

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP-21719-2017 (O&M)
Date of decision:- 17.01.2018

M/s Sukhdev Singh and Co.

...Petitioner(s)

Versus

Food Corporation of India and others

...Respondents

CORAM: HON'BLE MR. JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present:- Mr. Pawan Kumar, Senior Advocate,
with Mr. Vipin Kumar, Advocate,
for the petitioner(s).

Mr. J.S. Puri, Advocate, for respondents No. 1 to 5.

Mr. Ravi Kant Sharma, Advocate, for respondent No. 6.

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S.J. VAZIFDAR, CHIEF JUSTICE

The petitioners have challenged an order dated 19/20.09.2017 terminating the Labour Handling Contract awarded to them; forfeiting the earnest money deposited by the petitioners and blacklisting the petitioners for five years.

2. Respondent Nos. 2 to 5 are officers of the first respondent. Respondent No. 6 is the private respondent in whose favour the work has now been awarded pursuant to the termination of the contract with the petitioners.

3. The official respondents issued tenders for the appointment of Handling Contractors. By a letter dated 24.04.2017, the petitioners were informed that their quotation had been accepted for the period upto 03.08.2018. The

petitioners were called upon to deposit ` 19,52,200/- as security together with the performance guarantee. The letter also stated that the petitioners had the option to deposit 50 per cent security in lump sum and the balance by deduction at 10 per cent from each admitted bill against the contract and that the petitioners could get adjusted the earnest money of ` 7,80,880/- deposited towards security. Note 1 at the foot of the letter dated 24.04.2017 in so far as it is relevant reads as under:-

"1. The Area Manager, FCI, Sangrur with the request to complete all formalities by obtaining Security Deposit of Rs. 19,52,200/- @ 5% of CV and one Bank Guarantee of Rs. 39,04,400/- @ 10% of CV strictly as per Performa prescribed in Appendix-IV of MTF. Send confirmation of deposit of Security and BG within 15 working days without any fail."

4. The parties rightly agreed that the MTF i.e. the Model Tender Form applies to this case. The following clause therein is relevant and reads as under:-

"IX. Security Deposit:

(a) The successful Tenderer shall furnish within fifteen working days of acceptance of his tender, a Security Deposit for the due, proper and complete discharge of all their obligations under the Contract. The Security Deposit will comprise of the total of the amounts specified in following clauses (i) (ii) and (iii):

(i) A sum equivalent to 5% of the value of the Contract in the form of Demand Draft or Pay Order issued by a scheduled bank or through Electronic Clearing System (ECS)/Other Electronic Means in favour of the

General Manager, Food Corporation of India. The contractor at his option may deposit 50 (fifty) percent of this amount within fifteen working days of acceptance of his tender while the balance 50 (fifty) percent may be paid by the contractor by deductions at the rate of 10 (ten) per cent from the admitted bills. The Security Deposit shall not earn any interest.

(ii) another sum equivalent to 10% of the value of Contract, in the form of an irrevocable and unconditional Bank Guarantee issued by State Bank of India or its Associate Banks or by other Public Sector Banks in the format prescribed in Appendix-IV which shall be enforceable till six months after the expiry of contract period.

(iii) If applicable, an additional sum equivalent to 10% of the value of Contract (in addition to i & ii above), in terms of the undertaking provided by the Tenderer (without experience) for relaxation of eligibility conditions, in the form of an irrevocable and unconditional Bank Guarantee issued by State Bank of India or its Associate Banks/other Public Sector Banks in the format prescribed in Appendix-V which shall be enforceable till six months after the expiry of contract period.

(b) In case of failure of tenderer to deposit the Bank Guarantee as stipulated in clause 7(i) (b) & (c) within 15 working days of acceptance of his tender, further extension of 15 working days can be given subject to levy of penalty @ 1% of the whole amount of the Security Deposit and another 15 working days with levy of penalty @ 2% on the whole amount on the Security Deposit by GM(R).

(c) Upon satisfactory performance of the services and on completion of all the obligations by the contractor under the terms of contract and on submission of "No Due Certificate" from the concerned authority designated under EPF and MP Act 1952 showing due and correct deposit in respect of the employees employed by or through him for the contract period and on obtaining a "No Demand Certificate" from the assigned authority of Food Corporation of India, the Security Deposit will be refunded to the contractor subject to deductions, if any from the Security as may be necessary for recovering the claims of Food Corporation of India against the contractor. The Food Corporation of India will not be liable for payment of any interest on the Security Deposit.

