$~J-1 & 2

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 28.10.2021

Judgment pronounced on: 07.02.2022

\+ **W.P.(C) 5080/2021, CM Nos.15548/2021 & 18754/2021**

VIJAY KUMAR YADAV & ORS. ..... Petitioners

Through : Mr Rajesh Mohan Sinha, Adv.

versus

UNION OF INDIA AND ANR. ..... Respondents

Through: Ms Maninder Acharya, Sr. Adv. with Mr Om Prakash, Standing Counsel along with Mr Pradeep Kumar Tripathi, Mr Anil Kapoor, Mr Viplav Acharya and Mr Shikhar Kishore, Advs. for R-2/FCI. Ms Saroj Bidawat, Adv for R-1/UOI.

\+ **W.P.(C) 6060/2021 &CM No.19197/2021**

RAJENDER SINGH & ORS. ..... Petitioners

Through : Mr Rajesh Mohan Sinha, Adv.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr Om Prakash, Standing Counsel with Mr Pradeep Kumar Tripathi and Mr Anil Kapoor, Advs. for R-2 & 3/FCI. Ms Saroj Bidawat, Adv for R-1/UOI.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MR JUSTICE TALWANT SINGH

[Court hearing convened via video-conferencing on account of COVID-19]

RAJIV SHAKDHER, J.

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Preface:

1. Shorn of unnecessary details, the grievance which has impelled the petitioners to approach this Court is briefly this:

1.1. The petitioners, who are regular employees of respondent no.2 i.e., the Food Corporation of India [hereafter referred to as "FCI"] apprehend being transferred *en bloc* from FCI Food Storage Depots [in short "FSDs"] located at Shakti Nagar and Mayapuri to depots located at Okhla and other locations.

1.2. It is the petitioners' case that both depots i.e., FCI FSDs located at Shakti Nagar and Mayapuri, where they are presently located, have notifications issued *qua* them, under Section 10 of the Contract Labour (Regulation &Abolition) Act, 1970 [in short "CLRA Act"]. Thus, according to the petitioners, once the notification under Section 10 of the CLRA Act was issued, the FCI could not have deployed contract labour in the aforementioned depots [i.e., FSD Shakti Nagar and FSD Mayapuri], and therefore, in pursuing this course, FCI has whittled down their legal rights, by attempting to redeploying/transferring them *en bloc* to another depot.

1.3. It is on account of this grievance that the petitioners have approached this Court by way of the above-captioned writ petitions, to assail e-tender notice no.4/2021 dated 01.03.2021 and e-tender notice no.5/2021 dated 23.06.2021.

Insofar as e-tender notice no.4/2021 is concerned, it is assailed W.P.(C)No.5080/2021, while e-tender notice no.5/2021 has been challenged in W.P.(C)No.6060/2021.

2. At this stage, it would be relevant to note that after the matters were reserved, an affidavit dated 29.10.2021 was filed in W.P.(C) No.6060/2021 on behalf of FCI, stating that e-tender notice no.5/2021 dated 23.06.2021 had been cancelled on 12.10.2021; an aspect which was alluded to across the bar in the course of the hearing.

2.1 Given this position, we had, in the course of the hearing, tried to ascertain from the counsel appearing on behalf of FCI, as to whether FCI would be issuing a fresh tender for engaging contractual labour at FSD Mayapuri. Since we did not get a clear response, hearing in the concerned writ petition i.e., W.P.(C)No.6060/2021 was also continued, along with W.P.(C)No.5080/2021.

3. It would be worthwhile to note, at this juncture, that FCI banks upon the notification dated 06.07.2016, issued by the appropriate government [respondent no.1 i.e., the Government of India (GOI)] under Section 31 of the CLRA Act, to contend that the notifications issued under Section 10 of the very same Act, *qua* the depots covered under it have been rendered inefficacious. Thus, insofar as FSD Shakti Nagar is concerned, FCI contends that the prohibition against the engagement of contractual labour is no longer applicable. As regards FSD Mayapuri is concerned, FCI's stand is that notification under Section 10 of the CLRA Act has not been issued by the appropriate government, and, therefore, the objection taken by the petitioners vis-a-vis FSD Shakti Nagar would not be applicable in the case of FSD Mayapuri.

3.1 It is, however, not disputed by FCI that since the notification dat 06.07.2016 had a limited span of two years, it was extended twice i.e., on 26.06.2018 and 25.06.2020.

3.2 It is also not disputed by FCI that notifications dated 06.07.2016 and 26.06.2018 are the subject matter of challenge in W.P.(C) No.7627/2016, titled ***FCI Handling Workers Union vs. Union of India & Ors.***, and W.P.(C) No.7241/2016, titled ***Food Corporation of India Shramik Union vs. Union of India & Anr.***, which are pending adjudication before the learned single judge. The petitioners and FCI are at odds concerning the challenge to the notification dated 25.06.2020, whereby the duration of the initial notification dated 06.07.2016 was extended post 26.06.2018.

