
(2009) 06 OHC CK 0023
In the Orissa High Court

Zerina Marines Pvt. Ltd.

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 23-06-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 298
Land Acquisition Act, 1894 — Section 7

Citation : (2009) 108 CLT 336 : (2009) 2 OLR 935 Supp

Hon'ble Judges : I.M. Quddusi, Acting C.J.; Sanju Panda, J

Bench : Division Bench

Judgement

Sanju Panda, J.—In this writ application, the Petitioner-company has challenged the inaction of the Opposite Parties with regard to payment of its legitimate dues.

2. The facts as unfolded in the petition are as follows:

The Petitioner is a company incorporated under the Companies Act, 1956 situated at Bhubaneswar. In pursuance of a tender call notice, the Petitioner submitted its tender for excavation of R.B.C. including structure of Rengali Irrigation Project RD. 74.00 K.M to 79.00 K.M (Reach III). The work was allotted in favour of the Petitioner & a letter of intent was issued followed by the work order. The Petitioner entered into an agreement with the Executive Engineer, Sapua Badajoda Irrigation Division, Satmile, Dhenkanal for a value of Rs. 6,00,66,495.23. In the said agreement, the date of commencement of the work was 29.1.1999 & the date for completion of the work was 28.1.2000. The scope of the work was excavation of canal. For the said purpose, the Government was required to acquire the land following the procedure under the Land Acquisition Act & hand over the same to the Petitioner for execution of the work. During execution of the work, certain hindrances were faced by the Petitioner for which the progress of the work hampered. The Petitioner could not proceed with the work due to non-finalization of the drawings for the structures, non-acquisition of land & non-clearance of jungle. Those hindrances were of such nature that without Government action to clear those hindrances, the work could not be

proceeded. The Petitioner was also not able to complete the work within the stipulated time mentioned in the agreement i.e. within 28th January, 2000, due to non-removal of those impediments by the Opposite Parties. The Petitioner's application for extension of time was allowed upto 27.1.2001 vide letter dated 4.8.2000. Again, further extension of time was granted upto 20th January, 2002 & thereafter, till 30th June, 2002. During the above periods, the Petitioner was ready with its work force & machinery at the site but due to lethargic action of the Opposite Parties, the work could not be proceeded. During excavation of the canal, rock was met with. Excavation of rock being time consuming factor, separate rate was provided in the contract. Petitioner in its letter dated 8.10.2001 informed Opposite Parties as well as the concerned authorities to test the rock & identify the same, as separate rate was provided for classification of the rock & determination of the rate. Opposite Parties vide letter dated 8.2.2002 finally issued an order u/s 7 of the Land Acquisition Act directing the Collector, Dhenkanal for acquisition of the land required for execution of the Petitioner's contract work. From the said letter, it appears that the Government had not taken any step to acquire the land for the purpose of excavation of canal until 8.2.2002. Without considering the above facts & the genuine & bona fide request of the Petitioner, Opposite Party No. 2 closed the contract vide letter dated 4.7.2002.

3. Being aggrieved by the aforesaid closure of the contract, Petitioner approached this Court in W.P.(C) No. 6783 of 2002. This Court on 17.5.2005 allowed the said Writ Petition with a direction to the Opposite Parties to grant extension of time to the Petitioner to complete the balance contract work awarded in its favour within a reasonable period on clearing any hindrance in the alignment of the canal in question & take adequate steps to release the arrear amount due to the Petitioner for the work already executed by it & pay such further amount to which the Petitioner may be entitled to on account of executing the balance contract work as per law. The Tender Committee in its proceeding dated 30.12.2005 permitted the Petitioner to continue with the work & allowed extension of time upto 28.8.2006 for completion of the balance portion of the contract work. The Petitioner submitted its bill regarding escalation of price & the Opposite Parties did not grant the same as per Clause 32 of the agreement which provides for price adjustment. The said price adjustment shall apply to work executed during the extended period for reasons not attributable to the Petitioner. The reimbursement on variation in price of materials, labour, etc. shall be applicable to the contract work executed during the extension period. The Petitioner was unable to continue with the execution of the work due to continuous hindrances. The Executive Engineer, Opposite Party No. 2 intimated the said fact vide letter dated 7.2.2007 to the Superintendent Engineer. Finally, considering the reason for delay in making execution of the contract work, Opposite Party No. 2 vide letter dated 11.9.2007 intimated the State Government seeking approval for payment of price escalation & grant of extension of time to the Petitioner. In the meantime, the Petitioner completed

