

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

Reserved on: 10.05.2016
Pronounced on: 27.05.2016

+ **RFA (OS) 20/2013, C.M. APPL.2150/2013 & 15384/2014**

TINNA OVERSEAS LIMITED

.....Appellant

Through: Sh. Anupam Lal Das with Sh. Rajat Singh, Sh. Anirudh Singh and Sh. Sahil Moonga, Advocates.

Versus

FOOD CORPORATION OF INDIA

.....Respondent

Through: Ms. Kiran Suri, Sr. Advocate with Sh. Gautam Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

%

1. This is an unsuccessful plaintiff's appeal against the judgment of a learned Single Judge dismissing its suit whereby it sought a decree for recovery of ₹1,72,02,553/- with *pendente lite* interest and future interest @ 24% from 16.03.1996.

2. The brief facts are that the defendant (hereafter referred to as "FCI") published a scheme - by virtue of a Press Note dated 04.10.1995 (hereafter referred to as "Press Note") - inviting offers for procurement of wheat for the

purposes of export trade. The Press Note stated that applications were to be submitted to the FCI accompanied with earnest money at the rate of 1% of the basic notified selling price. Clause (II) elaborated selling price as follows: -

“The selling rate of wheat will be reckoned as applicable on the date of deposit of security money with FCI with condition that he takes delivery as per prescribed schedule”

3. The plaintiff/appellant applied to FCI by its letter dated 15.02.1996 indicated the terms for sale of 75,000 Metric Tonnes (“MT”) for export purpose. The terms and conditions were enclosed which were later subjected to a Corrigendum dated 19.02.1996. The contract entered into between the parties contained two conditions that are extracted below: -

“(b) The price will be charged in Indian Rupees. In order to give stability in export transactions, the Corporation 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 Corporation shall revise the prices monthly in terms of rupees with fluctuation of more than 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 fluctuations upto of 1% would be ignored.

XXXX

XXXX

XXXX

(e) (i) However, the buyer shall have the option to pay 10% in addition to the earnest money deposited of the value of the quantities allotted to him at the current price applicable and in that case, the price to be charged would be frozen in dollar terms at the current price to the extent of the quantities for which security deposit of 10% has been made, for a period of three months or till Corporation offers the same, whichever is earlier. This period on the ground of failure of movement arrangement

can be extended for a further period of three months by the Corporation. These buyers will be allowed to lift the consignment on tendering the payment of the balance at the same price in dollar terms at which they initially tendered 10% security deposit. In case of failure to lift the stocks when offered, the buyer shall be liable to pay the price prevailing at the time of delivery of stocks in addition to other compensation to Corporation, provided that in case of failure to lift the stocks even after the extended period if any, allowed by the Corporation, the security deposit of 10% shall be forfeited by the Corporation.

(ii) Such deposit shall be accepted only once at the commencement of this agreement which should be exercised within 7 days of receipt of this communication of the Corporation regarding this term and condition. No further option shall be made available.”

4. It is not disputed that the plaintiff exercised its option under clause II (e) (i) and deposited an amount of ₹3,85,23,750/- in addition to the earnest money deposited, i.e. ₹34,50,000/-. On 20.02.1996, the plaintiff wrote a letter, relevant portion whereof is extracted below: -

“As per the terms & conditions of your letter, we wish to avail the option to pay 10% of the value of 75,000 MTs at the current price applicable, i.e., Rs.5136.50/- in port towns of Andhra & Maharashtra, the price to be charged being frozen in Rupee terms. The balance payment to the extent of 90% of value will be paid at the time of taking delivery at the port towns at our concerned District Office of the State. The exact amount of 10% money to be deposited may be informed to us at the earliest.

Please find enclosed the terms & conditions duly signed by the Authorised Person.”

The above document was produced during the trial as Ex.P-4. The FCI acknowledged receipt of ₹3,85,23,750/- on 11.03.1996 (Ex.P-8).

