

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on: 23/06/2017****Judgment Delivered on : 27/06/2017****Writ Petition (C) No. 1606 of 2017**

National Federation of Farmer Procurement Processing and Retailing Cooperative of India Limited (NACOF) Through its State Head Charan Singh Naik, S/o Late Shri Panka Naik, aged about 35 years, having its State registered office at C-180, Shailendra Nagar, Raipur. Chhattisgarh- 492001.

---- Petitioner**Versus**

1. State of Chhattisgarh, Through the Secretary, Department of Food, Civil Supplies and Consumer Protection, Mahanadi Bhawan, Mantralaya, Post and PS Mandir Hasaud, Raipur, Chhattisgarh.
2. Managing Director, Chhattisgarh State Civil Supplies Corporation (CSCSC), Head office at Hitvada Parisar, Avanti Vihar, Telibandha, Raipur, Chhattisgarh – 492001.

Through the Principal Secretary, Department of Home, Mahanadi Bhawan, Mantralaya, Post and PS Mandir Hasaud, Raipur, Chhattisgarh.

---- Respondents**Writ Petition (C) No. 1608 of 2017**

National Federation of Farmer Procurement Processing and Retailing Cooperative of India Limited (NACOF) Through its State Head Charan Singh Naik, S/o Late Shri Panka Naik, aged about 35 years, having its State registered office at C-180, Shailendra Nagar, Raipur. Chhattisgarh- 492001.

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Through the Principal Secretary, Department of Home, Mahanadi Bhawan, Mantralaya, Post and PS Mandir Hasaud, Raipur, Chhattisgarh.

---- Respondents

For Petitioner	: Shri Kishore Bhaduri and Shri Abhinav Kardekar, Advocates.
For Respondent No.1/State:	Shri A.S. Kachhawaha, Additional Advocate General.
For Respondent No. 2	: Shri Saurabh Dangi and Shri Animesh Tiwari, Advocates.

Hon'ble Shri Thottathil B. Radhakrishnan. Chief Justice
Hon'ble Shri P. Sam Koshy, J.

C.A.V. Judgment

Per Thottathil B. Radhakrishnan, Chief Justice

1. These two writ petitions are filed by the National Federation of Farmer Procurement Processing and Retailing Cooperative of India Limited, which was the successful bidder for supplying *Chana* in terms of the invitations of offers issued by the 2nd Respondent – Chhattisgarh State Civil Supplies Corporation (*hereinafter referred to as "the Corporation"*).
2. These two writ petitions are filed challenging the decision of the Corporation to encash the two Earnest Money Deposits (*hereinafter collectively referred to as 'the EMD'*) made by the Petitioner for the two contracts to supply *Chana* and to blacklist it for a period of three years.
3. Heard the learned counsel for the Petitioner, the learned counsel for the 2nd Respondent and the learned Additional Advocate General for the State.

4. Writ Petition (C) No. 1606 of 2017 relates to supply of 25,932 Metric Tonnes of *Chana* in Bastar, Beejapur, Dantewada, Sukma, Kanker, Kondagaon, Narayanpur, Dhamtari, Balod, Gariyaband and Rajnandgaon area for the period from April, 2017 to March, 2018 (both inclusive) and Writ Petition (C) No. 1608 of 2017 relates to supply of 20,088 Metric Tonnes of *Chana* in Bilaspur, Korba, Raigarh and Jashpur for the same period.
5. Since the pleadings of the Petitioner and the Corporation are similar in both the writ petitions and the material documents are also similarly worded, we have heard the learned counsel for the parties on issues arising for consideration of the writ petitions jointly.
6. The sum and substance of the allegations against the petitioner is that pursuant to it being selected as the lowest bidder for supply of *Chana* under the two invitations of offers, it did not enter into the written contract document that is required to be made between the parties within the time prescribed, and also did not commence the supply of commodity within the period prescribed for commencement of such supply.
7. Petitioner pleads that the decision of the Corporation to encash the EMD and to blacklist it are arbitrary and wholly unjustified and the proposal to encash the EMD and to blacklist the Petitioner has no reasonable nexus to the actions attributed to it. The huge amount that is placed as EMD alongwith submission of tenders and the period of time during which the performance has to be obtained are pointed out to state that the action by the Corporation is liable to be interfered through judicial review under Article 226 of the Constitution. It is pleaded and argued that the impugned actions are violative of the fundamental rights in relation to trade and also are wholly arbitrary thereby infracting Articles 14 and 19 of the Constitution.