(d) The General Manager shall have the rights to forfeit the entire or part of the amount of security deposit lodged by the contractors or to appropriate the security deposit or any part, thereof in or towards the satisfaction of any sum due to be claimed for any damages, losses charges, expenses or costs that may be suffered or incurred by the Corporation. The decision of General Manager (Region) in respect of such losses, damages, charges, costs or expenses shall be final and binding on the contractors.

(e) Whenever the Security Deposit falls short of the specified amount, the Contractor shall make good the deficit so that the total amount of Security Deposit shall not at any time be less than specified amount.

(f) In the event of the Tenderer failure, after the communication of acceptance of the tender by the

Corporation, to furnish the requisite Security Deposit by the due date including extension period, his Contract shall summarily be terminated besides forfeiture of the Earnest Money and the Corporation shall proceed for appointment of another contractor. Any losses or damages arising out of and incurred by the Corporation by such conduct of the contractor will be recovered from the contractor, without prejudice to any other rights and remedies of the Corporation under the Contract and Law. The contractor will also be debarred from participating in any future tenders of the Corporation for a period of five years. After the completion of prescribed period of five years, the party may be allowed to participate in the future tenders of FCI provided all the recoveries/dues have been effected by the Corporation and there is no dispute pending with the contractor/party."

(emphasis supplied)

5. The first question is whether the respondents rightly terminated the contract. Considering the nature of the dispute, it is sufficient to note only a few facts. Under clause IX(a) (i), the petitioners were to deposit a sum equal to 5 per cent of the value of the contract in the form of a demand draft or pay order issued by a scheduled bank or through Electronic Clearing System (ECS)/other electronic means in favour of the General Manager of respondent No. 1. The petitioners had the option to deposit 50 per cent of the amount within fifteen working days of the acceptance of the tender and the balance by deduction at the rate of 10 per cent from the admitted bills. The petitioners admittedly did not pay 50 per cent of the amount within fifteen days. The petitioners' tender was

accepted by the said letter dated 24.04.2017 and the period of fifteen days, therefore, expired on 11.05.2017. The petitioners admittedly deposited 50 per cent of the amount only on 19.05.2017 i.e. beyond the period stipulated in Clause IX. There is no dispute on facts in this regard. In view of clause IX(f), the respondents were entitled to terminate the contract which they did. There are no circumstances which render this decision arbitrary or irrational.

6. Mr. Kumar, the learned senior counsel appearing on behalf of the petitioners, however, submitted that the petitioners were entitled to seek an extension of time for depositing the amount under clause IX(a)(i) upon payment of penalty.

7. His reliance upon clause IX(b) in this regard is not well founded. Clause IX(b) permits the extension only in respect of the bank guarantees as stipulated in clause 7(i) (b) & (c). The petitioners applied for and were granted extension of time to furnish the bank guarantee by paying 1 per cent penalty as permitted under the above clause.

It does not entitle the party to an extension of time to deposit the sum equivalent to 5 per cent of the contract in the form of a demand draft or pay order or through ECS or other electronic means referred to in clause IX(a)(i). It follows therefore that Mr. Kumar's further reliance upon clause IX(f) is also unfounded for the extension period referred to therein obviously refers to the extension stipulated in clause IX(b). Thus, if extension cannot be granted in respect of the amount to be deposited under clause IX(a)(i), there would be no question of clause IX(f) coming to the petitioners' aid.

8. Faced with this, Mr. Kumar relied upon a letter dated 29/30.05.2017 addressed by the 1st respondent's Manager (Cont.) for Area Manager to the 1st respondent's Manager (Depot) a copy whereof was forwarded to the petitioners. The letter stated that the petitioners had deposited the entire amount as required by clause IX on 19.05.2017 and requested the petitioners to be allowed to undertake the work.

9. The letter does not carry the petitioners' case further. Firstly, the 1st respondent's Manager did not have the authority to permit any deviation from the express terms and conditions of the contract. Secondly, the letter does not take into consideration the above provisions of the contract. At the highest, the letter could have been of some assistance to the petitioners had it been addressed prior to the expiry of the period of fifteen days stipulated in clause IX(a), namely, 11.05.2017. It is, however, written only on 29/30.05.2017. The petitioners cannot, therefore, contend that they acted on a representation, albeit wrongfully made, at the relevant time. Moreover, the letter was only a recommendation. The official respondents by a notice dated 05.06.2017 i.e. within less than a week from the letter dated 29/30.05.2017 called upon the petitioners to show cause why action as per clause IX(f) ought not to be initiated against them.

The order dated 14.07.2017 cancelling the award of the work in the petitioners' favour cannot, therefore, be faulted and is upheld.

