IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

(1)

CWP No.9323 of 2013
Date of Decision: June 29, 2015

Julka Foods, Batala Road, Qadian & others
...Petitioners

Versus

Union of India & others
...Respondents

(2)

CWP No.20624 of 2013

M/s Malwa Rice Mills & another
...Petitioners

Versus

Union of India & others
...Respondents

(3)

CWP No.52 of 2014

M/s Baba Deep Singh Rice Mill
...Petitioner

Versus

Union of India & others
...Respondents

(4)

CWP No.6319 of 2014

M/s Mahavir Agro Industries
...Petitioner

Versus

Union of India & others
...Respondents

CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

Present: Mr. Vikram K. Chaudhri, Senior Advocate with
Ms. Isha Goyal, Advocate,
for the petitioner(s)s in CWP No.9323 of 2013.

Mr. Vishal Sodhi, Advocate,
for the petitioner(s) in CWP No.6319 of 2014.

Mr. Jagpal Singh, Advocate,
for the petitioner(s) in CWP No.20624 of 2013.

Mr. L.M. Gulati, Advocate,
for the petitioner(s) in CWP No.52 of 2014.

Mr. V.K.Kaushal, Advocate
for UOI.

Mr. I.S. Sidhu, Advocate,
for respondents 6 and 7 in CWP No.52 of 2014.

Mr. Aruz Khan, Advocate,
for respondents 9 and 11 in CWP No.9323 of 2013.

Mr. Akshay Bhan, Senior Advocate with
Mr. Gurinder S. Sandhu, Advocate
for respondent No.7 in CWP No.9323 of 2013.

Mr. Daman Dhir, Advocate,
for the respondents 6 and 7 in CWP No.20624 of 2013.

Mr. Pankaj Kundra, Advocate for
Mr. Deepak Sabharwal, Advocate,
for respondents 6 and 13 in CWP No.9323 of 2013.

Mr. Karan Gupta, Advocate,
for respondents 8 and 10 in CWP No.9323 of 2013.

Mr. Vikas Chatrath, Advocate,
for FCI.

Mr. Vikas Singh, Advocate, and
Mr. Jagdev Singh, Advocate
for respondent No.5 in CWP No.6319 of 2014.

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AUGUSTINE GEORGE MASIH, J. :

By this order, I propose to decide four writ petitions i.e CWP Nos.9323 and 20624 of 2013 and CWP Nos.52 and 6319 of 2014 as the grievance of the petitioners who are rice millers is common and the assertions made in the writ petitions are based upon the same facts and policies of the Government. For convenience, the basic facts are being taken from CWP No.9323 of 2013.

2. The rice millers, who are petitioners, are engaged in the milling of paddy allotted to them by the various State agencies in accordance with the Punjab Rice Procurement (Levy) Order, 1983. Under the said Levy Order, Punjab Government has been formulating and notifying the Customs Milling Policy of Kharif Marketing Season every year. The procurement season in question in these writ petitions is the 'Customs Milling Policy of Kharif Marketing Season (hereinafter referred to as 'KMS') 2011-12'. As per the terms of this policy, agreements were executed between the petitioner-rice millers and the various procurement agencies of the State of Punjab. Petitioners assert that after the procurement of several tones of paddy, it was discovered that certain qualities of paddy including PAU-201, HR-47, HR-127 and other uncertified hybrid varieties of paddy were not yielding the expected quality of rice as per the standard parameters and yardsticks fixed. As a result thereof, the State was unable to deposit the same in the central pool causing financial loss to the exchequer.

3. A public request was made by the State which was published in the leading newspapers to the farmers dated 17.04.2013 (Annexure P-3) that the above referred varieties be not sown. It was also mentioned that the same would not be procured by the Punjab Government procurement agencies in the Kharif Season of 2013-14 and only approved varieties by the Department of Agriculture be sown. Since the procured paddy of these varieties were not yielding rice of the requisite standard, the petitioners were unable to deliver the rice as per the agreement for the KMS 2011-12. They were forced to hire 'Sortex' machine for sorting of the rice which resulted in extra expenses at the hands of the millers. The varieties referred to above had an inbuilt deficiency as it had pinpoint damage/black spot rice. The Sortex machine was able to removal the black spot to a great extent but the use of this machine resulted in damage and discoloration and even the pinpoint cannot be removed in toto.

