

**HIGH COURT OF TRIPURA
AGARTALA**

WP(C) No.611 of 2023

Smt. Namita Paul, W/o Sri Swapan Kumar Paul, resident of B.K Road, PO-Agartala, PS-East Agartala, District-West Tripura

.....Petitioner

Versus

1. Food Corporation of India, represented by its Managing Director, having its Head Office at 16-20 Barkhamba Lane, New Delhi-110001.

2. The General Manager (Region), Food Corporation of India, Assam Region, GS Road, Paltan Bazar, Assam

3. Assistant General Manager (Cont.), Food Corporation of India (RO:NEF), Janta Hotel Building, GS Road, Paltan Bazar, Guwahati, Assam, PIN-781008

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

.....Respondents

For the Petitioner(s)	:	Mr. Raju Datta, Advocate Mr. Kundan Pandey, Advocate
For the Respondent(s)	:	Mr. Ratan Datta, Advocate
Date of hearing & delivery of judgment & order	:	14.05.2024
Whether fit for reporting	:	Yes

HON'BLE MR. JUSTICE ARINDAM LODH

Judgment and Order (Oral)

By means of filing the instant writ petition, the petitioner has challenged the impugned order dated 05.08.2023 issued by the respondent no.2, the General Manager(Region), Food Corporation of India, Assam Region, whereby and whereunder the claim of the petitioner for refund of Earnest Money Deposit(for short, **EMD**) amounting to Rs.5,83,800/- with interest was repudiated on the plea that it was set off against the claim of the Corporation for the payment of a sum of money under the other contract works.

2. The petitioner has prayed for following reliefs:

“i) As to why a Writ in the nature of Mandamus should not be issued quashing the Order vide No. RO AS-22.0013.0(11.0)/6/2022-Cont Division dated 05.08.2023 issued by the Respondent No.2 whereby the claim of the petitioner for refund of Earnest Money Deposit amounting to Rs.5,83,800/- was set off/repudiated.

(ii) As to why a Writ in the nature of Mandamus should not be issued directing the Respondents to refund Earnest Money Deposit amounting to Rs.5,83,800/- along with interest at the rate of 12% per annum w.e.f 17.11.2011 till the date of payment in respect of Contract/Tender No. S&C/1363/ Assam/10 dated 22.09.2010 for transport work from Ex Rly. Siding New Guwahati/FSD New Guwahati to FSD Chandrapur, Tripura.

AND

(iii) As to why such other order/orders should not be passed so as to give full relief to the Petitioner and, upon causes shown, to make the Rule absolute”

3. Facts:

3.1. The petitioner is a Government contractor and supplier by occupation and having expertise on that field for several years she had participated in a tender vide No.S&C/1363/Assam/10 dated 22.09.2010 issued by the respondents for transportation of food-grains/sugar/allied materials on ad-hoc basis from Ex. Rly Siding New Guwahati/ FCI FSD, New Guwahati Complex to FCI FSD, Chandrapur(Tripura). The petitioner had also deposited earnest money of Rs.5,83,800/- by way of demand draft vide No.674083 dated 01.10.2010 through Canara Bank(Annexure-1 to the writ petition).

3.2. Subsequently, the petitioner came to know that the said tender was scrapped. The petitioner issued a letter dated 10.08.2017 to the respondent no.2 for release of the Earnest Money Deposit (EMD) but after receipt of the said letter, the respondents did not give any reply nor returned the said EMD to the petitioner. Being aggrieved, again on 04.09.2017, 12.04.2018, 27.11.2020 and 14.12.2020, the petitioner submitted reminder letters to the respondent no.2 (Annexures-4, 5, 7 and 8 respectively to the writ petition). In response to the said letters, the respondent-

Corporation(here-in-after referred to as “FCI”) by its communication dated 30.06.2021 requested the petitioner to submit proof of payment of EMD(*Annexure-9* to the writ petition).

