
(2015) 10 JH CK 0036

In the Jharkhand High Court

Case No : L.P.A. No. 176 of 2015 and I.A. No. 3836 of 2015

Food Corporation of India

APPELLANT

Vs

Ramchandra Yadav and Others

RESPONDENT

Date of Decision : 06-10-2015

Acts Referred:

Citation : (2016) 1 AJR 669

Hon'ble Judges : Dhirubhai Naranbhai Patel and Ratnaker Bhengra, JJ.

Bench : Division Bench

Advocate : Satish Bakshi, Advocate, for the Appellant; Pandey Neeraj Rai, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Dhirubhai Naranbhai Patel, J.—This Letters Patent Appeal has been preferred against the judgment and order delivered by the learned Single Judge in W.P.(C) No. 5774 of 2014 dated 12th February, 2015, whereby, the petition preferred by the respondent (original petitioner) has been allowed and the appellant-Corporation was directed to refund the earnest money deposit of Rs. 5,80,000/- with interest, if payable in terms of Corporation's own guidelines, within a period of four weeks and, hence, the original respondent No. 1 has preferred the present Letters Patent Appeal.

2. Factual Matrix:

"? Tender inviting notice was published by the appellant for two way transportation of foodgrains. The two works were narrated as under:--

"(a) Two way transportation from Rail Head Chandil to Private Entrepreneur Godown Seraikella and handling work at Rail Head Chandil and,

(b) Two way transportation from Rail Head Dhalbhumgarh to Private Entrepreneur Godown Chakulia and handling work at Rail Head Dhalbhumgarh."

? For both the aforesaid contracts, tenders were filled up by respondent No. 1

(original petitioner) with earnest money of Rs. 5,80,000/- for each of the tender process.

? Respondent No. 1 (original petitioner) was not given first contract because he was not a lowest one.

? It further appears from the facts of the case that as second contract, which was transportation from Rail Head Dhalbhumgarh to Private Entrepreneur Godown at Chakulia and handling work at Rail Head Dhalbhumgarh, was given to respondent No. 1 (original petitioner) as per the terms of general inviting notice and he was to deposit security amount of Rs. 12,50,000/- and two bank guarantees were given by respondent No. 1 each of Rs. 25,00,000/-.

? Time to give security amount as well as bank guarantees were extended up to 11th August, 2014.

? Respondent No. 1 was declared as a lowest number one on 18th July, 2014, so far as second contract is concerned.

? Respondent No. 1 could not give security amount of Rs. 12,50,000/- nor two bank guarantees were given as required and, hence, the appellant had forfeited security deposit of Rs. 5,80,000/- for second contract.

? The appellant had also passed an order dated 20th August, 2014 to withhold the security amount for first contract also. This is a bottleneck in the whole matter.

? Due to the order dated 20th August, 2014 passed by the appellant (Annexure-1 to the memo of this Letters Patent Appeal), writ petition being W.P.(C) No. 5774 of 2014 was preferred by respondent No. 1 (original petitioner), which was allowed by the learned Single Judge and, hence, the appellant (original respondent No. 1) has preferred present Letters Patent Appeal."

3. Arguments advanced by the learned counsel appearing for the appellant:

"? It is submitted by the learned counsel appearing for the appellant that looking to the terms and conditions, inviting tenders which are annexed at Annexure-2 to the memo of this Letters Patent Appeal and as per Clause IX, there is calculation of security deposit and as per Clauses (X)(a) and (X)(b), the appellant was entitled to withhold the amount of security deposit even for first item for which tender was filled up by respondent No. 1, though he was not given contract.

? It is further submitted by the learned counsel appearing for the appellant that as per Clauses (X)(b) and (XII) and as per Clause 6 of the general information to tenderers, the appellant can withhold the amount of security deposit till the actual loss is ascertained because respondent No. 1 could not give security amount nor two bank guarantees each of Rs. 25,00,000/-. Now, there shall be re-advertisement and if there is any difference in the amount to be paid by the appellant to another contractor, the said damages or losses will have to be recovered from this respondent No. 1 (original petitioner), looking to aforesaid

terms of the tenders. These aspects of the matter have not been properly appreciated by the learned Single Judge and, hence, the judgment and order delivered by the learned Single Judge deserves to be quashed and set aside."

