

GAHC010022302020



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : WP(C)/2413/2022

S A ENTERPRISE
A PROPRIETORSHIP FIRM HAVING ITS REGISTERED OFFICE AT M.L. NEHRU
ROAD
PANBAZAR
GUWHAATI-781001
DIST-KAMRUP(M)
ASSAM
REPRESENTED HEREIN BY ITS PROPRIETOR ARMAN ALI
S/O LATE RAMJAN ALI
AGED ABOUT 54 YEARS
R/O LILADHAR BARUAH ROAD
H.N. 15
AMBARI
GUWAHATI-01
ASSAM

VERSUS

THE STATE OF ASSAM AND 3 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM
PHE DEPARTMENT
DISPUR SECRETARIAT
DISPUR
GUWAHATI-06
ASSAM

2:THE CHIEF ENGINEER
PHE DEPARTMENT
GOVT. OF ASSAM
CHANDMARI

GUWAHATI-03
ASSAM
3:THE ADDL. CHIEF ENGINEER
PHE DEPARTMENT
GOVT. OF ASSAM
UPPER ASSAM ZONE
NAGAON
ASSAM
4:THE EXECUTIVE ENGINEER
PHE DEPARTMENT
GOVT. OF ASSAM
NAGAON DIVISION
DIST-NAGAON
ASSAM

Advocate for : MR. S CHAMARIA
Advocate for : SC
P H E appearing for THE STATE OF ASSAM AND 3 ORS

BEFORE
HONOURABLE MR. JUSTICE KAUSHIK GOSWAMI

ORDER

08.04.2024

Heard Mr. S. Chamaria, learned counsel for the petitioner. Also heard Mr. D. Gogoi and Mr. I. Borthakur learned Standing Counsels PHE for all the respondents.

The challenge made *inter-alia*, this writ petition is to the Order dated 28.08.2019, whereby the respondent No. 3 has cancelled 4 numbers of work orders in respect of Dhang PHE Division, which were earlier awarded to the petitioner and thereby, the earnest money against the respective works were sought to be forfeited.

The facts of the case is that pursuant to the e-procurement Notice No.

16/2015-16 issued by the PHE Department, Government of Assam for 'Designing and Construction of RCC Elevated Service Reservoir for different Piped Water Supply Scheme (NRDWP)', the petitioner was awarded altogether 4 work orders in respect of Dhang District. The petitioner, after completing the aforesaid work submitted bills for necessary payments. However, without releasing the aforesaid bills, the respondent authorities cancelled the work orders issued in favour of the petitioner and forfeited the earnest money deposited against the said works. Aggrieved by the aforesaid cancellation and non-release of the bills of the petitioner, the present writ petition has been filed.

Mr. S. Chamaria, learned counsel for the petitioner submits that the petitioner having completed the subject works is entitled to the payment thereof. He further submits that instead of releasing the aforesaid admitted payment due to the petitioner, the respondent authorities have cancelled the subject work orders without giving any notice whatsoever to the petitioner in gross violation of the terms and conditions of the contract as well as principles of natural justice and fair play.

Mr. I. Borthakur learned Standing Counsel for PHE submits that the petitioner has not started the works for which various reminders were issued and leaving with no other alternatives, the work orders issued in favour of the petitioner were cancelled. He therefore submits that the petitioner is not entitled for payment of the bills raised and the cancellation orders issued consequent to non-performance of the subject work, is valid.

I have heard the submissions made at the bar and have perused the materials available on record.

It appears that in the year 2015, E-NIT was floated vide No. 16/2015-16 for designing and construction of RCC Elevated Service Reservoir for different Piped Water Supply Scheme (NRDWP) including Sub-Soil Investigation Work and providing all necessary appurtenances thereof, under the Dhing PHE Division. The tender contains 4 packages, i.e, 4 numbers of works to be executed under the Dhing PHE Division.

The petitioner accordingly participated in the tender process and work orders in respect of the 4 packages under Dhing PHE Division was awarded to the petitioner. A chart showing details of the work orders awarded to the petitioner are provided here under for ready reference:

Name of Division	Work Order No. and Date	Package No.	Name of PWSS	Value of Work
Dhing	ACE/PHE/N/2015-16/ PB-87 (N)/8831 dated 11.12.2015	18	Borigaon	Rs. 30,84,797/-
Dhing	ACE/PHE/N/2015-16/ PB-87 (N)/9893 dated 19.01.2016	19	Khairamari	Rs. 31,83,209/-
Dhing	ACE/PHE/N/2015-16/ PB-87 (N)/8817 dated 11.12.2015	20	Patiapathar	Rs. 30,84,797/-
Dhing	ACE/PHE/N/2015-16/ PB-87 (N)/9899 dated 19.01.2016	21	Balikatia	Rs. 62,63,345/-

Though the case of the petitioner is that, the petitioner under the supervision of the respondent had carried out the said works at phase wise manner by reporting the progress of such work from time to time and accordingly, R/A bills were also submitted in respect of 80% of said works, the

respondent disputed the same and in fact, cancelled the work orders issued in favour of the petitioner on the ground that the petitioner has not started the above mentioned works. Relevant to refer to Clause 40 of the conditions and requirement for bidding document which is reproduced hereunder for ready reference:-

“40. Action when whole of the security deposit is forfeited:

In any case in which under any clause or clauses of the contract the contractor shall have rendered himself liable to pay liquidated damages or compensation amounting to the whole of his security deposit (whether paid in one sum or deducted by installments), the Engineer-in-charge on behalf of the Addl. Chief Engineer (PHE), Upper Assam Zone shall have power to adopt any or all of the following courses as he may deem best suited to the interest of the Addl. Chief Engineer (PHE), Upper Assam Zone.00.

