

HIGH COURT OF TRIPURA
AGARTALA

RFA 25 OF 2022

1. The Food Corporation of India, having its registered Office at Khadyasadan, 16-20, Barakhamba Lane, New Delhi, PIN-110001. Being represented by the General Manager, NEF Region, Jowai Road, Shillong-3, Meghalaya, (Now General Manager (Region) NEF Region, Mawlai Mawroh, Shillong-793008),

2. The Divisional Manager (Erstwhile Area Manager),
Food Corporation of India, Divisional Office, Colonel Chowmuhan, P.O. Agartala, P.S. West Agartala, District-West Tripura, PIN-799001.

....Appellants.

Vrs.

Smt. Namita Paul,
W/o Sri Swapan Kumar Paul,
R/o B.K.Road, Banamalipur, P.O.Dhaleswar,
P.S. East Agartala, District-West Tripura,
PIN-799007.

....Respondent.

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....Respondent.

Present (in both the appeals):

For the appellants : Mr. A. Bhaumik, Advocate.
Mr. S. Dey, Advocate.

For the respondents : Mr. Raju Datta, Advocate.

Date of hearing : 31.08.2023

Date of delivery of judgment & order : 19.10.2023

Whether fit for reporting : Yes

**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR.JUSTICE ARINDAM LODH**

JUDGMENT & ORDER

[Arindam Lodh, J.]

Since common questions of law and facts are involved in both the appeals, these were heard together on consent of learned counsel for the parties and are being taken up for decision by this common judgment.

2. These appeals under Section 13 of the Commercial Courts Act, 2015 read with Order XLI of the Civil Procedure Code, 1908 have been filed challenging the common Judgment and Decree dated 06.07.2022, passed in Case No. C.S.08/2017 & C.S. 04/2016 by the learned District Commercial Court, West Tripura, Agartala whereby the Suit bearing No. CS 08 of 2017 filed by the respondent [the original plaintiff] was partly decreed and the Suit bearing No.CS 04 of 2016 filed by the appellants [the original defendants] was dismissed.

3. The facts as narrated in common judgment i.e. in Commercial Suit No. 08 of 2017 and Commercial Suit No.04 of 2016 by learned Judge, District Commercial Court, may be reproduced here-in-below for the sake of convenience since the facts leading to CS 08 of 2017 filed by M/S Namita Paul being the plaintiff and her defence in CS 04 of 2016 are similar and the Food Corporation of India (for short, 'FCI') and its officials being the

plaintiffs in CS 04 of 2016 and their defence in CS 08 of 2017 are also similar and identical.

“The plaintiff claimed to be a Transport Contractor and has been carrying on such business successfully since 1995. The defendants issued a Notice Inviting Tender(for short NIT) dated 21.08.2009 in two bid tendering system(technical bid and price bid) for appointment of transport contractors for a period of two years for transportation of food grains/sugar and other allied materials from Railway siding(FSD), Churaibari to FSD Arundhutinagar, Agartala. Estimated value of the work was 4 crores 35 lacs and the scheduled rate for carrying food grains was prescribed at Rs. 611.22 per MT. The plaintiff being lowest bidder was accordingly appointed for transportation of food grains/sugar and other allied materials and after negotiation rate was fixed at Rs. 913.77 per MT which is 49.5% above the scheduled rate. The plaintiff commenced the transportation of food grains in terms of contract w.e.f. 16.11.2009. According to the plaintiff the rate quoted by the plaintiff was feasible only if she carries a load ranging from 16 MT to 19 MT per vehicle. Accordingly the plaintiff did the transportation works carrying loads of 16 to 19 MT per vehicle and bills submitted by the plaintiff in this connection were duly cleared by the defendants. The defendants also issued road movement permits(RMP) for the vehicle indicating gross weight of the goods to be carried ranging from 16 MT to 19 MT but from the 3rd week of October, 2010 all on a sudden the plaintiff started facing difficulties in its transportation within the State of Tripura because of the fact that the defendants have deviated from the prevailing system of issuing indents for Truck and instead of issuing indents on the basis of load capacity of 16 to 19 MT per Truck they started issuing indents on the basis of reduced load capacity of 8 to 10 MT per Truck. Being confronted by the situation the plaintiff came to know about the Supreme Court judgment in the case of Paramjit Bhasin & Ors vs Union of India & Ors. reported in (2005) 12 SCC 642. In the said case Hon’ble the Supreme Court had examined the legality of notifications issued by various State Governments permitting carriage of excess weight of goods laying down the law and issued directions to withdraw such notifications forthwith. Situating thus, the plaintiff started facing serious difficulties in its transport operation. The defendants were not allowing more than 8 to 10 MT of load in a Truck whereas from November, 2009 till 3rd week of October, 2010 the plaintiff carried 16 to 19 MT load in each Truck. Moreover, the rate quoted by the plaintiff on the basis of carriage of 16 to 19 MT of load in each Truck and the enforcement of restriction on carriage by Trucks to average 19 tonnes it became impossible for the plaintiff to carry out its contractual obligation at the rates quoted by it. The plaintiff, however, continued to execute the contract sustaining huge loss and kept on carrying food grains by engaging Trucks with permissible loads. The defendants vide, their letter dated 18.10.2010 and 19.10.2010 directed the plaintiff to engage more Trucks otherwise threatened to take action under the

