

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

% *Judgment Reserved on : January 22, 2016*  
*Judgment Delivered on : February 01, 2016*

+ **FAO(OS) 400/2015**

SUNAGRO SEEDS PVT LTD ..... Appellant

Represented by: Mr.Saket Sikri, Advocate with  
Mr.Deepak Yadav, Advocate

versus

NATIONAL SEEDS CORPORATION LTD ..... Respondent

Represented by: Mr.Yashvardhan, Advocate with  
Mr.Piyush Singh, Advocate

**CORAM:**

**HON'BLE MR. JUSTICE PRADEEP NANDRAJOG**

**HON'BLE MS. JUSTICE MUKTA GUPTA**

**PRADEEP NANDRAJOG, J.**

1. Limited challenge was made by the appellant to an award dated February 16, 2015 passed by the learned sole Arbitrator. Counter claim by the respondent for damages in sum of ₹1,38,58,650/- (Rupees One Crore Thirty Eight Lacs Fifty Eight Thousand Six Hundred and Fifty only) awarded by the learned Arbitrator was challenged. The appellant was unsuccessful in the challenge to the award. Vide impugned decision dated May 06, 2015 OMP No.291/2015 filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996 has been dismissed.

2. It is not in dispute that the appellant had indented for 1075 quintals of onion seeds with the respondent and only 394 quintals were lifted. 681 quintals remained un-lifted. Agreed price was ₹300/- per kg.

3. Parties are not at variance that if there is a breach of contract for sale of movable property, the measure of damages for the seller is the difference in the market price of the goods on the date when the buyer defaulted and the agreed sale price; subject to the parties agreeing in the contract as to what would be the measure of damages. By measure of damages we mean that if the parties have agreed in the contract to determine the damages in a particular manner, the damages have to be determined in the manner agreed to.

4. The principle of law concerning damages not being in dispute, the relevant fact which we need to note is that as per the appellant the measure of damages were determinable as per the schedule to the agreement, clause 3.3 whereof read as under:-

*“the liquidated damages payable by the dealer to NSC is 3% of the cost of seed not accepted/lifted at the general sale price applicable at the time of supply.”*

for the reason clause 20 and 21 of the main contract read as under:-

*“20. If the Dealer fails to either lift the quantity allotted within 15 days of NSC’s intimation or to suggest a schedule of supply as envisaged in clause 18. NSC may in its discretion cancel the allotment and dispose of the relevant quantity of seed in any other manner and treat such lapses on the part of the Dealer as shortfall in lifting the committed quantities, for which the Dealer is liable to pay to NSC liquidated damage as per clause 21.*

*21. The Dealer would be free to restrict the ultimate purchase of seed to extend of only 60 per cent of the quantity originally indented or the full quantity allotted by NSC whichever is less. If the Dealer fails to lift/accept the quantity allotted by NSC or 60 per cent of the original*

*indent whichever is less the Dealer shall pay to NSC liquidated damage at the rate prescribed in the Schedule.”*

5. The argument of the appellant is simple. If it failed to lift the allotted quantity of onion seeds, as per clause 20, it became liable to pay liquidated damages as per clause 21, as per which clause in turn the liquidated damages were to be at the rate prescribed in the schedule.

6. The damages claimed by the respondent, which have been awarded by the learned Arbitrator are based on the price realized by the respondent after selling 681 quintals onion seeds in the market, which was ₹34,05,000/- (Rupees Thirty Four Lacs and Five Thousand only). As per contract price the appellant was to pay ₹2,04,30,000/- (Rupees Two Crores Four Lacs and Thirty Thousand only) and was entitled to a discount of 15.5% i.e. ₹31,66,650/- (Rupees Thirty One Lacs Sixty Six Thousand Six Hundred and Fifty only). Net amount payable by the appellant would be ₹1,72,63,350/- (Rupees One Crore Seventy Two Lacs Sixty Three Thousand Three Hundred and Fifty only). Subtracting ₹34,05,000/- (Rupees Thirty Four Lacs and Five Thousand only) i.e. the sum realized by sale, damages awarded are ₹1,38,58,650/- (Rupees One Crore Thirty Eight Lacs Fifty Eight Thousand Six Hundred and Fifty only).

