

**IN THE HIGH COURT OF MANIPUR
AT IMPHAL**

MC (WP(C)) No.398 of 2022

Ref:- WP(C) No. 819 of 2022

1. The Food Corporation of India through the Chairman & Managing Director, 16/20 Barakhamba Lane, New Delhi- 110001.
2. The Executive Director (Zone), Food Corporation of India (NE), Zonal Office (NE), Publication Building, G.S. Road Lachit Nagar, Guwahati, Assam-7.
3. The Deputy General Manager (R), Food Corporation of India, Regional Office, Manipur, Old Assembly Complex, Imphal, Manipur – 795001.
4. The General Manager (R), Food Corporation of India, Regional Office, Nagaland, Regional Office, House No. 105, Bank Colony, Dimapur, Nagaland – 797112.

... Applicants

-Versus-

1. M/S Zenith Enterprise, having its Branch Office at M.G. Avenue, P.O & P.S. Imphal through its Proprietor namely Johnson Keishing, aged about 58 years old, S/O (L) Miba Keishing, a permanent resident of Marung Lane, New Checkon, P.O. & P.S. Porompat, Imphal East District, Manipur – 795002.

..... Respondent

MC (WP(C)) No.399 of 2022

Ref:- WP(C) No. 1012 of 2022

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2. The Executive Director (Zone), Food Corporation of India (NE), Zonal Office (NE), Publication Building, G.S. Road Lachit Nagar, Guwahati, Assam-7.
3. The Deputy General Manager (R), Food Corporation of India, Regional Office, Manipur, Old Assembly Complex, Imphal, Manipur – 795001.
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..... Respondent

2. The W.A.C. Enterprises through its proprietor, having its Head Office at Tushen Chanhong Village, Ukhrul District, Manipur – 795142.

... Proforma Respondents

BEFORE
HON'BLE THE ACTING CHIEF JUSTICE M.V. MURALIDARAN

For the Applicants :: Mr. W. Darakishwor, Sr.PCCG

For the Respondents :: Mr. HS Paonam, Sr. Adv.,
Mr. S. Gunabanta, Adv.

Date of Hearing and
reserving Judgment & Order :: 14.02.2023

Date of Judgment & Order :: **14.03.2023**

JUDGMENT AND ORDER
(CAV)

These petitions have been filed by the petitioners herein to vacate the interim order dated 28.9.2022 passed in WP(C) No.819 of 2022 and the interim order dated 30.11.2022 passed in WP(C) No.1012 of 2022.

2. The petitioners are the respondents in the writ petitions.

3. W.P.(C) No.819 of 2022 has been filed by the writ petitioner to quash the impugned third re-tender NIT dated 29.8.2022 issued by the Regional Office of the FCI at Dimapur, Nagaland for appointment of Road Transport Contractor for the route Ex-Dimapur to FSD Thoubal as the same is illegal and to direct the respondents therein to prove reasonable allocation of work to the writ petitioner in terms of the appointment order dated 6.12.2021.

4. W.P.(C) No.1012 of 2022 has been filed by the writ petitioner to quash the impugned order dated 30.5.2022 appointing the private respondent therein as ad-hoc road transportation contract from RH, Dimapur to FSD Thoubal so far as the contract period extendable by three months in terms of the speaking order dated 20.9.2022 and the RTI reply dated 20.9.2022 and to direct the respondents therein allowing allocation of the work program for transportation of rice from Railhead, Jiribam to FSD Thoubal to the writ petitioner.

5. On 28.9.2022, when W.P.(C) No.819 of 2022 came up for admission, this Court passed the following interim order:

“[1] Heard Mr. HS Paonam, learned senior counsel for the petitioner and perused the record.

[2] Admit.

[3] Notice returnable by 10.10.2022.

[4] Mr. D.Julius Riamei, learned counsel takes notice for the FCI and hence, no formal notice is required.

[5] Post this matter on 10.10.2022 as first item.

[6] Registry is directed to delete the name of Mr. W.Darakishwor, learned Sr.PCCG and

print the name of Mr.D.JuliusRiamei, learned counsel for the respondents.