3.3. Accordingly, the petitioner submitted proof of payment along with a forwarding letter dated 03.08.2021 and again requested the FCI to refund the said EMD by issuing letters dated 03.09.2021 and 20.11.2021(*Annexures-11 and 12* respectively to the writ petition). Ultimately, FCI by a letter dated 06.12.2021 refused the prayer of the petitioner. Being aggrieved, the petitioner filed writ petition No.WP(C) No.76 of 2022 before this Court praying for setting aside the communication dated 06.12.2021. After hearing the learned counsel appearing for the parties, the learned Single Judge had disposed of the writ petition vide judgment and order dated 11.04.2023 observing that “....*it is the prima facie duty of the respondents to indicate under what provision of law, her EMD cannot be returned. In the event, if it is to be forfeited a separate proceeding needs to be issued, or in the event if there is any resultant loss that has been suffered by the respondents on account of petitioner’s contract, it is not just on the part of the respondents to withheld the EMD without there being any expressed order for forfeiting her EMD. Withholding the EMD of the petitioner without giving any opportunity to the petitioner amounts to violation of the principle of natural justice and is also against the principle of ad alteram partem as clearly indicated herein above.*

In view of the above discussion, the impugned letter of the respondents dated 06.12.2021 is set aside and the respondents are directed to reconsider the request of the petitioner in accordance with the law within a period of 2(two) months from the date of receipt of the copy of this order.”

3.4. Thereafter, the respondents issued show-cause notice wherein it was mentioned that they suffered losses in connection with other contract dated 17.11.2008(*Annexure-16* to the writ petition). Subsequently, one corrigendum was issued wherein it was mentioned that they suffered losses in connection with other contracts dated 29.04.2009 and 12.11.2009(*Annexure-17* to the writ petition). Without considering the reply of the petitioner to the show-cause notice, the respondent no.2 vide order dated 05.08.2023 set off/repudiated the claim of the petitioner for refund of the EMD amounting to Rs.5,83,800/- with interest on the ground that they suffered losses in other contract works vide No.Cont.9/NEFR/TC/CBZ-CDR/2009 dated 29.04.2009 and Cont.9/NEFR/TC/CBZ-ADNR/09 dated 12.11.2009 (*Annexure-21* to the writ petition).

3.5. The petitioner had approached the respondents on several occasions to release the withheld EMD, but the respondents did not return the said amount in favour of the petitioner compelling the petitioner to file the present writ petition before this Court.

4. On the aforesaid background of facts, I have heard Mr. Raju Datta, learned counsel appearing for the petitioner as well as Mr. Ratan Datta, learned counsel appearing for the FCI.

5. Submissions on behalf of the petitioner:

5.1. Mr. Raju Datta, learned counsel for the petitioner at the very outset has submitted that the petitioner participated only in the tender process in response to Notice Inviting Tender by way of submitting her tender along with EMD. However, the said NIT was scrapped for the reasons best known to the Corporation-FCI. So, it was the duty of the FCI to refund the EMD in favour of the petitioner. The respondents illegally and

arbitrarily have withheld the EMD for the last several years without any valid reasons. Mr. Raju Datta, learned counsel for the petitioner has further submitted that under Clause 4 of the tender document/agreement of FCI it is specifically mentioned that the EMD will be returned to all the unsuccessful tenderers as soon as practicable after decision on tender with interest.

5.2. Regarding the loss incurred by the FCI in other contract works dated 17.11.2008 and 12.11.2009, Mr. Raju Datta, learned counsel for the petitioner has submitted that in connection with contract dated 17.11.2008, the respondents had filed MS 14 of 2011 which was dismissed by learned Civil Judge and subsequently affirmed by Division Bench of this Court under order dated 08.09.2022 in RFA 7 of 2022. The respondents had also released the Security Deposit as per order passed by this Court and the Hon'ble Apex Court. Again, in connection with contract dated 12.11.2009, the respondents had filed Commercial Suit No.4 of 2016 for alleged recovery of losses suffered by the respondents, but the learned Judge, District Commercial Court dismissed the suit by an order dated 06.07.2022 which was subsequently affirmed by a Division Bench of this Court in RFA 25 of 2022 and RFA 26 of 2022 by judgment dated 19.10.2023 and further affirmed by the Hon'ble Apex Court.