3.3 The record shows (something which is not disputed by FCI) that interim orders dated 13.09.2017[1]and 13.11.2017[2] were passed in W.P.(C)No.7241/2016 and W.P.(C) No. 7627/2016, respectively. It is also not in dispute that, *via* two separate orders dated 04.02.2019 in W.P.(C) No.7241/2016 and W.P.(C) No.7627/2016, the interim orders dated 13.09.2017 and 13.11.2017 were made absolute by the learned single judge. Importantly, the order dated 13.11.2017, passed in W.P.(C)No.7627/2016, was predicated on the order dated 13.09.2017 passed in W.P.(C)No.7241/2016. Although liberty was given by the learned

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[1] *"Time is sought on behalf of the respondents to file reply to the CM No.32805/2017 which be filed within a period of one week.*
Renotify for hearing on 21st September, 2017 at 12:30 P.M.
Transfer orders, if not yet implemented, be not implemented till the next date of hearing.
A copy of order be given dasti to both the sides."

[2] *"**<u>CM No. 39869/2017</u>***
Heard.
Learned counsel for the petitioner relied upon order dated13.09.2017 passed in W.P. 7241/2016 and CM No. 32805/2017.
Learned counsel for the respondent submits that the petitioner has concealed the material facts in the petition and hence, they are not entitled for the stay.
In view of the submissions made in the application, transfer orders, if not yet implemented, be not implemented till the next date of hearing.
Reply be filed within two weeks. Response thereto, if any, be filed within one week thereafter.
Renotify on 11.12.2017, the date already fixed….."

single judge, while making the order absolute on 04.02.2019 [in W.P.(C) No.7627/2016] to seek vacation of the interlocutory order i.e., order dated 13.11.2017, nothing has been brought to our notice which would indicate that the said order(s) stands vacated. This aspect was noticed by us while passing an interlocutory order on 06.05.2021, in W.P.(C) No.5080/2021.

4. It may also be relevant to note that at one juncture, the parties were asked to attempt a settlement in the matter. We were informed that the deliberations carried out by representatives of parties did not fructify into a firm settlement agreement.

Background:-

5. FCI's main plank in defence of its action in engaging contractual workers is pivoted on the judgment rendered by the Bombay High Court (Nagpur Bench) in a public interest petition i.e., PIL No.84/2014, dated 20.11.2015. The Division Bench issued a slew of directions to FCI, which are contained in paragraph 30 of the judgment. These directions read as follows:

> *" 30. In that view of the matter, we dispose of the present Public Interest Litigation by passing the following order.*
>
> *(i) The Government of India is directed to decide the representation made by the Food Corporation of India for grant of exemption under the provisions of Section 31 of the said Act within a period of one month from today, in the light of observations made by us hereinabove within a period of one month from today.*
>
> *(ii) The Government of India shall decide the issue regarding de-notification of the depots of the Food Corporation of India, in respect of which notification is issued u/s. 10 of the said Act, within a period of six months from today, in the light of observations made by us hereinabove and the report of M/s Deloitt Consultancy and the report of the High-Level Committee appointed by the Government of India itself.*
>
> *(iii) We clarify that the respondent/Food Corporation of India would be entitled to transfer the services of departmental labourers from one depot to another subject to protecting their salary and all other service conditions.*

(iv) We also clarify that the respondent/Corporation would be at liberty to implement its policy of change in the Scheme of incentives.

(v) The Government of India shall also take a decision regarding abolition of system of departmental labourers in a phased manner or absorbing their services in other establishments as recommended by the High Level Committee."

5.1. Being aggrieved, the FCI Workers Union, FCI Shramik Union and FCI Handling Workers' Union had carried the matter in appeal to the Supreme Court. These matters were registered as SLP(C) (CC) Nos.136/2016, 913/2016 and 11465/2016.

5.2. On 08.07.2016, the Supreme Court issued notice in the aforementioned SLPs and made the following observations in paragraph 3 of its order:

"We make it clear that the pendency of the present proceedings shall not prevent the petitioners from filing a petition, if so advised, to challenge the notification issued under Section 31 of the Act on all such grounds as are legally open to it...."

5.3 The final order in the aforesaid SLPs was passed on 31.07.2017, which reads as follows:

"1. We do not see any merit in these special leave petitions, which are hereby dismissed. We make it clear that this order shall not prevent the petitioners – Food Corporation of India Workers Union/Food Corporation of India Shramik Union/FCI Handling Workers Union, to challenge any order, passed in furtherance of the directions issued in the impugned order (dated 20.11.2015), in appropriate proceedings before an appropriate Court.

2. In case, such a challenge is raised by the petitioner(s), in continuation of the liberty granted to the petitioner(s), the claim raised by the petitioner(s) shall be considered in accordance with law, uninfluenced by any observations made by the High Court in the impugned order (dated 20.11.2015)."

5.4. Thus, the challenge raised by the FCI Shramik Union and FCI Handling Workers' Union to the Section 31 notifications, issued under the CLRA Act, in

W.P.(C) Nos.7627/2016 and 7241/2016 has to be foregrounded in the liberty given by the Supreme Court, *via* the aforementioned orders.

6. Given this, what is required to be examined is whether FCI could engage and deploy contract labour in FSD Shaktinagar and FSD Mayapuri, and, to effectuate this purpose, carry out *en bloc* transfer of employees from the said notified depots to other depots.

6.1. There can be no gainsaying that transfer is an incident of service and unless the transfer is carried out for *malafide* purpose or against the provisions of a statute or policy, an order passed to that effect, that is transferring an employee from one location to another without altering his terms of service, cannot be interdicted.

