(2012) 07 OHC CK 0003

In the Orissa High Court

Case No : Writ Petition (C) No. 11889 of 2009

Bhubaneswar APPELLANT

Vs

State of Odisha and Others RESPONDENT

Date of Decision : 06-07-2012

Acts Referred:

Citation : (2013) 116 CLT 315

Hon'ble Judges : V. Gopala Gowda, C.J;B.N. Mahapatra, J

Bench : Division Bench

Advocate : J.K. Mohapatra, for the Appellant;

Judgement

B.N. Mahapatra, J.—This Writ Petition has been filed with a prayer to direct the Opp. Parties to delete the conditions included in the guidelines annexed to the Office Order No. 5608 dated 03.04.2007 (Annexure-1) & to direct the Opp. Parties for making payment of differential cost of construction materials, labour & POL due to hike in price as per the Notification of the Government to different contractor/executing agencies. Mr. J.K. Mohapatra, Learned Counsel for the Petitioner submitted that the Petitioner is an All Orissa Contractor''s Association, Bhubaneswar, represented through its President. In order to submit tender for execution of work a contractor has to make estimation for the said work on the basis of the specification measurement & quantity of material & labour required & also taking into consideration the prevailing cost of materials & wages of labourers etc. Though the estimates are prepared basing on the prevailing price of the materials & labour, practically when the works are being executed the rate of construction materials & wages of labourer increases. Apart from that several works take time beyond the initial period of contract & completed with the extended period granted by the authority because of various reasons which are beyond the control of the contractors. Because of such price hike after submission of tenders & on completion of the work contractors are sustaining loss. Sometimes because of price hike some contractors leave the work incomplete as a result of which the interest of public is affected. Taking the above situation into consideration, the Government took a decision for reimbursement of the differential cost of construction materials & notified the same to all the Departments executing the construction works vide Office Order No. 5608 dated 03.04.2007 with guidelines Copy of the said Notification has been annexed to the Writ Petition as Annexure-1.

Despite such Notification & guidelines, the officers dealing with execution of works in different Departments are not carrying out the direction of the Government with ulterior motives taking advantage of the defective guidelines annexed to the Notification No. Codes-8/06-5608/W dated 03.04.2007. For such action of the departmental authorities, several contractors are going to be ruined financially & many executing agencies are not coming forward to participate in the tender process. This is a sheet case of harassment meted out to the members of the Petitioner-Association. Some times, the awarded works could not be executed due to inaction of the Department in acquiring land, not handing over the work site, non-supply of designs & drawing, change of design & drawing during execution of work, due to change of specification, execution of additional & extra works & some other local problems, natural calamities which are beyond control of the contractors/executing agencies. In those cases delay is not attributable to the executing agencies/contractors.

Further case of the Petitioner-Association is that the decision of the Government to the extent of non-payment of differential cost of materials, labour & payment of POL charges for the extended period is illegal, arbitrary & unsustainable. The Petitioner should be paid for differential price of the work. The differential price should be paid for the works executed during the original period & also extended period. Executing agencies as well as the contractors are entitled to get different price both for the original period as well as the extended period.

2. Learned Counsel appearing for the Petitioner submitted that a suitable direction should be given to Opp. Parties to take steps for reimbursement of the differential amount between the price of the materials, labour, POL quoted in the tender & subsequently hiked during the course of execution of work without stipulating condition for payment of such differential price only during the original construction period.

3. Per contra, Learned Additional Government Advocate submitted that the Petitioner has no locus standi to file the Writ Petition. Government in Works Department taking into account a trend of increase & decrease in the cost of Steel, Cement & Bitumen, have decided in principle to make specific provisions for reimbursement/recovery of the differential cost of such materials & for that purpose, it has been decided to include the provisions under Annexure-1 to the impugned letter dated 03.04.2007 as Clause 31 (a)(ii), 31 (a)(iii) & Clause 31(e) to the model F2 agreement for execution of public work. It is further submitted that the Petitioner has not properly gone through the provisions & made a misrepresentation of facts to mislead this Court. As a matter of fact, the provisions made for reimbursement of differential cost of Steel, Cement &