5.3. Learned counsel for the petitioner has further submitted that in respect of contract dated 29.04.2009, the respondents had filed a case vide No.CS 3 of 2016, which was dismissed by the learned Judge, District Commercial Court vide judgment dated 31.01.2019 which was subsequently affirmed by this Court by judgment and order dated 24.05.2021 in RFA 16 of 2019 and also released the Security Deposit in favour of the petitioner. Thus, Mr. Raju Datta, learned counsel for the petitioner has urged before this

Court to refund the EMD amounting to Rs.5,83,800/- with interest to the petitioner.

6. Submissions on behalf of the FCI:

6.1. Mr. Ratan Datta, learned counsel for the FCI has submitted that the FCI had suffered huge loss because of the petitioner in execution of various other contracts. Mr. Datta, learned counsel reiterated that the FCI has the right to recover the losses suffered by them under Clause XII(b) and XII(e) of the tender document. It is further agitated by Mr. Ratan Datta, learned counsel that the FCI is not liable to refund the EMD to the petitioner as contemplated in the contract itself.

6.2. Mr. Ratan Datta, learned counsel has further urged this Court that the present writ petition also suffers from delay and laches since the petitioner participated in the tender process in the year 2010 and has prayed for refund of the EMD in the year 2023.

7. Analysis and Conclusion:

7.1. I have considered the rival submissions of learned counsel appearing for the parties. The principal question centers around whether the FCI could adjust or forfeit the EMD which was a condition precedent to submit her tender for alleged loss suffered by the FCI in relation to other contracts it entered into with the petitioner.

8. Whether sub-clauses (b) and (e) of Clause XII are applicable in the context of the present case:

8.1. Admittedly, the FCI denied to refund the EMD and forfeited the sum by invoking Clause XII(b) and XII(e) of the tender document/agreement. It leads me to peruse Clause XII(b) and XII(e) of the

tender document laying down certain terms and conditions which are reproduced here-in-below:

“Clause XII. Liability of Contractors for losses etc. suffered by Corporation:

*(a)*****

(b) The Corporation shall be at liberty to reimburse themselves of any damages, losses, charges, costs or expenses suffered or incurred by them due to contractors negligence and un-workmanlike performance of service under the contract or breach of any terms thereof. The total sum claimed shall be deducted from any sum than due or which at any time hereafter may become due to the contractors under this or any other contract with the Corporation. In the event of the sum which may be due from the Corporation as aforesaid being insufficient the balance of the total sum claimed and recoverable from the contractors as aforesaid shall be deducted from the security deposit furnished by the contractors as specified in Para XI. Should this sum also be not sufficient to cover the full amount claimed by the Corporation, the contractors shall pay to the Corporation on demand the remaining balance of the aforesaid sum claimed.

*(c)*****

*(d)*****

(e) A set off any sum of money due and payable to the contractors(including security deposit returnable to them) under this contract may be appropriated by the Corporation and set-off against any claim of the Corporation for the payment of any sum of money arising of this or under any other contract made by the contractors with the Corporation.”

8.2. On careful reading of the provisions of Clause XII(b) and XII(e) extracted here-in-above, in my considered view, before invoking set-off Clause under Clause-XII, it must be proved that the Corporation suffered loss due to “negligence or un-workmanlike performance” of the contractor in execution of any work under any contract. Further, in the instant case, there is no material on records as to how the respondents have suffered loss in execution of any other contract work.

