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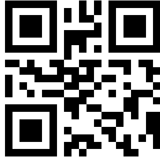

THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/2126/2022

BIKASH KUMAR MORE
S/O. LT. CHIRANJILAL MORE, R/O. WARD NO.4, NEAR DERGAON CHARIALI, DERGAON, DIST. GOLAGHAT, ASSAM, PIN-785614.

VERSUS

THE FOOD CORPORATION OF INDIA AND 3 ORS
REP. BY ITS CHAIRMAN CUM MANAGING DIRECTOR, BARAKHAMBA ROAD, NEW DELHI, PIN-110006.

2:THE GENERAL MANAGER (REGIONAL)

FOOD CORPORATION OF INDIA
REGIONAL OFFICE
ASSAM REGION
PALTANBAZAR
GUWAHATI
ASSAM
PIN-781008.

3:THE ASSTT. GENERAL MANAGER (CONT.)

FOOD CORPORATION OF INDIA
REGIONAL OFFICE
ASSAM REGION
PALTANBAZAR
GUWAHATI
ASSAM
PIN-781008.

4:THE DIVISIONAL MANAGER

FOOD CORPORATION OF INDIA
DIVISIONAL OFFICE
JORHAT
ASSAM
PIN-784001

Advocate for the Petitioner : MR A C BORBORA

Advocate for the Respondent : SC, F C I

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

JUDGMENT & ORDER (ORAL)

Date: 03.11.2022

Heard Mr. AC Borbora, learned senior counsel assisted by Ms. N Dey, learned counsel for the petitioner. Also heard Mr. PK Roy, learned standing counsel for the respondent FCI.

2. The petitioner participated in a tender process pursuant to the Notice Inviting E- Tender (for short, the NIET) dated 28.04.2015 for the work "*Ex-Railway Siding JPR/JTTN/FCI FSD Cinnamara to Sibsagar Complex (FSD Jaganikotia and Sibsagar) via weighbridge (Distance 78.185 KMS).*" The NIET provided that the rate should be quoted as per Metric Tonne (PMT) per Kilometer (PKM) as per MTF. It further provided that if the rate is quoted otherwise it shall be converted to per MT per KM taking distance as mentioned above.

3. Pursuant thereto, the petitioner was issued the appointment order dated 03.08.2015 which provided that the petitioner had been appointed as transport

contractor Ex-Rly Siding JPR/JTTN/FSD Cinnamara to FCI FSD Sibsagar via weighbridge on Regular Basis for a period of 2(two) years, with immediate effect, at the quoted rate of Rs.7.11 PMT-PKM (Distance of 78.185 KMs), on terms & conditions as contained in the tender agreement. The petitioner accordingly completed the work, otherwise to the satisfaction of the respondent authorities, and the work was duly completed within the period of two years from the date of appointment order dated 03.08.2015. Subsequently, the authorities in the FCI deemed it appropriate to recover an amount of Rs.89,99,853/- from the petitioner as per the internal office note (I.O.N.) dated 13.12.2021. The said recovery of Rs.89,99,853/- was preceded by the communication dated 16.05.2020 from the Divisional Manager FCI/DO/Jorhat to the Assistant General Manager (Cont.) Food Corporation of India, Regional Office, Guwahati. The communication dated 16.05.2020 makes it discernible that the recovery sought to be made for the completed contract work by the petitioner was as per the observation made by the Controller and Auditor General (for short, the CAG). The I.O.N dated 13.12.2021 further provides that the recovery of Rs.89,99,853/- would be made in terms of the security deposits of Rs.20,15,500/-, Rs.20,15,500/-, Rs.22,21,930/- respectively which were available with the respondent FCI, as well as by withholding the bill amount of the petitioner in respect of another work of Ex-JTTN to FSD Cinnamara for the period of 02/2019 to 02/2021 which amounted to Rs.26,78,929/-. Accordingly the ION dated 13.12.2021 had provided that a further amount of Rs.67,994/- remains pending for recovery from the petitioner.

