
(2010) 03 OHC CK 0032
In the Orissa High Court

Sri Padma Charan Patra

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 23-03-2010

Acts Referred:

Citation : AIR 2010 Ori 149 : (2010) 110 CLT 291 : (2010) 2 OLR 355

Hon'ble Judges : I.M. Quddusi, Acting C.J.;B.P. Ray, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.P. Ray, J.—The Petitioner has filed the present writ application being aggrieved by the decision of the State Government in issuing a notice inviting Tender for completing the balance work awarded to the Petitioner on 19.11.2004, vide Agreement No. 305 F2 of 2004-05 dated 19.11.2004 for construction of H.L. Bridge over river Luna with 30 mtrs. approach on either side of Chandol-Danpur Road. The Petitioner also seeks for a direction to close the contract without levy of penalty & direct the State Government to pay all its dues with reference to Agreement No. 305 F2 dated 19.11.2004 including escalation, which is entitled to under the agreement.

2. Briefly stated, the Petitioner is a super class contractor engaged in the business of civil construction like construction of roads, bridges etc. The Government of Orissa in the Works Department invited application for construction of H.L. Bridge over river "Luna" at Danpur of Chandol Danpur Road with 30 mtrs. approach. The Petitioner submitted its tender & since his tender was found to be the lowest, a work order was issued in his favour on 19.11.2004. On the same date, an agreement was entered into between the Petitioner & the Executive Engineer, Kendrapara (R & B) Division for executing the said work. The work was to commence on 19.11.2004 & was to be completed on 18.05.2006.

3. In course of execution of the work, the Petitioner faced the following

difficulties:

- (i) The land for pier well No. P7 had not been acquired by the State Government, because of which the local people are obstructing the progress of the work.
- (ii) The design & drawings of the wells were not handed over to the Petitioner.
- (iii) Well cap bottom levels were not fixed.
- (iv) Since well cap bottom level of abutment well AR & two canal abutment wells ARI & All were not finalized, the progress of these wells were being hampered.
- (v) The well curb shuttering & steel were getting submerged because the water level of the river was rising by two to three feet due to opening of the sluice gate of the Anicut by the Water Resources Department.

4. The Petitioner ventilated his aforesaid grievances/difficulties to the Opp. Parties, vide its various communications dated 08.02.2005, 22.03.2005, 25.04.2005, 29.11.2005, 10.12.2005, 11.02.2006, 13.03.2006 & 17.04.2006 vide Annexures-4 to 13 respectively. No steps were however taken by the Opp. Parties to mitigate the hardship which the Petitioner was facing. Consequently, the Petitioner could not progress with the work as per schedule.

5. On 17.04.2006, the Petitioner made his first application for extension of time to complete the work. While his application was pending, on 22.06.2006 a show cause notice was issued to the Petitioner by the Executive Engineer, Opp. Party No. 1 as to why stops shall not be taken against the Petitioner for disproportionate progress in completion of work by the stipulated date. The Petitioner replied to the said notice on 03.07.2006 indicating therein that the delay in completion of the work was on account of delay in supply of drawing & design, non-acquisition of land on either side of the bridge & the design of Pier Wells were approved & communicated on 16.12.2005 i.e. 13 months after the date of issuance of the work order & execution of the agreement, delay in taking decision for fixation of well cap bottom level & unusual rising of water level during working season due to opening of sluice gates of Anicut by Water Resources Department. On receipt of the reply of the Petitioner, the proceedings pursuant to notice dated 22.06.2006 was dropped by the Executive Engineer, Opp. Party No. 2.

6. The Executive Engineer, Opp. Party No. 2 recommended the application of the Petitioner for extension of time on 22.08.2006, i.e. two months after the request for extension was made by the Petitioner. On 02.05.2007, vide Annexure-19, the Superintending Engineer, Opp. Party No. 3 recommended to the Chief Engineer (DPI & Roads) Opp. Party No. 4 for extension of time without levy of penalty & with the benefit of price escalation. This clearly establishes that the Opp. Parties were conscious of their various laches set out in detail in the preceding paragraphs & the delay in execution of the work was not attributable to the lapses of the Petitioner.

7. On 04.06.2007, the Executive Engineer, Opp. Party No. 2, wrote a letter to the Petitioner asking him to intimate by 05.06.2007 the date by which the work on the bridge under the contract can be completed in all respect. It may be noted that even by that date the drawings/designs/specifications had neither been handed over to the Petitioner nor had the land been acquired.

