
(2009) 05 PAT CK 0027

In the Patna High Court

Case No : Letters Patent Appeal Nos. 278 and 281 of 2009

The East Central Railway (Engineering Department)

APPELLANT

Vs

Interlink Coal Pvt. Ltd.

RESPONDENT

Date of Decision : 06-05-2009

Acts Referred:

Citation : (2009) 05 PAT CK 0027

Final Decision : Allowed

Judgement

J.B. Koshy, C.J.—On 22.7.2007, the East Central Railway invited tenders for the construction of several residential units, staff quarters and other miscellaneous works at Sonapur/Hajipur. The estimated cost of the project was Rs. 106788840.20 paise. The tender stipulated price variation clause in Chapter - 3. Clause 34 of the said terms and conditions provides for price variation. Clause 34(A) is the general conditions for price variation. Clause 34(C) stipulates ceiling on price variation. As per Clause 34(C)(i), the adjustment ie. reimbursements/recovery based on price indices, shall be made only if to the extent the amount to be adjusted is in excess of 5% of the amount payable to the contractor as per accepted rates. As per Clause 34(C)(ii), the total amount of adjustments ie. increase/decrease in the payment to the contractor shall be limited to 10% ie. (15% - 5% (floor price)) of the amount finally payable to the contractor as per accepted rates for the contracts where the period of completion is between 1 to 2 years. As per Clause 34(C)(iii), the total amount of adjustment ie. increase/decrease in the payment to the contractor shall be limited to 20% ie. (25% - 5% (floor price)) of the amount finally payable to the contractor as per accepted rates for the contracts where the period of completion is more than two years. That from perusal of the ceiling on price variation clause is evident that the total amount of adjustment shall be limited to 10% of the amount finally payable to the contractor where the period of completion is upto two years and 20% adjustment is in the case of period of completion of more than two years. In the present case, the period of completion of the work is eighteen months and, therefore, the upper ceiling limit is only upto 10%. Pursuant to the tender

notification, several contractors, including the petitioner, submitted tender papers, along with the earnest money deposits in the form of fixed deposit. The tender was opened on 5.9.2007. The offer of the petitioner, being the lowest, was accepted. The acceptance was communicated to the petitioner in writing on 23/24.1.2008. The petitioner started the work. A final agreement as contemplated under the terms and conditions, After the acceptance of the quotation made by the petitioner, as per Annexure - 1 dated 28.9.2007, there was a change in policy, whereby the ceiling limit prescribed at 15-25% stood deleted. In the opening sentence of the said circular, it is stated that the modified clause would have prospective effect in all future work contracts. On 2.2.2008 and 5.5.2008, after starting the work, the petitioner requested the appellant for deleting the price variation clause, in view of the amendment. On 8.7.2008, the petitioner sent Annexure - 4 letter stating the difficulty in signing the agreement unless price variation clause is deleted. Annexure - 4 reads thus:

Ref: ICPC/Con/08/47

dated 8.7.08

To

The Chief Engineer, East Central Railway, Mahendrughat, Patna.

Sub : For deletion of ceiling on price variation clause as provided in Clause 34(C) as per policy decision of the Ministry of Railway (Railway Board) issued vide letter No. 2007/CEI/CT/18, New Delhi dated 28.9.2007.

Dear sir,

With reference to the captioned subject, we would like to submit that we have been allotted works contract vide Acceptance No. ECR/CAO/Con/WT/474/450 dated 23.01.08 for the work of "providing 38 units type III, 86 units type II and 36 units type I quarter and other miscellaneous work at Konharaghat, Hajipur".

In terms of the agreement, we have been directed to utilise Cement PPC confirming IS 1489 (Pt. I) and TMT steel basis (Grade fe 415) conforming to IS: 1786 of any dia.meter from Tata/Sail/RINL. Accordingly we quoted the basic rates of the said quality of cement and steel as prevailing in the market at that point of time.

However, the agreement consists of the Price Variation Clause. In Clause 34(c)(ii) & (iii) of the agreement, there is a ceiling on price variation, which inter alia provides that the total amount of adjustment shall be limited to 10% (15% - 5% (floor price)) in case of work to be completed within two years and 20% (25% - 5% (floor price)) in case the period of completion is more than 2 years.

Before the agreement was signed by both the parties, we could be able to know that the Govt. of India, Ministry of Railway (Railway Board) has taken a policy decision to delete the clause relating to Ceiling on price variation so far as it relates to upper limit. The said policy decision was communicated to all F.A &

CAOs of all Indian Railways vide letter No. 2007/CEI/CT/18, New Delhi dated 28.9.2007 issued under the signature of Executive Director Civil Engineering, Railway Board, New Delhi.

We, therefore, request you to kindly delete the Clause 34(C)(ii) & (iii) in terms of the policy decision of the Govt. of India, Ministry of Railway (Railway Board), else, we are unable to sign the agreement in question, which consists of ceiling clause on price variation. The said clause is actually in the teeth of the policy decision of the Govt. of India, Ministry of Railway (Railway Board).

Thanking you,

Yours faithfully, For: M/s Interlink Coal (P) Ltd Sd/- Managing Director

Despite the above letter, the appellant Railway took the stand that since the policy decision was after the acceptance of the tender submitted by the petitioner, no change can be effected. Finally, on 18.3.2008, a formal agreement was entered into between the parties on the same terms and conditions as stipulated in the tender form retaining the ceiling clause. On 12.11.2008, the writ petition was for incorporating the price variation clause in the agreement, in view of the amendment to the policy dated 28.9.2007.

