

IN THE HIGH COURT OF ORISSA AT CUTTACK
W.P.(C) No.22195 of 2022

(In the matter of an application under Articles 226 and 227
of the Constitution of India, 1950)

Sourabha, N.G.O., Khurda *Petitioner*
-versus-
State of Odisha and Ors. *Opposite Parties*

Advocates appeared in the case through Hybrid Mode:

For Petitioner : *Mr. Prafulla Kumar Rath, Adv.*

For Opposite Parties. : *Mr. A.K.Parija, AG*
Mr. T.K. Pattanayak, ASC
Mr. B.K. Sharma, Adv.
(for caveator)

CORAM:
DR. JUSTICE S.K. PANIGRAHI

DATE OF HEARING:-19.07.2023

DATE OF JUDGMENT: -25.07.2023

Dr. S.K. Panigrahi, J.

1. The Petitioner, in this Writ Petition, has made a prayer to set aside the order No.2873 dated 23.08.2022 passed by the Joint Secretary to Government, S.T. and S.C. Development Department and Programme Director, PMU, OPELIP terminating the existing agreement in respect of two OPELIP Projects i.e. to work in the programme area of KKDA, Belghar in

the district of Kandhamal and in the programme area of PBDA, Khuntagaon in the district of Sundargarh.

I. FACTS OF THE CASE:

2. The fact of the case is that the Petitioner is a Non-Government Organization (NGO) registered under the Societies Registration Act, 1860 and working on different projects of Social Development, eradication of poverty, livelihood programme for PVTG vulnerable group etc. in Odisha and for implementation of various awareness programmes in rural areas. Now, the Petitioner is working in OPELIP Project assisted by IFAD under Poudi Bhuyan Development Agency (PBDA), Khuntagaon, Lahunipada, Sundargarh and under Kutia Kandha Development Agency (KKDA), Belghar, Kandhamal.
3. The IFAD (International Fund for Agricultural Development), Union of India and Government of Odisha decided to implement OPELIP (Odisha PVTG Empowering and Livelihoods Empowerment Programme) for Primitive Vulnerable Tribal Group people launched in 2017 to be worked out through Non-Government Organisations assisted by IFAD and the Union of India and the State Government. The intention of the Government for mobilization and giving awareness among the Primitive vulnerable tribal group people and their development. Accordingly, the Government of Odisha divided those areas into 17 Micro Projects and selected 15 numbers of

NGOs for facilitating the same. It was also decided that the Entry Point Activities (EPA) would be for one year i.e. from 2017-18 and if it would be successful, in that event, the NGOs would continue their activities for the next term and to work in programme areas. An operational Guideline was also framed for Entry Point Activities for OPELIP.

4. Although the duration of the programme is seven years, but it was decided that the Entry Point Activities of the NGOs will be reviewed after one year. If the performance was found satisfactory, the said NGO would proceed for another six years. Accordingly, the Petitioner was selected as one of the facilitating NGOs by the Committee headed by Opposite Party No.1 with due procedure to work in two Micro Project Programmes areas named Khuntagaon in Sundargarh district and Belghar in Kandhamal district by executing an Agreement with Petitioner on 31.05.2017 and Engagement Letter dated 17.06.2017 was issued to the Petitioner.
5. Upon execution of Agreement, the Petitioner by deputing its 79 number of employees to the Programme areas had started its work as per Guidelines in June, 2017 under direct supervision of Opposite Party Nos.5 and 6 and completed the same within 10 months (from June, 2017 to March, 2018) successfully. In fact, it was too difficult to work by the Government Official because of all the Micro Project areas are covered by Mao Militants. While

the Petitioner was working in programme areas, the Opposite Party No.4/ Programme Director vide his letter dated 21.02.2018 directed the Special Officer to call for the records of Petitioner for verification. Prior to the said letter, the Petitioner had submitted the Report on 15.02.2018 before the Special Officer for verification. Upon verification of the report, the Special Officer vide letter dated 15.02.2018 informed the Programme Director that the report of the Petitioner was satisfactory. By reviewing the report of the Petitioner and other NGOs, since the Opposite Party No.4/ Programme Director found the Entry Point Programme of previous year was satisfactory vide office order dated 23.03.2018, the Petitioner was directed to sign on the contract for renewal of the Agreement to be held on 31.03.2018. The Petitioner had signed the renewal Agreement on 31.03.2018 and the Programme Director vide letters dated 02.04.2018 and 04.04.2018 informed all the Special Officers of Micro Project Agencies that the contract of the Petitioner along with other NGOs had been renewed from 01.04.2018 to 31.03.2024.

6. When the matter stood thus, the Petitioner continued the work in the Schedule villages engaging its 79 employees and about 10,000 households to be covered, as per the direction of the Opposite Party No.4 to achieve the time line given by the Programme Director, OPELIP on 21.04.2018 for implementation of the E.P.As for the year 2018-19. During continuance of the

work in Programme villages, the new Programme Director joined on 1st May, 2018 and called for a Review Meeting of the officials of Government engaged in OPELIP on 07.05.2018, 08.05.2018 and on 09.05.2018 without calling the Chief Functionaries of NGOs to the Review Meeting and issued show cause notice to all the NGOs working under OPELIP including the Petitioner regarding supply of utensil sets and MGNREGS KIT for distribution in the Programme areas. The Petitioner was issued with the show cause notice on 09.05.2018. The Petitioner submitted his reply on 13.05.2018 contending therein that the decision for distribution of utensils and MGNREGS KIT was not the unique decision of the Petitioner. Rather, it was the decision of the members of Village Development Agencies (VDAs) and the local Government Officers including the Collector of the concerned District, who was Chairman, OPELIP of the said Districts and the Petitioner being the facilitating Agency of Entry Point Activities of OPELIP had only to obey the direction of Government functionaries, after consulting with the local officers. Since it is a need of the community as per the Guideline, the Petitioner had provided the materials to fulfill their demand. The people of the (PVTG) in Tribal areas are malnourished and suffers from several diseases causing food poisoning because of their poor system in food preparation and preservation of food. One of the factors is that the food cooked in non-metallic

utensils and inadequate utensils/ carriers and it has been one of the criteria in OPELIP regarding health and nutrition. The Petitioner in his show-cause has described all the facts about distribution of MGNREGS KIT for generation of man days. The Programme Director in his letter No.1033 dated 19.05.2018 directed for termination of Contract with the Petitioner as facilitating NGO under OPELIP Programme areas by 17th June, 2018 which smacks arbitrariness and illegalities.

