

(2020) 11 OHC CK 0008

In the Orissa High Court

Case No : Writ Petition (Civil) No.25359 Of 2020

Sidheswar Panigrahi

APPELLANT

Vs

State Of Odisha And Others

RESPONDENT

Date of Decision : 10-11-2020

Acts Referred:

Citation : (2020) 11 OHC CK 0008

Hon'ble Judges : Mohammad Rafiq, CJ;Dr. B. R. Sarangi, J

Bench : Division Bench

Advocate : S. Mallik, P.C. Das, P.K. Muduli

Final Decision : Allowed

Judgement

Dr. B.R. Sarangi, J

1. The petitioner, by means of this writ petition, seeks to quash the order under Annexure-2 dated 15.09.2020 rejecting his tender, as well as fresh

notification dated 22.09.2020 in Annexure-5; and further seeks for a direction to opposite party no.3 to settle the lease of Paikaminigudi sand quarry

no. 2 of 2020 in his favour, he being the highest bidder pursuant to notification under Annexure-1 dated 14.08.2020, by holding that the reason of

rejection i.e., non-submission of original solvency certificate as illegal being not a requirement of law as well as the terms of the tender notification.

2. The factual matrix of the case, in hand, is that the Tahasildar, Nandahandi in the district of Nabarangpur floated a tender on 14.08.2020 inviting

applications in prescribed form in respect of Paikaminigudi sand quarry under khata no. 329, plot no. 922 measuring 1.25 hec. The last date of

submission of application was 15.09.2020. So far as Paikaminigudi sand quarry is concerned there were four applicants, including the petitioner, and as

such, the petitioner quoted the highest rate of royalty i.e. @ Rs.54/- per cum. The scrutiny committee of the Tahasil office opened the tender at 3.30 pm on 15.09.2020 and the result was published on 22.09.2020 rejecting all the applications. In the order, the rate quoted by different applicants was disclosed, but the petitioner's application was rejected on the ground of non-submission of original solvency certificate. The petitioner, being aggrieved by such decision, submitted an application on 22.09.2020 to the Tahasildar-opp. party no.3 stating therein that submission of original solvency certificate was not the requirement of law. Neither the provisions of rules nor the terms of the advertisement require for submitting original solvency certificate. In the past years, the tender applications were considered valid on submission of xerox copies of solvency certificates. When a person applies for more than one source, he cannot submit his original certificate in all his applications. Further, solvency certificates are being issued by the Tahasil office and the tender applications are being considered by the Tahasildar in a committee. In case of doubt, they can verify the authenticity of the solvency certificates from their office. Therefore, there is no necessity of production of any original solvency certificate in the tender documents, when a tenderer applies for more than one source. Consequently, the petitioner requested for allotment of quarry in his favour being the highest bidder. But the Tahasildar having not considered the same, the petitioner also preferred an appeal before the Collector, Nabarangpur on 23.09.2020 challenging the decision of the Tahasildar rejecting his claim on the plea of non-submission of original solvency certificate which was not the requirement of law. The said appeal is still pending before the Collector. But during pendency of the appeal, since the Tahasildar proceeded in issuing a fresh auction notice in respect of very same quarry on 22.09.2020, the date the petitioner made representation for consideration, finding no other alternative, the petitioner has approached this Court by filing this application.

3. Mr. S. Mallik, learned counsel for the petitioner contended that the Tahasildar showing undue haste has proceeded with the matter without considering the grievance made by the petitioner and, as such, when the petitioner's appeal is pending before the appropriate forum, the Tahasildar should not have issued a fresh notice on 22.09.2020 annexed as Annexure-5 to the writ petition. It is further contended that the petitioner has quoted

highest price for payment of royalty per cum, but the tender submitted by the petitioner has been rejected on a flimsy ground that due to non-

submission of original solvency certificate/bank guarantee the bid of the petitioner has not been accepted in respect of Paikamuniguda sand quarry

TMC No. 02/2020. It is further contended that there is no specific provision contained either in the rules or in government notification or even in the

tender notice to produce the original solvency certificate or bank guarantee for consideration of the tender submitted by the petitioner. It is also

contended that if the petitioner applies for more than one source, while submitting tender documents, it is not possible to produce original solvency

certificate in all places. Therefore, the document submitted by the petitioner should have been taken in to consideration, as in the past the very same

authority had accepted the photocopy of the solvency certificate submitted by the tenderers for various sources. It is also contended that the

Tahasildar being the authority for issuance of solvency certificate, authenticity of the photocopy of solvency certificate can be verified from his office.

