(2023) 07 OHC CK 0218

In the Orissa High Court

Case No : Writ Petition (C) No. 618 Of 2018

Trishool Logistics Private Limited, Balasore — APPELLANT

Vs

Orissa Industrial Infrastructure Development Corporation, Bhubaneswar & Ors — RESPONDENT

Date of Decision : 25-07-2023

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 227
Evidence Act, 1872 — Section 12

Citation : (2023) 07 OHC CK 0218

Hon'ble Judges : Dr. B.R. Sarangi, J;Murahari Sri Raman, J

Bench : Division Bench

Advocate : G. Misra, D.K. Patra, A. Dash, R. Deo, G. Mukherjee, A.C. Panda, S.D. Ray, S. Sahoo, S. Priyadarshini

Final Decision : Allowed

Judgement

Dr. B.R. Sarangi, J

1. The petitioner, by means of this writ petition, seeks to quash the letter dated 20.10.2017 under Annexure-11 issued by opposite party no.4 directing to deposit Rs.28,09,875/- as penalty towards damage, as well as the demand notice dated 07.01.2018 under Annexure-12, and to issue direction to the opposite parties to change the name of the petitioner-company in the lease agreement as per the application dated 18.08.2017 under Annexure-8 series and not to interfere with the possession and day to day activities of the petitioner-company over the allotted plots in any manner till the order of cancellation is revoked.

2. The factual matrix of the case, in brief, is that the petitioner-company was established in the year 1983 and it has been involved in the business of manufacturing of plastics/polymers. The allotment was made in the year 1983 and it commenced its commercial operations from 01.10.1985. On 31.01.1986, the Orissa Industrial Infrastructure Development Corporation (hereinafter

referred to as 'IDCO') formally entered into an agreement with the petitioner-company (formerly known as "Multilayer Composites Pvt. Ltd.") for leasing out land measuring 2.50 acres at the Industrial Estate, Ganeswarpur in the district of Balasore and subsequently IDCO Plot Nos.39 to 54 in the Industrial Estate at Balasore were allotted to the petitioner-company by executing lease deed for a period of 99 years.

2.1 The name of the petitioner-company was subsequently changed to Trishool Logistics Private Limited and the present writ petition has been filed in the new name of the petitioner-company. At the time of taking the lease, the petitioner-company gave a full payment of Rs.2,28,125/-, which was much higher than the market value prevalent at that point of time. After getting lease of the land, the petitioner company commenced its operations and started manufacturing of a variety of products involving polymers/plastics. A unit of the petitioner-company also manufactured co-extruded plastic films, for which it had incurred huge expenses and made huge investments for the construction of the factory building, office building along with all the internal amenities.

2.2. As per the terms of the lease agreement under Annexure-1, the petitioner-company continuously paid the lease rent and other charges and cleared all the dues of the opposite parties till 31.03.2018. The unit of the petitioner-company started making losses and, therefore, it wanted to sub-let a portion of the property on a temporary basis to revive its financial crisis, which was duly intimated to the opposite parties, vide letter dated 23.05.2012, as per their circular dated 23.12.2010. But the opposite parties issued a show-cause notice dated 04.06.2012 to the petitioner-company. In response to the same, petitioner-company gave its reply on 18.06.2012. When the same was pending for consideration, the opposite parties cancelled allotment of some of the plots vide letter dated 06.06.2012.

2.3 Challenging the cancellation of allotment, the petitioner-company filed W.P.(C) No.12832 of 2012, wherein this Court passed interim order on 24.07.2012 restraining the opposite parties from taking over possession of the property in question without leave of the Court. Thereafter, a discussion was held between the parties and the outcome of the discussion permitted the petitioner to submit online application for change of name and style of the company. Consequentially, it submitted online application on 18.08.2017 and also deposited a sum of Rs.5000/-.