7. Case pleaded by the respondent before the Arbitrator was that as per clause 18 and 19 of the contract a dealer had to lift the seeds within 15 days of intimation by the respondent, and if the quantity was sizeable the dealer could within 15 days of receipt of intimation suggest a schedule of supply. The two clauses being 18 and 19 of the contract read as under:-

*“18. The Dealer shall lift the seed within 15 days of intimation by NSC about the availability of the seed for lifting delivery. If the quantity is sizeable, the Dealer may*

*within 15 days of receiving the NSC's intimation, suggest a schedule of supply and if NSC agrees to the same, the supplies can be arranged accordingly.*

*19. The advance indents furnished by the Dealer shall receive priority consideration in the acceptance of booking and supply of seeds."*

8. As per the respondent clause 21 would come into play only if the dealer restricted the ultimately purchase of seed to 60% of the indented quantity, and upon failure to lift said 60% of the indented quantity.

9. The argument in response by the appellant was that as per clause 20, if the dealer failed to lift the quantity allotted, the respondent had a discretion to cancel the allotment and proceed to recover liquidated damages as per clause 21. Meaning thereby failure to lift the indented quantity, unrestricted by the appellant intimating that it would be lifting only 60% of the indented quantity, would make appellant liable to pay damages as per schedule.

10. To put it pithily the argument would be that damages envisaged by clause 20 and 21 were the same for the reason as per clause 20 the liquidated damages would be as per clause 21, which clause in turn made a reference to the schedule.

11. Having perused the award, which is extremely prolix and spans 116 pages, thereby making the same a torturous reading and the complexity of the matter not justifying such a lengthy award, we find that the learned Arbitrator has not even come to grips with the issue.

12. The learned Arbitrator has in para 15.13.2 of the award noted that the dispute relating to damages revolved around the interpretation of clause 20 and 21 of the agreement and clause 3.3 of the schedule attached to the

agreement. No doubt the learned Arbitrator has correctly noted his task i.e. to interpret clause 20 and 21 of the agreement with reference to clause 3.3 of the schedule. Thereafter, in paras 15.13.5 and 15.13.6 the learned Arbitrator has recorded as under:-

*“15.13.5 As per Clause 20 of the Seed Dealership Agreement, dealer is required to lift the quantity allotted within 15 days of NSC’s intimation. Claimant has failed to adhere to the timelines and as such breach of Agreement resulted.*

*15.13.6 The Claimant again failed to lift the seed as per the agreed Schedule vide Respondent’s letter dated 8.7.2011 and claimant’s letter dated 21.7.2011. Respondent’s letter dated 25.07.2011 reminds the claimant to fulfill its obligation to lift the balanced onion seed.”*

13. Argument of learned counsel for the respondent that in the two paragraphs the learned Arbitrator has interpreted the terms of the contract has simply to be noted and rejected for the reason in said two paragraphs the learned Arbitrator has noted a term of the contract as also a fact of the appellant not lifting the indented quantity of onion.

14. Having another string to his bow, learned counsel argued that the reason could be found in para 15.13.13, which reads as under:

*“15.13.13 The Claimant again vide its letter dated 29.6.2012 offered to lift 400 qtls. NSC responded to this offer by stating that Claimant has failed to meet its commitment to lift the booked/indented seed in spite of repeated reminders and as such now they have decided to invite tenders to liquidate the unsold stocks indented/booked by the Claimant.*

*From the above narration it is clear*

*(a) That Claimant has repeatedly failed to meet its commitment to lift the booked/indented onion seed as required under Clause 20 of the Seed Dealership Agreement.*

