

HIGH COURT OF TRIPURA
AGARTALA

WP(C) NO.113 OF 2021

Shri Abhijit Paul,
Son of Sri Swapan Kumar Paul,
Resident of B.K. Road, Banamalipur, Agartala,
P.S. East Agartala,
District-West Tripura.

---Petitioner

Versus

1. Food Corporation of India,
Represented by its Managing Director, having its
Head Office at 16-20 Barkhamba Lane,
New Delhi-110 001.

2. The General Manager(R),
Food Corporation of India,
North East Frontier Region,
Midland, Shillong-03.

3. The Assistant General Manager(Contract),
Food Corporation of India,
North East Frontier Region,
Midland, Shillong-03.

4. The Area Manager,
Food Corporation of India, Colonel Chowmuhan,
Agartala, P.S. West Agartala, District-West Tripura.

---Respondents

BEFORE
HON'BLE MR. JUSTICE ARINDAM LODH

For Petitioner(s)	:	Mr. Raju Datta, Advocate Mr. Kundan Pundey, Advocate
For Respondent(s)	:	Mr. Arijit Bhaumik, Advocate
Date of hearing	:	13.02.2023
Date of delivery of Judgment	:	02.06.2023
Whether fit for reporting	:	YES

JUDGMENT & ORDER

This writ petition is directed against the impugned order dated 08.06.2020, passed by the respondent No.2, the General Manager(R), Food Corporation of India, Regional Office, North East Frontier Region, Shillong, whereby and whereunder the representation of the petitioner dated 09.03.2020 was rejected by the respondent No.2.

2. By filing the instant writ petition under Article 226 of the Constitution of India, the petitioner has prayed for the following relief(s):

“(i) As to why a Writ in the nature of Certiorari should not be issued quashing/setting aside the order dated 08.06.2020 passed by the Respondent No.2 whereby the representation of the petitioner dated 09.03.2020 was illegally rejected.

(ii) As to why a Writ in the nature of Mandamus should not be issued directing the Respondents to implement the Judgment & Order(Oral) dated 26.04.2017 passed in W.P(C) 1152/2016 passed by this Hon’ble Court which was affirmed by the Hon’ble Division Bench of this Hon’ble Court by an Order dated 14.11.2018 in W.A 34 of 2017 and directing the respondents to refund the security deposit amounting to Rs.2,00,000/- along with interest @12% per annum w.e.f. 31.01.2015 till the date of payment in respect of Contract for loading/unloading and handling of food grains/sugar/allied materials at FSD Nandannagar, Agartala on regular basis for

2(two) years executed by the petitioner under Appointment letter No.CONT.9/NEFR/HC.NDN/2012/ 3536 dated 04.06.2012 issued by the respondent No.2.”

3. The dispute raised in the present writ petition has a chequered history, and it would be necessary to refer certain facts before advertng to the merits of the order passed by the General Manager(R), Food Corporation of India, the respondent No.2 herein.

4. The genesis of the case as projected by the petitioner is that the petitioner, a Government Contractor & Supplier, having expertise on that field for several years, on submitting a tender in response to an Notice Inviting Tender (NIT) issued by the respondents, was awarded contract under work order dated 04.06.2012 and on satisfactory completion of the contract work, he raised demand vide his letter dated 30.01.2015 addressed to the respondent No.4, for releasing the security deposit amounting to Rs.2.00 lakh, but the respondents did not refund the same in spite of repeated persuasions.

