

(2007) 05 OHC CK 0010

In the Orissa High Court

Case No : Writ Petition (C) No. 8971 of 2006

Classic Super Construction

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 02-05-2007

Acts Referred:

Citation : (2007) 1 OLR 642 Supp

Hon'ble Judges : A.K. Ganguly, C.J;N. Prusty, J

Bench : Division Bench

Advocate : Kamal Behari Panda and P.K. Sahoo, for the Appellant; Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Parichha, C.J.—This writ petition has been filed by M/s. Classic Super Construction. The Petitioner responded to a tender floated by the opposite parties relating to Package No. OR-07-27 dated 18.3.2004 and the offer of the Petitioner was accepted by the Tender Committee and the Petitioner was called for negotiation. The Petitioner's case is that pursuant to the said negotiation the Petitioner reduced its rates and the Tender Committee recommended the acceptance of tender of the Petitioner. The Petitioner's case is that despite the same, the Financial Adviser-cum-Additional Secretary to the Government rejected the tender of the Petitioner without any reason. Thereafter the Superintendent Engineer again recommended for acceptance of the offer of the Petitioner. Despite the said recommendation the Financial Adviser-cum-Additional Secretary to the Government vide his letter dated 20.10.2004 directed fresh tender to be invited. At this stage, the Petitioner moved this Hon"ble Court in W.P. (C) No. 12298 of 2004 challenging the order of the Financial Adviser-cum-Additional Secretary to the Government. The said matter was heard at length and a Division Bench of this Hon"ble Court passed an order on 14.2.2005 whereby the writ petition was allowed and the objection of the Financial Adviser-cum-Additional Secretary to the Government was quashed and the Chief

Engineer was directed to issue the work order in question in favour of the Petitioner.

2. Since the Government authorities were not acting in terms of the Court's order as aforesaid, a Contempt Petition was filed which was registered as CONTC No. 602 of 2005. The said contempt petition was kept pending. During the pendency of the contempt petition the opposite parties filed a Review Petition being RVWPET No. 77 of 2005 for review of the order dated 14.2.2005. However, thereafter the Government by its order dated 26.6.2006 intimated the Petitioner that its bid dated 19.4.2004 for execution of the work has been accepted for the contract price of Rs. 2,30,99,378/- and the Petitioner was asked to comply with the several requirements under the said order and sign the contract within ten days failing which it was stated in the communication that action in terms of the tender document will be taken. The Petitioner challenges the said subsequent order dated 26.6.2006 in this writ petition on several grounds. The Petitioner's stand is that it intimated the opposite parties on 20.6.2006 that it is not possible for the Petitioner to execute the said work at the rate quoted in March, 2004. It was pointed out by it that had the Department acted in terms of the High Court's order dated 14.2.2005, it would have been possible for the Petitioner to complete the work as per the rates quoted in 2004. It was also pointed out by the Petitioner that the Department itself has increased the rates. Hence, it is not possible for the Petitioner to carry on the work at that rate. The opposite parties have issued a general order dated 30.6.2006 intimating all the Executive Engineers including opposite party No. 3 that the current schedule of rates published in 2006 should be adopted. The Petitioner wanted protection from this Court for allowing it to execute the work at the said schedule of revised rates published by the Government in 2006.

3. In this matter several affidavits have been filed by the opposite parties. In paragraph 4 of the counter affidavit which has been affirmed by Ranjit Kumar Sahu, the Executive Engineer on 22.8.2006, it appears that the execution of work which was granted to the Petitioner are governed under Prime Minister Gramin Sarak Yojana (in short, "PMGSY") Scheme and the stipulations in such Scheme are prescribed by the National Rural Roads Development Agency under the Ministry of Rural Development, Government of India. Under such Scheme, there is no provision for escalation as the construction of such work as is taken up under PMGSY is targeted for completion within specified completion period of 9 to 11 months. Under Clause 15.2 of the ITB it is provided that the bidder may refuse the request without forfeiting his earnest money. But, a bidder agreeing to the request will not be required to modify his bid money but will be required to extend the validity of his earnest money for a period of extension and in compliance with Clause 16 of ITB. The stand of the opposite parties is that since the matter is covered by the aforesaid Clauses of ITB, the prayer for increase of the rates made by the Petitioner cannot be entertained. Learned Counsel for the opposite party submitted that such bid document has been signed by the Petitioner.

