(2011) 07 PAT CK 0010

In the Patna High Court

Case No : C.W.J.C. No''s. 12036 with 12308 of 2010

J. Sons Co. Ltd. APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 07-07-2011

Acts Referred:

Citation : AIR 2011 Patna 181 : (2012) 1 BC 592

Hon'ble Judges : S.N. Hussain, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.N. Hussain, J.—Both the aforesaid writ petitions have been heard together and are being decided by this common order as the petitioner and the respondents are same and the matter in dispute as well as the points involved are also same. The only difference is the date of impugned letters issued by the Deputy Chief Engineer/ TSP, East Central Railway cancelling the modification advice for different works. In C.W.J.C. No. 12038 of 2010, the petitioner had claimed the following reliefs:

(i) For issuance of writ/writs, order/orders, direction/directions quashing letter No. ECR/ENG/W-7A/04/07/6041/103-104/Part-1/2081 dated 8.6.2010 issued by Deputy Chief Engineer/TSP, East Central Railway whereby the modification advice No. 02/04/6041 /000104/000066 dated 17.6.2008 has been cancelled and fresh purchase of enhanced quantity was ordered to be made at petitioner''s risk & cost and responsibility (Annexure 15).

(ii) For issuance of writ/writs, order/orders, direction/directions quashing letter No. ECR/ENG/W-7A/02/10/6195/SP/Tender/2229 dated 22.6.2010, issued by Deputy Chief Engineer/TSP, East Central Railway whereby a risk and cost open tender against extended quantity of petitioner''s modification advices has been floated vide tender notice No. CE/2010/04 dated 22.6.2010 (Tender No. 02/10/6195/SP due for opening on 28.7.2010 and petitioner was held liable for any loss/ damages which may be incurred by the respondents on account of risk purchase (Annexure 16).

(iii) For issuance of writ/writs, order/orders, direction/directions quashing Para-(V) of letter No. ECR/ENG/W-7A/04/07/6041/104 dated 16.10.2007 issued to the petitioner whereby and whereunder rate for supply was lowered and it was made applicable from the date of issuance of this letter simply on the ground that tenders for subject stores have been finalized in East Central Railway at lower rate (Annexure 6).

(iv) For issuance of writ/writs, order/orders, direction/directions quashing letter No. W-07A/6041/104/05 dated 29.5.2008/2.06.2008, whereby respondent No. 4 has invoked Clause No. 15 of annexure of purchase order No. 000104 dated 29.3.2005 and directed the petitioner to make supply of increased quantity (+30%) of switches on rate as fixed and communicated vide letter No. ECR/ENG/W-7A/6041/104 dated 16.10.2007 and for enhanced quantity PVC was to be applicable with base month as December 2005 and delivery period was fixed as 6.10.2008 (Annexure 7).

(v) For issuance of writ/writs, order/orders, direction/directions quashing modification advice No. 02/04/6041/000104/000066 dated 17.6.2008 whereby and whereunder the respondent authorities have altered the original purchase order No. 02/04/6041/000104 dated 29.3.2005 and directed the petitioner to make the supply of enhanced quantity (+30%) on reduced rates and delivery period has also been reduced up to 5.9.2008 (Annexure 8).

(vi) For issuance of writ/writs, order/orders, direction/directions quashing the letter dated 15.7.2009 issued by respondent No. 4 to the petitioner directing him to supply the enhanced quantity of switches on reduced rates (Annexure 9).

(vii) It is further prayed that after quashing Para (V) of letter No. ECR/ENG/W-7A/6041/104 dated 16.10.2007 whereby and whereunder rate for supply was lowered and it was made applicable from the date of issuance of this letter respondent authorities may be further directed to pay the money to the petitioner as per original purchase order No. 000104 dated 29.3.2005 including PVC.

(viii) For any other relief/reliefs as may be deemed fit and proper in the facts and circumstances of the case.

2. In the aforesaid case, the matter arises out of fender notice No. CE/2004/07 for tender No. 2/4/6041 /SP issued by the Engineering Department of East Central Railway, for the following works :

(a) Fan shaped switches 60 Kg 1 in 81/2: to RDSO''s Drg. No. T-4966.