4. Being aggrieved this writ petition is instituted.

5. Mr. AC Borbora, learned senior counsel for the petitioner has raised the contention that the NIET dated 28.04.2015 made it abundantly clear that the contract amount of Rs.7.11 PMT/PKM was in respect of the distance specified in the NIET itself which is 78.185 KM. The learned senior counsel further refers to the order of appointment dated 03.08.2015 that the petitioner has been appointed as a transport contractor Ex-Rly Siding JPR/JTTN/FSD Cinnamara to FCI FSD Sibsagar via weighbridge on Regular Basis for a period of 2(two) years, with immediate effect at the quoted rate of Rs.7.11 PMT-PKM for a distance of 78.185 KMs. Accordingly, it is the submission of the learned senior counsel that the petitioner having duly completed his contract work is entitled to a bill amount at the rate of Rs.7.11 PMT-PKM for a distance of 7.11 PMT-PKM and no recovery or any deduction can be made from the contracted amount by taking any plea that the distance of 78.185 KMs can be reduced by referring to any circumstance.

6. Mr. PK Roy, learned senior counsel for the respondents in the FCI *per contra* raises the contention that the distance of 78.185 KM provided in the NIET dated 28.04.2015 as well as the letter of appointment dated 03.08.2015 also included the distance covered by the transport vehicle from the pickup point at Railway siding to the concerned weighbridge without carrying any food grains and also the distance from the Cinnamara weighbridge back to the pickup point. As the transport vehicle concerned did not carry the loaded food grains for its trip for this particular distance, therefore, it was pointed out by the CAG that the applicable rate of Rs.7.11PMT/PKM would not be relevant as per the terms of the contract for the said distance for which the transport vehicle travelled to Cinnamara weighbridge and back. Accordingly it is the contention of

the learned senior counsel Mr. PK Roy for the respondent FCI that the FCI could legitimately recover the amount of Rs.89,99,853/-, which amount had already been disbursed and paid to the petitioner contractor in terms of the concluded contract.

7. Mr. PK Roy, learned senior counsel further refers to Clause XIV of the terms of the contract which provides for 'Set Off'. By referring to Clause XIV providing for set off it is the submission of Mr. PK Roy, learned senior counsel that the respondent FCI is enabled under the terms of the contract to appropriate set off any claim of the FCI for payment of any sum of money arising out of or under the contract or any other contract made by the contractor with the FCI. Further reference is made to Clause XII of the terms of the contract which provides for recovery of loss suffered by the respondent FCI and accordingly submits that as the petitioner was paid at the contract rate even for the distance travelled by the transport vehicle without carrying the food grains, therefore, it is a loss that has been caused to the respondent FCI, and accordingly it can be recovered under Clause XII.

8. We have heard the learned senior counsel for the parties.

9. A reading of the NIET dated 28.04.2015 makes it discernible that it is a term in the contract itself that the rate should be quoted by the contractor PMT-PKM and if the rate is quoted otherwise, it shall be converted to PMT-PKM taking the distance as mentioned in the NIET itself. The relevant provision of the NIET is extracted as below:

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"The rate should be quoted as per MT per KM as per MTF. If the rate is quoted otherwise it shall be converted to per MT per KM taking distance as mentioned above."

10. A reading of the aforesaid provisions of the NIET dated 28.04.2015 makes it discernible that even if the contractor quotes the rate in a manner otherwise than what the NIET intended for, it is for the respondents in the FCI to convert the rate to PMT-PKM taking the distance as mentioned in the NIET itself i.e. 78.185 KM. In other words, the terms of the NIET is specific that whatever may be the manner in which the contractor would quote the rate, it is for the respondents in the FCI to convert the rate into PMT-PKM for the distance of 78.185 KM. If we take into consideration the said provision in the NIET dated 28.04.2015, it would be apparent that whatever rate is accepted by the respondent FCI would be for the distance 78.185 KM and the said distance in terms of the NIET cannot be reduced subsequently and that too unilaterally by the respondent FCI. If the reason put forth by the respondent FCI is accepted that the distance travelled by the transport vehicle from the pickup point at the railway siding to the Cinnamara weighbridge and back, where the food grains were not being carried, is excluded, it has to be understood that subsequent to entering the contract the respondents in the FCI now seeks to reduce the specified distance of 78.185 KM as provided in the NIET dated 28.04.2015. The reasons cited by the respondent FCI may be good or bad and without expressing any view on the reasoning, a reading of the NIET dated 28.04.2015 itself makes it apparent that the quoted rate is for the specific distance which cannot be altered subsequent to entering the contract unless a due procedure of law is followed at the time of entering the contract itself.

