

(2011) 03 GAU CK 0035
In the Gauhati High Court
Case No : Writ Petition (C) No. 5948 of 2010

Rana Construction and Engineer (R) Ltd.	APPELLANT
Vs	
Union of India and Others	RESPONDENT

Date of Decision : 18-03-2011

Acts Referred:

Citation : (2011) 6 GLR 744

Hon'ble Judges : Brojendra Prasad Katakey, J

Bench : Single Bench

Advocate : N. Dutta, Mr. A.K. Bhuyan, Ms. B. Bhuyan, Mr. R. Tanti, Mr. M. Das and Mr. J. Borah, for the Appellant; K.P. Pathak, G.N. Sahewalla and Mr. P.K. Roy, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Katakey, J.—The petitioner Company, which submitted the tender pursuant to the short tender notice dated 15th September, 2010, issued by the General Manager of Food Corporation of India, Assam Region, inviting tenders for appointment of Transport Contractors, in 2 (two) bids tendering system (technical bid and price bid) for transportation of foodgrains, sugar, allied materials on ad hoc basis for a period of 6 (six) months with the right of extension for another period of 3 (three) months from (i) Ex-Railway Siding Haibargaon to FCI FSD Itachali-via-weighbridge, (ii) Ex-Railway Siding Haibargaon to FCI FSD Senchowla via weighbridge and (iii) Ex-Railway siding New Guwahati/FCI FSD Guwahati Complex to FCI FSD Hailakandi via weighbridge, has challenged the decision of the competent authority of Food Corporation of India (FCI) to eliminate its tender submitted for appointment of Transport Contractors Ex-Railway Siding New Guwahati/FCI FSD Guwahati Complex to FCI FSD Hailakandi via weighbridge and refusing to open the price bid on the ground that it has disqualified in the technical bid, having failed to fulfill the terms and conditions of the NIT, as communicated vide communication dated 4th October, 2010 by the Deputy General Manager (Region), FCI.

2. The facts relevant for the purpose of disposal of the present writ petition may be noticed as under : -

(i) The respondent FCI pursuant to the tender process initiated for appointment of the Transport Contractors for transportation of foodgrains etc. appointed the petitioner as Transport Contractor for carrying foodgrains etc. from Ex-Guwahati to Badarpurghat for the period from 24th March, 2008 to 23rd March, 2010, which was subsequently extended up to 23rd June, 2010 and from Ex-Guwahati to Hailakandi for the period from 28th March, 2008 to 27th March, 2010 which was extended up to 27th June, 2010. During the contracted period, the performance of the petitioner, however, was found to be dismal as in the month of June 2010, despite the indents issued, no trucks were provided by the petitioner thereby affecting the public distribution system.

(ii) Prior to the aforesaid contract, another contract was awarded to the petitioner for transportation of food articles, etc., from Changsari/Amingaon/ Guwahati to FSD Kolasib, which, however, was terminated on 13th March, 2007, for the failure of the petitioner to carry out the contract, which was challenged by the petitioner in Title Suit No. 237/2007, wherein though on 10th November, 2009 the learned Civil Judge (Sr. Division), No. 3, Guwahati passed an order of injunction directing the parties to maintain status quo, the same, however, has been stayed by this court vide order dated 23rd December, 2009 passed in FAO No. 19/2009.

(iii) The respondent FCI on 14th December, 2009 issued another NIT for appointment of Transport Contractors, on regular basis for a period of 2 (two) years, for transportation of foodgrains, sugar, allied materials from Guwahati to Ramnagar as well as Guwahati to Badarpurghat, pursuant to which the petitioner and others submitted their tenders. The petitioner's offer was accepted by the FCI and it was appointed as Transport Contractor in respect of Guwahati-Ramnagar and Guwahati-Badarpurghat routes, which was communicated vide communication dated 17th June, 2010, asking him to deposit the security money on or before 25th June, 2010, for issuance of formal appointment orders, which was, however, extended to 30th June, 2010 vide communication dated 26th June, 2010. The petitioner was also informed by the said communication that in the event of failure to deposit the security money within the date fixed, the contract with the petitioner would be cancelled and alternative arrangement would be made for appointment of the Transport Contractor at his risk and cost, as stipulated in clause-XI of Model Tender Form (MTF).

