

(2004) 11 OHC CK 0030

In the Orissa High Court

Case No : Original Jurisdiction Case No. 14084 of 2001

Ganesh Chandra Kanungo

APPELLANT

Vs

Hindusthan Steel Works Construction Ltd.

RESPONDENT

Date of Decision : 03-11-2004

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2004) 98 CLT 698

Hon'ble Judges : Sujit Barman Roy, C.J;L. Mohapatra, J

Bench : Division Bench

Advocate : Milan Kanungo, M. Verma, L. Kanungo, D. Pradhan, S. Nanda and S. Satpathy, for the Appellant; S.C. Ray, Debasis Das, Rasmi Ranjan Das For the Opp. Parties 1 and 2, Saiyat Das, A.K. Panda, Sujata Jena, Saswati Mohapatra and Jagmohan Patnaik For the Opp. Parties 3 and 4, for the Respondent

Final Decision : Allowed

Judgement

L. Mohapatra, J.—The petitioner, a Super Class contractor, has filed this Writ Application for a direction to the opp. parties to pay Rs. 14,06,969/- on account of escalated labour charges along with interest at the rate of 20% per annum from 8.2.2001 without deduction of 15% overhead charges being a statutory reimbursement and for further direction to the Rourkela Steel Plant to pay the said amount directly to the petitioner.

2. Facts leading to filing of this case are that the Rourkela Steel Plant (Opp. Parties 3 and 4) invited tender for construction and maintenance of Northern and Southern side Diversion Channels for Storm Water Drainage of the Rourkela Steel Plant. Pursuant to such tender all notice, the Opp. Party No. 1 which is a Government of India Undertaking submitted its tender. The said Opp. Party No. 1 having been selected for the work, an agreement was executed between the Rourkela Steel Plant and the Opp. Party No, 1. Said agreement was executed vide Contract Bond No. 784 of 1994-95. The aforesaid agreement contained a clause with regard to payment for labour escalation and escalation on POL

(HSD). Said clause is quoted below :

"Only labour escalation and escalation on POL (HSD) are admissible. Base date for both escalations shall be 11.4.1995. Components of labour escalation shall be 20% and that for POL (HSD) shall be 10%. Escalation on POL (HSD) shall be admitted based on percentage increase at IOC Depot, Rourkela."

In order to execute the work the Opp. Party No. 1 company engaged five agencies including the petitioner and such agencies are the petitioner, M/s. Vijeta Construction Ltd., Sri Shyam Industries (P) Ltd., M/s. Rout Enterprises, M/s, Patra Fabrication (P) Ltd. The work was completed and all payments in terms of the contract executed between Opp. Party No. 1 and Rourkela Steel Plant were settled and payment were made by the Rourkela Steel Plant to the Opp. Party No. 1.

3. Case of the petitioner is that the work entrusted to him was divided into two parts. The first part is construction of Northern side diversion for Storm Water Drainage and the second part is for construction of Southern side diversion for Storm Water Drainage. The Opp. Party No. 1 provided for escalation of labour and POL for the Southern side, but did not provide for such escalation for the Northern side. Only ground on which such escalation was not provided for Northern side is that said work was to be completed within two months. According to the petitioner at the earliest point of time when this clause was noticed, a letter was written by him on 19.6.1995 stating that if the work on the Northern side takes more than two months for reasons not attributable to him, escalation on labour and POL may be allowed. Similar letter was also again written by the petitioner on 26.6.1995. The work was completed in May, 1998 with extension granted by the Opp. Party No. 1 and approved by the Rourkela Steel Plant even though construction of Northern side was supposed to be completed within a period of two months. Further case of the petitioner is that the work on the Northern side could not be completed within a period of two months as the opp. parties failed to displace villagers in order to make vacant site available for construction and the opp. parties could not submit drawings in time and there was huge deviation while executing the work. According to the petitioner, since the work on the Northern side could not be completed within two months, as stipulated in the agreement because of reasons attributable to the opp. parties, he should not be deprived of the escalation on labour and POL. It appears that the petitioner has also submitted bills claiming escalation to the tune of Rs. 16,24,507/- out of which an amount of Rs. 2,17,538/- having been paid, balance of Rs. 14,06,969/- with interest as claimed in this Writ Application is due.

4. The Opp. Parties No. 1 and 2 have filed counter-affidavit denying the claim of the petitioner. It is stated in the counter affidavit that the entire work entrusted to the Opp. Party No. 1 was given to five agencies including the petitioner. So far as the contracts between the Opp. Party No. 1 and M/s. Vijeta Constructions Ltd. and M/s. Rout Enterprises are concerned, they provided for escalation for

Northern as well as Southern side diversion channels and in respect of other three agencies, escalation was permitted only in respect of southern side and no escalation was permitted for Northern side as the same was to be completed within a period of two months. Case of the Opp. Parties No. 1 and 2 is that the petitioner having agreed to such a term now cannot maintain the Writ Application claiming escalation on labour as well as POL for Northern side. Further ground taken in the counter-affidavit is that the claim of the petitioner being in dispute appropriate remedy lies in a suit and in exercise of jurisdiction under Article 226 of the Constitution of India, this Court cannot entertain the disputed questions of fact.