4. Arguments advanced by the learned counsel appearing for respondent No. 1 (original petitioner):

"? It is submitted by the learned counsel appearing for respondent No. 1 (original petitioner) that so far as item No. 1 of the contract, as narrated hereinabove especially for two way transportation from Rail Head Chandil to Private Entrepreneur Godown Seraikella and handling work at Rail Head Chandil, is concerned, the said contract was never given to respondent No. 1 and, therefore, security deposit for this purpose ought to be refunded to respondent No. 1.

? It is further submitted by the learned counsel appearing for respondent No. 1 (original petitioner) that both the contracts are separate and independent to each other. The proposed damages or losses caused to the appellant, for the so called breach of the contract, cannot be recovered from the security deposit for the contract, which has never been entered between the appellant and respondent No. 1.

? It is further submitted by the learned counsel appearing for respondent No. 1 (original petitioner) that looking to Clause of tender inviting notice at Annexure-2 especially Clause (X)(b), there was no concluded contract, at all, so far as first item is concerned. Moreover, no liability has ever been decided by any competent Court, so far as payment of damages or losses is concerned.

? Learned counsel appearing for respondent No. 1 (original petitioner) has relied upon the decisions rendered by Hon"ble the Supreme Court, reported in J.G. Engineers Pvt. Ltd. Vs. Union of India (UOI) and Another, and Kailash Nath Associates Vs. Delhi Development Authority and on the basis of the aforesaid decisions, it is submitted that damages are yet to be decided by the competent Court even breach of contract has not been decided by any competent Court. In these eventualities, the appellant cannot withhold the security deposit for the first item of the contract, as narrated hereinabove. These aspects of the matter have been properly appreciated by the learned Single Judge while allowing the writ petition preferred by respondent No. 1 (original petitioner) and, hence, no error has been committed by the learned Single Judge in giving direction to refund the earnest money deposit at Rs. 5,80,000/- with interest, if payable in terms of appellant's own guidelines and, therefore, this Letters Patent Appeal may not be entertained by this Court.

? It is further submitted by the learned counsel appearing for respondent No. 1 (original petitioner) that for the first bid/tender/work, the contract was never entered into and, therefore, whatever security deposit is given by respondent No. 1 to the appellant should be refunded and it cannot be adjusted towards any liability which is yet to be finalized for the so called or alleged breach of contract for transportation of foodgrains from Dhalbhumgarh to Chakulia."

Reasons:

5. Having heard learned counsels for both the sides and looking to the facts and circumstances of the case, we hereby quash and set aside the judgment and order delivered by the learned Single Judge in W.P.(C) No. 5774 of 2014 dated 12th February, 2015 for the following facts and reasons :

"(i) Tender inviting notice was published for-

"(a) Two way transportation from Rail Head Chandil to Private Entrepreneur Godown Seraikella and handling work at Rail Head Chandil and,

(b) Two way transportation from Rail Head Dhalbhumgarh to Private Entrepreneur Godown Chakulia and handling work at Rail Head Dhalbhumgarh."

(ii) For the aforesaid two bids/tenders/works, respondent No. 1 had filled up the tenders and for both the tenders, security deposit of Rs. 5,80,000/- were deposited separately.

(iii) The respondent was not lowest No. 1, so far as bid/tender/work No.--(i) is concerned and, hence, he was not given bid/tender/work No. (i).

(iv) So far as bid/tender/work No.--(ii) is concerned, which is at two way transportation from Dhalbhumgarh to Chakulia, respondent No. 1 was declared as lowest No. 1 on 18th July, 2014.

(v) Looking to Annexure-2 to this Letters Patent Appeal which are the terms and conditions attached with tender, respondent No. 1 was to deposit Rs. 12,50,000/- as security deposit and two bank guarantees each of Rs. 25,00,000/- was to be deposited much earlier, but, ultimately, time limit was extended up to 11th August, 2014.