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11. The order of appointment as a contractor dated 03.08.2015 further fortifies the aspect that the petitioner has been appointed as a transport contractor at Rs. Rs.7.11 PMT-PKM for a distance of 78.185 KMs. The order of appointment provides that the said appointment is on the terms and conditions contained in the tender agreement. Accordingly, we requested the learned senior counsel for the respondent FCI Mr. PK Roy to point out any of the provisions in the terms and conditions in the tender agreement which may indicate that subsequent to entering the contract the respondent can reduce the distance of the contract agreement for the purpose of making the applicable rate @ 7.11 PMT-PKM. To such query, reference is made to the provisions of Clause XIV and Clause XII of the terms and conditions of the agreement.

12. Clause XIV of the terms and conditions of the agreement inter alia provides that the respondent FCI may appropriate and set off any claim of the FCI for payment of any sum arising out of or under the contract or any other contract made by the contractor with the FCI. Clause XIV is extracted as below:

"*XIV. Set-off:*

Any sum of money due and payable to the contractor (including Security Deposit refundable to the contractor) under this Contract may be appropriated by the Corporation and set off against any claim of the Corporation for the payment of any sum of money arising out of, or under this contract or any other Contract made by the contractor with the Corporation."

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13. A reading of the extracted portion of Clause XIV makes it discernible that the appropriation or set off can be made by the FCI in respect of the claim that the respondent FCI may have against the given contractor. The expression 'claim' is defined in the Black's Law Dictionary Ninth Edition which is extracted as below:

> "*The aggregate of operative facts giving rise to a right enforceable by a court…"*

14. The expression 'claim' means the aggregate of operative facts giving a rise to a right enforceable by a Court of law. In other words, we have to understand that in order to invoke the Clause XIV of the terms and conditions of the contract agreement there must be a prior determination that the facts of a given case has given rise to a right in favour of the FCI which would be enforceable in a court of law.

15. In *Hameedia Hardware Stores, represented by its Partner S. Peer Vs. B. Mohan Lal Sowcar* reported in *1988 2 SCC 513*, the Supreme Court interpreted the expression 'claim' and arrived at its conclusion that a claim means 'a demand for something as due' or 'to seek or ask for on the ground of right'. The meaning given by the Supreme Court to the expression claim also gives the meaning that in order to make a claim there must be a preceding determination of an enforceable right in favour of the person making a claim. Accordingly, we examine the facts and circumstance of the present case based upon which the respondents is making a claim that they have a right for the recovery of Rs.89,99,853/-.

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16. To substantiate the submission that the respondent FCI has a right to make a recovery of the amount, Mr. PK Roy, learned senior counsel for the FCI refers to the findings arrived at by a Committee constituted by the respondent FCI as regards serious irregularities in transport contract management resulting in financial loss of substantial amount. The Committee in paragraph B as available at running page 73 of the additional affidavit by the respondent FCI makes it discernible that the Committee took note of that the petitioner was appointed as a transport contractor at a quoted rate of Rs.7.11 PMT-PKM for a distance of 78.185 KM as per the terms and conditions of the contract agreement. The Committee thereafter referred to certain PWD certificates that the total distance covered by the contract agreement was 78.185 KM and the Committee in its report available as Annexure-B running page 70 arrived at its conclusion that the distance from the weighbridge FSD Cinnamara to JPR/JTTN for taking tare weight of the vehicle was 6KMs; distance from JPR/JTTN to weighbridge FSD Cinnamara for taking gross weight of food grains was 6KMs and from weighbridge FSD Cinnamara to JPR/JTTN (as JPR/JTTN is on the way of FSD Sibsagar) was 6KMs, the total being 18 KMs are to be excluded from the contracted distance of 78.185 KM.

