

GAHC010225192018



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

**Case No. : WA/114/2019**

FOOD CORPORATION OF INDIA,  
REP. BY THE CHAIRMAN CUM MANAGING DIRECTOR 16-20 BARKHAMBA  
LANE, NEW DELHI- 1.

2: THE GENERAL MANAGER,  
FOOD CORPORATION OF INDIA,  
ZONAL OFFICE (NE),  
GS ROAD, GHY-7, PALTAN BAZAR, GUWAHATI.

**VERSUS**

1. M/S M. PUL ENTERPRISE  
PROPRIETORSHIP CONCERN OF SRI MUHILUM PUL, HAVING ITS OFFICE  
AT VILLAGE HAYULIANG, DISTRICT ANJAW, ARUNACHAL PRADESH,  
REP. BY ITS CONSTITUTED ATTORNEY SRI NIRAJ KUMAR AGARWAL,  
R/O- VILL. AND P.O.- RUPAI SIDING, P.S. DOOMDOOMA, DIST.- TINSUKIA,  
ASSAM.

2:SRI MUHILUM PUL,  
S/O- SRI W. PUL,  
PROPRIETOR OF M/S. M. PUL ENTERPRISE,  
HAVING ITS OFFICE AT VILLAGE HAYULIANG,  
DISTRICT- ANJAW, ARUNACHAL PRADESH  
REP. BY ITS CONSTITUTED ATTORNEY SRI NIRAJ KUMAR AGARWAL  
S/O- SRI JAGADISH PRASAD AGARWAL,  
R/O- VILL. AND P.O.- RUPAI SIDING,  
P.S. DOOMDOOMA, DIST.- TINSUKIA, ASSAM.

3:SRI NIRAJ KUMAR AGARWAL,  
S/O- SRI JAGDISH PRASAD AGARWAL,  
R/O- VILL. AND P.O.- RUPAI SIDING,  
P.S. DOOMDOOMA, DIST.- TINSUKIA, ASSAM.

**– BEFORE –**  
**HON'BLE THE CHIEF JUSTICE**  
**HON'BLE MR. JUSTICE ARUN DEV CHOUDHURY**

For the Appellant(s): Mr. P.K. Roy, Senior Advocate assisted by Mr. S.K. Chakraborty, Advocate.

For the respondent(s): Mr. G. Khandelia, Advocate for respondent Nos.1 to 3.  
Mr. K. Deka, Advocate.

Date of Hearing & : 27.07.2023.  
Judgment

**JUDGMENT & ORDER(ORAL)**

*[Sandeep Mehta, CJ]*

The instant intra-Court writ appeal takes exception to the judgment and final order dated 14.08.2018 passed by the learned Single Judge accepting WP(C) No.4340/2008 filed by the respondents herein and quashing and setting aside the letter dated 15.10.2007 issued on behalf of the appellant General Manager, FCI, Regional Office, Guwahati directing forfeiture of earnest money deposited by the respondent No.1 in pursuance of the Notice Inviting Tender (NIT) floated by the appellants inviting bids for transportation of food grains from Tinsukia Railway Siding to the FCI Godown at Tezu including handling work at Tezu for 2(two) years.

**2.** Admitted facts as emanating from record are that the bids were opened on 03.08.2007. As the bid of the respondent No.1 was found to be compliant to all the requirements of the NIT and as the rate quoted by the respondents at

Rs.32.34 per MT, per KM, was the lowest, the same was accepted. However, rather than proceeding with the submission of document(s) and completion of formalities, the respondents herein wrote a letter dated 06.10.2007 to the appellant authority praying that they were from very remote area, had mistakenly quoted 47% higher rate reckoning the FCI rate to be Rs.22 per KM/per MT whereas, the actual rate prevailing in FCI was just Rs.2.25 per KM per MT and thus, the rate offered by them was unworkable and hence, a prayer was made to consider the rate as 247% instead of 47% above the rate of FCI (i.e. Rs.2.25 per KM per MT) so that they could carry out the transportation works smoothly and to the entire satisfaction of the Corporation.