(vi) Within aforesaid time limit, respondent No. 1 could not give the security deposit amount of Rs. 12,50,000/- nor could he give two bank guarantees each of Rs. 25,00,000/- and, hence, for bid/tender/work-(ii), the contract was terminated vide order dated 20th August, 2014 (Annexure-1 to the memo of this Letters Patent Appeal). Simultaneously, security deposit amount of Rs. 5,80,000/- for bid/tender/work-(ii) was forfeited as well as vide aforesaid order dated 20th August, 2014, the security deposit amount of Rs. 5,80,000/- for bid/tender/work-(i) is concerned, the same was withheld. This action was challenged by respondent No. 1 in the writ petition.

(vii) It appears from Clause No. 6 to be read with Clause Nos. (X), (XI) and (XII), the appellant has all power, jurisdiction and authority to withhold the security deposit amount of Rs. 5,80,000/- which respondent No. 1 had deposited while filling up tender for two way transportation from Chandil to Seraikella, even though this contract was not given to respondent No. 1. What is important is not the contract between the parties to this litigation, so far as bid/tender-(i) is concerned. What is important is that respondent No. 1 has caused losses or damages which have been suffered by the appellant because of breach of the

contract, committed by respondent No. 1 for bid/tender/work No.-(ii) i.e. two way transportation from Dhalbhumgarh to Chakulia and handling thereof at Dhalbhumgarh, looking to Clause Nos. (X), (XI) and (XII) to be read with Clause No. 6 of Annexure-2 to the memo of this Letters Patent Appeal.

(viii) Much has been argued out by the learned counsel appearing for respondent No. 1 upon liquidated and unliquidated damages on the decision cited by him, but, nothing is helpful to the learned counsel for respondent No. 1 mainly for the reason that damages are yet to be finalized. The calculation of damages is one thing and withholding of the security deposit amount is altogether another thing. The appellant has not forfeited the security deposit amount for bid/tender/work No.-(i). Vide order dated 20th August, 2014 (Annexure-1), the appellant has withheld the security deposit amount at Rs. 5,80,000/- which will be set off as per Clause Nos. (X), (XI) and (XII) and Clause No. 6 of the terms of the tender, later on. This aspect of the matter has not been properly appreciated by the learned Single Judge while allowing the writ petition being W.P.(C) No. 5774 of 2014 vide order dated 12th February, 2015.

(ix) There may be two bids/tenders. There may be two separate security deposits, deposited by respondent No. 1. There may be only one contract given to respondent No. 1 and in case of breach of the contract, the appellant has all power, jurisdiction and authority to retain the security deposit amount for bid/tender/work No.-(i) so that the appellant may not have to move from pillar to post when damages are finalized and when damages are to be paid by respondent No. 1.

(x) Clause No. (x) of the tender inviting notice reads as under:

"X. Liability of Contractor for losses etc. suffered by Corporation:--

(a) The contractor shall be liable for all costs, damages, demurrages, wharfage, forfeiture of wagon registration fees, charges and expenses suffered or incurred by the Corporation due to the contractor's negligence and un-workman like performance of any services under this contract or breach of any terms thereof or his failure to carry out the work with a view to avoid incurrence of demurrage, etc. and for all damages or losses occasioned to the Corporation due to any act whether negligent or otherwise of the contractor themselves or his employees. The decision of the General Manager regarding such failure of the contractor and his liability for the losses etc. suffered by Corporation, and the quantification of such losses, shall be final and binding on the contractor.

(b) The Corporation shall be at liberty to reimburse themselves of any damages, losses, charges, costs or expenses suffered or incurred by it due to contractor's negligence and un-workmanlike performance of service under the contract of breach of any terms thereof. The total sum claimed shall be deducted from any sum then due or which at any time hereafter may become due to the contractor under this or any other contract with the Corporation. In the event of the sum which may be due from the Corporation 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 contractor. Should this sum also be not sufficient to cover the full amount claimed by the Corporation, the contractor shall pay to the Corporation on demand the remaining balance of the aforesaid sum claimed.

(c).....

(d).....

(e)..... "

(emphasis supplied)

(xi) Clause No. (xi) of the tender inviting notice reads as under:

"XI. Summary Termination:--

(a).....

(b) The General Manager shall also have without prejudice to other right and remedies, the right, in the event of breach by the contractor 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 contractor and/or forfeit the security deposit or any part thereof for the sum or sums due for any damages, losses, charges, expenses or costs that may be suffered or incurred by the Corporation due to the contractor's negligence or unwork-man like performance of any of the services under the contract.