*(b) That the loss suffered by the Respondent is attributable to the continuous unfulfilled promises and commitments made by the Claimant from June/July, 2011 onwards and extended till as late as April/May, 2012. The facts on record clearly establish that the Claimant has indulged in unfair trade practice of keeping the Respondents on tenter-hook by continuously renewing the schedule and not fulfilling commitments repeatedly made. The Respondent has made all efforts to accommodate the Claimant but misleading behaviour of the Claimant led to loss suffered by the Respondent.*

*(c) That the Tribunal is of the opinion that claimant has failed to exercise option to restricting the ultimate purchase of onion seed to the extent of only 60% of the quantity originally indented and as such not entitled to the benefit of clause 21 of the Agreement dated 23.7.2007 and or Clause 3.3 of the Schedule thereof. Tribunal is of the opinion that overt and covert actions of the Claimant give no notice to the Respondent about his intention of restricting lifting of indented/booked seeds. In other words restriction of indented/booked seed quantity cannot be inferred from misleading actions and unfair trade practices of the Claimant and as such it is not legally tenable to allow the benefits of clause 21 of the Agreement read withy Clause 3.3 of the Schedule to the Claimant.*

*(d) That the liability of the Claimant will be to pay liquidated damages on entire un-lifted 681 qtls. of seed.*

*In view of above the liability of the Claimant is as under:*

|    |                                              |                |
|----|----------------------------------------------|----------------|
| A. | Total quantity of onion seed booked/indented | 1075 qtls. (A) |
|----|----------------------------------------------|----------------|

|    |                                                                            |                      |
|----|----------------------------------------------------------------------------|----------------------|
| B. | <i>Quantity of Onion seed lifted</i>                                       | <i>394 qtls. (B)</i> |
| C. | <i>Quantity un-lifted (A-b)</i>                                            | <i>681 qtls. (C)</i> |
| D. | <i>Cost of the seed not lifted 68100 Kgs. @ ₹300/- per Kg. (GSP rates)</i> | <i>₹2,04,30,000</i>  |
| E. | <i>Discount of 15.5%</i>                                                   | <i>₹31,66,650</i>    |
| F. | <i>Amount payable by M/s. Sun Agro Seeds Pvt. Ltd.</i>                     | <i>₹1,72,63,350</i>  |
| G. | <i>Dues recovered from sales of Onion @ ₹50/- per kg.</i>                  | <i>₹34,05,000</i>    |
| H. | <i>Balance payable (G-H)</i>                                               | <i>₹1,38,58,650</i>  |

15. Now, conclusions have been arrived at by the learned Arbitrator in the said paragraph, sans any reasons.

16. The learned Single Judge has to some extent accepted that the learned Arbitrator has not come to grips with the issue, but has concluded that meaningfully read the reasoning of the learned Arbitrator would be that since the appellant did not intimate that it would lift 60% of the seeds and thus the method of awarding damages was correct. The reasoning of the learned Single Judge in paragraph 13 of the impugned order reads as under:-

*“13. Having considered the submissions made by learned counsel for the petitioner, suffice to state, meaningfully read the conclusion of the learned Arbitrator, was that the petitioner having not expressed its intention to lift only 60% of the quantity at the outset and even after prescribing the schedule, failed to lift the onion seeds which resulted in a loss to the respondent, need to be compensated by the petitioner. Insofar as the submission that in view of the position of the contract in terms of clause 20 and 21, the liability could not have exceeded beyond ₹1,65,600/- is concerned, suffice to state, the clause 20 and 21 would come into play only when the*

