117/2 cases

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. CWP No.12720 of 2020
Date of Decision: 31.08.2020

M/s Dharampal and Company

..….. Petitioner

V/s

Food Corporation of India and others

.....Respondents

2. CWP No.13130 of 2020

M/s Dharampal and Company

..….. Petitioner

V/s

Food Corporation of India and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAKESH KUMAR JAIN
HON'BLE MR. JUSTICE ASHOK KUMAR VERMA

Present: Mr.Rajinder Goyal, Advocate for the petitioner(s).

Mr.K.K.Gupta, Advocate for the respondent-FCI.

Mr.Anurag Chopra, Advocate for the private respondent.

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RAKESH KUMAR JAIN, J. (Oral)

Cases have been taken up through Video Conferencing.

This order shall dispose of two writ petitions bearing CWP

No.12720 of 2020 titled as **M/s Dharampal and company Vs. Food Corporation of India and others** (for short `the first petition') and **CWP No.13130 of 2020** titled as **M/s Dharampal and Company Vs. Food Corporation of India and others** (for short 'the second petition').

The first petition is for the appointment of Handling and Transport Contractor (for short `HTC') for Pai Centre and the second petition is for Pundri Centre. Since the issue involved in both these writ petitions is common, therefore, both the writ petitions are being disposed of together. However, for the sake of convenience, the facts are being taken from the first petition.

The petitioner has prayed for the issuance of a writ in the nature of certiorari for quashing the order dated 23.07.2020 (Annexure P-9) and order dated 17.08.2020 (Annexure P-19) by which the technical bid of the petitioner for appointment as HTC for Pai Centre, applied pursuant to E Tender notice published on 23.04.2020 (Annexure P-1) has been declined and the order dated 28.07.2020 (Annexure P-12) by which the contract has been awarded to respondent No.5 by opening the financial bid on 27.07.2020 (Annexure P-10) despite the fact that financial bid of the petitioner was much lower than respondent No.4.

Shorn of unnecessary details, the Food Corporation of India (for short 'the FCI') invited online tenders under two bid system at Central Public Procurement Portion for appointment of Handling and Transport Contractors vide E-Tender Notice dated 23.04.2020. The online tenders were to be submitted between 23.04.2020 to 13.05.2020 and online technical bid was to be opened on 14.05.2020. Clause 3 of the Modern Tender Form (for short `MTF') laid down the qualification conditions for the tender. The relevant portion of Clause 3 (1) (a) of the MTF is reproduced as under:-

> **"3.Qualification Conditions for Tender**
>
> (1)Tenderer should have experience of Rake Handling and/or Transportation (Transportation shall be related to Rake movement only) duly obtained from manufacturer/PSU/Govt.department/Public limited Company/Private Limited company dealing in the field of fertilizer, food grains, cement, sugar, coarse grains or any other commodity.
>
> Tenderer should have executed in any of the immediate preceding five years the work of value:
>
> (a) At least 25% of the estimated value of the contract to be awarded, in one single contract:
>
> 4. That further clause 3(ii) of E-Tender Notice i.e. Annexure P-1, which is relevant for the purpose of the present writ petition is reproduced as:-
>
> **3. In case of Handling & Transport contract**
>
> (ii) The contractors submitting tenders having experience in handling contract has to submit the following documents in proof of deposit of EPF Compliance.
>
> (i) NDC from RPFC
>
> OR

(ii) Confirmation from EPF authorities and confirmation from principal employer

OR

(iii) Inspection report from EPF authorities and confirmation from principal employer

(iv) Confirmation of Principal employer if the EPF was deducted and submitted by the principal itself in its own code."

The petitioner had applied for being appointed as Handling & Transport Contractor (for short `HTC') for Pai Centre for linked Rail Head BG Dhand, District Kaithal for estimated contract value of Rs.50,00,000/-. The technical bid of the petitioner was rejected on 23.07.2020 with the following observations:

"1) The bidder has participated in experienced category. As per NIT Clause No.3(ii) bidder has to uploaded scanned copy of confirmation/inspection report from EPF authority which is mandatory requirement. The bidder has failed to upload the same. Instead to upload the confirmation/inspection report the bidder has uploaded the observation memo, wherein point no.7 mentioned that books of accounts for the year 2018-19 are pending for verifications due to non-finalisation of balance sheet for the year 2018-19 whereas the contract period of cheeka is 22.06.2017 to 21.06.2019 hence the inspection is not conducted on full contract period. Further in the last line of observation memo mentioned that compliance of the above be reported to RPFC, Karnal under intimation to undersigned within fifteen days but the bidder has not uploaded any compliance report with the documents. Hence, violation of clause No.3(ii) of NIT. Technically rejected.