[7] Till such time, the respondents are directed not to finalize the tender.”

6. Similarly, on 30.11.2022, when W.P.(C) No.1012 of 2022 came up for admission, this Court passed the following order:

“[1] Heard Mr. S.Gunabanta, learned Jr. counsel to Mr. HS. Paonam, learned senior counsel for the petitioner and perused the records.

[2] Admit.

[3] Issue notice, returnable by 20.12.2022.

[4] Since Mr. W.Darakishwor, learned senior panel counsel takes notice, no formal notice is required.

[5] Mr. S.Gunabanta, learned counsel for the petitioner prayed this Court for interim order whereas Mr. W.Darakishwor, learned senior panel counsel for the respondents has strongly objected for granting the interim order stating that as per the contract rule, the period for contract may be extended for further period of 3 (three) months, apart from this, the Hon’ble Supreme Court passed an order in favour of respondents, Mr.W. Darakishwor,

learned senior panel counsel for the respondents also pointed out that this writ petitioner has not participated in the proceedings and hence, he has no right to file the writ petition and therefore, he seeks time to file counter affidavit by praying not to grant any interim order.

[6] The prima-facie, it is made clear that the contract given to the private respondents is expired on 29.11.2022 and from today onwards, there is no order of extending the period for contract to the private respondents. Therefore, the private respondents have no right to continue the work. Therefore, there shall be an interim order directing the respondents not to extend the period of contract till the next date of hearing.

[7] The respondents are at liberty to file an application for vacating the interim order along with counter affidavit.

[8] Post the matter on 20.12.2022 as first item after the motion cases.”

7. Aggrieved by the said interim orders passed by this Court, the petitioner Food Corporation of India (FCI) has filed these petitions contending that all the tenders for road transport contractor are invited online by the FCI in Government e-Market

Place portal and, thus, there is no question of favouring any contractor by the FCI. The portal is a Government platform wherein any eligible firm can participate in any tender from any corner of the country. As such the first respondent himself can also participate in any tender floated by any FCI office located in any corner of the country.

8. It is submitted that Manipur is a landlocked State and its two lifelines are NH-2 – Dimapur to Imphal and NH-37 – Jiribam to Imphal and the primary objective of FCI is to cater to the NFSA requirement and the foodgrains are issued from the FCI godowns under the FCI regional office, Manipur. There are 8 FCI godowns in Manipur region, namely FSD Sangaiporou; FSD Bishnupur; FSD Senapati; FSD Ukhrul; FSD Jiribam; FSD Sangaiprou; FSD Sawombung; FSD Thoubal and FSD Churachandpur and the regular road transport contractor is already in position from Dimapur. Further, for FSD Thoubal and Churachandpur, there are ad-hoc transport contractors in position from Dimapur.

9. It is further submitted that unfortunately, NH-37 was completely cut-off for almost three months from mid-May 2022 to last part of July 2022 and the rail line was also cut-off due to heavy rain. Therefore, it became imperative that in order to tide

over such an unfortunate situation and to meet NFSA requirement, the FCI needs to position regular road transport contractor Ex-Dimapur to FSD Thoubal. Accordingly, FCI, Regional Office, Dimapur being the dispatching region, invited tender for appointment of regular road transport contractor Ex-Dimapur to FSD Thoubal for a period of two years vide NIT dated 4.5.2022. However, no bids were received. The tender was again re-invited by the FCI Regional Office, Dimapur vide NIT dated 28.5.2022, but no bids were received. Again the tender was re-invited vide NIT dated 21.7.2022, but again no bids were received. Finally, fourth time NIT dated 29.8.022 was invited wherein one bidder, namely M/s.SA Ngamo Agency participated and the value of the tender has been estimated at Rs.17.68 crore after considering the ad-hoc transportation rate and stocks likely to be inducted during the two years contract period.

10. According to the petitioners, the FCI undertakes movement of stock on least cost basis, as FCI is running and financed by the Government of India from public exchequer and the transportation is to be done on economic routes and decision taken by the FCI to move stocks from Dimapur to Thoubal at a cheaper rate is in public interest and for the FCI, no one is influential and all the tenders are finalized based on merits only.

