

THE STATE OF ODISHA & ORS.

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v.

RADHESHYAM AGRAWAL

(Civil Appeal No. 4934 of 2022)

MARCH 24, 2023

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[M. R. SHAH AND B. V. NAGARATHNA, JJ.]

Contract – Levy of Penalty – When not justified – Penalty imposed on respondents-Contractors while granting extension of time to complete the work awarded – Held: Penalty was levied by the State Government invoking Clause 3.5.5(v) of the Odisha Public Work Department Code (OPWD Code) – However, said Clause is applicable in a case where the contract is terminated – Here, it is not a case of termination of the contract – Therefore, Clause 3.5.5(v) shall not be applicable at all – Neither the contract nor the OPWD code provides for imposition of penalty while extending the contract – However, in a given case, the State Government might be justified in imposing the penalty while granting the extension but, the contractor must be put to notice that extension of time can be granted on imposition of reasonable penalty – Thus, in the present case, the State was not justified in levying the penalty unilaterally while granting extension of time, without putting the contractor to notice – Levy of penalty while granting extension of time was hence illegal and rightly set aside by the High Court.

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4934 of 2022.

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From the Judgment and Order dated 08.04.2021 of the High Court of Orissa at Cuttack in WPC No. 14922 of 2019.

With

Civil Appeal Nos. 4936 and 4935 of 2022.

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Sibo Sankar Mishra, Debabarta Dash, Ms. Kanika C., Rajesh Kr. Nayak, Uma Kant Mishra, Advs. for the Appellants.

Shubhranshu Padhi, Ashish Yadav, Vishal Banshal, Ms. Rajeshwari Shankar, Anirudh Sangneria, Advs. for the Respondent.

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A The Judgment of the Court was delivered by

M. R. SHAH, J.

B 1. Feeling aggrieved and dissatisfied with the impugned judgment(s) and order(s) passed by the High Court of Orissa at Cuttack in Writ Petition Nos. 14922/2019, 10344/2021 and 20066/2019, by which, the Division Bench of the High Court has allowed the said writ petitions preferred by the respective contractors – original writ petitioners and has set aside the penalty imposed while granting the extension of time to complete the work awarded, the State of Orissa has preferred the present appeals.

C 2. For the sake of convenience, the facts in Civil Appeal No. 4934/2022 arising out of the impugned judgment and order passed by the High Court in Writ Petition No. 14922/2019 are narrated, which in a nutshell are as under: -

D 2.1 That the respondent herein – original writ petitioner, who is a special class contractor was awarded the contract for work of “improvement to Khariar Boden Sinapali Road (MDR-121) from 8/000 Km. & 9/000 Km., 12/200 Km. to 20/959 Km., 23/550 Km. to 29/000 Km. & 44/300 Km. to 48/800 Km. in the District of Nuapara under NABARD Assistance RIDF-XIII).” As per the contract and work order, E the work was to be completed by 12.09.2009. However, the contractor could not complete the work within the stipulated period and continued up to 12.03.2014. He completed the work by 12.03.2014. The contractor – original writ petitioner applied for extension of time for the work. The request for extension of time came to be accepted and allowed by the appropriate authority/State Government *vide* order dated 07.02.2019, F without price escalation during the extended period from 13.09.2009 to 12.03.2014 but with levy of penalty @ 0.25% over the value of the work done during the extended period as per para 3.5.5(v) of Odisha Public Work Dept. Code (OPWD Code) Volume-I.

G 2.2 Levy of penalty @ 0.25% while granting extension of time from 13.09.2009 to 12.03.2014 was the subject matter of writ petition before the High Court.