4. Assertion has also been made that the petitioners have been raising hue and cry making repeated representations to the authorities one of which is dated 27.02.2012 (Annexure P-8). Petitioners have been approaching and urging the procurement agencies and other official in this regard and the delay in delivery of rice is purely on account of confused and unclear approach of the State and its agencies pertaining to the pinpoint damage rice and that the Central agencies and the State agencies must relax the norms for accepting the procurement of the pinpoint damage rice as it has been found that the said damage does not adversely affect the human health, if consumed, as the same was absolutely fit and safe for human consumption. Petitioners have, therefore, prayed that in the light of the peculiar situation prevalent a holistic view has to be taken to comply with the terms of the KMS 2011-12 and the agreements executed between the parties be harmoniously construed to attain the objectives of the policy so that the respondents may lift the milled rice/paddy lying in the premises of the petitioners' paddy mills without delay or in the alternative, the petitioners be permitted to sell the said milled rice/paddy and deposit the amount as per the custom milled rice rates for the year 2011-12. Prayer has also been made that no coercive action be taken against the petitioners either by way of arbitration proceedings or any other proceeding as contemplated under the agreements entered into between the parties.

5. Upon notice having been issued, replies have been filed by the Food Corporation of India and the various procurement agencies of the State of Punjab. The Food Corporation of India has objected to the maintainability of the present writ petition in the light of the terms and conditions of the agreements entered into between the petitioners and the various procurement agencies of the State of Punjab which provides for arbitration. Similar objections have also been taken by the respondent-procurement agencies of the State of Punjab.

6. Reference has also been made to Clause 16 of the agreement, according to which, in case of default on the part of the miller to perform obligation under the contract, it is lawful to the Government/agency to fortify the security after granting due opportunity to the miller and can also get the work executed at the risk and cost of the miller. Loss/damage suffered by the Government/agency shall be made good from the amount of security deposited or can be recovered in accordance with law. As per Clause 27, all the disputes and differences arising out of or in any manner touching or concerning this agreement whatsoever shall be referred to the sole Arbitrator of the Director/Managing Director or any person appointed by him in this behalf. In terms of these Clauses in the agreement, the writ petition is opposed at the preliminary stage on the question of maintainability thereof. Reliance has also been placed upon the judgment of tis Court in CWP No.6556 of 2010, titled as 'Deep Agro Exports and others Vs. Union of India & others, decided on 27.09.2010.

7. In addition, it has been asserted that the procurement agencies have initiated proceedings under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act') which proceedings are at different stages before the Arbitrator. In the case of petitioner No.10, i.e. Guru Nanak Rice Mills, the Arbitrator has passed an award on 08.08.2014 and objections under Section 34 of the Arbitration Act against the said award have been filed by both the parties in the Court of District Judge, Gurdaspur. Qua petitioner No.8 i.e. Mahal Rice and General Mills, it has been stated that the amount which was due from the said petitioner because of non-supply of custom milled rice, stands deposited and therefore, the arbitration proceedings were not initiated against the said petitioner.

8. These facts have not been disclosed by the petitioners in the writ petition and therefore, the writ petitions are liable to be dismissed on this ground also as the petitioners have not approached the Court with clean hands and have mislead the Court on this score.

9. It has been stated that the petitioners have not disclosed to this Court the material facts and suppressed the same regarding the violation of the terms and conditions of the agreement entered into between the petitioners and the procurement agencies. These writ petitions have been filed with a *mala fide* intention to cover up their illegal acts of embezzlement and misappropriation of 'A' grade paddy supplied to them. They are striving to get benefit of their wrongful acts under the garb of filing the present writ petition despite relaxation in the schedule of delivery of the custom milled rice granted to the petitioners and have committed breach of contract/agreement.

