

(2008) 07 PAT CK 0116
In the Patna High Court

Satav Infrastructure Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-07-2008

Acts Referred:

Citation : (2008) 07 PAT CK 0116

Final Decision : Allowed

Judgement

Navaniti Prasad Singh, J.—Identical dispute is involved in both the writ applications, which have been filed by the same petitioner in respect of two contracts which were awarded to the petitioner. The challenge is to the cancellation of the contract by the respondent Central Public Works Department by identical letters dated 11-1-2008, which is Annexure-16, in the first writ application and Annexure-15, in the second writ application. While cancelling the agreement earnest money of Rs. 48,87,500 and performance guarantee of Rs. 2,52,39,000 in the first case and similar amounts in the second case have been ordered forfeited.

2. During pendency of the writ applications fresh advertisements were issued inviting tenders the finalization of which was stayed by interim order of this Court passed on 6-2-2008, Central Public Works Department and its Officials connected with Rashtriya Sam Vikas Yojana (RSVY) have appeared and filed detailed counter-affidavit and rejoinder thereto filed by the petitioner.

3. Learned Advocate General of Bihar appeared suo motu in the general interest of the State of Bihar though State of Bihar is not a contesting party.

4. Parties were heard and with their consent the writ application is being disposed of at the stage of admission of itself.

5. Petitioner is a company, which is engaged in large infrastructure development programmes all over the country and has its registered Office at Pune in the State of Maharashtra. Central Public Works Department (hereinafter referred to as CPWD) is a department under Union of India and had been entrusted in the

State of Bihar the task of development of State High Ways under the Rashtriya Sam Vikas Yojana.

6. CPWD through its consultancy service organization issued notices inviting tender being NIT No. 63/NIT/RSVY (Bihar)/ 2006-07 in the first case, and 62/NIT/RSVY/(Bihar)/2006-07 in the second case. In the first case which is commonly referred as Package No. 10-B, it relates to the State High Way connecting Sheikhpura to Ramgarh and the road Sikandra to Lakhisarai via Ramgarh falling within the districts of Sheikhpura and Lakhisarai of the State. In the second case it related to State Highway between Bar Bigha to Sikandra via Sheikhpura and is commonly referred to as Package No. 10-A. The total estimated cost of package of 10-B was Rs. 47, 21, 94, 960 and that of Package 10-A was Rs. 38,87,16,498.

7. The petitioner company having requisite qualification and experience of undertaking such works filed their tender for both the packages separately. When tender documents were opened negotiations were held on 4-6-2007 petitioner agreed to reduce its rates to a point which was then accepted by respondent's letter dated 22-6-2007 for total value far above the estimated cost. Therefore, the acceptance was formally conveyed by letter dated 25-6-2007 by the Executive Engineer, RSVY, Project Division CPWD, Gaya. The said letter of acceptance mentioned that the time allowed for carrying out the work was 19 months which would reckon from 10 days from the issuance of this letter dated 25-6-2007, but, letter of commencement of work would be issued and the site of work shall be handed over to the petitioner of receipt of performance guarantee which was indicated in the said letter. The petitioner thereafter was issued another letter dated 30-7-2007, after performance guarantee was deposited, directing the petitioner to complete formal agreement and contract the respondent-Assistant Executive Engineer for taking possession of site and start the work immediately.

8. It may be mentioned that in the notice inviting tender in Chapter 1 Clause 3, it had been stipulated that the time allowed for carrying out the work was 19 months from the 10th day after issuance of letter of acceptance or from the first day of handing over the site, whichever is later. It was stated that the site for work was available.

9. The petitioner approached respondent Assistant Engineer to hand over the site and start work but he was not in a position to give possession of the site as there were several formalities that had to be undertaken before petitioner could initiate his work. This, apart from others, included getting clearance from various Government departments for removing trees which were all along the pre-existing roads on both sides, then there was removal/realignment of electricity poles and transformers for which permission and co-operation of the Electricity Board was required. Similarly, there were Telephone Poles which had to be removed/realigned by Bharat Sanchar Nigam Ltd.

10. It may be noted here that the road which petitioner had to construct now

had to be a double lane road with substantial unobstructed side flanks and it had to be realigned and relaid as the existing road was a narrow single lane road not properly laid. This necessitates deep digging for laying new foundation and working in trenches.