4.1. Being aggrieved, the petitioner filed writ petition being WP(C) No.1152 of 2016 before this Court praying for directing the respondents to refund the security deposit with interest. After hearing the learned counsel appearing for the parties, the learned Single Judge had disposed of the writ petition vide judgment and order dated

26.04.2017 observing that “it is really unfortunate that without determining whether the petitioner is at all liable to pay any amount to the respondents or not they have withheld the security deposit for almost last 2(two) years. On careful perusal of the decisions as referred by the learned counsel for the parties as well as to the clause-XII of the contract in hand, the respondents are directed to complete the inquiry within a period of 3(three) months from the date when the petitioner shall furnish a copy of this order to the respondents on affording reasonable opportunity to the petitioner to have his say in the matter and within a month thereafter, the security deposit, if the petitioner is entitled to get any money refunded that shall be released forthwith. It is made clear that mere filing of a suit cannot be a ground to withhold any money from the petitioner. The pendency of the suit will not give any extra limb to the respondents to withhold the money. Further, it is observed that the respondents without any basis had withhold the money, the petitioner will be entitled to get 12% interest on the security deposit w.e.f. 31.01.2015 till the actual payment is made”.

4.2. Being aggrieved by the judgment and order of the learned Single Judge, the respondents preferred appeal being WA No.34 of 2017 before the Division Bench and the Division Bench of this Court

vide order dated 14.11.2018 dismissed the appeal filed by the respondents observing, *inter alia*, “we reiterate that all that the learned Single Judge has directed early completion of the inquiry and refund the amount towards the security deposit along with interest. We see no reason to interfere with such finding. The learned Single Judge has noticed that the inquiry with regard to the charge of demurrage pursuant to the judgment rendered by this Court is pending. Petition for condonation as well as the connected appeal stand dismissed”.

4.3. Thereafter, the petitioner approached the respondents by submitting representation requesting them to implement the order passed by the Division Bench of this Court and having found no response had filed contempt petition being Cont. Cas(C) No.19 of 2019 which was disposed of by a Division Bench of this Court vide order dated 11.02.2020 with the following observations:

“2. Since no such inquiry was completed nor security deposit released, this contempt petition came to be filed. In response to the contempt petition the respondents have filed a reply principally taking a stand that show-cause notices were already issued to the petitioner on 21.08.2015 and 22.12.2015 alleging loss and damage to the FCI on account of which demurrage charges would have to be recovered. On account of this, no further inquiry was necessary and in any case security deposit could not be released.

3. It would have been desirable that the Corporation should have disclosed such facts in reply to the writ petition itself. The Court passed an order oblivion of such developments which has led to issuance of directions which probably now cannot be implemented.

4. Be that as it may, the petitioner would file response to the said notices dated 21.08.2015 and 22.12.2015 within a period of 4(four) weeks from today. If such response is made, FCI shall take a final decision on the question of demurrage to be recovered from the petitioner and resultant release of security deposit which may become due. Such decision shall be taken within a period of three months from the date of receipt of the representation after granting personal hearing to the petitioner or his authorized representative.

All contentions of the petitioner are kept open.”

4.4. The petitioner in compliance of the order dated 11.02.2020 submitted representation on 09.03.2020 addressing the Divisional Manager, FCI, Agartala stating categorically that the letters referred by the respondents are in no way connected with the present case. On receipt of the said reply the respondents asked the petitioner to appear personally on 12.05.2020 and on his failure to appear again asked him to appear on 21.05.2020, 02.06.2020 and on 08.06.2020 at FCI Regional Office at Shillong and finally without giving opportunity of being heard, the respondent No.2 passed the impugned order dated 08.06.2020 and rejected the representation of the petitioner stating that the petitioner is not entitled to refund of his security deposit.

4.5. Thereafter, the petitioner filed a Review Petition bearing No. 23 of 2020 before the Hon'ble Division Bench against the order dated 11.02.2020 passed in Cont. Cas(C) No. 19 of 2019. But, that review petition was dismissed. Hence, the petitioner has urged before this court that the respondent no.2 had passed the impugned order dated 08.06.2020 arbitrarily which is liable to be set aside and quashed and he is entitled to get the refund of security deposit amounting to Rs.2.00 lakh with 12% interest w.e.f.31.01.2015.

5. Heard Mr. Raju Datta, learned counsel appearing for the petitioner as well as Mr. Arijit Bhaumik, learned counsel appearing for the respondents.

