

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P (C) No.19356 of 2022

***M/s Hemanta Kumar Agrawal and
Co., Dharamgarh,***

.....

Petitioner

Mr. P.C. Nayak, Adv.

Vs.

State of Odisha and others

.....

Opposite Parties

Mr. P.P. Mohanty, AGA

CORAM:

DR. JUSTICE B.R. SARANGI

MR. JUSTICE S.K. MISHRA

ORDER

05.08.2022

Order No.

01.

This matter is taken up by hybrid mode.

2. Heard Mr. P.C. Nayak, learned Counsel for the Petitioner; and Mr. P.P. Mohanty, learned Addl. Government Advocate for State-Opposite Parties.

3. The Petitioner has filed this Writ Petition seeking to quash the Order dated 28.03.2022 under Annexure-1 issued by the Opposite Party No.4 in refusing to release balance escalation amount under Annexure-4, as calculated by the Opposite Party No.6 in terms of office memorandum dated 19.11.2019 and to issue direction to the Opposite Parties to release balance escalation amount, as per their own calculation, in terms of agreement including for extended period, as per the office memorandum dated 19.11.2019 under Annexure-5 for the work "Improvement to Jharial Malkasadha Themra Road in the district of Bolangir under State Plan for the year 2020-2021", vide Agreement No.54 P1 2020-21, within a stipulated time.

4. Mr. P.C. Nayak, learned Counsel appearing for the Petitioner contended that rejection of the claim of the Petitioner by the Authority vide Order dated 28.03.2022 under Annexure-1 cannot sustain in the eye of law, in view of the fact that no opportunity of hearing was given to the Petitioner. Had

opportunity been given, the Petitioner would have brought to the notice of the Authority with regard to the judgment rendered by this Court in ***Raghunath Sahu v. State of Odisha and others***, AIR 2022 ORISSA 37. Thereby, gross illegality and irregularity has been committed by the Authority in passing the Order impugned, which is liable to be set aside.

5. Mr. P.P. Mohanty, learned Addl. Government Advocate appearing for the State-Opposite Parties contended that since this question has already been decided by this Court in ***Raghunath Sahu*** (supra), while considering the case of the Petitioner, the Authority could have considered the same and passed appropriate order in accordance with law. As the said benefit has not been given to the Petitioner, the Order so passed by the Authority cannot have any justification.

6. Having heard learned Counsel for the Parties and after going through the records, this Court finds that under Annexure-1 dated 28.03.2022 Opposite Party No.4 passed order extending the time up to 31.03.2022 and approved the same without levying penalty and without extending the benefit of price escalation for the extended period, by virtue of no claim certificate furnished by the contractor and, as such, it has been stated that the Department will not be liable to pay in completion of the work.

7. Similar matter had come up for consideration before this Court in ***Raghunath Sahu*** (supra) and this Court in Paragraphs-20, 21, 22 and 25 held as follows:

“20. Therefore, taking into consideration the meaning attached to the word ‘escalation’, as per terms and conditions of the agreement, the petitioner is entitled to get escalation cost but not the compensation, for which the blockage of the escalation benefit has been made. Needless to say, an ‘undertaking’ is nothing but a standard form, which every contractor has to sign and submit to the effect that he shall not claim for compensation for delay in work

and extend the period of work. This is submitted whenever extension of time is granted for completion of work or else extension will not be granted. This document is signed, without adjudicating the merits of the claim of the petitioner, and is done under duress or else the contract would be liable to be terminated with penalty, even though the petitioner may not be responsible for delay in execution of work.

21. The Government of Odisha in Works Department, vide letter dated 28.06.1996 under Annexure-12, introduced the provision of escalation clause in P.W.D. Contract form for payment of escalation charges to the contractor during the extended period, relying upon the extract of the proceedings of the Codes Revision Committee Meeting held on 25.11.1995 at 11.30 A.M. in the Office Chamber of Engineer-in-Chief-cum-Secretary to Government, Works Department in Item -1, which is extracted hereunder:-

"Item -1: Payment of escalation charges to Contractors.

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(ii) While granting extension of time to the Contractors "no claim certificate" is obtained from them in the prescribed form of the Department. The significance of such certificate is that the Contractor surrenders his claim for "compensation on any account". But it is seen in many cases that contractors are putting up their claims for escalation in spite of no claim certificate given by them earlier. It is to be decided if such claim of the contractors are consistent with the non claim certificate. At this point, Secretary, Works Department observed that compensation and escalation are not one and the same. The object of payment of compensation is to make good the loss suffered by the contractor on account of negligence, default or fraud committed by the other party and does not cover escalation. Hence "no claim certificate" will not be a bar to the claim of escalation. The members endorsed the above views of the Engineer-in-Chief-cum-Secretary.

