
(2009) 02 PAT CK 0086

In the Patna High Court

Case No : CWJC Nos. 16495 and 16496 of 2008

Interlink Coal Private Limited

APPELLANT

Vs

The East Central Railway (Engineering Department) and
Others

RESPONDENT

Date of Decision : 11-02-2009

Acts Referred:

Citation : (2009) 02 PAT CK 0086

Judgement

Navaniti Prasad Singh, J.—Both these two writ applications are by the same Company against the same respondents and in relation to similar work involving the same dispute and, as such, with consent of parties, have been taken up together and heard for final disposal on merits at this stage itself.

2. The dispute essentially is with regard to compensation payable in relation to cost escalations during period of contract. Petitioner wants implementation of the policy of Railway Board dated 28.09.2007 which, under certain circumstances, removed barrier on price escalation, the agreement amongst parties being subsequent thereto and the Railway contends that the policy would apply only to future contracts thereby meaning to tenders which are floated after policy.

3. As the facts are similar in both the writ petitions, in material particulars relevant for decision, the facts of the first case being CWJC No. 16459 of 2008 are being noted in detail. The two writ petitions, for the sake brevity, are hereinafter referred to as the first case and the second case, as the case may be.

4. Petitioner is a Company incorporated under the Companies Act, 1956 and is a registered Class-I contractor mainly engaged in civil constructions and is also registered with the Indian Railways. On 22.07.2007, East Central Railways floated two tenders for construction of several residential units, staff quarters and other miscellaneous works at Sonapur/Hajipur. They were tender notice No. 21 of 2007-2008 (open), tender notice No. 57 of 2007-2008 respectively. Petitioner, being desirous of contesting in the tenders, filed tender papers for both the tenders which were opened on 05.09.2007. In the first case, the period

for completion of work was 15 months from the date of work order and it was 18 months in the second case. In the first case, the total cost of project was Rs. 10,67,88,840/- and in the second case, the total cost of project was Rs. 15,49,17,037/-. In the first case, tenders were filed with earnest money of Rs. 20,18,910/- in the shape of fixed deposit dated 03.09.2007 and in the second case, it was Rs. 29,27,400/- vide FDR dated 03.09.2007. The tender and the document, inter alia, contained Chapter 3, Clause 34 which provided for price variation. Clause 34(A) are general conditions for price variations and Clause 34(C) stipulates ceiling on price variation. Clause 34(C)(i), inter alia, provides for reimbursement of price variation based on price indices only if it is in excess of 5% as per accepted rates. Sub-clause (ii) thereof provides a ceiling wherein if the completion period is between 1 to 2 years then the ceiling is limited to 10% (15% minus 5% floor price) and Clause 3 provides that in case the period of completion is more than two years then similarly the limit is 20% (25% minus 5% floor price). It was also provided that if material requirement of steel and cement were available from the store of Railways, they would be so supplied subject to price adjustment from the project cost at price agreed.

5. These clauses are part of General Conditions of Contract (GCC) which then get incorporated as a part of agreement between the parties.

Soon after the tenders were opened, Railway Board, in the Ministry of Railways, took a policy decision which was communicated under policy letter No. RB/CE1/5/2007, Memo No. 2007/CE.1-CT/18 dated 28.09.2007 to all concerned Railway authorities with regard to policy decision to amend certain clauses in the existing GCC to enable more effective and efficient contract management. The said policy decision is Annexure-1 to both the cases. The said policy provided that the modified clauses/provisions shall be applicable with prospective effect in all future works contracts. Clause 2, which is the relevant clause, is quoted hereunder:

2. Amendment to PVC clause in works contract

In partial modification of Board's letter No. 85/W-1/CT/7-Vol 1 dated 04.04.1996, the following changes are introduced regarding Price Variation Clause :

(i) The minimum prescribed limit of one year of contract completion period for incorporating Price Variation Clause in tenders (para 1 (a) of above referred letter dated 04.04.1996) stands deleted.

(ii) Price Variation Clause (PVC) shall be applicable for tenders of value more than Rs. 1 crore irrespective of the contract completion period and PVC shall not be applicable to tenders of value less than Rs. 1 crore.

