

(2023) 09 GAU CK 0040

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 4031 Of 2023

M/S Naba Gogoi

APPELLANT

Vs

State Of Assam And 3 Ors

RESPONDENT

Date of Decision : 26-09-2023

Acts Referred:

Indian Penal Code, 1860 — Section 120B, 406, 409, 420
Essential Commodities Act, 1955 — Section 7

Citation : (2023) 09 GAU CK 0040

Hon'ble Judges : Suman Shyam, J

Bench : Single Bench

Advocate : K K Mahanta

Final Decision : Disposed Of

Judgement

1. Heard Mr. K. K. Mahanta, learned senior counsel assisted by Mr. M. H. Ansari, learned counsel appearing for the writ petitioner. Also heard Mr. B.J. Talukdar, learned senior counsel assisted by Mr. P. K. Medhi, learned Government Advocate, Assam appearing for all the respondents.

2. The instant writ petition is directed against the “undated order” passed by the Deputy Commissioner, Dibrugarh i.e. the respondent No.3 herein inter-alia cancelling the contract agreement dated 09.02.2018 entered into by the respondent No.3 as the 1st party the writ petitioner herein, a sole Proprietorship Firm ,as the 2nd party, for transportation of foodgrains under the National Food Security Act, 2013 [NFSA, 2013].

3. The facts of the case, in a nutshell, are that on 09.02.2018 the respondent No.3 had entered into a contract agreement with the petitioner for transportation of foodgrains from the FCI godown at Dibrugarh to the Wholesale Consumer Cooperative Societies i.e. WCCS as well as the Gram Panchayat Samabai Samiti (GPSS) Ltd. and thereafter, to the respective Fair Price Shop dealers in the Dibrugarh Municipality area and Naharkatia Town Committee area. The contract

agreement dated 09.02.2018 envisages a two Tier transportation mechanism. Under Tier-I the contractor is required to transport foodgrains from the FCI godown at Dibrugarh to the godowns of WCCS/GPSS. Under Tier-II, the foodgrains were required to be transported from the WCCS/GPSS godowns to the doorstep of Fair Price Shops. According to the submissions made at the bar, although the original contract agreement dated 09.02.2018 was valid only upto 31.12.2018, yet, the contract was renewed from time to time and the writ petitioner was allowed to execute the orders of transportation under the same terms and conditions even for the subsequent years uptill the current year i.e. 2023.

4. According to the writ petitioner, the transportation of foodgrains allocated for the year 2023, from the FCI godown to the respective WCCS/GPSS was duly executed by him thus, completing the Tier-I level of transportation. However, due to non-availability of requisite orders/memos from the concerned WCCS/GPSS for the Tier-II transportation, the petitioner could not commence the work of transportations to the respective FPS, even though, as per the terms and conditions of the contract, he was required to transport the goods to the Fair Price Shop dealers within 15 days.

5. It appears that some malpractices on the part of some of the office bearers of a GPSS Ltd. was detected by the authorities and on 31.05.2023, an ejahar was lodged before the Officer-in-Charge, Rohmaria Police Station, Dibrugarh, District – Dibrugarh by the Inspector of Food, Civil Supplies and Consumer Affairs, Dibrugarh alleging foul play on the part of the Chairman and Secretary of M/S Rohmaria S.S. Ltd. leading to diversion of highly subsidized TPDS rice made available under the NFSA, 2013. Based on the aforesaid ejahar, Rohmaria P.S. Case No.11/2023 was registered under Sections 120(B)/406/409/420 IPC read with Section 7 of the EC Act and the matter was taken up for investigation. During the course of investigation, the Chairman and the Secretary of the Rohmaria S.S. Limited were arrested by the police. The matter is currently under investigation. It appears from the materials available on record that the allegation is of diversion of rice bags from the godown of M/S Rohmaria S.S. Ltd. Situated thus, on 21.05.2023, the respondent No.3 had issued a show cause notice calling upon the writ petitioner to show cause as to why, the contract agreement should not be terminated and the value of the diverted quantity of rice should not be recovered from him.

6. On receipt of the show cause notice dated 21.05.2023, the writ petitioner had submitted reply on 27.05.2023, explaining his stand in the matter. While categorically denying his involvement in any unfair practice as has been alleged, the writ petitioner has stated that the responsibility to issue memos nominating the Fair Price Shops or the Agents or the NFSA beneficiary is with the Secretary/Chairman of the Samity. But the Secretary/Chairman had failed to issue such memos for the Tier-II transportation. It has also been alleged that the Secretary/Chairman had diverted the rice by keeping the authorities and the contractor in

the dark. The writ petitioner had also stated that due to the non-issuance of requisite orders, the Tier-II transportation could not be carried out. Notwithstanding the reply submitted by the petitioner, by the impugned order issued in the month of June, 2023 bearing No.DSC.02/2023/95 the contract agreement was terminated, the security deposit of Rs.10 lakhs placed by the writ petitioner with the respondent No.3 was forfeited and an order was issued to recover the price of the diverted rice jointly from the petitioner as well as the Chairman and the Secretary of M/S Rohmaria GP SS Ltd. Aggrieved thereby, the instant writ petition has been filed.

