

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

+ **W.P.(C) 1698/2006**

% **Date of decision : 17th November, 2009.**

M/S SHAH NANJI NAGSI Petitioner
Through Mr. B.P. Aggarwal, advocate.

versus

F.C.I & ORS Respondents
Through

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

ORDER

1. The petitioner M/S Shah Nanji Nagasi has filed the present writ petition for release of balance undelivered quantity of 30,951 metric tonnes of par boiled rice in terms of a concluded contract. The petitioner is also asking for refund of excess amount of penal interest levied by Food Corporation of India (hereinafter referred to as FCI, for short) or in alternative adjustment of the said amount against the undelivered par boiled rice.

2. In January, 2002, the respondent, FCI had invited tender for sale of par boiled rice on "as is where is basis". The petitioner submitted their bid and paid earnest money of Rs. 30,00,000/- for 1,30,000 metric tonnes of par boiled rice. The offer was extended at the request of the respondent, FCI. The offer made by the petitioner was found to be low and the respondent FCI by

their letter dated 18th March, 2002 made a counter offer to the petitioner to lift the stock @ Rs. 500/- per quintal for which the petitioner was required to deposit 1% of the cost of the stock within three days. On 19th March, 2002, the petitioner accepted the counter offer and it is stated that payment of Rs. 25,00,000/- was made as earnest money and thus Rs.55,00,000/- was deposited as earnest money for supply of 1,08,850 metric tonnes of par boiled rice @ Rs.500/- per quintal. As per the petitioner, the full quantity of par boiled rice was not supplied as the same was diverted to National Council for Consumer Federation (hereinafter referred to as NCCF, for short) or to NAFED.

3. The respondent, FCI, however, in their counter affidavit have stated that the rice for which the petitioner had submitted their bid was four years old and rice, which was supplied to NCCF and NAFED was two years old and, therefore, there is no connection between the supply made to NCCF and NAFED and the short fall in the supply made to the petitioner. On the question of short fall, it has been explained as under:-

“The contents of paragraphs 4(xxiii) & (xxiv) of the petition, it is admitted that there was shortage of 30961 MTs. Of boiled Rice but it was not on account of any mischief according to policy decisions of Government of India and Food Corporation of India the food grains from one region is dispatched to other Region as and where required. The stocks included in the petitioner’s tender were measured before 31/01/2002 and it was calculated at the tune of 108850 Mts. As the

tender was not accepted on due date, In the meantime there was demand from Bihar, West Bengal, and South India, accordingly to policy rice from Chhattisgarh Region which were not under the accepted tender, were to be dispatched with. Accordingly the rice from Chhattisgarh Region the rice were dispatched including same of the stacks which were under the tender of petitioner, though not accepted. The rice so dispatched was according to "first in first out basis". In this routine 26617 MTs of the rice included in the unaccepted tender of the petitioner, was dispatched. It is submitted that this dispatch was made prior to 19/03/2002 the petitioner tender was accepted on "as is where is basis" the balance quantity of the petitioner was due to this reason only. The clause "J" of the Agreement exempts these type of circumstances and gives ample jurisdiction with Senior Regional Manager to do the needful according to the circumstances in the best public use. Moreover, the Food Corporation of India itself provides storage loss, a copy of schedule of approved shortage is filed herewith as **Annexure R-3**. According to this the Respondent No.3 at the relevant time was authorized to condone the shortage up to 5%. In the present case, after dispatching 26617 MTs only about 4000 MTs. Was short which was well within sanctioned shortage. Actually, there was no shortage in the quantity but due to dispatch of 26617 MTs there became shortage in the quantity pre-mentioned in petitioners tender. The respondent to rectify this shortage offered the petitioner vide Annexure-R-2 to come for counter offer for the balance quantity of different quality. But the petitioner did not turn up. Hence the whole allegation is false and baseless. The contention made in the para do not give any help to the

petitioner in the facts and circumstances of the case.”