5. The plaintiff claimed that it opted for payment under clause II (e) (i) on the belief that there was an understanding that the condition of the minimum price being higher than the domestic rate was inapplicable to those who opted under that clause. In other words, purchasers opting in effect had a right to insist that the exchange rate was frozen at US\$ 141.58 per MT regardless of domestic rates, which could fluctuate. Consequently, the FCI could not insist that the balance price payable should be based upon domestic rates. Complaining that the FCI was bound to keep the price of wheat and not revise it upwards, it is urged that the dollar rate prevailing as on the date of entering into the agreement, i.e., in February, 1996 was applicable. So seen, the plaintiff had to pay US\$ 141.58 per MT or ₹4,842.36 per MT as per exchange rates. However, the FCI's demands resulted in payment @ ₹5,136.50/- which was equivalent to US\$ 150.19. The plaintiff claimed that despite its letters dated 06.06.1996, 03.07.1996 and 09.09.1998, the FCI did not refund the amount. It, therefore, sought recovery of the amount claimed in the suit.

6. The FCI contended in its written statement that almost the entire contracted quantity was supplied to the plaintiff not at rate of ₹5136.50 which was equivalent to the Indian Rupee @ US\$ 141.58 but at the lower rate. According to the written statement, the wheat was supplied on 42 occasions out of which on 35 occasions, the supply was @ ₹5073 per MT instead of ₹5136.50 per MT - the latter being in terms of the contract Ex.P-6. It is also urged that on 30.11.1999 by a letter (Ex.P-5), the plaintiff had settled its dues and accepted the amounts.

7. The parties went on trial on the basis of these pleadings. The main

issue was the correct interpretation of Clause II (e) (ii) having regard to the rival contentions and whether consequently the plaintiff was entitled to the decree for the amount claimed and price of wheat was to be frozen in dollar terms as on the date when the payment was deposited.

7. After considering the rival pleadings, the learned Single Judge - in the impugned judgment - discussed the evidence of FCI and noticed that there was no dispute with respect to the fact that wheat was lifted in 42 lots. Of these, the plaintiff had deposited the cost of wheat procured at ₹5136.50 on 11 occasions. In the balance 31 occasions, the plaintiff had paid ₹5073 per MT. The learned Single Judge in paragraph 11 rejected the claim that excess amount was recovered holding as follows: -

“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.”

8. As regards, the FCI's contentions that the plaintiff had settled its claims fully and finally, the learned Single Judge noticed that the proceeding, i.e., a writ petition was pending in the Andhra Pradesh High Court. However, in view of the findings recorded on the main issue, the suit was dismissed.

9. The plaintiff has relied upon documents of which it seeks leave to file for the first time by an application - CM No.2150/2013 under Order 41 Rule 27 CPC. This includes various file notings and the opinion of the Union Law Minister on the correct interpretation of the contract in question.

Arguments of parties

10. Mr. Anupam Lal Das, learned counsel for the Plaintiff argues that every buyer/exporter, was entitled to choose whether to avail Clause II (b) or Clause II(e) (i) of the terms and conditions contained in the letter dated 15.02.1996, issued by the Respondent. He submits that the relevant expression was “...*the price to be charged would be frozen in dollar terms at the current prices to the extent of quantities for which security deposit of 10% has been made....*”. The current price on 15.02.1996 in dollar terms was \$141.58 per MT – equivalent to ₹5136.50/-. As a result, the price of wheat was frozen in dollar terms, at \$141.58 per MT, with the Appellant availing Clause II (e) (i), as informed/conveyed by their letter dated 20.02.1996. It tendered a sum of ₹3,85,23,750/- towards the 10% security deposit on 09.03.1996 at the dollar rate of \$141.58, equivalent to ₹5136.50/-, based on the value of dollar existent on 15.02.1996.