7. The Petitioner is working in the area under OPELIP through its number of employees and households for Entry Point Activities and the contract between the Government and the Petitioner has already been renewed since 31.03.2018 till 2024. After renewal of the contract the termination of contract within one month without any meaningful cause is unsustainable in law.
8. The Petitioner has distributed the MGNREGS KIT, Utensils in presence of MPA, local Officers and Public Representatives (PRI Members) and PMU Director, representatives of NRM Officer. In the Show-Cause, the Petitioner has conveyed to the Opposite Party No.4 and the contract with the Petitioner has been renewed till 2024 after the work of OPELIP found satisfactory. But, at this stage, the Petitioner was made inconvenienced by terminating the Contract.
9. The Petitioner after renewal of Agreement has deployed about 79 numbers of employees in Khuntagaon and Belghar for

facilitating EPA in the OPELIP Programme catering to 10,000 Households. Due to termination of Contract, those employees will lose their job by which their family will be on the road and the beneficiaries will be deprived of the benefits from the Government as well as the Petitioner will fail to recover the money invested in Programme Area.

10. Challenging the earlier Termination order dated 19.05.2018, the Petitioner had approached this Court in W.P(C) No.9559 of 2018 and the same was disposed of on 31.08.2021 with the following orders:

“This matter is taken up through Video Conferencing Mode.

Heard Mr. J. K. Khuntia, learned Counsel for the petitioner, Mr. Ashok Parija, learned Advocate General and Mr. B.K. Sharma, learned Counsel for Opposite Party No.4.

Mr. Parija submits that since the main grievance of the petitioner is that the impugned order dated 19.05.2018 under Annexure-12 has been passed without considering the show cause filed by the petitioner, thereby violating the principles of natural justice; the authorities more particularly opposite party No.4 is now prepared to give the petitioner a fresh opportunity of hearing vis-à-vis the show cause filed by it and accordingly, prays that the matter be disposed of.

Considering such submissions, the impugned order dated 19.05.2018 under Annexure-12 is set aside and the petitioner is directed to appear before the Programme Director,

Odisha Particularly Vulnerable Tribal Groups Empowerment & Livelihood Improvement Programme, SC & ST Development Department (opposite Party No.4) either physically or through Video Conferencing Mode on 6.9.2021, who in turn is directed to fix a date for giving personal hearing to the petitioner vis- à-vis show cause. Upon completion of such hearing, opposite Party No.4 is directed to pass the final order in accordance with law.

The Writ Application is accordingly disposed of.

Issue urgent certified copy of this order on proper application.”

11. The Petitioner was noticed to appear before the Programme Director, OPELIP on different dates. The Petitioner entered appearance and complied with the requirements as required on different dates of hearing. The Project Director has passed the impugned order mechanically without considering reply given in the Show-Cause Reply and without applying the mind as to the grounds taken in the Show-Cause Reply to the effect that the allegations in the show-cause notice do not form part of Entry Point Activities (EPA) at all. Hence, this Writ Petition.

II. SUBMISSIONS ADVANCED ON BEHALF OF THE PETITIONER:

12. Learned counsel for the Petitioner had brought forward the following submissions:-

- (i) As per Operational Guidelines, guiding principle for EPA is provided that Entry Point Activities will include inter

alia: *“works based on urgent needs of the local communities such as rehabilitation of community shrines, drinking water, water harvesting, supply of solar lantern, supply of MGNREGS implements etc.”*

- (ii) A set of Guidelines called "Programme Implementation Manual" was issued by laying down different Guidelines. The Programme Implementation Manual provides as follows:

“16. The Programme will implement one or more Entry Point Activity in order to gain the confidence of the community. This will be the training ground for the community to plan for implementation of various activities. The programme has made an allocation of INR 175,000 to each village. The village will be facilitated to plan for these activities. The activities will be chosen in the VDA and, as far as possible, will create or repair assets of common use, especially targeting women, such as drinking water facilities, washing and bathing platforms, platforms for drying NTFPs/ crops etc”.

- (iii) In order to carry out Entry Point Activities, a contract initially was executed. The initial contract to carry out EPA and implementation of the programme was for a period from 01.06.2017 till 31.03.2018 which is in terms of Clause-2.4 of Special Conditions of Contract of Contract Agreement for Consultant Services between the Parties.

