

GAHC010091482022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

WRIT PETITION (C) No. 3249/2022

M/s NIT Traders, having its registered office at G.C. Road, Wakaf Building, Tezpur, District - Sonitpur, Assam, Pin- 784001, represented by its proprietor Sri Digantajit Baruah, aged about 55 years, son of Late Lakhi Parasad Baruah, R/o- G.C. Road, Wakaf Building, Tezpur, in the District of Sonitpur, Assam, Pin- 784001.

.....Petitioner

-Versus-

- 1) The Food Corporation of India, represented by its Chairman-cum-Managing Director, Barakhamba Road, New Delhi-110006.
- 2) The General Manager (REGIONAL), Food Corporation of India, Regional Office, Assam Region, Paltanbazar, Guwahati, Assam, Pin- 781008.
- 3) The Assistant General Manager (Cont.), Food Corporation of India, Regional Office, Assam Region, Paltanbazar, Guwahati, Assam, Pin- 781008.
- 4) The Divisional Manager, Food Corporation of India, Divisional Office, North Lakhimpur, Assam, Pin- 787001.

.....Respondents

Advocates :

Petitioner : Mr. A.C. Borbora, Senior Advocate
Ms. N. Dey, Advocate

Respondents : Mr. B.K. Singh, SC, FCI

Date of Hearing, Judgment & Order : 10.10.2023

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
JUDGMENT & ORDER [ORAL]

The instant writ petition under Article 226 of the Constitution of India is preferred to assail a Notice dated 19.04.2022 issued by the respondent no. 4 whereby the petitioner has been directed to deposit an amount of Rs. 12,60,298.18 in the specified account of the respondent FCI, on the premise that the said amount was paid to the petitioner firm in excess by the respondent FCI. By the Notice dated 19.04.2022, the petitioner has been directed to deposit the said amount within 15 [fifteen] days from the date of issuance of the Notice with the further observation that the petitioner firm should adhere to the Tender Agreement and deposit the said amount within the statutory period or otherwise, the said amount would be recovered from the petitioner's bill, security deposit, bank guarantee, etc.

2. The genesis of the dispute is traceable from a Ad-Hoc Contract Tender Enquiry dated 08.05.2015 [the Tender Notice', for short], published by the Regional Office, Food Corporation of India [FCI], Assam Region whereby tenders were invited on-line under Two-Bid Tendering System for appointment of contractors on ad-hoc basis for handling contract/handling and transport contract/transport contract for the following contract work :-

E-Tender No.	No. S&C/1710/Assam/2015/03
Nation of the Work Handling / Handling & Transportation / Transportation of foodgrains / sugar / allied materials from -	Handling and Transport Contract at Ex-Rly Siding North Lakhimpur including Transport Contract from Ex-Rly Siding North Lakhimpur to FSD North Lakhimpur [Distance 13 KM] via weighbridge and Handling works at Rly Siding North Lakhimpur

	[Minimum daily requirement of trucks during placement of rake/wagon=50-70, may increase or decrease as per exigency of requirement]
Estimated Value of Contract [VOC]	Rs. 50,00,000/-
Earnest Money @ 2% of VOC	Rs. 1,00,000/-
Security Deposit	[i] Rs. 2,50,000/-
[i] 5% of VOC [in the form of DD/Pay Order/ECS]	[ii] Rs. 5,00,000/-
AND	
[ii] @10% of VOC [in the form of an irrevocable and unconditional Bank Guarantee issued by SBI & its Associate Banks/other Public Sector Bank]	
Cost of tender for [Rs.]	Rs. 525/- [inclusive of taxes]

2.1. The Tender Notice had indicated that the appointment of contractor would be for Handling / Handling & Transportation / Transportation of foodgrains / sugar / allied materials on ad-hoc basis for a period of 6 [six] months and the FCI had reserved the right of extension of the contract period for another 3 [three] months or till finalization of the regular contract, whichever was earlier. Responding to the Tender Notice dated 08.05.2015, the petitioner submitted its tender for the contract-work viz. 'Ex-Railway Siding North Lakhimpur including Transport Contract from Ex-Railway Siding North Lakhimpur to FSD North Lakhimpur via weighbridge and Handling works at Railway Siding North Lakhimpur', quoting its rates. Finding the tender of the petitioner as responsive one, a Letter of Appointment [LoA] was issued to the petitioner on 19.06.2015 by the Regional Office, FCI, Assam appointing the petitioner as the handling and transport contractor. The Letter of Appointment [LoA] had specified that the contract would come into force with immediate effect at the quoted rate of 219% Above Schedule of Rates [ASOR] for transportation and 230% ASOR for handling only on terms and conditions as contained in the Tender Agreement. It was also set forth in the LoA that the contract would be governed by the terms and conditions of the Tender Document signed between the petitioner and the respondent FCI.

