
(2005) 05 OHC CK 0003
In the Orissa High Court
Case No : Writ Petition (C) No. 6783 of 2002

Zerina Marines Pvt. Ltd.

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 17-05-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 298

Citation : AIR 2006 Ori 66 : (2005) OLR 739 Supp

Hon'ble Judges : Sujit Barman Roy, C.J;M.M. Das, J

Bench : Division Bench

Advocate : S.C. Parija, P. Behera, M.R. Tripathy and S.K. Sarangi, for the Appellant; Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

M.M. Das, J.—The petitioner is a limited company registered under the Companies Act, 1956 which undertakes civil contract work. In the present writ petition, the petitioner has challenged the action of the opp. parties in closing the contract awarded in its favour for "excavation of Right Bank Canal including structures of Rengali Irrigation Project RD.74.00 Km. to 79.00 Km (Reach-III)" under Agreement No. 39-F2/98 executed by Opp. Party No. 2, as has been intimated to the petitioner by Opp. Party No. 2 under his letter dated 4-7-2002 under Annexure-18 to the writ petition.

2. The case of the petitioner is that after the above contract work was awarded to it on execution of the agreement referred to above, as the work was to be completed by 28-1-2000, the petitioner immediately mobilized the men, material and machineries and started execution of the said work i.e. excavation of the canal. After proceeding to execute the work to a certain extent, the petitioner found that It was not possible to proceed further with the work as a patch of forest land was coming in the canal alignment which required necessary clearance from the Forest Department and also some electric poles with high tension line were falling in the canal alignment. The petitioner further found that

the land for the proposed canal which was to pass through village Gundichapada has not been acquired and handed over to the petitioner for carrying out the excavation work. The petitioner, therefore, repeatedly brought this fact to the notice of Opp. Party No. 2 with a request to remove the hindrances so that the work can be completed within the stipulated period. It is stated by the petitioner that as the delay in execution of the work was not attributable to it, necessary extension of time was granted to the petitioner with normal escalation as per the terms and conditions of the agreement, but without any financial benefit beyond the provisions of the agreement. Such extension of time was intimated to the petitioner by the Chief Engineer by his letter dated 4-8-2000 under Annexure-A/2 to the counter affidavit filed by the Opp. Parties. The petitioner has made out a case in the writ petition that Opp. Party No. 2-the Executive Engineer by his letter dated 30-4-2001, Annexure-3 requested the Divisional Manager of the concerned electrical division for shifting the electric poles coming in the alignment of the canal. In spite of the same, as the electric poles were not removed nor the revised drawing and designs were handed over to the petitioner, the petitioner by various letters intimated Opp. Party No. 2 with a request for necessary action to continue execution of the contract work. According to the petitioner the lands coming in the alignment of the canal were also not acquired in spite of the letter of the Under Secretary to Government to the Collector, Dhenkanal under Annexure-7. The petitioner time and again has brought this fact to the notice of Opp. Party No. 2 and also ventilated its grievance that it is suffering from financial loss due to delay in progress of the work. Opp. Party No. 2 under his letter dated 22-2-2002 under Annexure-9, intimated the petitioner that action is being taken for removal of electric poles and for acquisition of the land. It appears that the petitioner subsequently also continued to intimate the authority for removing the obstacles in order to execute the contract work within the shortest period. In letter under Annexure-17 to the writ petition, the petitioner sought for extension of further time to complete the contract work stating therein that the delay in execution of the work cannot be attributed to it. According to the petitioner, Opp. Party No. 2 without looking into the grievance of the petitioner, issued the letter under Annexure-18 intimating the petitioner that the Government has ordered to close the contract and accordingly the contract as per the agreement was closed with effect from 4-7-2002.

3. A counter affidavit has been filed by Opp. Party No. 2 from which it reveals that the petitioner having not completed the contract work even after extension of time, further extension of time applied for by the petitioner was not granted by the authorities and the tender committee opined to close the contract since the progress by the petitioner was very slow. The minutes of the meeting of the tender committee with regard to the request for extension of time made by the petitioner has been annexed to the counter affidavit as Annexure-B/2. A rejoinder affidavit has been filed by the petitioner stating, inter alia, that the petitioner has executed the work over the land which was made available to it and the further progress of the work was affected due to the hindrances as

already stated in the writ petition. The petitioner has filed a further affidavit at the time of hearing of the case stating therein that it is ready and willing to execute and complete the balance contract work as per the terms and conditions of the agreement subject to necessary co-operation from the pp. Parties with regard to handing over necessary land free from all hindrances, providing necessary drawing and designs and on paying arrear amount towards the work already executed along with prompt payment of running bills raised during execution of the balance work. The petitioner has undertaken in the said affidavit that if it would be allowed to execute the balance work, the same would be completed by 31-12-2005 failing which the petitioner will face penal consequences under the agreement. In the counter to the said affidavit filed by the opp. Parties, reliance has been placed on a letter of the petitioner which was issued by it in December, 2001 agreeing therein that it would not claim any escalation beyond the agreement provision.

4. Mr. S. C. Parija, learned Counsel for the petitioner submitted that a bare reading of the proceeding of the tender committee filed as Annexure-B/2 to the counter would go to show that the said tender committee has not applied its mind to the recommendation made by the Chief Engineer in favour of the petitioner for extension of time for execution of the work. According to him, it would also be evident from the said proceeding that though the tender committee was well aware that the delay in execution of the work is not attributable to the petitioner, but without taking into consideration any of those facts, the tender committee by merely stating that it has considered the proposal of the Chief Engineer and Basin Manager, without any reasonable cause, concluded that the progress of the work by the Contractor is very slow and opined not to continue the work with the petitioner recommending closure of the contract. Mr. Parija submitted that the action of the tender committee in deciding to close the contract is not only arbitrary, but also unreasonable, improper and violative of Article 14 of the Constitution of India. He relied upon a decision of the Supreme Court in the case of Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, in support of his contention.

