
(2015) 01 OHC CK 0017
In the Orissa High Court
Case No : Writ Petition (C) No. 18258 of 2014

Jambeswar Pradhan

APPELLANT

Vs

O.F.D.C. Ltd.

RESPONDENT

Date of Decision : 07-01-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 56
Land Acquisition Act, 1894 — Section 4(1)

Citation : (2015) 01 OHC CK 0017

Hon'ble Judges : Amitava Roy, C.J. Dr. J.; Akshaya Kumar Rath, J.

Bench : Division Bench

Advocate : Jayant Das, Senior Advocate, for the Appellant; S.K. Pattnaik,,
Advocates for the Respondent

Final Decision : Disposed off

Judgement

Dr. Akshaya Kumar Rath, J.—In this writ petition, the petitioner has prayed, inter alia, to quash the letter dated 5.9.2014 issued by the Divisional Manager, Odisha Forest Development Corporation Limited, Bhubaneswar-C Division (hereinafter referred to as "the OFDC" for the sake of brevity), vide Annexure-5. By the said letter, the petitioner was requested to deposit the royalty (lease rent) for 2015 crop as per the provision of clause No. 12 of the terms and conditions as well as clause No. 3 of the agreement on leasing out of cashew plantation lots for three years license basis in shape of account payee bank draft on or before 30th September, 2014. An ancillary prayer has also been made to allow the petitioner to operate the lease for the year 2015 by depositing proportional reduced royalty on 5578 trees and the full royalty paid for the year 2014 in the year 2015.

2. Shorn of unnecessary details, the short facts of the case of the petitioner are that the OFDC issued a tender call notice inviting tenders from the interested persons/traders/firms/companies for collection of cashew nuts with thalamus from the plantation lots of Bhubaneswar (Commercial) Division, Berhampur

(Commercial) Division and Bhanjanagar (Commercial) Division for the period ending 31.07.2015 (2013, 2014 and 2015 CROP) with offer for three years i.e. 3 Crops in lump sum, vide Annexure-1. Pursuant to the same, the petitioner participated in the bid. He offered royalty of Rs. 30,00,000/- for three years, i.e. crop year 2013, 2014 and 2015. He became the highest bidder in respect of Lot No. 46/13 having an area of 286 hectares situated under Tangi Sub-Division. Thereafter, he was allotted the said lot. The total numbers of fruit bearing trees were 32212. A lease deed was executed between him and the OFDC. He had to deposit a sum of Rs. 10,00,000/- for each crop year on or before 30th September of the preceding year. He deposited Rs. 10,00,000/- for the crop year 2013 and operated the cashew field. He had also deposited the royalty for the year 2014 before 30.9.2013. To his ill luck, a cyclonic storm, namely, Phailin, hit the costal belt of Orissa on 12.10.2013. In the cyclone, out of total 32212 trees, 5578 trees were completely damaged. Only 2178 trees are left out. After cyclone, an assessment was made by the OFDC and it was found that only 5578 trees have been left out in Lot No. 46/13 of Tangi Sub-division. Thereafter, he submitted a representation before the OFDC praying for re-assessment of royalty on the basis of the available 5578 trees and allowing him to deposit the royalty on the reduced number of trees for the next crop year. But then, the OFDC demanded full royalty and threatened to forfeit the security deposit and black-list him. Finding no alternative, he deposited the royalty for the crop year 2014. Further case of the petitioner is that on 5.9.2014, the Divisional Manager (C), Orissa Forest Development Corporation, opposite party No. 2, without considering his representation, issued an order directing him to deposit the full amount of royalty i.e. Rs. 10,00,000/- for the crop year 2015.

