

IN THE HIGH COURT OF TRIPURA
AGARTALA

W.P.(C) NO.367 OF 2012

Sri Abhijit Paul,
son of Sri Swapan Kumar Paul,
resident of B.K. Road, Agartala,
P.O. Agartala, P.S. East Agartala,
District West Tripura.

..... Petitioner

– Vs –

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,
Food Corporation of India,
North East Frontier Region,
Midland, Shillong-03
3. The Area Manager,
Food Corporation of India,
Colonel Chowmuhani,
P.S. West Agartala, District West Tripura.

.....Respondents

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the petitioner : Mr. A.K. Bhowmik, Sr.Advocate
Mr. R. Dutta, Advocate

For the respondents : Mr. P. Chakraborty, Advocate

Date of hearing : 25.02.2015

Date of judgment & order : 27.02.2015

Whether fit for reporting :

Yes	No
	√

JUDGMENT & ORDER

By means of this writ petition, the petitioner who is a transport contractor, has challenged the action of the respondents deducting a sum of ₹2,32,154 as the railway demurrage charges from the bill of the petitioner (Annexure-4 to the writ petition) in respect of the transportation carried out in compliance to the order awarding the contract under No.Cont.9/NEFT/TC/CBZ-CDR/2011, dated 25.04.2012 (Annexure-2 to the writ petition).

2. There is no dispute that the petitioner was awarded the work for transporting, loading and unloading, handling of food-grains, sugar and allied materials for the prescribed route as provided in the Notice Inviting Tender dated 13.09.2011, (Annexure-1 to the writ petition). The petitioner had been awarded the work by the communication of even number dated 25.04.2012 (Annexure-2 to the writ petition).

3. After execution of the said transportation, the petitioner raised the bill (Annexure-4 to the writ petition), but when the payment was made, a sum of ₹2,32,154 had been deducted by the respondents as the railway demurrage charges.

4. The petitioner has asserted that there is no provision in the agreement that has been entered into between the petitioner and the respondents to deduct such demurrages,

wharfages etc. from the transport contractor. But, the petitioner has asserted that earlier a provision used to be the part of the agreement, which reads as under :

"12(a) The contractors shall be liable for all costs, damages, demurrages, wharfages, forfeiture of wagon, registration fees, charges and expenses suffered or incurred by the Corporation due to the contractor negligence and un-workman like performance of any services under this contract or breach of any terms thereof or their failure to carry out the work with a view to avoid incurrence of demurrage, etc. and for all damages or losses occasioned to the Corporation due to any act whether negligent or otherwise of the contractors themselves or their employees. The decision of the General Manager regarding such failure of the contractors and their liability for the losses, etc. suffered by Corporation shall be final and binding on the contractors."

5. According to the petitioner, in the present agreement no such provision has been incorporated and, as such, the petitioner does not have any contractual liability to make payment of the railway demurrage charges. Despite that, from the transportation bill that has been raised by the petitioner (Annexure-4 to the writ petition), the respondents deducted the said sum most arbitrarily.

6. In reply, the respondents have submitted that they have deducted the said amount in terms of clause 12(a) of the agreement and, as such, the petitioner is entirely responsible for the delay in clearance of the food materials from the railway

wagons or the yard. As such, the petitioner is under obligation to make good the loss of the respondents. It has been further stated that, in a similar matter, in terms of the order delivered in W.P.(C) No.460/2011 (Abhijit Paul Vs. F.C.I.), the Gauhati High Court permitted the Food Corporation of India to recover the losses suffered due to negligence of the contractor after necessary enquiry. It has been observed that the concerned Depot In-charge shall fix the liability of railway demurrage charges etc. after necessary enquiry at his level.

7. Mr. A.K. Bhowmik, learned senior counsel appearing for the petitioner, has submitted that the action of the respondents is entirely arbitrary and abuse of power, inasmuch as, the petitioner did not have any opportunity whatsoever either to deny or admit fully or partly the damage as determined by the Food Corporation of India. As there is no contractual liability, such determination is bound to be arbitrary and colourable exercise of power. Mr. Bhowmik, learned senior counsel, has relied on a decision of the Gauhati High Court in **Bulbul Enterprise Vs. Food Corporation of India & Ors.**, reported in **(2000) 2 GLR 537**, where it has been held that the powers of the Court under Article 226 is discretionary in nature and it has to be invoked in consideration of the facts and circumstances in the realm of the controversy. Where the dispute centres around arbitrary and unfair action, the Court shall not refuse to invoke such jurisdiction

and to pass the appropriate order. In **Bulbul Enterprise Vs. Food Corporation of India & Ors.**, the Gauhati High Court has further held that the respondents shall act in strict compliance with the provisions of the terms of contract and not to deduct any amount on account of demurrage without undergoing an exercise as provided under Clause XII of the contract.

8. There cannot be any amount of doubt that the respondents have failed to show that there had been any provision like the clause 12 in the relevant agreement and, as such, the petitioner cannot be saddled with any contractual liability in absence of such express provision for making good of the loss that has purportedly been sustained by the respondents during execution of the transportation work. However, it is well settled that even in absence of any agreement or contract, the petitioner may be held liable if it can be substantiated that for negligence or dereliction of the petitioner, the respondents have suffered loss in the course of the transportation. But, for that purpose there shall be an enquiry where the petitioner must have his say or the respondents may take recourse to a procedure established by law for realising the damages, if any.

9. Having held so, the respondents are directed to either determine the damages following the due process of law or satisfying the requirement of the principles of natural justice or by

way of conciliation. Only in that event the petitioner may be asked to make good of the loss, otherwise not.

10. In the result, the respondents are directed to assess the loss, if any, they have suffered at the hand of the petitioner in the course of execution of the said transportation work within a period of 6(six) months from today after affording the petitioner due opportunity to have his say or following the due process of law or action at law, else the respondents shall refund the said sum as deducted from the transportation bill that was raised by the petitioner (Annexure-4 to the writ petition), within a period of 3(three) months thereafter.

11. With this observation and direction, this petition stands allowed to the extent as indicated above.

There shall be no order as to costs.

JUDGE

ROY