purview of clause X(C) of the agreement. In response the plaintiff vide, his (sic 'her') letter dated 23.10.2010 had urged for enhancement of the rate of transportation in new changed situation. But the defendants without giving any reply to the letter of the plaintiff issued the letter dated 06.11.2010 advising the plaintiff to engage more trucks within a short period and thereafter without issuing any show cause notice even without giving an opportunity of being heard invoked the clause X(C) of the agreement and thereby terminated the contract at the risk and cost of the plaintiff. Not only that the defendants have engaged other new contractors namely, Sri Abhijit Pal and SMTs. Putul Saha for a period of six months at unusually much higher rates, i.e., about double the rate by an order dated 24.12.2010. The plaintiff claimed to have carried on execution of the contract up to 23.12.2010 but after finding that the defendants have engaged new contractor had stopped the transportation from 24.12.2010. The defendants further vide, order dated 22.06.2011 appointed aforesaid two contractors for carrying out the remaining portion of the contract for further period of six months at about the same rate contained in the earlier order dated 24.12.2010. The defendants further vide., demand notices dated 19.03.2011, 02.04.2011, 18.06.2011, 11.07.2011, 07.09.2011 claimed certain amounts on account of purported extra expenditure at the purported risk and cost of the plaintiff for carrying out the remaining portion of the transportation work under contract.

The plaintiff further stated that the defendants in its NIT dated 21.08.2009 did not mention the condition of compliance with the prescription against excess load beyond the maximum permissible limit in terms of the notification of the Govt. of India. On the contrary it resorted to practice of ignoring the aforementioned prescription and allowed the plaintiff to carry its contract work of transportation by loading transport vehicles beyond the prescribed maximum weight. The plaintiff, therefore, contended that the conduct of the defendants was arbitrary, illegal and caused serious prejudice to the plaintiff. The plaintiff further claimed to have carried the food grains for a period of twelve months valued at Rs. 1,52,26,860/- and thereby earned Rs. 15,22,686/- towards profit and as such, if he (sic 'she') had carried the goods for remaining twelve months he(sic 'she') could have earned Rs. 15,22,686/- as profit. In fine, the plaintiff prays for declaration that-(i) the order No. Cont.9/NEFR/TC/CBZ-ADNR/09, dated 24.11.2010; (ii) the order No. Cont.9/DO-AGT/TC/CBZ-ADN/Ad-hoc/2010, dated 24.12.2010; (iii) the order No. Cont.9/NEFR/TC/CBZ-ADNR/09/9532, dated 02.11.2011; (iv) the order No. Cont.9/NEFR/TC/CBZ-ADNR/Adhoc/2011/6322, dated 22.06.2011 and the demand notices dated 19.03.2011, 02.04.2011, 18.06.2011, 11.07.2011, 07.09.2011 are illegal arbitrary and wrong. The plaintiff further claimed for recovery of security deposit of Rs. 18,48,843/- and a sum of Rs. 15,22,686/- towards loss of profit along with 12% interest per annum thereon."

4. Being summoned, the defendants [appellants herein] appeared and contested the suit by filing written statement and on the basis of the

pleadings, learned trial Court had framed the following issues in both the suits:

Issues in CS 08 of 2017

- I. *Is the suit maintainable in its present form and nature?*
- II. *Has the plaintiff got any cause of action to institute this suit?*
- III. *Are the order bearing Nos.(i) No. cont.9/NEFR/TC/CBZADNR/09, dated 24-11-2010 issued by defendant No.5, (ii) No. cont.9/DOAGT/TC/CBZ-ADNR/Ad-hoc/2010, dated 24-12-2010 issued by defendant No.4, (iii) letter bearing No. cont.9/NEFR/TC/CBZ-ADNR/2009/9532, dated 01-11-2011 issued by defendant No.2, (iv) No.cont.9/NEFR/TC/CBZADNR/Ad-hoc/2011/6322, dated 22-06-2011 issued by defendant no.2 AND (v) Demand Notices, dated 19-03-2011, 02-04-2011, 18-05-2011, 11-07-2011 and 07-09-2011 issued by defendant no.4 void and illegal?*
- IV. *Is the plaintiff entitled to recover a sum of Rs. 18,48,843/- as security deposit from the defendants ? If so, is the plaintiff entitled to interest thereon @ 12% p.a.?*
- V. *Is the plaintiff entitled to recover a sum of Rs. 15,22,686/- towards loss of profit from the defendants? If so, is the plaintiff entitled to interest thereon @ 12% p.a.?*
- VI. *Whether the plaintiff is entitled to get any decree as prayed for?*
- VII. *To what relief/reliefs the parties to this suit are entitled?*

Issues in CS 04 of 2016

- I. *Is the suit maintainable in its present form and nature?*
- II. *Have the plaintiffs any cause of action to file the instant suit?*
- III. *Are the plaintiffs entitled to get a sum of Rs.1,89,86,602/- from the defendants? If so, are the plaintiffs entitled to any interest thereon?*
- IV. *Are the plaintiffs entitled to a decree, as prayed for?*
- V. *What other relief/reliefs the plaintiffs are entitled?*

5. On the basis of aforesaid issues, evidences were adduced by the parties. Thereafter, having heard the arguments of learned counsel appearing for the parties, the learned Commercial Court partly decreed the Commercial Suit No.08 of 2017 in favour of the plaintiff/respondent and dismissed the

Commercial Suit No. 04 of 2016 filed by the defendant-FCI/appellants by the impugned common judgment.

