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HIGH COURT OF CHHATTISGARH, BILASPUR

WPC No. 2529 of 2016

- Harvinder Singh Bhatia S/o Shri Balwant Singh Bhatia, Aged About 57 Years R/o Old Bazarpara, Pathalgaon, District Jashpur, Civil And Revenue District Jashpur, Chhattisgarh

---- Petitioner

Versus

1. Food Corporation of India, through its General Manager Region, Zonal Office West, 3rd Floor, Dattapada Road, Rajendra Nagar, Boriwali East Mumbai- 400 066
2. Assistant General Manager, Food Corporation Of India, Regional Office, Vidhan Sabha Marg, Pandri, Raipur, Chhattisgarh

---- Respondents

For Petitioner	:	Shri B. P. Sharma, Shri M.L.Saket, Shri Hari Agrawal, Shri Manay Nath Thakur and Shri Sameer Oraon Advocates
For Respondents	:	Shri B. P. Gupta, Advocate

Hon'ble Shri Ajay Kumar Tripathi, Chief Justice

Hon'ble Shri Parth Prateem Sahu, Judge

Order on Board

Per, Ajay Kumar Tripathi, Chief Justice

27.11.2018

1. Petitioner was awarded a contract for 'RH-H&T' Road Head and Handling & Transport which was to subsist between 01.06.2012 to 31.05.2014 since he was found L-1.

2. One Anup Singh Sayal, whose technical bid was rejected, made a complaint to the Respondent–Food Corporation of India (for short 'the FCI') on 24.05.2012 that a sum of Rs.9,96,634/- had been recovered from the Earnest Money Deposit (for short 'the EMD') / Security Deposit (for short 'the SD') by way of adjustment from M/s. Bhatia Road Carriers during the financial year 2008-09 by the Chhattisgarh State Civil Supplies Corporation, Raigarh (for short, 'the CGSCSC') and this fact had not been

disclosed, if not, suppressed by the successful bidder, therefore, the contract was liable to be terminated in terms of Clause 13 of the contract. Clause 13 reads as under :-

> "13. If the information given by the Tenderer in the Tender Document and its Annexures & Appendices is found to be false/incorrect at any stage, Food Corporation of India shall have the right to disqualify/ summarily terminate the contract, without any prejudice to any other rights that the Corporation may have under the contract and law."

3. In addition to the above clause, the Notice Inviting Tender also carried certain stipulation about disqualification. Disqualification conditions in Clause 4 are reproduced here in below :

> **"4. Disqualification Conditions.**
>
> (I) Tenderers who have been blacklisted or otherwise debarred by FOI or any department of Central or State Government or any other Public Sector Undertaking will be ineligible during the period of such blacklisting or for a period of 5 years from the date of blacklisting/ debarment, whichever is earlier.
>
> (II) Any Tenderer whose contract with the Food Corporation of India, or any department of Central or State Government or any other Public Sector Undertaking has been terminated before the expiry of the contract period at any point of time during last five years, will be ineligible.
>
> (III) Tenderer whose Earnest Money Deposit and/or Security Deposit has been forfeited by Food Corporation of India or any department of Central or State Government or any other Public Sector Undertaking, during the last five years, will be ineligible.
>
> (IV) If the proprietor/any of the partners of the Tenderer firm/any of the Director of the Tenderer company have been, at any time, convicted by a court of an offence and sentenced to imprisonment for a period of three years or more, such Tenderer will be ineligible.

> (V) While considering ineligibility arising out of any of the above clauses, incurring of any such disqualification in any capacity whatsoever (even as a proprietor, partner in another firm, or as director of a company etc.) will be render the Tender disqualified.
>
> (VI) A Hindu Undivided Family (either as a proprietor or partner of a firm) shall not be entitled to apply for tender. Any tender submitted in the capacity of Hindu Undivided Family (either as a proprietor or partner of a firm) shall be summarily rejected."