6. Mr. Datta, learned counsel for the petitioner at the very outset has submitted that the petitioner had successfully completed the contract work on 30.06.2014 as per Appointment letter dated 04.06.2012 mentioned in Clause V of the agreement. The petitioner deposited Rs. 2.00 lakh as security deposit to the respondents and after completion of the work the respondents are bound to refund the said security deposit. The respondents have issued a *No Demand Certificate* in favour of the petitioner. Therefore, after issuing the said Certificate,

the respondents cannot withhold the security deposit after completion of the work successfully. He has further submitted that since the contract work was relating to the loading and unloading of grains i.e. supply of labourers for loading and unloading purposes and as such there is no question of supply or short supply of trucks by the petitioner under this agreement. There is no scope of demanding railway demurrage charges from the petitioner without any fault of the petitioner. The petitioner never detained food grains to undergo natural decay, reduction due to rats, mice, etc. and also the public distribution system disrupts and in such an emergent situation the respondents had to appoint ad-hoc contractors at higher rates so as to ensure the public distribution system remains unaffected. Petitioner denied that he had suspended works during continuation in contract for which the respondents-FCI suffered huge loss towards railway demurrage charges for which they had to engage another ad hoc contractor on emergent basis. Thus, Mr. Datta, learned counsel for the petitioner has urged before this court to refund the security deposit to the petitioner as there was clause in the contract whereby the petitioner is not liable to pay any demurrage charges.

7. Mr. Arijit Bhaumik, learned counsel appearing for the respondents-FCI has submitted that the respondents-Corporation had

suffered huge loss because of the petitioner in execution of various transportation contracts in terms of demurrage charges. Mr. Bhaumik, learned counsel reiterated that the Corporation has a right to recover the losses sustained by them and the security deposit of the contractor is refundable only if the contractor successfully executes the work. Clause X(a), X(b) and XII of the agreement is very clear on this aspect. It is further agitated by Mr. Bhaumik, learned counsel that having understood and being aware of the terms and conditions of the agreement, the respondents are not liable to refund the security deposit to the petitioner.

8. Considering the aforesaid background, what is emerged that the present contract awarded in favour of the petitioner relates to the supply of labourers for loading, unloading and handling of food grains for which a security deposit for Rs.2.00 lakh was kept with the respondents-FCI. There is no complaint against the petitioner as regards the proper execution of the awarded work which was completed on 30.06.2014. On such completion of the work, the petitioner vide letter dated 30.01.2015 had sought for releasing the said security deposit. It is the plea of the respondents that the security deposit of Rs.2.00 lakh submitted by the petitioner for contract dated 04.06.2012 has been

adjusted for his alleged negligence in execution of 5(five) different transport contracts for which the respondents had to incur demurrage charges. According to the respondents, Clause-X(b) of the contract agreement clearly provides that the Corporation can deduct money due to the Contractor under the present or any other contract with the Corporation for losses suffered by the Corporation for negligence or unworkman like performance of the contract. Further, Clause-XII provides the set-off clause, which stipulates that any sum of money payable to the Contractor including security deposit may be appropriated and set-off by the Corporation against any claim of the Corporation arising out of this contract or any other contract.

9. Mr. Bhaumik, learned counsel appearing for the respondents had mainly relied upon the expression “any other contract” under Clause-XII of the loading and unloading contract dated 04.06.2012 executed between the petitioner and the respondents. According to learned counsel for the respondents, “any other contract” means and connotes that the respondents can adjust the loss suffered by them in execution of any other contract works from the bills of other contract works, even if, such contract is executed properly and without any complaint. So, since the respondents incurred loss and had to pay

demurrage charges in execution of transport contract, they had adjusted the said quantum of loss from the bills of the loading and unloading contract dated 04.06.2012.