6. The operative portion of the judgment reads as follows:

“In the result, CS 8 of 2017 stands decreed partly on contest. The plaintiff is entitled to get an amount of Rs. 15,22,686/- (Rupees Fifteen lakhs twenty two thousand six hundred eighty six) only along with 6% interest per annum thereon from 24-12-2010 till the date of realization towards loss of profit. The plaintiff is also entitled to get an amount of Rs. 18,48,843/- (Rupees Eighteen lakhs forty eight thousand eight hundred forty three) only towards refund of security deposits. The amount towards refund of security deposits shall be paid within three months failing which the amount shall carry 6% interest per annum from the date of filing this suit on 19-01-2012 till the date of realization.

CS 04 of 2016, however, stands dismissed.

To feel contrive for their (defendants) reproachable conduct, there is no order as to cost.

Prepare decree accordingly.

Original copy of the Judgment be maintained in CS 8 of 2017 and a certified copy of the Judgment be maintained in CS 4 of 2016.

Both the suits accordingly, stand disposed of on contest.”

7. Being aggrieved by and dissatisfied with the findings of learned Commercial Court, the appellants/defendants have preferred the instant appeals.

8. In both the appeals, heard Mr. Arijit Bhaumik, learned counsel appearing for the appellants as well as Mr. Raju Datta, learned counsel appearing for the respondent.

9. Mr. Bhaumik, learned counsel for the appellants challenging the impugned common judgment and order passed by the learned Commercial Court mainly raised his plea that learned trial Court had failed to appreciate that the respondent/plaintiff being a contractor was under a contractual obligation to execute the transportation work as per work order dated 12.11.2009 wherein the contract period was for a duration of 2 years i.e. upto

15.11.2011, but, the respondent/plaintiff suspended the work after 24.12.2010. The appellants/Corporation issued several letters of notices to the respondent/plaintiff and in spite of that she did not improve her performance. It was submitted by Mr. Bhaumik, learned counsel that under compelling circumstances, the appellants/Corporation had to impose Clause X(c) of the agreement i.e. in the event of failure of the original contractor in supplying adequate number of trucks and labourers etc. the appellant/Corporation can have the alternative remedy to get the work done by engaging other labourers, trucks, etc. at the cost of the original contractor. It was the further contention of Mr. Bhaumik, learned counsel that as per Clause X(c) of the agreement, the contractor is duty bound to bear all the additional charges, expenses, cost or losses that the appellants/Corporation may incur or suffer thereby. Thus, according to Mr. Bhaumik, learned counsel, in the present case in executing the work through *ad hoc* Contractors, the appellants/Corporation had incurred total expenditure of Rs.1,89,86,602/- which the respondent/contractor is liable to pay. It is averred by Mr. Bhaumik, learned counsel that the appellants/Corporation never allowed the respondent/contractor to carry over load than the permissible limits and when a judgment of Hon'ble Supreme Court in ***Paramjit Bhasin & Ors. Vrs. Union of India & Ors., (2005) 12 SCC 642*** came into force, the respondent/contractor had to carry load within the permissible limits, for which the respondent/contractor suspended the work. It is further strenuously argued by Mr. Bhaumik, learned counsel that learned trial Court came to an erroneous findings that the *ad hoc* contractors were appointed at higher rate, but, the appellants/Corporation did not enhance the rate of the respondent/contractor pursuant to her letter dated 23.10.2020. It is

the assertion of the corporation that the *ad hoc* contractors were appointed at higher rate on emergent situation. Thus, Mr. Bhauwmik, learned counsel unequivocally submitted that due to unprofessional activities and negligence on the part of the respondent/contractor, the appellants/Corporation had suffered a huge loss in carrying out the remaining part of the contract work through appointment of *ad hoc* contractors and as a result of which the respondent/contractor is not entitled to refund of any security deposit, rather the same will be adjusted against the loss suffered by the appellants/Corporation. Accordingly, Mr. Bhaumik, learned counsel for the appellants/Corporation prayed for setting aside the impugned judgment and order passed by learned Commercial Court.

10. Mr. Raju Datta, learned counsel appearing for the respondent/contractor refuting the submissions of learned counsel for the appellants mainly contended that on the basis of Road Movement Permit (for short, RMP) issued by the FCI/appellants, the respondent/contractor carried the food grains at the quantum of 16 Metric tons (MTs) to 19 Metric tons (MTs), but, subsequently the appellants/Corporation did not allow the respondent/contractor to transport same quantity of food grains for which the respondent/contractor had suffered financial loss. Mr. Datta, learned counsel again submitted that Clause X(c) of the agreement has not been fully complied with by the appellants/Corporation as the letter dated 19.10.2010 is not at all be treated a notice under Clause X(c), rather it is a general letter to 7(seven) contractors and in the said letter it is not specifically stated as to how and in what manner the contractor failed to supply trucks to the appellants. More so, before engagement of new contractors, no notice under Clause X(c) was

issued to the respondent, therefore, the appointment of new contractors is absolutely arbitrary and illegal according to Mr. Datta, learned counsel. Further, Mr. Datta, learned counsel agitated before this Court that the appellants/Corporation could not submit any scrap of paper/document to prove that they had suffered any loss due to the act of the contractor/respondent and on failure of such proof, they cannot be permitted to forfeit the security deposit as sought for in the instant appeals. On the issue of forfeiture of security deposit by a contractor, Mr. Datta, learned counsel had drawn attention of this Court to the decisions rendered by the Division Bench of this Court in ***RFA 14 of 2016, RFA 16 of 2019*** along with ***RFA 17 of 2019*** wherein this Court had decided identical issues between the same parties. As such, Mr. Datta, learned counsel urged that the respondent/contractor did not commit any breach of contract and the Corporation did not suffer any loss due to any fault of the respondent/contractor and according to learned counsel, the respondent/contractor is entitled to get refund of the security deposit.