8.3. Added to it, in the instant case, tender was scrapped/cancelled at the instance of the FCI itself, that is, the respondents at their own wisdom without entering into any contract with any of the participants to the tender including the petitioner. Mere participation in the tender process does not

come under the purview of the definition of “contract” under Indian Contract Act, 1872. The petitioner had only participated in the tender process by way of submitting her bid/offer. No agreement was executed between the petitioner and the FCI in respect of the present tender.

8.4. In the opinion of this Court, Clause XII(b) and XII(e) of the tender document cannot be made applicable in respect of forfeiture of EMD which was deposited by the tenderer/contractor at the time of submission of her tender. On bare perusal of Clause XII(b) and XII(e), it is crystal clear that respondent-Corporation had taken the advantage of the expression “any other contract” embodied in Clause XII(b) and XII(e). Clause XII(b) makes a provision providing liberty to the Corporation to reimburse any sum of money out of any loss or damage they suffer or incur due to contractor’s negligence or failure in performance of the contract to the satisfaction of the Corporation from any sum including the security deposit due or payable to the contractor under the ongoing contract work or any other contract executed by the same contractor in future under the Corporation.

8.5. In the instant case, admittedly the respondents having taken the recourse of the expression “any other contract” forfeited the EMD of Rs.5,83,800/- deposited by the petitioner at the time of submission of tender.

8.6. In my opinion, the expression “any other contract” means and connotes that there must be a contract to be entered into between two intending parties on certain terms and conditions enforceable in law.

8.7 Section 2(h) of the Indian Contract Act, 1872 defines the word “contract”, that connotes “an agreement enforceable by law”.

8.8. In the case in hand, FCI-Corporation only floated the tender inviting applications from the intending parties and such parties only

submitted their respective bids/offers. But, it was not proceeded further as the relevant NIT was scrapped/cancelled by the Corporation itself. So, it would not just and proper to say that there was existence of any contract entered into between the respondents-Corporation and the petitioner which was enforceable in law. In that case, FCI had no authority to reimburse any amount or set-off EMD amount deposited at the time of submission of offer by the contractor. Such set-off/forfeiture of EMD amount is illegal, arbitrary and dehors the terms and conditions stipulated in tender documents and thus, the FCI-respondents is liable to return/refund the EMD amount with interest to the petitioner.

9. Whether the FCI is liable to refund the EMD:

9.1. Here the question is whether the respondents are liable to pay interest for denying the refund of EMD to the petitioner. Mr. Ratan Datta, learned counsel for the respondents to justify his submission that interest will not be payable out of the delayed refund of EMD has relied upon Clause 4 of the tender document. Clause 4 may be reproduced hereunder:

“4. Earnest Money:

Each tender must be accompanied by an Earnest Money of Rs.7,68,000/-(Rupees Seven Lakh Sixty Eight Thousand) only in form of a Demand Draft/Pay Order issued by a Scheduled Bank in favour of the General Manager, Food Corporation of India, Shillong and payable at Shillong. Tenders not accompanied by earned money in the form prescribed above shall be summarily rejected.

The earnest money shall be liable to forfeiture if the tenderer after submitting his tender resiles from or modifies his offer and or the terms and conditions thereof in any manner, it being understood that the tender documents have been made available to him and he is being permitted to tender in consideration of his agreement to this stipulation. The earnest money is also liable to be forfeited in the event of the tenderers failure, 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 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.”

9.2. I have meticulously perused the said clause of the tender document and also have considered the submission of learned counsel for the respondents. On careful reading of the Clause 4, in the opinion of this Court, it has three components. *First part* speaks about deposit of earnest money along with the tender as a condition precedent to submit his/her bid/offer.

The *second part* is about the situations under which the FCI can forfeit the EMD accompanying the tender submitted by the bidder/contractor. Under this *second part* it is clearly stated that the EMD can only be forfeited if the tenderer/contractor after submitting his tender resiles from or modifies his offer and/or the terms and conditions thereof in any manner whatsoever since stipulations mentioned in the tender documents are binding on the bidders. It is further stated that the earnest money is also liable to be forfeited in the event of the tenderer's failure 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/FCI under the contract and law. The *first and the second part* do not create any such contingency giving liberty to the FCI to forfeit or set off the EMD for the loss it suffered/incurred from other contracts entered into with the contractor due to the non-performance or unsatisfactory performance of the contract works by the said contractor.