8. *Per contra*, the Corporation has pleaded and it has been argued on its behalf that the contract between the parties contain an arbitration clause and therefore going by the settled position of law, it is impermissible to grant relief in writ jurisdiction. It is further argued that the actions of representative of the Petitioner is ridden with fraud and oblique motives and the Corporation should be understood as having lost confidence in the Petitioner as a potential supplier. This contention is founded on the plea that the representative of the Petitioner was not available to sign the contract document and ultimately he had put a different date while actually signing the document and this was done in a clandestine manner. According to the Corporation, this is itself an act which results in breach of confidence and breach of the terms of the contract.

9. The Respondent-Corporation has the avowed objective to effectively augment the public distribution system in the State of Chhattisgarh. During the course of the consideration of these writ petitions, it was also noted that one among the two contracts related to supply to areas like Bastar, Beejapur, Dantewada, Sukma and other areas which, unfortunately, are facing certain adverse local situations in relation to administration and control, by virtue of law and order problems. Therefore, on 19.06.2016, this Court, while noticing the objections levied by the Corporation to the maintainability, jurisdiction and other issues and also keeping aside the various other contentions, issued an order in an effort to probe the possibility of arriving at a solution which will reduce the time lag for the supply of *Chana* reaching the end consumers. The Bench obviously had in mind also the delay that would result by not accepting the supply from the Petitioner on behalf of which, it was submitted that it was ready to make the supplies. Also, such a situation could be the where proceedings for invitation of tenders and resultant finalization of

fresh contracts and effecting supplies thereunder would also result in further time lag in the commodities reaching the end users, bearing in mind the time schedule that would be available in terms of such invitation of offers. Accordingly, an order was issued on 19.06.2017, the relevant portion of which reads as follows:

“....For the time being, keeping aside all niceties relateable to the maintainability, jurisdiction, comparative hardships etc. vis-a-vis parties to the litigation, what has emerged during the submissions on behalf of either side is that the pulses or cereals which are to be supplied by the Petitioner in terms of the contract are intended for the public distribution system which, as rightly pointed out by the Respondent-Corporation has to subserve the interest of the large mass of marginalised people of the State of Chhattisgarh including those spread in the socially and otherwise challenged sectors of the tribal areas and also areas where there appears to be conflict in matters relating to law and order.

On the whole, we are satisfied that this is an abundantly fit case where this Court should make all efforts at the first instance to possibly reach at a solution where the benefit of the contract does not wait to run and reach the end users.

In the aforesaid context and on the request of both the sides, we adjourn the matter to tomorrow for further consideration.

Finalization of any tender *de novo* in favour of any person by the Respondent-Corporation after the alleged termination or blacklisting of the Petitioner in relation to the contract which is the subject matter of these writ petitions, will stand suspended for the time being.”

10. The matter was accordingly posted on 20.06.2017. However, it was noticed on that day that the matter called for adjudication in the light of the fact that the situation could not be concluded otherwise. Hence, an order was minuted on 20.06.2017, the relevant portion of which reads as follows:

“.....Read the order dated 19.06.2017. Going by the submissions at the bar, it appears that the respondents are institutionally not prepared to go by any modality other than an adjudication of the issues raised. The subject matter requires emergent decision. Hence, list

for final disposal at the motion hearing list on 22.06.2017.

The restriction imposed by this Court on the finalization of any tender will continue for the time being.”

