

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9379 OF 2014
(Arising out of SLP (Civil) No.33798/2012)

SHREE SHYAMJI TRANSPORT COMPANY ... Appellant

Versus

FOOD CORPORATION OF INDIA & ORS.
...Respondents

WITH

CIVIL APPEAL NO. 9380 OF 2014
(Arising out of SLP (Civil) No. 3928/2013)

M/S R.S. LABOUR AND TPT. CONTRACTOR ..Appellant

Versus

FOOD CORPORATION OF INDIA & ORS.
..Respondents

J U D G M E N T

R. BANUMATHI, J.

Leave granted. These appeals arise out of
common order of the Punjab and Haryana High Court dated

26.7.2012 passed in CWP Nos. 8415/2012 & 8416/2012 whereby the High Court declined to interfere with the action of the Food Corporation of India (FCI) rejecting tender of the appellants-firms.

2. Brief facts leading to the filing of these appeals are as follows:- The appellants are partnership firms having five partners. Respondent No. 2 - FCI invited tenders for Mandi Labour Contract (MLC) for its centres at Uchana, Sonapat, Narwana and Safidon and the appellants applied for the tender. The tender consisted of two parts - technical bid and price bid. As per the procedure, on successfully qualifying the technical bid, the price bid was to be opened. The appellants were eligible in technical bid thereby making themselves qualified for opening of price bid. The said price bid was opened on 2.3.2012. The appellants' bid was not considered by FCI, in view of the fact that in the earlier tender of Road Transport Contract (RTC) of Hathin-Rajasthan, the appellants had failed to deposit the security deposit and bank guarantee within the stipulated period as required and the Earnest Money Deposit (EMD) of the

appellants had been forfeited vide Order dated 5.11.2011 and hence, the appellants' MLC tender was rejected invoking sub clause (III) of Clause 4 of the Disqualification Conditions. According to the appellants, earlier tender of the appellants was rejected by an Order dated 5.11.2011 invoking Clause 7 of the Model Tender Form (MTF). The appellant-Shree Shyamji Transport Company challenged the said Order dated 5.11.2011 by filing CWP No.21694/2011 which was disposed of by Order dated 6.3.2012 in which the Court observed that FCI had not invoked Clause 7 of the MTF to debar the appellant-Shree Shyamji Transport Company for the contract period and the apprehension of the appellant was ill-founded. In the light of the observations in CWP No.21694/2011, appellants contend that the Order dated 21.3.2012 rejecting the appellants' tender for MLC invoking Clause 4 (III) is unsustainable.

3. Challenging action of the respondents - FCI in not considering their MLC tender, the appellants filed two writ petitions bearing Nos. CWP 8415/2012 and 8416/2012 to quash the communication dated 21.3.2012 and also prayed

for consideration of their price bid with regard to MLC tender dated 14.3.2012. The High Court dismissed the writ petitions by a common Order dated 26.7.2012, *inter alia*, on the grounds:- (i) In the Writ Petition No.21694/2011, forfeiture of Earnest Money Deposit (EMD) of the appellants was not set aside by the Court and forfeiture of earnest money stood sustained justifying the invocation of Clause 4 (III); (ii) appellants had also not challenged the action of the respondents declaring it to be disqualified under Clause 4 (III) of the MTF. Aggrieved appellants are before us.

4. Assailing the impugned order, Mr. Jasbir Singh Malik, learned counsel appearing for the appellants submitted that in the light of the order dated 6.3.2012 passed in CWP No.21694/2011, it was not open to the respondents to forfeit the earnest money in respect of Hathin -Rajasthan RTC tender by invoking Clause 7 of the MTF and the learned High Court did not correctly interpret its earlier order passed in CWP No.21694/2011. Learned counsel further submitted that the High Court has committed

an error in observing that the appellant has not challenged the action of the respondents declaring it to be disqualified under Clause 4 (III) of the MTF whereas the appellant-firm had actually challenged the action of the FCI disqualifying the appellant under Clause 4 (III) of the MTF in CWP No. 8415/2012, contending that Clause 4 (III) could not have been invoked against the appellants.

5. Refuting the above contentions, Mr. Ajit Pudussery, learned counsel appearing for the respondents, submitted that admittedly EMD of the appellant-firm in RTC Hathin-Rajasthan tender was forfeited and forfeiture of EMD was not set aside by the High Court in the CWP No.21694/2011 and FCI rightly invoked clause 4(III) of the MTF against the appellants in MLC Tender. It was submitted that in CWP No.21694/2011, the High Court has wrongly assumed that Clause 7 of the MTF was not being invoked, when in fact action had been taken under Clause 7 only and thus the presumption made by the High Court in CWP No.21694/2011 is contrary to the record. Learned counsel further submitted that strict compliance of tender conditions

are provided to ensure that only serious tenderers participate in the bids as in case after the award of contract if the tenderer fails to perform his due obligations, huge amount of public money is wasted in re-tendering and also creating a situation affecting the movement and distribution of food grains which is not in public interest and the High Court rightly interpreted Clause 4(III) and the impugned order warrants no interference.

6. We have considered the rival submissions made by the learned counsel for the parties and perused the record. The question falling for consideration is that in the light of the observations made in CWP No.21694/2011 whether the High Court was right in upholding the action of the respondents-FCI declaring the appellants-firms to be disqualified under Clause 4 (III) of the MTF.