3. Pursuant to issuance of notice, a counter affidavit has been filed by the opposite parties. The sum and substance of the case of the opposite parties is that a notice inviting offer was issued by the OFDC for leasing out cashew plantation lots under Tangi Plantation Sub-Division under Bhubaneswar (C) Division of the OFDC for the three crop years 2013, 2014 and 2015. In the tender held on 31.10.2012, the petitioner offered Rs. 30,00,000/- for leasing out the cashew plantation lot No. 46/13 of Bhubaneswar (C) Division. The same was accepted by the Director (Operation), OFDC, vide Annexure-2. He deposited a sum of Rs. 4,50,000/- towards security deposit and Rs. 10,00,000/- towards royalty for the crop year 2013 and executed an agreement with the Divisional Manager, Bhubaneswar (C) Division on 30.4.2013, vide Annexure-A. Thereafter, the said lot was delivered to him. As per clause No. 12 of the terms and conditions as well as clause No. 3 of the agreement, he was required to deposit the lease rent/royalty on or before 30.9.2013 for 2014 crops and on or before 30.9.2014 for 2015 crop. He deposited the lease rent/royalty for 2014 crop and collected the cashew fruits and nuts during the collection season ending in June, 2014 without any objection regarding shortfall of cashew nuts production. Since he was required to deposit the lease rent/royalty for 2015 crop on or before 30.9.2014, an advance notice dated 5.9.2014 was issued to him and other lease

holders, vide Annexure-5, to deposit the same before 30.9.2014. He had not deposited the lease rent/royalty for 2015 crop by 30.9.2014 for which another opportunity was provided to him to deposit the required amount within 31.10.2014. The representation submitted by him was received on 30.9.2014 regarding damage of cashew trees in the cyclone Phailin occurred during October, 2013 wherein a request was made for re-assessment of the royalty value basing on the available trees. The same was rejected relying on clause Nos. 3 and 18 of the terms and conditions of the tender. But the letter of rejection could not be communicated to him due to receipt of the notice in this writ petition. It is further stated that although some cashew plantation areas were affected in the cyclone Phailin, yet by the time collection season started in April, 2014, the trees had reestablished and the yield was not substantially affected. He had collected cashew nuts during 2014 crop, i.e. after the Phailin and had not made any complain regarding shortfall of yield. It is further stated that the cashew lot area is under his possession. He had worked in the lot area during 2013 and 2014 crop after depositing the required amount towards lease rent/royalty. He will be allowed to collect cashew nuts with thalamus from the said cashew field after depositing the required amount towards royalty for 2015 crop. It is further stated that the trees which were damaged in the cyclone further established themselves in the meantime and the yield would not be affected during the crop of 2015 season. Cashew trees are resilient to withstand the aftermath of cyclone and have great strength of revival. There is no such report regarding death of cashew trees and removal of such dead trees by OFDC from the lot area. Therefore, the claim of the petitioner regarding waiving out/re-assessment of royalty amount commensurate with the damage to the trees in the cyclone Phailin has no merit. The uprooted trees have survived and are capable of bearing fruit as well. The branches which have broken during the cyclone have re-grown and such trees are now in healthy condition capable to bear fruits.

4. A rejoinder affidavit has been filed by the petitioner. It is stated that out of total 32212 numbers of trees, 26634 numbers of trees completely damaged in the Phailin. The assertions of the OFDC that some cashew plantation areas were affected in the cyclone during October, 2013, yet by the time of collection session started in April, 2014, the trees had re-established and yield was not substantially affected is denied. It is further stated that in the tender notice, vide Annexure-1, the total number of trees shown was 32212. The same lot was re-notified for the year 2014, 2015 and 2016 in which the numbers of available trees were shown as 6178. Thus only 6178 trees were available.

5. Further counter affidavit has been filed by the opposite parties to the rejoinder of the petitioner. It is stated that the petitioner has falsely stated that he deposited Rs. 10,00,000/- on 30.9.2013 i.e. 12 days before the cyclone Phailin occurred on 12.10.2013. Due to default of the petitioner in depositing the royalty of Rs. 10,00,000/- in due time, lease was cancelled on 21.12.2013, vide Annexure-C. Then the Lot No. 46/13 was put to fresh sale on 24.1.2014, vide Annexure-6. He voluntarily deposited eleven bank drafts dated 31.1.2014,

1.2.2014 and 3.2.2014, the total Rs. 10,00,000/- by letter dated 3.2.2014, vide Annexure-D. Thereafter the matter was reconsidered by the Managing Director, OFDC. By letter No. 2241 dated 6.2.2014 the deposit was accepted and accordingly, Divisional Manager, OFDC, Bhubaneswar was directed to revoke the forfeiture order passed by him earlier. Thereafter, the work order was issued to him on 31.3.2014, vide Annexure-F. It is further stated that he had deposited full royalty for the year 2014 after Phailin occurred and after the lease was cancelled and security was forfeited on 21.12.2013. He had taken the said lot for the year 2014 with open eyes and he is estopped from claiming any refund of royalty. The representation dated 30.9.2014 was filed at much belated stage after collecting the cashew nuts for the session 2014.