6.2. The FCI, in support of its plea that petitioners cannot resist transfer, although, it is an en masse transfer from one location to another, has adverted to Clause 5 of Certified Standing Orders (CSO). The said clause reads as follows:

> *"Workers shall be liable to be transferred from one place of work to another place of work of the Corporation as per practice in existence with a whole gang, except in the case of request for transfer from the individual worker."*

6.3. Furthermore, in support of this plea, FCI has also relied upon its guidelines dated 12.07.2016. These guidelines were framed for the implementation of exemption notification dated 06.07.2016, issued under Section 31 of the CLRA Act. A bare perusal of the said guidelines would show that it broadly adverts to the following aspects:

(i) That notification dated 06.07.2016 was issued in pursuance of the directions contained in the judgment of the Nagpur Bench of Bombay High Court dated 20.11.2015, passed in PIL No.84/2014.

(ii) The said notification has exempted depots and railheads of FCI from the applicability of all earlier notifications specified therein for two years, subject to

the compliance of conditions specified in Rule 25(2)(v)(a) of the Contra Labour (Regulation & Abolition) Central Rules, 1971 (in short "the CLRA Rules").

(iii) Out of the 289 depots and railheads, which stood notified [pursuant to 13 notifications issued under Section 10 of CLRA Act], 226 were exempted, as they were covered under notification dated 06.07.2016. Resultantly, FCI could reorganize and rationalize its workers working under various systems [i.e., Departmental System (DS); Direct Payment System (DPS) and No Work No Pay System (NWNPS)], by pooling and locating them into fewer depots, as per operational requirements, so that the optimum number of workers is deployed to carry out FCI operations, in an efficient manner.

6.4. In the interregnum i.e., between the time the judgment of the Bombay High Court (Nagpur Bench) dated 20.11.2015 was rendered and notification dated 06.07.2016 was issued by the appropriate government which were sought to be implemented by FCI through guidelines dated 12.07.2016 to reorganize and rationalize the deployment of its workers for enhancing its operational efficiency, FCI had, in the first instance, moved the Central Advisory Contract Labour Board (in short "Central Board") for seeking exemption under Section 31 of the CLRA Act. The Central Board, at its 88th Meeting held on 30.03.2016 and 31.03.2016 repelled these attempts. The relevant parts of the minutes of the 88th Meeting of the Central Board, which are captured in a document dated 13.04.2016, read as follows:

> ***"Item No. 5: Consideration of the request of the Ministry of Consumer Affairs, Food and Public Distribution, Department of Food and Public Distribution, for seeking exemption under section 31 of Contract Labour (R&A) Act, 1970 from the purview of various notifications prohibition employment of contract labour in various jobs of loading/unloading, stacking, de-stacking, weighment, sweeping and cleaning in the 128 and 98 railheads and depots respectively in all 226 depots/railheads of FCI. (S. 16012/2011-LW).***

The representatives of five Workers' Union and that of the F Management were present. The CACLB took note of the directions of the Hon'ble Bombay High Court, Nagpur Division Bench in PIL No. 84. of 2014 dated 20.11.2015. The Board heard the representatives of FCI Management and their lawyer, and the representatives of the respective Worker's Unions.

The Trade Unions submitted before prohibitory notifications issued by the Central Government in respect of 226 Rail Heads and Depots should not be considered.

The FCI management submitted that the main functions of FCI are procurement, transportation, storage and distribution of food grains. These functions by their very nature are seasonal and sporadic. It was submitted that the workload in FCI depots is not uniform on all days and the trend of procurement is absolutely uneven across the months of any year. It was pleaded that the similar type of work is not ordinarily being done by the regular workmen in other organisations like Central Warehousing Corporation and various State Warehousing Corporations. FCI submitted that the notifications prohibiting engagement of contract labour in 226 depots are based on arbitrary yardsticks and are contrary to the provisions of CL9R&A) Act. FCI requested that the prohibitory notifications issued so far in respect of 226 depots may be de-notified and the FCI depots/Railheads may be exempted from the provisions of CL (R&A) Act without conditions and any fixed period: 'As per the submission made before the CACLB, the FCI intended to phase out regular employees (some of them are getting salary including allowances upto Rs. 4 Lakh a month) based on the recommendations made by the High Power Committee and the Deloitte International Consultancy.

FCI is planning to engage only contract labour in place of four categories (1) regular employees (2) Direct Pay System (3) No Work No Pay (4) Contract Labour System. Further, in regard to the query of the Board in respect of emergency involved for seeking exemption, it was admitted by the FCI that there is no fresh emergency as such in view of the fact that the jobs of loading/unloading, stacking, de-stacking, weighment,the sweeping and cleaning being carried out in establishment are per se emergent in nature.

The Section 31 of the Act provides for exemption for a specific period in case of an emergency which reads as under:-

"Power to exempt in special cases- The appropriate Government may, in the case of an emergency, direct, by notification in the Official Gazette, that subject to such conditions and restrictions, if any, and for such period or periods, as may be specified in the Notification, all or any of the provisions of this Act or the Rules made thereunder, shall not apply to any establishment or class or establishments or any class of contractors."

The Board was of the view that there is no provision in the Act in regard to de-notification of a prohibitory notification. In this regard the Board had asked the FCI management to submit the outcome of implementation of the exemption notification dated 03.05.2012 and the cost cutting measures undertaken during the period of exemption. T may be mentioned that vide the exemption notification dated 03.05.2012, 29 godowns and depots of FCI were granted exemption from the applicability of the notification dated 07.02.2011 for a period of 6 months subject to compliance of the conditions as stipulated in Section 25 (2)(v)(a) of Contract Labour (Regulation & Abolition) Central Rules, 1971. The CACLB asked in regard to the implementation of the aforesaid exemption notification, FCI Management informed that the said exemption granted by the Central Government could not be availed as the FCI management has made some alternative arrangement in order to deal with the situation at hand. FCI did not come out and submit their Action Plan of Rationalization in support of their request for grant of exemption.

