

GAHC010190012021



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

Case No. : WP(C)/5986/2021

M/S NIT TRADERS
HAVING ITS REGISTERED OFFICE AT G.C. ROAD, WAKAF BUILDING,
TEZPUR, DIST- SONITPUR, ASSAM, PIN-784001, REPRESENTED BY ITS
PROPRIETOR, SRI DIGANTAJIT BARUAH, AGED ABOUT 55 YEARS, S/O
LATE LAKHI PRASAD BARUAH, R/O G.C. ROAD, WAKAF BUILDING,
TEZPUR, DIST-SONITPUR, ASSAM, PIN-784001

VERSUS

THE FOOD CORPORATION OF INDIA AND 2 ORS
REPRESENTED BY ITS CHAIRMAN-CUM-MANAGING DIRECTOR,
BARAKHAMBA ROAD, NEW DELHI, PIN-110006

2:THE GENERAL MANAGER (REGIONAL)
FOOD CORPORATION OF INDIA
REGIONAL OFFICE
ASSAM REGION
PALTANBAZAR
GUWAHATI
ASSAM
PIN-781008

3:THE DIVISIONAL MANAGER
FOOD CORPORATION OF INDIA
J.N. ROAD
KACHARIGAON
SONITPUR
ASSAM
PIN-78400

Advocate for the Petitioner : MR. A C Borbora, Sr. Adv.
Ms N Dey.

Advocate for the Respondent : Mr P K Roy, Sr. Adv.

BEFORE
HON'BLE MR. JUSTICE KAUSHIK GOSWAMI
ORDER

28.02.2024

Heard Mr A C Borbora, learned Senior Counsel, assisted by Ms N Dey, learned counsel for the petitioner. Also heard Mr P K Roy, learned Senior Counsel, assisted by Ms A Chakraborty, learned counsel for the respondents/FCI.

2. By filing this writ petition, the petitioner is assailing the action on the part of the respondent authorities in issuing the communication bearing No. S&C/FCI/DO/TEZ/Regular/Intershed/17-18 dated 27.10.2021, thereby directing the petitioner to pay an amount of Rs. 23,81,420/- (Rupees Twenty Three Lakhs Eighty One Thousand Four Hundred and Twenty Only), to the respondent authorities, which was allegedly paid in excess to the petitioners.

3. The brief facts of the case is that the respondent authorities, by NIT dated 30.08.2016, invited tenders for handling contract and road transport contract in respect of three routes within the State of Assam.

4. The petitioner, accordingly, submitted his bid document in respect of the route mentioned in Serial No. 2 of the said notice, i.e., E-Tender No. S & C/1813/Assam/2016/02-Transport Contract Ex-FCI Sliding Bindukuri to FCI FSD

Bindukuri via weighbridge (Intershed) (Distance 0.75 kms) along with 50% of Security Deposit amounting to Rs. 1,92,500/- (Rupees One Lakh Ninety Two Thousand and Five Hundred only) and an unconditional Bank Guarantee amounting to Rs. 7,70,000/- (Rupees Seven Lakhs Seventy Thousand only).

5. Accordingly, the respondent authorities after evaluation, appointed the petitioner vide communication bearing No. S & C/1843/Assam/2016 dated 20.02.2017, as Transport Contractor for the subject route. The petitioner successfully completed the work and submitted the periodical transportation bills, which also was cleared by the respondents.

6. It is the further case of the petitioner that after about expiry of three years from the conclusion of the said contract, the petitioner receives a communication dated 27.10.2021 issued by the respondent No. 3, whereby it is alleged that the petitioner has been given excess amount and hence, directed the petitioner to deposit the excess amount which is to the tune of Rs. 23,81,420/- (Rupees Twenty Three Lakhs Eighty One Thousand Four Hundred and Twenty Only).

7. Mr A C Borbora, learned Senior Counsel appearing for the writ petitioner, submits that the notice of recovery dated 27.10.2021, on the face of it, is *per se* illegal and bad in law. He further submits that the recovery notice is issued without giving any opportunity or notice to the petitioner to show cause and hence, there has been a gross violation of the principles of natural justice. He further submits that the impugned recovery notice is

barred by limitation. He further submits that the subject contract having been concluded three years back, the respondent authorities were estopped in law to re-open the matter and demand recovery of the excess amount.

8. Mr P K Roy, learned Senior Counsel for the respondents, on the other hand, submits that there being excess payment made to the petitioner, which has subsequently come to the notice of the respondent authorities, the recovery notice dated 27.10.2021 was issued. He fairly submits that there was no notice issued to the petitioner before issuing the said recovery notice. He further submits that under the terms of the contract, there is a dispute/grievance redressal committee at the Zonal Office of the Corporation, to settle disputes, if any arises between the parties to the contract. He, accordingly, submits that the writ petition is not maintainable as the petitioner has approached this Court by not availing the alternative dispute redressal forum available to him, under the contract.