The FCI Regional Office, Manipur, vide letter dated 28.12.2020 stated that at a time when there was a departmental letter posted at FSD Dimapur and handling cost was very high and capacity of the FSD Thoubal was only 2500 MT and later on, due to increase in norms, the capacity of FSD Thoubal has been increased to 3132 MT.

11. It is stated by the petitioners that by the end of January, 2023, all the departmental labour who were previously posted in FSD Dimapur had been transferred from FSD Dimapur on 24.1.2022 and 28.1.2022. Thereafter, contract labour was positioned in FSD Dimapur and handling cost at FSD Dimapur has come down exponentially. Therefore, the primary object of the FCI is not only to cater NFSA requirement, but also to undertake movement of stocks on least cost basis. The first respondent is an existing transport contractor in the road of Ex-Dimapur to FSD Ukhrul as the tender was awarded by FCI Regional Office, Dimapur. Therefore, there is no question of favour in inviting the tender as alleged by the first respondent.

12. The case of the petitioners is that the existing transport rate from rail-head/FSD Jiribam to FSD Thoubal is Rs.4071/- per MT for the entire distance awarded to the first respondent and, on the other hand, the transport rate quoted by

M/s. SA Ngamo Enterprise from Dimpaur to FSD Thoubal which is kept under abeyance by this Court is Rs.3763/- per MT for the entire distance which is lower by Rs.308/- per MT for the entire distance compared to the first respondent. Therefore, the financial implication or loss to the FCI will be around Rs.1,37,04,768/- if the stock is moved from Jiribam to Thoubal which is against the imperative policy of least cost policy.

13. The arguments of the learned counsel for the petitioners is summarized as under:

- That the first respondent has no locus standi to challenge the impugned third re-tender NIT dated 29.8.2022 issued by the Regional Office, Dimapur for appointment of the road transport contractor from Dimapur to FSD Thoubal, because the first respondent never participated in the NIT dated 29.8.2022 floated by the FCI Regional Office, Dimapur and, hence, the first respondent has no legal right to challenge the said NIT.

- The petitioner FCI is not a necessary party or proper party in the writ petition and on that count alone, the writ petition being W.P.(C) No.819 of 2022 is not maintainable and consequently, the interim order dated 28.9.2022 is liable to be vacated.
- In the re-tender dated 29.8.2022, M/s.Ngamo Agency participated and the said Agency became a successful bidder both in technical bid as well as financial bid and the first respondent knowingly failed to implead M/s.Ngamo Agency as party respondent in W.P.(C) No.819 of 2022 and the interim order dated 28.9.2022 passed in the said writ petition affected the rights of the said successful bidder.
- It is the duty of the FCI that the transportation is to be done on economical roads and the decision of the FCI to move the stocks from

Dimapur to Thoubal at cheaper rate is in public interest.

- From the interim order dated 28.9.2022 passed in W.P.(C) No.819 of 2022, the FCI incurred loss of about Rs.30 lakh and if it continued for one year, then the FCI will cause losses for more than Rs.1,37,04,768/-.
- Vide interim order dated 28.9.2022 passed by this Court, the first respondent was allowed to take the foodgrains at higher rates from FSD Jiribam despite having cheaper rates of transportation from FSD Dimapur to Thoubal.
- The first respondent is presently carrying foodgrains from FSD Dimapur to Ukhrul Depot on the basis of least cost policy. In addition to that, the first respondent is also carrying foodgrains from FSD Jiribam to Sangaiprou Depot and FSD Jiribam to Sawombung on the basis of the least policy despite having existing

contractor M/s.WAC& MS WI Enterprise from FSD Dimapur to Sangaiprou and FSD Dimapur to Sawombung.

- The first respondent cannot dictate the FCI to do what they want by thinking for their benefit only.
- The EMD deposited by the first respondent is Rs.2 crore something, which is refundable and the estimated cost for carrying foodgrains for the said two road is Rs.17 crore and before filing the writ petition, the first respondent has given allocation for more than Rs.6 crore.
- As per Clause XVI(b) of the MTF, the FCI has the exclusive right to appoint one or more contractors for any or all the services and to divide the work between such contractors in any manner that the FCI may decide and no claim shall lie against the FCI by reason of such division of work.

