

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

+ **CS(OS)No.614/1999**

% **10th October, 2012**

M/S TINNA OVERSEAS LIMITED Plaintiff
Through: Mr. M. Dutta, Adv.

versus

FOOD CORPORATION OF INDIA Defendant
Through : Ms. Kiran Suri, Ms. Aparna Mattoo,
Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. This suit has been filed by the plaintiff/buyer against the seller/Food Corporation of India (FCI) for recovery of ₹ 1,72,02,553/- along with interest @ 24% per annum from 16.03.1996 till the date of payment on the ground that the defendant charged a higher rate for supply than was agreed upon.

2. The facts as pleaded in the plaint are that the defendant floated an Open Market Sales Scheme vide a press note dated 04.10.1995 inviting offers to purchase wheat from the defendant for export purposes.

3. It is pleaded that the contract contained two clauses namely II(b) and II(e)(i). It is pleaded that parties are bound by the language of Clause II(e)(i) and which provides that the plaintiff/buyer is insulated from fluctuation in the rates of dollar in case the buyer deposits 10% of the price in addition to earnest money immediately on the contract of sale being entered into between the parties. It is pleaded that the plaintiff on opting of Clause II(e)(i), deposited the security deposit of ₹3,85,23,750/- in addition to 1% earnest money of ₹34,50,000/-. This additional 10% security deposit of ₹ 3,85,23,750/- was for the price to be frozen at US\$ 141.58 per metric tonne. The 10% option under clause II(e)(ii) was exercised vide the plaintiff's letter Ex.D4 dated 20.02.1996. The payment of 10% price of ₹3,85,23,750/- is reflected in letter dated 11.03.1996, Ex.P8, issued by the defendant.

4. The plaintiff pleads that the defendant instead of taking an amount of ₹35,68,47,534/- for contracted 75000 metric tonne of wheat took Rs.37,40,50,087/-. i.e an excess amount of ₹1,72,02,553/-, and refund of which excess paid amount is sought in the present suit alongwith interest.

5. The Defendant contested the suit on two basic defenses. The first defense was that most of the entire contracted quantity of 75,000 metric tonne was supplied to the plaintiff not at the fixed rate of ₹5136.50 per metric tonne (equivalent to Indian Rupee of US\$ 141.58) but at a lesser

rate. It is pleaded that during the months of March to May, 1996, the quantity of wheat was supplied on a total of 42 occasions, and, on 35 occasions out of 42 occasions the supply was made at the price of ₹5073/- per metric tonne and not at ₹5136.50 per metric tonne in terms of contract allotment letter, Ex.P6, between the parties. In effect, the defendant pleads novation of the contract and that the plaintiff cannot approbate and reprobate, in that, after taking most of the contracted quantity at lesser rate than the fixed rate, the plaintiff can seek to recover the alleged excess price charged.

The second defense is of full and final settlement amount received by the plaintiff in terms of the letter dated 30.11.1999, of the defendant to the plaintiff Ex.D5 and the acceptance letter of the plaintiff to the defendant dated 30.11.1999, Ex.D6.

6. The following issues were framed in this suit on 13.01.2003:-

- “1 Whether the plaintiff opted for Clause II(e)(ii)? OPP
- 2 Whether the defendant was justified in demanding higher price? OPD
- 3 Whether the plaintiff is entitled to recovery of ₹1,72,02,553/- ? OPP
- 4 Whether the plaintiff is entitled to interest? If so, to what rate and for what period? OPP.
- 5 Whether the price of wheat is liable to be frozen in dollar in terms as on the date of the payment of security deposit ? OPP.
6. Relief.”

Issue Nos1, 2,3 and 5:-

7. These issues can be dealt with together inasmuch as the basic aspect is that whether the plaintiff is entitled to refund of the amount claimed in this suit on the ground that the defendant has recovered an amount in excess by charging a price in excess of the fixed price of ₹5136.50 per metric tonne.

8(i). The defendant in para 11 of its written statement averred as under:-

“The contents of this para are denied as false. The para has been replied herein above. The reading of the clause makes the intention of the Corporation clear that the price for export will not be less than the price of wheat for domestic sale. It is apparent from the fact that the prices for the month of April was reduced from ₹5136.50 in the month of March to ₹5037/- thereby giving benefit of ₹63.50 per MT for the quantity lifted in the month of April, May and June, 1996 and the said benefit have been utilized by the plaintiff”.