9. I have heard the submissions at the Bar and perused the materials available on record.

10. It appears that the writ petitioner has successfully completed the work awarded to him on 19.02.2019 and all the periodic bills submitted by the petitioner to the respondents were also paid without any objection. It further appears that after expiry of about 3 years, the respondent authorities by issuing the recovery notice dated 27.10.2021, is resorting to recover an amount of Rs. 23,81,420/- (Rupees Twenty Three

Lakhs Eighty One Thousand Four Hundred and Twenty Only), which is said to be paid to the petitioner in excess of his bills. The impugned recovery notice dated 27.10.2021 is reproduced hereunder, for a ready reference:-

“Date-27.10.2021

To

*M/S NIT Traders G.C Road,
Wakaf Building,
Tezpur, Assam, PIN-784001.*

Sub- Recovery Notice-regarding

*Ref: 1. FCI R.O Assam work order no-S&C/ 1843/Assam/ 2016
dated 24.02.2017
2. FCI ZO(NE) speaking order no. Cont.2(6)/NEZ/ GRC/
2021/NIT/Assam dated 05.08.2021 (copy enclosed)
3. FCI R.O letter no-S&C/ 1843/Assam/ 2016 dated 26.10.2021
(copy enclosed)*

Sir,

With reference to FCI Regional Office, Guwahati Work Order No-S&C/1843/Assam/2016 dated 24.02.2017, your firm was appointed for the regular transport contract. Ex FCI Siding Bindukuri to FSD Bindukuri (Intershed). In this regard, a differential payment has been made by this office after the expiry of the Contract i.e during April'2020 (Period 24.02.2017 to 23.02.2019). However, after receiving clarification from the General Manager, FCI R.O Assam vide letter no. S&C/1843/Assam/2016 dated 26.10.2021 (copy enclosed) regarding admissible distance, it is known to this office that the payment is to be made for 0.75 kims only.

In view of the above, it is directed to deposit an amount of Rs 23,81.420/- (Rupees twenty three lakh eighty one thousand and four hundred and twenty) only in the Account of FCI DO Tezpur which is said to have been paid to your firm in excess from FCI. The said amount should be deposited within 15(fifteen) days from issue of this notice, Further, your firm is instructed to adhere with the contract agreement and deposit the aforementioned amount within the stipulated period otherwise the same will be recovered from your bills, SD/ Bank Guarantee, etc.

This is for information and necessary action please.

Yours faithfully,

*Divisional Manager
Food Corporation of India,
Divisional Office, Tezpur, 784001”*

11. A bare perusal of the aforesaid recovery notice dated 27.10.2021, indicates that the authorities have issued the final recovery notice unilaterally to the petitioner for recovering the excess payment of Rs. 23,81,420/- (Rupees Twenty Three Lakhs Eighty One Thousand Four Hundred and Twenty Only), without issuance of any show cause notice whatsoever. On the face of it, such action of the respondent authorities is demonstratively illegal and arbitrary.

12. Reference is made to the decision of Hon’ble the Apex Court in ***Bhagvan Shukla –Vs- Union of India***, reported in **1994 (6) SCC 154**, that no order could be passed by an authority against any one resulting in civil consequences without hearing the concerned person. The relevant paragraph from the said judgment is extracted hereunder:

"3. We have heard learned counsel for the parties. That the petitioner's basic pay had been fixed since 1970 at Rs.190 p.m. is not disputed. There is also no dispute that the basic pay of the appellant was reduced to Rs.181 p.m. from Rs.190 p.m. in 1991 retrospectively w.e.f. 18.12.1970. The appellant has obviously been visited with civil consequences but he had been granted no opportunity to show cause against the reduction of his basic pay. He was not

even put on notice before his pay was reduced by the department and the other came to be made behind his back without following any procedure known to law. There has, thus, been a flagrant violation of the principles of natural justice and the appellant has been made to suffer huge financial loss without being heard. Fair play in action warrants that no such order which has the effect of an employee suffering civil consequences should be passed without putting the (sic employee) concerned to notice and giving him a hearing in the matter. Since, that was not done, the order (memorandum) dated 25.07.1991, which was impugned before the Tribunal could not certainly be sustained and the Central Administrative Tribunal fell in error in dismissing the petition of the appellant. The order of the Tribunal deserves to be set aside. We, accordingly, accept this appeal and set aside the order of the Central Administrative Tribunal dated 17.09.1993 as well as the order (memorandum) impugned before the Tribunal dated 25.07.1991 reducing the basic pay of the appellant from Rs.190 to Rs.181 w.e.f. 18.12.1970."

13. The contention of Mr P K Roy, learned Senior Counsel appearing for the respondents that there is an alternative dispute redressal forum available to the petitioner and hence, the writ petition is not maintainable, cannot be accepted. It is well settled that in a given case when there is violation of the principles of natural justice, the High Court may entertain the writ petition notwithstanding the availability of an effective and efficacious remedy.

14. Reference is made to the decision of Hon'ble the Apex Court in the case of *Whirlpool Corporation –Vs- Registrar of Trade Marks, Mumbai & Others*; reported in (1998) 8 SCC 1. Paragraphs-14 and 15 of the said decision are reproduced hereunder for a ready reference:-

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

15. Reference is also made to the decision of this Court in Writ Petition (Civil) No. 3249/2022, in the case of *M/s NIT Traders –Vs- The Food Corporation of India &*

Others, where the coordinate Bench of this Court in the context of a similar issue, has set aside the recovery notice issued by the FCI authorities unilaterally without affording opportunity to the petitioner. Paragraphs 10 and 11 of the said decision are reproduced hereunder, for a ready reference:-

“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.”

16. In the present case, the decision of the respondent authorities to recover the excess amount from the petitioner affects the rights of the petitioner along with civil consequences. Such recovery in law is required to be preceded by giving full opportunity to the petitioner

to show cause against such recovery. Admittedly, no notice was issued before issuing the subject recovery notice. Therefore, there is gross violation of the principles of natural justice.

17. In view of the above, this Court is of the considered view that the recovery notice dated 27.10.2021 is not issued in accordance with law and is required to be interfered with. As such, the recovery notice dated 27.10.2021, issued by the respondent authorities, is set aside and quashed.

18. With the observations made and directions given above, the writ petition stands allowed. Interim orders passed earlier is accordingly, made absolute.

19. It is further provided that the security deposit, bank guarantee and earnest money, if is kept withheld, the same shall be released in accordance with law in accordance with the terms and conditions of the contract with the petitioner.

20. No cost(s).

JUDGE

Comparing Assistant