

# SUPREME COURT OF INDIA

Odisha Forest Development Corporation Ltd.

Vs.

Anupam Traders

C.A.No.9083 of 2019

(R.Banumathi,J., A.S.Bopanna and Hrishikesh Roy,JJ.,)

28.11.2019

## JUDGMENT

**A.S.Bopanna,J.,**

SLP (Civil) No.17627 of 2019)

1. Leave granted.

2. The appellants in eleven of these appeals are the Odisha Forest Development Corporation Ltd. (“OFDC Ltd.” for short) and the State of Odisha is the appellant in two other appeals. The appeals filed by the State of Odisha relate to the same orders in respect of the same private respondents who were the writ petitioners regarding whom the Odisha Forest Development Corporation Ltd. has also filed the appeal. Further, though separate orders passed by the High Court in different writ petitions relating to various petitioners are assailed in all these appeals, the issue involved is the same. Hence all these appeals were clubbed, heard together and are accordingly disposed of by this common judgment. For the purpose of narration of facts, the case as in Civil Appeal arising out of SLP(C) No.17627/2019, titled *Odisha Forest Development Corporation Ltd. vs. M/s Anupam Traders & Anr.* is taken note, which reads as hereunder.

3. The appellant OFDC Ltd. issued an e-tender notification dated 22.11.2016 inviting offers online from intending purchasers for advance sale of phal Kendu leaf (KL) of 2017 crop as per the ‘lots’ indicated in the notification. The private respondent had responded to the notification and made its offer. The bid was opened on 07.12.2016. The private respondent being the successful bidder was required to execute an agreement and deposit the provisional security deposit of Rs.5,00,000/- (Rupees Five Lakh). The private respondent herein executed an agreement dated 20.01.2017. In terms of the agreement, on the actual quantity of leaves collected, the additional security deposit covering 25% of the purchase price of the lot was to be deposited before 31.05.2017. The private respondent in the instant case was therefore required to deposit the differential security amount of Rs.27,14,765/-less, the security amount of Rs.5,00,000/- (Rupees Five Lakh) already paid.

4. In view of the requirement to pay the same before 31.05.2017. the private respondent addressed a letter dated 02.06.2017 seeking extension of time to pay the said security amount. The extension sought was declined by the appellant through the communication dated 06.06.2017. Since the amount required to be deposited was not made, the appellant cancelled the agreement dated 20.01.2017 by issuing the notice dated 21.08.2017. Since such cancellation would be at the 'cost and risk' of the private respondent, the lot was to be put to re-tender. The appellant accordingly proceeded to issue a fresh e-tender notification on 22.08.2017 for sale of the same 'lots' of the phal Kendu leaves.

5. At that stage the private respondent aggrieved by extension of time not being granted, filed the writ petition in W.P.(C) No.11498/2017, the same was withdrawn and a writ petition bearing W.P.(C) No.18718/2017 was filed wherein the order dated 21.08.2017 passed by the appellant cancelling the agreement dated 20.01.2017 as also the subsequent Auction Notice dated 22.08.2017, were assailed. In the said writ petition, interim order against the subsequent auction through notice dated 22.08.2017 was sought. While considering the same, the High Court while allowing the appellant to proceed with the subsequent tender process, had stayed the finalization of the sale subject to the private respondent herein depositing an amount of Rs.20,00,000/- (Rupees Twenty Lakhs only) within one week with the appellant herein. The said order was passed on 08.09.2017 wherein it was further directed that the said amount would be kept in a separate deposit by the appellant. The application filed by the appellant herein seeking vacation of the interim order was considered and at that stage since the vacation of the stay was not opposed by the private respondent herein, it was vacated on 28.03.2018 due to which the subsequent sale was completed on 24.04.2018. The private respondent herein thereafter sought leave to withdraw the writ petition in W.P.(C) No.18718/2017 thereby giving up the challenge to the cancellation of the auction process wherein the private respondent had taken part and also the challenge to the subsequent auction which had been conducted by the appellant. The High Court while disposing of the writ petition as withdrawn, despite objection put forth by the appellant herein directed refund of the deposit which was made pursuant to its interim order dated 08.09.2017. The appellant herein is, therefore, aggrieved by the order dated 30.04.2019 only to the extent whereby the High Court has directed refund of the amount available with the appellant.

6. The facts in the connected appeals is to the same effect except the variation in the 'lot' number, quantity of Kendu leaves which was purchased by each of the private respondents therein and the number of the writ petition filed before the High Court. The names of the different tenderers in the individual writ petitions that were filed and the quantum of amount ordered to be deposited by the High Court will be detailed in later part of this judgment. However, in all the cases the writ petitions have been withdrawn and the refund of the deposit ordered is directed to be refunded. In that view, the basic contention which is common, on consideration would answer all the appeals herein.