5. Opp. Parties No. 3 and 4 have also filed counter-affidavit stating that the work had been entrusted to the Opp. Party No. 1 and after completion of work in terms of the contract entered into between the Rourkela Steel Plant and the Opp. Party No. 1 bills with regard to escalation on labour and POL have already been paid to the Opp. Party No. 1. There being no contract between the petitioner and the Opp. Parties No. 3 and 4, prayer for directing the said Opp. Parties No. 3 and 4 to make payment to the petitioner directly cannot be entertained.

6. Learned Counsel appearing for the petitioner submitted that the agreement between the petitioner and the Opp. Party No. 1 was made on 22.11.1995 vide Annexure-3 for execution of the work in question. Letter of Intent sent to the petitioner on 18.8.1995 contained a clause stating that the labour escalation and escalation on POL (HSD) are admissible only in respect of Southern side diversions and no escalation will be payable for the Northern side work as the period involved is only two months. It was contended by the Learned Counsel for the petitioner that though the petitioner initially accepted such a clause expecting the work to be completed within two months, having faced difficulties of not getting the vacant site for construction as well as designs in time, prayed for payment of escalation on labour and POL on the ground that execution of work may take much more than two months for reasons attributable to the opposite parties. Apart from the above, it was also contended that for such delay in execution of work on the Northern side, the Opp. Party No. 1 having received escalation on labour and POL has no right to withhold the same solely on the ground that letter of intent did not provide for payment of the same to the petitioner. Learned Counsel appearing for the Opp. Party No. 1 submitted that the Letter of Intent clearly stipulates that the petitioner is not entitled to any escalation on labour and POL so far as Northern side work is concerned and therefore there has been no breach of contract in not paying escalation on labour and POL to the petitioner even though the work could not be completed within two months. It was also contended by the Learned Counsel for the Opp. Parties No. 1 and 2 that merely because Opp. Party No. 1 received payment on escalation for the aforesaid work from Rourkela Steel Plant cannot be a ground for allowing the same in favour of the petitioner as both flow out of different contracts. It was further contended by the learned counsel for the Opp. Parties No. 1 and 2 that the Writ Application is not maintainable and appropriate remedy

is only available in the Civil Court. Learned Counsel for the Opp. Parties No. 3 and 4 submitted that escalation on labour and POL so far as Northern side diversion is concerned, has already been paid to the Opp. Parties No. 1 and 2 and therefore there cannot be any grievance against the said opposite parties. It was also contended that there being no contract between the Opp. Parties No. 3 and 4 and the petitioner the Writ Application against the Opp. Parties No. 3 and 4 is not maintainable.

7. Having perused the Writ Petition and the affidavits filed by the parties and considering the argument advanced at the Bar, the following facts appear to be undisputed.

The Opp. Party No. 1 was entrusted with the work in question by the Rourkela Steel Plant. Opp. Party No. 1 in order to execute the work engaged five agencies including the petitioner and separate agreements were executed between the Opp. Party No. 1 and the five agencies who had been entrusted to execute the same. Only two of the agencies namely M/s. Vijeta Constructions Ltd. and M/s. Rout Enterprises were allowed escalation on labour and POL for the Northern side whereas rest three agencies including the petitioner were not allowed the same as the work in question on the Northern side was to be completed within a period of two months. Letter of Intent issued to the petitioner on 18.8.1995 clearly indicated that the labour escalation and escalation on POL shall not be allowed for Northern side work as the period of completion is only two months. There is also no dispute that the said work on the Northern side could not be completed within two months and the entire work was completed only in May, 1998. Now question that comes for consideration is whether in view of such clause in the Letter of Intent, the petitioner is entitled to the claim of escalation on labour and POL for the Northern side work.

From the Letter of Intent dated 18.8.1995 addressed to the petitioner it appears that Northern side diversion channel was to be completed within two months from 24.8.1995 and admittedly the said work was completed in May, 1998. The petitioner in the Writ Application claims that the work on the Northern side could not be completed within a period of two months because of the following reasons.

- (a) Displacement of villagers could not take place in time.
- (b) Law and order problem on the site could be controlled.
- (c) There was delay on the part of the M/s. Dastoor and Co. in submitting drawings.
- (d) There was huge deviation from the original plan and though original work was estimated at Rs. 2.72 lakhs the cost of the work ultimately was found to be Rs. 4.41 lakhs.

