

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P (C) No. 9145 of 2017

Pradipta Kumar Rout

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Petitioner

Mr. P.C. Nayak, Advocate

Vs.

State of Odisha & Ors.

.....

Opposite parties

*Mr. T.K. Pattnaik, ASC
(O.Ps.)*

CORAM:

**DR. JUSTICE B.R. SARANGI
MISS JUSTICE SAVITRI RATHO**

**ORDER
05.04.2022**

Order No.

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This matter is taken up through hybrid mode.

2. Heard Mr. P.C. Nayak, learned counsel for the petitioner and Mr. T.K. Pattnaik, learned Additional Standing Counsel for the State-opposite parties.

3. The petitioner has filed this writ petition to quash the order/letter dated 07.04.2017 issued under Annexure-11, by which opposite party no.6-Executive Engineer, Rural Works Division-II, Malkangiri has imposed penalty on termination of the work “Construction and Maintenance of Rural Roads and C.D. works under ADB Assisted PMGSY Package No. OR-20-ADB-05-II in the district of Malkangiri under agreement No.04F2/2007-08/EE” and to quash Annexure-10 dated 23.09.2013 issued by opposite party no.2 for closure of contract with usual penalty.

4. Mr. P.C. Nayak, learned counsel for the petitioner contended that pursuant to tender call notice issued by opposite party no.4 for the work “Construction and Maintenance of Rural Roads and C.D. Works under ADB Assisted PMGSY Package No.OR-20-ADB-05-II”, the petitioner participated in the tender process and was selected. On 20.05.2007, an agreement was executed, vide agreement

no.04F2/2007-08/EE with date of commencement as 20.05.2007 and date of completion as 19.02.2008. He brought to the notice of this Court, Clause-52 of the contract which deals with termination and also Clause-55, which deals with release from performance. Under Clause-55.1 It is provided that if the contract is frustrated by the outbreak of war or by any other event entirely outside the control of the employer or the contractor, the Engineer shall certify that the contract has been frustrated. The contractor shall make the site safe and stop work as quickly as possible after receiving this certificate and shall be paid for all work carried out before receiving it and for any work carried out afterwards to which a commitment was made. It is contended that the petitioner has executed the work in question partly and the balance work was not executed due to repeated threatening of naxals and frequent movement of naxals. Therefore, the petitioner sent a letter on 10.12.2010 to opposite parties no.3 & 6 to close the contract as per clause-55.1 of the agreement. Thereafter, on 04.02.2011, opposite party no.6-Executive Engineer, Rural Works Division-II, Malkangiri, on the representation of the petitioner, recommended to opposite party no.4 to close the contract as the said area was highly naxalite prone and the entire work site were beyond control of the contractor and employer. Opposite party no.3-Collector, Malkangiri, on 09.02.2011, sent a letter to opposite party no.4- Chief Engineer, Rural Works-III, Odisha to take action as per letter of opposite party no.6. Thereafter, opposite party no.6 again on 26.09.2011 recommended to close the contract under clause 55.1 since the said area is highly naxalite prone and border of Andhra Pradesh and Chhatishgarh State. Opposite party no.5-Superintending Engineer, Southern Circle, Rural Works, Sunabeda vide letter dated 15.10.2011 intimated opposite party no.4 that no work is possible in

the area due to repeated naxal threat and therefore the contract of the package may be considered for closure as per clause 55.1 of the GCC, treating the contractor frustrated and agreement in force. In a proceeding of meeting of committee of Chief Engineers of Rural Works held on 25.10.2011, it was decided by the committee to recommend the case to Government to close the contract as per clause 55.1 of GCC, since the said agency was not in a position to complete the work in view of increasing naxal activities and threat in the area. More so, opposite party no.4 recommended to opposite party no.1-Government, vide letter dated 18.01.2012, for closure of the contract as per clause 55.1 of GCC. Thereafter, opposite party no.2, without giving any opportunity of hearing to the petitioner, directed opposite party no.4 vide Annexure-10 dated 23.09.2013 to close the contract with usual penalty. It is contended that if due to some reason or the other the entire site was beyond the control of the contractor and employer and the work was not completed, then as per clause-55.1 the work should be closed. Therefore, the imposition of penalty vide Annexure-10 dated 23.09.2013 has caused prejudice to the petitioner because of no fault of him and without compliance of principle of natural justice. It is further contended that issuance of letter/order dated 07.04.2017 after four years of termination of contract imposing 20% penalty of left over work in adjusting security amount and directing the petitioner to deposit balance amount of Rs.17,34,107/- vide Annexure-11 is contrary to the provisions of law. 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. T.K. Pattnaik, learned Additional Standing Counsel for the State-opposite parties contended that communication was made

on 23.04.2014 to the petitioner by giving final notice. In view of such position, the order/letter dated 07.04.2017 issued by the Government directing the petitioner to deposit the balance amount of Rs.17,34,102/- is well justified. Therefore, the writ petition should be dismissed.

6. Having heard learned counsel for the parties and after going through the records, it appears that the reason for non-completion of work was beyond the control of the petitioner and the employer. Therefore, the Collector, Malkangiri made recommendation to close the contract stating inability of the petitioner to resume work further, in view of difficult site condition due to threat from naxals from the neighboring two States, i.e. Andhra Pradesh & Chattishgarh. The same was considered by the Superintending Engineer and also Committee of Chief Engineers and recommendations were made for closure of the contract. But instead of closing the contract in terms of Clause-55.1, opposite party no.2 issued order/letter dated 23.09.2013 in Annexure-10 imposing usual penalty. While imposing such penalty, which is punitive in nature, the petitioner should have been given opportunity of hearing. More so, by passing one line order, opposite party no.2 has imposed penalty on the petitioner. Nothing has been placed on record to show that the petitioner was given opportunity of hearing before imposing penalty. Thereby, the order under Annexure-10 cannot sustain in the eye of law. So far as letter dated 07.04.2017 is concerned, Mr. T.K. Pattnaik, learned Additional Standing Counsel for the State relied upon the notice dated 23.04.2014, which has been referred in the said letter. As such, nothing has been placed on record that such a notice had ever been served on the petitioner. More so, the petitioner has never challenged the notice dated 23.04.2014. Therefore, the contention raised in that

regard cannot sustain, as the opposite parties have not produced any material to that extent.

7. Therefore, this Court is of the considered view that the letter/order dated 23.9.2013 under Annexure-10 as well as the letter/order dated 07.04.2017 under Annexure-11 terminating the contract, which was issued after four years of the issuance of the letter dated 23.09.2013, having been passed without compliance of the principle of natural justice, in view of judgment of the apex Court in *Gorkha Security Services* (supra), the same are liable to be quashed and hereby quashed. Since the contract has been terminated, it is open to the State to pass appropriate order afresh, on the basis of recommendation made by the Executive Engineer, Superintending Engineer and Chief Engineer, by giving opportunity of hearing to the petitioner, as expeditiously as possible, preferably within a period of three months from the date of production/communication of certified copy of this order.

8. With the above observation & direction, the writ petition stands disposed of.

9. Issue urgent certified copy as per rules.

(DR. B.R. SARANGI)
JUDGE

(SAVITRI RATHO)
JUDGE