(iii) The present stipulation that "Price Variation Clause will not apply if the price variation is upto 5% and that reimbursement/recovery due to variation, in prices will continue to be made only for the amount in excess of 5% of (illegible)"

referred letter dated 04.04.1996 shall continue to be enforced. However, the existing upper limit prescribed at 15% and 25% (vide para I (b) and I (c) of Board's letter dated 04.04.1996 referred above) for price variation claim stands deleted.

6. It is not disputed amongst the parties that this policy document modifying clauses of GCC were not circulated to public/contractors or organizations outside the Railways.

7. It appears Railways took considerable time in finalizing the tenders and ultimately by letter dated 23/24.01.2008, the petitioner was communicated that both his tenders, which were filed on 05.09.2007, were accepted. The acceptance letters are Annexure-2 to the writ petitions. Petitioner was directed to submit irrevocable bank guarantees as a performance guarantee of Rs. 53,39,450/- in the first case and Rs. 77,45,860/- in the second case.

8. Immediately, on receipt of the said letter of acceptance of Railways, by letter dated 02.02.2008 (Annexure-4), petitioner, who had by now come to know about the policy decision of the Railways with regard to virtually deletion of price variation clause in the original GCC, in so far as petitioner was concerned, inasmuch as petitioner's contracts were of more than Rs. 1 crore and the completion period was more than 1 year, protested to the Railways and requested for deleting the price variation clause as till then no agreement had yet been signed as between the parties. It clearly stated in the said letter that unless the said clauses are deleted, it would not be in a position to sign the agreement.

9. It may be noted here that even though Railways have filed their counter affidavit, the said communication of the petitioner and the protest has not been denied.

10. The petitioner has then pleaded in its writ application which again has not been controverted by the respondents that it was given to understand by the Railway authorities dealing with the matter that once the Railway Board itself has taken a policy decision to amend the said price variation clause, those clauses are not required to be deleted in the tender document as the tender was not yet formalized by an agreement. Petitioner was also assured that as a consequence of deletion of the upper ceiling limit in the price variation clause, the petitioner would now be entitled to get the actual cost of construction materials and/or the cost arrived at after calculating the price variations in terms of the formula as formulated in the tender document. I may also note that the petitioner reiterated this very stand in its letter dated 05.05.2008 (Annexure-6) to the Railway which again has not been disputed by the Railways in their counter affidavit.

11. On the assurance aforesaid, on or about 28.02.2008, petitioner submitted performance guarantees in the shape of bank guarantees as noted earlier and, thereafter, the formal agreement was executed as between the parties on 18.03.2008 in the standard form (Annexure-3). There is no dispute that in the

said standard form agreement, Clause 34(C) was retained in original form though it was a contract being executed on 18.03.2008 which was almost six months after the policy of removal/modifying the same being policy decision communicated on 28.09.2007.

12. Petitioner has then pleaded that immediately thereafter, there was repeated abnormal increase both in price of steel and cement which are major components of the contract. The increase were such abnormal and in such a short time that if the petitioner is forced to execute the contract as per the earlier price variation clause, it would be virtually ruin. Railways, in their counter affidavit, have again not disputed this. They have specifically stated that even under the earlier terms, substantial loss would be mitigated but do not dispute that still the petitioner would be left to bear substantial amount from its pocket solely on account of abnormal price variation in the short term.

13. It is, under these circumstances, the writ petitioner has sought for two alternative reliefs. Firstly, once Railway itself took a policy decision to modify the GCC and made it applicable to all future works contracts with prospective effect then the contract having been awarded to the petitioner being much later, the policy decision would apply. The policy decision is dated 28.09.2007 and the Railway's acceptance letter is dated 23/24.01.2008 and the agreement is dated 18.03.2008. In the alternative, it is prayed that agreement itself provided that the Railways could provide steel and cement from their own store. It is, accordingly, sought that the Railways be directed to supply steel and cement after procuring it themselves from their stores which would be fair, just and equitable. It is submitted that Railways, even in contractual matters, is subject to Article 14 of the Constitution of India and must act fairly and reasonably and not like a common person entering into contracts for profits. It is submitted that payment of difference of price due to escalation, which escalation is not in the hand of either party, is merely compensatory in nature and Railways, being instrumentality of the Government and State, must act fairly and pay due compensation or supply the goods themselves as is an option open to the Railways but cannot refuse either of them and put a person to loss for no fault of his.