In the counter-affidavit filed by the opposite parties there is no denial of these allegations that delay in execution of the work on the Northern side was because of the aforesaid reasons. Rather, from the counter-affidavit filed by the Opp.

Parties No. 1 and 2 it appears that the petitioner was granted extension of time for completing the work on the Northern side. Opp. Parties No. 3 and 4 also do not dispute that the extension of time was granted to the petitioner for completion of work so far as Northern side is concerned. In view of the above, it is clear that delay in execution of the work on the Northern side was not attributable to the petitioner, but delay occurred due to the reasons stated in the Writ Application which are solely attributable to the opposite parties. It further appears that having sensed difficulties in completion of work on the Northern side within two months the petitioner had immediately written a letter in June, 1995 to allow escalation on labour and POL for the Northern side work. Though in Para 8 of the counter-affidavit filed by the Opp. Parties No. 1 and 2 a stand is taken that the petitioner had been granted extension of time without any financial implication, not a single document has been produced by the opposite parties to show that the petitioner had been granted extension of time with a condition that there shall be no financial implication for such extension of time and the clause contained in the Letter of Intent remained valid even if the petitioner took more than two months to complete the work. Moreover, from the counter-affidavit filed by the Opp. Parties No. 3 and 4 it is clear that the Rourkela Steel Plant on the basis of the bills submitted by the petitioner has already paid on labour escalation and escalation on POL to the Opp. Party No. 1 for the work on the northern side, but the same has been withheld by the Opp. Parties No. 1 and 2 whereas the same is not being paid to the petitioner on the ground of the clause contained in the Letter of Intent.

8. Learned Counsel for the Opp. Parties No. 1 and 2 referring to the decisions of the Apex Court in the case of Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, as well as in the case of State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd., submitted that interpretation and implementation of a clause in a contract cannot be the subject matter of a Writ petition. Relying on the aforesaid two decisions it was contended that since the clause contained in the Letter of Intent is required to be interpreted in this Writ Application, this Court under Article 226 of the Constitution of India cannot do the exercise and appropriate remedy lies in the Civil Court. In the case of Kerala State Electricity Board v. Kurien E. Kalathil (supra) the Court held as follows :

"We find that there is a merit in the first contention of Mr. Rawal, Learned Counsel has rightly questioned the maintainability of the Writ Petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a Writ Petition. Whether the contract envisages actual payment or not is a question of construction of contract ? If a term of a contract is violated, ordinarily the remedy is not the Writ Petition under Article 226. We are also unable to agree with the observation of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the

contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature."

Same view was also taken in the case of *State of Bihar v. Jain Plastics and Chemicals Ltd*, (supra).

Now the question that arises for consideration is whether the ratio laid down by the Apex Court which is long settled is applicable to the facts of the present case or not. Question of interpretation of the clause does not arise for consideration in this case. Relevant clause in the Letter of Intent addressed to the petitioner is quoted below :

"3(b) : Only labour escalation and escalation on POL (HSD) are admissible. Base date for both escalations shall be 25.5.95. Components for labour escalation shall be 20% and that for POL (HSD) shall be 10%. Escalation on POL (HSD) shall be admitted based on percentage increase at IOC Depot, Rourkela. No escalation will be payable for North side work as the period involved is only 2 months."

It is clear from the said clause that the work on the Northern side was to be completed within a period of two months and therefore no escalation was permissible. There is nothing in the Letter of Intent to show that if the work continues beyond the period of two months escalation shall not be allowed. The averments made in the Writ Petition with regard to delay in execution of the work on the Northern side, not being disputed in the counter-affidavit filed by the opposite parties, we have already held that delay in execution of the said work is solely attributable to the opposite parties. The opposite parties in their counter-affidavit also admit that they have granted extension of time for completing the work on the Northern side. As stated earlier, the Opp. Parties No. 1 and 2 in Para 8 of the counter-affidavit have specifically admitted that extension of time was granted to the petitioner to complete the said work but without any financial implication. As observed by us earlier, no letter has been produced by the opposite parties to show that extension of time was granted to the petitioner with such a condition. In absence of any such letter intimating the petitioner that the extension of time had been granted with such a stipulation, on the basis of the statement made in the counter-affidavit, we cannot hold that extension of time was granted to the petitioner with such stipulation. The clause contained in the Letter of Intent and quoted above shall be applicable provided the work is completed within two months. Admittedly, the work having been completed beyond the period of two months, we are of the view that in absence of any other stipulation in the contract prohibiting payment of escalation on Labour and POL during the extended period, the petitioner is entitled to escalation on labour and POL as claimed by him.

9. We, therefore, allow the Writ Petition and direct the Opp. Parties No. 1 and 2 to pay amount due to the petitioner on escalation on labour and POL within a period of three months from the date of communication of this order.

Sujit Barman Roy, C.J.

10. I agree.