The Board was of the view that blanket exemption in respect of 226 Depots could not be possible because CACLB can examine the cases/requests for grant of exemption case-wise/establishment-wise. The Board was of the view that the Depotwise/establishment-wise reasons for exemption along with the nature of emergency involved should have been furnished by FCI to enable the Board to examine the exemption request.

In view of above explained reasons, the CACLB unanimously decided not to accept the request of the FCI for grant of exemption for following reasons: The ground of emergency submitted by FCI is not establishment-wise /depot-wise and not specific. The non-production of future rationalization action plan of the establishment;

FCI seeking blanket exemption for entire establishment without conditions and without fixed period which cannot be granted as per Section 31 of CL (R&A) Act, 1970."

[Emphasis is ours.]

6.5. We may note that the FCI did not agree with the conclusions reached by the Central Board, which is reflected in a document titled “COMMENTS ON BEHALF OF FOOD CORPORATION OF INDIA WITH REFERENCE TO THE MINUTES OF 88TH MEETING OF CACLB DATED 13.04.2016”.

6.6. As is obvious, FCI having failed to persuade the Central Board, thereafter, approached the appropriate government for exemption of the notifications under Section 31 of the CLRA Act which, as noted above, was issued on 06.07.2016, albeit, for a period of two years, and, thereafter, followed by the notifications dated 26.06.2018 and 25.06.2020.

6.7. After the guidelines dated 12.7.2016, another communication dated 31.12.2020 was issued by FCI to rationalize “labour strength”.

7. With this foreground, and at this stage, it would be relevant to record the contentions advanced on behalf of the petitioners and FCI. Insofar as the petitioners are concerned, the submissions were advanced by Mr Rajesh Mohan Sinha, while on behalf of FCI, arguments were advanced by Ms Maninder Acharya, learned senior counsel, in W.P.(C) No.5080/2021, and in the other connected writ petition i.e., W.P.(C) No.6060/2021, Mr Om Prakash held the field on behalf of FCI, and adopted the arguments advanced by Ms Acharya.

7.1. Although notice was issued to all respondents including GOI [i.e., respondent no.1] in the above-captioned writ petitions i.e., on 06.05.2021 [in W.P.(C) No.5080/2021] and on 09.07.2021 [in W.P.(C) No.6060/2021], and, an opportunity was granted to file counter-affidavit(s), no counter-affidavit(s) were filed by respondent no.1/ GOI to convey its stand vis-a-vis the issues at hand.

Submissions on behalf of the petitioners:-

8. Mr Sinha, broadly, contended as follows:

(i) FCI, in transferring the petitioners' *en bloc,* was attempting to do indirectly, what it could not do directly vis-a-vis FSDs involved in the above-captioned writ petitions, which were notified under Section 10 of CLRA Act and therefore, supplanting contract labour with petitioners in the very same FSDs by employing the device of *en bloc* transfer, was illegal.

(ii) The first notification issued under Section 31 of the CLRA Act by the appropriate govt. i.e., notification dated 06.07.2016 exempted godowns, depots and railheads of FCI from the applicability of notifications issued by it from time to time, spanning between 29.06.1989 and 07.02.2011 and the notification issued by the State Government of Haryana dated 29.11.1985, in respect of employment of contract labour in different jobs for two years. This notification, however, excluded 63 godowns, depots and railheads located in various parts of the country.

(iia) The notification dated 06.07.2016 was infused with fresh life with the issuance of the notification dated 26.06.2018. Like the 06.07.2016 notification, the 26.06.2018 notification also had a life span of two years. These two notifications are the subject matter of challenge in W.P.(C)Nos.7627/2016 and 7241/2016. The concerned Court has granted an interim order. The FCI, to get around the interim order, once again, approached the appropriate government for the issuance of yet another notification. This resulted in the appropriate government issuing the third notification dated 25.06.2020, under the emergency power conferred upon it under Section 31 of the CLRA Act. Notwithstanding this situation, interim orders dated 04.02.2019, passed, albeit separately, in W.P.(C) No.7267/2016and W.P.(C) 7241/2016 continue to operate, which obliges FCI to maintain the *status quo,* with regard to the transfer of the members of the petitioner unions concerned in the said writ petitions.

(iii) FCI's reliance on the judgment dated 20.11.2015 passed by the Bombay High Court (Nagpur Bench) in PIL No.84/2014 is misplaced, as while the said judgment did issue directions, to the effect, that it could approach the appropriate government for issuance of a notification under Section 31 of the CLRA Act and de-notification of notifications issued under Section 10, there was no direction issued for substitution of regular employees stationed in notified depots, with contract labour.

(iv) The unreasonableness of FCI's action is discernible from the fact that although it had approached the Central Board for revisiting the issue concerning the prohibition placed on FCI for engaging contract labour in respect of godowns, depots and railheads, *qua* which notification under Section 10 of CLRA Act had been issued, it attempted to circumvent the decision of the Central Board taken in this behalf, at its 88th Meeting by taking out the impugned tender notices i.e., e-tender notice nos.4/2021 and 5/2021.