11. These writ petitions have been finally heard thereafter on the submissions raised on different issues.

12. Learned Counsel for the Petitioner making reference to chronology of events and the terms of the invitation of offers argued that the Petitioner is well within the terms of the tender conditions to effect supply within the period of two months covered by the supply order and by availing a further period of 30 days suffering penalty of 2%. He argued that the Petitioner had the unavoidable *bona fide* reason resulting out of death of the father of the Petitioner's representative and it was therefore the contract document was not signed in the first instance. He further argued that the Corporation cannot fasten such a drastic liability merely on account of delay in executing the document reducing the terms of the contract in writing after the supply orders for the months May – June 2017 were issued in both the cases. It is too harsh on the part of a public body like the Corporation to recall to its aid in previous event like non-signing of a document when it had issued supply order in conformity with the tender conditions. He argued that on the whole, this is abundantly a fit case where this Court comes to the aid of the Petitioner which is not an individual but a body of the farming community and it is involved in the process of procuring, processing and supplying of farm products and it operates at national level and its activities, on the whole, are intended to effect supplies of such large quantities.

13. Learned counsel for the Corporation making reference to the judgments of Hon'ble the Supreme Court of India in *Nova Steel (India) Ltd. Vs. M.C.D. and Others (1995) 3 SCC 334*, *State of U.P. vs. Bridge & Roof Company*

(India) Ltd. (1996) 6 SCC 22, State of Bihar vs. Jain Plastics and Chemicals Ltd. (2002) 1 SCC 216 and Joshi Technologies International Inc. vs. Union of India and Others (2015) 7 SCC 728 argued that in view of the availability of an arbitration clause, it was not open to the Petitioner to seek relief from the writ court and the arbitration clause is an alternative remedy which the parties have agreed to and the efficacy or otherwise of which cannot be disputed. The further submission is that the question of blacklisting and encashment of EMD have been taken on the basis of the contractual clauses and therefore it was not open to judicial review under Article 226 of the Constitution. Certain facts and factors were also submitted to point out that in accordance with the time schedule prescribed for executing written documents, the Petitioner had not made its representative available for carrying out such documentation and that inspite of the supply order that was issued, commencement of supply was not effected within the time limit prescribed from the date of execution of the contract. It was further argued that this is a case of sitting on the fence and delaying the supply awaiting favorite market price for purchase of *Chana* for effecting the agreed supplied. The learned counsel for the Corporation thus argued that notwithstanding the question of maintainability and jurisdiction, even on merits, the Petitioner's writ petitions would not stand.

14. Countering the Corporations's contentions as to alternative remedy on the basis of the arbitration clause, the learned counsel for the Petitioner argued that the decisions of the Hon'ble Apex Court in *Harbanslal Sahnia and another vs. Indian Oil Corporation Ltd. (2003) 2 SCC 107* and *Union of India vs. Tania Construction Private Ltd. (2011) 5 SCC 697* would clearly show that there is no exclusion of jurisdiction and even in cases where the parties have an arbitration clause between them, it is open to

the writ court to consider whether the facts and circumstances of the case call for interference with a contract of such nature, which is primarily in the public domain and intended to satisfy a public purpose. He further argued that if the contention of the Corporation is to the effect that the agreement itself has not been signed, it cannot be permitted to turn around and contend at the same breath that the agreement contains an arbitration clause and therefore recourse to arbitration is the only remedy available.

- 15.** The requirement to enter into a written document which would reflect the terms of the contract is provided for in the invitations of offers. The EMD is prescribed as something that could be invoked and appropriated if such requirement is not satisfied. Therefore, it would appear that a written document of contract is prescribed as between the parties and the requirement to make such document is one among the prescriptions of invitations for offers. The supply orders are to be given after the written document of agreement is entered into. However, in both the transactions in hand, while the Corporation alleges that the contract document was not signed by the representative of the Petitioner within the time stipulated, the fact of the matter remains that the supply order was duly issued. There is considerable dispute between the parties as to the exact date on which the Petitioner's representative signed the document and also whether there was a manipulation by him while putting the date in the document, which act could be attributed and characterized as fraud. However, the sequence of events would disclose that the invitations for offers by the Corporation resulted, among other things, in the offers being made by the Petitioner in response to the two invitations being actually accepted by the Corporation, as is understood in law. When the invitations for offer by the Corporation is responded to by the Petitioner by making the offers and such offers are accepted by the Corporation by issuing the

supply orders, the Petitioner cannot be permitted to wriggle out of the terms of contract which obliges it to effect the supplies. The question whether the written document that is contemplated in the tender is *sine qua non* to hold that there is a valid contract between the parties need not be deliberated upon much to hold that in the given situation, the documentation is the mode by which the bargain between the parties which have already been concluded, are reduced to writing. This is the net effect of the factual matrix of the transactions, as is evidenced through the documents leading to issuance of supply orders to the Petitioner. Therefore, the rights and liabilities as between the parties can be determined on the basis that there is a concluded contract *de hors* any written agreement between the parties.