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In view of the above mentioned provision, even though the petitioner executed "no claim certificate", but that will not be a bar for him to claim escalation cost.

22. In the present case, the bill dated 27.08.2002 was raised towards escalation cost to the tune of Rs.16,06,147/- , but the authority considered the same, after the order was passed by this Court on 19.02.2008 in W.P.(C) No.15922 of 2007, and sanctioned a sum of Rs.11,85,207/- towards escalation cost, by deducting Rs.4,20,940/- without any rhyme or reason, for which the said amount of

Rs.11,85,207/- was received by the petitioner with protest. Thereby, the opposite parties have agreed that the petitioner is entitled to escalation cost during extended period of work and as such, extension of work was not due to fault of the petitioner. As a matter of fact, the escalation cost was granted in part to the petitioner, relying upon no claim undertaking submitted by the petitioner, which is absolutely a myth. The opposite parties, having accepted the entitlement of escalation cost by the petitioner as per Clause-32 of the agreement, have taken into consideration the “value of work done in rupees during the quarter under consideration”. The said value of the work in rupees of the relevant quarter has already been decided and sanctioned by opposite party no.1 vide sanction order dated 18.08.2003. As per certificate dated 18.08.2003, the Junior Engineer F4 Engineering, Sub-Division, Bhadrak and Sub-Divisional Officer, Balasore, F4 Engineering Sub-Division, Bhadrak have certified the value in rupees of quarter-wise work, which states as follows:

Serial No.	Running Bill	Date of measurement by opposite party	Related quarter	Value of work in rupees
1	1 st	18.2.2000	1 st quarter of 2000	Rs.35,74,433
2	2 nd	12.5.2000	2 nd quarter of 2000	Rs.46,89,274
3	3 rd and 4 th	23.6.2000 & 11.8.2000	3 rd quarter of 2000	Rs.18,15,326
4	5 th and 6 th	1.3.2001	1 st quarter of 2001	Rs.15,00,596

The bill dated 27.08.2002 also reflects the same value even though it has been submitted earlier. As it appears, instead of taking note of own certified document dated 18.08.2003, the opposite parties, while dealing with the escalation bill of the petitioner dated 22.11.2010, have reduced the value of the work arbitrarily, so far it relates to the value of 1st quarter of 2000. Instead of reflecting the value as Rs.35,74,433/-, it has been reflected as Rs.1,21,600/-, which has resulted in arriving at a different amount as escalation cost and that is how instead of Rs.16,06,147/- the escalation cost has been calculated as Rs.11,85,207/-.

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25. Considering the facts and law, as discussed above, this Court is of the considered view that the opposite parties are liable to pay the blockage amount of

Rs.4,20,940/- towards escalation cost as per the bill submitted on 27.08.2002 along with interest @ 12% per annum w.e.f. 22.08.2012 till the actual payment is made. As such, the payment shall be made within a period of three months from the date of communication/production of the judgment, failing which it will carry further interest @ 18% per annum w.e.f. from 22.08.2012 till the actual payment is made.”

8. In view of the aforesaid principles, this Court is of the considered view that Opposite Party No.4 has lost sight of the fact that this question has already been decided by this Court. More so, while passing the Order impugned, no opportunity of being heard was given to the Petitioner. Had opportunity been given to the Petitioner, he would have brought to the notice of the Authority with regard to the judgment of this Court in ***Raghunath Sahu*** (supra).

9. In the above view of the matter, the Order impugned dated 28.03.2022 in Annexure-1 cannot sustain in the eye of law and the same is liable to be quashed and is hereby quashed. The matter is remitted back to Opposite Party No.4 to reconsider the same in the light of the judgment of this Court in ***Raghunath Sahu*** (supra) and pass appropriate order by affording opportunity of hearing to the Petitioner in accordance with law, as expeditiously as possible preferably within a period of two months.

10. With the above observation and direction, the Writ Petition is disposed of.

Issue urgent certified copy as per Rules.

(DR. B.R. SARANGI)
JUDGE

Ashok/Padma

(S.K. MISHRA)
JUDGE