(a) *To rescind the contract (of which recession notice in writing to the contractor under the hand of the Engineer-in-charge shall be conclusive evidence) and in which case the security deposit of the contractor shall stand forfeited, and absolutely at the disposal of the Addl. Chief Engineer (PHE), Upper Assam Zone.*

(b) *To employ labour paid by the Addl. Chief Engineer (PHE), Upper Assam Zone and to supply materials to carry out the work or any part of the work, debiting the contractor with the cost of the labour and the price of the materials (of the amount of which cost and price a certificate of the Engineer-in-charge shall be final and conclusive against the contractor) and crediting him with the value of the work done in all respect in the same manner and at the same rates as it had been carried out by the contractor under the term of his contract, the certificate of the Engineer-in-charge as to the value of the work done shall be final and conclusive against the contractor.*

(c) *To measure up the work of the contractor and to take such part thereof as shall be unexecuted out of his hands and to give it to another contractor to complete, in which case all expenses which may be incurred in excess of the sum which have paid to the original contractor, if the whole work has been executed by him (of the amount of which excess the certificate in writing of the Engineer-in-charge shall be final and conclusive) shall be borne and paid by the original contractor and, may be deducted from any money due to him by the Addl. Chief Engineer (PHE), Upper Assam Zone under the contract otherwise or from his security deposit or the products of the sale thereof or a sufficient part thereof.*

(d) *In the event of any of the above clauses being adopted by the Engineer-in-charge the contractor shall have no claim to compensation or any loss sustained by him by reason of his having purchased or procurement of any materials, or entered into any engagements, or made any advances on account of, or with a view to the execution of the work or the performance of contract. And in case the contract is rescinded under the provisions aforesaid the contractor shall not be entitled to recover or be paid any sum for any work therefore actually performed under this contract, unless and until the Engineer-in-charge shall have certified in writing the value payable in respect thereof, and he shall only be entitled to be paid the value so certified."*

A perusal of the aforesaid condition amply demonstrate that the respondent authority can resign the contract and forfeit the security deposit/earnest money of the Contractor in any case in which the Contractor shall have rendered himself liable to pay liquidated damages or compensation amounting to the whole of the security deposit. However, before taking such action, a notice in writing to the Contractor has to be issued. The aforesaid condition of issuing a show cause notice before issuance of a cancellation

termination order is a mandatory condition precedent.

The cancellation order dated 28.08.2019 issued to the petitioner, whereby the subject work orders were cancelled is reproduced hereunder for ready reference:-

“With reference to the above, it is here by informed that on the basis of report received from the Executive Engineer (PHE) Nagaon Division, Nagaon, in spite of several persuasion made with you time-to-time, it is seen that you have not started the above mentioned work till today. So the W/O issued to you vide letter under reference for the above mentioned works (Sl. No. 1 to Sl. No. 5) under Nagaon (PHE) Division, Nagaon is here by cancelled.

The corresponding Tender Agreement made with you against the Work Orders is also withdrawn here with.

In this regard you are here by informed that the earnest money deposited against the work will be forfeited and will be deposited to Govt.”

It is amply evident on the face of the cancellation order that no notice whatsoever was issued to the petitioner before issuing of the aforesaid cancellation order. Thus, the impugned cancellation order dated 28.08.2019 is not preceded by any notice whatsoever. Thus, the same is in violation of principles of natural justice.

Reference is made to the decision of the Apex Court in ***Whirlpool Corporation vs Registrar of Trade Marks, Mumbai and Others*** reported in **(1998) 8 SCC 1**, wherein the Apex Court has held that alternative remedy

shall not operate as a bar where there is a violation of principles of natural justice. Paragraph 14 and 15 of the aforesaid judgement is reproduced herein below for ready reference:

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

As such, the cancellation order dated 28.08.2019 is totally illegal, null and void. Resultantly, the cancellation Order dated 28.08.2019 is set aside and quashed. Consequently, the earnest money deposited by the petitioner against the subject work be released forthwith as per law.

Accordingly, it is hereby directed that the respondents authorities shall release the outstanding dues of the petitioner in accordance with law after due verification within a period of one month from the date of receipt of certified copy of this order.

With the aforesaid observation and direction, the writ petition stands allowed and disposed of.

JUDGE

Comparing Assistant