Bitumen are beneficial to the contractors as the differential cost is even payable in case of work where the stipulated period of completion is more than six months & less than one year. It is further submitted that during the progress of any work if the price of any material incorporated in the work not increases or decreases, as a result of increase or decease in the average wholesale price index & the contractor necessarily & properly pays in respect of the material, then for such increase or decrease price, he shall be entitled to get the differential price or liable to return the differential price as the case may be. Similar provision is made for increase or decrease in the price of POL. Increase or decrease as a result of the price fixed by the Government of India would be the basis of payment/return of the differential cost of POL. It is further submitted that such reimbursement/return on variation in prices of materials, labour & POL is applicable only in respect of contract of one year or more provided that the work has been carried out within the stipulated time or within the period of extension thereof which is not attributable to the Contractor. Where the original contractual period is less than one year, but subsequently, it has been validly extended, the escalation clause is applicable for the work executed beyond one year provided the delay is not attributable to the contractor. It is further stipulated that as per the said clause the contractor shall keep such books of accounts & other documents as necessary to show the amount of increase claimed for inspection by the authorized Government representatives. Besides, the contractor has to bring the matter of alteration in the price of materials, wages & POL to the notice of Engineer in charge within a reasonable time. The contractors who are genuinely procuring Cement, Steel & Bitumen for the work at enhanced price should necessarily maintain the records. Further, the Opp. Parties have never also received any complaint from any quarter till date in the matter of differential cost. Instructions vide Annexure-1 have been issued to amend the F2 agreement as per Annexure-1 thereto. The provisions are included in the F2 agreement to save the contractors from financial loss on account of fluctuation of price of Steel, Cement & Bitumen. The Petitioner has raised the matter without specifically indicting specific instance of non-payment of differential cost. Once an agreement is executed between the contractor & the Government both are to be abided by the terms & conditions of the contract. It is further submitted that in large number of cases wherein the period of contract is less than one year, the contractors are intentionally neglecting & delaying the process of execution of work in anticipation of increase or hike in price of materials & simultaneously applying for extension of time. Even if extension is granted by the Government to ensure completion of work but the differential cost is not granted for such extended period. Since the price index for POL & any notification pertaining to labour components remains valid at least for one year, the benefit of escalation is not extended to the contracts which are less than one year.

4. On rival contentions, the only question falls for consideration by this Court is as to whether there is any discrimination, unreasonableness in the matter of

granting differential price to the contractor on account of price hike in Steel, Cement, Bitumen, labour & POL for which they sustained loss in course of execution of the work.

5. Undisputedly, the decision is taken at Government level to pay to the contractors the differential amount between the price quoted in the tender & price hike takes place during execution of the work in respect of Steel, Cement, Bitumen, labour & POL. Annexure-A attached to the Notification No. 5608 dated 03.04.2007 provides for reimbursement of such amount to the contractors. The said guideline also provides for recovery of the differential amount from the contractors in case of decrease of cost of Steel, Cement, equipments, labour & POL during execution of work.

6. From the said guidelines, it is noticed that against Clause 31 (a) (ii) of F2 contract it is stated that where the original contract period is one year & above, increase/decrease of the cost of steel, Cement & Bitumen are to be paid & recovered. Payment in case of increase is to be made with prior approval of the Government when the total claim is more than Rs. 50,000 & with prior approval of EIC/Chief Engineer when the claim is upto Rs. 50,000. Recovery in case of decrease shall be made by concerned Executive Engineer from the contractor immediately.

7. Against Clause 31(a)(iii) of F2 Contract it is stipulated that where the original period of contract is more than six month & below one year, increase/decrease of cost of Steel, Cement & Bitumen are to be paid & recovered. Payment, in case of increase is to be made with prior approval of Government when the total claim is more than Rs. 50,000 & with prior approval of the EIC/Chief Engineer when the claim is upto Rs. 50,000 subject to fulfilment of the conditions mentioned therein.