2) As per experience certificate gross income is Rs.3,75,39,286/- but in P&L of FY 2018-19 shows Rs.3,73,80,266/- which is not in order (Deduction are now shown as expenditure)."

The petitioner had earlier filed Civil Writ Petition No.11153 of 2020 which was disposed of by this Court vide order dated 10.8.2020 with the following observations:

> "With the consent of learned counsel for the parties, the matter is being taken up and heard via video conferencing.
>
> Learned counsel for the petitioner submits that he has been declared as non-responsive in the tender proceedings initiated by the respondent-FCI on the ground that he has not submitted the inspection report of the EPF authorities and the confirmation certificate of the principal employer as required by clause 3(iii) of the eligibility criteria and there is some discrepancy in his account statement.
>
> Learned counsel for the petitioner submits that he has uploaded the inspection report of the EPF authorities as well as the confirmation certificate of the principal employer and the discrepancy in his account is only on account of the documents that have been given to the petitioner by the Food Corporation of India itself. He submits that in such circumstances, the petitioner has wrongly been declared as non-responsive and ineligible.
>
> Learned counsel appearing for the Food Corporation of India as well as for the private respondent submits that there is

a dispute resolution clause in accordance with which the petitioner has to first approach the authorities concerned against the rejection of his technical bid but the petitioner without having done so has directly approached this Court.

In view of the objection raised by learned counsel for the respondents, learned counsel for the petitioner submits that his petition be treated as a representation raising dispute under the relevant clause and may be directed to be considered and decided by the respondent-authorities by taking into consideration all the issues raised therein.

Learned counsel for the respondents have no objection to the said prayer.

In the circumstances, the petition is disposed of by directing the respondent-Food Corporation of India to treat the petition as a dispute under the relevant clause against the rejection of his technical bid and to consider and decide it expeditiously within a week and in any case prior to 28.08.2020 i.e. the date from which the work awarded to respondent No.4 is going to commence.

Learned counsel appearing for the respondent-Food Corporation of India undertakes that though they have filed return and have opposed the stand taken by the petitioner but would consider and decide the matter within an open mind taking all the issues raised by the petitioner by passing a reasoned order.

With the aforesaid observations, the petition stands disposed of."

In compliance of the aforesaid order, Food Corporation of India passed the order dated 17.08.2020 (Annexure P-19). The relevant portion of the impugned order passed by the FCI is reproduced as under:

"That Clause No.3(ii) clearly mentioned that the contractors submitting tenders having experience in handling contract has to submit the following documents in proof of deposit of EPF compliance:-

(i) BDC from RPFC

OR

(ii) Confirmation from EPF authorities and confirmation from principal employer

OR

(iii) Inspection report from EPF authority and confirmation from principal employer.

OR

(iv) Confirmation of principal employer if the EPF was deducted and submitted by the principal itself in its own Code.

M/s Dhrampal and Company, Kaithal has opted the point No.3 (ii) (iii) in proof of deposit of EPF compliance. As per NIT Clause No.3(ii) (iii) bidder has to upload scanned copy of confirmation/inspection report in respect to proof of deposit of EPF compliance for the relevant period from EPF authority which is mandatory requirement. The bidder has failed to upload the same. Instead to upload the inspection report from EPF compliance, the EPFO authority directed to the firm to require complied with various shortfalls/lackings. Further under point No.7 of observation memo uploaded by the tenderer, it is mentioned that books of accounts for the year 2018-19 are pending for verifications due to non-finalisation of balance sheet for the year 2018-19. Whereas the experience for the contract period of Cheeka for the year 22.06.2017 to 21.06.2019 has been claimed, hence the inspection is not conducted for full contract period. Further the audit report of FY 2018-19 clearly show that it was prepared on 25.10.2019 and ITR also filed on 25.10.2019. The Audit report/ITR which was in the hand of tenderer, the same should have been given to EPF Authority on 28.10.2019 but fails to do so. M/s Dharampal and Company have to produce same before the EPF Authority but they have concealed the facts from EPF Authority by not producing the Audit Report/ITR. Furthermore, in the last line of observation memo it is mentioned that compliance of the above be reported to RPFC, Karnal under intimation to undersigned within fifteen days but the bidder has not uploaded any compliance report within the documentary proof for having deposit of EPF. Whereas at point No.5 of NIT clearly mentioned that "All HTCs have to ensure that all statutory provisions such as EPF/ESI/Contract Labour Act etc. are strictly complied with."