- (iv) The Petitioner upon entering into the Contract successfully carried out the Entry Point Activities. Review and verifications were conducted by the specified authorities like Special Officer, KKDA. The Special Officer, KKDA vide letter dated 15.02.2018 has specially found that the performance of FNGO- SOURABHA in respect of Belghar is satisfactory, meaning thereby the Entry Point Activities in the shape of distribution of MGNREGS Kits in KKDA, Belghar found to be satisfactory. After completion of first year period as aforesaid, the contract for KKDA and PBDA was executed for a period of 5-years i.e. from 01.04.2018 to 31.03.2024.
- (v) The Petitioner worked in different areas of the State mostly dominated by Maoists having executed the aforesaid contracts. From time to time, the performance of the Petitioner was reviewed was held on 07.05.2018 and 08.05.2018. No wrong was pointed out by the Project Officials against the Petitioner for distribution of MGNREGS Kits as Entry Point Activities. On the other hand, the Authorities in their wisdom having found that the Petitioner has diligently worked regarding distribution of MGNREGS Kits as Entry Point Activities during the initial period of one year. Subsequently, the contract was executed for a period of 5 years. However, being estopped

under law to raise the issue as to distribution of MGNREGS Kits as Entry Point Activities, suddenly a Notice dated 09.05.2018 was issued calling upon the Petitioner as to termination of the contract. The Petitioner Organization submitted a detailed show-cause on 23.05.2018 specifically indicating creation of 2725 Mandays, conducting 43 numbers of Palli Sabha, facilitating 22 numbers of Palli Sabha, organizing village-level meeting with farmers, selecting 5 numbers of progressive farmers and with details of achievements in a Tabular form. Such a reply is exhaustive and specific points have been raised in the show cause.

- (vi) Considering all such show-cause notices and without complying with clause-2.8 of the Contract which is a clause governing the element of natural justice as a sine qua non before passing an order, the disengagement order dated 19.05.2018 was passed.
- (vii) The Petitioner had challenged the said order under Annexure14 in W.P.(C) No.9559 of 2018. At the stage of argument, the learned Advocate General appearing for the State conceded that there has been non-consideration of the show-cause filed by the Petitioner, thereby there is violation of principles of natural justice. As a consequence thereof, the disengagement order dated 19.05.2018 was set

aside. Direction was given to the Director, OPELIP to fix the date of hearing giving opportunity of hearing to the Petitioner vis-à-vis its show cause. The Opposite Party No.4 was directed to pass final order in accordance with law.

(viii) The order of dis-engagement has been passed by the Programme Director, OPELIP. Clause-2.8.1 of the contract is the relevant clause which empowers the client to terminate the contract. Clause- 2.8.1 of the contract is reproduced herein below for ready reference:

“2.8.1. By the Client.

The Client may, by not less than thirty (30) days’ notice written notice of termination to the Consultants (except in the event listed in paragraph (below, for which there shall be a written notice of not less than sixty (60 days). such notice to be given after the concurrence of any of the events specified in paragraphs (a) through (g) of this Clause GCC 2.8.1, terminate this Contract.

In terms of Clause-2.8.1, it further provides that if the consultants fail to remedy a failure in the performance of their obligations hereunder, as specified in a notice of suspension pursuant to Clause-2.8 hereinabove, within thirty (30 days) of receipt of such notice of suspension or within such further period as the Client may have subsequently approved in writing. The

Client can terminate the contract only thereafter.

Clause-2.7 of the Contract at Page-81 is the relevant clause as to suspension of a contract which has to take place prior to issuance of Termination Notice."

- (ix) The impugned order of termination does not show that the Opposite Parties/ Authorities have adhere to Clause-2.8 of the Contract, which itself is an incidence of violation of natural justice. The order also does not show issuance of 30 days or 60 days notice as the case may be. In view of the above, the impugned order is in violation of principles of natural justice. In other words, there has been non-compliance of principles of natural justice as:

(a) The Show-Cause Notice never demonstrates any single word as to the grounds on which the termination has taken place i.e. finding fault in supplying MGNREGS Kits as Entry Point Activities. On the other hand, the Show-Cause Notice was issued for the limited purpose of explaining how many mandays in fact on distribution of MHNREGS Kits is created and how it has worked on capacity building and how it has approached sustainable Livelihood Development etc, which has been replied by the petitioner in detail in its show-cause i.e. at Page-252 of the Writ Petition dated 23.06.2018 giving in details about the number of Mandays, how it has lead to empowerment of targeted communities, but the Opposite Party No.4 without whispering a single words on the merits involved in the show-cause, has straightway found fault and defects

with the petitioner for distribution of MGNREGS Kits itself.

(b) The petitioner herein contends that by adopting such a project, the Opposite Party No.4 has passed order on reasoning's which is not subject matter of the Show-Cause Notice.

- (x) The Petitioner placed reliance on the judgments passed by the Supreme Court in the cases of *Commissioner of Central Excise, Bangalore v. Brindavan Beverage (P) Ltd. & others*¹, *Commissioner of Central Excise, Chandigarh v. Shital International*² and *Commissioner of Customs, Mumbai v. Toyo Engineering India Ltd.*³ wherein the adherence to the principle of natural justice has been prominently focused.
- (xi) There has been non-consideration of show-cause in the impugned order. The Opposite Party No.4 has not dealt with nor has applied its mind on the detailed show-cause nor even has considered the same by giving reasons. In the instant case, this Court while setting aside the initial order of termination dated 31.08.2021 had also directed the Opposite Party No.4 to pass an order as per law meaning thereby in all the elements of natural justice as embodied with the contract are also to be complied with. This Court in the earlier order had never dispensed with compliance

¹ 2007 (5) SCC-388

² 2011(1) SCC 109

³ 2006 (7) SCC-592

of the specific terms of the contract which embodied the principles of natural justice itself. Hence, the arguments of the learned Advocate General that giving opportunity of personal hearing as taken is incorrect.