(v) Even though, the Supreme Court dismissed the special leave petition filed by the FCI Workers' Union, it gave liberty to the FCI Workers' Union to assail any order passed in furtherance of the directions issued in the judgment dated 20.11.2015, passed by the Bombay High Court (Nagpur Bench), in appropriate proceedings, by the appropriate government. The Supreme Court also observed that in case any challenge is raised by the FCI Workers' Union in continuation of liberty granted to them, the same shall be considered in accordance with the law uninfluenced by any observations made in the judgment dated 20.11.2015. In this context, reliance was placed not only on the interim order dated 08.07.2015 but also on the final order dated 31.07.2017 passed by the Supreme Court in SLP(C) (CC) Nos.136/2016, 11465/2016 and 913/2016 [which was converted into three SLP(C) Nos.19218-20/2016].

(vi). Therefore, it cannot be said that the aforementioned writ petitions are not maintainable, as it is the stated stand of FCI that the impugned e-tender notices

were taken out to deploy contract labour in FSD Shakti Nagar and FS Mayapuri, in place of petitioners i.e., regular employees, even though notifications under Section 10 of CLRA Act had been issued *qua* them.

(vii). There are three kinds of labour systems prevalent in FCI i.e., Departmental Labour System, Direct Payment System, No Work No Pay System and with the engagement of contract labour, a fourth system was introduced, which is, the Contract Labour System. The petitioners' grievance in the above-captioned writ petitions is the deployment of contract labour in storage depots, which stand notified under Section 10 of the CLRA Act. Once a notification is issued under Section 10 of the CLRA Act by the appropriate government, after confabulation with the Central Board or as the case may be with the State Board, there is a presumption in law that relevant factors adverted to in Clause (a) to (d) in sub-section 2 of Section 10 had been taken into account. In particular, the notification of the appropriate government would exemplify that the process or operation or other work carried out in the concerned establishment is perennial. Therefore, the impugned tender notices are nothing but an attempt to skirt the law.

Submissions on behalf of FCI

9. Ms Acharya on the other hand, broadly, contended as follows:

(i) After the Bombay High Court (Nagpur Bench) had rendered its decision on 20.11.2015, FCI took steps to rationalize its workforce. The disparity in the wages payable to workmen, as noticed by the Court, impelled FCI to approach the appropriate government for the issuance of exemption notifications under Section 31 of the CLRA Act. Thus, in line with the same approach, FCI issued the impugned tender notices for engagement of contract labour.

(ii) The transfer of the petitioners from one depot to the other is being done without varying their service conditions. A transfer is an incident of service and

therefore, this Court ought not to interfere with the decision of FCI taken, in th behalf.

(iii) Insofar as the exemption notification dated 06.07.2016 and 26.06.2018 are concerned, they are the subject matter of challenge in W.P.(C)No.7627/2016 & 7241/2016 and, therefore, this Court ought not to render a decision, *qua* these notifications as, if FCI were to fail, it would lose a forum of appeal.

(iv) The decision of the Supreme Court, whereby SLPs preferred against the judgment of the Nagpur High Court dated 20.11.2015, were dismissed, gave a pass-through to FCI to implement the directions issued *via* the said judgment. Therefore, the impugned e-tender notice which has been published in furtherance of directions issued by the said High Court ought not to be interdicted by this Court.

(v) In case the petitioners are aggrieved, they should take recourse to remedies under the Industrial Disputes Act, 1947 [in short "the ID Act"]. [We may indicate herein that, although this submission is incorporated in the written submissions filed on behalf of the FCI, this was not pressed during the arguments advanced before us.]

(vi) Several High Courts have declined to interfere with transfer orders concerning FCI workers, having regard to the judgment of the Bombay High Court dated 20.11.2015. In any event, as indicated above, a transfer is an incident of service and in this regard, reference may be made to Clause 5 of the Standing Orders which applies to the petitioners.

(vii) In support of the aforesaid submissions, reliance has been placed on the following judgments:

a. ***State of U.P.& Ors v. Gobardhan Lal***, (2004) 11 SCC 402
b. ***Surendrasing Navalising Mahto & Ors v. UOI,*** passed by the Gujarat High Court in W.P.(C) No. 14738/2016, dated 19.10.2016

c. ***Ravi B. Ghorpade & Ors v UOI & Ors,*** passed by the Bombay High Court in Writ Petition (I) No.1935/2016, dated 20.07.2016

d. ***FCI Workers Union and Ors v. FCI & Ors,*** passed by the Kerela High Court in W.P.(C) No.35398/2016, dated 13.01.2017

e. ***Majeed H.K. and Ors v. The General Manager (Kerela) Food Corporation of India and Ors,*** passed by the Kerela High Court in W.P.(C) No.2804/2018, dated 02.02.2018

f. ***Bhartiya Khadya Nigam Mazdoor Sangh and Ors vs FCI Through Its Chairman And Ors.,*** passed by the Allahabad High Court in Writ-A No.38560/2016, dated 26.09.2016

g. ***C.S. Saran Kumar v. UOI and Ors***, passed by the Madras High Court in W.P. No.26628/2016, dated 17.08.2016

h. ***Naresh Sahani and Ors v. FCI and Ors,*** passed by the Gauhati High Court in W.P.(C) No. 3314/2020, dated 11.11.2020

i. ***State of West Bengal and Ors v Calcutta Hardware Store and Ors,*** (1986) 2 SCC 203