5. Mr. G.C. Mohanty, learned Addl. Govt. Advocate per contra submitted that the work entrusted to the petitioner though was stipulated to be completed by end of the year 2000, the admitted fact being that the petitioner has only completed about 50% of the said work, ipso facto shows that the progress made by the petitioner was very slow as concluded by the tender committee and hence, the petitioner can have no grievance for closure of the contract as has been intimated to it under Annexure-18 to the writ petition. He further contended that the excavation of the proposed canal being in public interest, delay in execution of the said work cannot be encouraged and further, the executive/ administrative decision to close the contract is not liable to be subjected to judicial review.

6. The power of the State to enter into or not to enter into any contract with any individual is provided under Article 298 of the Constitution and Article 14 of the

Constitution is applicable to such exercise of power by the State and the action of the State can be checked under Article 14. It is well settled that every action of the State executive must be subject to rule of law and must be supported by reason. Hence, whatever be the action of the public authority, it should meet the test of Article 14 of the Constitution. If the executive action even in the matters of contract, fails to satisfy the test of reasonableness, the said action would be unreasonable. As has been held by the Supreme Court in *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, , rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State in dealing with citizens. The Supreme Court has further held that even though the rights of the citizens are in the nature of contractual rights, the manner, the method and 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 and non-discrimination. In the said decision, the Supreme Court has also held that the decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. However, existence of the power of judicial review always depends upon the nature of the right involved in the facts and circumstances of a particular case. Hence, we are of the opinion that the action of the State can be subjected to judicial review, if the fact situation of a case so demands. But, however, the power of judicial review is always exercised with self-restraint.

7. Earl Warren in November, 1955 issue of "Fortune" expressed his view with regard to exercise of power of judicial review by the Judges as follows:

Our Judges are not monks or scientists, but participants in the living stream of our national life, steering the law between the dangers of rigidity on the one hand and of formlessness on the other. Our system faces no theoretical dilemma but a single continuous problem: how to apply to every-changing conditions the never-changing principles of freedom.

8. Gandhiji in "The Law and the Lawyers" having no illusions about the power of Courts, said:

It does not require much reflection to see that it is through Courts that a Government establishes its authority and it is through schools that it manufactures clerks and other employees. They are both healthy institutions when the Government in charge of them is on the whole just. They are deathtraps when the Government is unjust.

9. The Supreme Court in *Onkar Lal Bajaj Vs. Union of India (UOI) and Another etc. etc.*, unequivocally laid down that the role model for governance and decision taken thereon should manifest equity, fair play and justice. The cardinal principle of governance in a civilized society based on rule of law not only has to

base on transparency but also must create an impression that the decision-making was motivated on the consideration of probity. The Government has to rise above the nexus of vested interests and nepotism and eschew window-dressing. The act of governance has to withstand the test of judiciousness and impartiality and avoid arbitrary or capricious actions. Therefore, the principle of governance has to be tested on the touchstone of justice, equity and fair play. Though on the face of it the decision may look legitimate but 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. In *Kartar Singh v. State of Punjab*, the Supreme Court held that the judicial review is the basic structure, independent judiciary is the cardinal feature, and an assurance of faith enshrined in the Constitution. The need for independent and impartial judiciary is the command of the Constitution and call of the people. The subordinate judiciary is a complement to constitutional Courts as part of the constitutional scheme and plays a vital part in dispensation of justice. Thus, subordinate Courts are integral part of the judiciary under the Constitution.

10. We are, therefore, of the view that as it is said, it may sound platitudinous, but it is profoundly true that if rule of law tend to become frequent casualties in public life, it is as certain as the night follows the day that democracy will inevitably be the next casualty. In view of the above settled position with regard to the power of judicial review, we have absolutely no hesitation in repelling the contention of the learned Addl. Government Advocate that the decision of the Opp. Parties impugned in this writ petition cannot be subjected to judicial review.

11. A plain reading of various correspondences made between the parties and the materials placed before the tender committee clearly goes to show that the delay in execution of the work in question cannot be attributed to the petitioner and that in spite of categorical recommendation made by the Chief Engineer for extending the time to enable the petitioner to complete execution of the work, the tender committee without considering the same, jumped to the conclusion that the progress on the part of the petitioner in executing the work is very slow and as such, the committee is of the opinion not to continue the work with the petitioner and close the contract. The said decision of the tender committee is clearly unreasonable and arbitrary.

12. Having considered the facts and circumstances of the case, the submissions made by the learned Counsel for the parties and the materials produced before us, we are of the opinion that the decision of the Opp. Parties under Annexure-18 to the writ petition closing the contract awarded in favour of the petitioner, which is an administrative decision under Article 298 of the Constitution, being unreasonable, arbitrary and violative of Article 14 of the Constitution, is liable to be quashed and we order accordingly. We direct that the Opp. Parties shall 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 and shall also take adequate steps to release

the arrear amount due to the petitioner for the work already executed by it and pay such further amount to which the petitioner may be entitled to on account of executing the balance contract work as per law.

The writ petition is, accordingly, allowed, but in the circumstances, without costs.

S.B. Roy, C.J.

13. I agree.