4. The contract also gives power to the General Manager to resort to summary termination in case of breach of any of the terms or conditions of the contract and also to get the work done for the unexpired period of the contract at the risk and cost of the contractor and / or forfeit the security deposit or any part thereof for the sum or sums due for any damages, losses, charges, expenses or costs that may be suffered or incurred by the FCI.

5. On 02.05.2013 i.e. almost after a year of award of the contract and while the contract was being honoured by the Petitioner, a show cause was issued on 02.05.2013, a copy of which is Annexure P/1. The primary allegation made in the show cause was that M/s. Bhatia Road Carriers while participating in the tender enquiry dated 31.03.2012 had given a declaration at point No.9 of the contract "I hereby declare that the Earnest Money Deposit and/or Security Deposit has not been forfeited or adjusted against any compensation payable, in the case of any Contract entered into by me/my firm/company/us with the Food Corporation of India, or any department of Central or State Government or any other Public Sector Undertaking during the last five years".

6. It is alleged in the show cause that for the financial year 2008-09, a sum of Rs.9,96,634/- had been adjusted from the SD / EMD from the Petitioner and he had not truthfully declared the same to the Corporation which was vital suppression of material facts.

7. The question which arises for consideration in the present writ application is whether the so-called deduction which was made by the CGSCSC in the financial year 2008-09 was any kind of forfeiture or adjustment against any compensation payable in relation to the said contract or not and whether non-discloser of the same warranted cancellation of the contract and forfeiture of the SD by the Respondent-FCI ?

8. Against the show cause a very detailed reply was given by the Petitioner, a copy of which is Annexure P/2. They denied that there was any suppression. They did accept that by mutual understanding and agreement, an adjustment on risk and cost was made by the said Civil Supplies Corporation in the year 2008-09, but the same should not be read as some kind of a punishment for a breach of a contract since the CGSCSC themselves in the communication made to the FCI on 09.11.2012 categorically stated that in the last five years, the CGSCSC had not incurred any loss from the Petitioner nor any SD or EMD has been forfeited. He has further neither suffered blacklisting or any kind of punishment which goes with breach of contract. However, they do certify that due to excess work the said M/s. Bhatia Road Carriers allowed and agreed to get the work done by hiring additional contractor

and the cost involved therein was quantified and adjusted against the SD or the EMD with due consent and agreement.

9. The explanation so offered coupled with the qualification did not satisfy the Respondents and it seems that one of the reasons can be that the unsuccessful bidder mounted pressure at various levels right up till headquarters and the FCI playing safe in such decision making treated such deduction to be a case of some kind of punishment upon the Petitioner for breach of contract which led to issuance of an order of annulment of contract including forfeiture. These decisions are Annexure P/3 dated 04.09.2013 and the rejection of appeal by Annexure P/5 dated 19.12.2013 and communication dated 18.03.2016 contained in Annexure P/11 where the request of Petitioner for refund of the SD has been negated. The Petitioner seeks quashing of all these orders.

10. Submission of the counsel for the Petitioner is that the FCI received the complaint of the unsuccessful bidder i.e. Anup Singh Sayal on 24.05.2012. They did make some quick communication with the CGSCSC and *prima-facie* being satisfied as to the circumstances of that adjustment, decided to award the contract to the Petitioner for the period 01.06.2012 to 31.05.2014. The Petitioner performed the contract without any kind of objection from the FCI till a decision to finally end the contract was taken on 04.09.2013. Thereafter for the left over period, a contract was floated at the risk and cost of the Petitioner, but that contract being lower than the price quoted by the Petitioner did

not create any kind of loss to the FCI and therefore, it is urged that there was no occasion to forfeit or withhold the SD.

11. It is forcefully contended on behalf of the Petitioner that in the given facts and circumstances there was no obligation on the part of the Petitioner to make a declaration of such adjustment by the the CGSCSC because a reading of the various terms and conditions of the contract the intent of the FCI was to find out whether any of the bidder including the successful one had incurred any kind of disqualification for non-performance of contract or failure to perform the contract which could be in any form lead to blacklisting, debarring forfeiture of EMD or SD or adjustment by way of compensation payable as part of any contract in relation to any previous contract.

