

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C). NO.21184 OF 2021

Bikash Chandra Deb

....

Petitioner

Mr.Avijit Pal, Advocate

-versus-

State of Odisha & Ors.

....

Opposite Party(s) .

Mr.S.Ghose, AGA

Mr.D.Mohapatra,

Adv.(O.P.Nos. 2 to

4)

**CORAM:
JUSTICE BISWANATH RATH**

**ORDER
28.11.2022**

**Order
No.7**

1. Heard learned counsel appearing for the parties.
2. This writ petition involves the following prayer:

“In view of the above facts and circumstances, the petitioner therefore prays that this Hon’ble Court may be graciously pleased to quash the impugned notices dated 18.08.2020 issued by the Opp. Party No.3 under Annexure-1 and impugned demand dated 25.05.2021 under Annexure-2;

And/or further be pleased to quash the OPP Case No.01/2021 initiated as against the petitioner and the impugned notice under Annexure-3 for the same being in derogation with the order dated 05.11.2020 passed by this Hon’ble Court in W.P.(C). No. 29376 of 2020;

And/or direct the Opp. Party No.3 for exemption of the rent of the petitioner’s Gymnasium/institution for the period from 23rd March, 2020 till April, 2021;

And further be pleased to pass any other order/orders as may be deemed just and proper;

And for this act of kindness the petitioner as in duty bound shall ever pray.”

3. Fact of the case is that while challenging the notices dated 18.08.2020 and 25.05.2021 at Annexures-1 and 2. Annexure-1 involving clearance of outstanding rent and energy charges whereas Annexure-2 appears to be a reminder for clearing the outstanding. At the same time, petitioner also attempted to quash OPP Case No.01 of 2021 initiated as against the petitioner and followed by notice at Annexure-3 as a consequence of notice of eviction.

4. Background involved herein, petitioner has taken the permission of Bhubaneswar Development Authority-opposite party no.3, statutory authority constituted under the ODA Act, 1982, for establishing and operating a gymnasium at I.G. Park, Bhubaneswar involving the agreement dated 12.08.2015 at Annexure-4, it is claimed that since the date of execution of agreement, the petitioner has been paying/depositing usual rent and energy charges before the opposite party no.3 till the activities of the petitioner establishment got affected by COVID-19 pandemic taking place in the year 2020 resulting almost closure of the gymnasium. It is claimed that facing financial difficulties, the petitioner could not deposit the usual rent and energy charges in time though during the COVID affecting. In the meantime, petitioner was served with notice dated 18.08.2020 at Annexure-1 with clear direction unless the petitioner clears the dues i.e. usual rent and energy charges within a period of seven days, the permission for the premises will be cancelled. In further notice, it is claimed that petitioner had cleared all charges in operational period except some outstanding for the COVID-19 Pandemic, petitioner represented to the opposite party no.3 with copies thereof to opposite party nos.1 and 2 requesting for a relaxation in the

conditions and in the demand. In the representation, petitioner also claimed for the loss in business due to COVID-19 affecting the establishment and that also he will clear the dues in the instalment. Petitioner attempted to take advantage of circular of the Ministry of Home Affairs of Union Government of India for waiver of usual rent and other charges for COVID-19 suffering. On 12.10.2022 petitioner deposited the energy charges and represented to opposite party no.3 to indicate the outstanding usual rent and also to rephrase the same into instalments so that the petitioner could be able to deposit the same in due time vide Annexure-5 as well as Annexure-6. In the meantime, petitioner finding no response, filed writ petition bearing W.P.(C).No.29376 of 2020. This writ petition came to be disposed of on 05.11.2020 directing the Chief Horticulturist, BDA, Bhubaneswar-opposite party no.3 to dispose of the representation of the petitioner pending at least within a period of two months. There was also direction of this Court preventing opposite parties from taking any coercive action. Copy of the order passed in W.P.(C).No.29376 of 2020 is appended in the writ petition as Annexure-7. Both parties have claim there is no post called Chief Horticulturist in B.D.A., however the proceeding is undertaken by the Secretary, Bhubaneswar Development Authority. On communication of the order of this Court by the petitioner in the above disposed of matter, the grievance of the petitioner since has not been taken into account and no communication to the said effect made to the petitioner and in the meantime opposite parties initiated OPP Case No.01 of 2021 for non-payment of sum of Rs.34,73,650/-, due up to December, 2020 accumulated and some due accumulated up to April, 2020, it appears, the petitioner was constrained to approach this Court. On reiterating all the factual gamut herein and taking this Court to the term of contract