16. The learned counsel for the Corporation is fully justified in arguing that the representative of the Petitioner could be seen to have not made himself available for signing the document on or before the appointed day and thereafter the attempt was to get further opportunity on the premise that he had lost his father. We are not persuaded by any plea of the Petitioner that there was no situational default by the representative of the Petitioner. We see that the case in hand is one where the questions as to whether the agreement was signed in time and whether there was any fraudulent action by the representative of the Petitioner in the matter of dating the said document while he put his signature thereon, are not to be considered at this point of time, for the simple reason that even beyond the so called execution of that document, supply orders were issued and no action for invoking the EMD was taken solely on a ground referable to non-execution or allegedly fraudulent activity of the representative of the Petitioner. Therefore, the settled factual position for the determination of these writ petitions is that there were two concluded supply contracts

between the Petitioner and the Corporation and such concluded contracts had to be satisfied by the Petitioner by effecting the supplies of *Chana* in terms of the time schedule required as per the tender conditions and the supply orders.

- 17.** The sequence of events and the documents would show that the invitation for offers was coupled with the requirement to provide EMD alongwith the offers. The supply schedule is on monthly basis and the periodicity is also settled. This is coupled with a penalty of 2% for delay upto 30 days in effecting the supplies. The supply orders are to be given by the Corporation for two months in one go and the supplies had to be effected in terms of such supply schedule with the said liability of 2% penalty for delay upto 30 days. It is only after the occurrence of delay of such 30 days the liability to termination and blacklisting would come.
- 18.** The aforesaid leads to the fact that the Petitioner did not commence the supplies in answer to the first set of supply orders which obliged the Petitioner to effect the supplies within 30 days of the supply orders which were issued on 03.04.2017. The supplies ought to have therefore been effected within 30 days from the issuance of those supply orders. The penalty provision provides for a further period of 30 days on a penalty being levied at 2%. With that, the first supply order could have been satisfied by the Petitioner, suffering the penalty, by the end of June, 2017.
- 19.** The facts disclose that for the month of May and June, 2017 the Petitioner had not effected any supplies and therefore, there was deprivation of commodities as ought to have been supplied by the Petitioner. The commencement of supply should have been within 15 days of the document of contract being entered into. Bearing that in mind, it is to be noted that the situation in hand is one where the proposal to invoke EMD and for their appropriation and consequential blacklisting are not based on

proper appreciation of entire relevant facts and factors in relation to supply contract of such nature. We particularly note that the total amount of EMD in both the cases put together runs on the basis of the total amounts covered by two contracts which would be around Rs. 143 Crores for the entire contract period. Taking the delay in complying with the first supply order, it would only be just and reasonable that the Petitioner is permitted to effect the supplies covered by the said supply order within the shortest period of time suffering penalty in accordance with the contract and also reasonable further penalty by way of compensation to the Corporation as may be decided by this Court as regards the delay in performing the obligations under the supply orders relating to months of May and June, 2017, and without prejudice to the Corporation insisting on due and timely performance of supply orders for the subsequent periods under the contract. The Corporation is entitled to impose penalty clause for the delay in the supply in terms of the supply orders for the months of May and June, 2017. The penalty component that would be thus available in terms of the contract is reckoned to determine just and reasonable further penalty that may be awarded by this Court as compensation over and above the penalty that may be imposed by the Corporation in terms of the conditions. We quantify such additional compensation to be at Rs.10,00,000/- (Rupees Ten Lakhs) which would approximately be ½ percent of the price of the commodities to be supplied as per the supply orders for the months of May and June, 2017 and hold that to avail benefit of this judgment, the Petitioner has to pay the Corporation within 10 days from today an amount of Rs. 10,00,000/- (Rupees Ten Lacs Only) as costs of these two writ petitions which would be reasonable component of compensation for not discharging the obligations under the supply orders even within the contractual period applying the penalty clause in the agreement.

