

IN THE HIGH COURT OF ORISSA AT CUTTACK

WP(C) No.3251 of 2020
(Through Hybrid mode)

Basanta Kumar Sahoo

....

Petitioner

Mr. Dayananda Mohapatra, Advocate

-versus-

***Odisha Forest Department
Corporation Ltd. and others***

....

Opposite Parties

Mr. P. K. Pattnaik, Senior Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER
20.04.2022

Order No.

05.

1. Mr. Mohapatra, learned advocate appears on behalf of petitioner and submits, his client is a poor person, who had tendered for obtaining lease of cashew plantation lot situated in Tangi under Jajpur Road Division. The lease was on basis of crop year commencing 1st October to next 30th September in years 2019-2021. The lot was taken in February, 2019 and super cyclone 'Fani' happened thereafter on 3rd May, 2019. The plantation was destroyed. His client could not harvest any crop in crop year commencing 1st October, 2019 or following years. His client took lease of an existing plantation but the plantation itself was destroyed by the super cyclone. He submits, for the cashew plants to grow again and yield crop, it would be beyond the aggregate period of lease.

2. He submits, there was frustration of contract. Prayer in the writ petition is direction for consideration be made. He relies on section 56 in Contract Act, 1872 and judgment of the Supreme Court in **Satyabrata v. Mugneeram**, reported in **AIR 1954 SC 44**, paragraphs 15, 16 and 20.

3. Mr. Pattnaik, learned senior advocate appears on behalf of opposite party no.1 and submits, the agreement contains arbitration clause. He submits without prejudice, the allegation of frustration cannot be decided in the writ petition. He relies on judgment of the Supreme Court in **Union of India v. M/s Puna Hinda**, reported in **AIR 2021 SC 4187**, paragraph 24.

4. Petitioner has impugned memo dated 17th January, 2020 issued by opposite party no.1. Said memo in rejecting representation dated 8th May, 2019 of petitioner, relied on clauses 3 and 18 of the tender terms and conditions dated 14th February, 2019. Terms and conditions of the tender are in annexure-1 in the writ petition and relied upon clauses 3 and 18, reproduced below.

“03. The intending tenderers can inspect the cashew plantation lots hereafter referred to as lot(s) before participating in the tender. The act of offering tender shall be taken as sufficient proof of the tenderers having inspected the lots and having been satisfied about the area of the lot, quality of the crop, condition of the plantation, and expected yield. No complaint whatever regarding area, plant population, yield, change/shortfall in working period, condition of the plantation and damage on account of force-majeure and damages such as tree cutting, theft and diseases etc. shall be entertained from any tenderer for grant of any relief by the

OFDC Ltd. at any point of time after submission of tender papers.

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18. Complaint regarding shortfall in the yield on account of Force-majeure, change in area, number of trees, forcible collection and obstruction by other persons etc. and claim for refund of royalty in part or full on account of the same will also not be entertained.”

5. So far as clause 3 is concerned, mention of force-majeure does not gain significance since the clause requires acceptance by the tenderer on inspection of the plantation. The super cyclone, being force-majeure, happened after inspection of the lot was taken by petitioner. It could not have been of information to be obtained on inspection, prior to the allotment. However, clause-18 makes it clear that claim for refund of royalty in part or full, on account of, inter alia, force-majeure will not be entertained.

6. Impugned memo is result of consideration of representation made by petitioner pursuant to direction in earlier writ petition WP(C) no.18115 of 2019, disposed of by order dated 26th September, 2019. In this writ petition, petitioner has challenged decision taken by the authority pursuant to direction in the earlier one. Court finds the writ petition to be maintainable.

7. Clause 18 in the terms of the tender reserves discretion to opposite party no.1 in the matter of claim made for refund of royalty in part or full on account of, inter alia, force-majeure. This is because the clause says that the claim will not

be entertained. This, opposite party no.1 had put as a term. However, that does not prevent opposite party no.1 from considering such a claim. Hence, the discretion was and is with it. Consideration made on whether or not to exercise the discretion does not appear from impugned memo. It proceeds on clause 18 to be a mandate, preventing the consideration. Petitioner has prayed for consideration as a result of devastation caused by super cyclone. Opposite party no.1 is an authority under article 12 of the Constitution of India. Court expects it will do the right thing.

8. Impugned memo is set aside and quashed. Court is inclined to mould the relief and directs opposite party no.1 to reconsider petitioner's representation dated 8th May, 2019, keeping in mind observations made hereinabove.

9. The writ petition is disposed of.

(Arindam Sinha)
Judge

RKS