6. Heard Mr. Jayant Das, learned Senior Advocate for the petitioner and Mr. S.K. Pattnaik, learned Senior Advocate for the opposite parties.

7. Mr. Das, learned Senior Advocate for the petitioner, submitted that the tender call notice was issued by the OFDC in respect of Lot No. 46/13 situated under Tangi Sub-Division for collection of cashew nuts with thalamus for three years, i.e. crop year 2013, 2014 and 2015. The tender notice, vide Annexure-1 in respect of lot No. 46/13, shows that there were 32212 numbers of trees. In Phailin, 26,034 number of trees were uprooted and 600 number of trees were broken as would be evident from the report on uprooted and broken trees in the cashew plantation area in cyclonic storm Phailin on 12.10.2013 issued by the Section Officer (Accounts)-cum-P.I.O., Odisha Forest Dev. Corporation Ltd., Bhubaneswar (C) Division dated 5.9.2014, vide Annexure-3. Drawing our attention to Annexure-6, he submitted that the OFDC has issued a fresh notice inviting tender for leasing out of the lots for the year 2014, 2015 and 2016, vide Annexure-6, which shows that the numbers of trees are 6178. Mr. Das further submitted that since 6178 numbers of trees are available after Phailin, the OFDC has committed a manifest illegality and impropriety in rejecting the representation of the petitioner and not adjusting the proportional amount of royalty paid 2014 in the year 2015. Relying on Section 56 of the Indian Contract Act, 1872, Mr. Das submitted that since 26034 numbers of trees were uprooted, the contract is impossible to perform and as such frustrated. In support of his submissions, Mr. Das relied on the decisions of the apex Court in the cases of Satyabrata Ghose Vs. Mugneeram Bangur and Company and Another, , Thiriveedhi Channaiah Vs. Gudipudi Venkata Subba Rao (D) by Lrs. and Others, and Narmada Bachao Andolan Vs. State of Madhya Pradesh and Another, .

8. Per contra, Mr. Pattnaik, learned Senior Advocate submitted that clause No. 3 of the tender notice, vide Annexure-1, provides that no complaint whatever regarding area, plant population, yield, change/shortfall in working period, condition of the plantation and damage on account of natural calamities 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. Clause-18 of the agreement for grant of licence for

cashew plantation lot No. 46/2013 of Bhubaneswar Commercial Division, O.F.D.C. Ltd., Bhubaneswar entered into between the petitioner and the OFDC provides that the terms and conditions of the tender for granting of licence which were supplied with tender form of the present transaction will form a part of the agreement. Clause-23 of the said agreement provides that in case of any dispute arising out of the agreement, the same shall be unilaterally referred to the Director (Operation), O.F.D.C. Ltd., Corporate Office, Bhubaneswar, who will work as Arbitrator and whose decision shall be final and finding on both the parties. Lastly, he submitted that since disputed question of facts are involved in the writ petition, the writ petition is not maintainable.

9. Section 56 of the Indian Contract Act, which is the hub of the issue, is quoted hereunder:

"56. Agreement to do impossible act.--An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.--A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.--Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

10. In *Satyabrata Ghose* (supra), the apex Court held that the word "impossible" has not been used in the Indian Contract Act in the sense of physical or literal impossibility. The performance of an act may not be literally impossible, but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do. The apex Court further held that the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The apex Court further held that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act.

11. The decisions of *Thiriveedhi Channaiah* and *Narmada Bachao Andolan* (supra)

have no application in the facts and circumstances of the present case.