- The FCI have clearly stated in paragraph 8 of the affidavit-in-opposition filed in W.P.(C) No.326 of 2020 that the movement programme is allotted to the transport contractor on the basis of requirement at the receiving end and on least cost basis.
- The FSD Sangaiprou is fed from Railhead Jiribam @ Rs.3531/- per MT for the entire distance; Railhead Dimapur @ Rs.3533/- per MT for the entire distance and Railhead Furkating @ Rs.3884/- per MT for the entire distance. However, due to higher charge of handling cost at Dimapur, the total cost would be Rs.4901/- per MT. However, the FCI has to transport stock even at higher rate in case of disruption in movement in lower cost route due to blockade by landslide period.
- The NIT dated 17.5.2022 had been invited in public interest and if any order for stay of appointment order dated

30.5.2022 is passed, there is possibility that monopoly of one contractor in single route will lead to more drainage of public exchequer since FCI will be deprived of exploration of movement of foodgrains on least cost basis.

- It is not true that the action of the FCI in its attempt to extend the contract work period of the private respondent in terms of impugned order dated 30.5.2022 would be a case of having been guided for polarizing the public sector transportation from Dimapur, Nagaland for vested interest and for favouring contractors and others who are influential in Dimapur.

14. To fortify his submission, the learned counsel for the petitioners relied upon the following decisions:

- (i) Haji Enterprise v. FCI, (2018) 1 GLT 383.
- (ii) Vikash Construction v. FCI, (2017) 2 GLT 432

- (iii) S.A.Ngamo Agency v. FCI, (2021) 3 GLT (MN) 862
- (iv) JagdishMondal v. State of Orissa and others, (2007) 14 SCC 517.
- (v) Sri Ram Builders v. State of Madhya Pradesh and others, (2014) 14 SCC 102.

Arguing so, a prayer has been made to vacate the interim orders passed in the writ petitions.

15. Per contra, the learned counsel for the first respondent submitted that the impugned order dated 30.5.2022 appointing the private respondent as ad-hoc road transportation contractor from RH, Dimapur to FSD Thoubal arose due to a contingency situation on the collapse of the Irang Balley Bridge on the Jiribam Road and disruption of railways line in Lamding-Badarpur Section in the month of April-May, 2022 during which the first respondent has been appointed as regular road transport contractor of FCI for the route RH, Jiribam to FSD Thoubal. However, the petitioner has not allotted any work during the period due the collapse of the Irang Bally Bridge. The said IrangBalley Bridge as well as disruption in the railways has been repaired and restored and the first respondent would be entitled to transportation of foodgrains of FCI from RH, Jiribam to FSD Thoubal.

16. The learned counsel for the first respondent would submit the regular road transport contract of the first respondent is still subsisting till December, 2023, inasmuch as the capacity of the godown at FSD, Thoubalis only 3132 MT. Therefore, as the regular road transport contract of the first respondent is still subsisting till December, 2023, there is no point to appoint another road transport contractor.

17. The learned counsel for the first respondent argued that the transportation from Dimapur is not the least cost route because of high handling cost at Dimapur godown, the same shall be substantiated by affidavit filed in W.P.(C) No.326 of 2020, wherein the FCI has taken a stand that handling charges is very high at Dimapur. The stand of the FCI in the instant case is contradictory and inconsistent with its earlier stand taken in the said petition.

18. The learned counsel for the first respondent further submitted that the first respondent was appointed as road transport contractor from Jiribam to Thoubal after having participated in the public tender of the FCI is entitled to freedom of trade and commerce where it shall be entitled for transportation of food grains till December, 2023, as it has been neither terminated nor the first respondent has defaulted any

terms and conditions of the contract. The FCI, if considered that Jiribam route is expensive and against the least cost factor ought to have done away with the grant of contract work for transportation by asking to deposit huge amount of Rs.2.64 crore and making it sitting idle without any work since June,2022 till date. But appointing the private respondent on ad-hoc basis with condition of depositing hardly Rs.10 lakh and allotting all works for transportation to the small capacity of godown at Thoubal itself shows mala fide and arbitrariness on the part of FCI.

