SUPREME COURT OF INDIA

Krishan Lal

Vs.

Food Corporation of India

C.A.Nos.8569-8570 of 2003

(T.S. Thakur and Gyan Sudha Misra JJ.)

24.02.2012

ORDER

T.S. THAKUR, J.

1. These appeals by special leave arise out of an order passed by the High Court of Punjab and Haryana whereby Civil Writ Petition No. 2416 of 2002 and R.A. No.134 of 2002 filed by the appellant seeking refund of Rs.10 lakhs deposited towards security pursuant to the order passed by the High Court has been dismissed.

2. On 12th November, 1999 the Food Corporation of India invited tenders for appointment of Handling and Transportation Contracts at various depots including the depot at Dabwali in the State of Haryana. Several persons appear to have submitted their tenders in response to the said tender notice including M/s R.R.S. Chautala Company who eventually bagged the contract in question having offered to undertake the contracted work in consideration of payment at 186% above the schedule of rates. The appellant questioned the said allotment in Writ Petition No.1368 of 2000, inter alia, alleging that he had been illegally prevented from submitting his tender by being denied the requisite form for submission of the tender. The appellant also asserted that he was ready to undertake the Handling and Transportation work at a much lower rate of 110% above the schedule of rates as against 186% offered by the successful tenderer mentioned above. The appellant even offered to deposit a sum of Rs.10 lakhs by way of security to show his bona fides. An affidavit to that effect was also, it appears, filed by the appellant.

3. The Writ Petition filed by the appellant was eventually allowed by the High Court by its order dated 5th April, 2001. The High Court held that the decision taken by the Food Corporation of India was without consideration of relevant facts and was not reasonable. The High Court therefore, found a case justifying interruption of contract and setting aside of the allotment of work in favour of the successful tenderer. Having said that, the High Court issued the following directions:

> It is directed that the fifth respondent shall cease to operate immediately. The respondent-corporation shall invite fresh tenders and proceed to allot the work in accordance with law. The petitioner shall be bound by his offer to work at 110% above the schedule of rates. He would deposit an amount of Rs.10 lacs by way of security within one week from today with the office of the Senior Regional Manager, Food Corporation of India, Chandigarh. This amount shall be adjusted towards security, etc. if the work is allotted to the petitioner. Otherwise, it would be refunded within one week of the final decision regarding the allotment of the work.

4. In obedience to the above directions the respondent- Food Corporation of India (FCI) invited sealed tender for handling and transport contact for its Dabwali depot for a period of six months. The short term tender notice required the intending tenderers to submit their tenders along with complete documents and the earnest money prescribed in the form of a Demand Draft.

5. In response to the above tender notice, the appellant also submitted a tender offering to undertake the work @ 50% above the schedule of rates. This offer was accepted by the respondent-Corporation with a direction to the District Manager, FCI, Hissar that no amount towards security be demanded from the appellant as the security amount of Rs.3,09,500/- stood deposited in the Regional Office. Shortly after the allotment of the contract to the appellant, the appellant sent a fax message expressing his inability to undertake the handling and transport contract and withdrawing the offer made by him. By this time the appellant had already executed a formal agreement with the respondent-Corporation on 28th May, 2001. In response, the respondent-Corporation informed the appellant that any withdrawal after the execution of the formal agreement was tantamount to a breach of the terms and conditions of the contract and would attract action under Clause X(b) of the agreement. The appellant was requested to take up the handling and transport work within one week positively, failing which the respondent-Corporation proposed to take recourse to Clause X(b) of the agreement to get the work done at the risk and cost of the appellant.