12. In *Thiriveedhi Channaiah (supra)*, an Agreement of Sale was entered into by and between the parties on 19.07.1981, in terms whereof the respondent offered to sell the suit property admeasuring 2.96 cents out of 11.82 cents for Rs. 44,000/- per acre in D. No. 140 situate at Agatavareppadu Village in the District of Guntur. Appellant advanced a sum of Rs. 50,000/- towards part payment of the said consideration. The balance amount of consideration was to be paid on or before 25.02.1982 whereupon a regular sale deed was to be executed. On the said date, however, another agreement was entered into by the parties in terms whereof it was agreed that on default of the appellant to pay the balance of sale consideration on or before 25.02.1982, the said amount of advance shall be forfeited. However, before the Deed of Sale could be executed, a notification under Section 4(1) of the Land Acquisition Act, 1894 was issued. Legality of the said notification was questioned by the respondent by filing a Writ Petition before the High Court of Andhra Pradesh which was marked as Writ Petition No. 434/1982. A suit was also filed by him for a decree for permanent injunction restraining the State of Andhra Pradesh from interfering with his possession. In view of the aforementioned developments, the appellant by a notice requested the respondent to refund the said sum of Rs. 50,000/- with interest at the rate of 18 percent per annum as he was not informed about the said land acquisition proceeding. However, in reply thereto, the respondent contended that as he has failed and/or neglected to pay the balance amount, the money stand forfeited in terms of the said agreement dated 19.07.1981. The apex Court held that the respondent therein could not have forfeited the amount of advance.

13. The facts in *Narmada Bachao Andolan (supra)* are totally different. The said decision pertains to allotment of agricultural land to the displaced persons in lieu of land acquired for construction of the dam in terms of the rehabilitation and resettlement policy.

14. A bare reading of the aforesaid decisions, however, show that there is a significant difference in the factual matrix in which the said case arose for consideration.

15. Bearing in mind the enunciation of law laid down by the apex Court in *Satyabrata Ghose (supra)*, we have given our anxious consideration to the matter in issue. In paragraph-5 of the writ petition, it is stated that in the cyclone Phailin, out of total 32212 trees, 5578 trees were fully damaged and only 2178 trees are left out. However, in para-12 of the writ petition, it is stated that in the Phailin occurred on 12.10.2013, 26634 trees had been completely damaged. Again in para-16 it is stated that out of total 32212 trees, 26634 trees had been fully damaged and 5578 trees are left out. The report on uprooted and broken trees in the cashew plantation area in cyclonic storm Phailin on 12.10.2013 issued by the Section Officer (Accounts)-cum-P.I.O. Odisha Forest Dev. Corporation Ltd., Bhubaneswar, (C) Division shows that 26034 number of trees were uprooted and 600 number of trees were broken. It is apt to state here

that in the tender call notice, vide Annexure-1, in respect of lot No. 46/13, 32212 numbers of trees were shown, but the agreement for grant of licence, vide Annexure-A, would show that the same was executed between the petitioner and the OFDC in respect of 25800 numbers of trees. In the fresh tender call notice, vide Annexure-6, for the same lots, 6178 number of trees were shown. The stand of the opposite parties is that although some cashew plantation areas were affected in the cyclone Phailin which occurred during October, 2013, yet by the time collection season started in April, 2014, the trees had re-established and the yield was not substantially affected. The petitioner had collected cashew nuts during 2014 crop i.e. after the Phailin during the collection period i.e. from April, 2014 to June, 2014 and had not made any complain regarding shortfall of yield. It is further stated that the trees which were damaged in the cyclone further established themselves in the meantime and the yield will not be affected during the crop of 2015 season.

16. These are the disputed question of facts which cannot be effectively adjudicated in a writ petition under Article 226 of the Constitution of India. The petitioner has also taken prevaricating stand in respect of the number of trees uprooted in Phailin. No clear picture emerges from the pleadings. Clause-23 of the agreement, vide Annexure-A, provides that in case of any dispute arising out of the agreement, the same shall be unilaterally referred to the Director (Operation), OFDC Ltd. Corporate Office, Bhubaneswar who will work as Arbitrator.

17. In view of the analysis made in the preceding paragraphs, we are on consensus ad idem that the opposite parties have committed illegality in rejecting the representation of the petitioner instead of referring the matter to the Director (Operation), OFDC Ltd. Corporate Office, Bhubaneswar for arbitration. We accordingly grant liberty to the petitioner to approach the Director (Operation), OFDC Ltd. Corporate Office, Bhubaneswar highlighting his grievances. If any application is filed, the Director (Operation), OFDC Ltd. shall do well to dispose of the same after affording opportunity of hearing to the petitioner.

The writ petition is accordingly disposed of.

Amitava Roy, C.J.

I agree.