11. By letter dated 3-8-2007, the respondent Executive Engineer asked the petitioner to start the work immediately. In the said communication, he directed the petitioner to submit detailed list of trees, poles and transformers etc. which are along the road. This was necessitated because of the special conditions contained in Chapter 6 of the tender and in particular Clause 6.4.2 which reads as follows:

The responsibility of removal of utilities & encroachments etc. which come in the way of execution of work shall be that of the concerned Departments/organizations. However, the contractor shall co-ordinate with these Departments/organizations effectively to get the project area cleared expeditiously.

12. At the very outset, I may point out that this Clause clearly predicates that removal of obstructions at the site in the shape of trees, poles and transformers etc. being beyond the independent control of petitioner consequently was made the responsibility of the concerned departments and organizations, for obvious reasons. They were neither the property of CPWD nor the property of the State Government. There were different laws controlling their removal and placements and those authorities are not within or under the control of the petitioner, but, removal thereof was a natural requirement before any work could be undertaken in a systematic manner.

13. The petitioner was then given physical possession only with regard to certain patches which were unobstructed though on paper it was shown that site was available for work. Petitioner started to set up its site offices, started procuring equipments, informed the authorities about it. Then as required by earlier referred two letters, it conducted a detailed survey of trees, electric and telephone poles and transformers along the site which had to be removed before the site could factually be handed over to the petitioner for commencement of work. These details with every individual tree mark, every individual electric poles, telephone poles and transformers mark along the site was submitted on 4th of November 2007 and is not disputed by any party. I will discuss the details of this survey later.

14. Petitioner was then asked to submit revised plan for execution of the work and get the work executed in full swing by letter dated 8-11-2007, in response to which petitioner expressed their willingness and competence for completing the work on schedule. They stated clearly in their letter dated 12-11-2007 that there was no laches on their part as sites had yet not been handed over. Detailed survey of physical obstructions had been submitted for removal for which the respondents had to get clearances with cooperation and co-ordination from the district administration and as soon as that is done the work would be started.

Another fact mentioned by it was that there had been unprecedented rains flooding various sites which had been seen by the respondent themselves.

15. It appears that the respondent Assistant Engineer of CPWD was to co-ordinate with the local authorities for removal of obstructions so that work could start. Petitioner met authorities and the District Magistrate, Sheikhpura, the district authorities noticed various Officers by their letter dated 2-1-2008 calling for meeting of all the authorities of PHED, Electricity Board, Irrigation Department and Telecommunication etc. The Assistant Engineer drew up a detailed agenda for each of the authorities clearly pointing out their responsibilities, which is a part of Annexure-15. I may note here that he (respondent-Assistant Engineer) has clearly in the agenda pointed out that non-removal of those obstructions were hindering the progress of the work as obviously without removal of those hindrances no organized work could start, I may note here that this letter/agenda drawn up by the respondent Assistant Engineer and the facts mentioned therein as also the survey report as submitted by the petitioner are not disputed by anyone. But, before anything could materialize, suddenly on 11-1-2008, the petitioner was issued with the impugned letter cancelling the agreement and forfeiting the earnest money and performance guarantee on the sole ground that till date petitioner had failed to commence the work as specified in the contract. It is the validity of this cancellation and forfeiture that is in challenge.

16. Petitioner's submissions are short and concise. It is submitted that unless a site free from obstruction is handed over it cannot be expected to commence work and that too in small patches spread over almost a 100 Kms. Secondly, it is submitted that reference to special condition No. 6.3 that the requirement to commence the work at site shall be fulfilled if a programme has been submitted in accordance with special condition No. 6, 7, the contractors authorized representatives with full supporting staff are in possession at site, the equipment material and labour for work programme in the first month have been mobilized to the site. These things, it is not disputed, were complied under the circumstances, but physical work in full swing could not commence till obstructions were removed, which were not few but were many. It was pointed out with reference to the survey that there was hardly even a patch of half a kilometer along the road which was not obstructed either by trees which had to be removed or by electric poles or by telephone poles or at places transformers. Under the said circumstances, to say that petitioner had not commenced work was neither factually correct nor legally acceptable.

17. Learned Advocate General, Bihar, appeared not on behalf of any of the contesting respondents but on his own and submitted that CPWD had a right to cancel the agreement, it exercised that right. Even if, it was wrongly or arbitrarily exercised, the petitioner had adequate remedy in before Civil Court but it could not challenge the actions in writ jurisdiction.

18. CPWD on its part submitted in substance, that watching the situation and the

slow progress of work they formed an opinion that the petitioner had failed to commence the work at site and as such having authority to cancel the agreement, did it. Their further stand is, without disputing the petitioner's detailed survey report as submitted to them and without disputing that State instrumentalities and authorities, work could still be started in between the obstructions in small patches and the same not having been done, the action of termination was fully justified.