The precise language of the above letter is quoted hereinbelow verbatim for the sake of ready reference:

- “1. We are the men of very remote area and earned the bread & butter by doing the business of carriage works in & around Arunachal Pradesh. Generally in Arunachal the flat rate per KM/Qtls for transport works is applicable. So we have no knowledge to calculate the percentage of rate as invited by you in this tender since this is first time FCI invited tender for Arunachal Pradesh Depot.
2. In the tender for Tinsukia to Tezu opened on 03.08.07 we put our rate 47% by taking into account of FCI Rate of Rs.22/- per KM/MT. In case you take into account of Rs.22/- per MT/KM than our rate is Rs.32.34 per MT/KM at 47%.
3. But after opening our bid, we came to know that FCI Rate is 2.25 per KM/MT for this contract and in that case our rate of 47% is totally unworkable and not at all possible to run this contract in comparison with the prevailing market rate of truck hire charge in & around the operational area.
4. Further it is to point out that present approved/minimum workable rate of Govt. of Arunachal Pradesh is Rs.11.50 per MT/KM and in that case how we run the instant transportation works at our such an unworkable rate.

So considering the above, it is earnestly requested your honour to consider our rate as 247% instead of 47% in this contract so that we can carry

*the said transportation works smoothly and entire satisfaction of the Corporation.*

*Kindly excuse us being the person of such remote area and consider our above mentioned prayer and give justice in to the matter.”*

**3.** The said request of the respondents was rejected by letter dated 15.10.2007 and the earnest money to the tune of Rs.19,37,020/- deposited by the respondents was forfeited.

Thereupon, WP(C) No.4340/2008 was instituted by the respondents for assailing the letter/order dated 15.10.2007 which came to be accepted by the learned Single Judge observing that the rate offered by the petitioner No.1 being the lowest, it was selected for award of contract. However, realising that the rate so offered was based on misreading of the FCI quoted rate leading to mistake of fact, a bonafide prayer was made by the tenderers that their bid should be construed as 247% above the scheduled rate of Rs.2.25.

**4.** The learned Single Judge held that there was no concluding contract between the tenderer and the accepting authority and hence, the earnest money furnished by the tenderer could not be forfeited for breach of contract which had not yet come into existence. It was further held that no loss was suffered by the FCI and consequently, the impugned letter dated 15.10.2007 was set aside by order dated 14.08.2018 which is challenged in this intra-Court writ appeal.

**5.** Learned Senior counsel Mr. P.K. Roy assisted by Mr. S.K. Chakraborty, learned counsel representing the appellants vehemently and fervently contended that the view taken by the learned Single Judge is illegal and was rendered without taking into consideration the mandatory conditions of the NIT.

He drew the Court's attention to Clause 4 of the NIT and the conditions

incorporated therein; which read thus:

“4. Earnest Money

- a) *Each Tender Form must be accompanied by an Earnest Money of Rs.19,37,020/-(Rupees Nineteen lacs thirty seven thousand twenty) only in the form of a Demand Draft/DCR/Pay Order/Banker's Cheque issued by the State Bank of India or a scheduled bank in favour of Food Corporation of India. Tenders not accompanied by Earnest Money, in the form as prescribed above, shall be summarily rejected.*

*The Earnest Money is also liable to be forfeited in the event of failure of tenderers, after the acceptance of his tender, to furnish the requisite security deposit by the due date without prejudice to any other rights and remedies of Corporation under the contract and law. The earnest money will be returned to all unsuccessful tenderers as soon as practicable after decision on tenders and to a successful tenderer, after he has furnished a security deposit, if the successful tenderer does not desire the same to be adjusted towards the security deposit. No interest shall be payable on the amount of earnest money, in any case.*

- b) *The Tenderers who resile before the validity period of the tender shall be blacklisted and tenderer not submitting the documents for verification, the EMD of such tenderer shall also be forfeited besides blacklisting.”*

**6.** Mr. Roy contended that the tender of the respondents was accepted and they being the successful bidders, failed to furnish the requisite security deposit by the due date. Not only this, the tenderers resiled from the rate offered before the validity period of tender and thus, forfeiture of EMD was the inescapable consequence as per Clause 4(b) (supra).

