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14.09.2021.
S.H./d.p

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CONSTITUTIONAL WRIT JURISDICTION
(APPELLATE SIDE)**

**W.P.A 1079 of 2021
(Via Video Conference)**

**Ratan Banik
-versus
Food Corporation of India & Ors.**

**Mr. Debabrata Saha Roy,
Mr. Subhankar Das,
Mr. Neil Basu.
...For the Petitioner.**

**Mr. Debajyoti Barman.
...For the Respondents.**

Affidavit-of-service filed in Court today is taken on record.

In response to a Notice Inviting Tender by the Food Corporation of India dated 17th July, 2020, the petitioner being proprietor of a firm applied for supplying SHS (Jute Twine & Gunnies) 50kgs for supplying food grains at various depots of FCI, D.O., Siliguri.

An appointment letter was issued in favour of the proprietorship firm of the petitioner on 7th August, 2020. The firm was appointed as a supplier of gunny bags at the rate quoted. The firm was advised to submit the letter of joining against the appointment letter before starting the work with effect from 8th August, 2020.

By a communication dated 13th May, 2021, the firm was directed to supply 10,000 pieces of SHS-SBT empty food grains gunny bags (50 kg) within seven working days, failing which supply order will be cancelled.

By a letter dated 24th May, 2021, the petitioner intimated the Divisional Manager, FCI, Siliguri that due to the State lockdown from 16th May, 2021 and severe corona situation the stock of gunny bag is not at hand and he was unable to provide the gunny bags within such a short period of time.

The petitioner, however, had already supplied 2000 pieces of gunny bags on 19th May, 2021.

By a communication dated 24th May, 2021, the Divisional Manager requested the firm to supply the remaining gunny bags within 24 hours otherwise rest of the entitled gunny bags will be procured at his risk and cost and its contract would be terminated on the ground of unworkman like performance and he would be blacklisted for future participation.

By a communication dated 25th May, 2021 the Manager (Storage), FCI, Siliguri terminated the contract of the petitioner's firm as it failed to supply the balance quantity of empty gunny bags within the stipulated time and the earnest money deposit/security deposit which was lying with FCI was forfeited. The Competent authority also blacklisted the firm and debarred it from taking part in any FCI work for next three years with effect from 25th May, 2021. It was further mentioned that to meet up requirement of empty gunny, the same will be purchased from local market through spot

purchase quotation basis and the difference in rate, if any, shall be borne at its risk and cost.

The petitioner through his learned advocate by a representation dated 28th May, 2021 requested the authorities to recall the termination and the blacklisting order and permit the firm to supply the remaining 8000 gunny bags within a reasonable span of time. The petitioner pleaded Force Majeure in the representation praying for recalling the order of termination.

The Model Tender Form for supply of SHS (Jute Twine & Gunnies) technical bid dated 17th July, 2020 mentions the delivery schedule.

Paragraph 15(v) mentions that an extension of 15 days will be given at the rate of LD (liquidation damage) charges @ 2% of the price of the SHS (Jute Twine & Gunnies) shall be levied on the supplier which shall be recoverable from the supplier. The date after 07 days of communication of detailed supply order for nominated depots shall be treated as date for the purpose of computation of levying the liquidated damages.

Paragraph 15(vii) mentions that in case of failure of the contractor to supply the SHS (Jute Twine & Gunnies) even beyond the extended period, the Corporation shall arrange such gunnies and jute twine at the risk and cost of the contractor. Failure of the contractor for more than two occasions shall make him liable for termination of the contract, forfeiture of EMD/SD apart from black listing of the firm. The Tender shall be terminated and re-floated on the risk and cost of the contractor.

The terms and conditions governing contract for purpose of SHS in paragraph XI relates to Force Majeure. It mentions that any event or circumstance of a nature analogous to the ones mentioned in the said clause which are beyond the reasonable control of the effected party which such party could not have prevented or reasonably overcome with the exercise of reasonable skill and care in relation to the implementation of the agreement, which do not result from the negligence of such party or the failure of such party to perform its obligation under the contract and which are of a severe magnitude and have a Material Adverse Effect on the affected party's obligation under this agreement the party shall be entitled to suspend or excuse performance of its respective obligations under the agreement to the extent such performance is impeded by a Force Majeure event.

