Deepika Constructions Vs. Government of A.P. and ors.

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SooperKanoon Citation : sooperkanoon.com/444214

Court : Andhra Pradesh

Decided On : Nov-22-2005

Reported in : 2006(2)ALD187; 2006(2)ALT272; 2006(1)CTLJ290(AP)

Judge : G. Rohini, J.

Acts : Constitution of India - Article 226

Appeal No. : WP Nos. 5056 and 5073 of 2005

Appellant : Deepika Constructions

Respondent : Government of A.P. and ors.

Advocate for Def. : Government Pleader for Irrigation and Command Area Development for the Respondent Nos. 1, 3, 4 and 5 in WP No. 5056 of 2005 and for the Respondent Nos. 2 to 4 in WP No. 5073 of 2005 and ;Government Pl

Advocate for Pet/Ap. : B. Vijaysm Reddy, Adv. in W.P. No. 5056 of 2005, ;V. Sree Ranga Rao, Adv. in W.P. No. 5073 of 2005

Judgement :
ORDER

G. Rohini, J.

1. These two writ petitions which are based on the same set of facts involving common questions of law for consideration are heard together and decided by this common order.

2. The 3rd respondent - The Chief Engineer (I&CAD;) Department, S.R.S.P. Stage-II, K.C. Camp, Warangal issued Tender Notice No. 42/2003-04, dated 24-11-2003 inviting tenders for earth work excavation and forming embankment of Kakatiya Main Canal from Km 317.00 to Km 318.00 including construction of structures.

3. In pursuance thereof, the petitioner in W.P. No. 5056 of 2005 submitted its tender and the same was found to be the lowest. Consequently, the petitioner-firm was awarded the work and an agreement dated 23-2-2004 was executed by the fourth respondent. As per the said agreement, the work awarded was to be completed within 12 months from the date of the agreement. It is relevant to note that as per the rates specified in Schedule-A to the agreement, the rate for excavation of canal cutting in hard rock and boulders more than 3 cum in size was specifically mentioned as Rs. 284.05 per cubic metre. As a matter of fact, the said rate was mentioned even in the tender notification and on the basis of the same the petitioner has quoted 31% less than the estimated value and thus stood as successful bidder.

4. Similarly, in response to another tender notice dated 2-12-2003 issued by the Superintending Engineer, I & CAD, Sriram Sagar Project (SRSP) for the purpose of earth work excavation and forming embankment of Kakatiya Main Canal from Km 319.00 to 320.00 including structures, the petitioner in W.P.No. 5073 of 2005 submitted its tender and consequently it was granted the contract having been declared as successful bidder. It is not in dispute that in pursuance thereof agreement No. 17/ 2004-05, dated 2-7-2004 was executed in favour of the petitioner in W.P.No. 5073 of 2005 in which the rate for earth work excavation in hard rock and boulders requiring blasting was mentioned as Rs. 211.60 per cubic meter. Even in the tender notice, the same rate was mentioned on the basis of which the petitioner offered 31.66% less than the estimate value. That apart, the petitioner in W.P.No. 5073 of 2005 was also awarded two other contracts in

respect of earth work excavation from Km 322.00 to Km 323.00 of Kakatiya Main Canal and Kakatiya Main Canal from Km 321.00 to Km 322.00 under agreements dated 9-6-2004 and 27-5-2004 respectively. Even in respect of the said works, the rate per cubic meter was fixed as Rs. 211.60 with regard to earth work excavation in hard rock and boulders.

5. The grievance of the petitioners in these two writ petitions is that having executed the agreements, agreeing to pay at the rate of Rs. 284.05 per cubic meter with regard to the earth work excavation in hard rock and boulders to the petitioner in W.P.No. 5056 of 2005 and Rs. 211.60 to the petitioner in W.P.No. 5073 of 2005, the respondents have subsequently offered only a sum of Rs. 96.72 per cubic meter purportedly on the basis of G.O. Ms. No. 34, dated 29-12-2003. The petitioners contend that G.O.Ms.No. 34, dated 29-12-2003 cannot be applied to the works awarded to the petitioners. Hence, these two writ petitions seeking a declaration that the action of the respondents in reducing the rates fixed under the agreements executed in their favour is arbitrary and illegal.

