

(2009) 10 PAT CK 0029
In the Patna High Court
Case No : CWJC No.16229 of 2008

Jai Maa Shardey Construction

APPELLANT

Vs

The Union of India (UOI)

RESPONDENT

Date of Decision : 06-10-2009

Acts Referred:

General Conditions of Contract 2001 — Clause 17(A)(ii)

Citation : (2010) 58 BLJR 92

Hon'ble Judges : Navaniti Prasad Singh, J

Bench : Single Bench

Advocate : P.K. Verma and S.R. Saran, for the Appellant; R.K. Tiwary, for the Respondent

Judgement

Navaniti Prasad Singh, J.—The present writ application has been filed for quashing the cancellation of the contract, as communicated to the petitioner by the Senior Divisional Engineer (2), East Central Railway, Danapur, by communication dated 3.10.2008 on the ground of non performance of contract within the stipulated period and against consequential invocation of performance guarantee and forfeiture of earnest money as well as subsequent re-tender of the same work at the risk and cost of the petitioner.

2. The performance guarantee was invoked and forfeiture of earnest money was ordered as well as re-tender was issued during the pendency of the writ petition and were stayed by order of this Court dated 9.4.2009.

3. Parties have appeared, filed counter affidavit and rejoinder.

4. As pleadings are complete, with the consent of the parties, the writ petition was finally heard for final disposal at this stage itself.

5. The East Central Railway, Danapur issued a notice inviting tender on 19.9.2006 for widening Hatidah Link Platform with RCC beam, column and slab. On 10.11.2006, petitioner duly filed his tender with earnest money of Rs. 97,100/-and his tender cost was Rs. 40,17,678.29/-.

6. The petitioner alleges that no Acceptance Letter/Work Order was given to him, which fact is being denied by the Railway.

7. Railway in their counter affidavit have stated that they had sent Acceptance Letter/Work Order to the petitioner vide their communication dated 15.3.2007 (Annexure 3 to the writ petition, which is Annexure A to the counter affidavit).

8. At this stage it may be pertinent to note some of the important features of the Acceptance Letter/Work Order dated 15.3.2007. The Acceptance Letter/Work Order being dated 15.3.2007 clearly stipulated that the work had to be completed within six months i.e. by 14.9.2007. Another important condition was that the petitioner had to, within fifteen days, submit performance guarantee of 5% of the tender value, which amounts to Rs. 2,00,900 (Two lacs nine hundred). Petitioner was immediately required to sign a formal contract. The Tender Schedule attached with the Acceptance Letter in Schedule "A" (3) clearly stipulated that broad concept for the work would be given by the Railway, upon which Architectural and Structural drawing had to be made in minute details, as required by the site-in-charge and to the satisfaction of the Railway for which Rs. 51,000/- was to be paid by the Railway to the petitioner.

9. As per petitioner, the first communication, he received from the Railway, was dated 3.8.2007. Railway noticed the petitioner giving him seven days to submit detailed design etc. It was pointed out that the petitioner had submitted only rough pencil drawing. It had not started the work nor signed the contract. This was followed by communication of Railway dated 27.8.2007 giving seven days notice to the petitioner to complete the work. This, undisputedly, was responded by the petitioner by two letters dated 6.9.2007 (Annexure D to the counter affidavit) and dated 8.9.2009 (Annexure 2 to the writ petition). The important aspect mentioned in these letters by the petitioner to the Railway was that the petitioner had not received Acceptance Letter/Work Order in respect of his tender because of which work could not be undertaken. It was also pointed out that even otherwise work could not be undertaken because of heavy rain inundating approach to the site. On 10.9.2007 (Annexure E to the counter affidavit), petitioner was given 48 hours notice, which was responded to by the petitioner by his letter dated 13.9.2007 (Annexure F to the counter affidavit) wherein petitioner, inter alia, reiterated that he had not been given Acceptance Letter/Work Order. It appears that on 17.12.2007 petitioner was given copy of the Acceptance Letter/Work Order and petitioner was made to apply for extension of time, which petitioner simultaneously gave requesting time upto 14.3.2008 to complete the work. It is not in dispute that on petitioner's application for extension of time, extension was granted upto 14.3.2008 on 18.12.2007 (Annexure- K to the counter affidavit). The extension was granted with reference to Clause 17(A)(ii) of the General Conditions of Contract, 2001. It is agreed by the parties that this clause gives authority to the Railway to extend the contract period on the ground of delay occasioned because of conditions beyond control of the parties. This extension was for a period of six months from the expiry of the

earlier contract period, which was ending on 14.9.2007 and, as noticed, was granted on 18.12.2007. Extension having been granted on 10.1.2008, petitioner submitted performance guarantee, as was required under the Acceptance Letter/ Work Order. Petitioner's further case is that earlier prior to receipt of Acceptance Letter, he had visited the site with Engineer. He had drawn rough pencil sketch of the work. Subsequently, after extension was granted, he was required by the site-in-charge to get formal drawing made and submit the same for approval. He was directed to get the same prepared from Cadcon (Computer Aided Structural Design Consultant), who drew the structural designing for railway as well. Petitioner accordingly requested the said organization to draw up detailed Architectural and Structural design, which they did and submitted it to the Railway Engineer at Mokama on behalf of the petitioner on 28.2.2008, which fact has been certified by the said organization, vide Annexure 4 to the writ petition. Petitioner states that he did not receive anything thereafter from the Railway and was visited with the impugned order of cancellation of the contract dated 3.10.2008.