2.4 Opposite party no.3 issued a letter dated 28.08.2017 to the petitioner-company intimating that its application for change of name was objected and advised the petitioner-company to withdraw W.P.(C) No.12832 of 2012 and apply for revocation of cancellation of allotment. Accordingly, the petitioner-company withdrew the aforesaid writ petition on 05.09.2017 with a liberty to re-file the same, if so advised. Thereafter, the petitioner-company filed an online application on 14.09.2017 for revocation of cancellation of allotment of IDCO plots.

2.5 In response to the same, opposite party no.4 issued a letter dated 20.10.2017 intimating the petitioner-company that the management of IDCO revoked the cancellation order issued by the Balasore Division against the plots allotted to it subject to compliance of certain terms and conditions. One of the conditions mentioned in the said letter was that it had to deposit an amount of Rs.28,09,875/- as penalty towards damage inclusive of GST @ 18%. Pursuant to such letter, the opposite parties issued a demand notice dated 07.01.2018 raising a demand of Rs.28,09,875/-. Hence, this writ petition.

3. Mr. G. Misra, learned Senior Counsel appearing for the petitioner vehemently contended that imposition of penalty and consequential demand notice issued for realization of Rs.28,09,875/- is absolutely arbitrary, illegal and violative of the interim order dated 24.07.2012 passed by this Court in W.P.(C) No.12832 of 2012. It is further contended that Clause-17 of the lease agreement is not applicable to the case of the petitioner, as the continuance of the possession over the allotted plot was owing to the interim order passed by this Court. Therefore, the occupation of allotted plots cannot be construed to be unauthorized. It is further contended that in any event, since opposite party-IDCO revoked the cancellation, Clause-17 of the lease agreement will not come into picture and, thereby, the illegal demand made by the opposite parties cannot be sustained in the eye of law. More so, such demand has been raised without complying the principle of natural justice, as the penalty has been imposed without giving opportunity of hearing to show-cause. It is further contended that imposition of penalty towards damages for unauthorized use and occupation is not only arbitrary but also amounting to gross disregard to the judicial pronouncement of this Court. It is further contended that since the opposite parties revoked the cancellation order, occupation of the petitioner-company over the allotted plots is completely legal and authorized and the petitioner-company is also willing to pay the amount of Rs.5,84,100/- towards subletting charges, as has been demanded in the letter dated 20.10.2017 under Annexure-11. Therefore, the demand for penalty towards damages is absolutely illegal, arbitrary and unwarranted. For the above reasons, he seeks for interference of this Court at this stage. To substantiate his contentions, he has relied upon Isolators and Isolators through its Proprietor Mrs. Sandhya Mishra v. Madhya Pradesh Madhya Kshetra Vidyut Vitran Co. Ltd. and Anr., 2023 SCC Online SC 444 and M/s. VFPL ASIPL JV Company & Anr. v. Union of India, 2020(III) ILR-CUT-388.

4. Mr. Mark Wright, learned counsel on behalf of Mr. S.D. Ray, learned counsel appearing for the opposite party-IDCO, while justifying the demand raised by the authority, vehemently contended that since the petitioner-company has utilized the land other than the purpose for which it was granted, it is liable to pay the damages and also penalty in terms of Clause-17 of the lease agreement executed between the parties. It is further contended that the claim of damages and penalty is well within the domain of the opposite parties, as the lease granted by the opposite parties has not been utilized for the purpose for which it was granted. Therefore, issuance of the impugned letter dated 20.10.2017 under

Annexure-11 directing to deposit Rs.28,09,875/- as penalty towards damages is well justified and as a consequence thereof, the demand notice issued under Annexure-12 dated 07.01.2018 cannot be said to be illegal so as to cause interference of this Court at this stage.

5. This Court heard Mr. G. Mishra, learned Senior Counsel along with Mr. A. Dash, learned counsel appearing for the petitioner and Mr. Mark Wright, learned counsel appearing for the opposite party- IDCO in hybrid mode. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. On the basis of factual facts, as discussed above, the demand raised by the opposite parties is allegedly made in violation of Clause-17 of the lease agreement executed between the parties. Therefore, for better appreciation, Clause-17 of the lease agreement is extracted below:-

"17. In the event of cancellation of the allotment, the Lessee shall be bound and liable to vacate and deliver to the Lessor the vacant possession of the property free from all obstructions, failing which the lessee shall be liable to pay to the Lessor damages at the rate Rs.500/- per day of unauthorized use and occupation of the property besides any other liabilities provided for in this agreement or in any other law for the time being in force."