- (xii) While passing the impugned order, Clause- 2.7 of the contract has never been followed. The Notice of 30 days or 60 days as the case may be has never been given to the Petitioner. Non-giving of such a Notice by the Opposite Party No.4 is fatal to the action like straightway termination. Hence, there is again violation of principles of natural justice by the Opposite Party No.4.
- (xiii) Law is well settled that even if the scope of litigation remains within the realm of a contract, but action like termination of the contract involving the State and its undertaking has to follow the decree the fairness must be with strict complying of natural justice and with all transparency. Where the Court exercising power under Article 226 finds that there is violation of principles of natural justice, it would be justified to strike down the action under Article 226 instead of relegating parties to a civil remedy.
- (xiv) Similar order of termination was passed in respect of Six FNGOs with self-same allegations and contract of Four

FNGOs have been restored. However, the Petitioner FNGO has been discriminated. The FNGOS restored are:

1. DKDA, Chatikona,
2. DKDA, Parsali,
3. HK & MDA, Jashipur,
4. PBDA, Jamardihi,
5. PBDA, Rugudakudar, and
6. S.D.A, Chandragiri.

(xv) In view of the aforesaid, there being clear non-compliance of principles of natural justice, which is established here, the impugned action is liable to be quashed.

III. SUBMISSIONS ON BEHALF OF OPPOSITE PARTIES 1, 2 AND 3/

STATE:

13. On the other hand, learned counsel for the Opposite Parties/ State has brought forward the following submissions:

(i) The Writ Petition is not maintainable in view of the fact that the Agreement has an arbitration clause. Clause-8 of the Agreement deals with the dispute settlement mechanism through the arbitration. It is settled law that if there is an arbitration agreement for resolution of the dispute, the parties must be referred to arbitration. In contractual matters where disputed question of facts are involved, the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India cannot be invoked. The Petitioner is praying for issuance of a restraining order from this Court

preventing the authority to take action as per the terms and conditions of the agreement. Moreover, the contract/agreement if confers a particular action to be taken by the employer, he cannot be prevented from doing so and his action may be subject matter of challenge, but there cannot be any prohibition.

(ii) Thus, the present Writ Petition in this view is not maintainable. Further, Section-14 of Specific Relief Act, 1963 provides that a contract which in its nature determinable cannot be specifically enforced. Further, Section 41 of the said Act, provides an injunction cannot be granted to prevent breach of a contract, the performance of which would not be specifically enforced. The present contract between the parties being determinable in nature cannot be specifically enforced and the contract being determinable in nature, in view of Section 41(e) of the Specific Relief Act, 1963, an injunction cannot be granted to prevent the breach of a contract, the performance of which could not be specifically enforced.

(iii) It is well settled that ordinarily, the remedy available for a party complaining of breach of contract lies for seeking damages. The party will be entitled to the relief of specific performance, if the contract is capable of being specifically enforced in law. The remedies for a breach of contract being

purely in the realm of contract are dealt with by civil courts. The public law remedy, by way of a Writ Petition under Article 226 of the Constitution of India, is not available to seek damages for breach of contract or specific performance of contract. In contractual matters, the decision-making process is subject to judicial review and not the decision itself. In the present case, the decision-making process is within the realm of legal principles and this being the position, the Writ Petition ought not to be entertained by this Court.

- (iv) The goal of Odisha PVTG Empowerment and Livelihood Improvement Programme (OPELIP) is to achieve enhanced living conditions and reduced poverty of the Particularly Vulnerable Tribal Group (PVTG) and other poor communities. This is sought to be achieved through realizing the development objective of enabling improved livelihoods and food and nutrition security primarily for a total of 62,356 households (comprising 32,090 PVTGs, 13,970 other Scheduled Tribes (STs) households, 5486 Scheduled Castes (SCs) households and 10,810 others) would directly benefit from the programme. ST and SC Development Department, Government of Odisha is the Nodal Department at State Level responsible for the functions relating to planning, fund flow, monitoring, evaluation, knowledge management etc.

- (v) One of the key initial activities of OPELIP is the engagement of Facilitating NGOs like the Petitioner in the present case, whose main role at the grass root level consists of intensive handholding support to the PVTGs which translates into capacity building and awareness creation of delivery of services related to livelihood empowerment etc.
- (vi) Accordingly, the Petitioner's NGO got an opportunity to work in the field facilitating weaker/ PVTG, Backward Community in the village planning. The present scheme OPELIP is being implemented by the State which is financed by International Fund for Agriculture Development (IFAD'), an international organisation.
- (vii) In this process, the NGOs are to organize Village Development Associations (VDA) and are to seek opinion of the Village Development Associations (VDA) about the deficiencies and facilities that requires for the purpose of their mobilization and programme implementation. The NGO will submit the shortlisted potential Entry Point Activity (EPA) to Special Officer/ Project Manager of Micro Project Agency (MPA) for final approval which the Special Officer will approve based on technical, social and financial consideration of the Entry Point Activity (EPA).
- (viii) The Petitioner's NGO was entrusted to look after and work in KKDA, Belghar under Kandhamal District and in

PBDA, Khuntagan under Sundargarh district. Accordingly, an agreement was executed between the Programme Director (Opposite Party No.4) and the Petitioner for 10 months and then subsequently, for a period of 6 years on 19.03.2018.

(ix) Considering the Entry Point Activity (EPA) and its objectives, the Opposite Party No.4 agency vide show cause notice dated 09.05.2018 sought for an explanation from the Petitioner against the proposed disengagement from being a facilitating NGO, on the premise that the petitioner had made huge expenditure towards procurement and distribution of MGNREGA kits, kitchen utensils etc. as well as expenditure of Unique Activity under Entry Point Activity (EPA) without being able to create sufficient mandays which would have uplifted the living conditions of the PVTGA.