Aggrieved against the orders dated 23.07.2020 and 17.08.2020, the present petition has been filed.

Counsel for the petitioner has submitted that respondent-FCI has committed an error by misreading the documents on record supplied by the petitioner regarding its eligibility. He has referred to Clause 3(ii) (iii) of the terms and conditions of the E Tender notice to contend that observation memo (Annexure P-3) is infact an inspection memo and therefore, rejection of the technical bid by the FCI is illegal. It is submitted that as per Clause 3 (ii) the contractor has to submit tenders having experience in handling contract in proof of deposit of EPF Compliance.

According to the counsel for the petitioner, the EPF compliance could be a “No Dues Certificate” from RPFC or it can be confirmation from the EPF authorities and confirmation by the principal employer of the EPF compliance or it could be an Inspection report from the Authorities and confirmation from the Principal employer. The petitioner has laid down emphasis on Clause 3(ii)(iii) to contend that inspection report from the EPF authorities is in fact the inspection memo of the EPF authorities prepared during inspection of the records of the petitioner for the inspection period from 07/2017 to 09/2019 in which the EPF Authorities have not observed that the petitioner is in arrears of EPF dues or has not deposited the EPF dues. It is also submitted that the petitioner has also complied with the second part of Clause 3 (ii) i.e. Confirmation Certificate of the FCI dated 08.05.2020 (Annexure P-4) in which the FCI has conceded that the petitioner has deposited PF challans of the eligible workers during the period from 22.6.2017 to 21.06.2019 and no dues of EPF is pending for the said contract period insofar as FCI Centre Cheeka is concerned. It is submitted that he has categorically averred in the writ petition that the petitioner is not in arrears of EPF dues and the other meaning of observation memo is inspection as well. It is further argued that he had obtained the certificate on 06.08.2020 from EPFO that the petitioner is not in arrears of EPF contribution for the period from 07/2017 to 09/2019.

In reply, counsel for the respondent-FCI has submitted that the impugned order dated 23.07.2020 (Annexure P-9) has rightly been passed because the Observation Memo (Annexure P-3) is an interim report by the EPF authorities and cannot be treated as an inspection report even if it is silent about the fact that no EPF is due. It is submitted that in the inspection report, the Inspecting Authority has to observe rather categorically mention that after the inspection of the record, no EPF dues have been found. It is further submitted that certificate issued by the FCI on 08.05.2020 (Annexure P-4) is only pertaining to FCI Centre Cheeka and not regarding the other Centres. At this stage, counsel for the petitioner has submitted that the petitioner has worked only for the FCI Centre Cheeka and none else, therefore, there was no occasion for him to produce the Confirmation Certificate about any other Centre of the FCI.

Counsel for the respondent then further argued that because proper documents are not submitted by the Contractors at the time of applying for HTC and are ultimately not traceable, after the contract period is over, the FCI has to face the litigation initiated by the EPF Authorities and has to pay EPF contribution being the Principal employer. Therefore, it is submitted that for the purpose of being eligible, it is categorically mentioned in Clause 3(ii) that the Contractor shall submit either NDC from the RPFC or confirmation from the EPF authorities and confirmation from

Principal employer or Inspection report from EPF authorities and confirmation from Principal employer or confirmation of Principal employer if the EPF was deducted and submitted by the Principal itself in its own code. It is thus submitted that in the document which is stated to be an Observation memo by the FCI and the Inspection report by the petitioner, the Inspecting Authority had found various discrepancies, for example: --

> (i) Late deposits are subject to levy of damages under section 14B and interest under section 7Q of the Act. Hence, the establishment is advised to deposit the dues by 15th of every following month to avoid penalties.
>
> (ii) Directed to obtain the declaration under para 34 of the EPF Scheme, 1952 in Form II (new) and keep in the record for verification on the next inspection.
>
> (iii) Books of accounts for the year 2018-19 are pending for verification due to non finalization of Balance sheet for the year 2018-19.
>
> Compliance of the above was to be reported to RPFC Karnal under intimation to undersigned within fifteen days.