On perusal of the aforementioned clause, it is made clear that in the event of cancellation of the allotment, the lessee shall be bound and liable to vacate and deliver to the lessor the vacant possession of the property free from all obstructions, failing which the lessee shall be liable to pay to the lessor damages at the rate of Rs.500/- per day of unauthorized use and occupation of the property besides any other liabilities provided for in the agreement. Needless to say, against cancellation of lease, the petitioner-company had approached this Court by filing W.P.(C) No. 12832 of 2012 and entertaining the same, this Court passed interim order on 24.07.2012 restraining the opposite parties from taking over possession of the property in question without leave of the Court. Therefore, the question of any unauthorized use and occupation of the property by the petitioner-company does not arise, as the same was protected by the order of this Court. As a consequence thereof, the damages at the rate of Rs.500/- per day, as mentioned in Clause-17 of the lease agreement, cannot also be sustained in the eye of law. More so, while determining such damages, there is non-compliance of the principle of natural justice by the opposite parties. Law requires that unless an amount is determined by following due procedure, the same cannot be raised against the person concerned. Therefore, if at all damages have been determined by the opposite parties in terms of Clause-17 of the lease agreement, the same should have been done by following due procedure. But nothing has been placed on record to indicate that any procedure has been followed for determination of compensation as well as the imposition of penalty thereof. In absence thereof, this Court is of the considered view that such damages and consequential penalty cannot be imposed on the petitioner-company. The basic concept of damages, as has been raised vide letter dated 20.10.2017, is lacking and without understanding the meaning of damages the consequential demand has been raised under Annexure-12 dated 07.01.2018. Therefore, it is highly essential to understand the meaning of damages.

7. For better appreciation and clarity, different meanings of 'damages' are elaborated below:-

FRANK GAHAN in The Law of Damages 1 (1936) defined 'damages' as follows:

"damages are the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong".

HALSBURY, in the 4th Edn. Vol.12 para-1109 at page-415, stated as follows:

"The parties may agree by contract that a particular sum is payable on the default of one of them, and, if the agreement is not obnoxious as a "penalty", such a sum constitutes "liquidated damages" and is payable by the party in default."

Mc Gregor defines damages as the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lumpsum which is awarded unconditionally.

Black's Law Dictionary, Revised Fourth Edition:-

"Damage. Loss, Injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter's person or property. The word is to be distinguished from its plural,-

"damages"- which means a compensation in money or a loss or damage. An injury produces a right in them who have suffered any damage by it to demand reparation of such damage from the authors of the injury. By damage, we understand every loss or diminution of what is a man's own, occasioned by the fault of another."

Section-12 of the Indian Evidence Act states as follows:-

"The sum claimed or awarded in compensation for loss or injury sustained."

In Organo Chemical Industries v. Union of India, (1979) 4 SCC 573, the apex Court held as follows:

"The expression 'damages' is neither vague nor over-wide. It has more than one signification but the precise import in a given context is not difficult to discern. A plurality of variants stemming out of a core concept is seen in such words as actual damages, civil damages, compensatory damages, consequential damages, contingent damages, continuing damages, double damages, etc. the essentials of the damages are (a) detriment to one by wrongdoer of another, (b) reparation awarded to the injured through legal remedies and (c) its quantum being determined by the dual components of pecuniary compensation for the loss suffered and often not always, a punitive addition as a deterrent cum denunciation by the law."

In Divisional Controller, KSRTC v. Mahadeva Shetty, (2003) 7 SCC 197, the apex Court held as follows:

"The word 'damages' constitute the sum of money, claimed or adjudged to be paid in compensation for loss or injury sustained."