7. In that backdrop we have heard Mr. S.K. Padhi, learned senior advocate for the appellants - OFDC Ltd, Ms. Anindita Pujari, learned advocate for the appellant State of Odisha and Mr. Aditya Kumar Choudhary, learned advocate for the private respondents in

all the appeals and perused the materials on record in the appeals.

8. As noticed, though the private respondents herein had filed the writ petition at the stage when the earlier agreement entered into pursuant to the tender process in their favour had been cancelled and a subsequent auction was notified, keeping in view the fact that all the private respondents herein had chosen to withdraw the writ petitions, which was permitted by the High Court through the order dated 30.4.2019, the consideration of that aspect is not required to be made. The only question for consideration herein is with regard to the correctness or otherwise of direction issued by the High court to the appellant herein to refund the amount which was a deposit made by the private respondents with the appellant pursuant to the interim order dated 08.09.2017.

9. The learned senior advocate for the appellant while contending that the High court was not justified in ordering the refund has taken us through the tender notification dated 22.11.2016, as also the purchase agreement dated 20.1.2017. In that light, it is pointed out that apart from the Earnest Money Deposit (“EMD” for short) to enable a tenderer to participate in the tender process, the successful purchaser was required to initially pay the provisional security deposit of Rs.5,00,000/- (Rupees Five Lakhs only) and after final collection of the leaves the differential amount to the extent of 25% of the purchase price was to be paid within 31.05.2017. It is contended that if the said amount was not paid, the security amount already paid was to be forfeited and if any further recoveries are to be made, the appellant had the liberty to do so.

10. In that light, it is contended that in the instant facts only the initial deposit of Rs.5,00,000/- (Rupees Five Lakhs only) was made, apart from the EMD. The default was committed relating to payment of 25% of the additional security amount which was to be made within the time frame. Since, the extension of time as requested was rejected and the amount was not deposited, the appellant was left with no other alternative but to terminate the agreement and forfeit the security deposit. It is the contention of the learned senior advocate that though the High Court has not specifically indicated deposit to be made as the additional security deposit, the extent of deposit ordered in each of the cases makes it clear that it is relatable to the extent of the additional security amount which was to be deposited. In that light, he contends that when the writ petition was not pressed, the termination of the agreement would remain valid and in such circumstance since the clause contained in the agreement permits the forfeiture of the preliminary security deposit, the direction to refund the same was not justified. On the other hand, the High Court ought to have allowed retention of the said amount and the liberty to recover additional amount, if any, should have been left open. Hence, he contends that the direction issued by the High Court to refund the amount is not justified.

11. The learned advocate for the respondent would also refer to the very same clauses as contained in the agreement. He contends that the private respondents herein were before the High Court seeking to exercise their right by assailing the order of termination so as to complete the transaction. With reference to the objection statement, the learned advocate would contend that there were circumstances which indicated that the price offered by the

private respondent was at higher rate when the panchayat had fixed a lower price for the Kendu leaf. It is his contention that, in any event, the forfeiture can only be to the extent of the amount that had already been deposited, namely, the EMD and the initial deposit regarding which the private respondents have not made a grievance. On referring to the tender conditions as also the clauses contained in the agreement, he contends that as per Clause 9 (iv) even if the additional security is not deposited or if any loss is suffered, the provision made therein is to recover the amount by way of initiating legal proceedings or through the Orissa Public Demand Recovery Act which option has been left open to the appellant by the High Court and as such the appellant cannot make out any grievance. It is his contention that the very fact that the High Court while granting the interim order, though had directed deposit of the amount Page 11 of 26 had further directed the appellant to keep it in a separate fixed deposit, will indicate that the said amount had no reference whatsoever to the additional security deposit but it was only to establish the bonafide of the private respondent who was the writ petitioner. Hence, in that circumstance when the High Court has directed refund the order does not call for interference.

12. In the light of the above, what is required to be noticed at the outset is the provision relating to the security deposit contained in Clause 9 of the tender notification on which reliance was placed by both sides, which reads as hereunder:

“Security Deposit

(i) The successful purchaser shall have to pay provisional Security Deposit @ Rs.5.00 lakhs (Rupees Five Lakh) per lot(s) within 21 [Twenty- one] days of issue of ratification order. If the provisional security deposit is not paid at Corporate Office within 21 days from the date of issue of ratification order, the sale of the lot(s) will be cancelled and the EMD/part S.D. will be forfeited to OFDC. However in exceptional circumstances, the period of 21 days may be extended for a further period of 7 (seven) days by the Director (C)/Managing Director of OFDC Ltd. by depositing of non-refundable fees of Rs.2000/- (Rupees two thousand only) by the purchaser.