8. The Petitioner accordingly on 10.07.2007, requested for closure of the contract without levy of penalty. The Petitioner was constrained to do so, because In the absence of drawings/designs/specifications, he is neither in a position to complete the work nor give any commitment in this regard as was being sought by the Executive Engineer, Opp. Party No. 2.

9. On 27.07.2007, the Executive Engineer, Opp. Party No. 2 wrote a letter to the Supt. Engineer, Opp. Party No. 3 stating that the drawings & designs are yet to be finalized & acquisition of land is yet to be completed & in view of the fact that the Petitioner has expressed his unwillingness to continue with the project, the contract may be closed as per the request of the, Petitioner without levy of penalty.

10. The aforesaid facts clearly demonstrates that the work could not be completed by the Petitioner within the scheduled time & even thereafter, obviously on account of several breaches & latches committed by the Opp. Parties.

11. While the matter stood thus, on 02.11.2007, the Petitioner was intimated by the Executive Engineer, Opp. Party No. 2 to attend the work site of the bridge for recording final measurement. The Petitioner thereafter learnt from the website maintained by the Works Dept. of Government of Orissa that the Chief Engineer, Opp. Party No. 4 has invited bids for completion of the balance work by 1/3 party & accordingly, the Petitioner filed the present writ application.

12. This Court on 24.12.2007 was pleased to issue notice & directed the parties to maintain status quo in respect of the discharge of the work in question & appointment of a new contractor. The interim order was subsequently modified on 15.05.2008 to the effect that in the event the Opp. Parties want to re-tender the work in question, they may do so, but a final decision shall not be taken without leave of this Court & further no agreement shall be executed for execution of the work which is to be done on a private land & has not been acquired under due process of law, till next listing.

13. The State of Orissa filed its counter affidavit contending that the Petitioner has no cause of action for filing the present writ application & the same is liable to be dismissed. The Agreement No. 305F2 dated 19.11.2004 has been closed with levy of penalty by the Chief Engineer (DPI & Roads) on 07.12.2007, which was communicated to the Petitioner on 17.12.2007. It was contended that notwithstanding the cooperation of the department, the Petitioner could not complete the work in time & has prayed for extension of time, which was also allowed to the Petitioner. As the work was not completed in time, keeping in view

the escalation & estimate & suffering of public, it was felt necessary to close the contract with levy of penalty.

The writ application is, therefore, not maintainable & liable to be dismissed. It is further contended by Learned Addl. Govt. Advocate that the Writ Petition for a money claim is not maintainable. The proposition broadly stated may be correct, but the Apex Court has held in a number of cases that a Writ Petition is maintainable for admitted dues. This observation finds support from the Judgment of the Apex Court reported in Hindustan Sugar Mills Vs. State of Rajasthan and Others, wherein, it has been held that:

We hopefully expect that the Central Government will not try to shirk its legal obligation by resorting to any legal technicalities, for we maintain that in a democratic society governed by the rule of law, it is the duty of the State to do what is fair & just to the citizen, & the State should not seek to defeat the legitimate claim of the citizen by adopting a legalistic attitude but should do what fairness & justice demand.

14. A perusal of Paragraph 5 of the Counter Affidavit would indicate that:

(i) It has been admitted for the purpose of approach road to the bridge some private lands are required to be acquired under the provisions of the Land Acquisition Act & the same has not been done.

(ii) The drawings/designs are bound to change depending upon progress of the work at the site.

(iii) Even though the Works Department had requested the Water Resources Department in their Letter No. 462 dated 03.12.2005 to close the sluice gate, so that execution of the work can be conducted, the same could not be done keeping in view the agricultural session.

(iv) It is admitted that the span length of the canal bridge was reduced from 30 meters to 25 meters, but since the Petitioner has not completed the work of pillar construction, he cannot have any grievance with the subsequent change.

It is admitted in Paragraph 13 of the counter affidavit that the Executive Engineer, Opp. Party No. 2 had recommended the application of the Petitioner about the extension of time by one year i.e. up to 18.11.2007 without levy of penalty & with benefit of price escalation, obviously because, the work was not delayed on account of any laches of the Petitioner. In paragraph 15 of the counter affidavit, it is admitted that the land acquisition proceeding have not been finalized. It is admitted in Paragraph 19 of the counter affidavit that an escalation bill for Rs.11,36,005 was submitted & pending consideration.