10. Mr. Datta, learned counsel appearing for the petitioner emphatically submitted that after satisfactory performance of the loading and unloading contract dated 04.06.2012, the respondents themselves issued “no demand certificate” dated 30.01.2015 certifying that :

“(1) There was no breach by Contractor of any terms and conditions of the contract and damage, loss and expenses were suffered by the Corporation due to contractor’s negligence or unworthy man like performance.

(2) The contractor has not been held responsible of any loss, wastage and damage to grains during loading/unloading transport shortage, etc. and no recovery is due from him/her on that account.

(3) No demurrage has incurred due to delay or negligence on the part of the contractor in loading/unloading and removal of corporation goods within the free time allowed.

(4) The Contractor has not been responsible for any loss or damage to articles of the dead stock including gunnies and other Govt. property.”

11. So, according to Mr. Datta, learned counsel appearing on behalf of the petitioner, after issuance of ‘no demand certificate’ the

respondents most illegally and arbitrarily had adjusted the security deposit which was submitted against the loading and unloading contract work dated 04.06.2012 alleging the negligent and un-worthy man like performance in execution of some other “transport contract”.

12. Opposing the plea of the respondents that vide communication dated 27.06.2017 [Annexure-8 to the writ petition] addressed to the petitioner it was informed that the security deposit amounting to Rs.2.00 lakh had already been set-off against the loss suffered by FCI, Mr. Datta, learned counsel for the petitioner contended that the respondents suppressed the material fact that the said communication was challenged by the petitioner and one Sri Suvajit Paul by filing writ petition vide WP(C) No.88/2017, WP(C) No.89/2017, WP(C) No.90/2017, WP(C) No.91/2017, WP(C) No.92/2017 and WP(C) No.93/2017, whereby and where-under this High Court by a common judgment and order dated 08.09.2017 observed as follows:

“Having observed thus, the corporation-respondents are directed to release the security deposits of the writ petitioners within a period of three months from the date when the petitioners shall submit a copy of this order to the corporation-respondent. Failure in making payment as aforesaid within the time as stipulated, the respondents shall be

liable to pay interest @ 9% per annum from the date when the petitioners had received the no-demand certificate from the respondents.

In the terms of the above, these writ petitions are allowed and disposed of. There shall be no order as to costs.”

13. Against the aforesaid judgment, the respondents preferred Special Leave Petition before the Hon’ble Supreme Court and the said SLP was dismissed upholding the common judgment and order dated 08.09.2017, passed by this court in WP(C) No.88/2017 along with other writ petitions (supra) and the respondents were directed to release the security deposit along with interest @ 9% per annum in favour of the petitioner. Mr. Datta, learned counsel for the petitioner further submitted that the petitioner also challenged the similar illegal and arbitrary action on the part of the respondents by means of filing writ petitions which were registered as WP(C) 366/2012 along with other writ petitions passed on 27.02.2015 and WP(C) No.1351/2016 passed on 14.12.2017 whereby in the judgment and order dated 14.12.2017 this court had observed thus:

“.... The FCI as by interpreting that direction occupied the position of an arbiter, which action cannot be permitted by law as no one cannot be the judge of own cause in order to resolve highly disputed positions.

Having observed thus, the FCI is directed to refund the said amount of Rs.2,32,156/- to the petitioner within a period of 3(three) months from the day when the petitioner shall submit a copy of this order. However, they may go for the realisation of the damage, if any, they have suffered either by way of demurrage or for any other act of the petitioner. They cannot resort to a course of withholding the payment due to the petitioner. If the civil court decides in their favour, they can realize the damage by dint of the process of law.”