j. ***Cotton Corporation of India Ltd v United Industrial Bank Ltd & Ors,*** (1983) 4 SCC 625

k. ***State of U.P. & Ors v Siya Ram and Ors,*** MANU/SC/0585/2004

l. ***National Hydroelectric Power Corporation Ltd. v. Shri Bhagwan and Anr,*** (2001) 8 SCC 574

m. ***Cipla Ltd v Jayakumar R. and Another,*** (1999) 1 SCC 300

n. ***K D Sharma v SAIL,*** (2008) 12 SCC 481

o. ***S.P. Chengalvarya Naidu vs Jagannath and Ors,*** (1994) 1 SCC 1

p. ***Namrata Verma v State of U.P. & Ors,*** passed by the Supreme Court in Special Leave to Appeal (C) No.36717/2017, dated 06.09.2021

q. ***Rani Devi & Anr v Indo Tibetan Border Police,*** 2021 SCC OnLine Del 3943

r. ***State Bank of Travancore vs Kingston Computers India Pvt. Ltd.***, (2011) 11 SCC 524

(viii) The petitioners are factually wrong on two grounds: first, that FSD Mayapuri is not a depot *qua* which notification under Section 10 of CLRA Act had been issued. Second, notification dated 25.06.2020 has not been assailed in the two writ petitions, which are pending before the learned single judge. Therefore, exemption from provisions of the CLRA Act and the Rules framed thereunder continue to apply to notified depots, godowns and railheads of FCI.

Analysis and reasons

10. Having heard the learned counsel for the parties, what we are required to adjudicate is: whether the impugned tender notices are legally tenable?

11. What has emerged from the record is the following:

11.1 Section 10 notifications, under the CLRA Act, had been issued *qua* 289 godowns, depots and railheads of FCI.

11.2 Based on a report published in the Times of India, the Bombay High Court, Nagpur Bench took *suo motu* action, upon it being noticed that some workmen were carrying home monthly wages in the range of Rs. 4 lakhs, when other contract labourers were earning a monthly wage of around Rs 10,000. It was also noticed that proxies were used by workmen in connivance with the officials of FCI. The court, after taking into account, the report of M/s Deloitte Consultancy and the High-Level Committee appointed by the GOI, concluded that FCI could reduce its operational costs by engaging contract labour that was cheaper and perhaps more efficient. It is in this context that certain directions were issued by the said Court. The operative directions have already been extracted by us in paragraph 5 above.

11.2(a). A perusal of those directions would show that, amongst other directions, the Court issued two principal directives : First, that FCI would approach the GOI under Section 31 of CLRA Act, for seeking exemption from provisions of said Act and the rules framed thereunder. Second, GOI shall decide the issue regarding de-notification of the depots of the FCI in respect of which notification is issued under Section 10 of the said Act, within six months from the date of the order, in the light of observations made in the judgement, the report of M/s Deloitte Consultancy and the report of the High-Level Committee appointed by GOI.

11.3. Concededly, GOI i.e., respondent no.1 has not de-notified any of the 289 depots although, from amongst these depots, exemption notification under Section 31 of the CLRA Act has been issued, with regard to 226 depots. FCI has not placed on record anything, which would suggest to the contrary. As is evident from the record, two out of three notifications i.e., notifications dated 06.07.2016 and 26.06.2018 are the subject matter of challenge in W.P.(C) Nos.7627/2016 and 7241/2016.

11.4. Pertinently, in the aforementioned writ petitions i.e., W.P.(C) Nos. 7627/2016 and 7241/2016, the Court has issued orders, whereby FCI has been directed to maintain the status quo with regards to the transfer of members of the petitioner Unions' concerned in those cases.

11.5. Importantly, FCI's counter-affidavit filed in the instant writ petitions alludes to the fact that notifications dated 06.07.2016 and 26.06.2018, are the subject matter of challenge, not only in W.P.(C)Nos. 7627/2016 and 7241/2016, but also in two other writ petitions i.e., W.P.(C) No. 6192/2016, titled ***Food Corporation of India Workers Union vs. Ministry of Labour & Employment & Ors.***, and W.P.(C) No.4136/2017, titled ***Bharatiya Khadya Nigam Shramik Sangathan vs. Food Corporation of India & Ors***. It appears that these four writ petitions are being taken up together with W.P.(C)No.6192/2016 being the lead

writ petition [See order dated 26.09.2019, passed by the learned Single Judge W.P.(C) Nos.7627/2016, 7241/2016 and 4136/2017[3]].

11.6. Therefore, we had called for the record of W.P.(C) No. 6192/2016, which revealed that by an order dated 03.09.2019, the writ court had allowed an application for amendment when the second notification was issued, i.e., notification dated 26.06.2018. Thus, in pursuance of this order when the third notification was issued i.e., notification dated 25.06.2020, the General Secretary of the petitioner-Union in W.P.(C) 6192/2016 filed an affidavit dated 19.09.2020, bringing on record the said fact. *Via* this affidavit, leave was sought of the Court to incorporate prayers to assail notification dated 25.06.2020 on the same grounds[4] stood challenged. The affiant, in effect, relying upon the reasoning given in the order dated 03.09.2019, sought exemption from moving a formal application to amend the writ petition, once again. It is not in dispute that the third notification i.e., notification dated 25.06.2020 has a tenure of two years, and will, thus, expire in June 2022.