10. The respondents have purchased 'A' grade paddy during the procurement season 2011-12 which was supplied to the petitioners. The petitioners, at the time of delivery of this paddy, carried out the physical verification of the same and issued receipt in writing certifying that 'A' grade paddy has been received by them. Had the petitioners not been satisfied with the quality of paddy supplied to them, they should have taken the objections at that stage or within a reasonable time thereafter. On physical verification of the stocks of rice after milling, which are lying in the premises of the petitioners, it has been found to have been all mixed with broken rice. The petitioners have misappropriated the 'A' grade paddy and are now trying to take the benefit of a fact that in some areas of Punjab, the paddy contained pinpoint damage or the black spot rice. The paddy stock which was supplied to the petitioners was not of the variety which contained the said draw-back of pinpoint or black spot rice. In any case, it has been asserted that the petitioners, if have any grievance which emanates from the agreement/contract, the only remedy available to them is to proceed under the arbitration clause i.e. 27 of the contract.

11. It has been further asserted that there are disputed questions of facts involved in the present writ petition especially with regard to the nature of paddy supplied by the respondents and received by the petitioners, which cannot be gone into in a writ petition and therefore, the writ petitions deserve to be dismissed.

12. Counsel for the petitioners in these cases have taken me through the pleadings and have put forth their submissions. It has been asserted that the present writ petition is maintainable despite there being a provision of arbitration in the agreements entered into between the parties. Merely because the agreement provides for an arbitration clause, the powers of this Court under Article 226 of the Constitution of India is not curtailed in any manner and the Court can intervene while exercising the powers of judicial review in order to prevent arbitrariness as in the present case. In support of this contention, reliance has been placed upon the judgments of Hon'ble Supreme Court in *Noble Resources Ltd. Vs. State of Orrisa & another, 2006 (10) SCC 236, Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai 1998 (8) SCC 1* and *M/s Hindustan Petroleum Corporation Ltd. & others Vs. M/s Super Highway Services & another 2010 (3) SCC 321,* to assert that the writ petitions are maintainable.

13. Counsel for the petitioners have further stated that the petitioners would be satisfied, if a direction is issued to the respondents to take a decision for pricing in consultation with the Food Corporation of India, the Central agency, so that the rice lying in the premises of the petitioners can be utilized. The petitioners, it is asserted, are ready for arbitration by any independent Arbitrator as under the agreement, the Arbitrator is an official of the respondent procurement agency. Prayer has, thus, been made by the counsel for the petitioners for allowing the writ petitions.

14. The fact that the arbitration proceedings stand initiated against the petitioners in CWP No.9323 of 2013 and non-disclosure of the same could not be disputed by the counsel. Similar is the position in CWP No.20624 of 2013 and CWP No.52 of 2014. Petitioner, in CWP No.6319 of 2014, has disclosed the fact of the proceedings under the Arbitration Act being pending.

15. On the other hand, counsel for the respondents have vehemently opposed the maintainability of the writ petitions. Reliance has been placed upon the judgment passed by this Court in *M/s Deep Agro Exports & others'* case (supra) where the Court was dealing with the PAU-201 variety of paddy for the crop season 2009-10 where similar contentions were raised as in these writ petitions, proceeded to rely upon the Clauses 10 and 26 of the agreement which are para materia to Clauses 16 and 27 of the agreement in these petitions and the Court refused to entertain the writ petition and relegate the petitioner to alternative remedy of arbitration as per the agreement. With vehemence, it has been asserted that the writ petitions deserve to be dismissed on the ground that the petitioners have not approached this Court with clean hands and therefore, are not entitled to the discretionary relief through the writ of this Court as they had mislead this Court. Prayer has, thus, been made for dismissal of the writ petitions.

