

(2014) 10 JH CK 0029

Jharkhand High Court

Case No: Writ Petition (Civil) No. 5731 of 2013

R.D. Construction

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision: Oct. 8, 2014

Acts Referred:

- Constitution of India, 1950 - Article 226

Citation: (2015) 1 AJR 102 : (2015) 1 JLR 67

Hon'ble Judges: S. Chandrashekhar, J

Bench: Single Bench

Advocate: V.P. Singh, Sr. Advocate and K.P. Deo, Advocate for the Appellant; Rajesh Kumar, G.P. V and Anil Kumar, J.C. to A.G, Advocate for the Respondent

Judgement

S. Chandrashekhar, J.

The petitioner has approached this Court seeking a direction upon the respondents for issuance of completion certificate with respect to the work allotted to the petitioner for which an agreement was signed on 15.10.2009 and for a further direction upon the respondents to refund a sum of Rs. 67,56,073/- with interest which has been deducted on account of time extension granted to the petitioner. Vide order dated 22.07.2014, I.A. No. 1379 of 2014 filed by the petitioner for amending the prayer in the writ petition for challenging communication dated 04.05.2012 has been allowed and thus, the said communication dated 04.05.2012 has also been impugned by the petitioner in the present proceeding. A further claim for award of interest @ 12% on the amount deducted from the petitioner has also been made in the writ petition.

2. The brief (sic) of (sic) can be stated thus:

The petitioner is a construction company, registered as Class-I contractor with Public Works Department, Government of Jharkhand. Pursuant to a Notice Inviting Tender (NIT), the petitioner participated by submitting its bid. The petitioner was the lowest

bidder and accordingly, it was declared L-1 and the Tender Committee decided vide its decision taken on 24.07.2009 to award the work of construction, widening and strengthening of road between Godda to Pirpaiti extending between 53.00 Km to 61.075 Km to the petitioner and an Agreement was signed between the parties on 15.10.2009. The schedule date of completion of work was 31.12.2010 however, the work under the contract could not be completed due to the Parliamentary General Election-2009, the Legislative Assembly Election and Panchayat Election in the State of Jharkhand. The progress of work suffered due to deployment of vehicles on election duty, non-availability of materials including Bitumen and stone chips besides, non-availability of clear site, naxal activities etc. The time extension for completing the work was granted to the petitioner from time to time and finally the scheduled completion period was extended upto 31.03.2012. The agreement was rescinded on 10.07.2012 which was challenged by the petitioner before this Court in W.P.(C) No. 4400 of 2012. Vide order dated 01.10.2012, the schedule completion period was extended up to 31.12.2012 and the petitioner accordingly completed the work before 31.12.2012. However, the completion certificate was not issued to the petitioner and an amount of Rs. 67,56,073/- was illegally deducted from the running bill of the petitioner and therefore, the petitioner was compelled to approach this Court again by filing the present writ petition.

3. A counter-affidavit has been filed on behalf of respondent Nos. 2 and 4 stating that the agreement was rescinded and final measurement was taken by the concerned executive engineer however, in view of the letter of the petitioner to the Principal Secretary, Road Construction Department and the affidavit and revised work programme submitted by the petitioner, it was granted last chance to complete the work upto 31.03.2012 which however, could not be accomplished by the petitioner and therefore, finally the agreement was rescinded on 10.07.2012. It is stated that the work order was issued on 01.10.2009 and the schedule completion period for the work was 15 months, that is, upto 31.12.2010. As the progress of work was not satisfactory, several letters were issued to the petitioner-company and vide letter dated 08.11.2011, the petitioner was ordered to complete the work on or before 28.11.2011 failing which, the agreement would be rescinded and final measurement would be taken on 28.11.2011. The petitioner failed to complete the work by 28.11.2011 and therefore, vide letter dated 02.12.2011, the agreement was rescinded. The petitioner thereafter submitted letter dated 24.12.2011 along with affidavit and revised work programme, seeking an opportunity to complete the work by 31.03.2012 which was accepted by the department and the respondent No. 4 vide letter dated 09.01.2012 granted time extension upto 31.03.2012 and the order rescinding the agreement was recalled. However, the petitioner again failed to complete the work within the extended period and therefore, letters dated 11.06.2012, 19.06.2012, 23.06.2012 and 29.06.2012 were issued to the petitioner. Finally, the agreement was rescinded vide order dated 10.07.2012 which was approved by the Chief Engineer vide letter dated 21.07.2012. The petitioner

committed fundamental breach of contract as per Clause 59.1 and 59.2(a), (e), (f) & (g) of the agreement and therefore, the agreement was terminated.