17. Accordingly, the Committee arrived at its conclusion that for a distance of 18 KMs, the transport vehicle moved without carrying any load of food grains or it travelled a distance for the purpose of weighment of the load in the truck, but not for the actual distance from the pickup point of the load of the food grains to the destination where the food grains are to be unloaded. In other words, it is the stand of the respondents in the FCI that therefore, the said distance ought to be deducted from the contract agreement for the purpose of payment of contractor's bill. If the said reasoning is now compared with the

communication dated 16.05.2020 from the Divisional Manager, FCI, DO, Jorhat made to the Assistant General Manager (Cont.) the reason as to why the respondent FCI intends to make a recovery is that there is an observation made by the CAG in their letter dated 05.02.2020. In other words, as per the communication dated 16.05.2020, the reason for the recovery is the letter of the CAG, whereas as per the submission made before the Court and the materials referred the reasoning is that the internal committee of the FCI had arrived at its conclusion that the transport vehicle had covered the distance of 18KM either without carrying any food grains or beyond the distance between the loading and unloading points of the food grains and as such the amount is to be recovered.

18. Apparently from the stand taken by the respondent FCI, there appears to be a contradiction as to the reason as to why the recovery is sought to be made. If the reasoning of the recovery is the letter of the CAG, no such material is provided before the Court for its examination as to whether the CAG had provided for a retrospective action that the amount for the distance travelled by the contractor's vehicle for the weighment of the vehicle and the distance travelled by the vehicle beyond the distance between the loading and unloading points of the food grains are not to be honored. On the other hand, if the reasoning arrived at by the Internal Committee of the FCI is the basis for arriving at such conclusion to effect a recovery, the reasoning of the Internal Committee would have to be examined as to whether there was an enablement of the respondent FCI as per the terms of the contract to effect such recovery. Similarly even if the CAG report provides for a retrospective action to deduct the amount from the contractor's bill, the same would also have to be examined whether such retrospective action of deduction can be effected without violating

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the terms and conditions of the contract.

19. The learned senior counsel for the respondent FCI in order to establish its enablement to effect the recovery refers to Clause-XII of the terms and conditions of the contract. Clause-XII provides for recovery of losses suffered by the respondent FCI, where Clause-XII(a) provides that the FCI shall be at liberty to reimburse themselves for any damages, losses, charges, cost or expenses suffered or incurred by them or any amount payable by the contractor as liquidated damage as provided in Clause-X thereof. Clause-XII(a) is extracted as below:-

> "*XII(a)- The Corporation shall be at liberty to reimburse themselves for any damages, losses, charges, costs or expenses suffered or incurred by them, or any amount payable by the contractor as Liquidated Damages as provided in Clauses X above. The total sum claimed shall be deducted from any sum then due, or which any time thereafter may become due, to the contractors under this, or any other, Contract with the Corporation. In the event of the sum which may be due from the contractor as aforesaid being insufficient, the balance of the total sum claimed and recoverable from the contractors as aforesaid shall be deducted from the Security Deposit, furnished by the contractors as specified in Clause IX. Should this sum also be not sufficient to cover the full amount claimed by the Corporation, the contractor shall pay the Corporation on demand the remaining balance of the aforesaid sum claimed.*

20. A reading of the extracted portion of Clause-XII(a) makes it discernible that the enablement of the respondent FCI to recover or reimburse itself would be in respect of any damages, losses, charges, costs or expenses that the FCI may have suffered or incurred.

21. 'Damage' means the money claimed or ordered to be paid to a person as a compensation for loss or injury that may be caused by the other party.

22. In the instant case, the petitioner contractor had submitted and got their contractors bill paid strictly in terms of the contract as well as the order of appointment, although subsequently it may have been realised by the respondent FCI that according to them the billed amount for certain distances for which the food grains were not carried or the distance was beyond the distance between the loading and unloading points, but the transport vehicle was required to travel was not required to be paid.

23. The circumstance does not satisfy the requirement that the petitioner contractor by their conduct in any manner or in a manner contrary to the terms of the contract had caused any loss or injury to the respondent FCI.

