(2007) 08 CAL CK 0004

In the Calcutta High Court

Case No : F.M.A. No. 395 of 2007 with CAN No. 4449 of 2004

Rajpath Contractors and Engineers Limited and Another — APPELLANT

Vs

State of West Bengal and Others — RESPONDENT

Date of Decision : 24-08-2007

Acts Referred:

Citation : 112 CWN 230

Hon'ble Judges : Rudrendra Nath Banerjee, J;Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Moloy Kumar Basu and K. Bhattacharyya, for the Appellant; Bikash Ranjan Bhattacharya, Shyamal Kumar Ganguly and Sambuddha Chakraborti, for the Respondent

Judgement

Bhaskar Bhattacharya, J.—The mandamus-appeal is at the instance of unsuccessful writ-petitioners and is directed against order dated 29th April, 2004 passed by a learned Single Judge of this Court by which His Lordship disposed of the writ-application filed by the appellants by granting leave to make representation to the Chief Engineer, Public Works Department, Government of West Bengal, for ventilating their grievances within a week from that date. His Lordship further ordered that if such representation was made within the aforesaid time, the Chief Engineer concerned should consider and dispose of the said representation in accordance with law after giving opportunity of hearing to the petitioners or their representatives and should pass a reasoned and speaking order within a month from the date of submission of the representation to him.

2. His Lordship further added that if the petitioners filed a fresh bank guarantee of Rs. 91,30,683/- as indicated in the Memo No. 1069 dated April 19, 2004 issued under the signature of the Executive Engineer, Public Works Department, Barasat Division, the department concerned should not take any coercive action against them.

3. The Chief Engineer was directed to communicate his decision to the petitioners within three days from the date of taking his decision in the matter.

4. Being dissatisfied, the writ-petitioners have come up with the present mandamus-appeal.

5. The facts giving rise to the filing of the writ-application out of which the present mandamus-appeal arises may be precised thus :

(a) The writ-petitioners were entrusted by the Superintending Engineer, Eastern Circle of Public Works Department on behalf of the Governor of the State of West Bengal with the work-order for execution of strengthening/improvement of Barasat-Basirhat-Hasnabad Road in the District of North 24-Parganas for a stretch of 55 Kms. under the Executive Engineer-1 (PWD), Barasat Division and accordingly, an agreement was entered into between the parties. According to the writ-petitioners, they completed the work and after submission of the bill, full payments were made but subsequently, all of a sudden, by Memo dated 7th April, 2004, the Executive Engineer, P.W.D. Department, Barasat Division, pointed out that as there was no increase in the tax structure by legislation during the stipulated period of construction, the payments towards the price escalation on Diesel and Bitumen allowed to the writ-petitioners was irregular and the same was required to be recovered from them. According to the Executive Engineer, P.W.D., the excess payment towards escalation price of Diesel and Bitumen amounting to Rs. 90,34,480/- was erroneously made as the same was not covered by the tender-agreement. The writ-petitioners, therefore, were directed either to submit authentic documents showing change in tax structure by legislation of those two articles during the stipulated period of making construction resulting in the increase of price of those materials or to refund / deposit the said excess amount in the office immediately for regularization.

(b) By a further letter dated 19th April 2004, the writ-petitioners were directed to submit a fresh bank guarantee of Rs. 91,30,683/- within five days with a threat that in default, suitable action would be taken against them.

6. As indicated above, being dissatisfied, the appellants filed the writ-application, which has since been disposed of by the learned Single Judge.

7. Being discontented, the writ-petitioners have come up with the present mandamus-appeal.

8. Mr. Basu, the learned senior advocate appearing on behalf of the appellants by referring to the relevant clause of the agreement between the parties pointed out that there was no scope of refund of the amount taken by his clients due to escalation of the charges of Diesel and Bitumen during the said period as those were "star priced materials" indicated in the agreement. Mr. Basu contends that even if the prices of Diesel and Bitumen are increased by the Government not because of restructure of tax by the enactment of the legislation, his clients cannot be asked to pay the excess amount in accordance with the terms of the agreement. Mr. Basu, therefore, contends that there was no justification for passing a direction for refund of the amount on the ground that the escalation of the prices of Diesel and Bitumen were made pursuant to the executive order of

the Government and not by the act of the legislation.