(x) Accordingly, a show case reply was given by the Petitioner to the Programme Director (Opposite Party No.4) on 13.05.2018. The reply given by the Petitioner was not satisfactory and, accordingly, letter dated 19.05.2018 was issued by the Opposite Party No.4 terminating the contract with the Petitioner NGO within a period of 30 days i.e. 17.06.2018 as per Clause-2.8. Thereafter, the Petitioner had approached this Court challenging the termination order

dated 19.05.2018 in W.P. (C) No.9559 of 2018 which was disposed of on 31.08.2021 with a direction to "*the Petitioner to appear before the Programme Director, OPELIP, ST & SC Development Department (Opposite Party No-4) either physically or through Video Conferencing mode on 06.09.2021, who in turn is directed to fix a date for giving personal hearing to the Petitioner vis-à-vis show cause. Upon completion of such hearing, the Opposite Party No-4 is directed to pass the final order in accordance with law*".

(xi) Accordingly, the Programme Director (Opposite. Party No.4) directed the Petitioner to appear before the Opposite Party No.4 either physically or Video Conference mode on 06.09.2021 so as to fix a date for personal hearing. The Petitioner did not appear. Subsequently, the Petitioner, on 23.09.2021, replied to the Show Cause Notice No.920 dated 09.05.2018 of the Programme Director (Opposite Party No.4) explaining the reasons for taking up Entry Point Activity (EPA) in PBDA, Khuntagaon, Sundargarh District and KKDA, Belghar, Kandhamal District.

(xii) As the reply of the Petitioner was not satisfactory, the Opposite Party No.4 offered opportunity for personal hearing on 07.10.2021. Accordingly, the Petitioner along with NGO President Shri Dhaneswar Sahu attended the personal hearing. During the course of hearing, they failed to explain

whether any substantial improvement in generating man days have occurred under MGNREGA by supplying MGNREGA kits in the programme areas. It was evident that 5 man days had been generated per beneficiary which was way below the expected outcome under MGNREGA.

(xiii) Further, on the request of Petitioner and NGO President, they were given another opportunity to appear on 10.02.2022 so as to produce evidence relating to distribution of MGNREGA kits, kitchen utensils and unique activities under Entry Point Activity (EPA) during 2017-18. During the course of hearing, they agreed to submit (1) GPS Photographs relating to infrastructure (2) GPS photographs of distribution of solar light systems and (3) GPS photographs of processing units and their present functional status for KKDA, Belghar and PBDA, Khuntagaon for the year 2017-18. The Petitioner could not provide the entire GPS photographs of Entry Point Activity (EPA) taken up in two Micro Project Agencies during the year 2017-18. They submitted photographs of 08 villages under KKDA, Belghar and few activity photographs of 09 Village Development Communities (VDCs) under PBDA, Khuntagaon. Though taking GPS photographs is mandatory as per operational guidelines of Entry Point Activity (EPA), the Petitioner could

not provide the evidentiary proof in the form of photographs in implementing the schemes.

(xiv) After personal hearing granted on different dates and examining the relevant documents, records received from both Special Officers of PBDA, Khuntagaon and KKDA Belghar, reply received from the Petitioner to the Show Cause Notice dated 09.05.2018, subsequent information and photographs received etc., the Programme Director (Opposite Party No.4) keeping in mind the greater interest of the PVTG Community and the timely execution of remaining works, decided to terminate the contract and consequently, disengage the Petitioner's organization with immediate effect.

(xv) In view of the facts and submission made above, the prayer made in the Writ Petition is devoid of merit and hence, liable to be dismissed, submitted by the learned Advocate General.

IV. SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTY NO.4:

14. Learned counsel for the Opposite Party No.4 reiterated the submissions as has been submitted by the learned counsel for the Opposite Party Nos.1, 2 and 3/State. In Addition, he further submitted that:

(i) The present Writ Petition is not maintainable in law. The agreement between parties has an arbitration clause. Clause-

8 of the agreement deals with the dispute settlement mechanism through the arbitration. It is settled law that if there is an arbitration agreement for resolution of the dispute the parties must be referred to arbitration. In contractual matters where disputed question of facts are involved the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India cannot be invoked. The present Writ Petition is in the form of seeking a restrained order from this Court preventing the authority to take action as per the terms and conditions of the agreement. Moreover, the contract/agreement if confers a particular action to be taken by the employer, he cannot be prevented from doing so and his action may be subject matter of challenge, but there cannot be any prohibition. Thus, the present Writ Petition in this view is not maintainable. Further, Section 14 of Specific Relief Act, 1963 provides that a contract which in its nature determinable cannot be specifically enforced. Further, Section 41 of the said Act provides an injunction cannot be granted to prevent breach of a contract the performance of which would not be specifically enforced. The present contract between the parties being determinable in nature cannot be specifically enforced and the contract being determinable in view if section 41(e) of the Specific Relief Act, 1963, an injunction cannot be granted to prevent the

breach of a contract, the performance of which could not be specifically enforced. Further, it is proved that the opposite parties have broken the contract of the Petitioner and the Petitioner has suffered any breach he is entitled to compensation for any loss or damaged caused to him as per Section 73 of the Indian Contract Act, 1872.

(ii) Further, the termination of agreement have been made after personal hearing on different dates, assessing all relevant documents produced/ submitted, records received from two MPAs, information and photographs of Entry Point Activity (EPA) verified there after such decision have been taken for greater interest of PVTG Community and smooth execution of remaining work. Moreover, the reasons for termination of contract have already been spelt out in the order dated 23.08.2022 wherein the show cause notice dated 09.05.2018 have been considered. The Petitioner's organization has been given adequate opportunities in the last 4 years.

(iii) The Opposite No.4 is not bound to abide under Clause 2.8.1 in the present context. Such termination order has been made by the Opposite Party No.4 based on the order dated 31.08.2021 passed by this Court in W.P.(C) No.9559 of 2018 directing the Opposite Party No.4 to hear either physically or through Video Conferencing mode for giving personal

hearing to Petitioner vis-à-vis show cause. Upon completion of such hearing, Opposite Party No.4 was directed to pass final order in accordance with law. Accordingly, the Programme Director (Opposite Party No.4) has passed the order of termination of contract. Hence, the allegation of the Petitioner that the OPELIP authority has not given 30 days prior notice as per Clause 2.8.1 is not justified.

