(2011) 09 JH CK 0094

In the Jharkhand High Court

Case No : L.P.A. No. 118 of 2011

M/s Setu APPELLANT

Vs

State of Jharkhand and Others RESPONDENT

Date of Decision : 06-09-2011

Acts Referred:
Contract Act, 1872 — Section 175(3), 70

Citation : (2011) 4 JCR 374

Hon'ble Judges : Prakash Tatia, Acting C.J.;P.P. Bhatt, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. Heard learned counsel for the parties.

2. The appellant is aggrieved against the Judgment dated 1.2.2011 passed by learned single Judge in W.P. (C) No. 46 of 2010 by which writ petition of the writ petitioner-appellant was dismissed.

3. The facts are not in dispute that the petitioner was given the contract to supply certain articles by the respondents, for which a bill of Rs. 64,74,761/- was submitted by the writ petitioner. The writ petitioner supplied the goods, which were retained and used, but when the cost of the above goods was demanded by the writ petitioner-appellant, it was refused by the respondents on the ground that the work order was given contrary to the rules/instructions contained in Resolution No. 5703 dated 1.10.2002 issued by the Finance Department, whereunder for any item of value above Rs. 50,000/-, tender should have been issued in the newspapers. This fact is not in dispute that no such tender was issued but the contract was given to the writ petitioner and the petitioner supplied the goods and the goods were not only accepted but also were utilised by the respondents. Therefore, the question for consideration before this Court is only that whether the respondents can retain the goods of the value of Rs. 64,74,761/- and at the same time deny the payment of the cost of goods on the

ground that the procedure for giving the contract was not followed by the persons and officers of the respondents'' department.

4. Learned single Judge, after considering the arguments of the parties, observed that Hon''ble Supreme Court in the case of ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, held that in an appropriate case, writ petition arising out of contractual obligation, is maintainable and merely because some disputed question of fact arises, the same cannot be the ground to refuse to entertain writ petitions in all cases as a matter of rule and that; a writ petition involving a consequential relief of monetary claim is also maintainable and in view of said judgment of Supreme Court held that "there is no dispute with respect to the above principle." Obviously the principle enunciated in the judgment, rendered by the Hon''ble Supreme Court cannot be disputed, rather to say, is required to be obeyed. In this case, as we have already noticed that the facts are not in dispute and this fact shows that the petitioner was given the supply order of goods of Rs. 64,74,761/- and there is no dispute with respect to the quality of the goods as well as value of the goods. However, the procedure was not followed in giving the contract to the writ petitioner and that was that before giving the work contract the department should have invited the tender. This fact is also not in dispute. Therefore, the petitioner''s case stands on a better footing than that of ABL International Ltd. & Anr. (supra), wherein Hon''ble Supreme Court held that merely because some disputed question of fact arises, on that ground the writ jurisdiction cannot be denied to the writ petitioner. The question only survives is that whether the respondents by taking help of this violation of procedure initially violated by their own employees and officers, can retain the goods without any consideration payment to the supplier? The procedure to purchase goods is prescribed, obviously, for the purpose of getting goods at a fair price from open market with an object to give an opportunity to all persons to compete as the Government contracts cannot be given by choice and by method of choose and pick up. In this case when it is not in dispute that the actual market value of the goods supplied by the writ petitioner is the same as claimed by the writ petitioner, in that situation the respondents cannot deny the payment of value of the goods received and used by them and there is no ground, other than violation of procedure. This cannot be basis for respondents to take double benefit of retaining goods of the petitioner as well as the consideration of the goods. If this is permitted then the principle of unlawful enrichment applies against the respondents who by entering into an illegal contract will take benefit of the goods without there being any consideration. We failed to understand as to how such a plea has been taken by the respondents in the facts of this case when they cannot justify that they have right to retain the goods of Rs. 64,74,761/- merely on the ground of not following the procedure by their own officers.