90% of the contract work & as escalation price was not paid, the Petitioner was unable to complete the balance work. Further during the last phase of the excavation of right bank canal, the Petitioner faced with rise in the level of water bed as a result of which there was continuous seepage of water. The Petitioner bringing the said fact to the notice of the Opposite Parties requested them to provide diversion of the extra water. As no action was taken by the Opposite Parties, the balance work could not be completed. Therefore, the Petitioner has approached this Court invoking its extra-ordinary jurisdiction under Article 226 of the Constitution of India & praying for a direction to the Opposite Parties to grant extension of time to complete the balance contract work & take adequate steps to pay the arrear dues to which the Petitioner is entitled. In view of the inaction of the Opposite Parties in not granting the escalation price & withholding the payment of current bills, though this Court in W.P.(C) No. 6783 of 2002 disposed of on 17.5.2005 directed the Opposite Parties to extend the time to complete the balance of work awarded in favour of the Petitioner.

4. Opposite Parties have filed an affidavit admitting that the land acquisition proceeding in the entire area covered under the agreement had been completed & the physical possession had been delivered to the Petitioner on 8.2.2005 for execution of the work in the village Gundichapada. The Petitioner is continuing with the work & about 55,000.00 Cum. execution of earth work (cutting) is still left to be executed by the Petitioner. The Petitioner applied for 5th phase extension of time from 1.7.2007 to 31.3.2008 & his application was under consideration. Though the Opposite Parties extended the time upto 28.8.2006 to complete the work, the Petitioner was not able to complete the work within that period. The proposals have been pending with the State Government for taking final decision in the matter as to whether extension of time will be allowed with or without escalation clause. Till the decision is taken by the State Government, no payment can be made to the Petitioner on the escalation bill submitted by him. In that view of the matter, the writ Petition is premature & not entertainable. They have further stated that the Petitioner has already completed 85% of the work & 15% of the work is left for execution.

5. They have also filed further affidavit on 12.5.2009 stating therein that they have cleared all the running account bills. The arrear amount towards the work already executed by the Petitioner on the date of closure of the work, i.e., 4.7.2002, & the work executed after closure of the work has been paid to the Petitioner along with the benefit towards price escalation upto 27.1.2002. The concerned Chief Engineer in consonance with the Judgment of this Court dated 17.5.2005 submitted the second spell of extension of time upto 28.8.2006 to the Government for approval. The Opposite Parties have stated that the arrear amount due to the Petitioner, was paid on 18.2.2006 & 29.3.2006. After such payment, it was found that the Petitioner did not execute the work properly for which rectification was necessary. Before completion of the period i.e. 28.8.2006, the Petitioner submitted an application on 25.8.2006 for extension of time for the period from 29.8.2006 till 31.3.2007 & 1.4.2007 to 30.6.2007 & again 1.7.2007

to 31.3.2008 & 1.4.2008 till 30.6.2008 for completion of the contract work in all respect. But the Petitioner did not complete the rectification work arising out of the instant contract work. They have further stated that the Petitioner while seeking extension of time voluntarily submitted an undertaking not to claim any escalation charges & in view of such undertaking, the Petitioner is not entitled to any escalation charges as per Clause 32 of the agreement. Clause 4.3 of the D.T.C.N stipulates that in case of delay in acquisition of land, no compensation will be admissible but extension of time will be granted.

6. During pendency of this Writ Petition, on 3.12.2008 this Court directed that 50% of the admitted dues shall be paid to the Petitioner by the end of December, 2008 & the Petitioner shall complete the rectification part of the work within a period of one month from the date of receipt of 50% of the admitted dues & as soon as the rectification work is completed, the Opposite Party shall release the remaining 50% of the admitted dues in favour of the Petitioner. Though Opposite Parties have paid the dues to the Petitioner, he has not done rectification work for which the Executive Engineer, Opposite Party No.2, time & again requested the Petitioner to rectify the defects & to cooperate with him for preparation of the final bill.