(b) Fan shaped switches 52 kg 1 in 81/2 to RDSO''s Drg. No. T-4866.

(c) Fan shaped switches 60 kg 1 in 12 to RDSO''s Drg. No. T-4219.

(d) Fan shaped switches 52 kg 1 in 12 to RDSO''s Drg. No. T-4733.

(e) Fan shaped Derailing switches 60 kg 1 in 814 to RDSO''s Drg. No. TA-6068.

(f) Fan shaped Derailing switches 52 kg 1 in 814 to RDSO''s Drg. No. TA-5836

3. In C.W.J.C. No. 12308 of 2010, the petitioner had claimed the following reliefs :

(i) For issuance of writ/writs, order/orders, direction/directions quashing letter No. ECR/ENG/W-7A/04/07/6041/103-104/Part-1/2081 dated 8.6.2010 issued by Deputy Chief Engineer/TSP, East Central Railway whereby the modification advice No. 02/04/6041 /000104/000065 dated 17.6.2008 has been cancelled and fresh purchase of enhanced quantity was ordered to be made at petitioner''s risk and cost and responsibility (Annexure 15).

(ii) For issuance of writ/writs, order/orders, direction/directions quashing letter No. ECR/ENG/W-7A/02/10/6195/SP/Tender/2229 dated 22.6.2010, issued by Deputy Chief Engineer/TSP, East Central Railway whereby a risk and cost open tender against extended quantity of petitioner''s modification advices has been floated vide tender notice No. CE/2010/04 dated 22.6.2010 (Tender No. 02/10/6195/SP due for opening on 28.7.2010) and petitioner was held liable for any loss/ damages which may be incurred by the respondents on account of risk purchase (Annexure 16).

(iii) For issuance of writ/writs, order/orders, direction/directions quashing Para-(V) of letter No. ECR/ENG/W-7A/04/07/6041/103 dated 16.10.2007 issued to the petitioner whereby and whereunder rate for supply was lowered and it was made applicable from the date of issuance of this letter simply on the ground that tenders for subject stores have been finalized in East Central Railway at lower rate (Annexure 6).

(iv) For issuance of writ/writs, order/orders, direction/directions quashing letter No. W- 07A/6041/103/06 dated 2.6.2008, whereby respondent No. 4 has invoked Clause No. 15 of annexure of purchase order No. 000103 dated 28.3.2005 and directed the petitioner to make supply of increased quantity (+30%) of switches on rate as fixed and communicated vide letter No. ECR/ENG/W-7A/6041/104/656 dated 16/ 26.10.2007 and for enhanced quantity PVC was to be applicable with base month as December 2005 and delivery period was fixed as 6.10.2008 (Annexure 7).

(v) For issuance of writ/writs, order/orders, direction/directions quashing modification advice No. 02/04/6041/000104/000065 dated 17.6.2008 whereby and whereunder the respondent authorities have altered the original purchase order No. 02/04/6041/000103 dated 28.3.2005 and directed the petitioner to make the supply of enhanced quantity (+30%) on reduced rates and delivery period has also been reduced up to 5.9.2008 (Annexure 8).

(vi) For issuance of writ/writs, order/orders, direction/directions quashing letter dated 15.7.2009 issued by respondent No. 4 to the petitioner directing him to supply the enhanced quantity of switches on reduced rates (Annexure 9).

(vii) It is further prayed that after quashing Para (V) of letter No. ECR/ENG/ W-7A/6041/103 dated 16.10.2007 whereby and whereunder rate for supply was lowered and it was made applicable from the date of issuance of this letter respondent authorities may be further directed to pay the money including PVC to the petitioner as per original purchase order No. 000103 dated 28.3.2005. (viii) For any other relief/reliefs as may be deemed fit and proper in the facts and circumstances of the case.

4. In the aforesaid case, the matter arises out of tender notice No. CE/2004/07 for tender No. 02/04/6041 /SP issued by the Engineering Department of East Central Railway, for the following works :

(a) Fan shaped switches 60 kg. 1 in 81/2 to RDSO''s Drg. No. T-4966.

(b) Fan shaped switches 52 kg. 1 in 81/2 to RDSO''s Drg. No. T-4866.