2. The learned single Judge found that "the petitioner seeks only a just compensation for unanticipated abnormal rise in prices of its basic ingredients required for fulfillment of the contract. On the other hand, if compensation, accordingly, is not permitted, then Railway would certainly be getting its work done at a cost less than legitimate due and would, thus, be unjustly enriching itself because of factors beyond control of both the contracting parties. That would be unjust and unfair." The learned single Judge held that the policy decision is violative of Article 14 of the Constitution and the Railway cannot act unfairly. The writ petition was allowed in the following manner:

Thus, in my view, the writ petition must succeed. Clause 34 of the GCC, as applicable to the petitioner in the facts and circumstances noted above, would apply in the form modified by the policy of the Railways, as contained in Annexure-1, and Railways would be bound to give benefit thereof to the petitioner. In case Railway itself has some reservation in that regard then it would be duty bound to supply the goods by procuring them in their stocks but Railways certainly cannot avoid both the situations to the detriment of the petitioner. I order accordingly.

3. The appellant contended that the policy decision dated 28.9.2007 was prospective and should apply only to those tenders which were floated after the policy decision and not to apply to the contracts entered after the policy decision, where the tenders were floated prior to policy. Therefore, the petitioner is not entitled to get the benefit stipulated in the policy dated 28.9.2007.

4. It is true that the publication of the tender documents by the Railways is not an offer. It is only an invitation or, in other words, "a chaffer to offer". Various

contractors made quotations (offers) in response to the tender notification. The tender quotations were opened on 5.9.2007. Earnest money was also deposited by the petitioner. Having found that the petitioner fulfilled all the conditions, the Railway accepted the offer of the petitioner, being the lowest tenderer. The acceptance of the tender was communicated to the petitioner on 23/24.1.2008. The petitioner sent two letters dated 2.2.2008 and 5.5.2008 requesting deletion of the price variation clause, in view of the policy dated 28.9.2007. Even though the petitioner informed the appellant Railways by letter dated 8.7.2008 that it cannot sign the agreement with a clause incorporating ceiling on price variation, the request having been refused, the petitioner on 18.3.2008 signed the formal agreement incorporating the tender condition notwithstanding the subsequent policy decision of the Railways. Therefore, it is contended, the petitioner is bound by the terms and conditions under the agreement and the writ petition will not lie.

5. It is settled law that in contractual matters, the power of this Court for interference is very limited. The award of a contract, whether it is by a private party or by a public body or the State, it is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. Price may not always be the sole criterion for awarding a contract. The Court cannot substitute its own decision for the decision of an expert evaluation committee. Award of contract is reached by process of negotiations at several tiers and more often, such decisions are made qualitatively by experts. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure see *Tata Cellular Vs. Union of India*, . A contract between the parties is in the realm of private law. The contract in question is not a statutory contract. The dispute relating to interpretation of the terms and conditions of a contract could not have been agitated in a petition under Article 226 of the Constitution of India. Of course, it is true, if the State or its agencies act arbitrarily violating Article 14 of the Constitution of India or as if there is procedural illegalities, a writ will lie even in contractual matters, as held by the apex Court in *Food Corporation of India and Another Vs. SEIL Ltd. and Others*, ; *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, and *Karnataka State Forest Industries Corporation Vs. Indian Rocks*, .

6. But, in this case, the question is whether any arbitrary or discriminatory action was taken by the Railways so as to justify interference in contractual matters. The tender notification was published much prior to the policy decision. By open eyes, the petitioner made the quotation. As a prudent and responsible contractor, he would have quoted the price after consultation with technical and financial experts. The other tenderers also quoted the amount considering the terms and conditions in the tender notification, knowing fully well that there is a ceiling on price escalation. The quotation made by the petitioner was the lowest. Since it was the lowest quotation, the petitioner's quotation was accepted before change in the policy decision. Further, if the price escalation limit was not there, others also might have quoted lesser amounts. If the ceiling of price escalation is taken

away only with regard to the petitioner, who was the lowest quoted tenderer, then it would have been violative of Article 14 of the Constitution of India. It is for the petitioner to study the market conditions and make quotations. Having found that the petitioner's quotation was the lowest, he was awarded the contract and even letter of acceptance was sent before the change in policy condition and there left only the signing of the formal agreement by the parties. The petitioner had sent two letters expressing his difficulty in signing the agreement unless the ceiling clause is deleted. But the appellant did not agree for the same. The agreement was also signed. Now the petitioner cannot go back from the terms of the tender accepted by them. In fact, it was stated in that circular, by which the change in policy was made, that it is prospective in nature. Prudent contractors submitted their tenders and quoted the amount taking into account that there would not be any price escalation. It cannot be changed after the date fixed for submission of tenders and opening of the tenders. Then only arbitrariness will come into surface. The agreement is in the nature of a private contract, the tender quotation was made by the petitioner with open eyes and the petitioner is bound by the general conditions. The terms and conditions of the agreement cannot be modified in a writ petition merely because one party to the contract is an instrumentality of the State. The Railways also cannot say that since written agreement was signed later, an agreement condition contrary to the tender conditions should be incorporated in the written agreement thereby making an additional burden on the contractor. We are of the view that the stand of the Railways that the petitioner is bound by the tender conditions, on the basis of which quotation was submitted and accepted. It cannot be altered on the basis of a subsequent policy change made after the opening and acceptance of the tender. It cannot be stated that there is any arbitrariness on the part of the Railways so as to warrant interference by this Court in a contractual matter. The petitioner-contractor was not able to convince us that there is violation of Article 14 of the Constitution or discrimination shown to him by the Railways. There is no patent illegality or procedural violation. In such circumstances, this Court cannot re-write the contracts between the parties. There is no scope for judicial review.

7. Therefore, we allow the Letters Patent Appeal and the impugned judgment of the learned single Judge is set aside.

Ravi Ranjan, J.

I agree.