Paragraph XII lays down that if a party claims relief on account of Force Majeure, then the party claiming to be affected by such event shall as soon as reasonably be practicable and in any event within seven days of becoming aware of the Force Majeure, give notice of and describe in reasonable detail the effect of such Force Majeure to the other party in writing, including the dates of commencement and estimated cessation of such Force Majeure and its effects on the party's obligations under the agreement. Upon cessation of the situation which led to a party claiming Force Majeure under this section, the relevant party shall within seven days thereof notify the other party in writing of the cessation and the parties shall as soon as practicable thereafter continue performance of all obligations under the agreement.

According to the petitioner he has been supplying the gunny bags to the Food Corporation of India for a considerable period of time.

The petitioner has relied upon a document dated 26th April, 2021 issued by the Manager, FCI Dabgram that the materials supplied by the petitioner has been received in good condition and no payment has been made to him in this regard and there is no pending material to be received from the petitioner.

The contract of the petitioner specifically contains the Force Majeure clause which the petitioner has pleaded for not delivering the huge quantity of gunny bags within such a short period of time. Out of the 10,000 quantity ordered the petitioner delivered 2,000 but the balance 8,000 he could not procure as because of the lockdown imposed in the State and due to non-availability of the goods.

The respondent/Food Corporation of India practically allowed only twenty-four hours' time to the petitioner for supplying the balance 8,000 gunny bags.

The petitioner made a representation immediately on 28th May, 2021 and alleges that the same has not been considered. Prayer has been made for setting aside the impugned order of termination.

The learned advocate appearing for FCI submits that Clause XIV of the Contract mentions that in the event of the tenderer's failure to provide the SHS (Jute Twine & Gunnies) to the satisfaction of the Corporation, the contract shall be summarily terminated besides forfeiture of the earnest money/security deposit.

The loses and damages arising out of and incurred by the Corporation by such conduct of the contractor will be recovered from the contractor. The contractor will also be debarred from participating in future tenders for a period of five years.

According to the Corporation the petitioner failed to deliver the goods within the stipulated period of seven days. Thereafter also the petitioner mentioned that he was not in a position to deliver the goods. There was nothing indicated in his representation as to when the goods will be delivered.

It has further been submitted that the representation of the petitioner was also made beyond the prescribed period of seven days.

The stand of the Corporation cannot be appreciated by the Court. The contract of the petitioner stood terminated by an order dated 25th May 2021. The petitioner made representation through his learned advocate on 28th May, 2021. The Corporation did not find it necessary to reply to the representation filed by the petitioner.

Force Majeure has been pleaded in the representation filed on behalf of the petitioner. The contract in question permits the contractor to take a plea of Force Majeure in case of any event which arises beyond the control of the contractor. The country is passing through severe covid crisis and it is not impossible that a contractor may not be in a position to deliver 10,000 gunny bags within a short period of seven days extended by only twenty-four hours. The ground reality ought to have been taken into consideration prior to passing the impugned order. The

delivery schedule of the contract permits extension of time by fifteen days and thereafter by a further period of seven days. The said extension does not appear to have been granted in favour of the petitioner.

The contract is terminable, according to the delivery schedule, only after the contractor fails on two occasions to supply the goods. In the present case, the contractor apparently appears to have failed for the first time. The Clause for termination of the contract ought not to have been invoked by Food Corporation of India after the first failure. Food Corporation of India ought to have taken into consideration the grounds for not delivering the articles as mentioned by the petitioner in his representation.

In view of the above, the instant writ petition is disposed of by directing the respondent no. 4 being Divisional Manager, FCI to take a decision with regard to the representation made by the petitioner through his learned advocate on 28th May, 2021 strictly in accordance with the terms and conditions mentioned in the contract at the earliest, after giving an opportunity of hearing to the petitioner or his authorized representative.

The said respondent shall pass a reasoned order and communicate the same to the petitioner immediately thereafter. Till such time the respondent no. 4 takes a decision in the matter the order of termination dated 25th May 2021 shall not be given effect to.

The writ petition stands disposed of.

Urgent photostat certified copy of this order be supplied to the parties, if applied for, as early as possible.

(Amrita Sinha, J.)