19. It is not disputed by any party that even on the own showing of respondents there was still more than a years time left for completing the work, when action to short terminate the agreement and forfeitures ordered.

20. In my view, the questions that arise for consideration are - (1) whether in entering into contracts or terminating contracts State or State instrumentalities are bound not only by contractual stipulations but by the principles enshrined in Article 14 of the Constitution as distinct from a private individual ? (2) Whether in case, where the action of terminating a contract by a State instrumentality is challenged on grounds of violating the reasonableness and the fairness norms of Article 14 of the Constitution is approaching the Civil Court for redressal, the only remedy available and the writ remedy not available? Whether in the facts and circumstances of the case, the actions of the respondents cannot be interfered with by this Court in writ jurisdiction under Article 226?

21. Before proceeding further certain more factual aspects need to be noticed. For the road to be constructed the black top was to extend (sic) to 3.50 meters on either side from the centre line, this means that the black top width was to be 7 meters with additional 2.5 meters of shoulder (flank) constituting earth work. As noticed above, the respondent-Executive Engineer who ultimately communicated the order of termination himself, by his letter dated 3-8-2007, asked for detail list of trees, poles and transformers etc. along the work site, which as indicated above was necessary for their removal/realignment, so that the new road could be laid out and it is in response to this that the petitioner got detail survey of all the site done and submitted the same. If one sees the survey report submitted, the contents whereof have not been disputed by any party it would be seen that there was hardly a clear patch existing of even half a kilometer road without physical hindrances on either of the side of the road.

22. In my view, one does not have to be an expert to deduce that to carry out work at this scale, systematically, maintaining homogeneity, integrity and continuity of the work, site must be cleared of physical obstructions. To say that heavy machineries can be moved and small trenches worked avoiding physical obstructions and then as and when they are removed to come back and dig up those areas and complete the section, to my mind, is neither reasonable nor fair as no work in such a large integrated manner can be carried out in fragmented patches.

23. It appears, the respondents had to show some tangible progress, but, the

petitioner could not undertake the physical work till obstructions were removed and as such apparently the respondents chose to cancel the contract throwing the blame on the petitioner, rather than, taking urgent and effective steps to hand over clear site for the convenient working of the petitioner. Here, I may mention that when the argument talks of handing over the site, it is not mere paper handing over of site as sought to be asserted by respondents that is relevant, but, it is naturally to be an unhindered, unobstructed free for work site which admittedly was not done by the respondents. It is a far cry, then, to urge that the action of the respondent was fair and reasonable and fully justified. In my view, that would be travesty of justice, specially, when cancellation is coupled with forfeiture of crores of rupees. It is well settled that the harsher the punishment/penalty the stricter, the scrutiny by Court of the fairness and reasonableness of the action.

24. Keeping in view these factual aspects, let's now examine the legal issues. Firstly, whether, there is a distinction between State instrumentality and private individuals in sphere of contract. In my view, it is too late in the day to suggest that State whether in entering into contracts, settling largess or terminating contracts is free to act just like an individual uncontrolled by or unhindered by the requirements of fairness and reasonableness, as enshrined in Article 14 of the Constitution. In my view, State and State instrumentality apart from being bound by contractual obligation like an individual has additional responsibility to see that its action conform to Article 14 of the Constitution and this to my mind was set at rest by the decision of the Apex Court in the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, . It would be useful to quote from Paragraph 12 of the reports in the above mentioned case:

...It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts quotas, licences etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard of norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory....

25. Here, I may also refer the Constitution Bench judgment of the Apex Court in the case of Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, and in particular the judgment of Sawant, J. wherein in Paragraph 223 at page 173 of the report, after pointing out that, it is inadvisable to depend on the good sense of the individuals, however, high-placed they may be. It is all the more

improper and undesirable to expose the precious rights like the rights of life, liberty and property to the vagaries of the individual whims and fancies. It is trite to say that individuals are not and do not become wise because they occupy high seats of power, and good sense, circumspection and fairness does not go with the posts, however, high they may be. There is only a complacent presumption that those who occupy high posts have a high sense of responsibility. The presumption is neither legal nor rational. History does not support it and reality does not warrant it.

26. Their lordships then lay down thus:

...The right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them....

