letter No. 5250, dated 24.9.2003, has stayed payment of petitioner relating to other contract which has nothing to do with the present controversy. This action of the respondents is in the teeth of the order passed in the writ application. This order is in contempt of the order passed in C.W.J.C. No. 3100 of 2003, dated 1.9.2003. In reply to this contention of the petitioner, counsel for the respondents has submitted that letter No. 5250, dated 24.9.2003, and subsequent letters were issued by respondent No. 3 in pursuance of the exercise of right vested in the Government under Clause I of F-2 Agreement. So far institution of arbitration proceeding is concerned, it is in pursuance to the order, dated 11.3.2004, passed in L.P.A. No. 326 of 2004 and Clause 23 of F-2 Agreement.

5. Counsel for the petitioner has further contended that so far Agreement No. F-2 of 1987-1988 is concerned, the work was completed much earlier, all payments were made to the petitioner and there was no enquiry which could have revealed that excess payment has been made to the petitioner, except report of flying squad. That report of flying squad was also considered in C.W.J.C. No. 3100 of 2003 and finding was recorded that for initiating a certificate proceeding for recovery of rupees ten lacs with interest there was no evidence on record, as such, requisition was bad. In the background of the order passed in the writ application, there is no existing dispute which can be resolved by arbitration. So far Clause 23 of F-2 Agreement is concerned, it is not an arbitration clause for resolving the dispute. Arbitration proceeding is maintainable when both the parties have consented for resolving their dispute through arbitration. In the present case petitioner has filed his objection regarding maintainability of the arbitration proceeding in the light of the order passed in writ application. He has also raised objection relating to respondent No. 4 as an Arbitrator. In this background arbitration proceeding cannot continue and any award of such arbitration case not having any binding impact on the petitioner.

6. Petitioner has placed reliance on a decision reported in Bharat Bhushan Bansal Vs. U.P. Small Industries Corporation Ltd., Kanpur, wherein similar contractual agreement executed in between contractor and the Government Department was under consideration. In that agreement Clause 23 of the Agreement was

supposed to be agreement clause. Wordings of that agreement and the agreement relating to present dispute were same. The Apex Court in this decision has recorded this finding "that Clause 23 of such agreement cannot be held to be arbitration clause". Clause 23 of the agreement which was considered in the reported decision and Clause 23 of the present case is similar. The finding of the Apex Court was "this Court held that the Clause did not contain an arbitration agreement either expressly or by implication, the intention was to vest the Superintending Engineer with supervision and administrative control over the work". Clause 23 of the agreement which according to respondent is an arbitration clause, at best can be a clause vesting the Superintending Engineer with supervisory and administrative control over the work.

7. It has been contended by the petitioner's counsel that Clause 23 does not vest any power to respondent No. 3 for initiating an arbitration proceeding specially when the other party is not agreeable to submit himself for resolving any dispute through arbitration by an Arbitrator appointed by respondent No. 3. It has also been contended that there is no dispute to be resolved through an arbitration proceeding.

8. In reply to this counsel appearing for the respondents has placed reliance on a decision reported in AIR 1990 S.C. 2232 (The Secretary to the Government, Transport Department, Madras vs. Munuswamy Mudaliar & Ors.) which also relates to the arbitration clause mentioned under an agreement.

9. I find that the facts of the case in the reported decision is different from the facts of present case. In the reported case contractor knowingly agreed to get the dispute resolved through arbitration and submitted himself to the jurisdiction of Arbitrator appointed by the Department. Superintending Engineer was appointed as an Arbitrator. Subsequently, the petitioner raised objections relating to impartiality of Arbitrator and his lack of confidence in the Arbitrator. The Apex Court rejected such objection of the petitioner holding that there being no tangible ground for justifying the removal of the Arbitrator, objection cannot be entertained. In the present case the petitioner has not submitted himself before the jurisdiction of the Arbitrator, rather he has raised objection relating to the maintainability of the arbitration proceeding. Petitioner's case does not relate to removal of the Arbitrator rather it relates to maintainability of the arbitration proceeding. This decision has no application in the facts of this case.

10. On consideration of the submissions made by the counsel, I find that subsequent to the order passed in C.W.J.C. No. 3100 of 2003 and dismissal of L.P.A. No. 326 of 2004, there is no reason for the respondents either to stop payment of petitioner's legal dues for works done under different contracts, this act of the respondents can be categorized as an arbitrary exercise of powers vested in them. So far initiation of arbitration proceeding is concerned, Clause 23 of F-2 Agreement cannot be held to be arbitration clause for resolving the dispute. This clause relates to supervisory jurisdiction in relation to the contractual work and not for resolving the dispute.

11. In the present case, after completion of the contractual work long time back and all payments having been made to contractor on completion of the work finding it to be satisfactory, after ten years of without any enquiry, no question could have been raised by the respondents. The question of excess payment raised by the respondents has also finally been settled in C.W.J.C. No. 3100 of 2003. Now there is nothing to be resolved by the Arbitrator, as such, initiation of arbitration proceeding is illegal and not maintainable.

12. Accordingly, all four letters mentioned in paragraph 1 are quashed. The respondents are directed to start making payment of petitioner's legal dues relating to other contractual works. Respondents are further directed not to proceed with the arbitration proceeding. This application is allowed.