

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

+ **CS(OS) No. 1086/1999**

% **10th October, 2012**

M/S TINNA OVERSEAS LIMITED Plaintiff

Through: Mr. M. Dutta, Advocate.

VERSUS

FOOD CORPORATION OF INDIA & ANR. Defendants

Through: Mr. Dileep Poolakkot, Adv. for D-2.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. The subject suit for recovery of Rs. 1,31,77,460.00 is filed by the plaintiff against two defendants. Defendant no.1 is the Food Corporation of India (FCI) and defendant no.2 is Project and Equipment Corporation of India Ltd. (PEC). The suit is filed for recovery on the ground that the plaintiff was promised by the defendant no.2/PEC supply of wheat by the defendant no.1 to the plaintiff at US\$ 137.46 per MT, however, the defendant no.1/FCI supplied the wheat to the plaintiff at a higher rate of US\$141.58 per MT in violation of the Associateship

Agreement dated 29.12.1995 Ex.PW1/D1 entered into between the plaintiff and the defendant no.2/PEC. The further case set up in the plaint is that since the plaintiff had to supply wheat to Government Trading Corporation (=GTC) Iran, and therefore since it could not afford to commit the breach with the said M/s GTC Iran, plaintiff was forced to purchase wheat from the defendant no.1 at a even higher rate of US\$ 154.40. It is this difference of rate i.e the difference higher than US\$ 141.58 per MT which is claimed through the subject suit.

2. Though the defendant no.1 filed a written statement, thereafter, it did not appear and was proceeded ex parte. However, as per the case as set up by the defendant no.1 in the written statement it was pleaded that it had no privity of contract with the plaintiff for any supply of wheat, much less at a particular rate, as claimed by the plaintiff. It is not disputed on behalf of the plaintiff that there is no contract between the plaintiff and the defendant no.1/FCI.

3. The defendant no.2/PEC, the main contesting defendant has filed its written statement. The case set up in the written statement was that it was the defendant no.2/PEC which had entered into the contract on 23.11.1995 with GTC Iran for supply of 1,00,000 MT of wheat and which was sub-contracted further to the present plaintiff. This sub-contract is the Associateship Agreement dated 29.12.1995 Ex.PW1/D1. It is argued that there was no responsibility of the

defendant no.2 under the Associateship Agreement dated 29.12.1995 to ensure that the plaintiff got wheat from the FCI/D-1 only at a rate of US\$141.58 per MT. It was pleaded that it was the entire responsibility of the plaintiff to ensure that it purchased wheat from FCI at whatever rate, and thereafter, perform its contract by making the supply of the contracted quantity of wheat to GTC Iran.

4. The following issues were framed in this suit on 17.11.2004:-

- “1. Whether there is ‘No privity of contract between plaintiff and defendant No.1? OPD
2. Whether the plaintiff is entitled to claim any amount from defendant No.1 in terms of Associateship Agreement dated 29.12.1995 entered between plaintiff & defendant No.2? OPP
3. Whether the defendant No.1 was not entitled to increase the price of goods? OPP
4. Whether the plaintiff is liable to pay price of goods as per terms agreed in Associateship Agreement? OPP
5. Whether the plaintiff is entitled to interest. If yes at what rate and for what period and against whom? OPP
6. Whether the suit of the plaintiff is without any cause of action? OPD
7. Whether name of the defendant No.1 is liable to be struck out from array of defendants under Order 1 Rule 10(2)? OPD
8. Whether the plaintiff is entitled to any relief if so against whom? OPP
9. Whether the suit as framed is maintainable against the defendant No.2? OPP

10. Whether there is any breach by defendant No.2 of Associateship Agreement entered into by and between the plaintiff and the defendant No.2 on account of arbitrary increase in prices of wheat by defendant No.1? OPP
11. Relief.”

