

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 11533 of 2022

Dillip Kumar Panda

.....

Petitioner

Mrs. Pami Rath, Advocate.

Vs.

State of Orissa and others

.....

Opposite Parties

Mr. P.P.Mohanty, AGA

(O.Ps.1 & 4)

Mr. B. Dash, Advocate

(O.Ps.2, 3 & 5)

CORAM:

DR. JUSTICE B.R. SARANGI

Mr. JUSTICE G. SATAPATHY

ORDER

22.09.2022

Order No.

04

This matter is taken up through hybrid mode.

2. The petitioner has filed this writ petition seeking to quash the order dated 28.04.2022 under Annexure-7 passed by opposite party no.3.

3. Though, notice has not been issued to opposite party no.6, who is an unsuccessful bidder, no prejudice would be caused to him, since this Court proposes to remand the matter, with a direction to opposite party no.3-Collector-cum-Chairman, Tender Committee, Nayagarh to give opportunity of hearing to all the parties including opposite party no.6-Deepak Kumar Behera and pass appropriate order in accordance with law.

4. Heard Mrs. Pami Rath, learned counsel for the petitioner; Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State opposite parties no.1 & 4 and Mr. B. Dash, learned counsel appearing for opposite parties no.2, 3 & 5.

5. Mrs. Pami Rath, learned counsel for the petitioner contended that while passing the order impugned dated 28.04.2022, opposite party no.3-Collector-cum-Chairman,

Tender Committee, Nayagarh has not assigned any reason and as such, there is non-compliance of the order dated 10.03.2022 passed by this Court in W.P.(C) No.5539 of 2022 at Annexure-6. It is also contended that the order so passed by opposite party no.3 is without application of mind, reason being opposite party no.3 has again upheld the order dated 01.01.2022, which was quashed by this Court, vide order dated 10.03.2022 passed in W.P.(C) No.5539 of 2022, which is the subject matter of challenge in the present writ petition. To substantiate her contention, she has relied upon the judgment of the apex Court in *Tarsem Singh v. Sukhminder Singh*, (1998) 3 SCC 471.

6. Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State opposite parties no.1 & 4 contended that since the dispute relates to Odisha Civil Supplies Corporation, learned counsel appearing for it can answer the same and, as such, the State has no role to play.

7. Mr. B. Dash, learned counsel appearing for opposite parties no.2, 3 & 5 contended that opposite party no.3 has passed the detailed order, but wrong communication has been made vide Annexure-7 dated 28.04.2022 and the said order has been incorporated in the counter affidavit. Therefore, it is contended that because of wrong communication made to the petitioner, the writ petition should be dismissed.

8. Having heard learned counsel for the parties and after going through the records, it appears that earlier the petitioner had approached this Court by filing W.P.(C) No.5539 of 2022 seeking to quash the order dated 01.01.2022 passed by the Collector-cum-Chairman of the Tender Committee, Nayagarh, by which the tender allotted in favour of the petitioner was cancelled. After due adjudication, this Court, vide order dated 10.03.2022 came to a conclusion that at least 15 days notice should have been given to the petitioner and therefore the order

of cancellation/termination of agreement passed by the Collector-cum-Chairman Tender Committee, Nayagarh cannot have any justification and accordingly, quashed the order dated 01.01.2022 and remitted the matter back to the Collector-cum-Chairman of the Tender Committee, Nayagarh to reconsider the grievance of opposite party no.6 afresh after giving opportunity of hearing to all the bidders, who had participated in the process of selection by giving them due notice and pass appropriate order as expeditiously as possible within a period of four weeks.

9. In compliance of the order dated 10.03.2022 passed by this Court in W.P.(C) No.5539 of 2022, the Collector-cum-Chairman of the Tender Committee, Nayagarh has passed the order impugned dated 28.04.2022 under Annexure-7, wherein it has been stated that it was decided to take decision ex-parte keeping in view the dateline of this Court for passing appropriate order and after going through the submissions of all the three participants, namely, Dillip Kumar Panda, Prasanna Kumar Panigrahi-petitioner and Deepak Kumar Behera-opposite party no.6 and all available documents, it was decided to uphold the order passed on 01.01.2022. Needless to say, the order dated 01.01.2022, being defective, the same was quashed by this Court vide order dated 10.03.2022 in W.P.(C) No.5539 of 2022 and, as such, if the order dated 01.01.2022 is upheld by the Collector-cum-Chairman of the Tender Committee, Nayagarh, that itself is an outcome of non-application of mind. More so, Collector-cum-Chairman of the Tender Committee, Nayagarh has passed the impugned order without assigning any reason and without giving opportunity of hearing to all the parties and, as such, the said order is nonest in the eye of law. Therefore, the order dated 28.04.2022 under Annexure-7 passed by opposite party no.3-Collector-cum-Chairman, Tender

Committee, Nayagarh cannot sustain in the eye of law.