through Annexure A/3, Mr.Pal, learned counsel appearing for the petitioner firstly on the petitioner establishment affecting for COVID-19 reason and secondly for the pendency of decision on the request of the petitioner even after direction of this Court in the disposed of writ petition further taking to the some of the terms and conditions particularly conditions at paragraph-12 available at internal page 11, running page- 41 of the brief on the premises of having a scope of extension and further there is no scope of operation of the demand period, while taking the notices to Annexures-1 and 2 also challenge the initiation of the OPP proceeding involved herein. In the above circumstance, Mr.Pal, learned counsel for the disclosure through Annexure-D/3 disclosing pendency of final outcome on the request of the petitioner contended that unless a final decision is taken by the Development Authority in obedience to the direction in the disposed of writ petition, there should not be any coercive action against the petitioner.

5. Mr. Dayananda Mohapatra, learned counsel appearing for the Development Authority however while not disputing that petitioner came to possesses the property involved by way of contract of agreement at Annexure- Annexure-A/3 and also not disputing that the direction of this Court in the disposed of writ petition is yet to be completely worked out and a decision on the request of the petitioner still awaited, drawing the attention of this Court to the interim direction dated 18.11.2021 contends for there is direction for no coercive action against the petitioner in the pendency of the writ petition and further there also operates a no coercive action direction against the petitioner involving the disposed of writ petition, they are unable to proceed in completing the exercise undertaken in the proceeding vide Annexure-D/3.

Mr.Mohapatra, learned counsel also taking this Court to the contract agreement at Annexure-A/3 made on 12.08.2015 to the clause and condition contained therein particularly the condition no.12 contends that the agreement herein was to operate for a period of five years though can be extended for another two years but at the discretion of the Bhubaneswar Municipal Corporation. Mr.Mohapatra also alleged that undisputedly there is no request for extension of lease period raised by the petitioner. Mr.Mohapatra, learned counsel thus alleged that the agreement entered into on 12.08.2015 and five years being elapsed on 11.08.2020 and in absence of any application for extension and decision on the same on the discretion of the B.D.A., there is no room for continuing of the petitioner beyond 11.08.2020. Arrear, if any, is a matter between the petitioner and the Development Authority and will be decided through the pending proceeding. But, however for the contract period and final outcome since yet to come, it is open for the authority to take such decision on the claim of the petitioner. On the extension of term, Mr.Mohapatra has a flat denial that there is neither any application for extension nor there has been any lawful order of the authority. As a whole, Mr.Mohapatra, learned counsel while expressing the intention of the Development Authority to finalize the issue involving the request of the petitioner and to have a considered view deciding the matter undertaken in a process vide Annexure-D/3. within a reasonable period, requests this Court for dismissal of the writ petition as not entertainable at this stage.

6. Considering the rival contentions of the parties, this Court finds undisputedly the contract agreement entered into between the parties on 12.08.2015 with the following conditions

“1. The rates entered in the agreement are firm and exclusive of all taxes and duties.

2. The agency is to deposit Rs. 2,72,700.00 (Two lakh seventy thousand seven hundred) per quarter with BDA regularly on or before 1st day of the beginning of the quarter.
3. In case the party fails to deposit rent for the quarter on or before of the 1st day on the beginning of the quarter BDA will be at its liberty to terminate the contract as per the relevant clause.
4. Rent for one quarter amounting to Rs. 2,72,700 is to be deposited with BDA by the agency which will remain as non interest bearing advance with BDA.
5. Price variation is not applicable.
6. The agency is not allowed to construct any structure inside the park area.
7. The agency may take up required interior works inside the building without making any structural changes for smooth operation of Gymnasium after getting approval of such interior works from BDA.
8. The agency is not allowed to sublet the Gymnasium to any other party.
9. BDA will not take any responsibility or claim by the worker/staff engaged by agency.
10. BDA shall provide three phase electrical connection and water connection to the Gymnasium but the electrical charges are to be borne by agency including maintenance of all electrical installation inside the building. BDA may install separate meter for the purpose of recording of electric consumption.
11. Opening and closing time of the Gymnasium will be decided as per the norms of Commissionerate Police, Bhubaneswar.
12. Initially the agreement will be executed for five years which can be extended for another two years at the discretion of Bhubaneswar Development Authority.
13. In case the party fails to operate and manage the gymnasium to the best satisfaction of BDA Authorities and / or violates the terms and conditions of agreement, BDA will be at the liberty to terminate the contract with maximum two months notice and such conditions shall be at the cost and risk of second party.
14. The agency shall be allowed to keep 2-3 nos. of care taker /trainer/ Security Guards inside the Gymanasium

Hall during the night time for management, safety and security of Gymnasium but has to maintain a clean hygienic environment of the Gymnasium.

