

WP(C) 4656/2010

BEFORE

THE HON'BLE MR JUSTICE HRISHIKESH ROY

Heard Mr. N. Dutta, the learned Senior Counsel appearing for the petitioners in the WP(C) 3682/2010, WP(C) 5672/2012, WP(C) 5673/2012, WP(C) 4437/2010 and WP(C) 4438/2010. Mr. A.M. Buzarbaruah, the learned Senior Counsel argues for the petitioners in the WP(C) 3498/2010. The two petitioners in the WP(C) 4656/2010 and WP(C) 4709/2010 are represented by the learned advocate Mr. M. Dutta and the petitioner in the WP(C) No.4661/2010 is represented by Mr. B. Chakraborty, the learned Counsel. The respondent Food Corporation of India (FCI) and their officials are represented by the Senior Counsel Mr. K.P. Pathak who is assisted by the Standing Counsel Mr. P.K. Roy. Mr. U. Rajbongshi, the learned Asstt. Advocate General appears for the Transport Department, Government of Assam. The learned Central Government Counsel Ms. J. Huda appears for the Union of India.

RELEVANT FACTS

2. The petitioners are in the business of transportation of food grains under the FCI and these cases are related to the tender process for appointment of carriage contractors for transporting food grains from the FCI depots on different routes in the North East region. Tender notices were issued on 14.12.2009, 28.4.2010 and 17.2.2010 for the individual routes by the General Manager (R) of the FCI, inviting bids from contractors with 2 years minimum experience in handling food grains. As experienced contractors, the petitioners participated in the 2 bid system tender process and after their technical bids were found responsive, their price bids were opened on different dates i.e. 22.1.2010, 8.6.2010 and 9.4.2010 for the concerned NITs. The FCI authorities then started negotiation for rate reduction with the responsive tenderers. In the meantime, the petitioners learnt of the strict enforcement of truck load restriction of 9 MT for each truck.

3. Earlier the trucks were overloaded with upto 21 MT of food grains and the rates quoted by the carriage contractors was on the assumption that each truck would carry an average load of 20/21 MT each. But when the permitted gross weight prescribed under Section 58 and 113 of the Motor Vehicles Act came to be strictly enforced in Assam and many overloaded trucks were fined at the check gates, for the subsisting contracts the transporters didn't place enough trucks to match the indents issued by the FCI authorities. Accordingly the Area Manager of the FCI through his FAX dated 7.6.2010 informed those defaulting contractors that if sufficient trucks are not provided, the FCI will levy penal charges from the contractors. In this communication, the Area Manager requested the higher-ups in the FCI to seek exemption for the FCI vehicles from the restrictive load barriers so that the transporters can carry the food grains to their destination without disruption of service. Then the Executive Director (NE) of the FCI through his letter dated 8.6.2010 sought special exemption for loading food grains above 9 MT in the FCI trucks as per the prevalent practice prior to 10.5.2010.

4. At that stage, one of the tenderer Salehul Gofoor who is the petitioner in the WP(C) 4438/2010 wrote to the FCI that the rate quoted by him was on the basis that the transporter will be carrying 18 to 20 MT load per vehicle but since the permitted load is restricted to only 9 MT, the tenderer may be allowed to revise his rate or else his earnest money be returned to him. Similar letter was also written on the same date i.e. 9.7.2010 by the tenderer Mritradev Chetry who has filed the WP(C) 4437/2010.

5. Then on 17.6.2010, three tenderers namely M/s Rana Constructions & Engineers Pvt. Ltd., M/s S.D. Enterprise and M/s Saikia Trade and Transport Co. jointly approached the High Court by filing the WP(C) 3498/2010 where they sought special exemption to carry load above 9 MT in their trucks. But when this case was moved on 18.6.2010, the FCI Counsel produced the FCI's FAX order dated 17.6.2010, whereby it was communicated that the tender process was already finalized on 17.6.2010. Consequently the tenderers were obliged to execute the contract at the

ir quoted rate.

6. Since this gave rise to a fresh cause of action to the 3 petitioners, they filed the WP(C) 3682/2010 on 24.6.2010, wherein they challenged the FCI's acceptance communication dated 17.6.2010 whereby the tenderers were directed to furnish the prescribed security money by 25.6.2010 for issuance of formal appointment letter. In this case, an interim order was passed on 30.6.2010 whereby the petitioners were protected from consequential risk and cost liability since the resultant contracts were being awarded to other contractors. Although the 3 transporters had jointly filed the WP(C) 3682/2010, subsequently 2 of them i.e. M/s S.D. Enterprise and M/s Saikia Trade and Transport Co. filed individual cases i.e. WP(C) 5672/2012 and WP(C) 5673/2012 respectively. Similarly the other tenderers have also challenged the decision of the FCI authorities to enforce the contract without revision of the quoted rates.

