

(2017) 03 OHC CK 0012

In the Orissa High Court

Case No : 19122 of 2015

Nagarjuna Construction Company Ltd.

APPELLANT

Vs

Bhubaneswar Development Authority, & Ors.

RESPONDENT

Date of Decision : 15-03-2017

Acts Referred:

Citation : (2017) 03 OHC CK 0012

Hon'ble Judges : Vineet Saran, B.R. Sarangi

Bench : DIVISION BENCH

Advocate : Pradipta Kumar Mohanty, D.N. Mohapatra, J. Mohanty, P.K. Nayak, A. Das, P.K. Pasayat, Dayananda Mohapatra, M. Mohapatra, G.R. Mohapatra, A. Dash, Ramakanta Mohanty

Final Decision : Allowed

Judgement

1. The Bhubaneswar Development Authority (BDA) had, on 05.11.2013, invited Expression of Interest (EOI) for the selection of executants for the work, namely, "Construction of Affordable Housing (LIG)" at Subudhipur, Bhubaneswar. In response to the same, five participants had submitted their bids, out of which four were found to be technically qualified, which included the petitioner. After complying with all the formalities, the petitioner was found to be the lowest bidder in the financial bid and hence the bid of the petitioner was accepted on 02.05.2014. Pursuant thereto, on 16.05.2014, a bid contract/agreement was executed between the petitioner and the BDA. There were certain formalities which were to be complied, which included the environment clearance, as well as interest free mobilization advance, which all were complied with by the petitioner.

2. The record shows that after execution of the contract on 16.05.2014, on 25.08.2014, the Vice Chairman of BDA wrote to the Commissioner-cum-Secretary, Housing and Urban Development Department, Government of Odisha intimating the Government of the entire sequence of events which led to the acceptance of the bid of the petitioner and the execution of the contract. In the said letter, it was also mentioned that the budget estimate was duly approved by

the authority and the administrative approval for the said project was also given by the Government of Odisha.

3. The case of the petitioner is that it had completed all formalities for execution of the work. But all on a sudden, on 05.08.2015, the petitioner received an order from the Chief Engineer-cum-Engineering Member, BDA, Bhubaneswar intimating that the agreement executed with the petitioner has been cancelled. Challenging the same, this writ petition has been filed.

4. Along with the counter affidavit, the opposite party-BDA justified the passing of the said order stating that the same was based on the report of the Tender Committee dated 11.06.2015, which was enclosed with the counter affidavit as Annexure-C. After receiving the counter affidavit, the petitioner filed an amendment application, by which it challenged the said report of the Tender Committee dated 11.06.2015 also.

5. We have heard Mr. P.K. Mohanty, learned Senior Counsel appearing along with Mr. P.K. Pasayat, learned counsel for the petitioner, as well as Mr. D. Mohapatra, learned counsel appearing for the contesting opposite party-BDA, and also Mr. Ramakanta Mohapatra, learned Government Advocate appearing for the Stateopposite party no.5. Pleadings between the parties have been exchanged and with the consent of learned counsel for the parties, this petition is disposed of at the stage of admission.

6. The submission of Mr. P.K. Mohanty, learned Senior Counsel appearing for the petitioner is that the impugned order dated 05.08.2015, whereby the concluded contract has been cancelled, is devoid of reasons and has been passed without affording the petitioner any opportunity of hearing and as such, the same is liable to be quashed. It is contended that no reason can be added or substituted by way of filing a counter affidavit or annexing some report of the Committee along with the counter affidavit, and as such, the reasons given in the report of the Tender Committee dated 11.06.2015 cannot justify the passing of the impugned order dated 05.08.2015. In the alternative, it is submitted that the report of the Tender Committee does not, in any case, recommend, suggest or direct the cancellation of the contract, and on the contrary, it has been mentioned in the said report that the proposal of the BDA does not come under the purview of the Tender Committee of the department, and that the Committee was not in favour of considering the proposal of the BDA. It is thus urged that the cancellation of the concluded contract in the manner, as has been done, is wholly unjustified and liable to be quashed.

7. Sri D. Mohapatra, learned counsel appearing for the contesting opposite party-BDA has, on the contrary, submitted that since the contract was of a value of over rupees one crore, before execution of the agreement, approval of the State Government was necessary, which had not been obtained in the present case, and as such, for this reason the contract/agreement executed between the petitioner and the opposite party-BDA on 16.05.2014 was cancelled.

8. Mr. R. Mohapatra, learned Government Advocate appearing for the State-opposite party no.5 has adopted the submission made by Mr. D. Mohapatra, learned counsel for opposite party-BDA.