He urged that the concept of loss or profit of the tendering authority on account of breach of tender conditions does not arise when the matter is being considered by the writ court in a challenge to the decision of the tendering authority while directing forfeiture of earnest money. In this situation, only the conditions of the NIT are to be examined.

7. Mr. Roy referred to the Hon'ble Supreme Court's judgment in the case of ***Villayati Ram Mittal Private Limited Vs. Union of India and Anr.***, reported in ***(2010) 10 SCC 532*** and submitted that the ratio of above judgment covers the controversy at hand fully and thus, the impugned judgment cannot stand to scrutiny and deserves to be reversed.

8. Per contra, Mr. G. Khandelia, learned counsel representing the respondents, vehemently and fervently opposed the submissions advanced by the appellants' counsel. He contended that there was no concluded contract between the parties and thus, the direction to forfeit the EMD was impermissible. The respondents herein being persons hailing from a rural background could not understand the terms and conditions of the NIT properly. Out of sheer ignorance, they quoted a totally unworkable rate Rs.32.34 per MT/per KM under the mistaken belief that the FCI rate was Rs.22 per MT per KM. However, later as they come to know that the FCI rate was Rs.2.25 per MT per KM and thus, the rate offered by the tenderers became unworkable and they bonafide sought rectification thereof by letter dated 06.10.2007 which was arbitrarily rejected. He urged that the tender was vitiated by mistake of fact.

He submits that respondent bidders rightly requested for enhancement of rates to the tendering authority who arbitrarily rejected the prayer and forfeited the earnest money to the tune of Rs.19,37,020/- without any justification. He contended that the learned Single Judge has objectively considered the entire controversy and reached to the only logical conclusion that there was no concluded contract between the parties. Furthermore, Clauses 4(a) and 4(b) were the only conditions provided in the tender document for forfeiture of earnest money but the same were not applicable and hence, the EMD could not have been forfeited.

**9.** We have given our thoughtful consideration to the submission advanced at bar and have gone through the material available on record.

Two reasons were assigned by the learned Single Judge for interfering in the impugned decision of the appellants directing forfeiture of the EMD.

**10.** The first reasoning of the learned Single Judge was that there was no concluded contract between the parties and hence, the earnest money could not have been forfeited.

In this regard, we would like to refer to the judgment rendered by Hon'ble the Supreme Court in the case of ***National Highways Authority of India Vs. Ganga Enterprises and Anr.***, reported in **(2003) 7 SCC 410**, wherein it was held that by invoking the Bank guarantee and/or enforcing the bid security, there is no statutory right, exercise of which was being fettered. The earnest money/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who by his own conduct precludes coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture. Thus, the whole purpose of such a Clause that is to see that only genuine bids are received would be lost if forfeiture is not permitted.

The relevant observations made by Hon'ble the Supreme Court in para 9 of the aforesaid judgment are reproduced hereinbelow for the sake of ready reference:

*“9. In our view, the High Court fell in error in so holding. By invoking the bank guarantee and/or enforcing the bid security, there is no statutory right, exercise of which was being fettered. There is no term in the contract which is contrary to the provisions of the Indian Contract Act. The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is accepted, is a completely different aspect*

*from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture. It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted.”*

Tested on the touchstone of the above judgment, the view taken by the learned Single Judge that the EMD could not have been forfeited on account of the fact that formal contract was not drawn between the parties is unsustainable in the eyes of law.

**11.** The second reasoning assigned by the learned Single Judge for interfering the action of forfeiture of earnest money was that Clause 4(a) and Clause 4(b) prescribe only two conditions for forfeiture of earnest money, i.e., failure to furnish requisite security deposit, and failure to furnish requisite documents for verification by the due date. It was held that neither of the two situations were prevailing in the case at hand.

We may note that Clause 4(b) of the Tender Conditions stipulates two scenarios (i) that the tenderers who resile before the validity period of the tender and (ii) the tenderers who do not submit documents for verification. The EMD of such tenderers would be forfeited besides blacklisting.