11. We have heard learned counsel for the parties and perused the findings of the impugned judgment passed by learned Commercial Court, West Tripura, Agartala.

12. The case of the appellants/Corporation in these appeals are centered round mainly on the issue of non-performance of the contractual obligations of the respondent/contractor in fulfilling the terms and conditions of the agreement made in between them. It is the case of the appellants/Corporation that they had rescinded the contract entered into with the plaintiff/respondent since the plaintiff suspended the work after

24.12.2010 violating the terms and conditions of the work which resulted the public distribution system in serious crisis and disruption affecting the public interest. The appellants vide their several communications informed the plaintiff/respondent that failure to perform the contract may make her liable to make good the losses suffered by the Corporation, but, the plaintiff/respondent did not pay any heed to such communications of the appellants/Corporation. Thereafter, the appellants/Corporation was compelled to invoke Clause X(c) of the agreement vide communication dated 24.11.2020. It is therefore, noticed from the case records that the defendants/Corporation had invited 'Limited Spot Tender Notice' dated 03.12.2010 for appointing *ad hoc* contractors for transportation of food grains with higher rate than that of the rate as quoted by the plaintiff/respondent. The defendant/appellants claimed to have paid an amount of Rs.644.84 per MT extra to the *ad hoc* contractors involving an extra expenses of Rs.71,06,186/- for the period from 24.12.2010 to 23.06.2011. The defendant/appellants further claimed that they have paid an amount of Rs.642.61 per MT extra to the *ad hoc* contractors involving an amount of Rs.1,18,80,416/- for the period from 24.06.2011 to 15.02.2012. Again, it is claimed by the defendant/appellants that due to breach of contract on the part of the plaintiff, they had to incur an amount of Rs.1,89,86,602/- and, consequently they sought for relief i.e. recovery of the said amount from the plaintiff/respondent with appropriate interest thereon.

13. Now, as we have seen from the evidence of plaintiff/respondent being PW-1 that as per the contract the plaintiff/respondent was allowed to carry goods with the load capacity ranging from 16 MTs to 19 MTs per vehicle, but surprisingly, the appellants/defendants had restricted the load to 8

to 10 MTs per truck. Resultantly, the plea of the plaintiff/respondent was that due to restriction on the ground of load capacity the plaintiff/respondent had to suffer severe difficulties. The plaintiff/respondent claimed enhancement of the rate, but the appellant/defendants Corporation terminated/cancelled the contract entered into with the plaintiff/respondent, vide communication dated 24.11.2010 which led the plaintiff/respondent to suffer huge professional loss. The said communication may be reproduced hereunder for the sake of convenience:

“No.F.Cont.9/NEFR/TC/CBZ-ADNR/09 dated 24.11.2010

To

M/s Namita Paul
B.K.Road, Banamalipur,
Agartala-I

M/s. R.K. Saha & Sons,
Old Thana Lane,
Agartala-I

Sub: Transport contract on regular basis for two years for transportation of food grain/sugar/allied materials from Railway siding/FSD Churaibari to FSD Arundhatinagar, Agartala.

Ref: This Office letter No.F9/NEFR/HTC/Misc-Corres./2008-09 dated 18.10.10., 19.10.10,4/6.11.10 issued by Area Manager, Agartala.

Sir,

Kindly refer to this office letter of even no.dtd. 12.11.09 appointing you as transport contractor on regular basis for two years for transportation of food grain/sugar/allied materials from Railway Siding/FSD Churaibari to FSD Arundhatinagar, Agartala and you had joined for the work on 16-11-2009.

2. Whereas your performance being not to the satisfaction of the Corporation, you were repeatedly requested/advised to improve your performance. In this connection the communications cited above may be referred. As your performance in executing the work entrusted to you has not been satisfactory, you were repeatedly requested to improve performance by placing trucks to clear the wagons indented to you and to transport stocks to the destination depots. Despite repeated requests to you from Area Manager, Agartala you have not paid any heed and the placement of trucks at Churaibari in the month of October & November 2010 has drastically come down thus causing depletion of stock position of food grains in the depots at Agartala. FCI has been faced with extreme difficulty to meet the PDS & other requirements of the State Govt. The position has now reached an alarming level and may lead to food crisis in the State of Tripura.

3. In spite of repeated notices & letters you cared a little to improve your performance and behaved in a most un-workman like manner and thus putting the corporation to continuous loss and injury whereas because of your un-workman like performance and as you have not responded to the repeated requests to improve performance, the undersigned has no other option but to take action as per tender clause.

4. Whereas the FCI is of the opinion that you have failed to carry out the contract work as per agreement and also there is no chance of any further improvement in performance and in the process the Corporation cannot afford to sustain further loss and allow the Public Distribution System suffer due to lack of supply of food grains at the depots in Agartala.

5. Now, in exercise of the powers vested upon the undersigned under Clause-X, hereby invoke upon you X'C' of the contract agreement entered between you and the Corporation for transportation of food grain, sugar, allied materials from Railway Siding/FSD Churaibari to FSD Arundhatinagar, Agartala and to get the work done at your risk & cost for the remaining period of the contract with you and you shall be liable to make good to the Corporation all, the additional charges/expenses, cost of losses that the Corporation may incur or suffer thereby.