(iv) The petitioner and some other contractors challenged the said communication dated 17th June, 2010 in WP(C) No. 3682/2010. During pendency of the said writ petition, the aforesaid communication dated 26th June, 2010 was issued, which the petitioner by filing a miscellaneous application, registered and numbered as Misc. Case No. 2096/2010, put to challenge, wherein vide order dated 30th June, 2010, the respondent FCI was directed not to give effect to the aforesaid communication dated 26th June, 2010. The said

communications dated 17th June, 2010 and 26th June, 2010 issued by the respondent FCI were put to challenge as the petitioner and others were informed that in the event of failure to deposit the security money, their offers would be cancelled and alternative arrangement at their risk and cost would be made for transportation of foodgrains etc. The respondent FCI filed an application for vacating the said interim order dated 30th June, 2010, which was registered and numbered as Misc. Case No. 2181/2010. Vide order dated 30th 11 July, 2010, a Single Bench of this court while observing that the interim order per-se does not prohibit the respondent FCI from initiating a fresh process without invoking the risk and cost clause, and in the event the respondent FCI suffers any financial loss in subsequent appointment of the Transport Contractors, the same can well be recovered from the writ petitioner in the event of dismissal of the writ petition, refused to vacate the interim order passed, however, allowing the respondent Corporation to take necessary steps for transportation of the foodgrains.

(v) The respondent FCI vide another communication dated 23rd August, 2010 invited different persons including the petitioner to participate in a limited spot tender for transportation of the foodgrains from Railway Siding Changsari/CWC Amingaon/Railhead, FSD Guwahati to FSD Shillong and from Ex-Railway Siding FSD Changsari/CWC Amingaon/Railhead, FSD to Aizawl/Godown complex. Another firm, namely M/s. Saikia Trade and Transport Company was awarded with the said contract for transportation of foodgrains etc. vide communication dated 30th August, 2010, which was put to challenge by the writ petitioner in WP(C) No. 4850/2010 and WP(C) No. 4851/2010, which are still pending.

(vi) In view of the aforesaid order dated 30th July, 2010 passed in MC No. 2181/2010 arising out of WP(C) No. 3682/2010, an ad hoc tender notice was, thereafter, issued by the General Manager of the FCI for appointment of the Transport Contractor for transportation of foodgrains in respect of the aforesaid routes, for a period of 6 (six) months with FCFs right to extend the said period by 3 (three) months, pursuant to which the petitioner submitted its tender in respect of the route Ex-Railway Siding New Guwahati/FCI FSD Guwahati Complex to FCI FSD Hailakandi via weighbridge. The said tender was issued in 2 (two) bids tendering system, i.e., technical bid and price bid. The petitioner, however, was found to be disqualified in the technical bid, in view of clause 3 of Appendix-II read with Note (ii) of the MTF, which was communicated by the Deputy General Manager vide communication dated 4th October, 2010, on the grounds (i) that his performance in executing the previous contracts in routes (a) Guwahati-Badarpurghat for the period from 24th March, 2008 to 23rd March, 2010 extended up to 23rd June, 2010 and (b) Guwahati to Hailakandi for the period from 28th March, 2008 to 27th- March, 2010 extended up to 27th March, 2010, has been poor and his performance during the last month of the contract tenure was dismal and almost no trucks were provided against the indents and, thus, brought the transportation work to a grinding halt, affecting the PDS in general and (ii) that the petitioner has failed to deposit the security money

despite the notice dated 26th June, 2010, which made the earnest money deposit of the petitioner liable for forfeiture, though his offer for appointment as Transport Contractor from Guwahati-Badarpurghat and Guwahati-Ramnagar route pursuant to the NIT Dated 14th February, 2009 was accepted and accordingly the earnest money deposit stands withheld. Hence, the present writ petition.

3. I have heard Mr. N. Dutta, learned senior counsel for the petitioner, Mr. K.P. Pathak, learned senior counsel for the respondent FCI and Mr. G.N. Sahewalla, learned counsel for the respondent No. 10.