But instead of doing so, the tender submitted by the petitioner has been rejected. Thereby, the Tahasildar has acted arbitrarily, unreasonably and

contrary to the provisions of law. Therefore, the petitioner seeks for quashing of the order of rejection passed in Annexure-2 dated 15.09.2020.

4. Mr. P.K. Muduli, learned Addl. Government Advocate appearing for State-opposite parties contended that the authorities are insisting upon

production of the original solvency certificate due to the fact that on the face value of one solvency certificate the petitioner has submitted multiple bid

applications to acquire sairat source in different Tahasils. Therefore, there may be a deliberate concealment of fact and, as such, in Form-M vide point

no. 4(iv) he has mentioned "NO", thereby, denying his participation in tender process of other Tahasils. Subsequently, in case of his default in

payment in respect of more than one sources, a confusion may arise as to who will get to exercise claim over the solvency of the petitioner. Thereby,

the need arises to ask for original solvency certificate and thus contended that the impugned order of rejection of the tender submitted by the petitioner

is well justified and the same should not be interfered with in this proceeding.

5. This Court heard Mr. S. Mallik, learned counsel for the petitioner and Mr. P.K. Muduli, learned Addl. Government Advocate appearing for the

State opposite parties on virtual mode. Pleadings having been exchanged, with the consent of learned counsel for the parties, the matter is being disposed of finally at the stage of admission.

6. Indisputably, the petitioner submitted his tender pursuant to advertisement issued in Annexure-1 in respect of Paikamuniguda sand quarry TMC No.

02/2020. Along with the petitioner, three others had also applied for the same, well within the time specified and the tender documents of all the four

bidders, which were opened on 15.09.2020, were rejected. The ground of rejection of the tender submitted by the petitioner reads as follows:-

â??Rejected due to non-submission of original solvency certificate/bank guaranteeâ??

On query being made by this Court, learned Addl. Government Advocate could not be able to produce any material before this Court to indicate the

requirement of production of original solvency certificate/bank guarantee in respect of a tender where the tenderer applied for more than one source.

In any case, the reasons for rejection of the tender documents have been specified in Annexure-2 in its proceedings of the scrutiny committee for

finalization of tender application pertaining to sairat sources of Nandahandi Tahasil held on 15.09.2020 by 3.30 pm in the office of Tahasildar

Nandahandi. The petitioner had also made a grievance before the Tahasildar on 22.09.2020, but the same was rejected subsequently on 23.09.2020.

Therefore, he preferred appeal before the appellate authority. When the matter is pending before the appellate authority, a fresh tender notice has

been issued by the Tahasildar vide Annexure-5 dated 22.09.2020. Therefore, even though appeal is pending for consideration, since steps have been

taken by the Tahasildar by issuing a fresh tender notice, finding no other alternative, the petitioner has approached this Court by filing this writ petition.

While entertaining this writ petition, this Court vide order dated 07.10.2020 issued notice to the opposite parties and directed to serve three extra

copies of the writ petition on Addl. Government Advocate, who accepted notice on behalf of opposite parties no. 1 to 3 and issued notice to opposite

party no.4 by speed post with A.D. returnable by 10.11.2020 and passed interim order to the following effect:-

â??It is directed that fresh tender pursuant to advertisement dated 22.09.2020 (Annexure-5) shall not be finalized till the next date.â??