Issue Nos.1,2 and 7

5. Issue Nos.1,2 and 7 are as to whether there is any liability of defendant No.1. Since admittedly the plaintiff never had any contract with the defendant No.1 whereby the defendant No.1 had to supply any wheat to the plaintiff, much less at the price of US\$ 141.58 per MT, there cannot be fastened any liability upon the defendant No.1. In my opinion, once the plaintiff has no privity of contract with the defendant No.1, and the only contract of the plaintiff is with the defendant No.2, it is not understood how the defendant No.1 can at all be liable because once there is no contract then there is no breach of any promise or contract committed by the defendant No.1 qua the plaintiff, and which thus can be sought to be enforced in the present suit. These issues are therefore decided against the plaintiff and in favour of the defendant No.1.

Issue Nos.3,4,6,9 and 10

6. In order to appreciate these issues as to whether there was liability upon the defendant No.2/PEC to ensure the plaintiff getting the supply of wheat from the defendant No.1 at US\$ 141.58 per MT, it is necessary firstly to refer to

the letter dated 6.2.1996, Ex.DW2/4 written by the Government of India, Ministry of Food to the defendant No.2 alongwith press note dated 2.2.1996 annexed to this letter. This letter alongwith annexed press notes reads as under:-

“
No.4-63/95-Impex
Government of India
Ministry of Food
Deptt. of Food Procurement
and Distribution
* * * * *

New Delhi, February 6, 1996.

To

Shri S M Diwan
Chairman-cum-Managing Director
Projects & Equipments Corporation
of India Limited
'Hansalaya', 15, Barakhamba Road
New Delhi-110 001.
Sub: Export of Wheat to Iran.

Sir,

I am directed to refer to your D.O. letter No.CMD/PEC/95 dated 22.12.1995 on the subject cited above and to say that the request of the Projects and Equipments Corporation of India Limited (PEC) for allotment of one lakh tones of wheat from Central Pool for export to Iran by it to fulfil the contract signed with the Government Trading Corporation (GTC) of Iran on 23.11.1995 during the visit to India of an Iranian delegation headed by Dr. H N Shirazi, Senior Deputy Minister of Commerce, Government of the Islamic Republic of Iran, has been considered. In view of the position explained in your letter under reference and considering the friendly relations between India and Iran, it has been decided to supply one lakh tones of wheat from Central Pool on priority basis as a special case without insisting on payment of requisite EMD, at the existing open sale rate of wheat for export i.e. US \$ 141.58 per MT ex-FCI port godown chargeable in Indian Rupees **as per the terms and conditions specified in the Press Note dated 2.2.1996** (copy enclosed). Accordingly, you are requested to get in touch with the FCI for purchase of wheat and finalization of delivery schedule etc.

Yours faithfully,

Fax No.378 2213

Government had authorized the FCI to export/sell for the purpose of of report upto 2.5 million tonnes of wheat from its stocks during 1995-96 under its Open Market Sales Scheme for export purposes at rates fixed from time to time. Government has since revised the open sale rates of wheat for the purpose of export in respect of various States with immediate effect until further orders as under subject to terms and conditions indicated in note below:

1. The aforesaid rates will be valid till further orders subject to the provision in para 2 as under.

2. The price will be charged in Indian Rupees. In order to give stability in export transaction, the FCI headquarters will communicate changes, if any, arising out of changes in the dollar-rupee fluctuations subject to the condition that the prices so fixed are not lower than the rates applicable for domestic sales. While doing so, the FCI shall revise the prices in terms of rupees with every change of 1% with reference to the dollar-rupee parity existing on the date of notification which has been taken at US dollar buying (bill) rate at Rs. 36.28, while day to day fluctuations upto of 1% would be ignored.” (underlining added)

7. A reference to the aforesaid letter Ex.DW2/4 dated 6.2.1996 alongwith press notes dated 2.2.1996 shows that no doubt the letter dated 6.2.1996 seems at one point of time to suggest sale of wheat at US \$ 141.58 per MT, however, that line which gives this rate of US \$ 141.58 per MT also goes on to say that it would be as per terms and conditions specified in the press note dated 2.2.1996. When we look at the press note dated 2.2.1996, the later part of this press note clearly states that the price is not fixed but variable and this variableness is because of the fluctuating value of US \$. Therefore, in my opinion, a conjoint reading of the letter dated 6.2.1996 alongwith press note only shows that there is no fixed price of supply of wheat by defendant No.1 to the plaintiff at US \$ 141.58 per MT, and, this price was variable as per the variation in the rate of US dollar.