4. In view of the said explanation given by the respondent, FCI, I am not inclined to entertain the present writ petition and leave it open to the petitioner to question and challenge and claim damages for alleged shortfall in breach of the contract, in a civil suit. The petitioner has equally efficacious alternative remedy by way of civil suit in which the commercial contract can be interpreted and the claim of the petitioner can be examined. The respondents have pointed out that the petitioner had written letters asking for refund of security deposit and the earnest money vide letters dated 4th September, 2003, 6th September, 2003 and 17th September, 2003, and in terms thereof the excess amount deposited by the petitioner was refunded. The respondents have, therefore, taken the plea of “estoppel”. The petitioner, however, submits that the letters were written under protest. The said letters have been placed on record as annexures R-1, R-2 and R-3 to the counter affidavit. Prima facie the letters do not indicate that these were written under protest and without prejudice to the rights of the petitioner to claim damages.

5. Counsel for the petitioner has referred two decisions of the Supreme Court in ***Gujarat State Financial Corporation Vs. M/s. Lotus Hotels Pvt. Ltd.*** (1983) 3 SCC 379, ***Union of India and Others Vs. Dinesh Engineering***

***Corporation and Another*, (2001) 8 SCC 491 and a decision of Delhi High Court in ***Gharda Chemicals Limited Vs. Central Warehousing Corporation Vs. Central Warehousing Corporation*, 118 (2005) DLT 159(DB)**, in support of his contention that the writ petition even in contractual matters is maintainable. Writ petition in contractual matters can be entertained in case there is arbitrariness and the authorities have acted contrary to Article 14 of the Constitution. In a writ petition while exercising power of judicial review, the court is concerned with the administrative action and examines whether the said action is free from arbitrariness, bias and mala fide. However, in the present case the subject matter is a commercial dispute and the respondents have prima facie shown that their conduct and decision is not tainted or malafide. Moreover, State must be given freedom of contract and free play in the joints while acting in contractual matters.**

6. In case the respondent, FCI have acted contrary to the contract and committed breach thereof, the petitioner under the law of contract can claim damages. Mere breach of contract by the respondent does not establish arbitrariness or malafides. Question of breach and interpretation of a contract should be ordinarily made subject matter of ordinary civil proceedings. It is noticed that the petitioner in fact seeks specific performance of a contract relating to moveable property by way of present writ petition as he is seeking direction that the balance quantity of par boiled rice should be directed to be

released. Normally, in cases of moveable property, damages is the appropriate remedy and specific performance of contract in moveable property is directed in exceptional cases. Explanation (ii) to Section 10 read with Section 14(1) of the Specific Relief Act 1963 provide for relieving the breach of contract of movable property by way of compensation in money or damages.

7. Quantum and amount of damages require oral evidence and adjudication of factual disputes which cannot be decided in a writ petition. It is well-settled that a writ petition under Article 226 of the Constitution of India is not maintainable for enforcement of terms of a contract. (Refer, ***Bareilly Development Authority versus Ajay Pal Singh*** AIR 1989 SC 1076 wherein it was observed that when State enters into a contract which is non statutory and purely contractual then the rights of the parties inter se are governed by the terms of the contract and not by the provisions of the Constitution and no writ order can be issued under Article 226 to compel an authority to remedy a breach of contract pure and simple; ***Kerala State Electricity Board and another versus Kurien E. Kalathil and others*** JT 2000 (8) SC 167) the Supreme Court held that interpretation and implementation a clause in a contract cannot be a subject matter of a writ petition under Article 226 of the Constitution)

8. Counsel for the petitioner submitted that the respondents have deducted Rs.27,63,663/- on account of delay under clause H(v), which reads

as under:-

“(v) After 60 days, further extension will be admissible only for a further period of 30 days on payment of 30 days on payment of 2% penal interest over and above the bank rate.”

9. It is submitted that the said deduction has been wrongly made as the delay was occasioned by the respondents-FCI themselves. It is also submitted that the petitioner had made an application for extension of time. These are factual disputes. Who was responsible for the delay, cannot be adjudicated without recording oral evidence and is not a matter which can be decided in a writ petition. The petitioner, if required, is at liberty to file a civil suit claiming refund of the said amount.

10. The writ petition is dismissed. The observations made above are for the purpose of deciding the present writ petition and civil suit, if any, filed by the petitioner will be decided without being influenced by the said observations. The petitioner had filed the present writ petition on 2nd June, 2006 and the same has remained pending since then. The petitioner, if required, will be at liberty to file an application under Section 14 of the Limitation Act, 1963. No costs.

SANJIV KHANNA, J.

NOVEMBER 17, 2009.

NA/P