12. Since the aforementioned three notifications are the subject matter of the writ petitions referred to hereinabove, we do not intend to dwell on them, which is also the contention of Mrs Acharya.

13. As alluded to hereinabove, FCI has also framed guidelines for implementing the notification dated 06.07.2016. These guidelines form the subject matter of a document dated 12.07.2016. A perusal of the said document shows that FCI had proposed to GOI that exempt/de-notify depot/railhead, which stood notified under Section 10 of the CLRA Act. The GOI, instead, issued only an exemption notification under Section 31 of the CLRA Act. Thus,

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[3] *"Learned counsel for the parties jointly submit that the connected petition being W.P.(C) No.6192/2016 which has been directed to be treated as the lead case is listed on 17.01.2020. They, therefore, pray that the present petitions be also taken up for consideration on the same date.*
At request, list on 17.01.2020 along with W.P.(C) No.6192/2016."

[4] on which previous notifications dated 06.07.2016 and 26.06.2018

FCI took recourse to "pooling" its workmen by undertaking inter-depot, inte district and inter-zone transfers (in exceptional cases). The guidelines provided that, while undertaking transfers, it had to be ensured that workmen did not move to another labour system. As noticed above, after 12.07.2016 guidelines, another communication was issued by FCI dated 31.12.2020, to rationalize "labour strength".

14. Thus, what the record discloses is as follows:

(i) That although FCI made a proposal for exempting/de-notifying depots/railheads, the GOI issued only exemption notifications under Section 31 of CLRA Act, *vis-à-vis* 226 godowns/depots/railheads, out of a total of 289.

(ii) Even though the Bombay High Court, Nagpur Bench had issued a specific direction to the GOI to de-notify the already notified godowns, depots and railheads within 6 months, no such steps have been taken.

(iii) The Supreme Court, *vi*a interlocutory order dated 08.07.2016, as noticed above, and final order dated 31.07.2017 permitted the FCI Workers' Union, FCI Shramik Union and FCI Handling Workers' Union to lay a challenge to the notification issued under Section 31 of the CLRA Act.

(iv) This led to the institution of the aforementioned four writ petitions, out of which three were filed in 2016, while the fourth writ petition was filed in 2017.

(v) As noticed above, status quo order *vis-à-vis* transfer of members of workmen union operates in W.P.(C) Nos. 7627/2016 and 7241/2016. Insofar as the other two writ petitions are concerned i.e., W.P.(C) Nos.6192/2016 and 4136/2017, status quo was directed to be maintained vis-a-vis conditions of service of members of petitioners-Unions', via orders dated 02.05.2017[5], passed

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[5] "***C.M. 25364/2016 (for directions)***
By way of this application, stay of Notification of 6th July, 2016 exempting the go-down, depots and railhead of Food Corporation of India under Section 31 of The Contract Labour

in the backdrop of Section 31 notification dated 06.07.2016, and 12.05.2017, respectively.

(vi) Even though, the FCI has admitted that a Section 10 notification was issued *vis-à-vis* FSD Shakti Nagar, it disputes that any such notification was issued *vis-à-vis* FSD Mayapuri. The petitioners, who are deployed in FSD Mayapuri, have not filed a rejoinder or placed anything on record, to establish the contrary.

(vii) Between the date, when Bombay High Court (Nagpur Bench) rendered its decision i.e., 20.11.2015, and FCI framed its guidelines to implement the exemption notification dated 06.07.2016 i.e., 12.07.2016, FCI had approached the Central Board for lifting the prohibition against employment of contract labour, *vis-à-vis* 226 depots and railheads. The Central Board, after considering the matter at length in its 88th Meeting, repelled FCI's request. The FCI, on its part, did not accept the view of the Central Board, which was put on record via its communication dated 13.04.2016.

(viii) A plain reading of the impugned E-Tender Notice No. 04/2021 would show that FCI intended to employ contract labour in FSD Shakti Nagar, which concededly, is a depot notified under Section 10 of CLRA Act.

15. Given the aforesaid position, the issue that arises for our consideration, as noticed above, is: whether the FCI, in these circumstances, can deploy contract

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(Regulation and Abolition) Act, from applicability of notifications of Government of India in respect of employment of contract labour in different job for a period of two years is sought.

Upon hearing, this application is disposed of with direction that status quo with regard to condition of service in respect of workmen of petitioner-Union be maintained during pendency of this petition.

Application is disposed of."

[6] *"**C.M.18094/2017***

Upon hearing, it transpires that in a similar matter i.e. W.P.(C) 6192/2016, it has been directed that status quo regarding the condition of service of workmen, who are members of petitioner-Union, be maintained during the pendency of this petition.

On parity basis, this application is disposed of with similar direction."

labour *qua* a godown/depot, which stands notified under Section 10 of CLRA Act?

15.1. In our view, once a notification under Section 10 is issued by the appropriate Government, *qua* an establishment, no contract labour can be employed to carry out any process, operation or other work in such an establishment. It is only the appropriate government, which can lift the prohibition against employment of contract labour *vis-à-vis* the establishment, *qua* which a notification under Section 10 of the CLRA Act has been issued.

15.2. The employer and in this case, FCI, has every right to transfer its employees/workmen for administrative/operational reasons; a directive which a Court will not, ordinarily, interdict except, inter alia, on the grounds of mala fide or where transfer takes place in violation of provisions of a statute or statutory rule or regulation. Therefore, while we can have no objection to FCI transferring its employees/workmen for administrative/operational reasons from one depot to another, this cannot be used as a ruse to deploy contract labour in a godown/depot, which is notified under Section 10 of CLRA Act.