11. It was argued that the Appellant availed supplies in complete/full between the months of March – May 1996. Between 15.02.1996, a dollar was valued at ₹36.50 and over March/May, 1996 the average value of a dollar had fallen to ₹33-34/-. Resultantly, with the dollar rate fixed at \$141.58 per MT, the Appellant could be called or required to pay its equivalent value as existent in the months of March - May, 1996- when the Appellant availed the 75,000 MT of wheat. The price of wheat had not been fixed on rupee terms but on dollar terms. However, FCI's stand, endorsed by the impugned judgment results in the fixation of wheat price at ₹5136.50/- per MT. Likewise, concluding that the price had been fixed on rupee terms, the impugned judgment proceeded to hold that the contract stood novated with FCI claiming and the Appellant paying ₹5073/- per MT. This conclusion- argued the learned counsel failed to appreciate that FCI was charging prices from the Appellant, on the basis of the domestic prices applicable then. This was based on a completely erroneous construction of Clause II (e) (i), wherein a party on payment of 10% of the price pronounced on that date, was entitled to fix the dollar rate per MT of wheat. It is submitted that the Appellant had fixed the price of wheat at \$141.58 per MT. Necessarily, the value of dollar on the date of delivery would apply; therefore, the Appellant had to pay the equivalent of \$141.58, existing on the date (s) of delivery between March-May, 1996.

12. The Appellant's counsel argued that the entire meaning, object and purpose of Clause II(e) (i) of the terms and conditions were erroneously misconstrued by the impugned judgment, in fixing the price at ₹5136.50 per metric tonne and then finally insisting on novation of the contract.

13. Learned counsel relied upon the judgment in *New Okhla Industrial Development Authority v. Arvind Sonekar* 2008 (11) SCC 31, stating that when the contract terms are clear, any amounts paid on account of demands by one party but which the latter is not entitled to under the agreement have to be refunded. It is highlighted that a plain interpretation of the term of the contract, the condition with respect to linkage between notified domestic rates and the price payable by purchaser to opt to protect itself against exchange fluctuation would be obliterated. The idea and purpose behind Clause II (e) (i), highlighted counsel, was to ensure that regardless of the rise and fall of the exchange rate of the dollar, the Indian exporters were assured - upon payment of 10% of the cost - a fixed rate. This kept out any uncertainty in the cost of procurement and also, acted as insurance. The learned Single Judge completely overlooked this aspect and on the contrary agreeing with the FCI's interpretation, erred in law.

14. Learned counsel also submitted that as an instrument of the State and possessing monopoly powers, the FCI, a statutory corporation is bound to act fairly. Having unambiguously represented to potential purchasers about the price mechanism and allowing them to act upon representations to that effect, to their detriment, it could not have legitimately retained excess amounts. Learned counsel relied upon the judgments reported as *Shreelekha Vidyarthi v. State of Uttar Pradesh*, 1991 (1) SCC 212 and *Mahabir Auto Stores & Ors. v. Indian Oil Corporation & Ors.*, 1990 (3) SCC 752.

15. Learned senior counsel for FCI, Ms. Kiran Suri, urged that this Court should not interfere with the judgment and findings of the learned Single Judge. It is submitted that the scheme under the contract was such that

exchange fluctuations upwards, i.e., in the event of rising price of dollar were clearly contemplated as falling within Clause II (e) (ii). The trend of exchange rates as on 04.10.1995 was such that value of USD continued to rise. However, after the parties entered into the contract, the dollar prices started to decline. It was contended that the parties' understanding is apparent from the fact that the parties were at *ad idem* or in complete agreement with the interpretation of Clause II (e) (i), as is clear from the fact that the plaintiff itself voluntarily deposited the dollars equivalent at ₹36.28 on 20.02.1996.

16. The plaintiff received more than 1/3rd of the consignment and did not protest in that regard. It protested on 14.05.1996 well after the 33 consignments were lifted by it. Since the parties were clear as to the meaning of contract and in fact the plaintiff had deposited the amount based upon the exchange rates as prevalent on the date of the contract at ₹36.28, the question of it contending that a lesser rate rather than ₹5136.50 per MT was payable, was without substance and unmerited. Learned counsel submitted that the plaintiff's reliance upon the Law Minister's opinion is of no avail because subsequent to the opinion the final decision of the Government was not to refund any excess amount but rather to contest the proceedings.