2.2. It is the case of the petitioner that on being appointed as handling and transport contractor by the LoA dated 19.06.2015 with such specified terms and conditions, the

petitioner deposited a sum of Rs. 1,25,000/- as security deposit which was 50% of the total security deposit amounting to Rs. 2,50,000/- along with a bank guarantee of Rs. 5,00,000/- and completed the other requisite formalities. It is stated that the petitioner had commenced with the allotted work immediately after issuance of the LoA and completed the contract as per the time period without any complaint whatsoever from the end of the respondent FCI authorities. During and after completion of the contract, the petitioner submitted a total 7 [seven] nos. of bills amounting to Rs. 56,11,653.29 by reckoning the distance, as mentioned in the Tender Notice and the Letter of Appointment, that is, 13 kilometres, for processing and disbursal by the respondent FCI authorities. The petitioner has stated that the petitioner was paid an amount of Rs. 48,50,000/- out of the final bills amounting to Rs. 56,11,653.29, after making the necessary deductions as per the Tender Notice/Letter of Appointment [LoA]. It has been asserted that when subsequently, an amount of Rs. 6,11,653/- was not paid for a substantial period of time, the petitioner had to approach the respondent FCI authorities by way of a Representation dated 24.08.2021 with the request to disburse the balance amount in an expeditious manner. It was after submission of such Representation on 24.08.2021, the petitioner was served with the impugned Notice dated 19.04.2022. Finding the decision contained in the impugned Notice dated 19.04.2022 arbitrary and unjust, the petitioner has approached this Court by this writ petition seeking setting aside and quashing of the said impugned Notice.

3. I have heard Mr. A.C. Borbora, learned senior counsel assisted by Ms. N. Dey, learned counsel for the petitioner and Mr. B.K. Singh, learned Standing Counsel, FCI for all the respondents.

4. The petitioner has submitted that the Tender Notice dated 08.05.2015 had clearly specified the distance for weighbridge as 13 KMs. By taking note of the terms and conditions set forth in the Tender Notice, the petitioner submitted its tender quoting a specific rate and the respondent FCI authorities had accepted the rate quoted by the petitioner. It was only after acceptance of the rate, the Letter of Appointment [LoA] dated 19.06.2015 was issued by the respondent FCI authorities quoting that the rate would be 219% ASOR for transportation and 230% ASOR for handling and with the acceptance of the

offer made by the respondent FCI authorities by the Letter of Appointment [LoA], the inter se relationship between the parties would be governed by the terms and conditions contained in the Tender Agreement. Thus, it is not open for the respondent FCI authorities to make a u-turn to contend that extra amount was paid to the petitioner on the premise that the distance to be covered for transportation of foodgrains from Ex-Railway Siding North Lakhimpur to FSD North Lakhimpur via weighbridge and Handling works at Railway Siding North Lakhimpur in the Tender Agreement should have been 8 KMs, instead of 13 KMs. It is, thus, contended that the action on the part of the respondent FCI authorities to recover such amount in such a manner, that too, after the contract had itself been worked out long back, is clearly arbitrary and unjust.

5. Responding to such submissions of Mr. Borbora, learned senior counsel appearing for the petitioner, Mr. Singh, learned Standing Counsel, FCI has submitted that the final bills submitted by the petitioner was processed and an amount of Rs. 50,00,000/- had already been paid to the petitioner. A part of the final bills amounting to Rs. 6,11,653/- was not processed and kept pending as the same was found beyond the delegated power of the authority who had issued the Letter of Appointment [LoA] dated 19.06.2015. He has pointed to a Report submitted by a Special Audit Team, to submit that when the audit was carried out, it was found that the distance between Ex-Railway Siding North Lakhimpur to FSD North Lakhimpur via weighbridge was in fact, 8 KMs. As the petitioner was found to have been paid in excess of 8 KMs, a decision was taken to recover the amount paid to the petitioner on the basis of the Letter of Appointment [LoA]/Tender Agreement, where rate was calculated on the basis of the distance as 13 KMs.