24. 'Loss', as per the Black's Law Dictionary, means an undesirable outcome of a risk or the disappearance or diminution of a value in an unexpected or relatively unpredictable way or the access of a property's adjusted value over the amount realised. The factual aspect that the respondent FCI later on arrives at a conclusion that the contractors bill for the distance mentioned above are not required to be paid cannot be the result of an undesirable outcome of a risk or the disappearance or the diminution of a value or relatively unpredictable way and accordingly the said aspect also cannot be accepted to be a loss that the respondent FCI may have suffered.

25. As per Black's Law Dictionary the expression 'charge' amongst others means an encumbrance, lien or claim of a property or a thing entrusted to another's care. Similarly the subsequent conclusion arrived at by the respondent FCI that the contractors bill for the distance travelled by the transport vehicle without carrying the food grains and for the distance beyond the loading and unloading points are not required to be paid also cannot be accepted to be in any manner an encumbrance, lien or claim of a property or that any property was entrusted by the FCI to the petitioner over which it has its charge.

26. Similarly, the transaction that took place between the parties also cannot be stated that it had resulted in the FCI requiring to bear any cost or that it had to bear any expenses because of the conduct of the petitioner contractor.

27. For the aforesaid reasons, we are unable to accept that Clause-XII(a) of the terms and conditions of the contract would be applicable in the facts of the present case enabling the respondent FCI to have the liberty to reimburse or recover from the paid contractor's bill by referring to a conclusion or a view formed by them much subsequent to the contract having coming to its end. Clause-XII(a) of the terms and conditions of the contract also enable the respondent FCI to reimburse or recover any sum payable by the contractor as liquidated damage as provided in Clause-X of the terms of the contract.

28. A reading of the provisions of Clause-X of the terms of the contract makes it discernible that the cost, damage, charge etc referred therein are on account of being contractors negligence in performing the work or in the event of failure

on the part of the contractor to provide the required number of trucks per day as required in the contract.

29. As no such circumstance exists in the present case that the FCI had to bear any cost, damage or charge because of any negligence on the part of the petitioner or there was a failure on the part of the petitioner to provide the required number of trucks per day, we also cannot accept that the contractors liability under Clause-X of the terms and conditions of the contract would be applicable in the present case. In view of the conclusion arrived that the enablement of a reimbursement or recovery under Clause-XII of the terms and conditions of the contract is inapplicable, we are also unable to satisfy ourselves that the respondent FCI had any legal right accrued in their favour for effecting such a recovery as sought to be made.

30. In order to invoke the provisions of Clause-XIV of the terms and conditions of the contract for appropriation or setting off any claim, the respondent FCI, as already provided hereinabove, first and foremost, would have to establish that a legal right had accrued in their favour in order to give effect to a recovery within the concept of their being a claim in their favour.

31. In order to further examine as to whether the enablement of the respondent FCI to the recovery sought to be made is a claim i.e. they have a legal right to such recovery, we also examine the concept as to what constitutes a legal right. For the purpose, reference is made to paragraph 15 of the pronouncement of the Hon'ble Supreme Court in *MR 'X' Vs. Hospital 'Z',* reported

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in *(1998) 8 SCC 296*, wherein 'Right' is held to be an interest recognised and protected by moral or legal rules, where a violation of which would be a legal wrong and the respect for such interest would be a legal duty. In fact the Hon'ble Supreme Court accepted the definition of 'right' as provided by Salmond in order to arrive at the aforesaid proposition. Further legal rights are those rights which are vested in a person and is available against another person who is under a corresponding obligation and duty to respect that right and has to act or forbear from acting in a manner so as to prevent the violation of the right and only upon satisfaction of the aforesaid requirement, a person can seek for a protection of his legal right against the other person.

32. Going by the meaning of the expression 'right', when we examine the factual situation involved in the present case, no provision in the contract agreement could be pointed out which provides that the contractor would not be entitled to the agreed rate of payment for any distance where the transport vehicle may travel in course of and in furtherance of the requirement of the contract without carrying the food grains or for any distance beyond the loading and unloading points of the food grains.