- (iv) Allegation of the Petitioner that the Show Cause Notice in the Writ Petition do not hit the requirement of operational guidelines of Entry Point Activity (EPA) issued by the Programme Implementation Agency (PLA) and hence could not form the basis of termination of the agreement is totally misconstrued. The main objectives of the Entry Point Activity (EPA) are (i) Community Mobilisation for effective and participatory project implementation (ii) gaining confidence of the targeted community on the project and their management skills (iii) endowing tangible assets to the targeted communities and (iv) providing short term financial benefits and incentives to the villagers (wages). Based on these broad objectives, the show cause notice was issued seeking reply on (i) how the Entry Point Activity (EPA) taken up in the financial year 2017-18 led in empowering the targeted communities (ii) the effect of Entry Point Activity

(EPA) work made on capacity building to the targeted community (iii) Whether the Entry Point Activity (EPA) works taken up led to sustainable livelihoods development and (iv) number of man days generated after distribution of MGNREGS kits under Entry Point Activity (EPA). These are very vital and fitting questions which have been part of the show cause notice seeking explanation from the Petitioner. Hence, the show cause notice clearly corroborates the operational guidelines of the Entry Point Activity (EPA). Therefore, the allegation of the Petitioner is totally unjustified.

(v) Further, an agreement has been executed between Programme Director (Opposite Party No.4) and the Petitioner for implementation of OPELIP Programme. As per agreement Opposite Party No.4 has to assess the performance of the Petitioner. Though the Special Officer may review the performance of the Petitioner and report to the Programme Director (Opposite Party No.4) but the report of the Special Officer is not final. The decision of the Programme Director on the performance of the Petitioner is final and binding. After assessment of Entry Point Activity (EPA) taken up by the Petitioner, on 09.05.2018 the Programme Director issued the Show Cause Notice which

clearly indicates that the performance of the Petitioner was not satisfactory. Hence, the Petitioner citing performance report submitted by Special Officer is not justified.

(vi) The decision for signing the contract renewal was intimated to all facilitating NGOs working for OPELIP areas based on the communication received from IFAD ICO, New Delhi, the donor agency during the IFAD Implementation Support Mission held from 12.12.2017 to 20.12.2017. Hence, all the NGOs have renewed the contract agreement from 01.04.2018 to 31.03.2024, not due to the satisfactory performance of the Petitioner. However, by renewing the contract agreement of the Petitioner there is no bar to access the performance of the Entry Point Activity (EPA) Activities by the Opposite Party No.4 and issue Show Cause Notice. Hence, the Petitioner's claim of renewal of contract due to satisfactory performance on Entry Point Activity (EPA) is misconstrued.

(vii) The Programme Director's letter dated 21.04.2018 was issued to all Special Officers of MPAS with a copy to all Chief Functionaries FNGOS for implementation of Entry Point Activity (EPA) in 2018-19, wherein due emphasis has been given for minimum 60% to civil construction work basing on the instruction received from IFAD, the donor

agency during the verification of documents of Entry Point Activity (EPA) work of 2017-18. Hence, the Petitioner's claim of continuation of work in scheduled villages does not concur due to the letter dated 21.04.2018 of Opposite Party No.4.

(viii) The Petitioner's allegation of calling review meeting of the officials of Government engaged in OPELIP on 07.05.2018, 08.05.2018 and 09.05.2018 without calling the Chief Functionaries, illegally issuing show cause notice to all NGOs working under OPELIP including the Petitioner regarding supplying utensil sets & MGNREGA kits for distribution in the programme areas is totally fallacious and without fact. The communication for attending the review meeting was issued by the Programme Director, Opposite Party No.4 vide letter No.866 dated 03.05.2018 addressing to all Special Officers, Micro Project Agencies with a copy to the Chief Functionaries of facilitating NGOs. In that letter, it has clearly been mentioned that all Special Officers and Team Leader of the facilitating NGOs to make presentation in the given format. The Team Leader of FNGO the key functionary for implementation of OPELIP work on behalf of FNGO attended the review meeting. The review of progress of work on the mentioned date was also in the knowledge of

Chief Functionary. Whatever progress reports presented in the prescribed format must be with the knowledge of Chief Functionaries, FNGOs. Hence, the Petitioner's plea that he was not called for the review meeting is totally mischievous.

(ix) As per office records, there was no review meeting held on 09.05.2018 and the Petitioner's claim of holding review meeting by the Opposite Party No.4 on 09.05.2018 has no basis. Review meeting was held on 07.05.2018 and 08.05.2018 and, accordingly, the proceedings of the review meeting have been communicated to the Chief Functionaries of FNGOs of the Writ Petition. In the proceedings, the Programme Director expressed displeasure on poor progress of work for financial year 2017- 18 and distribution of utensil sets, MGNREGA Kits to the communities by facilitating NGO and instructed in the concluding remarks that the Special Officers and NGOS to ensure transparency at all level and work wholeheartedly.

(x) Further, show Cause Notices were issued to 9 numbers of NGOs on improper implementation of Entry Point Activity (EPA) work during 2017-18. Hence, it is submitted that out of 15 FNGOs working 17 Micro Project Agencies only 9 NGOs including the Petitioner have been issued show cause notice and not all NGOS.