RELEVANT DATES

7. Before the rival arguments are considered, it may be appropriate now to note the relevant dates for the individual tenderers. For the carriage contract from Guwahati - Badarpur Ghat, the NIT was issued on 14.12.2009. The 3 tenderers i.e. M/s Rana Construction and Engineers Pvt. Ltd., M/s Saikia Trade and Transport Co. and M/s S.D. Enterprise made their bids valid until 20.2.2010. Between 8.2.2010 - 28.5.2010 rate negotiation was held by the FCI with the responsive tenderers and during the negotiation process, the bid validity was voluntarily extended by the transporters and last of such extension was granted on 28.5.2010 and consequently their offer was kept valid until 30.6.2010 plus a fortnight for these 3 tenderers. For these three, the acceptance of offer by the FCI was on 17.6.2010.

8. For the next transportation contract from Guwahati - Hailakandi, the NIT was issued on 14.12.2009 and the tenderer M/s Purbanchal Banijya Bikash initially made the bid valid until 20.2.2010. Then rate negotiation was held between 8.2.2010 - 28.5.2010 and by their last communication of 29.5.2010, the tenderer extended the bid validity until 30.6.2010. The FCI accepted their offer on 17.6.2010.

9. For the 3rd and 4th routes from Jorhat - Dergaon and Jorhat - Cinnamara, the tender notice was issued on 28.4.2010. The two tenderers Mitradev Chetry and Salehul Gafoor made their bids valid until 6.7.2010. The contract condition permitted unilateral extension of bid validity by the FCI's General Manager by 30 days and this is made binding on the tenderers. The respondents claim that when the acceptance of contract was notified for the two tenderers on 21.7.2010 and on 5.8.2010 by the FCI, both bids were valid by the discretionary 30 days extension invoked by the General Manager of the FCI.

10. The NIT dated 17.2.2010 was issued for the route(s) Halibargaon - Itachali and Harbargaon - Sensua and here M/s Mousumi Enterprise and M/s M.A. Enterprise made their quoted rates valid until 26.4.2010. Then negotiations were held with these two tenderers on 22nd and 26th April 2010 and during the process of negotiation, the two tenderers through their individual letters dated 26.4.2010 had agreed to keep their offer open for acceptance upto 26.5.2010 and 31.5.2010 respectively. Both tenderers also consented to the extension of their last dates by a fortnight and they bound themselves to communication of acceptance of the offer dispatched within this period. The FCI conveyed their acceptance to these two tenderers on 4.6.2010.

ARGUMENTS

11. The respondent FCI question the maintainability of the writ petitions on the ground that the writ jurisdiction should not be exercised to enforce contractual obligations. To resist this the petitioners argue that the contracts in these cases were not concluded and therefore in such cases the Writ Court should not take the hands off approach. The petitioners refer to Section 56 of the Indian Contract Act, 1872 (hereinafter referred to as the Contract Act) to project that when it become impossible to execute the contract (even if there is a deemed conclusion of contract), the contract should be held to be void because of impossibility of performance. The ratio of Satyabrata Ghosh vs. Mugneeram Bangur rep

orted in AIR 1954 SC 44 is cited to explain the nature of impossible acts under Section 56 of the Contract Act where the promisor can't be tied down to any promise in certain exigencies. The following portion is relied by the learned Counsel :-

& &.

&.. the word impossible has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do. & & & &.

12. Since some of the carriage contractors approached the High Court seeking rate revision, the petitioners contend that abrupt communication of acceptance at that stage by the FCI is arbitrary and the same is contended to be a mala fide acceptance. Referring to the unconcluded stage of the contract when rate revision was questioned, the petitioners submit that abrupt acceptance is nothing but an arbitrary act. As this was not a concluded contract, the tenderers argue that their cases are distinguishable from those cases of concluded contracts where the Writ Court refused to exercise its discretionary power.

13. Referring to the huge escalation of carriage cost soon after the overloading ban was enforced, the petitioners project that the difficulties were real and genuine and was established when no offer was received despite multiple tender notices and only after contract terms and estimate were revised to encourage bidders, the FCI could receive few offers to eventually execute the contracts at higher rates quoted by the tenderers.