14. I have considered the rival submissions advanced by the learned counsels appearing for the parties. The principal question centers around whether the respondents can adjust the security deposit submitted in connection with a particular work by the Contractor for alleged loss suffered by them in relation to other contract works. Admittedly, the security deposits of Rs.2.00 lakh has not been paid to the petitioner due to improper execution of loading/unloading contract work dated 04.06.2012. The said amount has been adjusted due to alleged negligence on the part of the Contractor in execution of other contract works i.e. transport contract. It leads me to peruse the Clause-X and Clause-XII of the Annexue-1, attached with the tender document [Annexure-7 to the writ petition, relevant pages 173 & 174] laying down the terms and conditions which are reproduced here-in-below:

“Clause X. Liability of Contractors for losses etc.

suffered by Corporation

- a) *The contractors shall be liable for all costs, damages, demurrages, wharfage, forfeiture of wagon, registration fees, charges and expenses suffered or incurred by the Corporation due to the contractor's negligence and un-workman like performance of any services under this contract or breach of any terms thereof or his failure to carry out the work with a view to avoid incurrence or demurrage etc. and for all damages or losses occasioned to the Corporation due to any act whether negligent or otherwise of the contractor themselves or his employees. The decision of the General Manager regarding such failure of the contractor and his liability for the losses, etc. suffered by Corporation and the quantification of such losses, shall be final and binding on the contractor.*
- b) *The Corporation shall be at liberty to reimburse themselves of any damages, losses, charges, costs or expenses suffered or incurred by it due to contractors negligence and un-workman like performance of services under the contract or breach of any terms thereof. The total sum claimed shall be deducted from any sum then due or which at any time hereafter may become due to the contractor under this or any other contract with the Corporation. In the event of the sum which may be due from the Corporation as aforesaid being insufficient, the balance of the total sum claimed and recoverable from the contractors as aforesaid shall be deducted from the security deposit furnished by the contractor. Should this sum also be not sufficient to cover the full amount claimed by the Corporation, the contractor shall pay to the Corporation on demand the remaining balance of the aforesaid sum claimed....*

Clause XII. Set-off: *Any sum of money due and payable to the Contractor (including Security Deposit refundable to the Contractor) under this Contract may be appropriated by the Corporation and set off against any claim of the Corporation for the payment of any sum of money arising out of, or under this contract or any other Contract made by the Contractor with the Corporation.”*

15. Admittedly, the respondents have invoked the expression “any other work” to deduct/adjust the security deposit of Rs.2.00 lakh submitted by the petitioner against the tender for loading and unloading contract. Now, the question is whether this expression “any other contract” can be invoked by the respondents when there is no complaint against the petitioner in execution of the loading and unloading contract under the tender.

16. On careful reading of the provisions of Clause-X and XII as quoted above, in the opinion of this court, before invoking set-off Clause under Clause-XII, it must be proved that the Corporation suffered loss due to negligence or un-workman like performance of the contractor in execution of any work under any contract. There is no material or details of breakup how the respondents suffered loss in execution of any other contract work. Negligence or un-workman like performance being a matter of fact is to be established by laying evidence where all materials and records are to be placed and this only can be considered by a civil court. The respondents cannot unilaterally decide that the Contractor is negligent as like as poor workmanship. I am in respectful agreement with the judgment and order dated 27.02.2015 passed in WP(C) 366/2012 and judgment dated 14.12.2017

passed in connection with WP(C) No.1351/2016 where this court held that “*FCI has by way of interpreting that direction occupied the position of an arbiter, which action cannot be permitted by law as no one cannot be the judge of own cause in order to resolve highly disputed positions.*”

17. I have also taken into consideration the decisions cited by learned counsel appearing for the respondents-FCI. His submission was that a dispute emerged out of a contract cannot be agitated or resolved in a writ proceeding invoking this court’s extra-ordinary and discretionary jurisdiction under Article 226 of the Constitution. Mr. Bhaumik, learned counsel appearing for the respondents urged that it was open to the respondents to approach the court of appropriate jurisdiction for appropriate relief for breach of contract. In support of his submissions, learned counsel had placed reliance upon the case of (i) ***Joshi Technologies International inc. Vrs. Union of India & Ors.,[(2015) 7 SCC 728, para 69]***, (ii) ***Barreily Development Authority & Anr. Vrs. Ajai Pal Singh & Ors.,[(1989) 2 SCC 116, paras 21 & 22]***.