(c) Fan shaped switches 60 kg. 1 in 12 to RDSO''s Drg. No. T-4219.

(d) Fan shaped switches 52 kg. 1 in 12 to RDSO''s Drg. No. T-4733.

(e) Fan shaped Derailing switches 60 kg. 1 in 81/2 to RDSO''s Drg. No. TA-6068.

(f) Fan shaped Derailing switches 52 kg. 1 in 81/2 to RDSO''s Drg. No. TA-5836.

5. Thereafter, the procedures of both the tenders were exactly the same and hence they are being jointly considered. The date of opening of tenders was 2.11.2004 and in response to the aforesaid notice several candidates including the petitioner applied and when the tenders were opened, the petitioner''s bids were found to be lowest and were accepted, whereafter supply order No. 000104 dated 29.3.2005 was issued by the authorities for the items included in the first writ petition, whereas, supply order No. 000103 dated 11.3.2005 was issued by the authorities for the items included in the second writ petition.

6. As per the terms of the tender, Railway was to supply rails and only then the petitioner was to perform its part of contract and hence the petitioner sent letter dated 8.4.2005 enclosing original Bank Guarantee 02/05-06 dated 7.4.2006 for Rs. 20 lacs. Furthermore, supply was to be made proportionately per month so as to complete the supplies within nine months from the date of purchase order, subject to extension on R.O. rail supply. The petitioner received the first consignment of rail on 2.5.2005 and supply was started immediately thereafter. The petitioner further claimed that nine months'' period expired on 28.12.2005, but full supply could not be made to the respondents as the rails were not provided to the petitioner by the respondents within time as per the purchase order. Considering their failure, Railway extended the time on three occasions and lastly the time was extended till 31.12.2006 vide letter dated 23/24.8.2006 (Annexure 4), issued by the authorities of the Railway to the petitioner subject to the condition that it would be with liquidated damages and without PVC. To the

aforesaid condition, the petitioner sent its objection on 2.9.2006 (Annexure 5) and also filed letter dated 8.1.2007 to extend the delivery period by eight months without liquidated damages stating that it was ready to execute work on the last accepted rate.

7. Railway vide letter dated 16.10.2007 (Annexure 6) accepted the proposal of the petitioner and extended the delivery period up to 15.6.2008. Thereafter, the petitioner sent its acceptance letter dated 29.10.2007. Respondent No. 4 also issued letter dated 2.6.2008 to the petitioner invoking Clause 15 of the purchase order and directing the petitioner to make supply of increased quantity of switches for which the PVC was to be applicable with base months as December, 2005 at the rate as communicated earlier. Thereafter, the respondents vide letter dated 9.6.2008 mentioning it as corrigendum extended the delivery period for enhanced quantity and refixed up to 6.10.2008 and immediately thereafter they issued another letter dated 17.6.2008 (Annexure 8) asking the petitioner to supply 30% more quantity at the same rate. Respondents again issued letter dated 15.7.2009 (Annexure 9) to the petitioner directing it to supply the enhanced quantity of switches, failing which, action would be taken as per IRS conditions of contract.

8. The petitioner replied vide letter dated 16.8.2008 (Annexure 10) stating that the period of contract was up to 28.12.2005 and, thus, extension of quantity was not within the currency of the contract and hence it was concerned, it was stated that it was not due to any fault of the petitioner rather it was delayed due to non-availability of rails, which were to be supplied by the respondents to the petitioner. Thereafter, there were communications between the parties and the petitioner specifically stated that as per the agreement and supply order it was not required to supply further quantity on the earlier rate as the period of contract had ended much earlier. Finally the Deputy Chief Engineer (respondent No. 4) sent letter dated 8.6.2010 (Annexure 15) to the petitioner cancelling the purchase order and stating that supply by the petitioner during the refixed delivery period against enhanced quantity was nil, which expired on 5.9.2008 and hence the petitioner''s failure to comply purchase order despite sufficient opportunities was a breach of contract and modification letter dated 17.6.2008 was cancelled and fresh purchase of enhanced quantity was directed to be made at the petitioner''s risk, cost and responsibility.