7. Petitioner has also filed a rejoinder & CONTC No. 406 of 2009 stating therein that the Opposite Parties have not complied with the Order Dated 3.12.2008 of this Court & they have not paid 50% of the admitted dues. He has stated that on 14.7.2008 the Chief Engineer & Basin Manager, Brahmani Right Basin, Dhenkanal written a letter to the Financial Adviser-cum-Additional Secretary to Government, Water Resources Department stating therein that the Petitioner is entitled to get price escalation for the agreement period & extended period upto 30.6.2008. The amount of price escalation for the agreement period from 29.1.1999 to 28.1.2000 & for the extended period from 29.1.2000 to 30.6.2008 are Rs. 18,72,555.00 & Rs. 1,44,72,891.00 respectively. A sum of Rs. 18,72,555.00 for the agreement period & Rs. 28,04,931.00 for the extended period upto 27.1.2002 towards escalation bill has been paid to the contractor (Annexure-24). The rest amount was not paid to the contractor on the ground that the Government did not approve the escalation price as the Petitioner had given an undertaking that he would not claim any price escalation after 27th January, 2002. In view of the clarification made by the Law Department wherein it was viewed that the benefit of the escalation price shall not be extended to the contractor who has submitted an undertaking not to claim price escalation. However, the Petitioner has also filed the decision of the Government dated 25.11.1995 wherein the above view of the Law Department was revised by the revision committee & it was decided that the contractor is not precluded from escalation even after furnishing the no-claim certificate & the decision of the said revision committee was communicated by A.F.A-cum-Under Secretary to Government of Orissa, Works Department to the Engineer-in-chief (Civil), Orissa/Chief Engineer (Road)/Buildings/ Bridges/etc. etc. vide letter dated 28.6.1996 is annexed as Annexure 31 to this Writ Petition. The Petitioner submitted that in view of the

above situation, there is no bar to clear its admitted dues.

8. From the above facts, it is crystal clear that the Petitioner has completed the work as per the contract & the Department extended the time from time to time. As per the said permission, the Petitioner carried out the work & the delay caused for completion of the work was due to the hindrances & the inaction of the Opposite Parties with regard to handing over the necessary land. Admittedly, the Petitioner carried on the work with approval of the authorities till 14.7.2008 & the delay caused in completion of the work cannot be attributed to the Petitioner. Therefore, the Opposite Parties are liable to clear the admitted dues of the Petitioner & the Petitioner should not be made to suffer for that. In view of the decision of the revision committee with regard to entitlement of the price escalation, the contractor is not precluded from claiming the said price even though he has given an undertaking not to claim the price escalation.

9. The right of the Petitioner being in the nature of contractual right, the manner, the method & motive of a decision with regard to the said contract are subject to judicial review on the touchstone of relevance, reasonableness, fair-play, natural justice, equality & non-discrimination. The decision of the State/Authority under Article 298 of the Constitution of India is an administrative decision & can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India or on any of the grounds available in public law field. The power of judicial review always depends upon the nature of the right involved in the facts & circumstances of a particular case. Therefore, the action of the Opposite Parties is subject to judicial review. The Apex Court in the case of Onkar Lal Bajaj Vs. Union of India (UOI) and Another etc. etc., has held that the Government has to rise above the nexus of vested interests & nepotism & eschew window-dressing. The act of governance has to withstand the test of judiciousness & impartiality & avoid arbitrary & capricious actions. Therefore, the principle of governance has to be tested on the touchstone of justice, equity & fair-play. Though, on the face of it, the decision may look legitimate, as a matter of fact the reasons may not be based on values but to achieve popular accolade that decision cannot be allowed to operate.

10. In view of the above principle, we are of the opinion that the decision of the Opposite Parties not to clear the Petitioner's bills with escalation price suffers from arbitrariness. Therefore, this Court directs the Opposite Parties to clear the Petitioner's running bills & escalation price as per the decision of the Government dated 28.6.1996 within a period of 3 months from the date of communication of this order.

The Writ Petition is disposed of accordingly.

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

I agree.