9. Mr. Bhattacharya, the learned senior advocate appearing on behalf of the State of West Bengal has opposed the aforesaid contentions of Mr. Basu and has contended that a plain reading of Clause 12 of the agreement will leave no doubt that only in case of enhancement of the price of those two articles due to the change of tax structure by legislation, the contractor should be entitled to claim the excess amount and in the case before us, there being no increase of price of those two items due to change of tax structure by legislation, the writ-petitioners are not entitled to get the enhanced amount.. Mr. Bhattacharya next contends that there is no justification of entertaining the appeal as the learned Single Judge has merely asked the appellants to approach the concerned Engineer. He, therefore, prays for dismissal of the appeal.

10. Therefore, the principal question that falls for determination in this mandamus-appeal is whether in view of the agreement between the parties, the excess amount towards the increased price of Diesel and Bitumen was erroneously paid by the respondents and consequently, the same was recoverable from the writ-petitioners.

11. To appreciate the question, it will be profitable to refer to Clause 12 of the agreement between the parties, which is quoted below:

"12. There shall be no addition deduction of any sums to the contract price on account of rise/fall in the cost of labour and/ or materials or any other items, which may affect the cost of the execution of works, except star priced materials like Diesel and Bitumen. Only the effect due to change of tax structure by legislation will be applicable. (Price quoted by the agency in the offer/I.O.C.''s price as on 01-12-1999 (where the price has not been mentioned) will be taken as base price, Quantum of enhancement/reduction on the said rate will only be admissible on the quantity procured during the period of consideration)."

12. After hearing the learned counsel for the parties and after going through the aforesaid clause, we find that the said clause consists of two main sentences with an added explanatory sentence within first bracket at the end of the second sentence. The first sentence without any ambiguity declares that there should not be any addition or deduction of any sum to the contract-price on account of rise/fall in the cost of labour or materials or any of the items involved which may affect the cost of execution of works, except the star priced materials like Diesel and Bitumen. Therefore, the Diesel and Bitumen have been kept out of the purview of the first sentence and consequently, any increase or fall of the price of Diesel or Bitumen will affect the cost price mentioned in the agreement and the parties will be bound by the rise or fall of price of those two items whatever may be the reason for such rise or fall.

13. The second sentence, however, clarifies that in respect of the cost of labour/ materials or any other items (excluding the Diesel or Bitumen) involved in the process of execution of the work, only the variations of the costs thereof due to

change of tax structure by legislation would be recognised, meaning thereby, that in case of alteration of costs of labour/ materials or any other items than Diesel and Bitumen, if such alteration of price is the outcome of the change of tax structure by legislation, the parties would only be bound by such revision but not in case of alteration of costs for any other reason.

14. The third sentence within the first brackets only explains that the price quoted by the agency in the offer and in the absence of mention of such price in the offer, the price fixed by the Indian Oil Corporation as on 1st December, 1999, would be taken as base price and the quantum of enhancement/ reduction on the said rate would only be admissible on the quantity procured during the period of consideration.

15. Therefore, it is apparent in the case of rise/fall of price of any materials, except Diesel and Bitumen, the parties will be bound by the price fixed by the contract unless rise/fall is based on change of tax structure by legislation. However, the increase or fall of price of Diesel and Bitumen are not governed by the aforesaid clause and in case of any increase or fall of those two articles, be it by the change of tax structure by legislation or otherwise, the parties will be entitled to the benefit of rise or fall of price of such article, as the case may be.

16. The reasons for keeping those two articles from the aforesaid clause is well understood, because, the rise or fall of the price of those two articles depends upon either the executive decision of the Central Government from time to time or by the change of tax structure by the legislation and no other person has any role to play in such rise or fall; whereas, in case of rise or fall (rarely) of the price of any other materials, the manufacturers, intermediaries, dealers, distributers or even the retail sellers may be involved in the process of increase of the price and to safeguard the interest of the public exchequer from the whims of those persons, the clause did not permit a contractor to rely upon the changed price of other articles except in case of increase or decrease due to change of tax structure on those articles by the legislation.