8. Comparison between guideline mentioned against Clause 31(a)(ii) & Clause 31(a)(iii) reveals that the basis for determining the cost of material is same; however, the only difference is that while following the conditions are stipulated against clause 31 (a)(iii), the same are not stipulated against clause 31(a)(ii) of F2 Contract.

(ii) Cost of the project should be more than Rs. 50.00 lakhs. However, the differential cost on such materials may be paid to the contractors after deducting the hike percentage amount in the tender for those materials from the calculated amount of differential cost.

(iii) Contractors have to submit the vouchers showing procurement from an authorized dealer for the said work within 28 days before utilization of steel, cement & bitumen.

(iv) Differential cost will be allowed only for the original agreement period but not for the extended period even though it might have been validly extended.

(v) Differential cost will be allowed only after successful completion of the work as per the approved work programme.

(vi) Stipulation contained in existing clause 31(f).

Recovery in case of decrease shall be made by concerned Executive Engineer from the contractor immediately.

9. It is understandable as to why similar conditions are not stipulated against clause No. 31 (a)(ii). Such a discrimination between original contract executed for the period of one year & above & contract executed for above six months & below one year does not stand to any reason & is totally impermissible.

10. Similarly under Clause 31(e) of F2 contract it is stipulated that vide Works Department letter No. 21369 dated 25.09.1991, the reimbursement/refund on variation in price of materials except steel, cement & bitumen will be governed as per clause 31(a)(ii) & 31(a)(iii), labour & POL as per sub clauses (a-i), (b) & (e) respectively of clause-31 shall be applicable in the prescribed manner.

11. There is no valid reason as to why where the period of completion of work in the agreement is less than one year, no escalation is admissible so far labour & POL are concerned. The only reason given in the counter is that in case of labour & POL the price usually increases annually. Such a plea even assuming to be correct, it has nothing to do with the works executed under any contract. A contract to execute any work is made on any date of and/or year. Neither the date of execution of contract nor the date of execution of work is same date on which price of POL & wages of labour increases. Therefore, if after submission of tender & in the course of execution of the work there is any hike in the price with regard to wages of labourers & POL the same should be taken into consideration irrespective of the period of contract & therefore the executing contractors/ agencies are entitled to get the differential amount.

12. Similarly, if there is decrease in the price irrespective of the period of contract, the same should be recovered from the agency/contractor. Sub-clause (iv) of Clause 31 (a)(iii) of F2 contract stipulates that the differential cost will be allowed for the original agreement period but not for the extended period even though it might have been validly extended. But contrary provision is there in clause 31(e) of F2 contract which provides that vide Works Department letter No. 21369 dated 25.9.91, the reimbursement refund on variation in price of materials except steel, cement & bitumen which will be governed as per clause-31 (a-ii) & (a-iii), labour & POL as per sub-clauses (a-i), (b) & (c) respectively of clause-31 shall be applicable in the following manner:

In terms of the aforesaid escalation clause, where the period for completion of the work as stipulated in the agreement is less than one year no escalation is admissible. In case of work where the stipulated period of completion is one year & more, escalation on account of price variation would be admissible only for the remaining period after excluding the first one-year period therefrom provided the work has been carried out by the contractor in terms of the relevant provision of the agreement in the situation, where the period of completion is initially stipulated in the agreement is less than one year & subsequently the completion period has been validly extended on the ground that the delay in completion of the work is not attributable to the contractor & in the result the total period including the extended period stands at one year or more escalations admissible only for the remaining period after excluding the first one year period therefrom. Such discrimination is not permissible.

13. In view of the above, we are of the view that the guideline under challenge is discriminatory, unreasonable in the matter of granting differential price to the contractors/executing agencies on account of price hike in Steel, Cement, Bitumen, Labour & POL as a result of which they sustained loss in course of execution of the work. The same is liable to be quashed & accordingly we quash the guideline under Annexure-1. Opp. Parties are directed to issue fresh guideline treating the contractors/executing agencies uniformly with regard to Payment/refund of differential cost of material, wages of labour & POL irrespective of the period of contract keeping in view the observations made hereinabove. In the result, the Writ Petition is allowed to the extent indicated above.

V. Gopala Gowda, C.J.

I agree.