The *third part* deals with the FCI's obligation to return/refund the EMD. It stipulates that the EMD would 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. However, in such cases, the contractor cannot claim interest on the amount of earnest money deposited with the FCI.

So, on plain reading of Clause 4 above, it can safely be said that in absence of any of the contingencies mentioned in the *second part* of the said clause, the FCI/Corporation has no right to withhold or to set it off or forfeit the EMD and the Corporation is under obligation to return the EMD to the unsuccessful bidders.

9.3. In the instant case, there was no fault of the tenderer/contractor i.e. the petitioner in submitting her tender. The petitioner had fulfilled all the essentialities mentioned in “Instruction of bidders”. Neither the contractor resiled from nor modified the terms and conditions made at the time of submitting the tender. The petitioner only participated in the tender process. It was the respondents who floated the Notice Inviting Tender (NIT, for short) had scrapped the tender for the reason unknown to the petitioner. Furthermore, the respondents denied to refund the EMD despite repeated requests and demand notices served by the petitioner, and, forfeited the same on the ground that the respondents had suffered huge loss due to the failure of the contractor in execution of other contracts by invoking Clause XII(e) of the tender document/agreement.

9.4. In my opinion, failure to return the EMD to the petitioner after the tender was cancelled by the FCI itself without any fault of the petitioner is unreasonable, arbitrary and contrary to Clause 4 stated above. As such, the FCI-Corporation is liable to pay interest for its failure to fulfill its solemn obligation to return the EMD to the petitioner as stipulated at the *third part* of Clause 4 analysed here-in-above. Moreso, pertinently, the contracts which

the FCI had referred where allegedly it incurred loss, and the suits it filed against the petitioner to recover such loss had been dismissed by the Courts including the Apex Court and thereafter had released the security deposits forfeited by FCI. In this circumstance, the EMD amount shall definitely fetch interest for its erroneous and arbitrary exercise of power under the garb of Clause XII(b) and XII(e) of the contract.

10. I have also taken into consideration the decision cited by learned counsel appearing for the respondents in support of his submission that the present writ petition suffers from delay and laches. Learned counsel for the respondents has placed reliance upon the case of *Shankara Cooperative Housing Society Ltd. v. M. Prabhakar and Ors.*, (2011) 5 SCC 607.

10.1. I have perused the said decision and it is found that facts of the **Prabhakar's** case are clearly distinguishable from the facts of the instant case. That apart, Mr. Raju Datta, learned counsel for the petitioner submits that in the first round of litigation, i.e., in WP(C) No.76 of 2022 the respondents had raised the similar question of delay and laches and this Court while entertaining the writ petition set aside the impugned order dated 06.12.2021 after consideration of the disputes raised therein. The same respondents did not prefer any appeal. Moreover, the impugned order, which is the subject matter of the present writ petition, was passed on 05.08.2023 and the present writ petition was filed on 21.09.2023. Keeping in view above factual aspect, in the consideration of this Court, the present writ petition should not said to be suffered from delay and laches.

11. For the reasons recorded here-in-above, the impugned order dated 05.08.2023 issued by the respondent no.2 whereby the claim of the

petitioner for refund of the EMD was repudiated/set-off is hereby set aside and quashed. The FCI is directed to return/refund EMD with interest at the rate of 6% per annum payable from the date when the earnest money was deposited by the petitioner till its refund. The entire process shall be completed within a period of 30(thirty) days from the date the copy of this judgment shall be received by the FCI authority at Agartala.

The instant writ petition stands allowed in the above terms.

JUDGE



Snigdha

SAIKAT
KAR

Digitally signed
by SAIKAT KAR
Date: 2024.05.29
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