

ITEM NO.106

COURT NO.8

SECTION XVI

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal No(s). 733/2016

STATE OF BIHAR & ORS.

Appellant(s)

VERSUS

M/S. KOMAL CONSTRUCTION

Respondent(s)

Date : 17-11-2022 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE J.K. MAHESHWARI

For Appellant(s) Mr. Abhinav Mukerji, AOR
Ms. Bihu Sharma, Adv.
Mr. Akshay C. Shrivastava, Adv.
Ms. Pratishtha Vij, Adv.

For Respondent(s) Mr. S.K. Sinha, AOR
Ms. Seema Kashyap, Adv.

UPON hearing the counsel the Court made the following
O R D E R

We have examined the impugned order which was passed in the execution proceedings arising out of the award dated 26.03.2008. In nutshell, the award held that in the absence of a written agreement, the respondent-contractor is not entitled to payment for additional/extra work. Having held so, the learned Arbitrator was of the view that the appellant-State of Bihar was not right in not preparing the final bill. It is observed that as per the agreement, various amounts had been deducted from the running bills by way of a security for performance and for want of extension of time from the

competent authority.

Accordingly, the Executive Engineer of the appellants was directed to prepare and pass the final bill. For the sake of convenience and completeness, we are inclined to reproduce the said operative portion of the award, which reads:

"The Executive Engineer is directed to prepare & pass the final bill within a month of the receipt of the copy of this award and on preparation & passing of the final bill if it is found that the Agency entitled to receive any admissible payment or release of Security deposited & deducted as well as the amount withheld on a/c of extension of time the same must be released & paid to the agency within three months from the date of receipt of this award."

In our view, the learned Arbitrator had merely directed the Executive Engineer of the appellants to prepare the final bill. In case any amount was due and payable under the final bill, the same was directed to be paid to the respondent-contractor. In case, as per the final bill, no amount would be due and payable, respondent-contractor is not entitled to payment.

It is an accepted case that the final bill was in fact prepared by the Executive Engineer of the appellants on 31.07.2008 and 08.09.2008 as per which, no amount is due and payable to the respondent-contractor. In fact, the appellants had to recover an amount of Rs.16,61,737/- from the respondent-contractor.

After the final bill was prepared, the respondent-

contractor filed a writ petition before the High Court of Judicature at Patna challenging the final bill, which was disposed of with liberty to the respondent-contractor to approach the competent civil court in the matter.

The respondent-contractor thereupon had filed an execution petition claiming an amount of Rs.52,30,065/-. Thereafter, a number of orders including an order of remit to the execution court by the High Court of Judicature at Patna were passed.

The impugned order dated 01.10.2015 passed by the High Court of Judicature at Patna affirms the order of the Sub-Judge directing the payment of Rs.23,37,430/- with simple interest @ the rate of 15% per annum from April 2004 till date of payment, refund of security deposit of Rs.1,63,000/- and payment of Rs.5,72,000/- with simple interest @ the rate of 15% per annum from April 2004 till date of actual payment. Resultantly, the appellant-State is before us in the present appeal.

The orders passed by the executing court, as confirmed by the High Court, could not have been passed in the execution proceedings as they go beyond the award dated 26.03.2008. Execution proceedings as drawn should not have been entertained, as the prayers went beyond what was postulated and directed in the award. The award is not for payment of

money, quantified and determined by the arbitrator. In execution proceedings a court executes a decree, in terms and in accordance with the provisions of Order XXI of the Code of Civil Procedure, 1908. Executing court could have examined whether the final bill was prepared and passed, which was the only direction in the award. The award had not given any specific mandate on how the final bill will be computed and prepared, except that the respondent-contractor in the absence of agreement is not entitled to payment for extra/additional work. Thus, the executing court could not have examined the correctness of the final bill in case of a dispute relating to calculations, deductions etc.

The impugned order passed by the High Court of Judicature at Patna as well as the order passed by the execution court dated 19.04.2014 are accordingly set aside.

Having held so, we observe that the respondent-contractor has the option to either invoke the arbitration agreement to challenge the final bill or to file civil proceedings before the competent civil court.

Learned Senior Advocate appearing for the respondent-contractor submits that he would like to proceed with arbitration as this would be expeditious. The parties have already spent a lot of time in litigation. Learned counsel appearing for the appellant-State of Bihar prays for some time

to obtain instructions, and suggest three names of persons who can be appointed as an arbitrator. The choice to nominate an arbitrator from the names will be given to the respondent-contractor.

Re-list on 24.11.2022.

(INDU MARWAH)
COURT MASTER (SH)

(R.S. NARAYANAN)
COURT MASTER (NSH)