14. Railways, on the other hand, have taken stand that the policy decision has a prospective application meaning thereby that it is only to apply to tenders floated after the policy decisions and is not to apply to contracts given after the policy decision where tenders were issued earlier. It is further stated by them, without denying petitioner's letters dated 02.02.2008 (Annexure-4) and 05.05.2008 (Annexure-6), that once petitioner signed on the dotted line in the standard form agreement notwithstanding change in policy even before Railway's letter of acceptance dated 23/24.01.2008 (Annexure-2), petitioner was bound by the printed terms in the agreement dated 18.03.2008 and Railway was under no obligation to supply the two commodities unless it had the same in stocks meaning thereby probably that it was their sole uncontrolled discretion whether

to supply or not the commodities for use in their contract.

15. In nutshell, petitioner wants a just compensation for abnormal unanticipated increase in prices and the Railway, notwithstanding acceptance of the abnormal rise in prices, does not intend to do so virtually seeking unjust enrichment to itself whether such a stand of Railway, which is a part of State, can be permitted in a democratic society governed by rule of law and in particular Article 14 of the Constitution of India.

16. In my view, the first thing, that is to be seen, is what in true terms, is petitioner seeking. In my view, petitioner seeks only a just compensation for unanticipated abnormal rise in prices of its basic ingredients required for fulfillment of the contract. It is not seeking any monetary compensation for profits. It is only seeking to indemnify itself for increased cost involved. It is not that as per agreement, no price variation at all was permissible. Both parties were aware of price variation and the agreement provided for it. Railways, in their counter affidavit, accept that even under the agreement, to a great extent, petitioner could be compensated but that has a ceiling beyond which the petitioner must suffer even though the price factor was beyond both the contracting parties. If petitioner is to be compensated then let us see what the effect would and if petitioner is not to be compensated what would be the effect. In my view, if petitioner is to be compensated in terms of the price variation as provided in the new policy then petitioner would not have to procure goods by incurring capital loss in terms of making payment without chance of recovery. That, in my view, would be just and proper. On the other hand, if compensation, accordingly, is not permitted then Railway would certainly be getting its work done at a cost less than legitimate due and would, thus, be unjustly enriching itself because of factors beyond control of both the contracting parties. That would be unjust and unfair.

17. It must be remembered that the policy decision was taken over four months before the letter of acceptance by the Railways and almost six months before the agreement was entered into. The policy clearly was of the Railway itself and was binding on all subordinate Railway officials. It only provided for a more just mode of compensation calculated and did not materially alter the tender itself. In my view, as neither the acceptance nor the agreement was done before the policy decision, the policy would bind the Railway. This is more so because Railways, in their counter affidavit, have not challenged or denied communications of the petitioner dated 02.02.2008 (Annexure-4) and 05.05.2008 (Annexure-6).

18. I may here also refer to the policy itself. The policy itself says that it has prospective application and would apply to works contracts given after the policy. In my view, it does not say that it will apply to tenders issued after the policy. This is so because it is well settled position in law that a tender is merely a notice inviting offers. Till the offer is accepted and an agreement signed between the parties, no agreement and/or contract comes into being. The works contract is awarded only on acceptance or agreement in that regard. In the facts of the

present case, it is undisputed that the policy decision was dated 28.09.2007 whereas acceptance was after five months that is 23/24.01.2008 and the agreement even much later on 18.03.2008. Thus, the works contracts in question came into being long after the policy and thus, in terms of policy itself, the modifications, as provided therein, became applicable and the concerned clauses of GCC have to be read in the modified terms. I may also note here that petitioner had serious reservations even before entering into the agreement and having entered into the agreement which fact is not denied.

19. Thus, in my view, in fact and in law, the policy of the Railway itself would apply to the contracts in question and not permitting the same to be effective would be unjust, unfair and contrary to the very intention of the policy because as has been repeatedly held by Courts that reasonableness and fairness on part of State in all its actions including contractual field is the heart and soul of Article 14 of the Constitution of India. It is too late in the day to even suggest that all governmental actions, in public domain, are bound by Article 14 of the Constitution of India but in contractual field, the Government is relieved of its obligation under Article 14 of the Constitution of India and can act unreasonable and unfairly.