(xi) The Petitioner's claim of the decision for distribution of Utensils and MGNREGS kit was not the unique decision of the Petitioner, rather, it was the decision of the members of the Village Development Agencies (VDAs) and the local Government Officers including the Collector of the concerned District and the Petitioner being the facilitating Agency of Entry Point Activity (EPA) of OPELIP has only to obey their direction is totally unbecoming. The main role of facilitating NGOs is to guide, mobilize, provide handholding support, capacitate, strengthen the communities as per mandate of the Programme. The Village Development Associations (VDAs) and Village Development Communities (VDCs) are from the PVTG Communities and are illiterate and unaware of the guidelines of the programme. That is the reason why facilitating NGOs have been assigned for. Unless proper capacity building with right guidance given, their demand cannot become sole reason of such expenditure by providing utensils and MGNREGA kits. The Petitioner has been equipped with professionals who are supposed to guide the Community towards right decision making even if the villagers demand for it. In this case, the Petitioner has failed in doing so by hiding behind with a plea that the Village Development Association (VDA) demanded. It was the responsibilities of the FNGO to identify community

based activities under Entry Point Activity (EPA) and guide them properly before getting approval or consent from the local Government Official. Citing the approval of EPA activities by VDA or by the Government Officials does not condone NGO's misdeeds.

(xii) Further, there are no such empirical study reports/ finding in the programme areas that the PVTG communities are malnourished and suffer from several diseases due to their poor system in food preparation and preservation of food because of non-metallic and inadequate utensils/carriers. This is purely imaginary and own creation of the Petitioner. In order to justify its wrong activities under Entry Point Activity (EPA), the petitioner has expressed such opinion.

(xiii) The Petitioner has claimed that the Programme Director illegally and arbitrarily on 19.05.2018 directed for termination of contract with the Petitioner as facilitating NGO under OPELIP areas by 17th June, 2018 is totally false. The NGO was terminated as per Letter No.1033 dated 19.05.2018 with effect from 17th June, 2018 as per Clause-2.8 i.e. termination by giving 30 days notice. So the termination of contract issued by Opposite Party No.4 is as per agreement signed with the Petitioner.

(xiv) The allegation of the Petitioner that on identical set of allegation, 6 numbers of NGO (for 8 MPAs) were noticed by the Programme Director. Out of the 8 MPAs, 03 NGOs covering 05 MPAS approached this Court. The Programme Director for obvious reason has permitted them to continue sitting on the Show Cause Notice assigned and without passing any order on the same. Further, the Petitioner alleges that the Programme Director vindictively passed order of termination from the existing contract due to his approach to this Court is purely fictitious and out of context. The fact of the matter is that the Show Cause Notices were issued to 9 numbers of FNGOs (for 11 MPAs) out of which 06 NGOS (for 08 MPAs) were disengaged. Out of the 06 NGOs, 03 NGOs (for 5 MPAs) approached this Court. As per letter dated 03.07.2018 attached as Annexure- 18 of Writ Petition, the Special Officer were intimated that the disengaged NGO should continue to work for carrying out pending works during the peak MGNREGS season till finalization of selection new agency or till further orders whichever is earlier. It is not true that the allegation of Petitioner citing that the Programme Director vindictively passed order to terminate the Petitioner from the existing contract because the Petitioner approached this Court which is discriminatory and violative of Article 14 of Constitution of India. On this

count, it is submitted that 03 NGOs (05 MPAs) including the Petitioner's organization had approached this Court out of which two NGOs were allowed to continue as facilitating NGO based on their Show Cause reply, personal hearing, justification of their EPA work, production of evidence etc. Hence, it is fallacious to allege the termination of the contract is discriminatory and violative of Article 14 of the Constitution of India.

(xv) In view of the facts submissions made above, the prayer of the Petitioner is liable to be dismissed being devoid of merit. Consequently, the Writ Petition may be dismissed.

V. COURT'S ANALYSIS AND REASONING:

15. As per Operational Guidelines, guiding principle for EPA is provided that Entry Point Activities will include out of all others *"works based on urgent needs of the local communities such as rehabilitation of community shrines, drinking water, water harvesting, supply of solar lantern, supply of MGNREGS implements etc."*

16. A set of Guidelines called "Programme Implementation Manual" was issued laying down different Guidelines. The Programme Implementation Manual provides as follows:

"16. The Programme will implement one or more Entry Point Activity in order to gain the confidence of the community. This will be the training ground for the community to

plan for implementation of various activities. The programme has made an allocation of INR 175,000 to each village. The village will be facilitated to plan for these activities. The activities will be chosen in the VDA and, as far as possible, will create or repair assets of common use, especially targeting women, such as drinking water facilities, washing and bathing platforms, platforms for drying NTFPs/ crops etc”.

17. In order to carry out Entry Point Activities, a contract initially was executed. The initial contract to carry out EPA and implementation of the programme was for a period from 01.06.2017 till 31.03.2018 which is in terms of Clause-2.4 of Special Conditions of Contract of Contract Agreement for Consultant Services between the Parties.

18. Considering the Entry Point Activity (EPA) and its objectives, the Opposite Party No.4 agency vide show cause notice dated 09.05.2018 sought for an explanation from the Petitioner against the proposed disengagement from being a facilitating NGO, on the premise that the petitioner had made huge expenditure towards procurement and distribution of MGNREGA kits, kitchen utensils etc. as well as expenditure of Unique Activity under Entry Point Activity (EPA) without being able to create sufficient mandays which would have uplifted the living conditions of the PVTGA.

19. Accordingly, a show case reply was given by the Petitioner to the Programme Director (Opposite Party No.4) on 13.05.2018. The reply given by the Petitioner was not satisfactory and, accordingly, letter dated 19.05.2018 was issued by the Opposite Party No.4 terminating the contract with the Petitioner NGO within a period of 30 days i.e. 17.06.2018 as per Clause-2.8. Thereafter, the Petitioner had approached this Court challenging the termination order dated 19.05.2018 in W.P. (C) No.9559 of 2018 which was disposed of on 31.08.2021 with a direction to *"the Petitioner to appear before the Programme Director, OPELIP, ST & SC Development Department (Opposite Party No-4) either physically or through Video Conferencing mode on 06.09.2021, who in turn is directed to fix a date for giving personal hearing to the Petitioner vis-à-vis show cause. Upon completion of such hearing, the Opposite Party No-4 is directed to pass the final order in accordance with law"*.