8. On careful perusal of the meaning attached to the word 'damages', as mentioned above, it is made clear that the essentials of the damages are; (1) detriment to one by wrongdoer of another; (2) reparation awarded to the injured through legal remedies; and (3) its quantum being determined by the dual components of pecuniary compensation for the loss suffered and often not always, a punitive addition as a deterrent cum denunciation by the law. But the 'damages' constitute the sum of money, claimed or adjudged to be paid in compensation for loss or injury sustained.

9. Applying such meaning of 'damages' to the present case, it is seen that neither the money has been claimed nor it has been adjudged to be paid in compensation for any loss or injury caused to the opposite parties. Rather, the opposite parties, by making their own calculation, have determined the damages without affording opportunity of hearing to the petitioner. Before making any demand for damages, the same should have been adjudged by the opposite parties by affording opportunity of hearing to the petitioner. If according to the opposite parties, the petitioner is wrongdoer, the demand has to be claimed by following due procedure established by law. The same having not been adhered to, the demand raised vide letter dated 20.10.2017 under Annexure-11 on the basis of so-called damages cannot be sustained in the eye of law.

10. Now comes the question of imposition of penalty on damages. If considered strictly the meaning attached to the word 'penalty', a penalty is a punishment inflicted by a law for its violation.

In common parlance, the word 'penalty' is understood to mean a legal or official punishment such as a term of imprisonment. In some context, it is also understood to mean some other form of punishment such as fine or forfeiture for not fulfilling a contract.

A penalty is defined as a temporary punishment or sum of money imposed by statute, to be paid as a punishment for the commission of a certain offence. A penalty is a punishment imposed by law or contract for doing or failing to do something that it was the duty of a party to do. A penalty is in the nature of a punishment for the non-performance of an act, or the performance of an unlawful act, and in the former case stands in lieu of the act to be performed.

11. In Karnataka Rare Earth v. Senior Geologist, Deptt. Of Mines & Geology, (2004) 2 SCC 783, the apex Court held as follows:-

"'Penalty' is a liability imposed as a punishment on the party committing the breach."

12. In Pratibha Processors v. Union of India, AIR 1997 SC 138, the apex Court held as follows:-

"Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute."

13. In Associate Cement Co. Ltd. V. Commercial Tax Officer, (1981) 4 SCC 578, the apex Court held as follows:-

"'Penalty' ordinarily becomes payable when it is found that an assessee has willfully violated any of the provisions of the taxing statute".

14. In Consolidated Coffee Ltd. V. Agricultural Tax Officer, (2001) 1 SCC 278, the apex Court held as follows:-

"The word 'penalty' occurring in Section 42(1)(ii) of the Act does not mean 'interest'. It is imposed on the assessee who fails to pay tax in time and the quantum of the penalty increases with the delay."

15. In Amin Chand Payarelal v. Inspecting Asstt., CIT, (2006) 7 SCC 483, the apex Court held as follows:-

"The 'penalty' is a punishment imposed on a wrongdoer."

16. In view of such position, a penalty is imposed for an actual infringement and not deemed infringement. More so, it is always imposed on account of personal fault of the person concerned. It is always relatable to an offender. It is a personal liability and it cannot be imposed on any person other than the offender. Therefore, the penalty is something in the nature of punishment or an infliction, i.e., it is something over and above claimed, i.e., due to by one party to the other.

17. Mr. Mark Wright, learned counsel appearing for the opposite party-IDCO vehemently contended that the impugned demand of damages was raised and penalty was imposed on the basis of circular no.23232 dated 02.11.2016 issued by the IDCO, which suggests that penalty of Rs.500/- per acre per day from the date of cancellation of lease to the date of revocation shall be realized from the allotees while revoking cancellation of lease and the said circular was in effect when the petitioner applied for revocation of cancellation of lease. Thereby, the action taken by the opposite parties raising demand is justified. But Mr. G. Mishra, learned Senior Counsel appearing for the petitioner refuted such contention raised by learned counsel for the opposite party-IDCO.