H 2.3 It was the case on behalf of the original writ petitioner – contractor before the High Court that the levy of penalty while granting extension of time was wholly impermissible. It was submitted that para 3.5.5(v) of OPWD Code Volume-I under which the penalty was levied

could not have been invoked as the penalty under the said para can be imposed only in a case where the contract is terminated. A

2.4 On the other hand, it was the case on behalf of the State that as there was a delay on the part of the contractor in not completing the work within the stipulated period and the contractor applied for extension of time which came to be accepted by the State Government, it was open for the department/State to levy the penalty for the delayed period. B

2.5 Accepting the submission made on behalf of the original writ petitioner – contractor that the levy of penalty while granting the extension of time was illegal and arbitrary and beyond para 3.5.5(v) of OPWD, by the impugned judgment and order, the High Court has set aside the levy of penalty which is the subject matter of present appeal. C

2.6 In Civil Appeal Nos. 4935 and 4936/2022, similar penalties have been levied by the State, however, the percentage of the penalty varies. On a similar reasoning, the High Court has set aside the levy of penalties in the said cases also. Hence, the present appeals by the State of Orissa. D

3. Shri Sibo Sankar Mishra, learned counsel appearing on behalf of the State has vehemently submitted that it is not in dispute and it cannot be disputed that the contractor did not complete the work within the stipulated time and as such, there was a delay on the part of the contractor in completing the work and that the contractor applied for extension of time which came to be allowed by the State Government, however, subject to payment of penalty on the value of the work done during the extended period. E

3.1 It is further submitted that as such on conjoint reading of Clause 2(a) & (b), Clause 4 of the terms and conditions of the contract and Clause 3.5.30 of OPWD Code, the State Government has the power to impose penalty for delay in work under the contract. F

3.2 It is contended that the High Court has failed to appreciate that there was a huge delay in completion of the work under the contract and therefore, merely because of mentioning of the penalty being imposed under a different provision, the contractor shall not be entitled to claim any equitable right of removal the imposition of penalty. G

3.3 Making the above submissions and relying upon the relevant clause of the contract and relevant clauses of OPWD Code, it is prayed that the present appeals be allowed. H

A 4. All these appeals are vehemently opposed by Shri Shubhramshu Padhi, learned counsel appearing on behalf of the respective respondents – original writ petitioners.

 4.1 It is vehemently submitted by Shri Padhi, learned counsel appearing on behalf of the respective respondents – original writ
B petitioners that in the facts and circumstances of the case, the High Court has not committed any error in setting aside the penalty levied while granting extension of time.

 4.2 It is further submitted that in the communication/order granting extension of time but with penalty, the State Government has relied upon
C Clause 3.5.5(v) of OPWD Code. That as rightly observed by the High Court, the said clause shall not be applicable while imposing penalty while granting extension of time. It is contended that Clause 3.5.5(v) shall be applicable in a case where the contract is terminated due to the failure on the part of the contractor to carry out the work. That in the
D present case, it was not a case of termination of the contract, but of extension of time. That therefore, the High Court has rightly observed that the levy of penalty while granting extension of time was bad in law.

 4.3 It is further contended that during the course of the submissions learned counsel appearing on behalf of the State has relied upon Clause 3.5.30 of the OPWD Code. That however, even the said Clause 3.5.30
E of the OPWD Code does not permit the State to levy penalty while granting extension of time.

 4.4 It is averred that even otherwise, once the time is extended on the application submitted by the contractor that there was a genuine reason for which the contractor could not complete the work within the
F stipulated time, thereafter, it was not open for the State to levy/impose the penalty while extending the time that too, without giving any opportunity of being heard to the contractor on the quantum of penalty.

