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

206

**CWP-7024-2019 (O&M)
Date of decision: 06.11.2023**

M/S GARG AND COMPANY ......Petitioner

VERSUS

HARYANA STATE COOPERATIVE SUPPLY AND MARKETING FEDERATION LIMITED
.......Respondents

CORAM : HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

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Present: - Mr. I.S. Pabla, Advocate
for the petitioner.

Mr. Pardeep Bajaj, Advocate
For respondents-HAFED.

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VINOD S. BHARDWAJ, J. (Oral)

1. Challenge in the present writ petition is to the impugned letter dated 11.03.2019 (Annexure P-9) whereby the respondents have directed for encashment of the Bank Guarantee No. 11JGT02170240001 dated 28.05.2018.

2. Counsel for the petitioner contends that the petitioner had been awarded the work for "Construction of 26380 Mt capacity godowns (without roofing) with EI works, CC Roads, Boundary Wall etc. vide allotment letter dated 05.06.2015 at a contractual cost of Rs. 9,23,15,840/-. The said work

was duly completed within a period of 09 months after the site was handed over to the petitioner and on completion of the leveling work. The said site was handed over to the petitioner on 20.06.2015 whereupon the petitioner completed 70% of the work upto December, 2015. There was, however, delay/default on the part of the respondents in providing the cement for the allocated work, to be supplied by them, as per the terms and conditions of the letter of allotment. Various letters/reminders were sent by the petitioner requesting the respondents to supply the necessary material for carrying out the work, however, the delay was repeatedly caused by the respondents at their end. Till May, 2016, the petitioner had performed 87% of the financial part of the contract and was paid a sum of Rs. 8,00,37,347/- by 19.05.2016.

3. The petitioner was called upon to complete the balance work by the Junior Engineer vide communication dated 19.05.2017. Response was sent by the petitioner that the balance work could be completed only after the roofing is done by the respondents and as the work of roofing had not been allotted to it, the balance civil work could not be finished. Further, E-mail about the shortage of cement and performance of work was also sent.

4. It is contended that notwithstanding the aforesaid communication and dispute *inter se* amongst the parties, the respondents sent the communication dated 11.03.2019 directing encashment of the Bank Guarantee furnished by the petitioner for the sum of Rs. 44 lacs.

5. Counsel for the petitioner argues that Clause 3 of the agreement executed between the parties entitled the respondents to forfeit the security deposited by a Contractor upon occurrence of an event of recission of the contract. The relevant Clause thereof reads thus:

Action when whole of security deposit is forfeited.

> ***Clause 3****-In any case, in which under any clause or clauses in this contract the contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit (whether paid in lump sum or deducted by installments) the Managing Director on behalf of the HAFED shall have power to adopt any of the following courses, as he may deem best suited to the interests of HAFED.*
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> *(a) To rescind the contract (of which recession notice in writing to the contractor, under the head of the Managing Director shall be conclusive evidence), and in which case the security deposit of the contractor shall stand forfeited, and be absolutely at the disposal of HAFED.*

6. It is strenuously argued that the contract in question has not been cancelled by the respondents and no order has been passed as regards any damages/recovery to be effected from the petitioner. Besides, the petitioner was never associated in any of the proceedings that were initiated by the respondents and the communication directing forfeiture of the earnest money has been passed in a non-speaking manner.

7. Counsel for the respondent, however, contends that the petitioner was at default and that the work was required to be completed within a period of 09 months, however, the needful had not been done and as such, the forfeiture of the Bank Guarantee has been done in exercise of the powers conferred as per the tender. It is further averred that there is an arbitration clause No.25 in the said agreement and that if there is any question/difference or objection whatsoever arising out of and/or in

connection with the instrument, meaning and operation thereof, the same is required to be decided by way of an arbitration.

8. Responding to the same, counsel for the petitioner contends that there is no question, difference or objection of any nature whatsoever. As a matter of fact, no order has been passed by the respondents and no question/objection on the basis whereof direction for forfeiture of the earnest money deposit has been conveyed. Hence, the order of forfeiture of the Bank Guarantee suffers from want of any reasoning or any other order passed to the prejudice of the petitioner in any manner. He further contends that the shield of the Arbitration clause cannot be invoked by the respondents to cover up their arbitrary acts and notwithstanding violation of the procedure prescribed and even when the mandate of the contract has not been followed.

9. I have heard learned counsel appearing on behalf of the respective parties and have gone through the documents appended alongwith the instant petition.

10. Counsel for the respondents has fairly conceded that there is no order passed as regards rescinding of the contract awarded in favour of the petitioner. It is evident that before directing forfeiture of the security deposited by the Contractor, the contract in question had to be rescinded and/or some other order had to be passed for effecting recovery. Undisputedly, no such order determining any right of the respondent-employer or determining any liability against the petitioner has been passed. It would be inappropriate at this juncture on the part of instrumentality of the State to contend that even though their act may be fully devoid of the procedural requirements and/or the non-compliant of the mandate of law, yet, such illegality is not be looked into and that a litigant is supposed to

invoke the alternate dispute resolution for settlement of his claim and/or seeking recovery of the amount which stands forfeited by the respondents. I fail to find myself in agreement with the arguments advanced by the respondents and I am of the opinion that any artificial creation of a dispute cannot be relied upon to perfect a right and thereafter to compel a Contractor to subject himself to the alternate dispute resolution through the process of arbitration. A dispute should exist in real & not just a frivolous creation of a dispute merely because a violator has acted in violation of law. It can be held as a valid dispute when the action of the respondent-State has been done in accordance with the procedure prescribed in the Contract which it can claim as a defence for its act and which such conflict is then required to be resolved in terms of the clauses of the contract. Where the first principles and the basic pre-requisites have not been fulfilled and a jurisdiction has been invoked without assigning any reasons following any procedure or passing any valid order as per law, such order is per se illegal and is not sustainable in the eyes of law. Protection of any such order is likely to promote and perpetuate an illegality and protect an act which is per se in violation of the contractual arrangement between the parties.

11. It is evident from the facts noticed above & undisputed by the respondents that no order for cancellation of contract, assessment of damages or determination of any liability or accountability had been passed. Merely because unconditional Bank Guarantee had been furnished by the Contractor does not mean that the same can be invoked at Will. The pre-requisites for invocation of Bank Guarantee must exist before the same is invoked. In the absence of any such order or following the legal/contractual

procedure, it would not be entitled to claim the protection of an alternate remedy.

12. In view of the above, the impunged order/communication dated 11.03.2019 is set aside and the present writ petition is allowed. The respondents may, if so advised, take appropriate steps and/or pass a fresh order in accordance with law and the contractual provisions.

13. All the pending miscellaneous application(s), if any, are also disposed of.

(VINOD S. BHARDWAJ)

NOVEMBER 06, 2023 **JUDGE**

Vishal Sharma

Whether speaking/reasoned **:** Yes/No
Whether Reportable : Yes/No