16. I have heard the counsel for the parties at length and have gone through the pleadings of the case.

17. In the considered view of this Court, there are disputed questions of facts which cannot be gone into in the present writ petitions, the basic being with regard to the quality of paddy which was supplied by the respondents to the petitioners as there are claims and counter-claims in this regard. Petitioners are asserting that the quality of paddy supplied to them was defective which resulted in the milled rice which suffers from damage because of pinpoint damage/black spot rice, whereas, the stand of the respondents is that the paddy which was supplied to the petitioners was 'A' grade and the petitioners have misappropriated the said paddy and have replaced or mixed the same after milling, by or with the other stock of already damaged rice. They, with *mala fide* intention, have misused the rice and therefore, have violated the terms and conditions of the contract/agreement for which the arbitration proceedings have been initiated and the Clause 27 of the agreement stood invoked. The petition, therefore, deserves to be not entertained because of the disputed questions of fact involved in the present cases. Apart from that, there are other disputed questions which are not being elaborated herein as the arbitration proceedings are already pending at various stages.

18. It is not disputed that the KMS 2011-12 policy is not under challenge nor are any of the clauses of the agreement entered into between the parties. In the absence of any challenge to the policy/the agreement, the writ petition would not be maintainable especially when the arbitration proceedings have already been initiated and that provision for arbitration is provided for in the contract itself which fact is not disputed. That apart, petitioners in CWP Nos.9323 and 20624 of 2013 and 52 of 2014 have not disclosed the fact that the arbitration proceedings have already been initiated and are pending at various stages. This itself is a good ground for not entertaining these writ petitions.

19. The judgments on which the reliance has been placed upon by the counsel for the petitioners would not be applicable to the cases in hand for the reasons mentioned hereinafter.

19(A). In *Noble Resources Ltd.*'s case (supra), the Hon'ble Supreme Court had observed that the writ would be maintainable even in a contractual field where the Court may exercise its judicial review in order to prevent arbitrariness or favourtism on the part of the government bodies although inherent limitations exist for the Court to exercise its extra-ordinary jurisdiction. In the present case, there is no allegation of favourtism nor are there any arbitrariness exercised on the part of the respondents.

19(B). In *Whirlpool Corporation*'s case (supra), it was observed by the Hon'ble Supreme Court that the High Court has imposed on itself certain restrictions one of which is that if an effective and efficacious remedy is available, it would not normally exercise its jurisdiction. Alternative remedy would not be a bar where the writ has been filed for enforcement of any of the fundamental right or where there has been a violation of principles of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged. None of these contingencies arise in the present cases.

19(C). In *M/s Hindustan Petroleum Corporation Ltd. & others'* case (supra), the Hon'ble Supreme Court did not refer the matter to arbitration on the ground that none of the parties had objected to the maintainability of the writ petition before the High Court and no point of referring the matter to the arbitration was raised before the Court. The said plea could not be raised for the first time before the Hon'ble Supreme Court. In the present case, the respondents have vehemently opposed the writ petition and have stressed upon the arbitration clause in the agreement and also asserted that the proceedings have already been initiated under the Arbitration Act.

20. Counsel for the respondents, on the other hand, have relied upon the judgment in *M/s Deep Agro Exports and others'* case (supra) where in similar circumstances, objections with regard to maintainability of the writ petition in the light of the clause for arbitration in case of dispute relating to the agreement was considered and after reproducing Clauses 10 and 26 of the agreement in para 8, which are para materia to Clauses 16 and 27 in the agreement of the present case, the Court proceeded to hold in paras 8 to 11 as follows:-