19. The learned counsel for the first respondent next submitted that the appointment of ad-hoc contract was issued on 30.5.2022 and upon expiry of 6 months, the FCI authority has neither processed for extension of the contract period nor learned counsel for the FCI informed about the extension of the contract or subsistence of the contract at the time of passing of the interim order dated 30.11.2022 in W.P.(C) No.1012 of 2022. Therefore, the first respondent should not be blamed for the fault of the FCI, inasmuch as the prayer of the first respondent is for not extending the terms of the contract beyond 6 months as contained in the order dated 30.5.2022.

20. The learned counsel for the first respondent added that consequent upon passing of the interim order dated

30.11.2022 in W.P.(C) No.1012 of 2022 and the interim order dated 28.9.2022 in W.P.(C) No.819 of 2022 and further extension, the FCI has allotted the work at the line of 2300 MT for transportation to the route of the first respondent i.e. Ex-Jiribam to Thoubal vide office letter dated 30.12.2022. The FCI by attempting to appoint regular road transport contractor from Dimapur to Thoubal have favoured the contractor at Dimapur thereby depriving the first respondent's fundamental right of freedom of trade and commerce. Out of 8 godown in Manipur Region, namely FSD Sangaiprou, FSD Bishnupur, FSD Senapati, FSD Ukhrul, FSD Jiribam, FSD Sawombung, FSD Churachandpur and FSD Thoubal, FSD Sangaiprou and FSD Sawombung are fedded from RH Riribam by regular road transport contractor and the godown concerned with the first respondent i.e. Thoubal and that of Churachandpur is fed by ad-hoc transport contract from Dimapur.

21. The learned counsel for the first respondent lastly submitted that the attempt of the FCI for appointment of regular road transport contractor from Dimapur though failed on two different occasion indicates the intention of the FCI for favouring the contractor at Dimapur and that the mala fide intention of the FCI for floating NIT for appointment of regular road transport

contractor from Dimapur is an arbitrary exercise of power and the same has to be interfered with by this Court.

22. This Court considered the rival submissions and also perused the materials available on record.

23. Assailing the impugned re-tender NIT dated 29.8.2022, the first respondent/writ petitioner filed W.P.(C) No.819 of 2022 primarily on the ground that the arbitrary action of the respondent General Manager (R), FCI, Regional Office, Nagaland in floating the tender having guided for polarizing the public sector transportation from Dimapur, Nagaland for vested interest and for favouring contractors and others, who are influential in Dimapur is liable to be quashed, as the same was issued with an ill-motive and mala fide intention to favour certain third parties, thereby depriving the freedom of trade and commerce enjoyed by the first respondent. Further, the impugned re-tender was issued against the decision of the Regional Office of FCI at Imphal, Manipur by the Regional Office of FCI at Dimapur, Nagaland despite the fact that the Regional Office at Imphal for catering the need of the State of Manipur. The Regional Office at Dimapur, Nagaland without appreciating the ground realities of Manipur that the first respondent was already operating for the route RH Jiribam to FSD Thoubal for

the godown capacity of 3132 MT, only for vested interest and for favouring contractors and others who are influential in Dimapur, has issued the impugned re-tender.

24. The main contention of the first respondent in the writ petitions is that despite being appointed as regular road transport contractor of FCI for the route RH Jiribam to FSD Thoubal vide appointment order dated 6.12.2021 for two years, the authorities of the FCI have failed to allocate any quota of work for the reason best known to them and, therefore, this Court may be pleased to pass an appropriate order/direction to the FCI authorities for providing reasonable allocation of work to the first respondent in terms of the appointment order dated 6.12.2021 for protecting the right and interest.

25. As could be seen from the appointment order dated 6.12.2021, it is clear that the first respondent M/s.Zenith Enterprises was appointed as road transport contractor for transportation of food grains/allied materials etc. from RH/FSD Jiribam to FSD Thoubal for a period of 2 years on regular basis at the quoted rate of Rs.4071/- per MT for the entire distance with effect from 7.12.2021 to 6.12.2023.