15.3. Thus, while the court cannot possibly come in the way of the steps taken by FCI to enhance its operational efficiency, we do find it difficult to accept the proposition put forth by FCI that it can deploy contract labour in notified godowns, depots and railheads, and, thus, queer the pitch for regular employees in the coming days—which is, that they are not required to carry out operations in notified depots, inter alia, on the ground of enhanced efficiency and intermittent work without going through the rigours of the CLRA Act.

15.4. On the same note, one cannot quibble with the proposition that transfer is an incident of service and therefore, is ordinarily not interfered with by Courts, except where it is imbued with mala fide and is contrary to statutory provisions and policy.

15.5. Therefore, as indicated above, while cannot have any objection to F transferring its employees from one depot to the other, we certainly are of the view that if the trigger for such transfer is the deployment of contract labour in notified godowns, depots and railheads—only to dilute the rationale which formed the basis of their notification under section 10 of CLRA Act in the first instance, that cannot be permitted. Such a step, in our opinion, would be in the teeth of the notifications issued under Section 10 of the CLRA Act as also the directions contained in the judgement dated 20.11.2015, passed by the Bombay High Court (Nagpur Bench).

15.6. FCI, instead of approaching the government for recalling the notification issued under Section 10 of CLRA Act, has taken the route of issuing the impugned tender notice no.4/2021 dated 01.03.2021 to circumvent the provisions of law.

16. It is, therefore, rightly argued on behalf of the petitioners that FCI is attempting to change the texture and contour of the godown/depot in issue, which is the subject matter of W.P.(C) 5080/2021 i.e., FSD Shakti Nagar.

16.1. As far as the other godown/depot is concerned i.e., FSD Mayapuri, since FCI has denied that a notification under Section 10 under CLRA Act has been issued *vis-à-vis* the said depot and fact that the petitioners in W.P.(C) No.6060/2021 have not filed a rejoinder or placed on record material that would establish that a notification under Section 10 of CLRA Act has been issued, the FCI should be free to take whatever steps it wishes to take for improving its operations in FSD Mayapuri, albeit as per law, as the reasoning provided for FSD Shakti Nagar would not be applicable in the case of the former. In other words, what we have observed hereinabove *vis-à-vis* FSD Shakti Nagar would not, perhaps, apply to FSD Mayapuri. However, this issue, for the moment may have become academic *vis-a-vis* FSD Mayapuri, as the e-tender notice

no.5/2021, which is the subject matter of W.P.(C) 6060/2021, has be withdrawn by FCI.

17. Insofar as the submission made by FCI, that the petitioner should have taken recourse to the provisions of ID Act to assail the impugned e-tender notices is concerned, the same, to our minds, is misconceived for the reason that challenge to impugned e-tender notices would not be available under the ID Act. As noticed above, this argument was, in fact, not articulated during the hearing.

18. As regards decisions rendered by other High Courts, on which reliance is placed by FCI, we are of the view that in none of the cases, the crucial fact which obtains in the instant matter i.e., W.P.(C) No. 5080/2021, which is deployment of contract labour in a godown/depot notified under Section 10 of CLRA Act, has arisen for consideration.

19. To our minds, the objection raised concerning *locus standi* of the petitioners is also not sustainable, since the petitioners before us are members of the Workers Unions, which have laid challenge to the exemption notifications, issued under Section 31 of the CLRA Act.

<u>Conclusion</u>

20. Therefore, for the foregoing reasons:

(i) E-Tender Notice No. 4 of 2021, which is the subject matter of W.P.(C) No. 5080/2021, is quashed.

(ii) Since E-Tender Notice No. 5 of 2021, which is assailed in W.P.(C) No. 6060/2021, has been recalled, no operative directions are required to be issued in the said writ petition.

(iii) Thus, while FCI would be free to transfer its employees/workmen from FSD Shakti Nagar, it cannot supplant the transferred workmen with contract

labour, till such time the notification under Section 10 of the CLRA Act remai operable. Exemption notifications under Section 31 of the very same Act, which are temporary, issued for an emergent purpose, cannot dilute the rigour of a Section 10 notification.

(iv) It is also made clear that, insofar as the challenge to the aforementioned exemption notifications issued under Section 31 of the CLRA Act are concerned i.e., 06.07.2016, and 26.06.2018 [and proposed challenge to the notification dated 25.06.2020] is involved, the rights and contentions of the parties in the aforesaid writ petitions will not be impacted by any of the observations made hereinabove, as the legal tenability of those notifications has not been examined by us.

(v) Since 12.07.2016 guidelines have been framed to implement the notification dated 06.07.2016, issued under Section 31 of the CLRA Act, and the said notification has been assailed in W.P.(C) Nos.7241/2016 and 7627/2016, we desist from ruling on it, as it may impact the pending litigation. The same position would obtain, vis-à-vis communication dated 31.12.2020, issued by FCI, as it takes forward the theme contained in the 12.07.2016 guidelines.

21. The above-captioned writ petitions are disposed of, in the aforesaid terms. Consequently, pending applications shall also stand closed.

22. There shall be no order as to costs.

RAJIV SHAKDHER, J

TALWANT SINGH, J

FEBRUARY 7, 2022/aj

Click here to check corrigendum, if any