> ***[8].*** *Learned counsel for the parties are indeed ad-idem on the execution of the 'agreement' for the custom milling of paddy between the parties, a copy whereof has also been placed on record by the petitioners [Annexure P-1]. As per its clause 22, the agreement came into force from the date of its execution and is in force up to 30.09.2010 or till the clearance of dues, whichever is later. Clauses 10 and 26 of the agreement have a direct bearing on the controversy and the same read as follows:-*
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> > *"10. The entire quantity of rice of all varieties delivered by the miller to the Government/Agency shall conform to the specifications laid down in the Punjab Rice Procurement [Levy] Order, 1983, as amended from time to time or in any other order or notification issued by the Government of India/State Government from time to time. The stocks of rice not conforming to the specifications so laid down shall be liable to be rejected. The miller shall be required to manufacture rice as per specifications laid down by the Government of India and deliver the same to the Food Corporation of India, at its depots by 31.03.2010.*
> >
> > *xx xx xx*
> >
> > *26. All the disputes and differences arising out of or in any manner touching or concerning this agreement whatsoever [except as to any matter the decision of which is expressly provided for the contract] shall be referred to*

the sole arbitrator of the Director/Managing Director or any person appointed by him in this behalf. There will be no objection to any such appointment that the person appointed is or was an employee of Food and Supplies Department, Punjab/Agency or that he had to deal with the matter to which the contract relates and that in the course of his duties such an employee of the Food and Supplies Department, Punjab/Agency had expressed views on all or any of the matter in dispute or difference. The award of such arbitration shall be final and binding on the parties to this contract. It is a term of this contract that in the event of the arbitrator being transferred or vacating his office or being unable to act for any reason, the Director/ Managing Director at the time of such transfer, vacation of office, death or inability shall appoint another person to act as arbitrator. Such a person shall be entitled to proceed with reference from and the stage where it was left by his predecessor"

[9]. *True it is that the entire quantity of rice of all the varieties to be delivered by the petitioner – Millers must conform to the specifications [relaxed or otherwise] prescribed by the Competent Authority and in the event of any failure to maintain such specifications, the rice is liable to be rejected. It is equally true that in the event of any dispute or difference arising out of or in any manner touching or concerning the inter-se 'agreement', the same is referable to the Sole Arbitrator to be appointed in terms of Clause 26, reproduced above, whose* *award shall be final and binding on the parties to the contract.*

[10]. *It is trite that a contract does not become statutory in nature merely because it is executed for a 'public object' or has been awarded by a 'statutory body'. The very statute under/by which the statutory body is constituted, may expressly or impliedly empower such constituent body to enter into contracts for the purpose[s] of discharging its functions and all such contracts would not ipso-facto become 'statutory contracts', the breach whereof might entitle the aggrieved party to invoke even extra ordinary writ jurisdiction under Article 226 of the Constitution. In such like matters, the parties shall be governed by the obligations consciously accepted by them against each other. The breach of the agreed terms and conditions of the contract would thus be got settled by them through the ordinary process of law of contract or through the mechanism agreed to between the parties.*

[11]. *In the case in hand, Clause 26 is wide enough that to take all types of disputes within its sweep which need to be referred to the Sole Arbitrator agreed to be appointed between the parties. In my considered view, the remedy to invoke the arbitral jurisdiction being equally effective and there being no exceptional circumstances warranting the invoking of the extra-ordinary discretionary jurisdiction under Article 226 of the Constitution, the writ petitions are liable to be dismissed on this score alone by relegating the petitioners to the afore-stated alternative remedy.*

21. This Court is of the considered view that the above reproduced observations are applicable and cover these cases and therefore, agreeing with and following the same, these writ petitions are dismissed by relegating the petitioners to the alternative remedy of arbitration as per Clause 27 of the agreement, which has already been resorted to by the respondents and the proceedings are, admittedly, pending at different stages.

22. Before parting with this order, it needs to be clarified here that these cases have not been decided on merits with regard to the factual controversy which is relatable to the agreement/contract entered into between the parties and the facts which have been referred to above, are primarily for the purpose of determination as to the entertainment or otherwise of these writ petitions, any observation/opinion expressed in this order shall have no bearing or effect on the arbitration proceedings pending/concluded as the parties have been relegated to the alternative remedy.

(AUGUSTINE GEORGE MASIH)
JUDGE

June 29, 2015
Harish