26. On the other hand, it is the say of the FCI that in view of the disruption of rail connectivity in the Limding Badarpur section and collapse of Irang Bridge during mid-May, 2022 till the last part of July, 2022, there was utmost necessity to feed FSD Thoubal by road from Dimapur and, accordingly, the FCI, RO Nagaland has positioned limited ad-hoc transport contracts within the DoP of GM(R) for a period of 6 months, extendable by another 3 months at the rate of Rs.3768/- per MT for the entire distance vide appointment order dated 30.5.2022. The period of the said contract is from 2.6.2022 to 1.12.2022. However, the existing transport contract of the first respondent from Jiribam to FSD Thoubal has been awarded at the rate of Rs.4071/- per MT for the entire distance i.e. from 7.12.2021 to 6.12.2023.

27. According to the FCI, the FCI undertakes movement of stock on least cost basis, as FCI is running and financed by the Government of India from public exchequer and it is imperative that transportation is to be done on economical routes and the decision taken by the FCI to move stocks from Dimapur to FSD Thoubal at cheaper rate is in public interest. Therefore, the prayer of the first respondent to allot work to them is fit to be out rightly rejected.

28. This Court finds no force in the aforesaid submission made by learned counsel for the FCI for the simple reason that once the contract for transportation of food grains from FSD Jiribam to FSD Thoubal for a period of 2 years from 7.12.2021 to 6.12.2023 was awarded in favour of the first respondent, citing the disruption of rail connectivity in the Lumding Badarpur section and collapse of Irang Bridge during mid-May 2022 till last part of July, 2022, the authorities of the FCI cannot award or appoint another contractor in the place of the first respondent by stating that the transportation is to be done on economical routes and the decision of the FCI to move stocks from Dimapur to FSD Thoubal at cheaper rate is in public interest.

29. The claim of the petitioners that between May and July 2022, there was complete cut-off of the road due to heavy rain, which is the reason for appointing ad-hoc contractor is not an excuse for appointing the private respondent, when the existing contract in favour of the first respondent has not been terminated and the same subsists till December 6, 2023. Thus, when the contract awarded in favour of the first respondent subsists, the unilateral decision of the FCI in appointing the ad-hoc contractor is unacceptable. Nothing on record to show that

due notice was given to the first respondent before the ad-hoc appointment was made in favour of the private respondent.

30. The contention of the petitioners that since the first respondent never participated in the impugned re-tender, it has no legal right to question the same, cannot be countenanced for the reason that if a person participated and unsuccessful in the tender process filed a writ petition questioning the awarding of tender, then the said submission made by the petitioners is valid. In the present case, as stated supra, when the contract awarded in favour of the first respondent subsists, the FCI has awarded ad-hoc contract in favour of the private respondent. The said act of the FCI is not appreciable.

31. On behalf of the FCI, an argument was canvassed to the effect that the interim order dated 28.9.2022 affects the right of the private respondent. This Court is of the view that such an argument cannot be canvassed by the FCI on behalf of the private respondent.

32. Placing reliance upon the decision of the Gauhati High Court in the case of *Haji Enterprises*, supra, the learned counsel for the petitioners submitted that the FCI as public

authority is duty bound to go for cheaper expenditure to safeguard the public interest.

33. It is no doubt true that the primary objective of FCI is not only to cater to the NFSA requirement, but also to undertake movement of stock on least cost basis as FCI is run and financed by the Government of India from public exchequer. The least cost basis and the transportation on economical routes pleaded by the petitioners are to be examined by the FCI before awarding contract in favour of the first respondent. It is not the case of the petitioners that without seeing all these things, including the cost aspect, the tender was awarded in favour of the first respondent. Once the tender has been awarded in favour of the first respondent taking into consideration of the ground reality prevailed at the relevant point of time, later on changing their mind, the FCI for one reason or the other cannot contend that the first respondent has been awarded at the rate of Rs.4071/- per MT for the entire period, which is very high. When the FCI themselves stated in the earlier round of litigation in W.P.(C) No.326 of 2020 that handling charges at Dimpaur is very high, it cannot contend that the first respondent has quoted high value. In view of the above, the decision in *Haji Enterprises*,

supra, relied upon by the learned counsel for the petitioners is not favour to them.