4. Mr. V.P. Singh, the learned senior counsel appearing for the petitioner has submitted that once the schedule completion period for the work has been extended by the Court vide order dated 01.10.2012, the respondents are denuded from power to impose liquidated damages in the garb of time extension as per the terms of contract. The schedule completion period was extended by the Court by recording that if the work is not completed within the period as undertaken by the petitioner in its affidavit, that is, on or before 31.12.2012, the petitioner may be held liable for non-performance and other legal consequences and since the petitioner has completed the work within such period as extended by the Court vide its order dated 01.10.2012, the respondents are not justified in resorting to Clause 49 of the Agreement. It is submitted that since an amount of Rs. 67,56,073/- has been illegally deducted from the running bills of the petitioner, the petitioner is entitled for grant of interest @ 12% or atleast at the market/bank rate. It is further submitted that since the default, if any, on the part of the petitioner in not completing the work within the stipulated completion period has been condoned by the respondents themselves by recalling the order terminating the agreement and finally by virtue of Court's order dated 01.10.2012, the respondents are not justified in recovering liquidated damages and in issuing letter dated 04.05.2012 recommending the name of the petitioner for blacklisting the petitioner and denying it allotment of further works till the work allotted is completed by the petitioner.

5. Per contra, Mr. Rajesh Kumar, the learned counsel appearing for the respondent-State of Jharkhand has submitted that the conduct of the petitioner disentitles the petitioner for grant of any discretionary remedy in the matter of contract. The parties are governed by the express terms of the contract. Clause 49 of the Agreement entered into between the parties provides imposition of liquidated damages to be paid by the contractor to the employer at the rate specified in the contract data and since, the petitioner failed to complete the work even within the extended period of time, that is, on or before 31.03.2012, the respondents have rightly deducted the amount of Rs. 67,56,073/- from the running bill of the petitioner. Reiterating the stand taken in the counter-affidavit, it is submitted that, the respondents have taken action in the matter, in terms of the provisions of the contract and therefore, in exercise of its jurisdiction under Article 226 of the Constitution of India this Court may not interfere in the matter. Paragraph No. 22 of the counter-affidavit is extracted below:

22. "That it is humbly submitted that the time extension was granted to the petitioner as per his undertaking to complete the work within three months and this extension in any manner does not absolve the consequences of delayed completion of work from ensuing as per the terms of the contract. The time extension granted to the petitioner does not in any manner absolve the petitioner from his liability for

the liquidated damages as stipulated in Clause 49 of the conditions of contract."

6. I have carefully considered the submission of the counsel appearing for the parties and perused the documents on record.

7. In the factual background noticed above and the submission of the counsel for the parties, the following issues arise for consideration:

(i) whether the time was the essence of the contract?

(ii) whether the respondents have expressly waived their right of recovering liquidated damages? And,

(iii) whether in view of order dated 01.10.2012, the respondents cannot recover/appropriate the liquidated damages in terms of Clause 49 of the Agreement?

8. Before referring to the contentions of the parties, the provision under Clause 49 of the Agreement can be noticed usefully. The relevant portion of Clause 49 of the Agreement is extracted below:

49.1. "The Contractor shall pay liquidated damages to the Employer at the rate per day stated in the Contract data for each day that the Completion Date is later than the Intended Completion Date (for the whole of the works or the milestones as stated in the contract data). The total amount of liquidated damages shall not exceed the amount defined in the Contract Data. The Employer may deduct liquidated damages from payments due to the Contractor. Payment of liquidated damages does not affect the Contractor's liabilities.

49.2. If the Intended Completion date is extended after liquidated damages have been paid, the Engineer shall correct any over payment of liquidated damages by the Contractor by adjusting the next payment certificate. The Contractor shall be paid interest on the over payment calculated from the date of payment to the date of repayment at the rates specified in Sub-Clause 43.1.

....."

9. A bare reading of Clause 49.1 and 49.2 would indicate that for time extension the contractor is liable to pay liquidated damages to the employer at the rate specified in the contract data subject to the maximum as specified in the contract data. It is not in dispute that the petitioner was granted extension of time even before the extension granted by the Court vide its order dated 01.10.2012. However, the respondents have not produced on record any order whereby liquidated damages as provided under Clause 49.1 and 49.2 has been imposed upon the contractor. The extension of time granted by the employer is an evidence to conclude that time was not the essence of contract. In [Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain \(Dead\) by Lrs Vs. State of Maharashtra,](#) it has been held that, "the question whether or not time was the essence of the contract would

essentially be a question of the intention of the parties to be gathered from the terms of the contract." The Hon"ble Supreme Court has held thus:

8. "It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract."

10. The delay in completion of the project has been condoned by the employer. Moreover, it is manifest that the extension of time upto 31.03.2012 is not extension granted by the employer in terms of Clause 49.2 of the Agreement and the completion period has been extended till 31.12.2012 by the Court's order dated 01.10.2012.

11. In the previous proceeding of W.P.(C) No. 4408 of 2012, the petitioner gave the following undertaking:

"That the petitioner humbly submitted that the letter as contained in memo No. 650 dated 10.07.2012 issued by the executive engineer is wholly arbitrary, mala fide, without jurisdiction and not sustainable, in as much as the petitioner has completed more than 68% works and undertakes to complete the work by 31st December, 2012, if the petitioner is allowed to continue the work with immediate effect".