Admittedly, by issuing the letter dated 06.10.2007, the respondents, being the successful bidders tried to change the quoted rate manifold. This clearly amounted to resilement before validity of the tender and manifestly thus, Clause 4(a) of the Tender Conditions became operational and the inescapable consequence of this development was the forfeiture of the earnest money deposited by the tenderer.

**12.** The Hon'ble Supreme Court examined almost a similar controversy in the case of **Villayati Ram Mittal Private Limited** (supra) relied upon by the learned Senior counsel for the appellants observing as below,

*“3. In response to the Notice, the petitioner submitted its offer along with earnest money of Rs.40 lacs. When the tenders were opened on 05.05.2004, the offer of the petitioner was found to be the lowest at Rs.32 crores for the work. On 06.05.2004, however, the petitioner sent a letter to the respondent No.2 making a correction of a figure in its tender to read as Rs.32,76,000/- instead of Rs.23,76,000/-. As a result of this correction, the offer of the petitioner for the work increased from Rs.32 crores to Rs.41 crores. Respondent No.2 treated this correction made by the petitioner in its tender as revocation of its offer and forfeited the earnest money of Rs.40 lacs furnished by the petitioner.*

*8. We find that Clause 6 of the Notice clearly stipulated that "if any firm revokes its offer during the validity period, its earnest money shall be forfeited". Hence, the question that arose before the High Court for decision was whether the petitioner by revising one of the figures in its tender from Rs.23,76,000/- to Rs.32,76,000/- revoked its offer and the High Court has taken the view in the impugned judgment that as a consequence of the change in the figures, the offer of the petitioner for the work was enhanced from Rs.32 crores to Rs.41 crores and, therefore, the original offer of Rs.32 crores for the work stood revoked.*

*12. It is thus clear that when earnest money is furnished by a tenderer it forms part of the price if the offer of the tenderer is accepted or it is refunded to the tenderer if someone else's offer is accepted, but if for some fault or failure on the part of the tenderer the transaction or the contract does not come through, the party inviting the tender is entitled to forfeit the earnest money furnished by that tenderer.*

*13. In facts of the present case, the respondents have stated in their reply to the Writ Petition before the High Court that as a consequence of the failure of the petitioner to stand by its offer dated 05.05.2004 the tender for the*

*work had to be re- invited by the respondent No.2 on revised costs of the construction and in the circumstances, the respondent No.2 had to forfeit the earnest money of the petitioner. This was thus a case where on account of failure on the part of the petitioner to stand by its offer, the transaction or the contract did not come through and therefore the respondents were entitled to forfeit the earnest money furnished by the petitioner in terms of Clause 6 of the Notice.”*

**13.** In the said case also, the prevailing fact situation was that the bidder, after acceptance of its bid being the lowest, sent a letter to the tenderer seeking correction of figure in the tender to be read as Rs.32,76,000 instead of Rs.23,76,000/-. As a result of this correction, the offer of the bidder for the work increased from Rs.32 crores to Rs.41 crores. The situation in the case at hand is almost identical and hence, the action of the respondents in seeking change of the rate offered bid amounted to resiling and thus, it was direct violation of Clause 4(b) of the Tender Conditions and attracted the automatic consequence of breach of EMD.

**14.** In view of the above discussion, we are of the firm opinion that the learned Single Judge failed to appreciate the Clauses 4(a) and 4(b) of the NIT in the correct perspective and the relevant part thereof seems to have escaped notice thereby rendering the decision incorrect on facts and in law. The NIT contains a clear stipulation that the tenderers who resile before the validity period shall be liable for forfeiture of EMD. This precisely is the fact scenario prevailing in the case at hand. Hence, the tendering authority i.e. appellants herein were perfectly justified in directing forfeiture of the EMD deposited by the respondents along with the bids.

**15.** The impugned judgment dated 14.08.2018 rendered by the learned Single Judge in WP(C) No.4340/2008 does not stand to scrutiny and hence, the same is reversed.

The appeal is allowed accordingly.

**JUDGE**

**CHIEF JUSTICE**

**Comparing Assistant**