9. From the record it does not transpire that the order dated 05.08.2015, cancelling the contract already executed in favour of the petitioner, was done for the reason that approval for the same had not been obtained from the State Government. The short order, by which contract has been cancelled, is reproduced below:

"The Agreement bearing No. P-1/of 01-2014-15 for the work "Construction of affordable housing (LIG) at Subudhipur (7 Acre site)" is hereby cancelled on administrative ground with no financial liabilities on either side."

All that has been stated in the said order is that the agreement is being cancelled on administrative ground. It is well settled law that once a contract or an agreement is concluded, the same can be cancelled or withdrawn only after affording the affected party opportunity of hearing by giving a show cause notice, and considering its reply, and also by assigning reasons for passing such order.

10. The apex Court in *State of Orissa v. Dr. (Miss) Binapani Dei*, AIR 1967 SC 1269 held that if there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. Similar view has also been taken in *A.K. Kraipak v. Union of India*, AIR 1970 SC 150, *A.R. Antulay v. R.S. Nayak*, (1988) 2 SCC 602, *R.B. Shreeram Durga Prasad and Fatechand Nursing Das v. Settlement Commission (I.T. & W.T.)*, AIR 1989 SC 1038. Thus, even though the said provision may not provide for notice to be given to the party affected before issuance of any order, but the same has to be read down in the said provision.

In *Smt. Menaka Gandhi v. Union of India*, AIR 1978 SC 597, the Constitution Bench of the apex Court held as follows:-

"Although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. The principle of *audi alteram partem*, which mandates that no one shall be condemned unheard, is part of the rules of natural justice."

Similar view has also been taken by this Court in *Bijay Kumar Paikaray v. State of Odisha and others*, 2017 (I) ILR -CUT- 252 : 2017 (I) OLR-439.

11. Reasons being a necessary concomitant to passing an order, the appellate authority can thus discharge its duty in a meaningful manner either by furnishing the same expressly or by necessary reference to those given by the original authority.

12. "*Nihil quod est contra rationem est licitum*" means as follows:

"nothing is permitted which is contrary to reason. It is the life of the law. Law is

nothing but experience developed by reason and applied continually to further experience. What is inconsistent with and contrary to reason is not permitted in law and reason alone can make the laws obligatory and lasting."

Therefore, recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is pertinent to note that a decision is apt to be better if the reasons for it are set out in writing because the reasons are then more likely to have been properly thought out. It is vital for the purpose of showing a person that he is receiving justice.

In *Re: Racal Communications Ltd.* (1980)2 All ER 634 (HL), it has been held that the giving of reasons facilitates the detection of errors of law by the court.

In *Padfield v. Minister of Agriculture, Fisheries and Food* (1968) 1 All E.R. 694, it has been held that a failure to give reasons may permit the Court to infer that the decision was reached by the reasons of an error in law.

13. In *Union of India v. Mohan Lal Capoor*, AIR 1974 SC 87 it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice. Similar view has also been taken in *Uma Charan v. State of Madhya Pradesh*, AIR 1981 SC 1915.

14. In the present case, the order dated 05.08.2015 is devoid of any reason and admittedly the same has been passed without complying with the principle of natural justice, as the opposite party-BDA has accepted that no show cause notice or opportunity of any kind was afforded to the petitioner prior to passing of the impugned order. On this sole ground, the writ petition deserves to be allowed.

15. Further, the justification given by the opposite party- BDA in the counter affidavit, that the impugned order dated 05.08.2015 was passed on the basis of the report of the Tender Committee dated 11.06.2015, also does not have much force. The contention of the learned counsel for the petitioner appears to be correct that such report of the Tender Committee has nothing to do with the proposal of the BDA as the Committee itself accepted that the same does not come within the purview of the Tender Committee of the Department and that the Committee was not in favour of considering the proposal of the BDA. As such, the justification given by the opposite party-BDA in the counter affidavit for passing the impugned order dated 05.08.2015 is also not tenable.

16. We may here draw attention to the observations of Bose J. in *Gordhandas Bhanji*, AIR 1952 SC 16 (at page. 18):

"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

17. The Constitution Bench of the apex Court in *Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi*, AIR 1978 SC 851, the apex Court held :

" when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."

Orders are not like old wine becoming better as they grow old.

18. Applying the above principles of law laid down by the apex Court to the present case, it is clear that the impugned order has been passed without any basis, and without following the established procedure of law.

19. Accordingly, for the reasons given hereinabove, this writ petition stands allowed. The order dated 05.08.2015 is quashed. No order to cost.