7. Clause 4 (III) of the MTF stipulates that the tenderer whose EMD was forfeited in any other contract with FCI during the last five years will be ineligible to participate in the bid. For better appreciation, we may refer to the

relevant clause 4 (III) and relevant paras in Clause 5 of the MTF which read as under:-

“Clause 4. Disqualification Conditions

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- (III) Tenderer whose Earnest Money Deposit and/or Security Deposit has been forfeited by Food Corporation of India or any Department of Central or State Government or any other Public Sector/Undertaking, during the last five years, will be ineligible.

“Clause 5. Details of Sister Concerns.

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- (i) The blacklisted parties by FCI or Govt./Quasi Govt. Organization will not be qualified.
- (ii) The parties whose EMD is forfeited by FCI will not be qualified.
- (iii) Food Corporation of India reserves the right not to consider parties having any dispute with Food Corporation of India in order to protect its interest.”

8. According to the respondents, EMD of the appellant- Shree Shyamji Transport Company was forfeited in the earlier tender of Road Transport Contract (RTC) -Hathin-Rajasthan, making the appellant ineligible to bid in the MLC tender and therefore, the bid of the appellant for MLC was rightly rejected by the respondents-FCI by Order dated 21.3.2012.

9. Insofar as RTC tender for Hathin-Rajasthan is concerned, it appears from the record and the observations of the High Court in CWP No. 21694/2011 that there was no

intentional lapse on the part of the appellant and the delay in furnishing the security and the bank guarantee appeared to be on account of failure of banking operations. As per Clause 7 (iii) of MTF, the successful tenderer within fifteen days of acceptance of its tender, must furnish security deposit for the due performance of his obligation under the contract. While dismissing the writ petition CWP No. 21694/2011 on 6.3.2012, High Court observed that respondents-FCI did not have any intention to invoke that part of Clause 7 of the MTF indicating that the respondents-FCI preferred not to debar the appellant for the contract period. For proper appreciation of the contention of the parties, it is relevant to refer to the order of the High Court in CWP No.21694/2011 which reads as under:-

“In so far as the argument of the learned counsel for the petitioner apprehending debarment under clause 7 of the MTF is concerned, we are of the view that there is nothing in the impugned order dated 05.11.2011 (P-16) which may indicate that the respondents have any intention to invoke that part of clause 7 against the petitioner. The reason for not invoking clause 7 of the MTF appears to be that there is no intentional lapse committed by the petitioner and the delay in furnishing the security and the bank guarantee appears to be on account of failure of banking operations. Therefore, we appreciate the respondents for not having invoked clause 7 of the MTF to debar the petitioner for the

contract period. Therefore, the apprehension of the petitioner expressed through their counsel is ill founded.”

10. The respondents-FCI, in fact, filed Civil Miscellaneous Application No.4480/2012 seeking modification of the above order dated 6.3.2012 and prayed to hold that Clause 7(iii) of the MTF includes the debarring of the contractor and its partners i.e. the appellants from participating in any future tender of the FCI for a period of three years. By order dated 2.4.2012, the Division Bench of the High Court disposed of the said application and other applications reiterating its earlier order dated 6.3.2012 that FCI in its order dated 5.11.2011 (pertaining to RTC Hathin-Rajasthan) did not indicate any intention to invoke that part of Clause 7 of MTF to debar the appellants' firm for the contract period. The said Order of the High Court dated 2.4.2012 reads as under:-

“It is thus evident that this Bench has taken the view that in the order dated 05.11.2011 (P-16), the respondents did not indicate any intention of invoking that part of clause 7 of MTF which could debar the petitioner. The reason for adopting the aforesaid course has also been noted by the Division Bench by observing that there was no intentional lapse committed by the petitioner and the delay in

furnishing the security and the bank guarantee was on account of failure of banking operations. The Bench, in fact, appreciated the respondents for not invoking the part of clause 7 of the MTF to debar the petitioner for the contract period.”

11. Insofar as RTC Hathin-Rajasthan is concerned, finding of the High Court that there was no intentional lapse on the part of the appellant and that delay in furnishing the security and bank guarantee was on account of failure of banking operation had attained finality. In response to appellants’ apprehension of debarment under Clause 7 of MTF, Division Bench has recorded its finding that it appreciates that FCI has not invoked Clause 7 of the MTF to debar the appellants for the contract period. It appears that apprehension of debarment of appellants invoking Clause 7 was brought to the notice of the Court and the High Court did consider the same as a necessary point. In our view, the finding of the Court on the same is binding on FCI. In spite of FCI’s modification petition, the finding that there was no intentional lapse on the part of the appellant- Shree Shyamji Transport Company, was neither modified nor set aside. That being so, while considering the appellant’s

tender for MLC, FCI was not justified in invoking Clause 4 (III) of the MTF on the ground that the tender of the appellants pertaining to RTC Hathin-Rajasthan was earlier rejected and that appellant's EMD was forfeited. High Court, in our view, has not properly appreciated its own observations in CWP No.21694/2011 that FCI has not invoked Clause 7 of the MTF to debar the appellants for the contract period.

12. The impugned tenders pertain to Mandi Labour Contract (MLC) for which the appellants submitted their bid on 2.3.2012 and the appellants have already suffered debarment for about three years. Considering the facts and circumstances of the case and in the light of High Court's observation made in CWP No.21694/2011, in our view, the debarment of the appellants is not justifiable and the impugned order of the High Court cannot be sustained.

13. In the result, the impugned order of the High Court is set aside and the appeals are allowed. No order as to costs.

.....J.
(T.S. Thakur)

.....J.
(R. Banumathi)

New Delhi;
October 9, 2014

SUPREME COURT OF INDIA



JUDGMENT