33. In the absence of any such provision, we have to accept that the petitioner contractor was under no obligation nor had a duty to act or forbear from being entitled to the quoted rate for the entire kilometers of the distance provided in the contract agreement. In the absence of any duty on the part of the petitioner contractor, leading to a corresponding obligation to respect any view that the respondent FCI may subsequently develop that the bills in respect of the distance travelled by the transport vehicle without carrying the food

grains or for the distance beyond the loading and unloading points of the food grains, which again are required to be done in terms of the contract itself, are not required to be honored or that the petitioner contractor had the obligation to act or forbear from being paid the agreed rate for the said distance travelled, we are of the view that no corresponding right is discernible in favour of the respondent FCI to take a subsequent stand in a concluded contract that they have a claim against the petitioner contractor for reimbursement or a recovery or set off of the amount as sought to be done in the present case.

34. Accordingly, we are of the view that even the enablement of the respondent FCI for a reimbursement or a set off of a claim under Clause-XIV of the terms and conditions of the contract agreement would be unavailable to the respondent FCI.

35. Further, we have also taken note of that even if the respondent FCI had arrived a subsequent conclusion in favour of the recovery because of any report of the CAG or as because an internal committee of the respondent FCI had arrived at such a conclusion, but no material is produced before the Court that the petitioner contractor was ever confronted with such material and was given an opportunity to explain his cause on the inapplicability of such material in the facts and circumstances of the present case.

36. From such point of view, we have to conclude that the impugned conclusion arrived at by the respondent FCI for effecting the recovery of the amount of Rs.89,99,853/- was made by the respondent FCI also in

violation of the principles of natural justice.

37. Further, another question would also remain that while entering the contract or in course of the period when the contract was executed, it was never the view of the respondent FCI as discernible from the records that the contractor would not be paid for the distance travelled by the transport vehicle for the purpose of tare weight during which time it would not be carrying the food grains or for any other distance beyond the loading and unloading points of the food grains. From such point of view, it has to be accepted that the contract was entered by the FCI without the aforesaid elements being present as a part of the contract agreement and it was only after the report of the CAG that was available in the year 2020 i.e. after three years of the contract being concluded that it donned in the mind of the official respondents of the FCI that as the transport vehicles also travels a distance without carrying the food grains for the purpose of tare weight of the vehicle and for the distance beyond the loading and unloading points of the food grains, the contracted rate should not be paid for such distance. In other words, it appears that the respondent FCI officials had made applicable the views that may have been expressed by the CAG with retrospective effect in a concluded contract which again would be a question as to whether it can be done or not.

38. It also has to be kept in mind that as per the NIET dated 28.04.2015 the rate PMT-PKM are required to be quoted by the bidders for a distance of 78.185KMs, whether or not the contract works actually requires the travel of such distance, and, therefore, the application of the minds of the bidders in quoting the rates would be by keeping in mind that the distance as per the

contract agreement would be 78.185 KMs. Any reduction of the KM subsequent to the contract being concluded would adversely affect the rate that the bidders may have quoted inasmuch as, had the distance for which the bill amount would be honored would have been indicated before the contract was entered, the bidders would have had the opportunity to quote the appropriate rate by taking note of the volume and nature of the work.

39. For the reasons mentioned above, we are of the view that the impugned recovery made by the respondent FCI pursuant to the communication dated 05.02.2020 of the Divisional Manager, FCI, DO, Jorhat as well as the ION dated 13.12.2021 of the Manager, Contract Division, FCI, DO, Jorhat, amounting to Rs.89,99,853/- from the contractors bill of the petitioner is held to be arbitrary, unreasonable and unsustainable in law and accordingly the same stand set aside. The amount that had already been recovered from the petitioner contractor shall be refunded back to the petitioner within a period of three months from the date of receipt of a certified copy of this order.

40. The petitioner also makes a claim for an interest to be paid for the amount retained by the respondent FCI. For any such claim for interest, the petitioner is at liberty to make appropriate application.

41. The writ petition is allowed in the terms as indicated above.

JUDGE

Comparing Assistant

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