 4.5 Making the above submissions, it is prayed that the present appeals be dismissed.

G 5. Having heard learned counsel appearing on behalf of the respective parties and having gone through the impugned judgment(s) and order(s) passed by the High Court, the short question which is posed for consideration of this Court is whether the State Government is justified in levying the penalty while granting extension of time in favour of the
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contractor when the contractor fails to complete the work within stipulated time under the contract and subsequently, completes the work beyond the period prescribed under the contract? A

5.1 In order to consider the aforesaid issue, the relevant clauses of the contract and OPWD Code, are required to be referred to and considered, which are as under: - B

Relevant provision of the contract agreement

Extension of Time

Clause-4 “If the contractor shall desire an extension of the times for completion of the work, on the ground of his having been unavoidably hinder in its execution or any other ground he shall apply in writing to the Executive Engineer within 30 days of the date of the hindrance on account of which he desires such extension as aforesaid and the Executive Engineer shall, if in his opinion (which shall be final) reasonable grounds be shown thereof, authorize such extension of time, if any, as may in his opinion, be necessary or proper. The Executive Engineer shall at the time inform the contractor whether he claims compensation for delay.” C D

Relevant provisions of the OPWD Code

Clause (V) of para 3.5.5 of the OPWD Code, Vol. I: -

“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 Page 3 of 5 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- E F G H

A 1. In this for time is the essence. 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. The quantity
mentioned can be increased or reduced to the extent of 10% for
B 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.

C”

Clause 3.5.30 of the OPWD Code

D “Application for extension of time for the completion of a work
on the grounds of unavoidable hindrance or any other grounds
shall be submitted by the contractor within 30 days of such
hindrance and the Divisional Officer shall authorise or recommend
such extension of time as deemed necessary or proper within
fifteen days of the receipt of such an application. In cases where
the sanction of the higher authority to the grant of extension of
time is necessary, the Divisional Officer should send his
E recommendation as expeditiously as possible. The higher authority
should communicate his decision within 60 days from the date of
receipt on recommendation in his office. If the orders of the
competent authority are not received in time the Divisional Officer
may grant extension of time under intimation to the concerned
F authorities so that the contract might remain in force, but while
communicating this extension of time, he must inform the contractor
that extension is granted without prejudice to Govt.’s right to levy
Compensation under relevant clause of the contract.”

5.2 In the communication granting extension of time with levy of
G penalty, penalty is levied by the State Government invoking Clause 3.5.5(v)
of the OPWD Code. However, it is required to be noted that Clause
3.5.5(v) of the OPWD Code shall be applicable in a case where the
contract is terminated. It permits the appropriate authority/State to
terminate the contract with penalty when the progress of work is not as
per the conditions of contract. Here, it is not a case of termination of the

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contract. Therefore, Clause 3.5.5(v) of the OPWD Code which has been invoked in the communication granting extension of time but with levy of penalty shall not be applicable at all. A

5.3 So far as the reliance placed upon Clause 3.5.30 of the OPWD Code by learned counsel appearing on behalf of the State is concerned, even under the said clause, there is no provision for imposition of penalty while granting extension of time. Clause 3.5.30 only provides that while communicating to the contractor of extension of time, he must be informed that extension is granted without prejudice to State Government's right to levy compensation under relevant clause of the contract. If the relevant clause of the contract is seen and/or considered, there is no condition stipulated in the contract that while granting the extension of time, there may be levy of penalty. The relevant clause with respect to the extension of time is Clause-4, which has been reproduced hereinabove. Neither the contract nor the OPWD code provides for imposition of penalty while extending the contract. Therefore, levy of penalty while granting extension of time is wholly without authority of the law and is illegal. The same has been rightly set aside by the High Court. B C D

5.4 Even otherwise, it is required to be noted that before the levy of penalty of a particular percentage, while granting extension of time, no opportunity of being heard has been given to the contractor as to why the penalty may not be imposed while granting extension of time and at what rate. In a given case, the State Government might be justified in imposing the penalty while granting the extension. However, the contractor must be put to notice that extension of time can be granted on imposition of reasonable penalty. However, without putting the contractor to notice, unilaterally, the State is not justified in levying the penalty while granting extension of time. E F

6. In view of the above and for the reasons stated above, the High Court has rightly set aside the penalty levied while granting extension of time. Under the circumstances, the present appeals fail and the same deserve to be dismissed and are accordingly dismissed. In the facts of the cases, there shall be no order as to costs. G