12. From the various communications including the deliberations done within the FCI it does emerge that the FCI did accept the position from the detailed narration of the summary of the case relating to RH-H&T contract of Raigarh which is evident from Annexure P/7. After a complete narration in relation to the award of the said contract, the note of the AGM (Contract) of FCI which concludes in paragraph 17 does shed a-lot of light as to what was perceived by one of the important functionaries of the Respondent FCI.

> "17. <u>Further, CGSCSC clarified that the adjustment of EMD is a regular practice in their agency & his EMD was adjusted at his own will. M/s Bhatia Road Carriers is still being awarded contracts in CGSCSC</u>.

13. Counsel for the Petitioner, therefore, summarizes his argument that despite clear communication and the stand of the CGSCSC as to the circumstances under which the adjustment came to be made with clear stipulation and indication that the same was not treated as a kind of failure on the part of the Petitioner to perform the contract as such. Adjustments were never treated to be an adverse decision creating any kind of disqualification against the Petitioner in award of any future contract. In the said background, the Respondent FCI should have closed the matter at that, but by a laboured kind of decision by relying upon Clause 13 that it was a case of deliberate suppression, they terminated the contract and also ordered for forfeiture of the SD after more than a year.

14. The stand of the counsel for FCI who has been resisting the prayer of the Petitioner in a dogged manner submits that the adjustment from the EMD made by the CGSCSC was on the risk and cost of the Petitioner and when ever such expression is used, it indicates failure on the part of the contractor to perform the contract in question. The communication from the CGSCSC does indicate that even though it was with the consent of the Petitioner, the adjustment was made at the risk and cost and this fact should have been truthfully disclosed by the Petitioner in his declaration made before the FCI and since he did not do so, the FCI was correct in terminating the contract after issuing him an opportunity and show cause.

15. We fail to understand and appreciate as to why FCI itself was being hyper sensitive ignoring the earlier part of the communication made by the CGSCSC which informed the FCI that the additional work which was carried out in relation to the contract for the year 2007-08 was not treated as breach of contract. They have indicated it so in so many words. It also emerges that such adjustments are being done as a norm at times without any adverse inference being attributed to such adjustments and therefore, they ought not be treated to be a case of some kind of forfeiture or adjustment being compulsorily made by way of compensation which was necessitated because of failure or breach of the contract.

16. If the Petitioner had entered into a contract with the CGSCSC for the year 2007-08 and the adjustment so made by them because of enhanced or additional work was not treated to be a breach committed by the Petitioner, then the FCI ought to have accepted the communication made by the said Corporation clarifying the position. For after all debarment from consideration or participation in a contract has to be also seen in terms of Clause 4 which gives out the essence including the elements which can create a hurdle for a person to be considered eligible for award of a contract.

17. The sum essence of the evidence and materials available on record is a pointer to one fact that the idea was to punish a person provided he had incurred any kind of disqualification or punishment for a breach or non-fulfilment of a contract. Since that essence is not emerging from

the adjustment made of Rs.9,96,634/- by the CGSCSC for the year 2007-08, the cancellation of the contract after its award and agreement when almost half of the period of contract had been performed successfully by the Petitioner was uncalled for.

18. Since the contract in question has already run its force, therefore no relief as such can be granted to the Petitioner on that count. However, we do record that since for the left over period the contract was awarded at the risk and cost of the Petitioner and that contract was awarded to a successful bidder at a lower price than the present Petitioner, therefore, the FCI has not suffered any additional loss or expenses in completion of the left over period of contract.

19. In the above circumstances, therefore, the decision of the Respondent at this stage to withhold the SD on the spacious ground of suppression of material fact or falseful declaration does not stand to reason and therefore the decisions Annexures – P/3, P/5 and especially Annexure P/11 dated 18.03.2016 refusing to release the SD of the Petitioner is set aside.

20. A direction is issued upon the Respondent authorities of the FCI to release the SD in favour of the Petitioner within a period of three months from the date of production of a copy of this order.

21. The writ application stands allowed in terms of the above.

Sd/-
(Ajay Kumar Tripathi)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

Chandra