6. It is common ground that the appellant did not undertake the work. He cited some security problems which according to the appellant prevented him from discharging his contractual obligations. Not only that the appellant demanded the refund of Rs.10 lakhs which stood deposited with the respondent-Corporation pursuant to the direction issued by the High Court in the writ petition referred to earlier. Upon refusal of the respondent- Corporation to refund the amount in question the appellant filed Writ Petition No.2416 of 2002 in the High Court of Punjab and Haryana for a mandamus directing the respondent-Corporation to refund the same. The High Court dismissed the said petition holding that since the parties had entered into a written contract their mutual rights and obligations were governed by the terms and conditions of the said contract. The High Court observed: It appears from the record of the case and in particular Annexure-P-5 dated 20.6.2001 addressed to the petitioner by the F.C.I. that the petitioner had executed agreement in the office on 28.5.2001 and his offer at 50% ASOR was accepted by the office vide telegram dated 25.5.2001, a copy whereof was sent to the petitioner through registered post. It has been clearly mentioned in Annexure-P-5 that the F.C.I had accepted the offer of the petitioner and that being so, in our view, a concluded contract had come into existence. Withdrawal of offer would certainly attract relevant condition of the contract. The contract that has been arrived at between the parties has not been placed on records. The terms of contract in the event a party, after its offer has been accepted, may back out, are, thus, not known. There is, however, sufficient indication forthcoming from Annexure-P-5 that Clause 10(b) would apply in the event of contractor may not carry out the work allotted to him. This clause too has not been shown to us nor made a part of pleadings. All that we would, thus, like to observe at this stage is that once the parties have arrived at concluded contract, the terms thereof would alone determine the rights inter se parties. Be that as it may, petitioner cannot ask for refund of Rs.10 Lacs on the dint of orders passed in his earlier petition bearing No.1368 of 2000 as it is only in the event work was not to be allotted to him that, he could ask for refund of the money deposited by him.

7. We have heard learned counsel for the parties at some length. The material facts are not in dispute. It is not in dispute that the amount of Rs.10 lakhs was deposited by the appellant in terms of the order of the High Court in Writ Petition No.1368 of 2000. The said amount had to be refunded to the appellant if the work was not allotted to the appellant upon the issue of the fresh tenders. In case the appellant succeeded in bagging the contract the amount was to be adjusted towards security. This clearly implied that the order passed by the High Court envisaged a situation where the appellant would not succeed in securing the contract pursuant to the

fresh tender process, in which event the amount deposited by the appellant had been refundable in toto. In case, however, the appellant succeeded in bagging the contract which obviously depended upon whether he offered the lowest rate for undertaking the work in question, the amount deposited by him had to be adjusted towards security in relation to the said contract. It is also not in dispute that a short-term tender was issued pursuant to the direction of the High Court and that the security amount required to be furnished by the appellant was limited to a sum of Rs.3,09,500/-. The High Court order did not provide for a situation where the security amount required under the contract may be Rs.3,09,500/- for other tenderers but Rs.10 lakhs in the case of the appellant. That a formal agreement was executed between the parties is also admitted before us as indeed it was before the High Court. Withdrawal of the offer tantamount to refusal to undertake the contract, hence a breach of the terms of the contract, and shall attract the penal provisions contained in the same is also not in question. Our attention was, in this regard, drawn by learned counsel for the appellant to Clause X (b) and XI (f) of the agreement which read as under:

> X(b) The Senior Regional Manager shall also have without prejudice to other rights and remedies, the right, in the even of breach by the contractors of any of the terms and conditions of the contract to terminate the contract forthwith and to get the work done for the unexpired period of the contract at the risk and cost of the contractors and/or forfeit the security deposit at any part thereof for the sum of sums due for any damages, losses, charges, expenses of costs that may be suffered or incurred by the corporation due the contractor's negligence or unworkment like performance of any of the services under the contract. XI (f) In the event of termination of the contract envisaged in clause X, of the Senior Regional Manager shall have the rights of forfeit the entire or part of the amount of security deposit lodged by the contractors or to appropriate the Security Deposit or any part thereof in or towards the satisfaction of any sum due to be claimed for any damages, losses, charged expenses or cost that may be suffered or incurred by the Corporation.

8. It was argued on behalf of the appellant that even the widest and most favourable interpretation of the above terms would not entitle the respondent-Corporation to forfeit any amount besides the security deposit and recover any damages, losses or cost that may be suffered or incurred by the respondent-Corporation in getting the contracted work executed through some other agency. Such being the position the respondent-Corporation could at best forfeit the sum of Rs.3,09,500/- towards security deposit and a sum of Rs.2,17,274/- which the

respondent- Corporation claimed to have incurred towards extra expenditure in getting the work executed at the risk and cost of the appellant. The extra expenditure incurred by the respondent-Corporation after termination of the contract allotted to the appellant, it is noteworthy, has been quantified by the respondent-Corporation in para 5(i) (ii) of the counter-affidavit filed on its behalf. The respondent- Corporation has inter alia said:

> I say that during the contract period of six months of the petitioner, the Respondent Corporation had to incur an extra expenditure of Rs.2,17,274/- and suffered heavy losses. I say that security amount of Rs.10 lakhs was furnished by the petitioner as security for fulfilment of contract in terms of High Court order. Even after depositing Rs.10 lakhs as per the High Court Orders, the petitioner did not resume the work and the entire amount of Rs. 10 lakhs was rightly forfeited against excess payment made towards alternative arrangements made at the risk and cost of the petitioner. I say that the amount of Rs.10lakhs was stand forfeited under Clause X(b) read with Clause XI(f) of the contract.