Yours faithfully,

(B.B.Singh)
Dy. GENERAL MANAGER”

(emphasis supplied)

14. In view of the above facts, it would be useful to have glance at Clause X & XI of the agreement which prompted the appellants/Corporation to revoke the contract entered into with the plaintiff/respondent. Clause X & XI of the contract reads as follows:

X. Summary Termination:

“(a) In the event of the contractors having been adjudged insolvent or going into liquidation or winding up their business or making arrangements with their creditors or failing to observe any of the provisions of this contract or any of the terms and conditions governing the contract, the General Manager shall be at liberty to terminate the contract forthwith without prejudice or any other rights or remedies under the contract and to get the work done for the unexpired period of the contract at the risk and cost of the contractors and to claim from the contractors any resultant loss sustained or costs incurred.

(b) The General Manager shall also have without prejudice to other rights and remedies, the right, in the event of breach by the contractors of any of the terms and conditions of the contract to terminate the contract forthwith and to get the work done for the unexpired period of the contract at the risk and cost of the contractors and/or forfeit the security deposit or any part thereof for the sum or sums due for any damages, losses, charges, expenses or costs that may be suffered or incurred by the Corporation due to the contractor's negligence or un-workman like performance of any of the services under the contract.

(c) *The contractors shall be responsible to supply adequate and sufficient labour, scales/trucks/carts/any other transport vehicle for loading/unloading, transport & carrying out any other services under the contract in accordance with the instructions issued by the General Manager or an officer acting on his behalf. If the contractors fail to supply the requisite number of labour, scales and trucks/carts, the General Manager shall at his entire discretion without terminating the contract, be at liberty to engage other labour, scales, trucks/carts, etc. at the risk and cost of the contractors, who shall be liable to make good to the Corporation all additional charges, expenses, cost or losses that the Corporation may incur or suffer thereby. The contractors shall not, however, be entitled to any gain resulting from entrustment of the work to another party. The decision of the General Manager shall be final and binding on the contractors.*

XI. Security Deposit:

(a) *The contractor shall furnish within a week of the acceptance of their tender, security deposit as prescribed in the invitation to tender failing which the contract shall be liable to cancellation at the risk and cost of the contractors and subject to such other remedies as may be open to the General Manager under the terms of the contract. The contractors at their option may deposit fifty per cent of the prescribed security*

(b) *The security deposit will be refunded to the contractors on due and satisfactory performance of the services and on completion of all obligations by the contractors under the terms of the contract and on submission of a No Demand Certificate, subject to such deduction from the security as may be necessary for making up of the Corporations claims against the contractor.*

(c) *In the event of termination of the contract envisaged in Clause-X, the General Manager, shall have the rights to forfeit the entire or part of the amount of security deposit lodged by the contractors or to appropriate the security deposit or any part, thereof in or towards the satisfaction of any sum due to the claimed for any damages, losses charges, expenses or costs that may be suffered or incurred by the Corporation.*

(d) *The decision of the General Manager in respect of such damages, losses, charges, costs or expenses shall be final and binding on the contractors.*

(e) *In the event of the security being insufficient or if the security has been wholly forfeited, the balance of the total sum recoverable as the case may be shall be deducted from any sum then due or which at any time thereafter may become due to the contractors under this or any other contract with the Corporation. Should that sum also be not sufficient to cover the full amount recoverable the contractors shall pay to the Corporation on demand the remaining balance due.*

(f) *Whenever the security deposited falls short of the specified amount the contractors shall make good the benefit so that the total*

amount of security deposit shall not at any time be less than the specified amount.

15. On perusal of Clause X(c) of the agreement, we find that if the contractors fail to supply the requisite number of labourers, scales and trucks/carts, the General Manager at his entire discretion **without terminating the contract** shall be at liberty to engage other labourers, scales, trucks/carts, etc. at the risk and cost of the contractors, who shall be liable to make good to the Corporation all additional charges, expenses, cost or losses which the Corporation may incur or suffer thereby. Here, the expression '*without terminating the contract*' is very significant. We have noticed that the appellants had rescinded the contract entered into with the plaintiff/respondent and thereby engaged new *ad hoc* contractors vide communication dated 22.06.2011 on urgent basis without terminating the contract. Therefore, as per Clause X(c) of the agreement, in case the contractor fails to place requisite number of trucks for carrying necessary quantity of food grains, the appellants would be at liberty to engage other contractor/s for carrying food grains and other allied materials without terminating the contract at the risk and cost of the actual contractors.

16. On the other hand, Clause XI(c) deals with the forfeiture of security deposit lodged by the contractors. A plain reading of Clause XI(c) makes it clear that in the event of termination of the contract envisaged in Clause X, the competent authority of Food Corporation of India would have the right to forfeit the security deposit. To say it otherwise, as a part of the contract agreement, it can only be forfeited if contract is terminated. That apart only in the event of termination of the contract, the FCI can claim damages, losses, charges, expenses of costs suffered by the Corporation. In the

instant case, noticeably, **the FCI/appellants preferred to engage other contractors at their own discretion without terminating the contract.** As such, according to us, since other contractors were appointed by the FCI/appellants during existence of the contract, i.e., without termination of the contract, they cannot invoke the forfeiture clause as provided under XI(c) of the agreement.

