

W.P. No.2529/2015

(Shri Virendra Sharma vs. State of M.P. And others)

28.03.2016

Shri Navneesh Jauhari, Advocate for the petitioner.

Shri Amit Seth, Govt. Advocate for the respondents/State.

Heard counsel for the parties on admission.

This writ petition under Article 226 of the Constitution of India takes exception to the Revenue Recovery Certificate (RRC) issued by the Tahsildar on 04.02.2015 (Annexure P/9) in the sum of Rs.76.16 Lakhs.

2. The principal argument of the petitioner is founded on the decision of the Full Bench of our High Court in the case of **B.B. Verma and another vs. State of M.P. and another** reported in **2007 Arb.W.L.J. 733 (MP)**. The emphasis is placed on the dictum in paragraph 9 of this decision. The same reads thus:-

“9. A perusal of Clause 4.3.29.2 of the conditions of contract quoted above would show that the decision of the S.E. of the Circle for the time being in respect of questions and disputes mentioned therein ‘or as to any other question, claim, right, matter or thing whatsoever in any way arising out of, or relating to the contract 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’.

Hence, the decision of the Divisional Officer of the Executive Engineer under Clause 4.3.3.3 of the conditions of contract quoted above to have the unexecuted work completed by another contractor and claim the expenses which may have been incurred in excess of the sum which would have been paid to the original contractor is subject to the final decision of the S.E. if the contractor raises a dispute on such claim made by the Divisional Officer of the Executive Engineer. The second para of Clause 4.3.29.2 further stipulates that 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 refer such dispute to the Arbitration Tribunal constituted under the Adhinyam. Hence, any decision taken and any amount claimed by the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 of the conditions of contract is not final but subject to the decision of the S.E. and any decision of the S.E. on these aspects is also subject to the decision of the Tribunal under the Adhinyam, if referred to the Tribunal by any party to the contract. The result is that the amount claimed by the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 will not become a sum due from the contractor until the dispute is decided by the S.E. on an appeal made before him from the decision of the Executive Engineer or the Divisional Officer, or until the dispute is adjudicated by the Tribunal under the Adhinyam where the decision of the S.E. is challenged by way of reference.”

(emphasis supplied)

3. This decision, however, is not an authority on the question that arises for our consideration. In that case, admittedly, the Superintending Engineer had not decided

the dispute, as is stated in paragraph 2 of the Judgement; and, as a result of which, the petitioner was required to file application under Section 7 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983.

4. In the present case, however, after the contract of the petitioner was terminated, the Superintending Engineer adjudicated the claim in terms of Clause 29 of the Agreement. Clause 29 of the Agreement of the Contract reads thus:-

“Arbitration Clause

Clause 29- Except as otherwise provided in this contract all question and dispute relating to the meaning of the specification, designs, drawings and instruction herein before mentioned and as to thing whatsoever in any way arising out of or relating to the contract designs, drawings, specification estimates, concerning the works or the execution of failure to executive the same whether arising during the progress of the work or after the completion or abandonment there of shall be referred to the Superintending Engineer in writing for the decision within a period of 30 days of such occurrence thereupon the Superintending Engineer shall give his written instruction and/or decisions within a period of 60 days of such request. This period can be extended by mutual consent of the parties.

Upon receipt of written instruction or decisions, the parties shall promptly proceed without delay to comply such instructions or decisions. If the Superintending Engineer fails to give his instructions or decisions in writing within a period of 60 days or mutually agreed time after being requested of if the parties are aggrieved against the decision of S.E. the

parties may within 30 days prefer on appeal to the Chief Engineer who shall afford an opportunity to the parties of being heard and to offer evidence in support of his appeal. The Chief Engineer will give his decision within 90 days. If any party is not satisfied with decisions of the Chief Engineer, he can refer such disputes for arbitration by an Tribunal constituted by the State Government which shall consist of three members of whom one shall be chosen from among the officers belonging to the Department not below the rank of S.E. one Retired Chief Engineer of any Technical Department in one serving officer not below the rank of S.E. belonging to another Technical Department.

The following are also the terms of this contract namely:-

(a) No person other than the aforesaid Arbitration Board constituted by the Government (to handle cases of all Technical Department) shall act as Arbitrator and if for reason that is possible the matter shall not be referred to Arbitration at all.