5. Learned counsel for the respondents submitted that the respondents initiated proceeding against their own employees departmentally. However, what

punishment has been imposed upon that employees is not known. In any fact situation, there cannot be penalty of Rs. 64,74,761/- because of non-observance of the procedure as indicated above. As, if the petitioner is denied the amount of Rs. 64,74,761/- because of non-observance of the rules, then that will amount to putting penalty upon the petitioner to the tune of Rs. 64,74,761/-.which is impermissible.

6. In addition to above, we may take the help of judgment of the Hon''ble Supreme Court delivered in the case of State of West Bengal Vs. B.K. Mondal and Sons, , wherein even the question of "lawful Contract" has been considered while interpreting Section 70 of the Indian Contract Act which requires that if a person has lawfully done something or lawfully deliver something to another, then he is entitled to get the consideration or reasonable damages for his action. The Hon''ble Supreme Court in paragraph 20 thereof observed that "It is well known that in the functioning of the vast organisation represented by a modern State Government officers have invariably to enter into a variety of contracts which are often of a petty nature. Sometimes they may have to act in emergency, and on many occasions, in the pursuit of the welfare policy of the State Government officers may have to enter into contract orally or through correspondence without strictly complying with the provisions of Section 175 (3) of the Act." Hon''ble Supreme Court held that if, in all these cases, what is done in pursuance of the contracts is for the benefit of the Government and for their use and enjoyment and is otherwise legitimate and proper Section 70 would step in and support a claim for compensation made by the contracting parties notwithstanding the fact that the contract had not been made as required by Section 175 (3). If it is held that Section 70 was inapplicable in regard to such dealings by Government officer it would lead to extremely unreasonable consequences and may even hamper, if not wholly bring to a standstill the efficient working of the Government from day to day. Hon''ble Supreme Court then observed that like ordinary citizens even the State Government is subject to the provisions of Section 70, and if it has accepted the things delivered to it or enjoyed the work done for it, such acceptance and enjoyment would afford a valid basis for claim of compensation against it.

7. In a case where the contract Is of a private nature with the Government and the facts are not in dispute, in that situation asking the parties to go to Civil Court and burden the Civil Court with the litigations, which could be decided without evidence in view of the undisputed or admitted facts, will be unnecessarily burdening the Courts and particularly when the parties have approached the Court and when the learned single Judge held that in the fact situation, the writ petition could not have been rejected in the light of judgment of Hon''ble Supreme Court in the case of ABL International Ltd. (supra), we do not find any justification now to send the parties to Civil Court in view of the facts of this case.

8. We are benefited by the judgment delivered in the case of Food Corporation of

India and Another Vs. SEIL Ltd. and Others, which also has taken the same view.

9. Learned counsel for the respondents relied upon the judgment of the Hon''ble Supreme Court delivered in the case of Jagdish Mandal v. State of Orissa and others, reported in (2007) 14 SCC 514. It has also been considered by the learned single Judge, on the basis of which the writ petition has been dismissed.

10. It will be worthwhile to mention here that in Jagdish Mandal''s case the Hon''ble Supreme Court observed that "the tenderer or contractor with a grievance can always seek damages in a civil Court. Attempts by unsuccessful tenderer with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade Courts to interfere by exercising power of judicial review should be resisted." The above observation clearly indicates that in such circumstances referred to above, the Court should be slow in entertaining writ petitions. Not only this in the same paragraph the Hon''ble Supreme Court observed that judicial review of administrative action intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision id "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. We have referred the above observations from the portion which has been quoted in the impugned judgment itself to indicate that subject matter in the case of Jagdish Mandal (supra) was entirely different and it nowhere overrules the propositions laid down in the case of ABL International Ltd. & Anr. (supra), nor it is a declaration of law that in a contract where there is no disputed question of fact, and this involves question of law only, requiring no detailed investigation even of law, writ petition is maintainable or not.

11. In view of the above reasons, we are of the considered opinion that the writ petition of the writ petitioner should have been allowed in the facts of the case. Hence, the impugned judgment is set aside and the writ petition is allowed. The respondents are directed to pay Rs. 64,74,761/- to the writ petitioner without any delay with interest (sic) 6 % per annum.