Analysis and findings:

17. The controversy – evident from the factual discussion – is the correct interpretation of clause II of the contract. Rival interpretations of the terms and conditions are sought to be placed upon clause II(e)(i); whereas on the

one hand, the plaintiff contends that the said stipulation requires buyers to deposit 10% over and above 1% required of it, clause II(b) entitles it to freeze the US \$ terms “*at the current price*”. What FCI argues is that this condition should be read along with the earlier stipulation in clause II(b) that fluctuation and exchange rate and the fixation of price of the goods would be, “*subject to the condition that the prices so fixed are not lower than the price fixed for domestic sale*”. The plaintiff’s argument is that if the current rate revision is not undertaken on the basis of what prevailed, there would be actually no difference for those not opting for the 10% upfront deposit and those who had in fact opted for it.

18. The scheme in this case was envisioned by the Press Note of 04.10.1995 which clearly stated that the selling rate of wheat would be reckoned as the rate applicable on the date of deposit of security money with FCI and that the sale would be in US \$ (foreign exchange terms). In the present case, the offer letter clearly stated – in clause II(b) that while charging price in Indian Rupees, the fixation of price would not be, “*lower than the rates applicable for domestic sales. While doing so, the FCI shall revise prices in monthly terms with fluctuation with reference to the \$-Rupee parity existing on the date of notification which has been taken at US\$ buying (bill) rate @ Rs.36.28 while fluctuations of upto 1% would be ignored.*” The offer letter of 15.02.1996 itself clearly stated that sale of wheat to purchases *inter alia* in Andhra Pradesh located within 50 Kms of port town would be @ US\$ 141.58. The offer clearly indicated the equivalent rupee term @ Rs.5136.50/-.

19. The appellant/plaintiff accepted the offer and in fact communicated its

position by depositing 10% of “*the value of 75,000 MTs at the current price applicable, i.e. Rs.5136.50 in port towns of Andhra Pradesh.*” It is, therefore, clear that both parties had no dispute as to what constituted terms and conditions of the contract. The FCI proposed that the rate at current price was ₹ 5136.50/- for US\$ 141.58/-; the plaintiff agreed to this too. The plaintiff even deposited 10% of the amount calculated in that regard. The evidence on record in the form of tabular statement relied upon by the FCI (and quoted in the impugned judgment) also reveals that substantial consignments (17833.569 MTs) were accepted by the plaintiff. It was in this background that on 18.04.1996, the plaintiff demanded that a rate lower than ₹5136.50/- had to be charged. The claim made in the letter of 18.04.1996 was that on an analysis of the average US \$ price for the month of March 1996, it was evident that the average rate was ₹ 34.22 and that the price to be collected, therefore, should have been reduced to ₹ 4844.86/-. This formed the basis of the claim for refund of the so-called excess amounts. To support this, the plaintiff had relied upon a letter by the Syndicate Bank which indicated the exchange price for US\$ in the months of January and February. The demand for refund was reiterated in subsequent letters of 14.05.1996 and 06.06.1996.

20. In this Court’s opinion, the plaintiff’s claim had to fail because the construction sought to be urged in respect of clause II(e)(i) is premised on current price of the US\$ being “frozen”. A careful reading of the entire condition would clarify that the price to be charged was to be frozen in USD terms at current price as on the date of the contract “*to the extent of the quantities for which security deposit of 10% has been made, for a period of*

three months or till Corporation offers the same whichever is earlier.” *Arguendo*, were this condition to be construed independently of clause II(b), nevertheless, the parties’ argument, that what the current price was cannot be different from that for which the plaintiff accepted the offer is clear from its letter of 20.02.1996 – it enclosed the signed agreement which clearly stipulated ₹5136.50/- as the “*rate for the equivalent of US\$ 141.58/- and valid till further orders subject to the provisions in para as under.*”

21. This Court is also of the opinion that besides the parties’ consensus – evident from acceptance of the condition and deposit of the amount based upon US\$ 141.58/- being equivalent to ₹ 5136.50/-, there is no indication in the contract that clause (e)(i) is independent of clause II(b). This is because both are part of the same contract, and deal with eventualities with respect to the payments to be made for the goods. There is nothing in clause II(e)(i) to show that it overrides the conditions contained in clause II(b), rather clause II(e)(i) appears to be an additional option but in no way removed from or independent of the previous conditions.