10. Railway, on the other hand, states that they had sent Acceptance Letter/ Work Order on 15.3.2007. The stand of the railway is that the work had to be completed accordingly by 14.9.2007, which was not done. On petitioner's request for extension of time, the contract period was extended upto 14.3.2008. The work not having been completed within that time nor petitioner having asked for any further extension, railway had no option but to cancel the contract, invoke the performance guarantee and forfeit the earnest money and consequently issued re-tender for the work at the risk and cost of the petitioner.

11. Railway in their comprehensive counter affidavit have not annexed any other material communication apart from what has been referred earlier.

12. Petitioner submits that in the facts, as stated above, it is clear that it was railway, who delayed the matter and if at all they had a right to cancel the contract they could not invoke the performance guarantee, forfeit the earnest money or at any rate re-tender at the risk and cost of the petitioner.

13. It is submitted on behalf of the petitioner that if, as stated by the railway, the Letter of Acceptance dated 15.3.2007 was duly served on the petitioner then why the railway did not communicate to the petitioner about failure to submit performance guarantee within fifteen days stipulated therein? They accepted the performance guarantee, which was furnished not within fifteen days of 15.3.2007 but was furnished on 10.1.2008. Why was the petitioner never noticed with regard to signing of contract any time prior to 3.8.2007? Why did the railway, if petitioner had not submitted Architectural drawing after the time was extended upto 14.3.2008, take no action to remind the petitioner in that regard and why was the contract period extended under Clause 17(A)(ii) on 18.12.2007 and why the contract was only ultimately cancelled for its non performance by 14.3.2008 only on 3.10.2008? Petitioner submits that these unexplained facts clearly show that the petitioner was not wholly at fault and cannot be penalized for non

performance of the work. It is not in dispute that till date formal contract has not been signed.

14. Having considered the matter, in my view, the writ petition must substantially succeed. The cancellation of the contract cannot be interfered with, as admittedly, work was not performed even within the extended period but the subsequent action of invocation of performance guarantee, forfeiture of earnest money and re-tender of the work "at the risk and cost of the petitioner" are clearly arbitrary in the facts and circumstances of the case. These actions cannot be sustained.

15. In my view, merely because railways state that they had informed the petitioner of acceptance of his tender by their letter dated 15.3.2007, it cannot be presumed that such an information was duly received by the petitioner. In my view, it is apparent that the railways were aware or at least they realized much later that this formal communication had gone amiss some where. Reason is simple. The Acceptance Letter, as noted in the very beginning had several important stipulations that the work had to be completed by 14.9.2007; within fifteen days of the Letter of Acceptance dated 15.3.2007, the petitioner had to give performance guarantee of Rs. 2,00,900/- and contract had to be signed. Before starting the work, structural drawing had to be prepared and got approved. For over five months, after issuance of the said letter, nothing had been done by the petitioner, still railways made no complaint and are totally silent. That is neither normal conduct rather is indicative of the fact that for some reasons railway themselves were not in a position to pursue the matter further. Neither it has been pleaded by the railway nor anything brought on record by the railway to show that they had at any point of time reminded the petitioner and directed it to furnish performance guarantee much less within fifteen days of the Letter of Acceptance dated 15.3.2007 nor is there any such pleading or communication with regard to non furnishing of proper structural drawing or signing of contract till the first communication dated 3.8.2007 (after five months when the contract period was itself six months). Thus, in my view, it is clear that the railway themselves realized that acceptance was not formally communicated to the petitioner. They accordingly extended the time by six months but this extension was granted on 18.12.2007 when work was to be completed by 14.9.2007, that is, giving only three months time to complete the work. Railway has failed to explain why they accepted the performance guarantee, which was furnished on 10.1.2008. It was long after completion of the contract period, as originally designated. Thus, in my view, its conduct establishes that they communicated the acceptance to the petitioner for the first time formally on or about 17.12.2007 only. Again if the petitioner had not submitted structural drawing even after extension of time, railway has not pleaded nor brought anything on record as to why thereafter they did not notice the petitioner for failure to undertake the work and sat over the matter for almost ten months only to issue the cancellation order on 3.10.2008 with retrospective effect from 14.3.2008, the extended the period for completion of the work. This clearly

points out that there was some lapses on the part of the railway in this regard and now arbitrarily the entire blame is being shifted on the petitioner and the petitioner is being penalized. This finding is also un-resistible in view of the conduct of the Railways and the facts on record. Thus, in my view, though the cancellation of contract cannot be interfered with nor re-tender interfered with but certainly in view of the findings, as above, this Court is inclined to hold that the penal actions, on the part of the railway, are uncalled for and unjustified. Thus, the invocation of performance guarantee, forfeiture of earnest money and re-tender "at the risk and cost of the petitioner" cannot be sustained and it is held accordingly. Those money, if realized, are to be refunded to the petitioner forthwith. The re-tender process would now proceed but will not be at the risk and cost of the petitioner.

16. With the aforesaid observations and directions, this writ petition stands disposed of.