9. Thereafter, the Deputy Chief Engineer (respondent No. 4) wrote letter dated 22.6.2010 (Annexure 16) to the petitioner stating that a risk and cost open tender against unsupplied quantity of modification advice dated 17.6.2008 has been floated vide tender notice dated 22.6.2010 and as such the petitioner was made liable for any loss/damages, which would be incurred by the respondents on account of the risk purchase. Thereafter, the petitioner wrote a letter to respondent-authorities dated 23.6.2010 (Annexure 17) that there was no concluded contract between the petitioner and respondent-authorities to supply the enhanced quantity and as such there was no occasion available for cancelling

the modification advice at the petitioner''s risk, cost and responsibility. However, when no step was taken by the authorities in that regard, the petitioner filed these writ petitions.

10. Learned Counsel for the petitioner argued that the authorities themselves were fully aware that supply could not be made by the petitioner due to the failure of respondents themselves to provide rails to the petitioner and hence the respondents extended the period and within extended period the petitioner supplied the materials fully at the reduced rate. It was also stated that direction of the respondents to the petitioner for enhanced supply of switches at reduced rate was not legal and proper as the contract had already terminated after full supply of the contractual quantity by the petitioner and nothing remained after the concluded contract for the respondents to demand anything as per the agreement after expiry of the contract. He further stated that according to the contract itself, supply has to be made as per the rate fixed in the contract and hence the respondents were not justified in directing the petitioner for enhanced supply at the reduced rate. In this connection, learned Counsel for the petitioner relied upon a decision of the Apex Court dated 18.4.2011 in case of Union of India & Others v. Tantia Construction Private Limited bearing SLP No. 18914 of 2010.

11. Learned Counsel for the petitioner raised another question as to the validity of corrigendum dated 9.6.2008 for extending the time when the entire supply had already been completed on 14.5.2008 as per the earlier directions of the authorities concerned. On the point of delay of the respondents in supplying rails to the petitioner, reliance was also placed upon a decision of this Court in case of Navshardul Construction Pvt. Ltd. v. Union of India & Ors., 2007 (4) B.B.C.J. 571.

12. On the other hand, learned Counsel for the respondents vehemently opposed the contentions of learned Counsel for the petitioner and submitted that the demand for supply of enhanced quantity of materials vide letter dated 29.5.2008 was less than 30% of the quantity included in the supply order and was in terms of Clause 15 of the contract. Thereafter, the authority was competent enough to issue corrigendum dated 9.6.2008 with respect to Railway''s earlier letter dated 16.10.2007. Learned Counsel for the respondents further argued that the decision of the Supreme Court cited by the petitioner was not applicable to the instant case as it was with respect to an original contract worth Rs. 19 crores but in the name of enhanced rate, works of Rs. 35 crores were asked to be done. It was also stated that in the said case no clause was there with respect to 30% enhancement and fresh tender had separately been issued for the work and in those circumstances, the Apex Court found it to be a separate work requiring a separate proceeding.

13. Learned Counsel for the respondents averred that the plea of delay raised by the petitioner cannot be raised now after the respondents had allowed the petitioner to complete the work. Learned Counsel for the respondents also averred that the rates were reduced only to waive the liquidated damages, which

was accepted by the petitioner as earlier the third extension was granted on 28.3.2006 with liquidated damages i.e, 2% each month with maximum of 10%, where after contract was to be terminated. It was further stated that on 8.1.2007 the petitioner sent letter for extending delivery period without liquidated damages and the authorities accepted the offer of the petitioner, waived the liquidated damages and extended the delivery period and modified the rates by order dated 16.10.2007, where after the petitioner wrote a letter to the authorities on 29.10.2007 thanking them and accepting the offer of the Railway. He also stated that all these steps were taken within the currency of the contract. In this regard, reliance was placed by him upon a decision of the Apex Court in case of New Bihar Biri Leaves Co. and Others Vs. State of Bihar and Others, .

14. Learned Counsel for the respondents lastly argued that when the petitioner even thereafter did not fulfill the terms of the contract and comply the directions of the authorities issued in regard to the contract, respondent-authorities had no option left but to retender the said enhanced requirement at the risk and cost of the petitioner as due to his refusal the respondents had suffered a lot.