4. The aforesaid stand of the opposite parties in paragraph 4 of the counter affidavit could not be contradicted in the rejoinder filed by the Petitioner. In fact the specific stand of the opposite parties in paragraph 4 of the counter affidavit has not at all been dealt with. A further additional affidavit has been filed by the State which was affirmed by the Ranjit Kumar Sahu on 4.12.2006 and in the said counter affidavit in paragraph 6 it has been stated that if the claim of the Petitioner to introduce the rates as per schedule in the year 2006 stipulated by the State Government is applied to the execution of work in question under PMGSY Scheme, that will require fresh preparation of estimate followed by subsequent sanction by NRRDA and inclusion of the working in Phase VII of PMGSY Programme. The aforesaid process will require a fresh tender. But, in the instant case keeping the Petitioner's bid alive, such revision of rates is not possible. This additional affidavit was filed on behalf of opposite party No. 3 pursuant to the Court's order. In paragraph 3 of the additional affidavit, it has been pointed out that initially the Petitioner's tender was rejected due to the record of poor performance and details of the same have been given in paragraph 3. But since the Hon'ble High Court directed to award the work in favour of the Petitioner, the matter was again consulted with the Law Department and as per their advice the work was again awarded to the Petitioner in terms of the order of the Hon'ble High Court. It appears that in the meantime, the Petitioner has filed a Contempt Petition for enforcing the order of the Hon'ble High Court referred to above and the opposite parties have filed a Review Petition for reviewing the High Court's order. It was also pointed out in the said affidavit that allowing the Petitioner to perform the contracted work on higher rates is not permissible unless the whole matter is re-tendered as per the guidelines governing the said work. It was also pointed out that PMGSY Scheme is a Central Government Scheme and under such Scheme money is sanctioned by the Central Government to all the states of India and for each of the work a fixed amount is sanctioned for each phase of work. The work in question relates to Phase III (2003-04) of PMGSY Scheme and the same was approved by NRRDA. Since the funds received against a particular work is fixed one, the State Government cannot enhance the cost of the work in that particular phase.

5. The averments made in the said affidavit dated 4.12.2006 have not been properly controverted by the Petitioner in its affidavit. In the aforesaid state of facts, it is difficult for this Court to accept the contention of the Petitioner that the rates must be revised.

6. Reference in this connection may be made to the tender document governing the work and Clause 13.4 of the said bidding document is as follows:

13.4 The rates and prices quoted by the Bidder shall be fixed for the duration of the Contract and shall not be subject to adjustment.

It also appears that the Petitioner has filed an affidavit in a non-judicial stamp paper. It appears that similar other contractors working under PMGSY Scheme have filed affidavits to the extent that they will not claim any price escalation

towards the hike of cost of labour and materials. Such affidavit which was filed by the contractors working under PMGSY Scheme in the year 2003-04 bearing Package No. OR-07-26 is referred to by the learned Counsel for the opposite parties. Similar affidavit was also filed by Anr. contractor, namely, Kabi Prasad Samantaray, Managing Director of K.K. Construction Pvt. Ltd. in respect of the same Scheme for Package No. OR-07-24 that he will not claim any compensation on any account from the Department for the delay in completion of work.

7. In view of the aforesaid factual position and considering the nature of work which the Petitioner has to perform, it is difficult for this Court to pass an order in favour of the Petitioner allowing its prayer to give higher rate for the work.

8. Learned Counsel for Petitioner relied on a Division Bench decision of this Court in the case of *M/s. Varsha Fabrics Pvt. Ltd. v. State of Orissa and Ors.* reported in 2006 1 OLR 849. In that case, an unreasonably short period of seven days was stipulated as the period for completing the contract. This Court held that fixation of such a period for completing the contract is unreasonable and if a clause in the contract is unreasonable the writ Court can interfere. But in the instant case, we do not find any unreasonableness on the part of the Government in stipulating the terms of contract relating to the rates. Apart from that, the work in question is governed by the Central Government Scheme and the rates are not fixed by the State Government. The Central Government authorities have not been impleaded in this writ petition. In their absence, it is difficult for this Court to come to a conclusion about unreasonableness of the rates. Therefore, the decision in *Varsha Fabrics* case is not attracted to the facts of this case.

9. The other judgment referred to by the learned Counsel for the Petitioner was rendered in the case of *Food Corporation of India v. M/s. A.M. Ahmed and Co. and Anr.* reported in AIR 2007 SCW 544. That was a matter in which the Arbitrator passed an award granting escalation. The question was whether the Arbitrator had the jurisdiction to give an award on escalation. That question was raised in a proceeding for setting aside the award. The Court held that the Arbitrator had the jurisdiction as escalation was the effect of statutory wage revision. This Court fails to appreciate the relevance of that ratio rendered in a totally different fact situation to the facts of the present case.

10. For the reasons aforesaid, there is no merit in this writ petition, and as such it is dismissed. Interim order, if any, is vacated.

No order as to costs.

N. Prusty, J.

11. I agree.