4. Mr. Dutta, learned senior counsel for the petitioner referring to various communications issued to the respondent FCI as well as the minutes of the meeting held on 22nd August, 2010 with the Contractors' Federation convened by the respondent FCI, has submitted that the petitioner and other Transport Contractors, appointed by the respondent FCI for transportation of the foodgrains from one place to another during the period from 2008-2010, being unable to place the trucks as against the indents given by the respondent FCI, because of the strike in the month of June, 2010, about which the respondent FCI was well aware, the petitioner cannot be found to be not responsive to the technical bid because of its failure to provide the trucks during the month of June, 2010, when admittedly no transport contractors placed any trucks for transportation of the foodgrains against the indents given by the respondent FCI, which is one of the grounds on which the petitioner has been disqualified in the technical bid. That apart, referring to the Note in Appendix-II of the MTF dated 15th September, 2010, it has been submitted that since poor performance of the contract for the previous period, unless the Transport Contractor is blacklisted, is not the ground for disqualifying a bidder in the technical bids, the petitioner cannot be disqualified on the aforesaid ground.

5. Relating to the second ground of disqualification, i.e., the forfeiture of the earnest money deposited, it has been submitted by the learned senior counsel that since vide order dated 30th June, 2010 passed in WP(C) No. 3682/2010, the respondent FCI has been directed not to give effect to the communication dated 26th June, 2010, which interim order has been refused to be vacated vide order dated 30th July, 2010 passed in Misc. Case No. 2181/2010, the respondent FCI cannot disqualify the technical bid of the petitioner on the ground that it has failed to deposit the security money and as such, his earnest money deposit has been forfeited.

6. The learned senior counsel further submits that the petitioner is sought to be victimized as its Director is the President of the Contractors' Federation, which went on strike, which is evident from the fact that though one firm, namely, M/s. Saikia Trade and Transport Company, which also did not place any truck, pursuant to the earlier transport contract, in the month of June 2010, because of the strike, it was favoured with the transportation contract vide order dated 30th August, 2010, pursuant to the limited spot tender and the petitioner has been

sought to be disqualified in the technical bids on the ground that it has failed to place the trucks for transportation of the foodgrains for the month of June 2010. The learned senior counsel, therefore, submits that the contract already awarded in favour of the respondent No. 10 pursuant to the aforesaid NIT dated 15th September, 2010 may be set aside and the respondent Corporation may be directed to issue a fresh NIT for awarding such transportation contract.

7. Mr. Pathak, learned senior counsel for the respondent FCI, on the other hand, referring to two notices both dated 21st June, 2010 issued by the General Manager, FCI submits that the writ petitioner though earlier awarded the contract for transportation of the foodgrains from Guwahati to Badarpurghat and Guwahati to Hailakandi, it has failed to supply the trucks for transportation of such foodgrains despite the indents issued by the respondent FCI. According to the learned senior counsel, in respect of the transportation of the foodgrains from Guwahati-Badarpurghat, the petitioner, in the month of June, 2010, against the indents to 140 (one hundred forty) trucks, supplied only 3 (three) trucks and in respect of the contracts for transportation of the foodgrains from Guwahati-Hailakandi, it did not even supply any trucks against the indents of 140 (one hundred forty) trucks, which has ultimately affected the public distribution system and also the public interest. It has also been submitted by the learned senior counsel that since a contract has been entered into by the petitioner for transportation of foodgrains, it cannot refuse to carry out the contract by resorting to strike thereby jeopardizing the public distribution system. The learned senior counsel, therefore, submits that the petitioner has rightly been disqualified in the technical bid on the said ground.

8. Mr. Pathak referring to the averments made in paragraph 3 of the affidavit-in-opposition as well as in paragraph 5 of the affidavit-in-reply filed by the writ petitioner, further submits that though the petitioner was appointed as Transport Contractor on the Changsari/Amingaon/Guwahati to FSD Kolasib route, the said contract was terminated on 13th March, 2007 for the petitioner's failure to perform the contract, which was though challenged in Title Suit No. 237/2007 and an order of temporary injunction directing the parties to maintain status quo was passed on 10th November, 2009, the same, however, has been stayed by this court vide order dated 23rd December, 2009 passed in FAO No. 19/2009 and, hence, the order of termination of the said contract dated 13th July, 2007 stands. The learned counsel, therefore, submits that the performance of the petitioner was not at all satisfactory and it also did not disclose such fact about termination of contract in Appendix-II of the MTF.