None of the reasons ascribed by the Petitioner for delay in completion of the work has been refuted in the counter affidavit.

15. Three letters enclosed to the present writ application establish beyond any reasonable doubt that it was impossible on the part of the Petitioner to execute

the contract within the stipulated time. The first letter is of the Superintending Engineer, Opp. Party No. 3 to thy Chief Engineer, Opp. Party No. 4 dated 02.05.2007, vide Annexure-19. While recommending the application of the Petitioner for extension of time, the Superintending Engineer, Opp. Party No. 3 has clearly indicated that the work could not be completed within the stipulated period on account of the following hindrances;

1. Non-acquisition of land for both sides approach for Paniola side.
2. Non-finalisation of drawing abutment well AL.
3. Non-finalisation of well cap bottom level of AR, AL1 & AR 1 wells due to use in low water level.
4. & due to frequent rise in water level by 1.5 mtr. in the river due to opening of Mahanadi Barrage sluice gates.

It accordingly, recommended for extension of time without levy of penalty with the benefit of price escalation. The second is the letter of the Executive Engineer, Opp, Party No. 2 to the Petitioner dated 19.07.2007, vide Annexure-22. In this letter extension of time was allowed to the Petitioner which was applied for on 17.04.2006 i.e. almost after 15 months. This letter clearly establishes the callous attitude of the State Government. The third is the letter of the Executive Engineer, Opp. Party No. 2 to the Superintending Engineer, Opp. Party No. 3 dated 27.07.2007, vide Annexure-23, recommending closure of contract without levy of penalty. In the said letter, it has been stated that an agreement was entered into with the Petitioner on 19.11.2004 & the date of commencement of work & the date of completion of the same were stipulated as 19.11.2004 & 18.05.2006 respectively. Further it was indicated that:

(a) the cuttingedge, curb & details of steining for ALI & AR 1 of canal bridge was communicated to this office vide Chief Engineer (D.P.I. & Roads), Orissa, Bhubaneswar good office memo No. 44882 dated 18.11.2005.

(b) The top of the steining of ALI & ARI of canal bridge was fixed to be (+) 6.04 mtr. & (+) 7.24 mtr. respectively & was communicated to this office vide kind memo No. 16040 dated 22.04.2006 of the Chief Engineer (D.P.I & Roads), Orissa, Bhubaneswar.

(c) At present the AL of river bridge is cast & sunk upto (-) 15.00 mtrs. & a balance execution of steining & sinking for 6.00 mtrs. is required to reach the founding RL i.e. (-) 21.00 mtrs. as per the approved GAD. Further to ascertain the exact-founding level of the AL, the conformity boring is conducted & after receipt of the bore log data with test result the same Shall be communicated to the higher quarters for decision.

(d) The span length of the canal bridge is decided to be reduced to 25.00 mtrs. instead of 30.00 mtrs. Basing on site condition which was approved & communicated to this office vide Chief Engineer (D.P.I. & Roads), Orissa,

Bhubaneswar memo No. 31418 dated 30.07.2005.

(e) The design details of the superstructure such as soffit slab, web & deck slab for canal bridge is communicated to this office vide Chief Engineer (D.P.I. & Roads), Orissa, Bhubaneswar good office memo No. 13401 dated 28.03.2007.

(f) As regards to acquisition of land this Division has deposited the required amount towards establishment charges with the Land Acquisition Officer (Civil), Kendrapara & the 4(1) notification is likely to come up very shortly.

16. The stand taken by the State Government in its counter affidavit & the three documents vide Annexures-19, 22 & 23 respectively, which have been issued by the Opp. Parties, establish beyond any reasonable doubt that the Opp. Parties did not fulfill their obligation under the agreement & the Petitioner was clearly prevented from executing the work within the stipulated time. Accordingly, the Petitioner cannot be made to suffer for the admitted laches of the functionaries of the State Government. In the circumstances, the action of the State Government in seeking to rescind the contract along with penalty is clearly illegal & cannot be sustained. Therefore, the Petitioner is entitled to payment of all his dues along with price escalation.

Accordingly, the Writ Petition is allowed.

I.M. Quddusi, A.C.J.

17. I agree.