14. Projecting that the FCI authorities were conscious of cost escalation as they themselves wrote on 7.6.2010 for exempting FCI trucks from the load restriction, the petitioners argue that forcing the contractors to execute the work at the unviable rate is an unfair demand and as a State authority, the FCI is obliged to act fairly even in the contractual sphere.

15. Representing the respondents, Mr. K.P. Pathak, the learned Senior Counsel however submits that the petitioners were aware of the market conditions when they quoted their rates and although their profit expectation may have been downsized through load restriction, this can't be treated as contract which is impossible to be performed and at worst the contractors will earn lesser profit than what they originally expected. Therefore it is argued that Section 56 of the Contract Act is not attracted in the facts of the present cases.

16. The FCI's lawyer contends that the doctrine of fairness is inapplicable in contractual matters as the said doctrine is applicable only in the administrative law field. Therefore Mr. Pathak argues that when hard-nosed experienced contractors quoted their rates, the FCI is within their right to communicate acceptance within the validity period of the offer made by the tenderers. In support of this submission the respondents rely on Assistant Excise Commissioner vs. Issac Peter reported in (1994) 4 SCC 104.

17. Moreover since this was a free bidding process where the FCI had not stipulated any rate schedule and the rate is to be quoted by the individual tenderer, the FCI argues that the principal employer has no obligation to stipulate a so called workable rate. Mr. Pathak relies on M/s Alopi Parshad vs. Union of India reported in AIR 1960 SCC 588 to project that equitable principles can't apply in contractual matters and therefore the Writ Court should not be swayed by consideration of hardship to the contractors.

18. On whether the contracts were concluded in the present case, Mr. Pathak submits that this is a matter of evidence which is best decided either by the Civil Court or by an Arbitrator and therefore the petitioners should be relegated to the competent forum for redressal of their grievance.

19. For the Transport Department Mr. U. Rajbongshi submits that the permits issued under the M.V. Act determine the load carrying capacity of trucks and he makes distinction between a contract which is impossible to be performed and

one which may not be practicable to execute.

DISCUSSIONS & DECISION

20. The primary plea of the tenderers is that when they quoted their rates for the carriage contract, they believed that they could carry 20/21 M.T. load in their trucks and were unaware of the strict load restriction. But what is glaring here is that the transporters during the negotiation stage wrote a letter on 28.5.2010 to the FCI referring to the 9 M.T. load cap on trucks and the consequential increase of transportation cost. Thus from this letter it can be gathered that even while the petitioners were negotiating rate reduction with the FCI, they were aware of the load restriction and yet they extended the bid validity of their respective tenders. Therefore when the tenderers were conscious of the load restriction and knowingly they extended the bid validity, they can't turn around and say that their offered rate was commercially unviable and that the contract has become impossible to perform.

21. The Section 5 of the Indian Contract Act, 1872 provides for revocation of proposals and acceptance and after communication of acceptance, the offer can't be revoked. Likewise Section 6 provides for the manner of revocation. These two Sections of the Contract Act show that acceptance is valid when the offer is subsisting and the offer can be withdrawn before acceptance is communicated. The tenderers in all these cases had extended their bid validity through written communication and bound themselves to keep the offer open for acceptance till the extended dates plus a fortnight more. The acceptance dates in all the cases is found to be within the validity period of the offers made by the tenderers.

22. But the petitioners argued that even if it is a concluded contract, they can't be bound down to an impossible agreement and they take the shelter of Section 56 of the Contract Act and rely on Satyabrata Ghosh (supra). But the question is whether the changed circumstance totally upset the very foundation upon which the parties rested their bargain.

23. For answering the above question, we can usefully refer to the provisions of the Motor Vehicles Act, 1988. The Section 113(3)(b) prohibits driving of vehicles the laden weight of which, exceeds the gross weight specified in the certificate of registration and overloading transport vehicles is an offence under Section 194 of the M.V. Act which is compoundable under Section 200. From these provisions it is clear that the gross laden weight for transport vehicles is determined by the registration certificate and the legal obligation to adhere to load restriction can be traced to the M.V. Act.

24. In *Paramjit Bhasin vs. Union of India* reported in (2005) 12 SCC 642, the Supreme Court observed that overloading lead to significant damage to road surface and is a safety hazard for all road users. Therefore scrupulous adherence to the prescribed load limit was emphasized by the Apex Court but the court had no occasion to lay down any new law. On the compounding power under Section 200 of the M.V. Act, the Court declared that after compounding the excess load, the same can't be allowed to be carried in the concerned vehicle.