17. Furthermore, we have noticed that the FCI/appellants allowed the contractor/respondent for carrying loads having quantity ranging from 16 to 19 MTs per vehicle and bills submitted by the plaintiff/respondent against such transportation were duly cleared by the FCI/appellants. It is also revealed from the records that the appellants/Corporation used to issue RMP for the vehicles mentioning gross weight of the goods to be carried ranging from 16 to 19 MTs which act and conduct by necessary implication indicates that there was tacit contract between the appellants/Corporation and the contractor that the contractor would carry loads of 16 to 19 MTs per vehicle. The acts and conducts of the parties to the *lis*, clearly establish the fact that the rates for carrying food grains and allied materials were offered by the contractor/respondent on the mutual understanding that the food items would be carried having quantity ranging from 16 to 19 MTs per vehicle which was also accepted by the appellants/Corporation. The appellants/Corporation had also paid the bills raised by the contractor/respondent having full knowledge of the fact that the contractor/respondent was carrying food grains ranging from 16 to 19 MTs per vehicle till 3rd week of October, 2010 when the appellants/Corporation suddenly started issuing RMP/indents mentioning load capacity ranging from 8 to 10 MTs per vehicle.

18. Admittedly, the quantity of loads containing food grains to be carried per vehicle and the types of vehicles to be used for transportation are not mentioned in the instrument of contract entered into between the parties to the *lis* in expressed terms. The raising of bills by the contractor/respondent for carrying food grains ranging from 16 to 19 MTs per vehicle since commencement of the transportation till 3rd week of October, 2010 and payment of such bills by the appellants/Corporation make it clear that both the parties by necessary implication *without saying anything expressly* in the contract and to give *business efficacy to the transactions*, although *tacit* formed a part of the contract. Furthermore, such tacit contract between the appellants/Corporation and the contractor/respondent appeared to be decided at the very inception of the contract that the contractor/respondent would transport maximum quantity of loads of food items per vehicle. Added to it, it is aptly proved by the conduct of the appellants/Corporation that they used to issue RMP in favour of the contractor/respondent categorically mentioning the quantity of loads ranging from 16 to 19 MTs, because a carrier like the present contractor/respondent cannot carry loads beyond the permissible limits mentioned in the RMP. So, from the acts and conducts of the appellants/Corporation and the contractor/respondent, it comes to light that they clearly intended to carry food grains ranging from 16 to 19 MTs per vehicle at the time of entering into the contract.

19. Here, the principle of business efficacy can be invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. In *Satya Jain v. Anis Ahmed*

Rushdie, (2013) 8 SCC 131, after examining the classic test of business efficacy which was proposed by **Bowen, L. J.** in **The Moorcock, (1889) LR 14 PD 64 (CA)**, held that: –

“... This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied- the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen, L.J. in *The Moorcock*, (1889) LR 14 PD 64 (CA), sums up the position:

“... In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances...”

... The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement...”

20. We have had the advantage of going through the judgment passed by the Hon’ble Supreme Court in **Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) & Anr., (2018) 11 SCC 508**, where it was observed that “the significant issue was the principle of “business efficacy to the transactions” which are intended at all events by parties who are businessmen.” [SCC.p.525, para 35]

21. Again, the aforesaid principle was relied upon in **Shirlaw v. Southern Foundaries (1926) Ltd., (1939) 2 K.B. 206: (1939) 2 All ER 113(CA)** as also referred to in **Nabha Power** (supra), and it was observed that, ‘*prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if,

while the parties were making their bargain, an officious bystander, were to suggest some express provision for it in their agreement, they would testily suppress him with a common “Oh, of course!” ’ [SCC.p.525, para 36]

22. Thereafter, the Hon’ble Supreme Court held that “The aforesaid, thus, extended a word of caution while applying *The Moorcock* test, by bringing forth “The Officious Bystander Test” of ‘Oh, of course!’ ” [SCC.p.526, para 37]

23. In the case of *Nabha Power* (supra) the Hon’ble Supreme Court (comprising of Rohinton Fali Nariman and Sanjay Kishan Kaul, JJ.) while discussing the legal principles for interpretation of commercial contract has set forth certain judicial pronouncements relevant for determination of the issue starting from the judgment of the Court of Appeal in *The Moorcock* to the case of *Satya Jain* (supra) and ultimately, had summed up the principles which had been evolved for interpreting the terms of a commercial contract in question. The Court said that the parties indulging in commercial activities or transactions act in a commercial sense. The Apex Court in *Nabha Power* (supra) has ultimately viewed that:-

“The development of law saw the “five condition test” for an implied condition to be read into the contract including the “business efficacy” test. It also sought to incorporate “the Officious Bystander Test” [*Shirlaw v. Southern Foundaries (1926) Ltd.*]. This test has been set out in *B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings*, 1977 UKPC 13: (1977) 180 CLR 266 (Aus) requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the

contract; (3) it goes without saying i.e. the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same penta-principles find reference also in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [*Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, (1998) 1 WLR 896; (1998) 1 All ER 98 (HL)] and *Attorney General of Belize v. Belize Telecom Ltd.* [*Attorney General of Belize v. Belize Telecom Ltd.*, (2009) 1 WLR 1988 (PC)] Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract *inter se* the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.”

