

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P (C) No.602 of 2020

Hemanta Malik

.....

Petitioner

Mr. P.C. Nayak, Adv.

Vs.

State of Odisha & Ors.

.....

Opposite Parties

Mr. P.K. Muduli, AGA

CORAM:

DR. JUSTICE B.R. SARANGI

MR. JUSTICE S.K. MISHRA

ORDER

20.07.2022

Order No.

05

This matter is taken up through hybrid mode.

2. Heard Mr. P.C. Nayak, learned Counsel appearing for the Petitioner and Mr. P.K. Muduli, learned Additional Government Advocate for the State Opposite Parties.

3. The Petitioner has filed this Writ Petition seeking to quash the letter/Order dated 06.06.2019 issued by Opposite Party No.2 imposing penalty of Rs.5,48,459/-, i.e., 20% of the value of left over work and the Office Order dated 18.05.2019 under Annexure-3 issued by Opposite Party No.2 terminating the contract of the Petitioner and further to issue direction to Opposite Party No.2 to release all the security amount of the Petitioner within a stipulated period.

4. Mr. P.C. Nayak, learned Counsel appearing for the Petitioner contended that against the termination of contract and imposition of penalty, the Petitioner has approached this Court by filing this Writ Petition. He contended that the Authority has imposed such penalty without giving opportunity of hearing to the Petitioner. Therefore, there is gross violation of Principle of

Natural Justice. In support of his contentions, he has relied upon the Judgment of the apex Court in ***Gorkha Security Services v. Government (NCT of Delhi) and Others***, (2014) 9 SCC 105.

5. Mr. P.K. Muduli, learned Additional Government Advocate for the State Opposite Parties contended that though notice was issued on 14.01.2020, till date no Counter Affidavit has been filed. On having received instructions, he further contended that so far as termination of contract is concerned, no cause of action survives for the Petitioner, as in the meantime work has been allotted in favour of other person on 30.09.2019. So far as imposition of penalty is concerned, if the petitioner has not been given opportunity of hearing, as contended by learned counsel for the Petitioner, let liberty may be granted to the Petitioner.

6. Having heard learned Counsel for the parties and after going through the records, it appears that the Petitioner has filed this Writ Petition against termination of contract. In course of hearing, learned Counsel for the Petitioner stated that the Petitioner does not want to press the prayer made in that context, as in the meantime the work has been allotted in favour of other person, and stated that the petitioner is aggrieved by imposition of penalty, which has been done without giving him opportunity of hearing. Therefore, there is gross violation of Principle of Natural Justice. In ***Gorkha Security Services*** (supra), the apex Court in paragraphs-24, 25 & 26 of the Judgment held as follows:

“24. It would be necessary to take note of the relevant portion of Clause 27 of the NIT under which umbrage is taken by the respondents to justify their action, and even appealed to the High Court. Clause 27(a) reads as under:

“(a).....(sic) In case the contractor fails to commence/excute the work as stipulated in the agreement or unsatisfactory performance or does not meet the statutory requirements of the contract,

Department reserves the right to impose the penalty as detailed below:

- (i) 20% of cost of order/agreement per week, up to two weeks' delays.*
- (ii) After two weeks' delay principal employer reserves the right to cancel the contract and withhold the agreement and get this job carried out preferably from other contractor(s) registered with DGR and then from open market or with other agencies if DGR registered agencies are not in a position to provide such contractor(s). The difference if any will be recovered from the defaulter contractor and also shall be blacklisted for a period of 4 years from participating in such type of tender and his earnest money/security deposit may also be forfeited, if so warranted."*

25. It is clear from the reading of the aforesaid clause that when there is a failure on the part of the contractor to comply with the express terms of the contract and/or to commit breach of the said terms resulting into failure to commence / execute the work as stipulated in the agreement or giving the performance that does not meet the statutory requirements of the contract, the Department has a right to impose various kinds of penalties as provided in the aforesaid clause. These penalties are of the following nature:

- (i) Penalty in the form of 20% of cost of orders /agreement per week, up to delay of 2 weeks.*
- (ii) If the delay is beyond 2 weeks then:*
 - (a) To cancel the contract and withhold the agreement . In that event, Department has right to get the job carried out from other contractor at the defaulter contractor;*
 - (b) To blacklist the defaulter contractor for a period of 4 years ;*
 - (c) To forfeit his earnest money/deposits, if so warranted.*

26. In the present case, it is obvious that action is taken as provided in sub-clause (ii). Under this clause, as is clear from the reading thereof, the Department had a right to cancel the contract and withhold the agreement. That has been done. The Department has also a right to get the job which was to be carried out by the defaulting contractor, to be carried out from other contractor(s). In such an event, the Department also has a right to recover the difference from the defaulting contractor. This clause, no doubt, gives further right to the Department to blacklist the contractor for a

period of 4 years and also forfeit his earnest money/security deposit, if so required. It is thus apparent that this sub-clause provides for various actions which can be taken and penalties which can be imposed by the Department. In such a situation which action the Department proposes to take, need to be specifically stated in the show-cause notice. It becomes all the more important when the action of blacklisting and/or forfeiture of earnest money/security deposit is to be taken, as the clause stipulates that such an action can be taken, if so warranted. The words "if so warranted", thus, assume great significance. It would show that it is not necessary for the Department to resort to penalty of blacklisting or forfeiture of earnest money/security deposit in all cases, even if there is such a power. It is left to the Department to inflict any such penalty or not depending upon as to whether circumstances in a particular case warrant such a penalty..."

7. In view of the above, the penalty imposed in Annexure-4 dated 06.06.2019 by Opposite Party No.2 cannot sustain in the eye of law. Therefore, the same is liable to be quashed and is hereby quashed. The matter is remitted back to Opposite Party No.2 to pass appropriate Order by giving opportunity of hearing to the Petitioner in compliance of the Principle of Natural Justice.
8. Accordingly, the Writ Petition stands disposed of.
9. Issue urgent certified copy as per rules.

(DR. B.R. SARANGI)
JUDGE

(S.K. MISHRA)
JUDGE

Alok/Padma