27. Then, a reference may be made to a recent decision of the Apex Court in the case of ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, In this case, as against a repudiation of insurance claim by Export Credit Corporation of India Ltd. the petitioner company had filed a writ application before the Calcutta High Court challenging the repudiation, which was allowed by Hon"ble single Judge, but, reversed by the Appellate Bench of the same High Court, which brought the petitioner company to the Apex Court. Before the Apex Court, it was contended that writ proceedings were not the proper remedy against repudiation of insurance claim; it was virtually a money claim, which could not be entertained in writ jurisdiction. After reviewing elaborately the case laws on the subject their Lordships have held that there is no rule that in matters of contract Court's jurisdiction under Article 226 of the Constitution is ousted. It further held that it is not an absolute rule that in all cases involving disputed questions of fact the party should be relegated to Civil suit. In paragraph 23 of the reports it held as thus:

...It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the Contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India....

28. The law was ultimately laid in Paragraph 27 thereof, which is quoted hereunder:

...From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also the answer to the first issue that (sic) maintainable....

29. In a recent decision of the Apex Court in the case of Food Corporation of India and Another Vs. SEIL Ltd. and Others, the question with regard to maintainability of writ petition is contractual matters arising out of breach of contract including the question of money claim. In Paragraph 16 of the reports the Apex Court held thus:

...It is now no longer res integra that contractual disputes involving public law element are amenable to writ jurisdiction. In these cases, the Central Government not only scrutinised the bills but also verified the claims of the respondents. A direction was issued to make payment. The appellant, which is "State" within the meaning of Article 12 of the Constitution of India, withheld payment without any legal justification....

30. Their Lordships of the Apex Court then relied on the earlier judgment of the Court in the case of ABL International Ltd. (supra) in para 21 of the reports to justify maintainability of writ in contractual matters to set right the arbitrary actions of State or its instrumentalities.

31. Merely because State or State instrumentality has entered into a contractual obligation it is not absolved of its responsibilities under Article 14 of the Constitution in addition to contractual obligations. This distinction, which is now well established and it is this that distinguishes its action from that of an ordinary citizen to whom or to whose actions Article 14 of the Constitution does not apply. Thus, all actions of State or State instrumentality including those in relation to contractual sphere have to be tested not only on contractual basis but on the anvil of Article 14 as well. If it is found that the actions are lacking in reasonableness and fairness then notwithstanding contractual terms the actions will be quashed and this Court would be constitutionally obliged to do the same. Now, it is established beyond doubt that every State action must be fair and reasonable and what is reasonable is well established. One of the tests would be what is well known as "Wednesbury principle of reasonableness." Where no reasonable man would act in a manner in which, under the facts and circumstances, the State has acted then the actions of the State would be deemed to be unreasonable. Reasonableness and fairness, in my view, is the heart and soul of Article 14 and every State action or action of State instrumentality has to thus conform to it, irrespective of their field of operation.

32. The next issue is as raised by the learned Advocate General of Bihar that once the power to terminate the agreement and forfeiture was exercised under a contract the remedy is only Civil Court has to be answered in the negative. The observations of the Apex Court in the decision above have to be kept in mind

which clearly indicate and hold otherwise. Here, I may also usefully refer to the judgment of the Apex Court in the case of Hindustan Petroleum Corporation Ltd. and Another Vs. Dolly Das, and in particular the law as laid down in Paragraph 9 thereof;

...We may now advert to the contention that the writ remedy is not appropriate in this case. Where interpretation of a contract arises in relation to immovable property and in working such a contract or relief thereof or any other fallout thereto may have the effect of giving rise to an action in tort or for damages, the appropriate remedy would be a civil suit. But if the facts pleaded before the Court are of such a nature which do not involve any complicated questions of fact needing elaborate investigation of the same, the High Court could also exercise writ jurisdiction under Article 226 of the Constitution in such matters. There can be no hard and fast rule in such matters.

When the High Court has chosen to exercise its powers under Article 226 of the Constitution we cannot say that the discretion exercised in entertaining the petition is wrong....

(Underlining supplied for emphasis).

33. Here, I may point out that if it were to be held in the present case that the only appropriate remedy as suggested by the learned Advocate General was for the petitioner to suffer cancellation and forfeiture and huge amount of money running into several crores to move the Civil Court, then, let us see the consequences thereof. Litigation in Civil Courts are notoriously slow. It may take well over a decade, if not several decades for a civil litigation of this magnitude to reach any finality. By then, the petitioner would have been completely financially ruined and even if the litigation after decades are to end in its favour it would be of no use. Asking a party in such circumstances to go into civil litigation would be a death blow and would virtually be forcing it to seek other remedies and would be putting a premium on the extreme power wielded by the State or State instrumentality. In words of the Apex Court in the case of Gaya Prasad Vs. Sh. Pradeep Srivastava,

...If a citizen is told that once you resort to legal procedure for realization of your urgent need you have to wait and wait for 23 to 30 years, what else is it if not to inevitably incur and force him to resort to etc. legal measures for realizing the required relief. A Republic governed by rule of law cannot affirm to compel its citizen to resort to such etc. legal means which are very often contract legal means with counter productive results on the maintenance of law and order in the country....