7. By referring to the materials available on record, Mr. Mahanta, learned senior counsel appearing for the writ petitioner has vociferously argued that the writ petitioner could not have transported the foodgrains to the fair price shops under the Tier-II level of transportation unless specific instructions/memos were issued to it by the concerned GPSS/WCCS nominating the FPS dealer. In the present case, submits Mr. Mahanta, no such memo was issued to the petitioner as a result of which, the transportation could not be carried out in the Tier-II level. The learned senior counsel for the petitioner has further argued that the alleged malpractices have been detected while the rice bags were stored in the godown of M/S Rohmaria GP SS Ltd. and were in their custody. Therefore, the writ petitioner had nothing to do with diversion of rice bags. According to Mr. Mahanta, the allegation of malpractice is clearly directed against the Chairman and the Secretary of M/S Rohmaria GP SS Ltd. and not against the writ petitioner. However, on a misconstruction of Clause-10 of the contract agreement the respondent No.3 had not only terminated the contract agreement but has fastened huge liability upon the petitioner by holding that the writ petitioner had "failed to substantiate the charge". Mr. Mahanta, therefore, submits that the impugned order (Annexure-10) is vitiated by complete non-application of mind and as such, the same deserves to be set aside by this Court.

8. Responding to the above arguments, Mr. B. J. Talukdar, learned senior counsel and Government Advocate, Assam appearing for the respondents has contended that as per the contract agreement, the writ petitioner also had the responsibility to ensure that the transportation of goods were completed in a time bound manner not only at the Tier-I level but also at the Tier-II level. Even assuming that the petitioner did not receive the memos from the GPSS for carrying out the Tier-II level transportation within the stipulated time period even, then it was incumbent upon the transporter i.e. the writ petitioner herein, to raise the issue and lodge a complaint before the officials which he had failed to do in the instant case. Therefore, the complicity of the petitioner in diversion of the foodgrains cannot be ruled out. On such ground the learned Government Advocate has argued that there is no merit in this writ petition and the same is liable to be dismissed.

9. I have considered the submissions made at the bar and have also gone through the materials available on record.

10. From a careful reading of the impugned order (Annexure-10) I find that the respondent No.3 has observed that the writ petitioner was in league with the Secretary and the Chairman of M/S Rohmaria GP SS Ltd. for diversion of rice quantity. However, the impugned order (Annexure-10) does not record any finding of fact based on cogent materials available on record so as to arrive at such a conclusion. Rather, it appears that the conclusion drawn by the respondent No.3 as regards the alleged complicity of the petitioner in diversion of rice is on mere suspicion and presumption, based on the circumstances which were also not clearly established in the impugned order. Since the respondent No.3 has relied upon Clauses-6 and 10 of the contract so as to terminate the contract agreement, it would be necessary to reproduce the relevant clauses of the contract agreement. As such, Clause Nos.6 to 10 of the contract agreement is reproduced herein below for ready reference :-

"6. The transport contractor shall deliver the allotted foodgrains transported by them to the nominee GPS and WCCS (in TIER-I) and to the FP Shop dealers (in TIER-II) properly without any loss, damage, storage etc. of its quality and quantity.

7. The transporter shall obtain a receipt from the allottee GPSS/WCCS and Fair Price shops after successful delivery of transported food-grains duly signed by the recipient and countersigned by executive officer/Secretary of the concerned GPSS/WCCS.

8. No extra amount shall be paid by the authority in case of any delay at FSDs of FCI while loading and at WCCS/GPSS and F.P. Shop level at the time of unloading. However, the District authority shall ensure for timely loading and unloading of foodgrains transported by the contractor.

9. The transporter shall adhere to the lifting programme of foodgrains provided to them by the authority/FCI and shall be bound to complete delivery of allotted foodgrains to the nominees in time and within validity period.

10. The transporter shall be responsible for any loss, damage, leakage, theft, replacement with inferior quality of the transported foodgrains and shall have to compensate for any such irregularities besides, liable to face prosecution as per provisions of law."