(ii) The plaintiff in his replication in response to para 11 of the written statement stated as under:-

“That the contents of para No. 11 are incorrect and are denied. The parity between the price for wheat for the domestic market and for export was applicable only to those persons who opted for payment as per Clause II(b). The plaintiff had made payment under Clause II(e) and the value at which the wheat was to be supplied to the plaintiff was fixed at US\$ 141.50 dollars per metric tonne. The price was frozen at the said figure and could not be increased or decreased in relation to any increase or decrease in the price of wheat for the domestic sale.

9. The defendant in its affidavit by way of evidence has given the

following chart showing supply by the defendant to the plaintiff most of the quantities at ₹5073/- per metric tonne instead of ₹5136.50 per metric tonne. This para in the affidavit by way of evidence filed by the witness of the defendant V.P. Sharma, DW1 reads as under:-

“5. The plaintiff deposited security of 10% and as on that day the price of wheat at port towns was ₹5136.50 per Metric tonne. The price was ₹5136.50 for the month of March 1996. The said price was reduced to ₹5073/- per Metric tonne. The details of the price chart on different dates is as follows:

<u>S.No.</u>	<u>Ro No./Date</u>	<u>Quantity lifted (in MTS)</u>	<u>Rate per MT(in Rs)</u>
1.	901/16.3.96	3244	Rs5136.50
2.	902/18.3.96	2535	Rs5136.50
3.	904/21.3.96	1014	Rs5136.50
4.	905/23.3.96	120	Rs5136.50
5.	906/26.3.96	3400	Rs5136.50
6.	907/27.3.96	845.569	Rs5136.50
7.	908/30.3.96	892	Rs5136.50
		12050.569	
8.	913/06.4.96	578	Rs5073.00
9.	915/11.4.96	825	Rs5073.00
10.	916/12.4.96	2160	Rs5073.00
11.	917/13.4.96	2200	Rs5073.00
12.	918/19.4.96	2300	Rs5073.00
13.	919/19.4.96	290	Rs5073.00
14.	920/20.4.96	445	Rs5073.00
15.	921/20.4.96	180	Rs5073.00
16.	922/22.4.96	750	Rs5073.00
17.	924/1.5.96	2230	Rs5073.00
18.	931/22.5.96	990	Rs5073.00
19.	931/25.5.96	1265	Rs5073.00
20.	936/28.5.96	182	Rs5073.00
21.	937/30.5.96	137.777	Rs5073.00
22.	941/10.6.96	3080	Rs5073.00
23.	943/15.6.96	2830	Rs5073.00
		20444.777	

	Grand Total:	32495.346 MT	
1.	7465/22.3.96	2300	Rs5136.50
2.	7466/25.3.96	1250	Rs5136.50
3.	7467/26.3.96	1900	Rs5136.50
4.	7469/29.3.96	3750	Rs5136.50
5.	7470/3.4.96	2150	Rs5073.00
6.	7471/6.4.96	130	Rs5073.00
7.	7472/10.4.96	2000	Rs5073.00
8.	7473/11.4.96	3850	Rs5073.00
9.	7474/13.4.96	500	Rs5073.00
10.	7475/15.4.96	1233	Rs5073.00
11.	7476/15.4.96	2000	Rs5073.00
12.	7477/19.4.96	900	Rs5073.00
13.	7479/25.4.96	4000	Rs5073.00
14.	7480/27.4.96	3700	Rs5073.00
15.	7481/30.4.96	550	Rs5073.00
16.	7482/4.5.96	500	Rs5073.00
17.	7483/17.5.96	41000	Rs5073.00
18.	7484/23.5.96	5000	Rs5073.00
19.	7485/31.5.96	3987.96	Rs5073.00
		43800.745	
	Grand Total:	76296.091 MT	

10. There is no cross-examination with respect to the contents of para 5 of the affidavit by way of evidence filed by the witness DW1, and nor can there be any, as the plaintiff cannot really dispute that though it was bound to pay for the contracted quantity of 75,000 metric tonne at the US\$ 141.58 per metric tonne, and which would translate to ₹5136.50 per metric tonne, however, most of the quantity was in fact taken at a lesser rate of ₹5073 per metric tonne, and which is clear from the above chart.

11. In my opinion, though the parties initially agreed in terms of Clause II(e)(i) to have a fixed rate of US\$ 141.58 per metric tonne or equal to ₹ 5136.50 per metric tonne, subsequently, since the plaintiff took

most of the quantity at the reduced rate of ₹5073 per metric tonne there

took place a novation of the contract. The plaintiff all along knew that it was benefitting by receiving the wheat under the contract, not at the contracted rate of ₹5136.50 per metric tonne but at a lesser rate of ₹ 5073/- per metric tonne, and therefore it willingly took most of the contracted quantity at the lesser rate of ₹5073 per metric tonne. The plaintiff, therefore, now cannot turn around, after having taken a huge benefit (and which of course it had not returned back to the defendant) now to claim that the original contract stood, and the defendant has taken an excess amount of ₹ 1,72,02,553/-. The net effect is that the plaintiff has substantially benefitted, but is now crying wolf. The plaintiff acted in terms of novation of the contract by paying a lesser amount, and therefore, the plaintiff cannot now seek implementation of the original contract of supply at the price of Rs. 5136.50 per metric tonne. The plaintiff is now seeking enforcement of the original clause, because in the meanwhile, the dollar rate seems to have changed and the price payable would have been more than the price of Rs. 5136.50 per metric tonne, and which the plaintiff is legally prevented from doing.