(c)..... "

(emphasis supplied)

(xii) Clause No. (xii) of the tender inviting notice reads as under:

"XII 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."

(emphasis supplied)

In view of the aforesaid three Clauses, even though for bid/tender No.-(i), no contract was entered into between the appellant and respondent No. 1, but, because of breach of the contract which has been entered into between the parties for bid/tender No. - (ii), the appellant can retain or withhold the security deposit amount of Rs. 5,80,000/- even for bid/tender No. - (i) for set off the damages which are recoverable from respondent No. 1.

(xiii) The security deposit amount for bid/tender No. - (ii), which has been resulted into a contract, has not been fulfilled by respondent No. 1.

(xiv) So far as security deposit for bid/tender No. - (ii) is concerned, the same can be withheld for adjustment of the liability of respondent No. 1 towards the appellant. This security deposit amount has never been forfeited, so far as bid/tender No. -(i) is concerned, but, this retention is only towards future liability of respondent No. 1. This is always permissible, otherwise, the appellant will have to move from pillar to post for recovery of the damages. The appellant is a Public Sector Undertaking. The security deposit amount, which is retained by the appellant, can be recovered by respondent No. 1 very easily, if respondent No. 1 is not found liable for any damages, which can be even returned/refunded with interest. These aspects of the matter have not been properly appreciated by the learned Single Judge while deciding the writ petition being W.P.(C) No. 5774 of 2014 vide order dated 12th February, 2015.

(xv) In Clause (X)(b), there is a liability upon respondent No. 1 to reimburse the damages/losses/charges/costs or expenses suffered or incurred due to contractor's negligence and this amount for damages/losses/charges/costs or expenses suffered or incurred by the appellant can be recovered from any sum due to respondent No. 1. This amount may be towards security deposit for bid/tender No. -(i).

(xvi) Looking to the aforesaid Clauses viz. Clause No. 6, Clause (X), Clause (XI) and Clause (XII), if all are read together, the appellant can retain/withhold the security deposit amount deposited by respondent No. 1 for bid/tender No. -(i), though it has not been resulted into contract because the appellant has power, jurisdiction and authority for reimbursement of any damages/losses/charges/costs or expenses suffered or incurred due to negligence of respondent No. 1.

(xvii) The learned Single Judge has appreciated Clause No. 6 of the tender inviting notice, in isolation. This is an error apparent on the face of the record. Clause No. 6 ought to be read with Clause Nos. (X), (XI) and (XII) and the cumulative effect of these Clauses are to be seen and are to be evaluated, conjointly. The very purpose of these Clauses is permitting the appellant for reimbursement of damages/losses/charges/costs or expenses suffered or incurred due to breach of the contract from any sum payable to respondent No. 1, including security deposit for a bid/tender which respondent No. 1 might have filled up for which even no contract is given.

(xviii) It is submitted by the learned counsel appearing for the appellant that liabilities and damages will be finalized very soon. It is further submitted by the learned counsel appearing for the appellant that there is further development after the judgment is delivered by the learned Single Judge which has been pointed out in the affidavit that because of the breach of the contract for bid/tender No. -(ii) by respondent No. 1, fresh tender has to be invited and there is difference of approximately Rs. 41 Lakhs which shall have to be borne by the appellant, but, this aspect of the matter is a development after the judgment is delivered by the learned Single Judge and, therefore, the liability for the damages/losses/charges/costs or expenses suffered or incurred will be finalized

very soon. Be as it may, but, the security deposit amount of Rs. 5,80,000/- for bid/tender No. -(i) is concerned, the same can be retained by the appellant towards the damages/losses/charges/costs or expenses suffered or incurred by the appellant due to breach of the contract by respondent No. 1."

6. As a cumulative effect of the aforesaid facts and reasons, we hereby quash and set aside the judgment and order delivered by the learned Single Judge in W.P.(C) No. 5774 of 2014 dated 12th February, 2015. Accordingly, this Letters Patent Appeal is allowed and disposed of.

7. Accordingly, I.A. No. 3836 of 2015 is also disposed of.