11. A plain reading of the aforementioned clauses of the contract agreement, more particularly Clause-8 would clearly go to show that the responsibility to ensure timely loading and unloading of foodgrains by the transporter (contractor) was on the District authority. The aforesaid clause of the contract agreement, when read in the context of other clauses, would clearly demonstrate that the responsibility of the contractor (transporter) was only to adhere to the lifting programme of foodgrains provided to him by the authority/FCI. The contractor would be bound to complete the transportation of loaded foodgrains within time. The lifting of foodgrains and the delivery of the same were, however, to be carried out under the supervision of the District authorities. In other words, the

terms of the agreement governs duties and liabilities of the transporter in the matter of transportation of the foodgrains and issues arising during transit and not beyond that. Under the terms of the contract agreement the transporter would not have any liability in respect of the foodgrains while the same is stored in the godowns of the WCCS/GPSS. Moreover, the contractor could also not lift the foodgrains at Tier-I or Tier-II level unless instructions for lifting of foodgrains and the delivery address was given to it/him by the concerned WCCS/GPSS.

12. In the present case, materials on record indicate that diversion of foodgrains by the mechanism, as projected by the learned Government Advocate, Assam, was detected while the foodgrains were stored in the godown of M/S Rohmaria GP SS Ltd. The contractor/transporter does not have any access to the goods stored in the godown of the S. S. Limited during the period during which the goods are stored in the godown. The responsibility for storage of such good would lie on the concerned WCCS/GPSS and on the authorities/In-Charge Inspectors, under whose supervisions, the WCCS/GPSS are located. There is no allegation against the writ petitioner to the effect that he had a direct role to play in the diversion of the rice bags. There is also nothing on record to show even the indirect involvement of the writ petitioner in diversion of bags.

13. Clause-10 of the contract agreement no doubt makes the transporter responsible for any loss, damage, leakage, theft, replacement with inferior quality of the transported foodgrains but as has been indicated above, the said clause would be applicable only if there are materials to suggest that the loss, damage, leakage, theft and/or replacement had taken place while the foodgrains were in transit and in the custody of the transporter and not otherwise. In other words, the transporter cannot be made responsible for any loss or damage under Clause-10 while the foodgrains were in the custody of the GPSS/WCCS unless there are specific materials to indicate the complicity of the transporter in any malpractices. After a careful analysis of the documents on record, I find that there is no material to arrive at a conclusion as regards the complicity of the petitioner in diversion, theft and/or replacement by inferior foodgrains while the foodgrains were in transit. Under the circumstances, this Court is of the unhesitant opinion that the present is not a case where Clauses-6 and 10 would have any application in the facts and circumstances of the case.

14. The respondent No.3 has issued the impugned order, the operative part of which reads as follows :-

"1. The NFSA Transport Agreement dated 09.02.2018 made with Transporter M/S Naba Gogoi is hereby terminated forthwith.

2. The Security deposit of Rs.10,00,000.00 (Rupees Ten Lakh) placed before the Deputy Commissioner, Dibrugarh by Transporter M/S Naba Gogoi in respect of the Transport Contract is hereby forfeited into the exchequer of Govt. of Assam for the breach of terms of the transport contract agreement and to meet the partial value of alleged diverted rice.

3. The share of value of diverted rice co-jointly with the Chairman and Secretary of M/S Rohmaria Samabai Samitee Ltd. will be realized in due course as per the outcome of Judicial Court order in respect of Rohmaria PS Case No.11/2023 u/s 120(B)/406/409/420 R/W Sec. 7 of E.C. Act, 1955.

Given under my seal and hand on thisday of June, 2023 and this order will come into force with immediate effect.”

15. If the impugned order is implemented, the same would not only have serious adverse civil consequences upon the petitioner but he may even be subjected to future proceedings involving penal provisions. Therefore, unless the conclusions are drawn on the basis of cogent materials available on record and the charge is established in a proceeding conducted in accordance with law, an order, having serious adverse civil consequences upon the petitioner, cannot be sustained in the eye of law.

16. As noted above, there is not even an iota of evidence on record to suggest that the writ petitioner had acted in violation of the terms and conditions of the contract. The writ petitioner is also not named in the F.I.R. As such, having regard to the facts and circumstances of the case, this Court is of the opinion that there is no cogent basis for the respondent No.3 to issue the impugned order against the writ petitioner.

17. For the reasons stated above, this writ petition succeeds and is hereby allowed.

18. The impugned order (Annexure-10) is hereby set aside.

19. It is, however, made clear that this order would not come in the way of the authorities in initiating appropriate legal action against any person, including the writ petitioner, if found guilty of any foul play or commission of malpractice, as and when such occasion arises.

With the above observation, the writ petition stands disposed of. There would be no order as to cost.