24. In the case on hand, what has been gathered, as we said earlier, that there is no express terms as regards the quantity of loads to be carried and types of vehicles to be used for transportation of food grains. On the contrary, it is established by their acts and conducts that both the parties had intended to carry loads having quantity of food grains ranging from 16 to 19 MTs using a vehicle having capacity of transporting such quantity of loads which was a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties having felt prudent made for themselves. Further, according to us, it was an unexpressed term sought to be read as implied which had been

clearly intended by the parties at the time of making of the contract. That apart, such unexpressed term cannot be said to be unreasonable and inequitable in absence of any restriction imposed by the appellants/Corporation while carrying loads ranging from 16 to 19 MTs of food grains. Thus, the implied condition as aforesaid that the contractor/respondent would carry food grains having quantity of loads ranging from 16 to 19 MTs per vehicle satisfies the “five condition test” or “Penta-test” as laid down in *Nabha Power* (supra). The sudden change in issuing RMP indicating reduced quantity of loads i.e. ranging from 8 to 9 MTs is obviously a clear deviation from the contract the parties to the *lis* intended to be mutually performed from the very inception of the contract. Resultantly, the appellants/Corporation cannot take the plea of breach of contractual obligations by the contractor/respondent while forfeiting her security deposit and they are liable to release the security deposit immediately as indicated in the judgment and decree passed by learned Commercial Court.

25. Thus, the learned Commercial Court rightly came to a finding that forfeiture of security deposit lodged by the contractor/respondent was absolutely illegal and arbitrary and accordingly, we are not inclined to interfere with the findings returned by learned Commercial Court on this aspect.

26. Now coming to the issue whether the appellants are entitled to claim an amount of Rs.18,48,843/- as security deposit due to un-workmanlike performance as well as negligence on the part of the

plaintiff/contractor/respondent in carrying out the remaining part of the work for which, they claimed that they had suffered huge loss.

27. To appreciate the case in hand, an important question necessary to be dealt with and answered that when a party to a contract suing another party, fails to make out a case of any actual loss or damage, thereby disentitling his claim compensation, can forfeit compensation, can forfeit the security deposit of the another on the ground of non-performance of the contract.

28. To answer this question, it would be apposite to refer to Sections 73 and 74 of the Indian Contract Act, 1872. For brevity, Section 74 may be reproduced first, which reads as under.

74 Compensation for breach of contract where penalty stipulated for:- [When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.]

29. On careful reading of Section 74, it becomes aptly clear that the party complaining of breach of contract is not required to prove the extent of real or actual or factual loss or damage, but clearly suggests grant of reasonable compensation, however, subject to the condition that it shall not exceed the amount specifically mentioned, i.e. stipulated as penalty in the contract. In other words, proof of actual loss or damage suffered in fact is dispensed within the expression of Section 74. In this regard reference may be made to the decision in *Fateh Chand Vrs. Balkishan Dass* [AIR 1963 SC 1405]; *Kailash Nath Associates Vrs. Delhi Development Authority* [(2015) 4

SCC 136], in which the Hon'ble Supreme Court has held categorically that, in a case coming under the purview of Section 74 of the Contract Act, a party claiming compensation under this Section does not necessarily need to prove that actual loss or damage has been caused. To say it otherwise, what is necessary to prove that there is apparent breach of contract which is emanated from plain and simple reading of the expressed terms of the contract, and in that case, the party complaining of breach of contract would be entitled to penalty to the extent of the amount it is indicated/mentioned in the clause of the contract itself, but not beyond that.

30. In the instant case, it is not the case of the appellants/Corporation that they have invoked Section 74 and claimed reasonable compensation or penalty to the extent it is stipulated in any of the clauses of the contract.

31. Now, Section 73 of the Indian Contract Act reads thus:-

“73.Compensation for loss or damage caused by breach of contract-When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.”

32. On conjoint reading of the aforesaid provisions, in our opinion, the expression “loss or damage” would necessarily mean and indicate that the party complaining of breach must have suffered some visible loss or damage which apart from being faced with the mere act of breach of contract. This is because every breach of every contract need not necessarily result in actual loss or damage. According to us, compensation payable under Sections 73,74 as also under Section 75 is only for loss or damage caused by the breach and

not of the mere act of breach. To summarize, if in case the breach has not resulted in or caused any loss or damage to a party, he cannot claim compensation.

33. In the context of the case, we may gainfully refer the decision of the Hon'ble Supreme Court in *Union of India v. Rampur Distillery and Chemical Co. Ltd.*, [(1973) 1 SCC 649: AIR 1973 SC 1098], where it was held that a party to a contract taking security deposit from the other party to ensure due performance of the contract, is not entitled to forfeit the deposit on ground of default when no loss is caused to him in consequence of such default.

34. Applying the aforesaid principles to the facts of the instant case, we may easily come to a conclusion that since the appellants/Corporation have failed to meet the requirements of Sections 73, 74 as also Section 75 of the Indian Contract Act in substantiating any loss or damage caused to them as a consequence of any default on the part of the contractor/respondent to justify their claims for compensation, they are not entitled to forfeit the security deposit on the ground of breach of contractual obligations by the contractor/respondent.

35. Here, we may profitably refer to a decision of a Division Bench of our own High Court in a case between the same parties [*Smt. Namita Paul Vrs. Food Corporation of India & Ors.*], Case No. *RFA 14 of 2006* had observed thus:

“20. Since, the defendants have failed to prove their actual cost and risk, suffered by them, in our considered view they cannot be permitted to forfeit the security deposit as it is well settled that even under

Section 73 of the Contract Act only the actual damage suffered by the person by the act of the other person in the contract can be realised as the damage. In this case, since the defendants have utterly failed to plead the account of loss and risk and prove that “loss and risk”, they cannot be permitted to realise any damage from the plaintiff. Hence, the decision as communicated by the letter dated 12.07.2010 is bad in law particularly that part which reads as follows :

“3. Whereas, vide this Office letter of even number dated 01/07/10, tender agreement Clause X(c) was invoked upon you to get the work done at your risk and cost without terminating the contract. But that also failed to evoke any response from your side.