17. In the case before us, there is no dispute that the Central Government itself increased the price of Diesel and Bitumen during the period of contract, as a result, the enhanced amount mentioned in the notice was paid to the writ-petitioners; subsequently, the State Government has come out with the plea that such increase of price of Diesel and Bitumen was not due to change of tax structure by legislation and, therefore, the appellants should refund the amount.

18. After hearing the learned counsel for the parties, we are of the view that the only reasonable interpretation that is possible on a plain reading of Clause 12 has already been indicated by us and it is preposterous to suggest that even in case of Diesel and Bitumen, the price of which is fixed by the Central Government, the contractor will suffer even if the Central Government increases the price not consequent to the restructure of tax by legislation but by executive direction. The intention of Clause 12 of the agreement is clear in the sense that Diesel and

Bitumen were kept out of its'' purview and as even apart from the change of tax structure by legislation, often the price of those articles are increased or decreased by the executive instruction of the Central Government. Because of increase of price, the augmented amount will be deposited in the public exchequer and therefore, the exchequer will not suffer for payment for the additional sum to the contractor. Similarly, if for executive instruction, there is a fall of the price of those two items, there will be lesser amount of deposit in the exchequer and that deficiency should be filed up by the contractor and instead of paying him the agreed sum, the shortfall due to fall of price would be deducted from his dues. If we accept the contention of Mr. Bhattacharya that only in case of rise or fall of prices of those two items due to change of tax structure by legislation there may be variation of the price fixed by the contract, in that case, the public exchequer will suffer for the decrease of price of those items by the executive direction of the Central Government and the contractor in spite of the fact that he procured those items at lower price from the market, would get the higher price fixed by the agreement. Such is, definitely, not the intention of the Clause 12 of the agreement.

19. We, therefore, find substance in the contention of Mr. Basu, the learned senior advocate appearing on behalf of the appellants that the demand of the respondent authority for refund of the alleged excess amount was uncalled for as the price of those items can be increased only due to either the executive instruction of the Government or by the change of restructure of tax policy by legislation and for that reason those two articles were taken out of the Clause 12 of the agreement for public interest.

20. We also do not find any substance in the contention of Mr. Bhattacharya, the learned senior advocate appearing on behalf of the respondents that the matter should be reconsidered by the Chief Engineer. It is rightly pointed out by Mr. Basu that the notice impugned in the writ-application was issued on the basis of the direction of the Chief Engineer and the writ-petitioners were directed to justify that the enhanced amount was due to change of tax structure by legislation by totally misinterpreting Clause 12. Therefore, no purpose would be served by returning the matter back to the Chief Engineer for reconsideration.

21. We, thus, hold the Clause 12 of the agreement between the parties does not permit the Government to refuse excess payment incurred by the contractor due to trise of prices of Diesel and Bitumen at the relevant point of time fixed by the Central Government and in the case before us, the writ-petitioners are entitled to retain the amount already sanctioned provided the amount mentioned in the letter impugned is attributable due to increase in price of Diesel and Bitumen.

22. Although, Mr. Bhattacharya tried to convince us that there was violation of other clauses of the agreement, since such question is not the subject-matter of the writ-application, we do not propose to enter into the same and the respondents will be free to take appropriate steps in accordance with law if there are violation of any other terms of the agreement at the instance of the writ-

petitioners.

23. We, therefore, set aside the order passed by the learned Single Judge and direct the respondents not to realise the excess amount paid to the appellants due to increase of the price of Diesel and Bitumen at the relevant point of time, although, such increase was not due to change of tax structure by legislation but by the executive order of the Central Government. The Memo dated 7th April, 2004 issued by the Executive Engineer which was impugned in the writ-application is quashed. The mandamus-appeal is, thus, disposed of with the aforesaid direction. In the facts and circumstances, there will be, however, no order as to costs.

Bhaskar Bhattacharya, J.

I agree.

Rudrendra Nath Banerjee, J.