10. In ***Tarsem Singh*** (supra), the apex Court, taking into consideration Section-10 of the Contract Act and also ‘mistake of fact’ on the agreement in question, held in paragraphs-11, 12, 14 and 15 of the said judgment as follows:

“11. What is the effect and impact of “Mistake of Fact” on the agreement in question may now be examined.

12. “Contract” is a bilateral transaction between two or more than two parties. Every contract has to pass through several stages beginning with the stage of negotiation during which the parties discuss and negotiate proposals and counter-proposals as also the consideration resulting finally in the acceptance of the proposal. The proposal when accepted gives rise to an agreement. It is at this stage that the agreement is reduced into writing and a formal document is executed on which parties affix their signatures or thumb impression so as to be bound by the terms of the agreement set out in that document. Such an agreement has to be lawful as the definition of contract, as set out in Section 2(h) provides that “an agreement enforceable by law is a contract”. Section 2(g) sets out that “an agreement not enforceable by law is said to be void”.

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14. Section 10 of the Contract Act provides as under:

“10. What agreements are contracts.—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.”

15. The essentials of contract set out in Section 10 above are:

- (1) Free consent of the parties*
- (2) Competence of parties to contract*
- (3) Lawful consideration*
- (4) Lawful object”.*

Competence to contract is set out in Section 11 which provides that every person is competent to contract who is of the age of

majority and who is of sound mind and is not disqualified from contracting by any law to which he is subject and Section 12 provides that a person will be treated to be of sound mind if, at the time when he makes the contract, he is capable of understanding it and forming a rational judgment as to its effect upon his interests.

11. Thereby, the apex Court in paragraph-21 in **Tarsem Singh** (supra), held as follows:

“21. This section provides that an agreement would be void if both the parties to the agreement were under a mistake as to a matter of fact essential to the agreement. The mistake has to be mutual and in order that the agreement be treated as void, both the parties must be shown to be suffering from mistake of fact. Unilateral mistake is outside the scope of this section”.

12. In view of law laid down by the apex court in **Tarsem Singh** (supra), Collector-cum-Chairman of the Tender Committee, Nayagarh has not applied his mind to the relevant provision of the Contract Act and passed the impugned order dated 28.04.2022 under Annexure-7 upholding the order dated 01.01.2022, which was set aside by this Court, vide order dated 10.03.2022 in W.P.(C) No.5539 of 2022.

13. Even if Mr. B. Dash, learned counsel appearing for opposite parties no.2, 3 & 5 stated that a detailed order has been annexed to the counter affidavit, the same cannot be taken into consideration at this stage because in the counter affidavit reasons for consideration cannot be supplemented and supplanted, which is contrary to the judgment of the apex Court.

14. In that view of the matter, this Court is of the considered view that the order dated 28.04.2022 under Annexure-7 passed by opposite party no.3 cannot be sustained in the eye of law. Accordingly, the same is liable to be quashed and is hereby quashed and the matter is remitted to opposite party no.3 for rehearing the same and pass a reasoned order by applying his

mind and also giving opportunity of hearing to all the parties, namely, Dillip Kumar Panda, Prasanna Kumar Panigrahi-petitioner and Deepak Kumar Behera-opposite party no.6. Since Deepak Kumar Behera-opposite party no.6 to the writ petition was not issued with notice, opposite party no.3 shall make endeavour to give opportunity of hearing to all the parties including Deepak Kumar Behera-opposite party no.6 for just and proper adjudication of the case.

15. Accordingly, the writ petition stands disposed of. Needless to say, since the tender will over within six months, opposite party no.3 will not cause any delay in disposal of the grievance and the entire exercise shall be completed within a period of four months from the date of communication/production of certified copy of this order.

16. Issue urgent certified copy as per rules.

(DR. B.R. SARANGI)
JUDGE

(G. SATAPATHY)
JUDGE