IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P (C) No. 8636 of 2018

Sundar Pravat Das ….. ***Petitioner***

Mr. S.S. Padhy, Advocate

Vs.

State of Orissa & Ors. ….. ***Opposite Parties***

State Counsel

CORAM:
DR. JUSTICE B.R. SARANGI
MR. JUSTICE SANJAY KUMAR MISHRA

ORDER
12.09.2022

I.A. No.12335 of 2022

Order No. 04.

This matter is taken up through hybrid mode.

2. This application has been filed for correction of the typographical error crept in Order dated 21.07.2022 passed in this Writ Petition.

3. Considering the submission made by the learned Counsel for the parties and after going through the record, the Order dated 21.07.2022, passed in this Writ Petition is recalled and a fresh Order is passed today.

4. Accordingly, the I.A. stands disposed of.

(DR. B.R. SARANGI)
JUDGE

(S.K. MISHRA)
JUDGE

Arun/Banita

Contd……2

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.8636 of 2018

Sunder Pravat Das	…..	***Petitioner***
		Mr. S.S.Padhy, Advocate
	Vs.	
State of Orissa & Ors.	…..	***Opposite parties***
		State Counsel

CORAM:
DR. JUSTICE B.R. SARANGI
MR. JUSTICE S.K. MISHRA

ORDER
12.09.2022

Order No.
05

This matter is taken up through hybrid mode.2.

The Petitioner challenges the order dated 23.08.2017 of Opposite Party No.4 in respect of imposition of penalty@ 0.50% on the value of the work executed beyond the stipulated period.

3. The Petitioner is a Special-class Contractor and executed an agreement for the work *"Construction and Maintenance for five years of Rural road under PMGSY (ADB Rural Connectivity Investment Programme) for package No. OR-08-ADB-03/T III in the District of Deogarh for the year 2015-16."* with stipulation to complete the same by 17.6.2016. The work could not be completed within the stipulated period and continued till 17.06.2016. Such completion of work beyond the stipulated date was permitted by the Opposite Parties subsequently in order dated 23.08.2017 under Annexure-8. The Petitioner's grievance is that in the said order while granting sanction for extension of time, the condition to levy penalty @ 0.50 % has been imposed illegally and arbitrarily without considering genuine causes of hindrances.

4. Learned counsel appearing for the Petitioner submits that before levying such penalty, no notice was sent nor anyopportunity of being heard was granted to the Petitioner. He further submits that due to hindrances relating to issues like (i) Non availability of site and structural drawing, (ii) Philin, Cyclone and Subsequent Flood.

Petitioner could not complete the work within the stipulated time. It is also submitted that para 3.5.5 (V) of the OPWD Code as referred in the impugned order does not prescribe imposition of penalty while granting extension of time, but it speaks otherwise.

5. Mr. P.P. Mohanty, learned Additional Government Advocate submits that since the Petitioner could not complete the workwithin the stipulated time, as per recommendation of the technical committee, the penalty was levied in terms of the provision inpara 3.5.5 (V) of the OPWD Code, Vol.I.

6. Clause (V) of para 3.5.5 of the OPWD Code, Vol.I reads as under:

> *"Percentage Contract will be in addition of item rate, lump sum contractors etc. In such contracts the schedule of quantities shall mention estimated rate of such item and amount thereof. The Contractor has to mention percentage excess or less over the estimated cost (in figures as well as words) in the prescribed format appended to the tender document. The Contractors participated in the tender for more than one work may offer conditional rebate. Rebate offer submitted in separate sealed envelope shall be opened, declared and recorded first. The rebate so offered, shall be considered after opening of all packages called in the same tender notice. The Contractors who wish to tender for two or more work shall submit separate tender for each. Each tender shall have the name and number of the works to which they refer, written on the envelope.*
>
> *The adopted format for percentage rate is same as that of the form adopted for item rate tenders but the word "item rate" shall be replaced by "percentage rate" and the contract form may be named as P-1. In this for time is the essence. <u>The Contractor is required to maintain a certain rate of progress specified in the contract. The contract can also be terminated with penalty when the progress of work is not as per the conditions of contract</u>. The quantity mentioned can be increased or reduced to the extent of 10% for individual items subject to a maximum of 5% over the estimated cost. If it exceeds the limit stated above prior approval of competent authority is mandatory before making any payment. The period of completion is fixed and cannot be altered except in case of exceptional circumstances with due approval of next higher authority.*

In case of percentage Rate tenders, only percentage quoted shall be considered. Percentage quoted by the Contractor shall be accurately filled in figures and words, so that there is no discrepancy. If any discrepancy is found in the percentage quoted in words and figures, then the percentage quoted by the Contractor in words shall be taken as correct. If any discrepancy is found in the percentage quotedin percentage excess/less and total rate quoted by the Contractor then percentage will be taken as correct. The percentage quoted in the tender without mentioning excess or less and not supported with the corresponding amount will be treated *as excess. The Contractor will write percentage excess or less upto one decimal point only. If he writes the percentage excess or less upto two or more decimal point, the first decimal point shall only be considered without rounding off. Where the Contractor has omitted to quote the rates either in figures and words the officer opening the tender should record the omission.*

Bills for percentage rate tenders shall be prepared at the estimated rates for individual items only and the percentage excess or less shall be added or subtracted from the gross amount of the bill.

This may not be applicable to the works funded by World Bank and other external agencies, in which case their guidelines shall be followed."

(emphasis supplied)

7. As per the submission of the Petitioner, imposition of penalty @ 0.50% is grossly illegal and arbitrary since the contract has not been terminated, but extension of time has been granted. Further as per Annexure-8, extension of time was granted without any price escalation and without any monetary compensation. We find substantial force in the contention of the Petitioner. Because, it is not the case where the contract has been terminated for non- completion of the work within the stipulated time. Clause (V) of para 3.5.5 of the OPWD Code Vol. I prescribes that the contract can be terminated with penalty when the progress of work is notas per the conditions of contract. So when the contract has not been terminated, rather an extension of time has been granted as permissible in the terms of contract (Clause-4), the levy of penalty @ 0.50% by resorting to Para 3.5.5 (V) of the OPWD Code, appears unjustified in the

circumstances of the case. Accordingly, the same is liable to be quashed.

8. The writ petition is allowed and Annexure-8 is quashed to the extent of levy of penalty @ 0.50%. The Opposite Parties are further directed to release the withheld bill value of the Petitioner for the work, if any, in favour of the Petitioner within a period of two months from the date of receipt of a certified copy of this order.

9. Urgent certified copy of this order be granted on proper application.

(DR. B.R. SARANGI)
JUDGE

Ashok/Ananta

(S.K. MISHRA)
JUDGE