(b) The State Government may at any time effect any change in the personnel of the Board and the new members appointed to the Arbitrator Board shall be entitled to proceed with the reference from the stage at which it was left by his or their predecessors.

(c) The party invoking arbitration shall specify the dispute or disputes to be referred to Arbitration under this clause together with the amount or amounts claimed in respect or each such dispute(s).

(d) Where the party invoking arbitration is the contractor no reference for arbitration shall be maintainable, unless the contractor furnishes a security deposit of sum determined according to the table given below and the sum so deposited shall on the determination of Arbitration proceeding be adjusted or in the absence of the such cost being

awarded by the Board against the party and the balance remaining after such adjusted or in the absence of the such cost being awarded the whole of the sum shall be refunded to him within one month from the date of the award.

Amount of claim	Rate of Security Deposits
For claims below Rs.10,000	5% of the amount claimed
For claims of Rs.10,000 & above but below Rs.1,00,000	3% of the amount claimed subject to minimum of Rs.500
For claims of Rs.1,00,000 and above	2% of the amount claimed subject to a minimum of Rs.3000

(e) If the contractor does not make any demand for Arbitration in respect of any claim (s) in writing within 90 days on receiving intimation from the Executive Engineer that the final bill is ready for payment the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged or released of all liabilities under the contract in respect of such claims.

(f) The Arbitration Board may from time to time with the consent of the parties extend the time for making the award.

(g) A reference to the Arbitration Board shall be no ground for not continuing the work on the part of contractor and payment as per terms and conditions of the agreement shall be continued by the Department.

(h) Except where otherwise provided in this Contract the provisions of the Arbitration Act 1940 and the Rules thereunder for the time being in force shall apply to the arbitration proceedings under this clause.”

5. The Superintending Engineer adjudicated the liability of the petitioner on account of incomplete work and the loss suffered by the Department in that behalf. The amount so determined, therefore, cannot be considered as non-liquidated damages nor as unadjudicated amount, which cannot be recovered as arrears of land revenue by issuance of revenue recovery certificate.

6. Suffice it to observe that the decision in the case of **B.B. Verma** (supra) is in respect of unadjudicated claim or (Liquidated) damages not quantified in the Contract itself. The observations in paragraph 9 of the decision on which emphasis has been placed, must be understood accordingly.

7. Indeed, if the decision of the Superintending Engineer is not acceptable to the Contractor, he is free to take recourse to further remedy as provided in Clause 29 of the Contract and decision of that Authority may become final. That, however, does not mean that the original order passed by the Superintending Engineer is not in the nature of adjudicated claim between the parties. Once it is an adjudicated liability; and so long as that decision has not been overturned or stayed by the Superior Authority or Court of law, it remains in the realm of dues payable to the

Government. Being dues payable by the Contractor, the same becomes recoverable as arrears of land revenue by issuance of recovery certificate. The Full Bench decision, therefore, has no application to the fact situation of the present case.

8. Counsel for the petitioner then invited our attention to Clause 3 of the Contract to contend that Clause 3 of the Agreement does not authorise the State Government to proceed against the petitioner by taking recourse to recovery certificate as arrears of land revenue. Clause 3 of the Contract, no doubt, deals with the action to be taken when the work is left incomplete, abandoned or delayed beyond the permitted limit allowed. The same reads thus:-

“Action when the work is left Incomplete, Abandoned or Delayed beyond the permitted Limit Allowed by the Divisional Officer

Clause 3 - In any case in which under any clause of clauses of this contract the contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit (whether paid in one sum or deducted by installments) or committed a breach of any of the rules contained in Clause 24 or in the case of abandonment of the work except due to permanent disability or death of the Contractor any other cause the Divisional Officer on behalf of the Governor of M.P. shall give a notice before 15 days for work costing up to Rs.10.00 lacs and before 30 days for works costing above Rs.10.00 lacs and in the event

of the contractor failing to comply with the direction contained in the said notice, shall have power to adopt any of the following courses as he may deem best in the interest of the Government.

(a) To rescind the contract (of which rescission notice in writing to the contractor under the hand of the Divisional Officer shall be conclusive evidence) and in which case the security deposit of the contractor shall stand forfeited and be absolutely at the disposal of Government.