(ii) After final collection of leaves, the purchaser has to pay the differential amount up to the extent of 25% of Purchase price of the lot towards final Security deposit within 31.5.2017, failing which it will be considered as violation of purchaser's agreement and the provisional security deposit will be forfeited.

(iii) The Security Deposit can be adjusted either wholly or in part, as the case may be, by the Director (C)/Managing Director, OFDC Ltd. towards any amount recoverable from the purchaser, including the purchase price under provisions of the Acts, Rules & Notification of Govt., Purchaser's agreement and the terms and conditions of the sale notice and all such deductions shall have to be made good by the purchaser by depositing an equal amount within 15 days of issue of the notice to that effect.

(iv) If the dues to be recovered from the purchaser exceed the amount of security deposit, the amount in excess shall unless made good to the Corporation within 15 days from the date of issue of the notice to that effect, be recoverable by way of initiating legal proceedings or through Orissa Public Demand Recovery Act 1962 (Orissa Act-I of 1963).”

13. Similarly, the agreement entered into between the parties, apart from containing a similar clause for security deposit as at Clause No.11, also contains Clause 13 relating to the termination of the agreement. The said clause reads as under: -

“13. Termination of Purchaser’s Agreement

(i) If the purchaser fails to pay the first instalment before the due date of 2<sup>nd</sup> instalment or 2<sup>nd</sup> instalment before due date of the 3<sup>rd</sup> instalment or third instalment within 15 days after its due date or any other amount due or to comply with any of the provisions of the agreement, the Director (C)/Managing Director of OFDC Ltd. may at his discretion and without prejudice to any other right and remedies that may be available to him, terminate this agreement after giving 15 days notice and an opportunity of hearing to the purchaser and blacklist the purchaser for a period up to 3 years.

(ii) The order of termination of the agreement shall be delivered in person to the purchaser or sent by Registered/Speed Post. The termination shall be effective from the date of order terminating the agreement.

(iii) On termination of the agreement the Corporation shall be entitled to:

a. Forfeit the provisional as well as final security deposit in full.

b. Forfeit the undelivered stocks of Kenduleaves in storage in favour of the Corporation for which payment has been made.

c. Cancel the customer registration with OFDC along with forfeiture of registration fees.

d. (i) Sell the Kenduleaves in the godown for which amount due has not been paid and undelivered stock of Kenduleaves in storage which has been forfeited in favour of the Corporation under condition 13 (iii) (b) and recover the loss. The same shall also be recoverable by encashment of the Bank guarantee, if any such guarantee has been furnished by the purchaser under clause-7, as also from sale of such leaves which has been forfeited in favour of the Corporation under condition 13(iii)(b). Provided if the lot is not resold in the first sale after issue of order of termination of agreement, loss will be recovered from the purchaser treating the value of the lot as zero. However, if the lot is sold in subsequent sale, the amount of sale price recovered as such shall be adjustable against balance amount of loss or be refunded

to the purchaser as the case may be. However no interest will be payable to the purchaser on such amount. In the event of cancellation of purchaser's agreement the loss to be recovered from 1st purchaser will be computed as follows: -

Total expected receipts including all taxes in concerned sale (+) expenditure on storage, supervision etc. up to disposal (-) receipts including taxes from subsequent sale.

(ii) Recover any amount of loss still remaining due through Legal proceedings.

(iii) Retain the full amount, if on such resale, higher amount is received than is due in respect of the lot and the purchaser shall have no right or claim there to.

e. Recover all cost and expenses incurred for recovering loss.

f. Recover all penalties imposed and compensation assessed not yet paid.”

In addition to the same, it is noticed that in the communication dated 02.08.2017 (Annexure P/8) while issuing the notice calling upon to pay the additional security deposit, the appellant has indicated that if the same is not paid the provisional security deposit will be forfeited and the 'lot' will be sold in the ensuing sale. That apart, in the order dated 21.08.2017 whereby the agreement was terminated, it was intimated that the provisional security is forfeited and that the stock contained in 'lot' No. 42 would be resold at the 'cost and risk' of the private respondent herein.