9. Mr. Pathak, referring to the second ground of disqualification, has submitted that though the petitioner's bid pursuant to the NIT dated 14th December, 2009 for appointment as the regular Transport Contractor from Guwahati-Badarpurghat and Guwahati-Ramnagar routes was accepted and it was informed vide communication dated 17th June, 2010 to deposit the security deposit money and again informed vide communication dated 26th June, 2010 to deposit the

same within 30th June, 2010, intimating him that in the event of failure to do so, the transport contractors would be appointed at the petitioner's risk and cost, it has failed to deposit the security money, which in turn leads to the forfeiture of the earnest money deposited and as such, the petitioner is found to be disqualified in terms of Note -- (ii) of Appendix-II of the MTF dated 15th September, 2010. Referring to the aforesaid orders dated 30th June, 2010 and 30th July, 2010 passed in WP(C) No. 3682/2010, it has been submitted by the learned senior counsel that the order requiring the petitioner to deposit the earnest money has not been stayed. According to the learned senior counsel, only the proposed action of the respondent FCI to initiate a fresh process for appointment of the Transport Contractors at the risk and cost of the petitioner, because of his failure to deposit the security money, has been stayed as is evident from the order dated 30th July, 2010 passed in Misc. Case No. 2181/2010 arising out of WP(C) No. 3682/2010.

10. It has also been submitted by the learned Sr. Counsel that the petitioner intact has furnished incorrect information in the tender paper submitted by him in Appendix-II by stating that no security deposit or earnest money deposit of the petitioner was forfeited by the respondent FCI, though the petitioner's earnest money was forfeited in respect of the earlier contract, which is also a ground for disqualifying the petitioner in the technical bid. Mr. Pathak further submits that there is no discrimination or victimization, as projected by the petitioner, its Director being the President of the Contractors' Federation. According to Mr. Pathak, the limited spot tender was issued on 23rd August, 2010 for clearing the stranded food articles and allied materials, wherein the detailed formalities are not required to be followed. It has been submitted that in such limited spot tender anyone who is willing to transport the foodgrains etc. is allowed to participate, irrespective of their past performance, as the same was for the purpose of clearing the stranded articles and not for appointment of the Transport Contractor as such. The learned senior counsel further submits that in any case, the period for which the respondent No. 10 has been appointed as transport contractor pursuant to the ad hoc tender notice dated 15th September, 2010 is going to expire on 5th April, 2011 and as such, awarding of the contract in favour of the respondent No. 10 may not be disturbed, since it involves the transportation of foodgrains for distribution to the general public.

11. Mr. Sahewalla, learned senior counsel appearing for the respondent No. 10, supporting the argument advanced by the learned senior counsel for the respondent FCI, has also submitted that since the petitioner's performance was found to be dismal in respect of the earlier contract and his earnest money deposit was forfeited because of his failure to deposit the security money pursuant to acceptance of its bid in terms of the NIT dated 14th December, 2009, the petitioner has rightly been disqualified in the technical bid. It has also been submitted that pursuant to the NIT dated 15th September, 2010, the respondent No. 10 has been appointed as Transport Contractor vide order dated 5th October, 2010, in terms of which it is transporting the foodgrains, which may not be

disturbed at this stage.

12. I have considered the submissions of the learned counsel for the parties and also perused the pleadings as well as the materials available on record produced by the learned counsel for the respondent FCI.