12. In view of the above, issue Nos1,2,3 and 5 are decided in favour of the defendant and against the plaintiff and it is held that the plaintiff is not entitled to recovery of principal amount of ₹1,72,02,553/-.

13(i). The defendant has also raised a defense of full and final settlement in terms of letters Ex.D5 and Ex. D6, both dated 30.11.1999, written by the defendant to the plaintiff and plaintiff to the defendant respectively.

In order to appreciate this defense, it is necessary to reproduce both the aforesaid letters and which read as under:-

FOOD CORPORATION OF INDIA

BY FAX/BY REGISTERED POST/
NO.J.1(6)/95/TOCL/W/S.III/IE/VOL.II Dated 30.11.99

To

M/s Tinna Oils & Chemicals Ltd.,
A-151, Mayapuri, Phase-II,
New Delhi (FAX No.5401110 & 5492025)

Sir,

I am directed to inform you that notwithstanding your contention as well as of the Food Corporation of India in Writ Petition No. 3547 in Andhra Pradesh High Court and final outcome of the same, the Corporation would be releasing the partially withheld earnest money deposit of Rs6,25,754.55 (Rupees Six Lakh Twenty Five Thousand Seven Hundred Fifty Four and paise fifty five only) to you with a clear understanding that you would be bound by the final judgment of the Hon'ble High Court of Andhra Pradesh. You are also requested to give a pre-receipted bill for the said amount of Earnest Money Deposit in full and final settlement of this transaction with Food Corporation of India.

2. You are requested to furnish the pre-receipted Bill accordingly at the earliest enabling Food Corporation of India to release the partially withheld Earnest Money Deposit.

Yours faithfully,
(S.K. BHATTACHARYA)
MANAGER (IMPORT & EXPORT)

TINNA OILS & CHEMICALS LIMITED

Sh. S.K. Bhattacharya
Manager(Import & Export)
Food Corporation of India
New Delhi

Date 30.11.99
Page No.1
Our Ref. TOC/FCI/99

Fax No. 33168/3

Dear Sir,

We acknowledge with thanks receipt of your Fax No. JJ(6)/9S/W/TOCL/W/S.III/IE/Vol.II dated 30.11.99 with regard to release of partially withheld Earnest Money of Rs6,25,754.55 (Rs.Six lakh twenty five thousand seven hundred fifty four and paise fifty five only)

As desired, we hereby give an undertaking that we would be bound by the final judgment of Writ Petition No. 3547 of the Hon'ble High Court of Andhra Pradesh.

We are also enclosing herewith a pre receipt bill for the said amount of Earnest Money Deposit in full and final settlement of this transaction with Food Corporation of India with a request to kindly release the Earnest Money in question at the earliest.

Thanking you,

Yours faithfully,
For Tinna Oils & Chemicals Ltd.
Director.

(ii) A reading of the aforesaid letters shows that the plaintiff received the withheld earnest money ₹ 6,25,754.55/- in full and final satisfaction of the pending dues under the subject contract, of course, subject to the condition that a final judgment in the writ petition pending in the High

Court of Andhra Pradesh will bind the parties. I have been informed by the counsel for the plaintiff that this writ petition is still pending. Therefore, as of today, this defence cannot be decided, and which can only be decided on disposal of the writ petition bearing No. 3547 pending in the Andhra Pradesh High Court. However, since I have otherwise held that the plaintiff is not entitled to the suit amount in terms of the discussion above, even if this defense is not decided, the same will make no difference to the result of the suit.

Issue No. 4

14. This issue pertains to interest. Once it is held as above that the plaintiff is not entitled to the principal amount of ₹1,72,02,553/-, there does not arise any issue of grant of interest to the plaintiff. This issue is, therefore, decided in favour of defendant and against the plaintiff.

Relief:-

15. In view of the above, suit of the plaintiff has no merit, and the same is accordingly dismissed, leaving the parties to bear their own costs. Decree sheet be prepared.

VALMIKI J. MEHTA, J

OCTOBER 10, 2012

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