18. As it reveals, the occupation of the petitioner-company with the lease land continued, even after revocation of lease, by virtue of interim order passed by this Court in W.P.(C) No.12832 of 2012. Since continuance of occupation of the lease land validated by this Court, the said occupation cannot in any sense be said to be unauthorized. Thereby, the interest of the petitioner was protected by

virtue of interim order passed by this Court. Therefore, no damages should have been raised by the opposite parties. If the damages and penalty are connected with unauthorized occupation of the premises of the petitioner and, as such, it has been protected by this Court by passing interim order, the so called demand of damages and penalty cannot also be sustained in the eye of law. More so, the reliance placed on the circular dated 02.11.2016 issued by the IDCO cannot have any retrospective application, if at all the same is applied to the present case, rather the same is prospective in nature. If that be so, damages can be considered with effect from 24.10.2014, but not prior to that, as the circular specifically indicates it should be given effect from 24.10.2014. Therefore, any damages calculated and discussed in the counter affidavit from 06.07.2012 to 22.09.2017 is absolutely arbitrary and unreasonable.

19. In Isolators and Isolators through its Proprietor Mrs. Sandhya Mishra (supra), the apex Court held in paragraph-37 of the judgment as follows:-

"37. As regards the question of penalty, we find force and substance in the contentions urged on behalf of the appellant that such an imposition cannot be approved for two major factors: The first and foremost being that in the show-cause notice dated 26.11.2019, the appellant was put to notice only as regards the proposition of debarment and in the said notice, nothing was indicated about the proposed imposition of penalty. Though in the cancellation orders dated 19.11.2019 and 21.11.2019, the respondents purportedly reserved their right to take appropriate steps, those orders cannot be read as show-cause notice specifically for the purpose of imposition of penalty. The submissions on behalf of the respondents in this regard that the said orders dated 19.11.2019 and 21.11.2019 have attained finality do not take their case any further. Finality attaching to the action of cancellation cannot be read as a due notice for imposition of penalty even if the respondents chose to employ the expression 'cancelled with imposition of penalty' in those orders. Looking to the terms of contract, quantification of the amount of penalty (if at all the penalty is considered leviable) could not have been carried out without affording adequate opportunity of response to the appellant. That being the position, the action of the respondents in imposing the penalty without even putting the appellant to notice as regards this proposed action cannot be approved."

Taking into consideration the ratio decided in the above mentioned case, it is made clear that imposition of penalty without even putting the petitioner to notice as regards to the proposed action cannot be approved.

20. In M/s. VFPL ASIPL JV Company (supra), this Court in paragraph-55 of the judgment held as follows:-

"On perusal of the facts mentioned in the impugned order dated 29.04.2020 read with additional affidavit dated 03.07.2020, it is clearly discernible that the impugned banning order has been passed primarily due to losses suffered by MCL on account of which the production capacity of MCL was severely impaired.

It is not the petitioner no.1 but the MCL which is responsible for impairing the production capacity, since MCL is responsible for more than 94% of the total shortfall (or 55.6% of the total targeted quantity). Banning of petitioner no.1 as a consequence of shortfall of only 3.27% in performance, as is evident from the impugned order, can be construed to be unreasonable and wholly disproportionate to the findings. Even if the contention raised in the additional affidavit dated 03.07.2020 would be taken into consideration, the shortfall in performance was only 4.36% and, as such, on that score also banning of petitioner no.1 can be construed to be unreasonable. Even though the right of petitioner no.1 is in the nature of a contractual right, the manner in which the impugned decision has been taken by the MCL, which is a State within the meaning of Article 12 of the Constitution, is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality."

Applying the above principle to the present case, any damages raised and penalty imposed vide letters dated 20.l0.2017 and 07.01.2018 under Annexures-11 and 12 respectively cannot be sustained in the eye of law, as the same are arbitrary, unreasonable and violative of principle of natural justice.

21. For all the above reasons, this Court is of the considered view that determination of damages as made vide letter dated 20.10.2017 under Annexure-11 and consequential demand notice dated 07.01.2018 issued vide Annexure-12 imposing penalty are liable to be quashed and are hereby quashed.

22. In the result, the writ petition stands allowed, but, however, under the circumstances of the case, there shall be no order as to costs.

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