10. The petitioners challenged this order by filing CWP-15472-2017 which was disposed of by an order and judgement of a Division Bench of this Court dated 09.08.2017. The

Division Bench set aside the order on the ground that it did not contain reasons and had been passed without affording the petitioners an opportunity of being heard. The matter was remitted to the official respondents to pass a fresh order with reasons after affording the petitioners an opportunity of being heard.

The official respondents accordingly heard the matter afresh and passed the impugned order dated 19/20.09.2017. The contract was terminated; the earnest money deposited was forfeited and the petitioners were blacklisted for five years.

11. For the reasons already stated, the order in so far as it terminates the contract must be upheld. The security deposit under clause IX(a) (i) was admittedly deposited beyond the period of fifteen days from the date of issuance of the letter of acceptance of the tender. This period could not have been extended by the payment of penalty. It does not fall within the purview of clause IX(b).

12. The order in so far as it blacklists the petitioners, however, is unsustainable. An order of blacklisting entails serious consequences far too obvious to enumerate. The impugned order furnishes no reason for blacklisting the petitioners. A mere breach of a term of a contract does not necessarily warrant blacklisting the contractor. In this case, the breach was on account of the delay of about five weeks in paying the security deposit under clause IX(a). The impugned order does not contain any reasons justifying blacklisting on this ground.

13. It was contended on behalf of the respondents that clause IX(f) contemplated an automatic blacklisting. In our view, the clause does not entail automatic blacklisting.

14. In *M/s Venus Transport Company v. Food Corporation of India and others*, Civil Writ Petition No.13298 of 2015, the relevant clauses read as under:-

"4. Disqualification Conditions.

(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."

The Division Bench to which one of us (S.J.Vazifdar, CJ) was a party came to the conclusion that the ground furnished for the summary rejection of the tender was sufficient but held that the order black-listing the petitioner was harsh. The Division Bench held:-

"8. The above clauses merely entitle the respondent to blacklist the party for a specified period. It does not compel the respondent to do so. It would be open to the respondent to blacklist a party for less than the period specified or even not at all. A decision in this regard must be an informed one keeping in mind all the facts and circumstances of the case. It can hardly be suggested that a deliberate breach of the terms and conditions would invite the same consequences as an inadvertent error."

15. The clause in the present case is similar. Merely because an order of termination is upheld, it does not necessarily follow that a party is also liable to be blacklisted. In other words a valid termination of a contract

does not necessarily justify blacklisting a party. Considerable reliance was placed on the following sentence in clause IX(f) *"the contractor will also be debarred from participating in any future tenders of the Corporation for a period of five years."* We would readily read the word "Will" as "May". There are no compelling or special circumstances which indicate that the respondents intended blacklisting a contractor merely on account of a breach irrespective of the nature and extent of the breach or the circumstances in which it occurs. We do not rule out the possibility of extreme cases where compliance with every term and condition is so imperative that the breach must result in blacklisting. We, however, do not express any opinion in this regard. It is sufficient to hold that the present matter does not indicate such a case. If for instance the respondents have suffered no loss or prejudice and if the nature of breach is such that it does not indicate that it is not desirable for the party inviting their bid to deal with such a bidder, an order of blacklisting would not necessarily follow.

16. Mr. Pawan Kumar further sought refund of the earnest money and an order directing the return of the bank guarantees duly discharged.

17. It is premature to consider any application for the refund of the earnest money deposit and the return of the bank guarantees. The official respondents would have to assess the situation and take a decision whether or not to forfeit the amount and/or to invoke the bank guarantees. This would depend on a variety of facts such as whether the official respondents have suffered any loss or not. In the event of their invoking the bank guarantees, the petitioners can always challenge the

same and in the event of the bank guarantees being encashed, the petitioners can always adopt proceedings for the refund of the money.

18. The validity of the decision to forfeit the earnest money deposit would depend upon a variety of facts and circumstances. It would for instance require a determination as to whether it amounts to a penalty or not. Moreover, if the official respondents have suffered any damages on account of having issued the work to another contractor, they will be entitled to adjust the amount towards such a claim. In our view, the petitioners must be relegated to a suit in this regard.

19. The writ petition is accordingly disposed of by upholding the termination of the contract, setting aside the order of black listing and relegating the petitioners to a suit or other appropriate proceedings regarding the forfeiture of the amounts deposited and the invocation of the guarantees.

(S.J. VAZIFDAR)
CHIEF JUSTICE

(AVNEESH JHINGAN)
JUDGE

17.01.2018

Amodh/ravinder

Whether speaking/reasoned	✓Yes/No
Whether reportable	✓Yes/No