9. It was in the light of the above assertions, argued Mr. Jha, learned counsel for the appellant, that the respondent-Corporation could not lay any claim against the amount in question in excess of Rs.3,09,500/ plus Rs.2,17,274/- and that the balance amount was liable to be refunded to the appellant.

10. On behalf of the respondent-Corporation it was argued that the appellant ought to have resorted to the arbitration clause under the agreement instead of filing a writ petition in the High Court. Alternatively, it was argued that the security deposit having been made under the orders of the High Court, the entire amount of Rs.10 lakhs was liable to be forfeited on the failure of the appellant to work once the same was allotted to him.

11. It is true that there was an arbitration clause in the agreement executed between the parties. It is equally true that, keeping in view the nature of the controversy, any claim for refund of the amount deposited by the appellant could be and ought to have been raised before the Arbitrator under the said arbitration. The fact, however, remains that the High Court had entertained the writ petition as early as in the year 2002 and the present appeals have been pending in this Court for the past ten years or so. Relegating the parties to arbitration will not be feasible at this stage especially when the proceedings before the Arbitrator may also drag on for another decade. Availability of an alternative remedy for adjudication of the

disputes is, therefore, not a ground that can be pressed into service at this belated stage and is accordingly rejected.

12. Equally untenable is the alternative argument that since the amount of Rs.10 lakhs had been deposited pursuant to the order passed by the High Court the same was liable to be forfeited in toto in the event of any breach of the agreement between the parties. The deposit was, no doubt, made pursuant to the direction of the High Court but the said direction did not go further to say that in case the appellant committed a breach of the agreement executed between the parties, any such breach would result in the forfeiture of the entire amount of Rs.10 lakhs. A closer reading of the order passed by the High Court leaves no manner of doubt that the amount was deposited but was refundable in case the contract was not allotted and was adjustable towards security if the appellant succeeded in emerging as the successful tenderer. In the event of adjustment of the amount towards security the breach of the contract would have led to the forfeiture of the security amount alone and not the entire amount deposited by the appellant.

13. Even so, the terms of the contract provided for execution of the contracted work through another agency at the risk and cost of the appellant. It is not in dispute that the respondent-Corporation had engaged an alternative agency for getting the work executed. It is also not in dispute that an extra amount was incurred by the respondent-Corporation in that regard. If that be so, the amount lying with the respondent-Corporation could be utilised for recovery of the loss. The respondent- Corporation could therefore make a claim for recovery of the extra expenditure, incurred by it. We must mention, in fairness to Mr. Jha, that the respondent-Corporation's right to forfeit the security amount or to recover the extra expenditure incurred in getting the work executed from alternative agency was not disputed by him.

14. That being the position, the respondent-Corporation would be entitled to retain a sum of Rs.3,09,500/ plus Rs.2,17,274/- = Rs.5,26,774/-. The balance amount of Rs.4,73,226/- ought to have been refunded to the appellant on the admitted factual and contractual premise.

15. In the result, we allow this appeal, set aside the order passed by the High Court and direct the respondent- Corporation to refund the balance amount of Rs.4,73,226/- to the appellant within a period of three months from today failing which the said amount shall start earning interest @ 10% p.a. from the date of expiry of the stipulated period of three months mentioned above. We are consciously making no order for payment of interest on the amount held

refundable to the appellant, for we are of the opinion that the appellant had without any real intention to perform the work in question got the earlier contract terminated by a judicial order and put the Corporation through the unnecessary botheration and consequential prejudice of calling for fresh tenders. The appellant, it appears to us, was interested only in scoring a point over his rival for whatever reasons he had in view. The conduct of the appellant has, therefore, dissuaded us from directing payment of any interest to him on the amount that is held refundable.

16. These appeals are, with above directions observations, allowed and disposed of leaving the parties to bear their own costs.