(2008) 09 PAT CK 0162

In the Patna High Court

Case No : CWJC No. 12565 of 2007

M/s Dhananjay Construction Private Ltd. APPELLANT

Vs

The Union of India and Others RESPONDENT

Date of Decision : 09-09-2008

Acts Referred:
Income Tax Act, 1961 — Section 24

Citation : (2009) 2 PLJR 704

Hon'ble Judges : Navaniti Pd. Singh, J

Bench : Single Bench

Advocate : K.N. Singh, K.D. Sharma and Abhimanyu Sharma, for the Appellant; Bindhyachal Singh and Prashant Kumar, for the Respondent

Final Decision : Allowed

Judgement

Navaniti Pd. Singh, J.—Petitioner is the company of contractors of railway and other departments of Government. Railway issued a tender notice inviting open tender for construction and strengthening of minor bridges with widening of embankment from Dauram to Madhepura in connection with gauge conversion work of Saharsa-Purnia section.

2. Petitioner responded and submitted his tender paper on or about 14.9.2005. The petitioner was then informed by letter dated 29.12.2005 that the petitioner''s tender was accepted and he was given 15 months time to complete the work and he should sign an agreement in that regard. The work was basically in two parts that of earth work of construction and strengthening of minor bridges as it was required for converting the meter gauge line into broad gauge line. Petitioner started work and several letters including letters dated 24.3.2006, 5.7.2006 and 27.9.2006 are on records with regard to petitioner''s demanding approved map of the minor bridges so that he could proceed with the work. They were not responded to. In time petitioner completed the earth work and sought payment thereof. The bridge work yet to begin because approved maps/plans were not being supplied but time was running out as the contract period was to

end on 29.3.2007. As plans were still to be made available and the period was virtually at end, suddenly, the petitioner was informed by letter dated 27.3.2007 (Annexure-E to the counter affidavit) that most of plans were standard plans which petitioner could have obtained. At this stage, I may say that this letter conceals more than disclose. It makes no admission that several bridge plans are yet to be approved and handed over it does not refer. Even in the past petitioner was told in response to his request that plans were available. This letter only reaffirmed what petitioner has consistently maintained that the plans were never supplied during the period of the contract. Then it seems that the petitioner was advised to make an application for extension of time. Petitioner made such an application wherein he has clearly stated that he was seeking extension of time because the plans were not made available and it was on account of administrative lapses of the railway that the work could not be completed. He sought an extension of almost one year three months i.e. the contract was to end 28.3.2007 and he sought an extension up to 30.6.2008. The matter was placed before the railway, authority, who in clear term endorsed and allowed extension on administrative ground referable to clause 17(A)(iii) of General Conditions of Contract. Here I may refer to the said Clause 17(A)(iii) of the General Conditions of Contract. This refers to extension being granted because of default on the part of the railway administration, which leads to non-completion of work within the stipulated period. All these are to be found in Annexure-F to the counter affidavit but a reference to the same would also show that though the recommendation was originally made or granting extension up to 30.6.2008. this has scored and substituted by 2007. The effect is that as against extension of one year three months, as sought for by the petitioner, extension was granted of only three months and that too even till then without making plans for the bridges. Naturally, the petitioner had sought for price revision as well, as the contract period was over and the petitioner was being extended because of railway administration defaults. Considering the period of extension, the work could not be completed in any manner and has resulted in cancellation of the contract and subsequent re-tendered pursuant to a fresh tender at the risk and cost of the petitioner alongwith forfeiture of security.

3. Petitioner is aggrieved by the said cancellation and re-tendering at the risk and cost of the petitioner.

4. Counter affidavit has been filed.

5. Heard the parties and with their consent this writ petition is being disposed of at this stage itself.

6. The basic facts have been noted above. In view of Annexure-F, as discussed above, railway cannot be heard to say that the petitioner was responsible for delay. Their own documents annexed by themselves in the counter affidavit shows that extension was sought for because maps/plans were not made available, which was admitted by the railway and extension granted with reference to Clause 17(A)(iii) of the General Conditions of Contract. I am,

therefore, unable to accept the argument of the learned counsel for the railway that the period being fixed and not having completed the work in time, petitioner cannot make grievance. In my view, railway having defaulted and the default having been admitted by them, they cannot be permitted to make the contractor a scrape and take punitive action against him. Admittedly, the contractor had sought an extension of one year three months still in anticipation of plans being made available, extension was granted only for three months with no plausible explanation of curtail a period of one year. I may also refer to Para 9 of the counter affidavit wherein railway have admitted that the approved drawing of the minor bridges were also made available to the petitioner on 5.4.2007 i.e. more than six days after the extension was granted for a period of three months.

7. In view of these admissions, it is futile for the respondent to make about default on part of the petitioner. Default, if any, was on the part of the railway administration and is admitted by themselves. On this ground alone, the punitive action taken by the railway against the petitioner cannot be sustained. It is upto railway to get the contract completed by a third agency but not at the risk and cost of the petitioner because it is well known that no one can take advantage of his own default. I cannot do better than quote the words of Chief Justice Chagla. The principle in this regard, which is to be found in the case of All India Groundnut Syndicate Ltd. vs. Commissioner of Income Tax, Bombay City since reported in AIR 1954 Bombay 232:-

But the most surprising contention is put forward by the Department that because their own officer failed to discharge his statutory duty, the assessee is deprived of this right which the law has given to him under subsection (2) of S. 24. In other words, the Department wants benefit from and wants to take advantage of its own default. It is an elementary principle of law that no person-we take it that the Income Tax Department is included in that definition-can put forward his own default in defence to a right asserted by the other party. A person cannot say that the party claiming the right is deprived of that right because "I have committed a default and the right is lost because of that default.

8. Thus, I am left with no option but to hold that the cancellation of the petitioner contract was not justified in fact and in law but as the contract has been re-tendered, no order in this regard can be passed except that earnest money, which was ordered to be forfeited, has to be refunded to the petitioner and fresh tender issued would not be at the risk and cost of the petitioner.

9. I may note here one of the contentions raised by the learned counsel for the railway is that it is open for the petitioner to move in arbitration. The provision may be there but there being no dispute of the nature which cannot be resolved by this Court and the parties having pleadings and argued on merit, I do not think necessity of referring the matter to arbitration consuming further time. With these observations and directions this writ petitions stands allowed and all accounts must be settled accordingly.