34. The learned counsel for the petitioners, by placing reliance upon another decision of the Gauhati High Court in the case of *Vikash Construction*, supra, submitted that where it is in public interest, the Court will not interfere because public interest must override any consideration of private loss or gain.

35. This Court is in full agreement with the proposition that where it is in public interest, the Court will not interfere because public interest must override any consideration of private loss or gain. On the other hand, when the authority of the Government like FCI acts unfairly contrary to their earlier stand, the Courts can interfere in the acts done by the authorities.

36. In the instant case, admittedly, the first respondent was awarded contract from 7.12.2021 to 6.12.2023 and their contract period subsists till December 6, 2023, inasmuch as the capacity of the godown at FSD, Thoubal is only 3132 MT. While that being so, without terminating the contract awarded to the first respondent, awarding of ad-hoc contract to the private respondent amounts to unfair acts of the FCI. Therefore, the decision in *Vikash Construction* is not applicable to the case on

hand. As rightly canvassed by the first respondent, prima facie, there is no point to appoint another road transport contractor in the place of the first respondent.

37. The next argument of the learned counsel for the petitioners is that the allocation of quota of rice is not a matter to be decided in proceedings under Article 226 of the Constitution of India and, therefore, the writ petitions at the hands of the first respondent are not maintainable. In support, the learned counsel placed reliance upon the decision in the case of *S.A. Ngamo Agency*, supra. This Court perused the said decision and find that in the given facts and circumstances, the decision in *S.A. Ngamo Agency*, supra, is not applicable, as the factual matrix of the issue involved in the said case and in the present case are entirely different. That apart, in the instant case, there is no point in deciding the issue of allocation of quota of rice.

38. The argument of the learned counsel for the first respondent that the non-sanctioning of the work as contemplated in the contract till date is a clear case of arbitrary exercise of power, breach of law and violative of the freedom of trade and commerce cannot be brushed aside, as the contract between the FCI and the first respondent is due to expire in December, 2023. No explanation is forthcoming from the side of the FCI as to why

the work has not been allotted to the first respondent despite the route becoming operational.

39. The learned counsel for the petitioners by relying upon the decision in the case of *National High speed Rail Corporation Limited v. Montecarlo Limited and another*, (2022) 6 SCC 401, submitted that in contract and tenders, the test to be made are – (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour some; or whether the process adopted or decision made is so arbitrary and irrational that the court can say; “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”?; and (ii) Whether the public interest is affected? and if the answers to the above questions are in negative, then there should be no interference under Article 226 of the Constitution of India. Adding further, the learned counsel for the petitioners submitted that the FCI acted bona fide and in accordance with the relevant law. Therefore, applying the aforesaid decision, the Court cannot interference in the tender process.

40. In *National High Speed Rail Corporation Limited*, supra, the Hon’ble Supreme Court held:

“48. Even while entertaining the writ petitioner and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner’s notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advice, we rest the matter there and leave it to the wisdom of the Court(s) concerned, which ultimately may look to the larger public interest and the national interest involved.”

41. As stated supra, the tender period of the first respondent subsists till December 6, 2023 and the tender awarded to the first respondent has not been terminated and the first respondent is also ready to continue their work. Therefore, the present case is distinguishable from the facts involved in the aforesaid decision. The question of delaying the execution of the work does not arise in the instant case, as the FCI has unilaterally stopped the allocation of work in favour of the first respondent. Therefore, in the given facts and circumstances of the present case, this Court is of the *prima facie* opinion that the decision of the FCI in appoint ad-hoc contractor is in violation of the terms and conditions stipulated in the appointment of the first respondent, which warrants interim orders in favour of the first respondent.