6. The learned Counsel for the petitioners contend that the terms and conditions under the concluded contracts cannot be varied or revised unilaterally and therefore the respondents are not justified in reducing the rates agreed upon under the contracts in question.

7. On behalf of the respondents, the Executive Engineer, I&CAD;, Sriram Sagar Project, Stage-II filed separate counter-affidavits in which the fact that the works in question were entrusted to the petitioners under the agreements as claimed by them is not disputed. However, it is stated that the rates for earth work excavation of hard rock and boulders of more than 3 cubic meters in size has been fixed as Rs. 96.72 per cubic meter as per G.O. Ms. No. 34, dated 29-12-2003 and Government Memo dated 15-7-2004 against the S.S.R. rates. It is further slated that the respondent No. 3 is the competent authority to regulate the rates and the contractors are bound by the same.

8. On behalf of the State Government, separate counter-affidavits have been filed by the Deputy Financial Advisor and Ex.officio Deputy Secretary of the Government stating that the tender notice is only an invitation for application

indicating the name of work, value of the work and etc., and the same does not indicate the rates for each item prepared by the department and therefore the rate quoted by the agency is not relevant. The necessary rates would be indicated in the relevant agreements concluded, after accepting the offer made by the petitioners. It is further stated that the Finance (Works and Projects) Department has examined the matter and in order to have uniformity and economy in the cost in all the Engineering Departments throughout the State, issued G.O. Ms. No. 34, Finance (W&P;) Department, dated 29-12-2003 directing all the departments to follow the rates fixed by I & CAD Department in the said memo for various items of earth work excavation, among which the rate of Rs. 96.72 per cubic meter was fixed for excavation of hard rock and boulders. In Government Memo, dated 15-7-2004, it was further clarified that with regard to the tenders accepted upto 29-12-2003 the rates as per SSR shall be applied and in other cases the rate prescribed under G.O. Ms. No. 34, Finance (W&P;) Department, dated 29-12-2003 shall be made applicable.

9. The learned Government Pleader appearing for the respondents submits that the petitioners are bound by the rates specified under G.O. Ms. No. 34, dated 29-12-2003 since the works in question were awarded after 29-12-2003. The learned Government Pleader while placing reliance upon a decision of the Division Bench of this Court in Govt. of A.P. v. Sri Rama Engineering Constructions (E&C;), : 2005(3)ALD281 (DB), further contended that the petitioners cannot maintain these writ petitions for enforcement of contractual obligations arising under the agreements.

10. In Govt. of A.P. v. Sri Rama Engineering Constructions (E&C;) (supra), the dispute arose between the department and the contractor with regard to the rate payable to the contractor in respect of the work executed exceeding several times the estimated quantity. The case of the contractor was that due to increase in the quantity of work subsequent to the award of the contract, the respondents were liable to pay the same rate as agreed in the agreement even for the additional work executed. It was claimed that the contractor was entitled to be paid even for the additional work executed at the rate of Rs. 126/- per cubic meter being the agreed rate contending that the department had no authority and jurisdiction to fix

any other rate. On the other hand, the case of the department was that disproportionate excess work from the estimated quantity was not governed by the rate agreed and that as per Clause 3.2 of the agreement the employer was entitled to fix its own rate. The writ petition was allowed declaring that the action of the respondents and the consequential action in making payment under final bill which resulted in non-payment of Rs. 3.03 crores was arbitrary and illegal. On appeal by the Government, the Division Bench observed that the dispute between the parties was not a question of law alone or interpretation of terms of agreement but also on facts as to their respective rates vis-a-vis terms of contract. Accordingly, the Division Bench concluded that since the case involved serious questions both of law and of facts, the petitioner therein i.e., the contractor ought to have been relegated to the ordinary remedy of civil suit. It was further observed that the material on record was not sufficient to come to a conclusion as sought for by the petitioner and therefore the learned Single Judge was not justified in going ahead to entertain and decide the writ petition involving disputed questions. Accordingly, the writ appeal was allowed and the order in the writ petition was set aside.