15. Certified physical trainers to be engaged by the agency for various activities.

16. A 60 (sixty) days moratorium period (grace period) to be provided from the date of agreement during which the agency will complete their required indoor interior works, installation of gym equipments, its operation and commissioning of Gymnasium. BDA will not charge rent for this grace period of 60 days.

17. Terms & Conditions envisaged in the detailed RFP for Operating Gymnasium will also form a part of general condition of this Contract Agreement.”

7. Reading the term at Clause-12 therein, this Court finds there is no doubt that the agreement, if any, operated between the parties to continue for five years, this Court nowhere finds any request of the petitioner on the extension of the contract agreement involved herein rather there is flat denial by the Development Authority. In the circumstance, this Court observes, the petitioner's terms in the contract of agreement came to expire on 11.08.2020. Petitioner, if liable can be liable till the period expires. It is not known under what capacity petitioner still occupying the area involved. However for proceeding of competent Authority. Finalizing the request of the petitioner in the matter of relaxation and or facilitating the payment, if any, by way of installment is an independent aspect required to be finalized in the pending proceeding. In deciding the proceeding vide Annexure-B/3, entertaining the writ petition, this Court finds a Coordinate Bench of this Court by order dated 08.11.2021 passed the following:

“08.11.2021:

1. This matter is taken up through hybrid mode.
2. Mr. Mohapatra, learned counsel for the BDA submits that he has received instruction in the matter and will file counter affidavit within a period of seven days.

3. Put up this matter on 25th November, 2021.
4. Till then, no coercive action shall be taken against the Petitioner in respect of the property involved in OPP Case No. 01 of 2021 subject to payment of current rent in respect of the premises.”

Further, in disposal of the earlier writ petition bearing W.P.(C).No.29376 of 2020, by order dated 05.11.2020 has come to pass the following:

“05.11.202.

As Lock-down period for COVID-19 is continuing, this matter is taken up in Court through Video Conferencing. Heard learned counsel for the parties.

The petitioner is stated to have filed a representation vide Annexure-4 before the Chief Horticulturist, BDA, Bhubaneswar (Opposite Party No. 3) expressing his inability to pay the rent for the Covid period. The said representation is stated to be pending.

Regard being had to the facts and submission and the nature of relief sought for, the writ petition is disposed of directing the Chief Horticulturist, BDA, Bhubaneswar (Opposite Party No. 3) to dispose of the representation of the petitioner vide Annexure-4 within a period of two months from the date of receipt of the certified copy or soft copy of this order by passing a reasoned order.

The petitioner is directed to supply the copy of the writ petition containing all the Annexures to Opposite Party No. 3 along with a certified copy or soft copy of this order for convenience and reference to Annexure-4.

Till disposal of the representation, no coercive action shall be taken against the petitioner.

The writ petition is accordingly disposed of.”

8. Reading both the above orders, this Court finds it may be at best construed a no coercive action against the petitioner in the dispute involved but till disposal of the representation of the petitioner vide Annexure-4 in the earlier writ petition and in no stretch of imagination can be construed to have a stall in the determination of the issue involving between the parties vide Annexure-4 in the disposed of writ petition and

undertaken in a proceeding vide Annexure-D/3. For the limited nature of interim direction, nothing prevented the authority to take a decision on the request of the petitioner vide Annexure-4 which is directed to be showing finality without further delay.

9. This Court while declining to interfere in any of the action involved herein, directs the competent authority to finalize the issue involving Annexure-4 in the disposed of writ petition undertaken in the proceeding vide Annexure-D/3 by completing such process within a period of six weeks but in the involvement of the petitioner. This Court here likes to observe while taking view, the authority shall also take into account the suffering of business in the severe COVID-19 pandemic even involving lockdown notices by the Union of India as well as State Authorities. Looking to the other aspect involved herein till there is finality to Annexure-4 pending consideration vide Annexure-D/3, there may be no coercive action, but so far it relates to demand, if any, pending against the petitioner for the period he was in lawful occupation. So far petitioner's challenge to the initiation of proceeding under OPP Act registered as OPP Case No.01 of 2021, for the clear observation herein and looking to the terms of contract agreement expiring on completion of five years from the date of its execution, period of agreement long since expired, there may not be any obstruction in proceeding in the OPP case which, if decided, should be decided in accordance with law and in the involvement of the petitioner. This Court here also makes it clear that the finding in the proceeding undertaken vide Annexure-D/3 has nothing to do with the OPP proceeding.

10. With this observation, the writ petition stands disposed of.

(Biswanath Rath)
Judge