42. It is settled law that in issuing the interim order, the tests to be applied are – (i) whether the petitioner has a *prima facie* case; (ii) whether the petitioner would suffer an irreparable loss of his prayer for interim order is disallowed; and, (iii) whether the petitioner would suffer an irreparable loss if his prayer for interim order is disallowed. The phrases ‘*prima facie* case’, ‘balance of convenience’ and ‘irreparable loss’, are words of width and elasticity to meet myriad situations presented by man’s

ingenuity in given facts and circumstances but they must always be hedged with a sound exercise of judicial discretion to meet the ends of justice. A *prima facie* case implies the probability of the petitioner obtaining a relief on the material placed before the Court. Every piece of evidence produced by either party has to be taken into consideration in deciding the existence of a *prima facie* case.

43. In the light of above, when this Court examines the case on hand, the materials produced by either side *prima facie* would prove that the first respondent is entitled to freedom of trade and commerce i.e. it is entitled for transportation of food grains till December, 2023, as the first respondent has neither been terminated nor has defaulted any terms and conditions of the contract. If the FCI considered that Jiribam route is expensive and against the least cost factor, it ought not to have done away with the grant of contract work for transportation by asking to deposit huge deposit amount of Rs.2,64,24,045/- and making the first respondent sitting idle without any work since June, 2022 till date. But appointing the private respondent on ad-hoc basis with a condition of depositing hardly Rs.10 lakh and allotting all works for transportation to the small capacity of godown at Thoubal itself shows mala fide and arbitrariness on the part of the FCI.

The admitted case of the parties is that the private respondent has deposited Rs.10.00 lakh, whereas the first respondent deposited Rs.2,64,24,045/- as security deposit. Thus, this Court is of the view that a *prima facie* case has been made out by the first respondent.

44. It is well settled that in order to obtain an interim order, the party who seeks for grant of such interim order has to prove that he has made out a *prima facie* case to go for trial/enquiry, the balance of convenience is also in his favour and he will suffer irreparable loss and injury, if interim order is not granted. But it is equally well settled that when a party fails to prove *prima facie* case to go for trial/enquiry, the question of considering the balance of convenience or irreparable loss and injury to the party concerned would not be material at all, that is to say, if that party fails to prove *prima facie* case to go for trial/enquiry, it is not open to the Court to grant interim order in his favour even if, he has made out a case of balance of convenience being in his favour and would suffer irreparable loss and injury, if no interim order is granted.

45. The law is also well settled that there must be some material on record in support of the claim of legal right put forward by the person who seeks interlocutory relief and such material

must either by itself or in the light of material placed before the Court by the opposite party, satisfy the Court that it could at that stage and under those circumstances act on it. This is precisely what can be comprehended by the expression *prima facie* case.

46. As stated *supra* and as *prima facie* proved by the first respondent, a *prima facie* case has been made out by the first respondent for grant of interim order and the balance of convenience is also with the first respondent who is continuing as regular transport contractor of FCI till December, 2023 for the FSD Thoubal and if the impugned re-tender is finalized in favour of the private respondent, irreparable loss would be caused to the first respondent.

47. For all the reasons stated above, this Court is of the view that the first respondent has established *prima facie* case, balance of convenience and the irreparable loss to get the interim order. Only after taking note of the aforesaid judicial action, this Court granted the interim orders directing the respondents in the writ petitions not to finalize the tender and not to extend the contract in favour of the private respondent respectively. Since the interim orders of this Court are based on *prima facie* evidentiary proof, there is no valid ground to interfere with the aforesaid interim orders. Therefore, this Court is of the view that

the interim orders granted by this Court needs to be made absolute.

48. In the result, MC (WP) Nos.398 and 399 of 2022 in W.P.(C) Nos.819 and 1012 of 2022 are dismissed. The interim order dated 28.9.2022 passed in W.P.(C) No.819 of 2022 and the interim order dated 30.11.2022 passed in W.P.(C) No.1012 of 2022 are made absolute.

49. It made clear that the opinion expressed by this Court in this order is only a *prima facie* opinion for dealing with only the interim relief prayed and not a view expressed on the main matter.

50. Since pleadings are completed, the Registry is directed to list the main writ petitions for hearing on 11.04.2023, as the tender awarded in favour of the first respondent is going to expire on December 6, 2023.

ACTING CHIEF JUSTICE

FR/NFR

Sushil