11. In the case on hand, it is not in dispute that the tender notices were issued in December, 2003 and the agreements were executed in July, 2004. Though G.O. Ms. No. 34 was issued on 29-12-2003, the respondents did not choose to include the rates as specified in the said Government Order in the respective agreements. Admittedly, in the agreements executed in favour of the petitioners, the respondents have agreed to pay at the rate of Rs. 211.60 and Rs. 284.05 respectively with regard to earth work excavation of canal cutting in hard rock and boulders more than 3 Cum in size requiring blasting. It is true that under G.O. Ms. No. 34, dated 29-12-2003 the Government ordered all the engineering departments throughout the State to adopt the rate structure prescribed thereunder with regard to earth work excavations which included the excavation of hard rock and boulders of more than 3 cum in size requiring blasting by machinery, in respect of which the rate was fixed as Rs. 96.72 per Cum. However, the petitioners were never put on notice about the said rate prescribed under G.O. Ms. No. 34, dated 29-12-2003 and admittedly the respondents did not even execute supplementary agreements with regard to the revised rates on the basis of G.O. Ms. No. 34, dated 29-12-2003. It is also clear from the counter-affidavits

that the petitioners were not afforded any opportunity before taking a decision to apply the rates prescribed in G.O. Ms. No. 34, dated 29-12-2003 to the works already awarded to the petitioners. On a reading of G.O. Ms. No. 34, dated 29-12-2003, it does not appear that it can be made applicable automatically even to the contracts which were already concluded. The agreements in question also do not contain any clause empowering the department to vary the rates agreed. Hence, the respondents are not justified in adopting the rates prescribed in G.O. Ms. No. 34, dated 29-12-2003 unilaterally.

12. However, the learned Government Pleader while drawing the attention of this Court to Clause 3.2 of Addendum to Schedule-A of the Agreement No. 17/2004-05, dated 2-7-2004 executed in favour of the petitioner in W.P. No. 5073 of 2005, contended that it is always open to the department to revise or amend the rates agreed.

13. A perusal of the Addendum to Schedule-A to the Agreement shows that the said Clause 3.2 deals with the payment of rates for supplemental items of work which are found essential, incidental and inevitable during execution of main work which the contractor is bound to execute. The said clause is not at all relevant for the purpose of the controversy raised in these writ petitions since the earth work excavation of canal cutting in hard rock and boulders more than 3 Cum in size requiring blasting was one of the items included in the work to be executed under the agreements in question. The simple case of the petitioners herein is that since the respondents offered the rates at the rate of Rs. 284.05 per cubic meter and Rs. 211.60 per cubic meter respectively to the two petitioners and since the same was accepted and incorporated in the agreements, the respondents are bound to pay the same and they are not entitled to vary the terms and conditions of the concluded contracts. Hence, Clause 3.2 of the Addendum to Schedule-A which apparently dealt with supplemental items cannot be made applicable to the issue involved in these writ petitions. No other clause under the Agreements in question entitling the department to revise the agreed rates is pointed out by the learned Government Pleader.

14. It is true that normally this Court will not entertain a writ petition under Article 226 of the Constitution of India relating to money claims in respect of the commercial transactions. However, as held by the Supreme Court in ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd., : (2004)3SCC553 , exercise of judicial review depends upon the facts and circumstances of each case, the nature of dispute or difference and etc. As can be seen from the material on record, the matter does not involve any disputed questions of fact. It is a simple case where the petitioners are seeking enforcement of the rates agreed to be paid under the agreements. Since the respondents failed to make out any case to show that the rates prescribed under G.O. Ms. No. 34, dated 29-12-2003 can be made applicable to the agreement in question, particularly in the absence of any supplementary agreements, I do not find any force in the contention of the respondents that the petitioners cannot maintain these writ petitions under Article 226 of the Constitution of India. There can be no dispute about the ratio laid down by the Division Bench in Sri Rama Engineering Constructions (E&C;) 's case (supra), but the same does not attract to the cases on hand since the matter does not involve any disputed question of fact.

15. Accordingly, both the writ petitions are disposed of holding that the action of the respondents in withholding the payment to the petitioners for excavation in hard rock and boulders as per the rates agreed under the agreements in question as arbitrary and illegal. Consequently, the respondents are directed to make payment to the petitioners as per the rates agreed under the agreements in question in respect of the said item of work. No costs.