20. In the aforementioned factual context of the cases in hand, the different precedents referred to by the learned counsel for the Corporation on the issue whether this Court would exercise its discretionary jurisdiction under Article 226 of the Constitution of India on the face of the arbitration agreement between the parties do not appeal to us. We say this for two reasons; firstly, because the Corporation having pleaded that the document of contract was not executed within time, the question of arbitration regarding invocation of the EMD and blacklisting on the ground that such agreement was not executed, cannot be arbitrable and secondly, the issue raised by the Corporation as to fraud is not one which is to be adjudicated on any other material but solely dependent on the so called non-execution of the contract document in time and the alleged action of the representative of the Petitioner in putting a particular date other than that of the day on which he had signed the document. Under such circumstances, we are of the view that notwithstanding availability of arbitration clause in the document of contract which was to be entered into between the parties, there is no jurisdictional bar for this Court to deal with the issues in hand under Article 226 of the Constitution of India. This is more particularly because the penalty clause was not invoked by the Corporation and such situation necessarily calls for judicial review even on admitted facts. Therefore, the law laid down by the Hon'ble Apex Court through the different decisions noted above relating to different situations does not exclude the exercise of writ jurisdiction in the matter.

21. We are of the view that the delay in effecting supplies, either by reason of fresh tenders being invited or otherwise, would only delay the supply of the food articles through the Public Distribution System. Therefore, ends of justice require that the impugned orders are quashed paving way for the Petitioner effecting the supplies on the basis of supply orders issued

for the month of May and June, 2017 and also for the subsequent periods in terms of the contracts between the parties on such conditions as are enumerated in the succeeding paragraph of this judgment. As a consequence, tender process initiated after the impugned orders also has to be prevented from being enforced in view of the order and directions being issued hereinafter.

22. In the result, these writ petitions are ordered as follows:

(I) The orders impugned in both the writ petitions are quashed paving way for the Petitioner effecting the supply on the basis of supply orders issued for the month of May and June, 2017 and also for the subsequent periods in terms of the contracts between the parties on the following conditions:

(i) The entire supplies due in terms of the supply orders for the months of May and June, 2017 shall be effected within 14 days from today, that is to say before 10.07.2017 and the Corporation shall receive those supplies if they are made promptly within such time limit and on the further condition that the Corporation shall impose penalty of 2% in terms of clause 24 of the supply conditions based on the date of the supply order and also on the further condition that the Petitioner pays the Corporation within ten days from today, an amount of Rs. 10,00,000/- (Rupees Ten Lakhs) as costs of these two writ petitions.

(ii) If supplies aforesaid are made in accordance with the contract, as regards quality, quantity, destination etc. the Corporation will permit the Petitioner to discharge the obligations in terms of the contracts for the remaining periods by issuing supply orders and all such supply orders shall be satisfied within the time limits as per the tender conditions. The period of time for performance of any such supply order shall not be extended

merely by reason of the extension of period of time granted as per this judgment for complying with the supply obligations as per the supply orders dated 03.04.2017.

(iii) The time limits fixed herein shall be treated as peremptory.

(II) Any invitation for offers or consideration of offers in terms of any invitation issued as a consequence of the impugned order will not be processed or effectuated for the time being awaiting due performance of the directions in this judgment by the Petitioner.

(III) If the aforesaid conditions as to supply, penalty and costs in relation to supply orders dated 03.04.2017 are not obeyed by the Petitioner in relation to the contracts which are the subject matter of these writ petitions, the quashment of the impugned decisions of the Corporation will stand automatically withdrawn and the impugned orders will operate and bind the Petitioner; and all directions and orders contained in this judgment insofar as it is in favour of the Petitioner will stand vacated and the writ petitions will stand dismissed with costs fixed at Rs.10,00,000/- (Rupees Ten Lakhs) and the Corporation will be entitled to further proceed with the tenders which have already been received in terms of the tender invitations extended after issuance of the impugned orders. This will be without prejudice to the eligibility of the Corporation to recover the costs as ordered in this clause.

Sd/-

(Thottathil B. Radhakrishnan)
CHIEF JUSTICE

Sd/-

(P. Sam Koshy)
JUDGE