

GAHC010035292022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1389/2022

PRASENJIT MONDAL
S/O SRI RANJIT MONDAL
R/O 353, BIKRAMPUR ROAD, JAPORIGOG, POST OFFICE DISPUR, DIST.
KAMRUP (M), ASSAM, PIN-781005, ASSAM

VERSUS

THE STATE OF ASSAM AND 5 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
PWD (ROADS) DEPARTMENT, DISPUR, GUWAHATI-781006.

2:THE SECRETARY

DEPARTMENT OF PWD (ROADS) DEPARTMENT
GOVERNMENT OF ASSAM
DISPUR
GUWAHATI-781006.

3:THE CHIEF ENGINEER

PWD (BR)
CHANDMARI
GUWAHATI-781003

4:THE SUPERINTENDENT ENGINEER

PWD (ROADS)
GOALPARA WEST AND JALESWAR TERRITORIAL ROAD DIVISION
(W.A.C.) GOALPARA
LAKHIPUR
GOALPARA
ASSAM

5:THE EXECUTIVE ENGINEER

PWRD
GOALPARA WEST AND JALESWAR TERRITORIAL ROAD
DIVISION
(W.A.C.) GOALPARA
LAKHIPUR
GOALPARA
ASSAM

6:THE ASSTT. EXECUTIVE ENGINEER

PWRD GOALPARA WEST T.R. SUB-DIVISION
BASHBARI
ASSAM

Advocate for the Petitioner : MR H BURAGOHAIN

Advocate for the Respondent : SC, PWD

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

ORDER

Date : 04-03-2024

Heard Mr. H. Buragohain, learned counsel for the petitioner as well as Mr. D. Nath, learned standing counsel for the PWD (Roads) for the respondent nos.1 to 6.

2. The petitioner's contract having been terminated by way of an Advocate's notice, the same has been put to challenge.

3. The respondents in the PWD (Roads) in the Goalpara Division issued an NIT under Memo No. TECH/129/SOPD(G)/SE(W)/G/2019-20 dated 26.05.2019 for construction of STP Bridge No. 1/1 on Rakhaldubi Anchalik Bazar

to Rakhaldubi Char including Approach under SOPD for 2018- 2019, Package No. SOPD_GL_29, in which the petitioner along with other bidders submitted their bids.

4. It is the case of the petitioner that as the rate quoted by him with regard to the said work was found to be responsive, the respondent in the PWD (Roads), vide communication No. Tech/CS104/SE(W)/G/SOPD(G)/2018-19/3 dated 30.08.2019, issued Letter of Acceptance to him and further, by communication No. Tech/CS-104/SE(W)/G/SOPD(G)/2018-19/5 dated 02.09.2019, issued notice to the petitioner to proceed with the said work informing him that the work should be completed within a period of 120 days.

5. However, on the prayer of the petitioner, due to pandemic Covid-19, said work order was extended from time to time and lastly i.e., on 20.12.2020, it was extended upto 28.03.2021.

6. As the petitioner failed to complete the said work inspite of extensions of time for completion of work, the respondents in the PWD (roads) on 06.08.2021 issued a legal notice to him.

7. It is the further case of the petitioner that though he prayed for another 45 days time to complete the said work and was granted the same by the respondents authorities, but he failed to complete the work within the stipulated time. The respondents in the PWD (roads) issued Advocate Notice (4th) dated 27.09.2021 to the petitioner informing him that the contract work had been terminated.

8. By communication No. GW&J/TRD/Tech-2/ SOPD/ Est/ 2019-20/1023 dated 08.10.2021, the Executive Engineer, PWRD, Goalpara West & Jaleswar, T.R. Division, Lakhipur, Goalpara informed the petitioner that his contract had been terminated by the Advocate's notice. The petitioner was then directed to attend the office of the issuing authority and to remain present in the concerned site, to take the up-to-date work measurement executed by him within a period of 3 (three) days from the date of issuance of the said letter.

9. Mr. Buragohain, learned counsel for the petitioner submits that in response to the letter dated 08.10.2021, the petitioner submitted representations dated 12.10.2021 and 08.03.2021 before the Executive Engineer, PWRD, Goalpara West & Jaleswar, T.R. Division, Lakhipur, Goalpara, which is still pending disposal.

10. The petitioner's counsel submits that the termination of the contract work had been done through an Advocate's notice and not in terms of the contract agreement executed by the parties. The communication made by the Executive Engineer, PWD (Roads) regarding the termination of the contract work was only a reiteration of the Advocate's notice. He submits that as the advocate could not have terminated the petitioner's contract work, the impugned communication dated 08.10.2021 issued by the Executive Engineer should be set aside.

11. Mr. D. Nath, learned counsel for the State respondents, submits that the reason for terminating the petitioner's contract was due to the petitioner's

failure to complete the contract work within the stipulated time period, despite repeated extensions given to him. He, however, does not deny the fact that the termination of the contract work could not have been done by way of an Advocate's notice, in terms of the contract agreement executed between the parties.

12. I have heard the learned counsels for the parties.

13. Clause 4.1 of the Contract agreement executed between the parties provides that except where otherwise specifically stated, the Engineer will decide contractual matters between the employer and the contractor in the role representing the employer.

14. Clause 59.1 of the Contract agreement provides that the employer or the contractor may terminate the contract, if the other party causes a fundamental breach of the contract. The definition of employer as given in the contract agreement states that the employer is the party who will employ the contractor to carry out the works.

15. The contract agreement in question has been executed between the Superintending Engineer, Public Works Department (Roads), Western Assam Circle, Goalpara and the petitioner. The above provisions of the contract agreement show that the advocate representing the PWD was not the employer of the petitioner and, as such, could not have issued any letter terminating the contract being executed by the petitioner. There being no source of power, the

exercise of terminating the petitioner's contract work was a void exercise, keeping in view the judgment of the Supreme Court in the case of *Union of India Vs. Tulsiram Patel, 1985 3 SCC 398*, where it has held that the source of power must exist for its exercise.

16. Consequently, the Advocate's notice dated 27.09.2021 cancelling the petitioner's contract work can have no force in law in relation to the contract work being executed by the petitioner. Thus, the subsequent order issued by the Executive Engineer, PWRD, Goalpara West & Jaleswar Territorial Road Division, (W.A.C.), Goalpara, Lakhipur, Goalpara, Assam i.e. the respondent no.5 vide letter dated 08.10.2021 regarding termination of the petitioner's contract work, cannot be considered to be an order terminating the petitioner's contract work, as the initial order was not a valid order. Accordingly, the respondent no.5's letter/ order dated 08.10.2021 is set aside, as the same cannot be construed to be a sanctifying/justifying letter/order of the termination of the petitioner's contract work by the advocate's letter dated 27.09.2021.

17. The State respondents are accordingly directed to consider whether to allow the petitioner to complete the contract work by way of giving him further extension. The above direction will not come in the way of the respondents to take a fresh decision to continue/ discontinue the contract work with the petitioner pursuant to the NIT dated 26.05.2021.

18. The writ petition is accordingly disposed of.

JUDGE

Comparing Assistant