(4) Whereas, FCI is of the opinion that you have totally failed to carry out the contract work as per agreement and there is no chance of any improvement and in the process the Corporation cannot afford to sustain further loss and allow the public distribution system to suffer for your total failure to carry out the work.

(5) Therefore, the above captioned contract awarded to you vide our appointment letter of even number dated 17/11/2008 is hereby terminated with immediate effect as per Clause X(a) & X(b) of the Contract agreement (MTSF) entered between your and the Food Corporation of India and the fresh tender is being invited to get the work done for the unexpired/remaining period of contract at your risk and cost.”

21. In the said letter dated 12.07.2010 [Exbt.11], it has been stated that the said decision is without prejudice to the right of the FCI to take action against the plaintiff as per clauses and sub-clauses of the tender agreement in order to make good of additional charges, expenses, cost or losses that the corporation may suffer or incur to get the work done at the plaintiff's risk and cost. There is no dispute that the counter claim for realising losses as was instituted by the defendants has been dismissed and no appeal has been preferred therefrom. In this conspectus of fact, the defendants cannot forfeit any part of the security deposit without showing that they suffered loss for “sudden stoppage of the transportation” by the plaintiff. Hence, the judgment dated 11.05.2016 stands interfered with. It is stated that the plaintiff is entitled to the refund of the security deposit as maintained by the defendants to the extent of Rs.54,00,000/-. However, in the context of the case, we are not inclined to grant any interest. The refund of the security deposit to the extent as noted above shall be made within a period of two months from the date of the decree. In the event of failure, the plaintiff will be at liberty to execute the decree.”

36. Here, in the instant case, it has been transpired that the contract was terminated followed by forfeiture of security deposit. Applying the law as

analyzed and interpreted the provisions embodied in Sections 73, 74 and 75 of the Indian Contract Act *vis-à-vis* the principles laid down in case of ***Smt. Namita Paul*** (supra), we are of the firm opinion, that unless and until actual loss incurred by the appellants/Corporation is established, forfeiture of security deposit must be held to be illegal and arbitrary, and in that situation, the entire security deposit has to be refunded to the contractor.

37. Having taken into consideration the aforesaid observations, we hold that the learned trial Court had rightly decided that the plaintiff/respondent is entitled to get refund of the security deposits to the tune of Rs.18,48,843/- (Rupee Eighteen lakhs forty eight thousand eight hundred forty three) only. As such, on this issue also no interference is called for.

38. Next, if we look upon the contentions of the contractor/respondent where she had demanded her loss of profit to the tune of Rs.15,22,686/-, we find that the plaintiff/respondent had claimed that she had executed the work of the appellants/Corporation for a period of 12 months and thereby she had realized her payment towards that period of work done by her. But, her plea was that if she could have performed her work for the remaining period of 12 months, she could have earned profit at least for such amount i.e.Rs.15,22,686/-. Learned trial Court had allowed the claim of contractor/respondent awarding Rs.15,22,686/- against loss of profit. In that view of the findings, we feel it necessary to reiterate again that the contractor/respondent has failed to justify her claim that as to how she incurred loss of profit to the extent of Rs.15,22,686/-. More so, since all the bills raised by the contractor/respondent had been paid by the appellants/Corporation for the period she carried out the work without any

deduction, according to us, there was no visible loss or damage suffered by the contractor/respondent. Accordingly, on the issue of loss of profit, the contractor/respondent is not entitled to get any compensation towards her loss of profit and as a corollary, the direction given in the judgment and decree passed by learned Commercial Court awarding damages to the tune of Rs.15,22,686/- in favour of the contractor/respondent is liable to be set aside and quashed.

39. For the reasons stated and discussed in the foregoing paragraphs, we find no infirmity in the judgment and decree dated 06.07.2022, passed by learned Commercial Court in Commercial Suit No.08 of 2017 and Commercial Suit No. 04 of 2016 to the extent of direction passed upon the appellants/Corporation to release the security deposit in favour of the contractor/respondent, which is hereby affirmed and upheld. However, we are not in agreement with the learned Commercial Court in awarding damages as held to be suffered by the contractor/respondent to the tune of Rs.15,22,686/- (Rupees fifteen lakhs twenty two thousand six hundred eighty six) and thus, this part of the judgment passed by learned Commercial Court is set aside and quashed.

40. As a sequel, the Appeal No.RFA 26 of 2022 filed by the FCI/appellants against the judgment passed in connection with Commercial Suit No.4 of 2016 whereby and whereunder they raised claim for awarding damages in favour of them, stands dismissed and the Appeal No.25 of 2022 filed by the same appellants/Corporation against the judgment passed in connection with Commercial Suit No.08 of 2017 is allowed in part to the extent that the contractor/respondent is held entitled to get the refund of

security deposit along with interest as indicated in the judgment and decree passed by learned Commercial Court in C.S. 08 of 2017. The amount payable to the contractor/respondent as a consequence of this judgment be remitted in favour of her within 45 (forty five) days from the date of receipt of the copy of this judgment.

41. All pending Interlocutory Applications are disposed of in the light of this judgment and order.

(ARINDAM LODH), J

(APARESH KUMAR SINGH),CJ



SANJAY GHOSH Digitally signed by SANJAY GHOSH

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