25. From the above discussion it is apparent that overloading is prohibited under the M.V. Act and since the Registration Certificate of the trucks specifies their carrying capacity, the transporters can't be permitted to plead that their offer was made on the understanding that the trucks would carry excess weight. This view is taken because the tenderers can't be allowed to make their offer on assumption of load capacity, beyond the permitted limits. Moreover since the carrying capacity of transporting vehicles is stipulated in each registration certificate under the M.V. Act, legally speaking, there can be no changed circumstances which upset the very foundation on which the transporters made their offer. If the foundation for the quoted rate is based on an illegal footing, to apply the doctrine of impossibility of performance in these cases in my view would be illogical and unjustified.

26. The tenderers while negotiating the rate reduction with the FCI voluntarily extended their offers and also bound themselves to acceptance during the extended period at the option of the FCI. All the while they were aware of the so c

alled changed circumstances but failed to revoke the offers. Considering this conduct, the tenderers can't be allowed to plead impossibility of performance as they entered into the contractual arena with full awareness of all implication of their quoted rates. Therefore while the profit margin of the contractors may be affected through load restriction, this can't be treated as such contract which is impossible to be executed to attract Section 56 of the Contract Act.

27. Next the petitioners argument of being treated arbitrarily is to be considered as in that situation, even in contractual matter, the aggrieved party can approach the Writ Court. On this aspect the Supreme Court in *M/s Alopri Parshad & Sons Ltd. vs. Union of India* (AIR 1960 SC 588) declared that equitable principles are not to be lightly applied to absolve a contracting party who face an unanticipated turn of events like abnormal price rise. In *Asstt. Excise Commissioner vs. Issac Peter* reported in (1994) 4 SCC 104 the Supreme Court declared that the doctrine of fairness and reasonableness shouldn't be read into contracts where the State is a party and the obligation of the parties are culled out from the terms of the contract. But in *ABL International Ltd. vs. Export Credit Guarantee* reported in (2004) 3 SCC 553 the Court did observe that on a given set of facts if the State acts arbitrarily even in a matter of contract, the writ jurisdiction can be invoked to give relief to an aggrieved party. From these judgments one can say that Writ Court can interfere in cases relating to contractual terms but it is a discretion to be applied in the facts of each case.

28. In the present cases through acceptance of their offers the tenderers are likely to make less profit, but as earlier noted, both parties were aware of the load restrictions and yet the experienced transporters extended the validity of their offers. The FCI accepted the offers within the validity period and required the contractors to fulfil their part of the bargain. When well experienced transporters quoted rates with open eyes and the FCI acted on those offers, in such situation the FCI can't be said to have acted arbitrarily or unfairly in conveying their acceptance. Therefore I see no reason to absolve the tenderers from the obligations under the contract on equitable consideration.

29. As the petitioners contend that FCI should have allowed rate revision by taking into account the realistic rate and such obligation stem from Clause 26.6, 35.2 and 35.3 of the FCI manual, it needs to be observed that these Clauses apply to situations where schedule of rate is stipulated by the FCI themselves. But they mayn't apply in the present facts where the contractors have assessed the ground realities and quote their competitive rates. Accordingly this issue is answered against the petitioners.

30. For the pre-existing contracts when the transporters (because of load restriction), failed to deploy enough trucks to fulfil the FCI indents the defaulting transporters were penalised by the FCI. In a challenge by an aggrieved contractor, this Court in *Rana Construction & Engineers Pvt. Ltd. vs. Union of India* reported in 2011 (5) GLT 629 held that failure to provide trucks in pursuance of contract would constitute refusal to discharge contractual obligation and on that ground, declined to grant relief to the contractor. This decision supports the FCI's contention as the petitioner in that case was on similar footing and their plea of impossibility of performance was indirectly rejected by this Court.

31. Before parting with the records I must note that this Court in similar cases refused relief to several transporters under the FCI. Here since the acceptance was communicated while the offer was valid, the Court is not dealing with unconcluded contracts. In situations where acceptance is communicated without reservation to open offers, the parties are obliged to fulfil their contractual obligations and when they fail, they must face the consequences.

32. For the forgoing discussion and reasoning the Court's interference in my view is unjustified in these cases and it is declared accordingly. Therefore the cases are dismissed without cost.