*dealer fails to lift the quantity allotted within 15 days of the respondent's intimation or fails to suggest the schedule of supply as envisaged in clause 18 and not where the party that is the petitioner had repeatedly failed to meet its commitment/schedule to lift the booked/indented onion seeds. In fact, it was concluded by the learned Arbitrator that the petitioner had continuously unfulfilled promises and commitments made by it from June/July 2011 onwards till April/May, 2012. He was of the opinion that the petitioner was not entitled to the benefit of clause 21 of clause 3.3 of the schedule thereof. He worked out the liability in the manner already reflected above. The view taken by the learned Arbitrator is a plausible view. Insofar as the judgments relied upon by learned counsel for the petitioner are concerned, the proposition of law laid down in those judgments are well settled. However, the same are not applicable on the facts of the case. I do not see any merit in the petition."*

17. The observation made by the learned Single Judge that meaningfully read the conclusion of the learned Arbitrator was that because the appellant did not express its intention to lift only 60% of the indented quality clause 20 and 21 were of no help to him because as per the two clauses they would be applicable only when the dealer failed to lift the quantity allotted within 15 days of the respondent's intimation or failure to suggest the schedule, is a mere recognition of what the learned Arbitrator did.

18. But 'Why'? Has not been answered even by the learned Single Judge.

19. Faced with the above the award would be liable to be set aside leaving it open to the parties to appoint another arbitrator and have the dispute resolved. But we do not do so because the interpretation of the contract, to our mind is a straight line reason.



20. The reasoning would be : as per clause 18, the appellant was obliged to lift the indented seeds within 15 days of intimation, and if the quantity was large, within and agreed supply schedule. Failure to lift the allotted quantity within 15 days or as per agreed schedule of supply if the quantity was sizeable would entitle the respondent, as per clause 20, to cancel the allotment and render the appellant liable to pay liquidated damages as per clause 21. Clause 21 dealt with the situation where the dealer restricted the ultimate purchase to only 60% of the indented quantity with advance intimation that the dealer would lift only 60% of the indented quantity and if there was breach to lift even the said 60% indented quality to pay damages at the rate prescribed in the schedule. Thus reference in clause 20 to the liquidated damages *as per clause 21* would mean that the damages determinable under clause 20 would be in the same manner as would be the damages payable under clause 21. Thus, the incorporation of the schedule would be to clause 20 as well.

21. Though it may not be necessary for our judgment, because we have to interpret the contract for the reason neither the learned Arbitrator nor the learned Single Judge have done so, to opine as to why the parties penned clause 20 and clause 21 in the agreement if the measure of damages contemplated by both was the same. But the reason which we can think of, being the only reason possible, is that the respondent, which is the author of the contract, had in mind that the contract gave an option to the dealer to restrict the purchase to 60% of the indented quantity and thus the author of the contract thought, by way of precaution, to incorporate both situations in the contract with reference to the liability to pay damages.

22. We therefore hold that the measure of damages being liable to be determined under the contract as per clause 3.3 of the schedule; for the 681 quintals un-lifted onion seeds the appellant would be liable to pay damages at 3% of the cost of seed. Learned counsel for the appellant conceded that the agreed cost was ₹300/- (Rupees Three Hundred only) per kgs. Un-lifted quantity was 68,100 kg i.e. 681 quintals. Total price being ₹2,04,30,000/-. (Rupees Two Crores Four Lacs and Thirty Thousand only). 3% thereof as liquidated damages would be ₹6,12,900/- (Rupees Six Lacs Twelve Thousand and Nine Hundred only).

23. The appeal is disposed of modifying the impugned award dated February 16, 2015 to the extent counter claim by way of damages allowed in favour of the respondent in sum of ₹1,38,58,650/- (Rupees One Crore Thirty Eight Lacs Fifty Eight Thousand Six Hundred and Fifty only) is reduced to ₹6,12,900/- (Rupees Six Lacs Twelve Thousand and Nine Hundred only). The rest of the award which has not been challenged by either party is maintained.

24. No costs.

**(PRADEEP NANDRAJOG)**  
**JUDGE**

**(MUKTA GUPTA)**  
**JUDGE**

**FEBRUARY 01, 2016**  
*mamta*