8. Not only the price was variable in terms of fluctuation in US dollars, there was never any contract between the plaintiff and defendant No.2, whereby the defendant No.2 had to ensure supply to the plaintiff at US\$ 141.58 per MT.

The only contract between the plaintiff and the defendant No.2 is the Associateship Agreement dated 29.12.1995, Ex.PW1/D1, and no part of this contract specifies that the defendant No.2 was to ensure that the plaintiff got the supply of wheat from the defendant No.1 at US\$ 141.58 per MT. Counsel for the plaintiff however, relied upon the following paragraphs of the Associateship Agreement dated 29.12.1995 in narration part of the agreement:-

“AND WHEREAS PFC has agreed to assist TINNA for export of wheat to Iran, PEC shall in association with TINNA **take up the issue** with MOE/FCI for allocation of the entire quantity of 100,000 M.T. of wheat from FCI block and the freezing of applicable price of wheat as on date of signing of the contract between PEC and GTC of Iran.”(underlining added)

9. In my opinion, the last line which is relied upon on behalf of the plaintiff does not help the plaintiff inasmuch as the earlier part states that the only liability of the defendant No.2 is to jointly with the plaintiff ‘take up the issue’ with the defendant No.1/FCI. Taking up of an issue cannot mean that the defendant No.2 has to ensure that plaintiff gets the specified quantity of wheat from the defendant No.1/FCI at a fixed price of US \$ 141.58 per MT. In fact, if there is any doubt that there was no liability upon the defendant No.2 for ensuring that the plaintiff gets the wheat at US \$ 141.58 per MT, then, for that purpose reference can be taken to para 12 of the Associateship Agreement dated 29.12.1995 which specifies that procurement will be the entire responsibility of the

plaintiff, and the defendant No.2/PEC would not at all be liable. This part further states that defendant No.2 without being liable or responsible will however assist the plaintiff. Therefore, a promise of mere assistance of taking up the issue with the FCI, does not and cannot mean that there was binding obligation on the defendant No.2 to cause supply of the specified quantity of wheat at US \$ 141.58 per MT as is sought to be urged by the plaintiff relying upon the letter of the Ministry of Food dated 6.2.1996, Ex.DW2/4. As already stated above, even if we look at this letter dated 6.2.1996 Ex.DW2/4, the same makes reference to the price in the press note attached with the same, and the press note specifically states that price is not fixed but variable depending upon the fluctuation of the US dollar.

10. In view of the above, issue Nos.3,4,6,9 and 10 are decided in favour of the defendant No.2/PEC and against the plaintiff and it is held that there was no liability upon the defendant No.2/PEC to ensure that the defendant No.1 did not increase the price from US \$ 141.58 per MT and it is held that once the contract for supply of wheat to GTC of Iran was sub-contracted by the defendant No.2 to the plaintiff, in terms of the Associateship Agreement dated 29.12.1995, it was the sole and entire responsibility/liability of the plaintiff to procure the wheat at whatever price and thereafter fulfill the contract with GTC of Iran. It is therefore held that plaintiff has no cause of action to file the present suit.

Issue No.5

11. Since, the plaintiff is not entitled to any principal amount, there does not arise the issue of the plaintiff being entitled to any interest.

Issue No.5 is accordingly decided against the plaintiff.

Issue Nos.8 and 11(Relief)

12. In view of the above, plaintiff is not entitled to relief against any of the defendants. Suit of the plaintiff is therefore dismissed, leaving the parties to bear their own costs. Decree sheet be prepared.

OCTOBER 10, 2012
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VALMIKI J. MEHTA, J.