13. It is not in dispute that the petitioner was earlier appointed as Transport Contractor on the routes (i) Guwahati-Badarpurghat for the period from 24th March, 2008 to 23rd March, 2010, which was subsequently extended up to 23rd June, 2010 and (ii) Guwahati-Hailakandi for the period from 28th March, 2008 to 27th March, 2010, which was also extended up to 27th June, 2010. One of the grounds on which the petitioner has been disqualified in the technical bid, in respect of the NIT dated 15th September, 2010, is that his performance during the last month of the contract tenure was dismal and almost no truck was provided against the indents and, thus, brought the transportation work to a grinding halt, affecting the Public Distribution System (PDS) in general. The said position has been disputed by the petitioner referring to the certificates issued by the Arrear Manager of FCI, both dated 29th July, 2010, certifying that the performance of the contractor with effect from 27th March, 2008 to 3rd June, 2010 in respect of the route Guwahati-Badarpurghat and with effect from 28th March, 2008 to 31st May, 2010 in respect of the route Guwahati-Hailakandi is satisfactory. It is also the case of the petitioner that during the month of June, 2010, because of the strike by all the transport contractors, the trucks could not be supplied, which was also taken note of in the meeting held on 22nd August, 2010 in the Zonal Office of the FCI and hence the performance of the petitioner in the said month cannot be the ground for disqualification in the technical bid. As noticed above, the same is disputed by the respondent FCI contending that during the month of June, 2010, in respect of the route Guwahati-Badarpurghat against the indents of 140 (one hundred forty) trucks, the petitioner made available only 3 (three) trucks and in respect of the route from Guwahati-Hailakandi not even a single truck was made available by the petitioner against the indent of 140 (one hundred forty) trucks. It is also the contention of the respondent FCI that there being a contract between the parties, they cannot take the PDS for a ride by resorting a strike on the ground that the Apex Court has restrained carrying load in the truck more than the limit prescribed under the provisions of the Motor Vehicles Act and the Rules framed there under.

14. It appears that the petitioner was made known by the General Manager of the FCI vide 2 (two) communications dated 21st June, 2010 (issued on 23rd June, 2010) that it has, in the month of June, 2010, in respect of the route Guwahati-Badarpurghat, supplied only 3 (three) trucks against the indents of 140 (one hundred forty) trucks and in respect of the route from Guwahati-Hailakandi it did not supply a single truck against the FCI indents of 140 (one hundred forty) trucks. The certificates, both dated 29th July, 2010, issued by the Arrear Manager of the respondent FCI, which are the basis for contending that the petitioner's performance in respect of the said contract was found to be

satisfactory, being up to 3rd June, 2010 in respect of Guwahati-Badarpurghat, route and 31st May, 2010 in respect of Guwahati-Hailakandi route, those cannot be the basis for recording the finding relating to the performance of the petitioner in the month of June, 2010. The petitioner in fact has not disputed the allegation that it did not supply the requisite trucks, pursuant to the contract, in the month of June 2010 for the aforesaid routes. The petitioner having entered into a contract for transportation of food-grains, etc., for distribution to the general public, cannot take the entire system for a ride by resorting to strike that too on the ground that because of the Apex Court has prohibited carriage of load in a truck more than the permissible limit. The petitioner in any case, under the provisions of the Motor Vehicles Act and the Rules framed there under cannot carry load more than the prescribed limit. The petitioner's action in resorting to the strike and in not providing the required number of trucks, pursuant to the contract, has adverse effect on the Public Distribution System and also the public interest. Failure of the petitioner to provide the trucks, pursuant to the contract, therefore, is a relevant consideration for the purpose of disqualifying it in the technical bid, in such type of contract.

15. In a contract, like one involved in the present writ petition, which is for transportation of food-grains from one place to another, which is meant for the public distribution, the Transport Contractor cannot refuse to provide the trucks for transportation of the foodgrains etc., by resorting to strike, that too on the ground that the Apex Court has prohibited overloading in the trucks, i.e., prohibiting carrying of load in excess of the limit prescribed under the provisions of the Motor Vehicles Act and the Rules framed there under, thereby jeopardizing the public interest and affecting the PDS, which in turn has the affect of depriving the public in general from getting the food-grains to which they are entitled to. Such an action on the part of the Transport Contractor being against the public interest, cannot, at all be condoned and can be a relevant consideration for the purpose of disqualification of technical bids of such contractor, who submitted the bids pursuant to the subsequent NIT. Public interest in such a contract is the paramount consideration. If such a bidder is awarded such a contract there is every possibility of not fulfilling the contractual obligations, thereby jeopardizing the entire public distribution system.

