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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

*Date of decision: 4<sup>th</sup> May, 2018*

+ **RFA 859/2016 & CM APPL. 42426/2016**

**NARESH KUMAR**

..... Appellant

Through: Mr. Anil Gahlat & Mr. Praveen  
Sharma, Advocate (M-9810243453).

versus

**FOOD CORPORATION OF INDIA**

..... Respondent

Through: Mr. Rishi K. Awasthi, Advocate (M-  
9891920235).

**CORAM:**

**JUSTICE PRATHIBA M. SINGH**

**Prathiba M. Singh, J. (Oral)**

1. This is an appeal against the impugned judgment and order dated 24<sup>th</sup> August, 2013 by which the suit for recovery filed by the Appellant was dismissed. The short question is whether the Food Corporation of India (*hereinafter*, 'FCI') could forfeit the security amount of Rs.12,56,000/- deposited by the Appellant pursuant to the expression of interest invited by the FCI dated 15<sup>th</sup> December, 2009. The expression of interest contained the following conditions:

**"EXPRESSION OF INTEREST FOR  
EMPANELMENT OF BUYERS OF WHEAT  
UNDER OMSS(D)BULK SALE**

**1. DETAIL OF DOCUMENTS REQUIRED FOR  
EMPANELMENT**

**(i) An attested copy of the "Registration Certificate"**

*issued by the Industries Department of the State Government.*

*(ii) An attested copy of the current VAT/Trade Tax Registration.*

*(iii) An attested copy of PAN issued by the Income Tax Department.*

*(iv) Copies of latest audited balance sheet and profit and loss account duly certified by the Auditors showing that they are using wheat as raw material.*

*(v) Self declaration showing installed capacity of the unit and wheat consumed in 2008-09*

*(vi) An attested copy of the current electricity bill (paid in last four months) and receipt of payment giving details of sanctioned load.*

*(vii) An attested copy of any license issued to the tenderer in case licensing/declaration requirements for bulk consumers of wheat have been specified by the concerned state government.*

*(viii) An undertaking on a stamp paper of Rs.20/- that the wheat so purchased from FCI under OMSS(D) will be utilized in their own processing unit and not for trading etc.”*

2. It is the case of the Respondent that the security deposit was liable to be forfeited as the Appellant had submitted a fraudulent pollution control certificate. The letter for forfeiture dated 22<sup>nd</sup> March, 2010 reads as under:

*M/s Ajay Industries,  
19/28, MGP Road,  
Nangli Sakrawati,  
Najafgarh Road,  
New Delhi-110043.*

*Sub: Forfeiture of EMD.*

*Ref: Your financial bid for Tender No.III opened on 31.12.2009*

*Dear Sir,*

*You had submitted documents for empanelment as desired in the Tender Notice No. II opened dated*

14.12.2009

*While submitting the set of documents required, you have submitted DPCC Consent letter No. DPCC/IPC/Consent/2007 dated 22.03.2007 (Annexure-A) alongwith your request letter. After submitting the name, address etc. to DPCC for confirmation. DPCC vide their letter No. DPCC/CMC/2009-10/2222-A dated 05.01.2010 (copy enclosed as Annex-B) has informed that you have not been issued any Orange Consent.*

*Since you have violated Para-3 (C) of tender terms and conditions by attaching a fraudulent document with your application for empanelment the competent authority has forfeited your EMD, as per the provisions in Para F (V) and G(iii).*

*Yours faithfully,*

*Assistant General Manager (Comml.)  
For General Manager (Region) ”*

3. A specific query was put to the Respondent as to what was the fraudulent nature of the certificate filed by the Appellant. However, the Respondent was not aware of the same. The alleged fraudulent pollution control certificate has not been placed on the records of the appeal. A perusal of the Trial Court record also reveals that the said alleged letter has not been filed by the FCI. Even the witness appearing on behalf of the FCI has made a statement to the following effect:

*“3. That I say that the plaintiff submitted a false request letter in lieu of the consent letter of orange category which was found to be false on confirmation by the defendant from the DPCC.*

*4. That I say that the General Manager Delhi region has not played any foul play to give benefits to others. The whole process is absolutely fare and transparent.*

5. *That I say that on finding that a fictitious pollution certificate has been filed by the plaintiff, the defendant intimated the plaintiff vide letter No.S&S-1 (1)/OMSS(D)/bulk/consumers/TE/47 dated 22.3.2010 about forfeiture of his EMD as per the terms and condition of the contract. The said letter is marked as Exhibit DW1/1.”*

4. However, the so called letter has not been exhibited even by the witness. Under similar circumstances, a Ld. Single Judge of this Court in ***Food Corporation of India v Satya Narayan Gahlot*** has observed as under:

*“Briefly stated, facts of the case are that respondent filed a suit for recovery of Rs.12.56 lacs together with costs and interest against the appellant before the trial court alleging therein that he was running a flour mill under the name and style of M/s Kishan Flour Mills. He was empanelled by the appellant for filing bid for tender No. III opened on 31st December, 2009. Respondent submitted the tender. Later on, General Manager of appellant added an additional condition regarding filing of a pollution certificate from DPCC. Bid of respondent was accepted. As per the terms and conditions of tender, respondent deposited Rs.12.56 lacs towards the earnest money vide DD No. 25956 dated 30<sup>th</sup> December, 2009 drawn on Allahabad Bank. Respondent did not pick up the wheat since he came to know that General Manager of appellant had given certain benefits to other flour mills. Despite repeated demands appellant did not refund the earnest money to the respondent. On the contrary, vide letter dated 22<sup>nd</sup> March, 2010, appellant conveyed that earnest money was forfeited since a fictitious pollution certificate was furnished by him.*

*Respondent alleged that act of forfeiture of earnest money of appellant was illegal, unjustified and arbitrary. Hence the suit for recovery of earnest*

*money together with costs and interest against the respondent.*

*In the written statement, appellant did not dispute that respondent was empanelled for financial bid in respect of tender No. III, for supply of wheat to bulk consumers. It was not denied that financial bid submitted by the respondent was accepted. It was admitted that earnest money was deposited by the respondent. However, appellant stated that earnest money was forfeited since respondent had submitted a forged and fabricated documents in proof of pollution certificate. The only defence of the appellant before the trial court was that earnest money was forfeited on this ground, in view of Clause F (V) and G (iii) of the tender document.*

.....

*Trial court has noted that appellant had failed to prove that pollution certificate submitted by the respondent was a forged and fabricated document. Trial court has observed that onus to prove that respondent had submitted a forged and fabricated pollution certificate was upon the appellant which it failed to prove. Appellant claimed that DPCC, vide letter dated 5<sup>th</sup> January, 2010, informed the appellant that pollution certificate submitted by the respondent was not issued by the DPCC, however, appellant had failed to produce and prove any such letter. It has been further held that Clause F(V) and G(iii) of the terms and conditions of tender document do not envisage forfeiture of earnest money on the grounds as mentioned in the letter Ex.PW1/9. Consequently, trial court has decreed the suit.*

*I do not find any illegality or perversity in the impugned judgment and decree. It is trite law that onus to prove a fact is on the person who alleges the same. It was the case of appellant before the trial court that earnest money was forfeited since pollution certificate, submitted by the respondent, was a*

*fabricated document, accordingly, onus was on the appellant to have proved the said fact by leading cogent evidence. No witness from the Delhi Pollution Control Committee was summoned to depose that pollution certificate, furnished by the respondent, was not issued by them. Even communication dated 5<sup>th</sup> January, 2010, allegedly sent by the DPCC to the appellant was not placed and proved on record. The only defence taken by the appellant before the trial court was that earnest money was liable to be forfeited since the same was forfeited on the ground of furnishing forged and fabricated pollution certificate by the respondent. Since the said plea had remained unproved, trial court has rightly decreed the suit.”*

5. In the above referenced case, the FCI did not dispute the deposit of the security amount. However, the security amount was forfeited on the ground that the goods were not lifted and the pollution certificate submitted was fabricated. Counsels submit that the SLP against the said judgment dated 21<sup>st</sup> July, 2014 has since been dismissed. Even in the said case of **Satya Narayan Gahlot (supra)** the issue was about the submission of fabricated pollution control certificate and also the fact that the bidder therein had not lifted the wheat and therefore, withdrawn the offer.

6. The Trial Court in the present case dismissed the suit on identical grounds i.e. for non-lifting of the material resulting in withdrawal of the offer and the submission of an alleged false pollution control certificate. These issues are covered identically in the said matter. The facts of the present case are almost identical to the facts of **Satya Narayan Gahlot (supra)**. The deposit of security amount is not disputed even here. The so called alleged fabricated pollution certificate has not even been produced.

Thus the onus on the Plaintiff has not been discharged. A perusal of the evidence on behalf of the FCI shows that neither in the documentary nor oral evidence an attempt was made to actually demonstrate how the certificate was fabricated. The amount deposited by the Plaintiff is substantial. Various reasons have been alleged as to how the officers of FCI were in connivance with some other parties who were permitted to lift the stock. This Court is not going into the said allegations. Insofar as the security amount is concerned, the FCI cannot retain it without any basis.

7. Accordingly, the impugned judgment/decreed is set aside. The FCI has failed to establish on record that a fraudulent certificate was produced by the Appellant. The forfeiture is therefore illegal. Thus, the amount of security deposited is liable to be refunded to the Appellant.

8. The appeal is delayed by more than a thousand days. The said delay is condoned.

9. Accordingly, the security amount is liable to be refunded along with simple interest @ 6% per annum from the date of filing of the suit till the date of the impugned judgment i.e. 24<sup>th</sup> August, 2013. Since there was enormous delay in filing of the appeal, which has today been condoned, no interest would be payable for the period during which the appeal has pending before this Court. The refund of security deposit be given within 12 weeks from today.

10. With the above directions, appeal and all pending applications are disposed of.

**PRATHIBA M. SINGH, J**

**MAY 04, 2018/Rahul**