6. I have given consideration to the submissions of the learned counsel for the parties and have also gone through the materials brought on record by the parties through their pleadings.

7. It is not in dispute that in the Tender Notice dated 08.05.2015, it was clearly indicated that the contract would be for Handling and Transport Contract at Ex-railway Siding North Lakhimpur including Transport Contract from Ex-Railway Siding North Lakhimpur to

FSD North Lakhimpur [Distance 13 KM] via weighbridge and Handling works at Railway Siding North Lakhimpur. From the Letter of Appointment [LoA], it is discernible that the accepted rate was 219% ASOR for transportation and 230% ASOR for handling. The Tender Notice as well as the LoA had set forth that the appointment of the petitioner as Handling and Transport contractor was on an ad-hoc basis for a period of 6 [six] months with right reserved to the FCI for extension of the contract period for another 3 [three] months or till finalization of the contract, whichever was earlier. It is also not in dispute that the duration of the contract was for the period of 6 [six] months and the contract period was not extended beyond the period of 6 [six] months. From paragraph 8 of the affidavit-in-opposition of the respondent FCI authorities, it is discernible that the final bills submitted by the petitioner taking the distance as 13 KMs is not disputed. The contention of the respondent FCI authorities is to the effect that the final bills submitted by the petitioner were required to be considered by taking the distance as 8 KMs from a Report of a Special Audit Team and about 5 [five] years after expiry of the contract period instead of 13 KMs, which aspect came to their knowledge and if such a calculation is made, then the respondent FCI authorities are entitled to recover an amount of Rs. 12,60,298.18. Thus, in view of such claims and counter claims, what has fallen for consideration is whether the action on the part of the respondent FCI authorities seeking to recover the amount, indicated in the impugned Notice dated 19.04.2022, can be termed as justified in the backdrop of the fact situation obtaining in the case, as expounded above.

8. None of the parties has brought the Tender Agreement, if any, executed between them, on record. As the period of contract was for 6 [six] months, it is clear that the Tender Agreement, if any, had itself worked out long back after expiry of 6 [six] months from 19.06.2015. Though the respondent FCI is an instrumentality of the State under Article 12 of the Constitution of India, the Tender Agreement and/or the contractual arrangement which was entered into between the parties herein or in its place, if the LoA is accepted as the Contract between the parties for the sake of argument, was not in the nature of a statutory contract. The respondent FCI is a statutory body which has come into existence under the Food Corporation of India Act, 1964. It has been settled that a statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to

enable it to discharge its functions. Disputes arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract, if the contract is not statutory. The fact that one of the parties to the agreement is a statutory or a public body does not by itself affect the principles to be applied. Every act of a statutory body need not necessarily involve an exercise of statutory power. If the contract entered between the parties is not a statutory contract then the inter se relationship between the parties are governed by the ordinary laws of contract, that is, Indian Contract Act, 1872. As to the maintainability of a writ petition involving a claim of money, the Hon'ble Supreme Court of India in **ABL International Ltd. and another vs. Export Credit Guarantee Corporation of India Ltd. and others**, reported in [2004] 3 SCC 553, after discussing a number of previous preiudacates/authorities, has laid down the legal principles as follows :- [a] in an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable; [b] merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule; and [c] a writ petition involving a consequential relief of monetary claim is also maintainable. The aforesaid principles have been followed in the subsequent three-Judge Bench decision in **State of Uttar Pradesh vs. Sudhir Kumar**, reported in 2020 SCC OnLine SC 847 and **Popatrao Vynkatrao Patil vs. State of Maharashtra**, reported in [2020] 19 SCC 241. Reiterating the said principles, it has been observed in **Unitech Limited and others vs. Telangana State Industrial Infrastructure Corporation [TSIIC] and others**, reported in [2021] 2 SCALE 653, that while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of State power or a misuse of authority. It has been observed that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract.