12. In the counter-affidavit, it is stated by the respondents that when W.P.(C) No. 4408 of 2012 was taken for hearing on 12.09.2012, the respondents urged before the Hon"ble Court that the petitioner may be directed to file an undertaking before the Court for completing the work within three months. In the said proceeding, the respondents filed a supplementary counter-affidavit dated 29.09.2012 stating as under:

"That in pursuance of order dated 19.09.2012 the Hon"ble Court has directed the respondents to seek instruction that if the petitioner is ready to give undertaking before this Hon"ble Court that the petitioner will complete the construction of road within three months then can respondents allow three months time to the petitioner to complete the remaining construction work.

That in pursuance of that order the department has taken a decision to allow the petitioner to complete the work i.e. construction of road if the petitioner is ready to give the undertaking before this Hon"ble Court that the petitioner will complete the work within three months."

13. It is a matter of record that the petitioner filed an undertaking in the W.P.(C) No. 4408 of 2012 which was accepted by the Hon"ble Court and the writ petition was disposed of vide order dated 01.10.2012. The relevant portion of the order dated 01.10.2012 is quoted below:

"

This writ petition along with I.A. Nos. 2406 & 2719/2012 are, accordingly, disposed of. The petitioner has assured to complete the road by 31st December, 2012. In view of its assurance, if the road is not completed within the said period, the petitioner may be held liable for non-performance and other legal consequences."

14. From a bare reading of order dated 01.10.2012 which has not been challenged by the respondents by preferring any appeal, it would appear that the petitioner would be liable for non-performance of the contract only if the petitioner fails to execute the work before 31.12.2012. In the counter-affidavit, the respondents have produced a copy of the completion certificate evidencing that the petitioner has completed the work before 31.12.2012.

15. In general, where one party by his conduct affects the legal relations and the other party at his words acted on it, so as to alter his position, the first party would be deemed to have waived his right under the previous legal relationship. In Halsbury's Laws of England, 4th Edn., Vol. 16, the term "waiver" has been described in the following words:

1471. "Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. ... A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration."

16. From the materials brought on record, it does not appear that, after the agreement was rescinded on 02.12.2011 and it was revived vide order dated 09.01.2012, Clause 49 of the Agreement was invoked by the respondents. No specific order has been brought on record by the respondents indicating that the order dated 02.12.2011 was revoked on the condition that the petitioner would be liable to pay liquidated damages under Clause 49 of the Agreement. It further appears that the second cancellation order dated 10.07.2012 stands quashed by the High Court when the petitioner was granted further time upto 31.12.2012 to complete the work. The petitioner has brought on record various orders by which the liquidated damages recovered from other contractors for time extension have been directed to be refunded to other contractors. Another contractor, who worked on a different stretch on the same road between Godda and Pirpaiti, has also been

refunded the liquidated damages recovered on account of time extension granted to the said contractor. This has not been controverted by the respondents. In the affidavit filed in the proceeding of W.P.(C) No. 4408 of 2012, the respondents have not taken a plea that the extension of time may be granted to the petitioner on the condition that the petitioner would be liable to pay liquidated damages as per Clause 49 of the Agreement rather, the only stand taken by the respondents was that the petitioner should file an undertaking in the Court. The stand taken by the respondents appears in supplementary counter-affidavit dated 29.09.2012, relevant extract of which has been noticed hereinabove. Though in the present proceeding, the respondents have taken a plea that the time extension granted to the petitioner does not in any manner absolve the petitioner from its liability to pay liquidated damages as stipulated in Clause 49 of the Conditions of Contract, I am of the opinion that the respondents by their conduct and stand taken in earlier writ proceeding, have waived their right to invoke Clause 49 of the Agreement. In any case, order dated 01.10.2012 passed in W.P.(C) No. 4408 of 2012 permits the respondents to take action against the petitioner in terms of the Agreement, only if, the petitioner fails to complete the work within the extended time.

17. In [Gujarat Ambuja Cements Ltd. and Another Vs. Union of India \(UOI\) and Another,](#) the Hon"ble Supreme Court had directed the petitioners to deposit the outstanding liability within two weeks. It was held that, "the liability to pay interest or penalty on outstanding amounts will arise only if the dues are not paid within the period of two weeks from the order passed by this Court on 17.11.2003."

18. In view of the above discussions, the present writ petition is allowed insofar as, the prayer with respect to refund of Rs. 67,56,073/- is concerned. Insofar as, prayer seeking direction upon the respondents for issuing completion certificate is concerned, it has become infructuous. The challenge to the communication dated 04.05.2012 appears to be pre-mature. It was directed by the said communication that the allotment of further work to the contractors would be stopped only till the completion of work. The petitioner has already completed the work within the scheduled time as specified by the High Court. If any adverse action is taken against the petitioner pursuant to communication dated 04.05.2012, it would be open to the petitioner to challenge the same in appropriate proceeding. Since the deductions on account of time extension have been made in purported exercise of power under Clause 49 of the Agreement, no interest can be awarded on the amount of Rs. 67,56,073/-, which has been directed to be refunded to the petitioner.

19. In the result, the writ petition is partly allowed, in the aforesaid terms.