

(2008) 02 PAT CK 0138
In the Patna High Court
Case No : CWJC No. 13522 of 2007

M/s Arjun Singh and Co.

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 14-02-2008

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2008) 2 PLJR 485

Hon'ble Judges : Navaniti Pd. Singh, J

Bench : Single Bench

Advocate : Anil Singh, S.R. Sharan, Dr. Mankeshwar Tiwari and Saroj Kumar Sharma, for the Appellant;

Judgement

Navaniti Pd. Singh, J.—The petitioner is a contractor who had been issued a work order by the NF Railways for construction of approach road to 21 railway level crossings. Pursuant to his tender having been accepted by railways" letter dated 14.12.2006, he was asked to start work and complete by 13.3.2007. He was also advised to sign contract agreement within seven days and deposit performance guarantee. For various reasons not relevant for the present, neither contract agreement was signed nor performance guarantee given nor work completed. Petitioner then, citing difficulties, sought for extension of time. By railways" letter dated 21.6.2007 (Annexure-3), time was extended to complete the work by 30.9.2007. The petitioner submitted performance guarantee on 16.7.2007 even though the time granted had been extended upto 30.9.2007 by letter dated 21.6.2007 on 13.8.2007 that is one and a half months before the time was to expire, by the impugned order as communicated by letter dated 13.8.2007 (Annexure-7), the work order and the contract was terminated. This was preceded by a seven days" notice issued on 12.7.2007 which was about three weeks from the date the extension was granted and a 48 hours notice was issued on 8.8.2007 which is almost two months prior to the expiry of time directing for completing the work at early date and show progress. Petitioner challenges this and submits that this would show a predetermined mind of the respondents to

cancel the contract even before the period was over on ground of urgency to get the work done which was a facade which would appear from subsequent conduct wherein till date no fresh tender has been finalized even after six months of termination of petitioner's tender which would not have been the case if the work had to be completed urgently. This is further compounded by the fact that on both occasions on retender, petitioner tendered and petitioner was in the first retender, the only tenderer and in the second retender, was the lowest by over Rs. 10 lacs still the work is not being given to the petitioner which should not have been the case if the work was of really urgent nature so as to justify premature termination. The factual position is not disputed in the counter affidavits filed by the respondent-railways. Their only defence to their action is that petitioner's work was slow and there was urgent need to get the work completed. This empowered them to cancel the contract. They had a right to cancel and they cancelled. The general terms and conditions then provided that a defaulting contractor cannot be given contract in fresh tenders and, therefore, petitioner was not considered again on retender. Railways did all this acting strictly by the Rules and the technicalities associated with it. To the questions whether the plea that work was urgent and there being delay, there was necessity to cancel and make fresh settlements which fact was not born out from the conduct. The respondents submit that progress not satisfactory, the work getting delay, they exercised their contractual rights.

2. The fact remains that on 21.6.2007, the period to complete work was extended upto 30.9.2007. Therefore, once the respondents granted petitioner time upto 30th of September, 2007, they ought to have waited for the day and then taken action instead of starting to precipitate the action immediately after 21.6.2007 when three months extension was granted by issuing a seven days" notice on 12.7.2007. On 12.7.2007, admittedly, petitioner had more than two months" time at hand but a seven days" notice was being issued. Again on 8.8.2007, a 48 hours" notice was issued when petitioner still had more than one and half months" time left. The petitioner appears to be correct in submitting that as is well known after June, 2007, there were unprecedented floods in the State due to unprecedented heavy rains. The railway crossings are village roads which become inaccessible and work cannot be carried out still substantial work was done. Time was on petitioner's side who could have completed the work but the sequence of events would show that though three months" extension was granted on 21.6.2007, within three weeks, on 12th July, 2007, notwithstanding extension being granted, some decision to force terminating the contract was taken. There is no plausible explanation except that railways had the authority to do it and acting technically in accordance with the general terms of contract they did. To my mind, I may refer only to a quotation from the judgment of the Apex Court in the case of Mangalore Chemicals and Fertilisers Ltd. Vs. Deputy Commissioner of Commercial Taxes and others, where their Lordships have quoted as hereunder:

"The answer to this is in the words of Lord Denning: "Now I know that a public

authority cannot be estopped from doing its public duty, but I do think it can be estopped from relying on a technicality and this is a technicality" [see *Wells vs. Minister of Housing and Local Government*, (1967)1 WLR 1000 at p. 1007].

Francis Bennion in his "Statutory Interpretation", 1984 edition, says at page 683:

"Unnecessary technicality: Modern courts seek to cut down technicalities attendant upon a statutory procedure where these cannot be shown to be necessary to the fulfilment of the purposes of the legislation."

3. As noticed above and at the cost of repetition, the entire action of the railways is based on urgency to get the work completed. If that was the true intention of railways, the same could have been achieved by giving petitioner a further time in case he was unable to complete the work by 30.9.2007 instead of canceling the same itself on 13.8.2007. By that process, the work would have long back completed, there would have been no disputes and time of this Court would not have been wasted. Instead having cancelled the contract on 13.8.2007 till date no further/ fresh contract has been issued even though petitioner has twice retendered as the lowest tenderer subsequent to the cancellation but again, based purely on technicalities forgetting the object for which work was to be done, petitioner's retenders are not being considered. These facts, in my mind, clearly bring out that the true reason was not urgency to get the work done but apparently urgency to get rid of the petitioner from the work. It may be mentioned that contractual provisions are stipulations in aid of getting work done timely and properly and to put to notice parties with regard to their respective obligations but the fact remains that the parties are to get work done. The purpose is not to rely on technicalities forgetting the work itself. If time was really the essence of the contract then the action of the railways in the matter is not in conformity with such pleading. The actions are clearly to keep petitioner out even at the cost of work not being done or work to be done at a much higher price. These facts, in the ultimate analysis, render the decision to terminate the petitioner's contract grossly arbitrary and, thus, violative of Article 14 of the Constitution of India.

4. Accordingly, I am left with no option but to quash Annexure-7 being the letter dated 13.8.2007 but as the extended period has already expired, I direct the railways to consider the work done and the remaining work which has already been measured for the purposes of retender and grant suitable extension in which time the petitioner could complete the work at the rates as quoted by it originally. I order accordingly. The writ application stands disposed of with the aforesaid directions with consent of parties at this stage itself.