9. In view of the nature of contract the parties herein had entered into, which had been worked out long back in the year 2015, it has emerged that the inter se relationship between the parties were/are governed by the ordinary laws of contract. It is well settled

principle of law of contract that a party to a contract can insist for performance of only those terms and conditions, which are part of the concluded contract. A party to a concluded contract has no right to unilaterally alter the terms and conditions of the contract and neither of the parties has any right to add any additional terms and conditions in the contract unless both the parties agree to add or alter any such terms and conditions in the contract. It is also settled that if any party adds any additional terms and conditions in the contract without the consent of the other contracting party then such unilateral addition is not binding on the other party. A party which unilaterally adds any such terms or conditions, has no right to insist on the other party to comply or abide by such additional term or condition. Having regard to the fact situation obtaining in the case in hand, it is apt to refer to the decision of the Hon'ble Supreme Court of India in **Kumari Shrilekha Vidyarthi and others vs. State of U.P. and others**, reported in [1991] 1 SCC 212, wherein it is held that even if the contract is concluded, the State cannot cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters. It has been categorically held that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14, does not undergo any radical change after the making of a contract. It has been held that the situation does not envisage or permit unfairness or unreasonableness in State actions in any sphere or its activity contrary to the professed ideals and exclusion of Article 14 in contractual matters has not been accepted.

10. When in view of the aforesaid principles of law, the impugned Notice dated 19.04.2022 is considered, it is found that the decision conveyed by the impugned Notice was without any prior opportunity of hearing to the petitioner or prior consent of the petitioner. It is also found that the respondent FCI by its decision contained in the Notice dated 19.04.2022 has contemplated to recover of an amount of Rs. 12,60,298.18 from the petitioner's bills, security deposit, bank guarantee, etc. and such recovery has been sought to be done in a completely unilateral manner without any consent from other contracting party i.e. the petitioner, in respect of a contract which had itself worked out as about 6 [six] years back as the Letter of Appointment [LoA] dated 19.04.2022 was for a period of only 6 [six] months only. Notwithstanding the aspect whether such action to recover money would

be barred by the law of limitation, the decision itself to make such recovery is beyond the terms and conditions of the concluded contract, entered into earlier by the petitioner on one side and the respondent FCI on the other side. Decision to make recovery of the amount of Rs. 12,60,298.18 from the petitioner is an unilateral act, without the consent from the petitioner and beyond the terms and conditions of the concluded contract. An instrumentality of the State and for that matter, a statutory body like the respondent FCI in the case in hand, in a matter where inter se relationship is governed by the ordinary laws of contract, and when such relationship is relatable to a concluded contract of non-statutory character, can only enforce its contractual right and does not wield or exercise any statutory power, in absence of any statutory provision governing such contractual relationship. The petitioner had proceeded to execute the contract in terms of the Tender Notice dated 08.05.2015 and the LoA dated 19.06.2015 and there was no complaint whatsoever from the end of the respondent FCI authorities during the execution period of the contract.

11. In such backdrop, the action contemplated by the respondent FCI authorities to recover the amount of Rs. 12,60,298.18 by the impugned Notice dated 19.04.2022, is found to be a arbitrary and unjust one and the same cannot be considered as sustainable in law in view of the inter se relationship between the parties, as exposted above. In the above view of the matter, this Court finds that the impugned Notice dated 19.04.2022 containing the decision to recover the amount of Rs. 12,60,298.18, is liable to be interfered with. It is accordingly interfered with with the further observation that the respondent FCI authorities shall not recover the amount of Rs. 12,60,298.18, as indicated in the impugned notice dated 19.04.2012, from the final bills, security deposit, bank guarantee, etc. submitted by the petitioner. As a corollary, it is directed that the respondent authorities shall process the matter of payment as regards the amount of Rs. 6,11,491/- which is stated to be pending, as stated by the respondent authorities in their affidavit-in-opposition, within a period of 2 [two] months from the date of submission of a certified copy of this order at the office of the respondent no. 4. On receipt of a certified copy from the petitioner at the office of the respondent no. 4, the respondent no. 4 shall inform the petitioner within 2 [two] weeks therefrom about the formalities, if any, required to be completed by the petitioner to receive such amount.

12. With the observations made and the directions given above, the writ petition is allowed to the extent indicated. There shall, however, be no order as to cost.

JUDGE

Comparing Assistant