20. Here, I may only quote from the judgment of the Apex Court in the case of Hindustan Sugar Mills Vs. State of Rajasthan and Others, :

Where there is such a clause, the Central Government is bound to pay the amount of sales tax on the freight component of the price and we hope and trust that the Central Government will honour its legal obligation and not drive the appellant to file a suit for recovery of the amount of such sales tax. We hopefully expect that the central Government will not try to shirk its legal obligation by resorting to any legal technicalities, for we maintain that in a democratic society governed by the rule of law, it is the duty of the State to do what is fair and just to the citizen, and the State should not seek to defeat the legitimate claim of the citizen by adopting a legalistic attitude but should do what fairness and justice demand.

I may also usefully refer to the celebrated decision of the Apex Court in the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, and, in particular, paragraph 12 thereof which reads as under :

It was argued for the Government that no person has a right to enter into contractual relationship with the Government and the Government, like any other private individual, has the absolute right to enter into contract with any one it pleases. But the Court, speaking through the learned Chief Justice, responded that the Government is not like a private individual who can pick and choose the person with whom it will deal, but the Government is still a Government when it enters into contract or when it is administering largess and it cannot, without adequate reason, exclude any person from dealing with it or take away largess arbitrarily. The learned Chief Justice said that when the Government is trading

with the public, "the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions.... The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure." This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc, must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

21. On behalf of Railways, it is then submitted that in such matters of contractual dispute, this Court should not interfere in writ jurisdiction under Article 226 of the Constitution of India and must relegate the parties to civil remedies. In my view, the contention has been raised merely to be noted for the purpose of rejection. It is now well settled by decisions of the Apex Court that where there are no contentious disputes of facts which cannot be resolved in a writ proceeding even in contractual matters, writ petition is maintainable even if consequences result in monetary claims. This is now settled by the decision of the Apex Court in the case of ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, wherein the Apex Court has exhaustively dealt reviewing previous case laws. In paragraph-23 of the reports, the Apex Court holds thus:

It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India.

In paragraph-53, their Lordships have held thus :

From the above, it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution.

The legal principle enunciated by their Lordships is to be found in paragraph-27

of the reports which is quoted hereunder:

From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

Recently, in the case of Food Corporation of India and Another Vs. SEIL Ltd. and Others, , the same position has been reiterated and I may usefully refer to paragraphs-23 and 24 of the reports :

Another aspect of the matter, I may refer to, is with regard to the stand of the Railway that it had uncontrolled and untrammelled discretion in the matter of supplying goods by itself for use in its contracts. It is not disputed that Railway has under the agreement a discretion to supply the goods itself to be used in its works contracts but its stand is that it can choose not to do so and the discretion or the decision cannot be questioned. Again, one has to start from the founding head of Article 14 of the Constitution of India. The actions of State instrumentality, and I believe, Railway is a part thereof, cannot be arbitrary or unfair. If the price of goods have rises abnormally and if the petitioner was forced to procure it then it would force the petitioner to suffer an irreparable loss for no fault of its. In such a situation, Railway could have avoided such a situation by itself procuring the goods from its stocks and then supplying it for use in its own contract. Discretion cannot be unguided or unfettered especially when it is to be exercised by a State instrumentality. It has to be guided by the principles enshrined in Article 14 of the Constitution of India and be based upon reasonableness, fairness and non-arbitrariness. Discretion is not an autocratic unruly horse left to the sole judgment and discretion of State instrumentality like any individual. Thus found, the request of the petitioner to the Railways for supply of materials was neither unfair nor unjust and the Railways ought to have exercised the discretion in an appropriate manner by procuring the stocks and supplying the same because the material was to be used in Railway's own work. By non-exercise of discretion, the Railways would surely be enriching itself unjustly which cannot be permitted so long as Article 14 of the Constitution of India is there.

22. Thus, in my view, the writ petition must succeed. Clause 34 of the GCC, as applicable to the petitioner in the facts and circumstances noted above, would apply in the form modified by the policy of the Railways, as contained in Annexure-1, and Railways would be bound to give benefit thereof to the

petitioner. In case Railway itself has some reservation in that regard then it would be duty bound to supply the goods by procuring them in their stocks but Railways certainly cannot avoid both the situations to the detriment of the petitioner. I order accordingly.

23. The writ petitions, with the above observations and directions, stand allowed.