14. In the above background, a perusal of the interim order dated 08.09.2017 passed in writ petition would indicate that the High Court on considering the facts and circumstances of the case has directed that the private Page 15 of 26 respondents herein deposit the amount as indicated in the order, which is shown against their respective names here below in tabular format for easy reference: -\

<b>S.No.</b>	<b>SLP (C) No.</b>	<b>Name of the Firm</b>	<b>Amt. deposited as per Interim Orders (In Rs.)</b>
1.	17627	ANUPAM TRADERS	20,00,000
2.	18726	NABILA ENTERPRISE	15,00,000
3.	18575	RAFIK FURNITURE MART	50,00,000
4.	18846	SAIYED SULTAN	20,00,000
5.	18664	VIJAY ENTERPRISE	20,00,000
6.	18876	JAI BABA BHOLANATH ENTERPRISE	10,00,000
7.	18916	T. PRASAD RAO	50,00,000
8.	18939	ANANYA ENTERPRISE	35,00,000
9.	18890	YASEEN KHAN	35,00,000
10.	18800	KARIM KHAN	5,00,000
11.	18945	SHEIKH ZAKIR	15,00,000

The High Court does not specifically indicate that the amount is relatable to the additional security that was required to be deposited by the writ petitioners.

15. In a circumstance of the present nature, when it is noticed that the termination of the agreement itself was for non-deposit of the additional security amount to the extent of 25% of the value, the deposit ordered by the High Court cannot be classified as additional deposit in terms of the contract, at that stage. If ultimately the writ petition was taken to its logical conclusion and the private respondents had succeeded in such proceedings, only in such event the said amount could have been considered as a belated payment towards additional security deposit and in any event, the consideration in that regard would be in terms of the directions that would have been issued by the High Court. Though that be the position and presently since the writ petition was withdrawn unconditionally, the question is as to whether the respondents were entitled to refund of the amount as a matter of right when all future action for disposal of the subject Kendu leaves was at the 'cost and risk' of the private respondents as per Clause 13 of the agreement which is extracted supra.

Hence even if the said amount is not considered as the additional security amount in its true spirit as per the agreement and the right of forfeiture at this stage is not accepted in its technical sense in favour of the appellant, the right of the appellant to recover the loss suffered in terms of the agreement cannot be ignored.

16. In the above backdrop, before we proceed any further, the intent of such conditional interim orders passed by the Courts will have to be gathered. In order to aid the same it will be apposite to take note of the observations contained in the decision of this Court in the case of *M/s. Atma Ram Properties (P) Ltd. vs. M/s. Federal Motors Pvt. Ltd.*<sup>1</sup>. which is as hereunder, “The power to grant stay is discretionary and flows from the jurisdiction conferred on an appellate Court which is equitable in nature. To secure an order of stay merely by preferring an appeal is not the statutory right conferred on the appellant. So also, an appellate Court is not ordained to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. Therefore, an applicant for order of stay must do equity for seeking equity. Depending on the facts and circumstances of a given case an appellate Court, while passing an order of stay, may put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal. In *South Eastern Coalfields Ltd. Vs. State of M.P. & Ors.*<sup>2</sup>, this Court while dealing with interim orders granted in favour of any party to litigation for the purpose of extending protection to it, effective during the pendency of the proceedings, has held that such interim orders, passed at an interim stage, stand reversed in the event of the final decision going against the party successful in securing interim orders in its favour; and the successful party at the end would be justified in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery to it of benefit earned by the opposite party under the interim order of the High Court, or (b) compensation for what it has lost, and to grant such relief is the inherent jurisdiction of the Court. In our opinion, while granting an order of stay under Order 41 Rule 5 of the CPC, the appellate court does have jurisdiction to put the party seeking stay order on such terms as would reasonably compensate the party successful at the end of the appeal in so far as those proceedings are concerned.” Though the said observation was made in the context of interim order being considered under Order 41 Rule 5 CPC, it would be more appropriate in a writ proceedings in as much as, not only the interim prayer but the very writ petition will be entertained in the discretionary jurisdiction unlike the statutory appeal under Section 96 read with Order 41 of CPC. In such circumstance, though it is not necessary that a condition is to be imposed in every case for grant of interim order, if the Court in a given case imposes the condition, the same is to be treated as being with a purpose and not as an empty formality.

17. In that regard, it is to be noticed that in the instant case in a circumstance where the private respondent had filed the writ petition, even though the High court had permitted the process of re-tender to progress, the finalization thereof had been stayed. If that be the position, the appellant herein was not in a position to immediately bring the Kendu leaves for re-auction by receiving the amount from the subsequent purchaser and the same is likely to have dissuaded purchasers to offer the best price due to uncertainty looming large.