22. As far as the second question with respect to the final settlement urged by the FCI is concerned, the Court notices that the document relied for this purpose – in the written statement - is a letter of the plaintiff (dated 30.11.1999), the letter was produced during the trial. It acknowledged receipt of a communication dated 30.11.1999 with regard to partially withheld earnest money of ₹6,25,754.55/- and stated that as desired, the plaintiff, “*hereby give undertaking that we would be bound by the final judgment of Writ Petition 3547 of the Hon’ble High Court of Andhra Pradesh. A pre-receipted bill for the said amount which stated that the*

refund of partially withheld earnest money deposited was in full and final settlement of this transaction”.

23. A plain reading of the letter and receipt itself revealed that it was not unconditional and consequently that the pre-receipted bill was in terms of FCI's requirement that the plaintiff furnish an undertaking that it would be bound by the terms of the judgment. This document, in the Court's opinion, cannot be termed as a discharge in any manner absolving the liability, if any, of the FCI. It was concerned only with the withheld earnest money deposited. Furthermore, in terms of the letter, the plaintiff agreed to be bound by the judgment of the High Court of Andhra Pradesh.

24. The other aspect is with regard to the document relied upon by the plaintiff in the form of Law Minister's opinion. Now this document was not part of the original record. The then Law Minister, after considering the facts, was of the opinion that clause II(e)(i) is independent and not subordinate to clause II(b). In terms of the opinion, it was felt that the price in respect of those exporters/purchasers who had deposited 10% security would stand “frozen” for the specified period in respect of exchange rate fluctuation and the price was such that it would not be restricted in any manner by the rates applicable at the domestic level. This Court is of the view that such opinion – expressed on 04.02.2000, is not binding and conclusive. FCI has sought to rely upon additional documents to show that even on 20.07.2005, the opinion expressed by the Government was that the sale price for export should not be less than domestic sale price.

25. On an overall consideration of this question, the Court is of the opinion that the findings expressed earlier about the correct interpretation of

clause II(e)(i), i.e. that it is linked with clause II(b) has to be sustained. Regardless of what opinion is expressed by one functionary or the other, howsoever high, it is the task of the Court alone to decide what is the true of the terms of the contract. Whilst the plaintiff's submission could lead to one plausible interpretation of the contract, equally, that advocated by the FCI is another plausible view. There is undoubtedly logic to the plaintiff's submission that the exchange fluctuation – downwards to the extent it benefits them should be preferred. However, at the same time, the finding of the learned Single Judge cannot be termed as unreasonable or illogical; in this regard, as noticed earlier, the parties were clear as to what was meant by “current market rate”. Its linkage with the domestic prices and moreover, the exact amount equivalent of \$141.58/- being ₹5136.50/- was not a matter of doubt. In fact, a major part of the consignments were purchased at ₹5136.50/-. The balance was purchased at ₹5073/-. For a good period of six weeks, the plaintiff did not raise a controversy in this regard. When parties were, therefore, clear as to what was the precise meaning of the term in the contract, the subsequent rethink by one could not have – at least in the realm of contract interpretation - led to the conclusion that the understanding arrived at by them was based on a mistake of fact, nor for that matter could it be concluded that either party sought to take undue advantage of it. In other words, when the plaintiff entered into the contract, it understood the current market rate at which wheat was to be lifted @ ₹5136.50/- per MT (equivalent of US\$ 141.58/-), that was “frozen” by virtue of clause II(e)(i). The plaintiff's argument to the contrary are unpersuasive and, therefore, rejected.

26. In view of the above findings, this Court is of the opinion that there is no merit in the appeal. RFA(OS) 20/2013 is accordingly dismissed. There shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

MAY 27, 2016