20. Learned Counsel for the petitioner has contended that while passing the impugned order, Clause- 2.7 of the contract has never been followed. The Notice of 30 days or 60 days as the case may be has never been given to the Petitioner. Non-giving of such a Notice by the Opposite Party No.4 is fatal to the action like straightway termination. Hence, there is again violation of principles of natural justice by the Opposite Party No.4.

21. Learned Counsel for the Opposite Parties has clarified that with due regard to the order dated 19.05.2018 in W.P. (C) No.9559 of 2018, the Programme Director (Opposite. Party No.4) directed the Petitioner to appear before the Opposite Party No.4 either physically or Video Conference mode on 06.09.2021 so as to fix a date for personal hearing. The Petitioner did not appear. Subsequently, the Petitioner, on 23.09.2021, replied to the Show Cause Notice No.920 dated 09.05.2018 of the Programme Director (Opposite Party No.4) explaining the reasons for taking up Entry Point Activity (EPA) in PBDA, Khuntagaon, Sundargarh District and KKDA, Belghar, Kandhamal District.

22. As the reply of the Petitioner was not satisfactory, the Opposite Party No.4 offered opportunity for personal hearing on 07.10.2021. Accordingly, the Petitioner along with NGO President Shri Dhaneswar Sahu attended the personal hearing. During the course of hearing, they failed to explain whether any substantial improvement in generating man days have occurred under MGNREGA by supplying MGNREGA kits in the programme areas. It was evident that 5 man days had been generated per beneficiary which was way below the expected outcome under MGNREGA.

23. Further, on the request of Petitioner and NGO President, they were given another opportunity to appear on 10.02.2022 so as to produce evidence relating to distribution of MGNREGA kits,

kitchen utensils and unique activities under Entry Point Activity (EPA) during 2017-18. During the course of hearing, they agreed to submit (1) GPS Photographs relating to infrastructure (2) GPS photographs of distribution of solar light systems and (3) GPS photographs of processing units and their present functional status for KKDA, Belghar and PBDA, Khuntagaon for the year 2017-18. The Petitioner could not provide the entire GPS photographs of Entry Point Activity (EPA) taken up in two Micro Project Agencies during the year 2017-18. They submitted photographs of 08 villages under KKDA, Belghar and few activity photographs of 09 Village Development Communities (VDCs) under PBDA, Khuntagaon. Though taking GPS photographs is mandatory as per operational guidelines of Entry Point Activity (EPA), the Petitioner could not provide the evidentiary proof in the form of photographs in implementing the schemes.

24. After personal hearing granted on different dates and examining the relevant documents, records received from both Special Officers of PBDA, Khuntagaon and KKDA Belghar, reply received from the Petitioner to the Show Cause Notice dated 09.05.2018, subsequent information and photographs received etc., the Programme Director (Opposite Party No.4) keeping in mind the greater interest of the PVTG Community and the timely execution of remaining works, decided to

terminate the contract and consequently, disengage the Petitioner's organization with immediate effect. Therefore, this Court is of the opinion that there has been no violation of the principle of natural justice as the petitioner was provided with sufficient opportunities.

25. Moreover, the allegation of the Petitioner that the Show Cause Notice in the Writ Petition do not hit the requirement of operational guidelines of Entry Point Activity (EPA) issued by the Programme Implementation Agency (PLA) and hence could not form the basis of termination of the agreement is totally misconstrued. The main objectives of the Entry Point Activity (EPA) are (i) Community Mobilisation for effective and participatory project implementation (ii) gaining confidence of the targeted community on the project and their management skills (iii) endowing tangible assets to the targeted communities and (iv) providing short term financial benefits and incentives to the villagers (wages). Based on these broad objectives, the show cause notice was issued seeking reply on (i) how the Entry Point Activity (EPA) taken up in the financial year 2017-18 led in empowering the targeted communities (ii) the effect of Entry Point Activity (EPA) work made on capacity building to the targeted community (iii) Whether the Entry Point Activity (EPA) works taken up led to sustainable livelihoods development and (iv) number of man days generated after

distribution of MGNREGS kits under Entry Point Activity (EPA). These are very vital and fitting questions which have been part of the show cause notice seeking explanation from the Petitioner. Hence, the show cause notice clearly corroborates the operational guidelines of the Entry Point Activity (EPA). Therefore, the allegation of the Petitioner is totally unjustified.

26. Additionally, the Writ Petition is not maintainable in view of the fact that the Agreement has an arbitration clause. Clause-8 of the Agreement deals with the dispute settlement mechanism through the arbitration. It is settled law that if there is an arbitration agreement for resolution of the dispute, the parties must be referred to arbitration. In contractual matters where disputed question of facts are involved, the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of Indian cannot be invoked. The Petitioner is praying for issuance of a restraining order from this Court preventing the authority to take action as per the terms and conditions of the agreement. Moreover, the contract/agreement if confers a particular action to be taken by the employer, he cannot be prevented from doing so and his action may be subject matter of challenge, but there cannot be any prohibition.

27. In light of the aforesaid discussion and cases cited herein, this Court is of the opinion that the contentions of the Petitioner is

devoid of merit and, therefore, cannot be entertained. Therefore,
the Writ Petition is hereby dismissed.

(Dr. S.K. Panigrahi)
Judge

Orissa High Court, Cuttack,
Dated the 25th July , 2023/B. Jhankar