15. Considering the arguments of learned Counsel for the parties as well as the materials on record, it is quite apparent that the dispute between the parties is only with respect to the enhanced quantity demanded by the respondents to be supplied by the petitioner. So far the original contract and the work order is concerned, admittedly, articles included in the work order had been supplied by the petitioner to the respondents. So far the delay in supply by the petitioner is concerned, several enhancements of delivery period had been granted by the respondents. This point raised by the petitioner could not be validly negated by the respondents and, thus, the delay in supply of the articles was not due to any fault of the petitioner as it supplied the required articles within the time extended by the Railway due to their own fault and to save the petitioner from any loss on that account.

16. From letter dated 8.1.2007, it is quite apparent that the petitioner had merely written to the respondents for extension of time as due to none of its fault the supply could not be made and even then he was ready to execute the work on the last accepted rate. The said letter was replied by the respondents vide letter dated 16.10.2007, in which time was extended uptil 15.6.2008 with liquidated damages and with denial clause. It was also noted in that letter that the tenders for supply stores have been finalized in the Railway at lower rate and, therefore, lower rate accepted for RDSO Pt.-I approved firm would be adopted for the supply made after date of issue of the latest purchase order, in which rate duly escalated and enumerated in that letter would be adopted for the supply and PVC would not be applicable and for the said enhanced supply other terms and conditions of the purchase order would remain unchanged. In response to the aforesaid letter, the petitioner sent letter dated 29.10.2007 to the respondents thanking for extension of delivery period of purchase Order No.

02/04/6041/000103 dated 28.3.2005 and the enhanced supply as per letter dated 16.10.2007 was accepted. The said enhanced quantity demanded by the respondents was, admittedly, within 30% of the original supply order.

17. The basic concept of law is that if the contractual work is not completed within the time prescribed in the contract, the terms of the contract will continue till the time of contract is extended by mutual consent of the parties. In the instant case, the work, admittedly, having been completed on 14.5.2008, it was within time extended up to 15.6.2008 by the respondents vide letter dated 16.10.2007, which was accepted by the petitioner vide its letter dated 29.10.2007 and, accordingly, the entire work of supply was completed by the petitioner on 14.5.2008 i.e. within that time and until then the terms of contract would be legally deemed to have been extended.

18. Clause 15 of the purchase order/supply order dated 29.3.2005 (Annexure 2) provided as follows :

The purchaser shall be entitled at any time during the currency of the contract to increase/decrease the ordered total quantities by not more than 30% of the ordered quantity at the same price, terms and conditions as stipulated in the contract by giving a notice in writing to that effect to the contractor and the contractor shall be bound to supply the quantities so ordered according to the revised schedule advised by the purchaser fixed on the basis of the contracted delivery schedule.

19. The notice for increase of the supply, which was, admittedly less than 30% of the ordered quantity, had already been given by the respondents to the petitioner much earlier on 16.10.2007 during the currency of the contract and the same having been accepted by the petitioner vide letter dated 29.10.2007, it was the duty of the petitioner to supply the aforesaid enhanced quantity within the time granted and non-supply of such materials within the said period clearly amounted to violation of the terms of contract.

20. So far reliance of the petitioner upon the decision of the Apex Court in case of Union of India v. Tantia Construction Pvt. Ltd. (supra), it is quite apparent that in the said order there was no enhancement clause in the original contract and more so the original contract being for only Rs. 19 crores the enhancement of Rs. 35 crores was ordered and for that a fresh tender had also been separately issued and hence the Apex Court found that it was a separate work not connected with the original contract and a separate supply order had to be passed. In the said circumstances, the aforesaid case law is not applicable in the facts and circumstances of this case.

21. So far reliance of learned Counsel for the petitioner upon a decision of this Court in case of Navshardul Construction Pvt. Ltd. (supra) is concerned, the said decision is not applicable to the facts and circumstances of this case as it was a case of termination of the 14 contract and subsequent issuance of fresh tender, whereas, in the instant case there is no termination of contract before issuance

of fresh tender at the risk and cost of the petitioner. In the aforesaid facts and circumstances, this Court does not find any illegality in the impugned action taken by the authorities concerned. Accordingly, both the writ petitions are hereby dismissed.