18. *Observance of procedural fairness and fair play is the soul of all administrative actions.* According to this court, negligence or poor work-manship on the part of the Contractor is to be established first.

The expression that *“any sum of money due and payable to the contractor (including security deposit) refundable to the contractor under this contract may be set-off against any claim of the Corporation for the payment of any sum of money arising out of **“any other contract”** made by the contractor with the Corporation”*, in my opinion, is a punitive clause and being it imposed upon the Contractor as a punitive measure, it cannot be invoked by an administrative/State authority mechanically without following the due process of law. In addition, such punitive measure can be taken against the Contractor only when the fact of “negligence” or “poor work-manship” is proved by an appropriate statutory adjudicating body under the Corporation having authority to decide such issues, which is to be discerned from the related contract document itself. However, in absence of such statutory adjudicating body, the remedy lies with the Corporation to approach the civil court of competent jurisdiction, where the Corporation would get the opportunity of leading relevant evidence to substantiate its loss due to the negligence or poor-workmanship of the Contractor. Pertinent to mention here-in that, admittedly, there is no statutory adjudicating body to determine issues relating to “negligence” or “poor-workmanship” attributed to the Contractor during the

performance of works under different contracts entered upon between the Contractor and the Corporation.

19. Cumulative effect of aforesaid discussion is that, in absence of duly constituted decision making statutory authority, any order passed by the FCI authorities imposing the punitive clause as set out and discussed here-in-above would be an arbitrary exercise of jurisdiction which fails the test of reasonableness *vis-a-vis* the settled principles of administrative jurisprudence and thus offends Article 14 and 19(1)(g) of the Constitution.

20. Applying the aforesaid principle, the impugned order dated 08.06.2020, since, has resulted in denial of the fundamental rights guaranteed under Part-III of the Constitution and suffers from jurisdictional error as enumerated in the preceding paragraphs, in my opinion, in the context of the case, this court can invoke its extraordinary and discretionary power of judicial review even in contractual matters.

21. This court while disposing of ***WP(C) No.366/2012*** along with other connected writ petitions titled as ***Sri Abhijit Paul Vrs. the FCI & 2 Ors.*** had dealt with similar submissions regarding the exercise

of discretionary power of judicial review of this court in contractual matters and observed thus:

“8. Even though the dispute has emerged from the contract, this court have the limited jurisdiction to judicially review the action of the respondents, inasmuch as, it has been enunciated by the apex court in **Kumari Shrilekha Vidyarthi Vs. State of U.P. & Ors.**, reported in **AIR 1991 SC 537** that the State activity in contractual matters also may fall within the purview of judicial review. Every State action must survive the test against arbitrariness and abuse of power. Non-arbitrariness, being a necessary concomitant of the rule of law, is imperative that all actions of every public functionary, in whatever sphere, must be guided by reasons and not whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State. Exercise of all powers must be for public good, instead of being abuse of the power.”

22. In case of **Sri Abhijit Paul** (supra), this court being countered with almost similar situations set aside the impugned order of adjustment/set-off issued by the FCI authorities, which was affirmed and approved by the Hon'ble Supreme Court in **Food Corporation of India & Ors. Vrs. Abhijit Paul**, reported in **2022 Online SC 1605**.

23. Applying the aforesaid principles of law, in the context of the present case, in my opinion, the impugned order dated 08.06.2020 issued by the respondent no.2 is not sustainable in law. Accordingly, the said order dated 08.06.2020 stands set aside and quashed. However, liberty is given to the FCI-respondents to approach the civil court of competent jurisdiction seeking appropriate relief.

24. In the result, the writ petition is allowed and disposed of. The respondents are directed to release/refund the security deposit within a period of 30(thirty) days from today.

Pending application(s), if any, shall also stand disposed.

JUDGE