Whether all these and any other factor has caused the loss to the appellant and the public exchequer is a matter to be determined based on materials and evidence but the fact remains that such resultant delay was at the instance of the private respondent. As noticed from the terms of the agreement, any loss caused was permissible to be recovered from the respondent after adjusting the security deposit available. Therefore, even if the amount of deposit made pursuant to the order passed by the High Court is not considered as an additional security deposit, the right of the appellant to proceed in accordance with law to assess the damage suffered and to recover the same from the private respondents, would still remain intact. As such the deposit ordered will have to be considered as a conditional deposit to protect the interest of the appellant as well.

18. In such event, the issue for consideration is as to whether in view of the clause contained in 9(iv) of the tender notification the appellant should be driven to initiate the legal proceedings or for public demand recovery after refunding the amount which is deposited, as contended by the learned Advocate for the private respondents despite taking note of the intent of such deposit. It is no doubt true, dehors the writ proceedings initiated by the private respondents and in the absence of such deposit, option in any event was open to the appellant to make the recovery through such proceedings. It is noticed that apart from the right available to recover the amount by forfeiting the additional security deposit, the appellant had also clearly indicated that the subsequent sale would be made at the 'cost and risk' of the private respondents herein which would mean that the difference of the cost between the first and second auction and the resultant loss to the appellant if attributable to the private respondents, is recoverable from the private respondents. However, it is no doubt true that such recovery is to be made after quantifying the same by following due process of law.

19. Presently, though the learned senior advocate for the appellant had furnished a chart showing the original price as against the resale price, thereby projecting the net loss suffered by the appellant, the correctness of the same cannot be adjudicated in a proceeding of the present nature arising out of a writ proceeding. The matter being contractual and also requiring factual determination, the same can only be done in an appropriate proceeding. Therefore, though at this stage the said amount of deposit as ordered by the High Court cannot be considered as additional security deposit nor the actual determination of the loss suffered, when in a circumstance the action of the appellant to re-tender was caused to be deferred, through a proceedings initiated at the instance of the private respondent, the condition to deposit the amount should have been considered by the High Court in the background of its intent to protect the interest of appellant. In that circumstance, when the contention of loss being caused was put forth the amount ought to have been allowed to be retained till the procedure as contemplated in law is followed and a decision is taken though not directly as forfeiture.

20. As noticed above, the appellant in any event would have the right to determine the loss suffered and recover the same in accordance with law as the process to re-tender, was at the 'cost and risk' of the private respondent as stated in the notice of termination. In that circumstance, when it is prima-facie indicated that due to the delay caused at the instance

of the private respondents the value of the Kendu leaves had reduced, thereby causing loss, in view of legal proceedings initiated by the private respondents, the Court will have to bear in mind the maxim *actus curiae neminem gravabit*, namely, no party should suffer due to the act of Court. In such event, since the interim order was at the instance of the respondent the appellant should in our opinion be permitted to retain the amount and complete the process by providing opportunity to the private respondents.

21. In the above circumstance, the direction to refund the amount unconditionally is not found justified and is accordingly set aside. The appellant shall issue appropriate notice(s) to the private respondents indicating details about the manner in which they computed the loss after conducting the second auction at the 'cost and risk' of the private respondent. On receiving response to the same, a detailed consideration be made and a speaking order be passed in that regard. The respondents are at liberty to challenge the speaking order to be passed by the appellant and the process being pursuant to a contractual matter the private respondent if aggrieved are entitled to avail their legal remedy before the appropriate forum, in accordance with law and the entitlement of the amount will be decided therein. As per the speaking order passed by the appellant, if it is found that the loss suffered is within the amount available in deposit, appropriate adjustment should be made and the balance if any, be refunded. On the other hand, if the loss caused is found to be more than the amount in deposit, the amount available shall be adjusted and the appellant would have the liberty of initiating action for the recovery of the additional amount, if any, in accordance with law. Such procedure shall be completed within the outer limit of two months from the date on which a copy of this order is available. Until such time, the amount available in fixed deposit as ordered by the High Court shall be retained in the same position and shall not be appropriated for the benefit of the appellant. The adjustment of the amount by the appellant if made after passing the speaking order, the same shall be without prejudice to the contention of both parties and Page 25 of 26 the same shall be subject to the outcome of the proceedings in the matters where the respondents may challenge the speaking order in accordance with law.

22. Accordingly, all the appeals are allowed in part with no order as to costs. Pending applications, if any, shall stand disposed of.

Judgment Referred

<sup>1</sup>(2005) 1 SCC 0705

<sup>2</sup>(2003) 8 SCC 0648