34. Where the facts are not in serious dispute and can be resolved in a summary proceeding before a writ Court in a short time and relief granted, then, this Court wonders why State or State instrumentalities fear facing the proceedings in a writ Court and drive a person to prolong litigation elsewhere? State must do what is just and fair and must not be permitted to take technical pleas to defeat the

legitimate claims of citizen and drive them to civil suit as held in the case of Hindustan Sugar Mills Vs. State of Rajasthan and Others,

35. Thus, I hold that even in matters of termination of contracts State action has to conform to the norms of Article 14 and notwithstanding other remedies available, it cannot be said that writ petition under Article 226 is not maintainable or is not the proper remedy, which remedy the most expeditious remedy available, provided that there is no serious controversy of fact which this Court cannot resolve in these proceedings. While on this reference may also be made to a recent decision of the Apex Court in the case of Bhikhubhai Vithlabhai Patel and Others Vs. State of Gujarat and Another, wherein their Lordships held that there cannot be any absolute or unfettered discretion even in case of administrative action. This is in response to the submission of the learned Advocate General, Bihar, wherein, he submitted that the contract gave power to the respondent to cancel or terminate the agreement, it terminated it and therefore it exercised the power it had, power being there no further questions could be raised.

36. In the said judgment the Apex Court has further laid down that where an action can be taken on formation of an opinion which is a condition precedent then even though the opinion is subjective, it must be based on material disclosing the necessity to take action. The formation of opinion should reflect intense application of mind with reference to the material available on record. The exercise should reflect application of mind which postulates consideration of all the relevant facts and aspect of the matter. This, in my view, is a necessary fall out of application of Article 14 of the Constitution and if it is found that while taking action the relevant aspect has been ignored or not taken note of the action would be liable to be questioned as being violative of Article 14 of the Constitution.

37. This brings us to the last issue as found above. It is not in dispute that there was enormous number of physical obstructions all along. The site plan details whereof were asked by the respondent-Executive Engineer himself and supplied by the petitioner in form of a detail survey establishes it. They were noticed by the respondent-Assistant Engineer in the agenda drawn up for the meeting of various officials at the district level to seek their co-operation in removal thereof which emphasizes the necessity of removal thereof, for, the work to be effectively and systematically carried out. None of these facts were disputed by the respondents. Yet, the order terminating does not at all disclose application of mind to this aspect at all which was extremely relevant matter. The only ground given for terminating was non-commencement of work and subsequently in counter-affidavit filed pleas are taken that in small unobstructed patches work could have been commenced is no gain saying. Petitioners were to be given the site which had to be unobstructed and free for work which was, in fact, never done. Mere handing over site on paper is no good as work has to be performed on ground and not on paper. It can reasonably be said and held that it was the

duty, as also pointed out earlier from the contract itself, of the respondent to ensure removal of obstructions, which admittedly was not done.

38. Facts clearly revealed that even before effective meeting of the district administration for the purpose could take place and action taken thereafter, the agreement was cancelled for non-commencement of work. In my view, considering the nature and scope of work and nature of physical obstructions at the site the action of the respondents in holding that the petitioner had not commenced work was neither a fair nor a reasonable deduction nor a reasonable or fair action. In my view, the facts clearly thus establish that the petitioner was not at fault. The fault lay at the hands of the respondents who were bound to hand over site free from obstruction and failed to do so. For the fault of respondents the petitioner cannot be punished and made scapegoat. The action of terminating the contract is, thus, violative of Article 14 of the Constitution and is per se arbitrary.

39. Though, this Court is not called upon to decide this issue as raised by the petitioner that only to avoid being held responsible for not getting the work expedited, the respondents chose to throw the burden on the petitioner and blame the petitioner making it a scapegoat for their own inactions in handing over clear obstacle free site. It is being noticed for the sales of records.

40. The result is that the petitioners have succeeded in establishing that the action in terminating the agreement and ordering forfeiture was per se arbitrary and violative of Article 14 of the Constitution and is liable to be set aside and is set aside as such. The consequences being that subsequent notice notifying re-tender would also stand rescinded and the petitioner would be entitled to complete the work allotted to it under both the agreements with additional period for which work remained suspended because of cancellation.

41. The writ applications, thus, stands allowed.