It is further submitted that the petitioner did not submit the compliance report, therefore, inspection could not take place and thereafter, since there was non compliance by the petitioner of the aforesaid discrepancies found at the time of alleged inspection, therefore, no further inspection was made for the purpose of preparing the inspection report. Insofar as the letter dated 06.08.2020 is concerned, counsel for the respondent has referred to Clause (ii) of the E Tender notice which says that no additional/explanatory document will be entertained after the closing of receipt of tenders and Clause XVIII-C is reproduced as under:

> "The results of technical evaluation will be uploaded on the CPP portal. In case there are technically disqualified bidders, the reasons for disqualification will be uploaded and price bid shall be opened only after three working days. If any of the bidders is disqualified, he may submit grievance (if any) to General Manager (Region) within three working days from the date of disqualification. However, no new documents will be accepted. In case of receipt of grievance, General Manager (Region) will redress the grievance by passing speaking order within seven (7) working days. In case of receipt of grievance from any disqualified bidder, the validity period of the tender shall get automatically extended by 15 working days, which shall be binding on all the bidders."

We have heard learned counsel for the parties and perused the record with their able assistance.

The issue involved in this case is as to whether document Annexure P3 is an Inspection report or an Observation memo? There is no dispute even raised by the counsel for the petitioner that the petitioner, for the purpose of becoming eligible submitting tender in terms of Clause 3(ii) has to comply with with one of the four conditions mentioned therein. However, the case of the petitioner is that it has complied with Clause 3(ii) (iii) and submitted the Inspection report from the EPF authorities and confirmation from Principal employer regarding EPF compliance. The petitioner has relied upon letter dated 06.08.2020 (Annexure P-17) in support of his contention that nothing has been found due by the EPF Organisation from the petitioner of the relevant period but the said document was not uploaded by the petitioner at the time when the technical bid was submitted, therefore, in view of Clause (ii) of the E Tender notice and Clause XVIII the said documents cannot be looked into and has to be ignored. As regards document (Annexure P-3) is concerned, we are of the considered opinion that since the petitioner has not produced the bank accounts for the year 2018-19 which were pending for verification due to non filing of the balance sheet for the year 2018-19 and the exact picture was not brought to the notice of Inspection team/Authority about the payment of EPF dues, therefore, the Inspecting Authorities have not categorically stated in the Observation memo that the petitioner has paid the EPF dues or has made the EPF compliance. In our considered opinion, document Annexure P-3 is an Observation memo only because after finding certain discrepancies in the documents, inspected by the Inspection team, period of 15 days was given to the petitioner to rectify the discrepancies but the petitioner did not submit the rectified documents to the Inspecting Authority for obtaining the Inspection report about the compliance of EPF. As per the Scheme of E Tender notice, contractor can take NDC from RPFC and need not to have the confirmation of the EPF compliance from EPF authorities or confirmation from the Principal employer. In case the contractor has not obtained NDC from RPFC then it can obtain confirmation from the EPF Authorities and confirmation from the Principal employer but in case the aforesaid two confirmations are not obtained, the contractor can still have the Inspection report of the compliance of the EPF from the EPF Authority or confirmation of the EPF compliance from the Principal employer. The Inspection report is thus the compliance of the EPF issued by the EPF Authorities and is not merely the inspection of the record intimating the various discrepancies, if any.

Thus, in view thereof, we are in agreement with the arguments raised by the counsel for the respondent and do not find any substance in the writ petitions filed by the petitioner and therefore, both the writ petitions are hereby dismissed though without any order as to costs.

A photocopy of this order be placed on the file of connected matter.

(RAKESH KUMAR JAIN)
JUDGE

(ASHOK KUMAR VERMA)
JUDGE

31.08.2020
Meenu

Whether speaking / reasoned: Yes/No
Whether reportable : Yes/No