7. The opposite parties no. 2 and 3 have filed their counter affidavit and have admitted that the petitioner had quoted highest price and also stated that

he was the successful bidder but because of the submission of photocopy of the solvency certificate, his bid has not been accepted. Paragraph-6 of

the counter affidavit reads as follows:

â?? That, in reply to the averments made in paragraph-1 of the Writ Petition, it is submitted that the Auction Notice dated 14.08.2020 was prepared on the basis

of order No. 465/ R&DM, dtd. 02.01.2020 (ANNEXURE- F/3) wherein at Point No. 6, it is mentioned that â??Issue of solvency certificate shall be phased out. No

department shall ask for solvency certificate for grant of license for issuing licenses to storage agents, grant of renewal of excise license, quarry lease, etc. Instead

they will ask for IT Returns, Bank Guarantee etc. for issuing such lincseses.â? Accordingly, in Point No. 1(iv) of the Auction Notice No. 1400, dtd. 14.08.2020 it is

clearly indicated about submission of Bank Guarantee with a validity period of 18 months for the offered amount of additional charges. In addition to this, it is a

fact that the petitioner is also the successful bidder in respect of Sandhidangariguda and Saraguda Sand Sources under Dabugam Tahasil. In the event of

participating in more than one tender process under different Tahasils, submission of photocopy of Solvency Certificate instead of the original one, obviously

renders the purpose of such Solvency Certificate ineffective.

The Petitioner has admitted the fact that on Solvency Certificate, he has submitted multiple bid applications to acquire sairat source in different Tahasils, but he

has deliberately concealed this fact and filled the application in Form-M vide Point No. 4(iv) as â??NOâ? (Annexure-G/3), thereby denying his participation in

tender process of other Tahasils. In case of his default in payment in respect of more than one sources, a confusion arises as to who will get to exercise claim over

the solvency of the Petitioner, thereby the need arises to ask for original Solvency Certificate.â??

8. There is no dispute that the bid submitted by the petitioner has been rejected due to non-submission of original solvency certificate/bank guarantee.

As such, nothing has been placed on record that the petitioner has to submit the original solvency certificate or bank guarantee along with the tender,

but the reasons which has been assigned in the counter affidavit, as quoted above, is not made available in the order impugned in Annexure-2,

whereby the tender of the petitioner has been rejected. Therefore, by way of filing counter affidavit, reasons cannot be supplemented or supplanted to

the order impugned in the writ petition. As such, the subsequent explanation given in the counter affidavit filed by opposite parties no.2 and 3 cannot

be taken into consideration in view of the judgment of this Court in *M/s Shree Ganesh Construction v. State of Orissa*, 2016 (II) OLR 237, which has

been passed by following the judgment of the apex Court in *Mohinder Singh Gill v The Chief Election Commissioner, New Delhi*, AIR 1978 SC 85.1

In paragraphs-7 and 8 of the judgment in *Shree Ganesh Construction* mentioned supra, this Court observed as under:-

“7. In the counter affidavit filed, the reasons have been assigned, which are not available in the impugned order of cancellation filed before this Court in

Annexure-4 dated 5.2.2016. More so, while cancelling the tender, the principles of natural justice have not been complied with. It is well settled principle of law

laid down by the Apex Court in *Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others*, AIR 1978 SC 851 that :

“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.”

8. In *Commissioner of Police, Bombay v. Gordhandas Bhanji*, AIR 1952 SC 16, the Apex Court held as follows :

“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. Orders are not like old wine becoming better as they grow older.â??

9. In absence of any reasons specified in the order impugned, subsequent explanation given in the counter affidavit cannot be taken in to consideration.

In that view of the matter, this Court is not inclined to accept the reasons assigned in the counter affidavit as the order impugned has been passed

bereft of any other reasons other than what has been specified therein. Thereby, rejection of the bid submitted by the petitioner on the ground of non-

submission of original solvency certificate/ bank guarantee cannot sustain in the eye of law. Accordingly, the order impugned in Annexure-2, so far it

relates to Paikaminigudi sand quarry in respect of the petitioner is concerned, is hereby quashed. The matter is remitted back to the Tahasildar,

Nandabandi to reconsider the claim of the petitioner taking into consideration the documents submitted by him in accordance with law as expeditiously

as possible, preferably within a period of three weeks from the date of production of this order. Till that period, the interim order passed by this Court

on 07.10.2020 shall remain in force.

10. The writ petition is accordingly allowed. However, there shall be no order as to costs.

As lock-down period is continuing for COVID-19, learned counsel for the parties may utilize the soft copy of this judgment available in the High

Courtâ??s official website or print out thereof at par with certified copies in the manner prescribed vide Courtâ??s Notice No.4587 dated

25.03.2020.