16. The contention of the petitioner that another contractor, namely, M/s. Saikia Trade and Transport Company though was also defaulted in supplying trucks pursuant to the contract, was subsequently awarded the transportation contract on 30th August, 2010 for carrying the stocks from Changsari/Guwahati to Shillong and, on the other hand, the petitioner has been disqualified in the technical bid for failure to provide the trucks in the month of June 2010, thereby the petitioner has been discriminated against, cannot be accepted as said M/s. Saikia Trade and Transport Company was allowed transportation of food articles etc. from Changsari/Guwahati to Shillong pursuant to the spot tender notice to clear the stranded stocks and not against any ad hoc tender notice or regular tender notice, where the past performance of the contractor is a relevant

consideration.

17. It also appears from the pleadings in the affidavit-in-opposition filed by the respondent FCI that though the petitioner was appointed as Transport Contractor on the Changsari/Amingaon/Guwahati to FSD Kolasib route, the same was terminated on 13th July, 2007, for the failure of the petitioner to perform the contract. The said order of termination was, however, challenged in T.S. No. 237/2007, wherein an order of injunction directing the parties to maintain status quo was passed by the learned Civil Judge (Sr. Division), No. 3, Guwahati, on 10th November, 2009, which was, however, stayed by a Single Bench of this court vide order dated 23rd December, 2009 passed in FAO No. 19/2009. The said position has not been denied by the writ petitioner in the affidavit-in-reply filed by him except stating that the aforesaid suit and FAO are still pending for disposal. From the said averments it, therefore, appears that the petitioner's appointment as Transport Contractor for the aforesaid route was terminated on 13th July, 2007 because of the failure on its part to perform the contract. The petitioner, despite that, in column No. 3 of the Appendix-II of the MTF has furnished the wrong information stating that no contract was earlier terminated before expiry of the contract period. As held above, the past performance in such type of contract is a relevant consideration for the purpose of disqualifying in the technical bid of a bidder.

18. The second ground, on which the petitioner has been disqualified in the technical bid, is the forfeiture of the earnest money deposit for his failure to deposit the security money despite the notices dated 17th June, 2010 and 26th June, 2010, though his bid was accepted for appointment as Transport Contractor on Guwahati-Badarpurghat and Guwahati-Ramnagar routes pursuant to the NIT dated 14th December, 2009.

19. It is evident from the record that the communication dated 26th June, 2010 issued by the respondent FCI was put to challenge in WP(C) No. 3682/2010, wherein an interim order dated 30th June, 2010 was initially passed directing the respondent FCI not to give effect to the said communication. On the basis of the application being Misc. Case No. 2181/2010 filed by the respondent FCI, vide order date 30th July, 2010, the respondent FCI, however, was allowed to take necessary steps for transportation of food-grains to cater the public interest by observing that the interim order does not in any way impede such an endeavour. By the said order the interim order dated 30th June, 2010 was refused to be vacated.

20. It appears from the said order dated 30th July, 2010 that the petitioner's grievance was relating to the application of clause 26.6 of the Storage and Contract Manual of the respondent FCI as well as clause-XI(a) of the MTF, which provides that in the event of the failure to furnish the security deposit within a week of acceptance of the tender, the contract shall be liable to be cancelled at the risk and cost of the contractors. By communication dated 26th June, 2010 the petitioner has been informed about the said clause-XI(a) of the MTF directing

him to deposit the prescribed security money on or before 30th June, 2010. The petitioner was also informed that in the event of failure to make such deposit, his contract would be cancelled and alternative arrangement would be made at his risk and cost as provided in the MTF. The operation of the said communication has been stayed by the aforesaid order, thereby staying the invocation of the risk and cost provision by the respondent FCI. Till that date no decision relating to the forfeiture of the earnest money deposit was taken. Since the respondent FCI has been directed not to give effect to the said communication dated 26th June, 2010, it naturally cannot cancel the contract with the petitioner and consequently cannot forfeit the earnest money deposit made by him while submitting his tender pursuant to the aforesaid NIT, during continuance of the aforesaid interim order. That being the position, the second ground on which the petitioner's technical bid has been disqualified is not sustainable in law. However, since it has been held that the petitioner's technical bid pursuant to the NIT dated 15th September, 2010 has rightly been disqualified because of the first ground, the ultimate decision of the respondent FCI, as reflected in the impugned communication dated 4th October, 2010 has not been interfered with.

21. The writ petition is, therefore, dismissed. No costs.