(b) To employ labour paid by the Works Department and to supply materials to carry out the work or any part of the work debiting the contractor with cost of the labour and the price of the materials (of the amount of which cost and price certificate of the Divisional Officer shall be final and conclusive against the contractor) and crediting him with the value of the work done in all respects in the same manner and the same rates as it had been, carried out by the contractor under the terms of his contract or the cost of the labour and the price of materials as certified by the Divisional Officer, whichever is less. The Certificate of the Divisional Officer as to the value of the work done shall be final and conclusive against the contractor.

(c) To measure up the work of the contractor and to take such part thereof as shall be unexecuted out of his hands and to give it to another contractor to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor, if the whole work had been executed by him (of the amount of which excess certificate in writing of the Divisional Officer shall be final and conclusive) shall be borne and paid by the original contractor and may be deducted from any money due to him by Government under the contract or otherwise or from his security deposit or the proceeds of sale thereof a sufficient part thereof.

In the event of any of the above courses being adopted by the Divisional Officer the contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials or entered into any agreement or made any advances on account of or, with a view, to the execution of the work or the performance of the contract. And in the case the contract shall be rescinded under the provision aforesaid the contractor shall not be entitled to recover or be paid any sum for any work there to for actually performed under the contractor's bill shall be finalized within three officer will have certified in writing the performance of such work and value payable in respect thereof and he shall only be entitled to be paid the value so certified.

Whenever action is taken under clause-3(a) the contractor's bill shall be finalised up within three months from the date of rescission both in the case of building works and road and bridge works.”

9. This provision refers to the process to be followed for proceeding against the Contractor who leaves the work incomplete or abandon the same or delay the completion beyond the permitted limit. Besides this Clause, it may be useful to refer to Clause 39 of the Contract which reads thus:-

“Penalty For Breach of Contract

Clause 39-On the breach of any term of condition of this contract by the said Government shall be entitled to forfeit the security deposit or the balance thereof that may at that time be remaining and to realise and retain the same as damages and compensation for the said breach but without prejudice to the right of the Government to recover further sums as damages

from any sums due or which may become due to the contractor by Government or otherwise howsoever.

Note- The person or firm submitting the tender should see that the rates in the schedule showing materials to be supplied by the department are filled up by the Engineer-in-charge on the issue of the form prior to the submission of the tender.”

10. The process for adjudication of the claim or the quantum of amount to be recovered from the defaulting Contractor in furtherance of Clause 3 read with Clause 39 is stipulated in Clause 29 of the Contract – being arbitration clause. That clause having been invoked and the Superintending Engineer having adjudicated the liability of the petitioner, it is not open to contend that the amount is still non-liquidated or unadjudicated claim. Once it is treated as outstanding dues payable to the Government, it is open to the Authorities to proceed to recover the same as arrears of land revenue by issuance of recovery certificate, when stayed by superior forum. The respondents having resorted to that mechanism, no fault can be found with that process.

11. The argument of the petitioner, however, is that the petitioner has resorted to remedy of reference before the Arbitrator under the Act of 1983 and until the said proceedings are decided finally, no recovery can be made from the petitioner as the amount is yet to attain finality.

12. No doubt, the decision of the Superintending Engineer or the Appellate Authority is subject to the outcome in the arbitration proceedings under the Act of 1983. That, however, does not mean that the amount has not become payable or cannot be recovered from the petitioner. Notably, there is no provision in the Act of 1983 similar to empowering the Arbitrator to entertain prayer for interim relief. Further, the petitioner has not challenged the decision of the Superintending Engineer or the Appellate Authority in the present petition. He has chosen to challenge the same by way of reference under the Act of 1983.

13. Suffice it to observe that the contention of the petitioner to stay the impugned recovery certificate (Annexure P/9) until the decision of arbitration proceedings under the Act of 1983, cannot be countenanced. In that, until the decision of the Appellate Authority affirming the view taken by the Superintending Engineer is overturned, stayed or modified, nothing prevents the Authority from recovering the adjudicated amount as having become due and payable by the Contractor, as arrear of land revenue.

14. In other words, the pendency of arbitration proceedings, in no way, will be any impediment for proceeding to recover the outstanding dues from the petitioner. If the petitioner succeeds in the arbitration proceedings under the Act of 1983, may become entitled for suitable relief to be awarded by the Arbitrator, which, however, cannot be the basis to interdict the recovery certificate issued against the petitioner.

15. Hence, this petition fails and is **dismissed**. Interim relief is vacated forthwith.

(A. M. Khanwilkar)
Chief Justice

(Sanjay Yadav)
Judge