

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

+ **RFA (OS) 21/2013**

Date of decision: 10th August, 2017

TINNA OVERSEAS LIMITED Appellant
Through: Mr. Rajat Singh, Adv.

versus

FOOD CORPORATION OF INDIA & ANR. Respondents
Through: Mr. R.K.Dhawan, Ms. Richa
Dhawan, Mr. V.K.Teng, Adv. for
R-1/FCI
Mr. Dileep Poolakkot, Adv. for R-2

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J. (Oral)

The appellant is the plaintiff/Tinna Overseas Ltd., in the suit CS(OS) No.1086/1999. The respondents are defendants, Food Corporation of India (FCI for short) and Project & Equipment Corporation of India Ltd. (PEC for short).

2. The impugned judgment and decree dismisses the suit filed by the appellant for recovery of Rs.1, 31,77,460/- with an interest @12% p.a.

3. The impugned judgment holds that there was no privity of contract between the appellant and FCI. Interpreting Associateship Agreement dated 29th December, 1995 (Ex.PW1/D1) and the letter

dated 6th February, 1996 (Ex.DW2/4) written by the Government of India, Ministry of Food to PEC, it has been held that PEC was not liable to ensure that FCI would not increase or change the price of wheat from US Dollar 141.58 or 137.46 per metric ton. Even otherwise the letter dated 6th February, 1996, (Ex. DW2/4) makes reference to the price fixation mentioned in the attached Press Note dated 2nd February, 1996 (Ex. DW1/2), which states that price declared by the FCI would be variable and not a fixed price.

4. FCI, a Public Sector Undertaking, pursuant to assurance given by the Government of India to the Islamic Republic of Iran, was permitted to sell 1 lakh metric tons wheat from the Central Pool to Iran.

5. Pursuant to the said understanding, PEC which is an agency of Government of India had entered into an agreement with Government Trading Corporation of Iran (GTC for short) on 23rd November, 1995 (Ex. DW2/2) for sale or export of wheat at the rate of US Dollar 180 per metric ton. The wheat was to be procured by PEC from FCI.

6. The appellant had entered into Associateship Agreement dated 29th December, 1995 (Ex. PW1/D1) with the PEC. FCI is not a party and a signatory to this agreement (Ex. PW1/D1). To this extent, that there is no dispute or lis between the appellant and the respondents.

7. The contention of the appellant, which has been rejected in the impugned judgment, is that it was agreed that wheat for export from the Central pool would be supplied to them at the rate of US Dollar 137.46/141.58 per metric ton. Contrary to the agreed terms, the FCI had demanded and the appellant was forced to pay to FCI, US Dollar 154.50 per metric ton. The appellant had made over payment of Rs.1,31,77,460/- for 40,595 metric tons of wheat procured from FCI, and exported to Iran.

8. The appellant has in appeal restricted their claim to the difference between US Dollar 141.58 and US Dollar 154.50 per metric ton of wheat.

9. The primary question and issue is whether the respondents had agreed on the price of US Dollar 141.50 per metric ton and, therefore, are liable to refund the difference between US Dollar 141.50 and 154.50 per metric ton for 40,595 metric tons of wheat sold by FCI.

10. As stated above, it is an accepted and admitted position that there was no written contract between the appellant and FCI. Further, FCI had never written to the appellant confirming or accepting that wheat for export to Iran would be sold at the rate of US Dollar 141.58 per metric ton. The Associateship Agreement (Ex. PW1/D1) did not specify and stipulate the price at which FCI would sell wheat for export to Iran. The question is whether this rate was an implied and accepted term agreed by PEC and FCI.

11. The Government of India vide letter dated 6th February, 1996 (Ex. DW2/4) had informed PEC 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.

2. *This issues with the concurrence of the Ministry of Finance.*

Yours faithfully,

(D SUDHAKARAN)

Under Secretary to Govt. of India Tel.No.338 2504

Fax No.378 2213"

12. The aforesaid letter states that PEC was entitled to export one lakh metric tons wheat from Central Pool to Iran to fulfill the Government's obligation under the contract signed with the GTC of Iran. The Government had decided to honor the said contract considering friendly relations between the two countries on priority basis as a special case without payment of EMD (Earnest Money Deposit). The price, it was stated, shall be the existing open sale rate of wheat for export i.e. US Dollar 141.58 per metric ton ex-FCI godown as per the terms and conditions specified in the Press Note dated 2nd February, 1996 (Ex. DW1/2). The price was to be charged in Indian rupee.

13. The aforesaid press note, Ex. DW1/2, reads as under:-

"

PRESS NOTE

Government had authorized the FCI to export/sell for the purpose of export 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:

<i>S.No.Name of the State</i>	<i>Price in</i>	
	<i>(US \$)</i>	<i>Rupees</i>
1. Punjab, Haryana, Uttar Pradesh & Delhi	(122.89)	4458.45
2. Madhya Pradesh & Rajasthan	(125.77)	4562.95
3. Bihar	(130.08)	4719.30
4. Andhra Pradesh)-Sale within)50 Kms. Of	(141.58)	5136.50
5. Karnataka)port towns		
6. Kerala) Sale in places) other than port	(135.84)	4928.30
7. Gujarat) town		
8. Maharashtra)		
9. Orissa)		
10. Tamil Nadu)		
11. West Bengal)		

Note:

- 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.” (emphasis supplied).

14. The press note refers to authorization given to FCI to export of wheat from their stock for the years 1995-96 under open market sale scheme (OMSS) for export purposes. The Government had revised the open sale rates of wheat, which varied from State to State. Rate of US Dollar 141.58 per metric ton was fixed for the State of Andhra Pradesh. On conversion in Indian Rupee, the price payable was Rs. 5136.50/- per metric ton.

15. We have referred to the aforesaid figures both in US Dollar and in Indian Rupee as the letter dated 6th February, 1996 (Ex. DW2/4) refers to the rate of wheat for export as US Dollar 141.58 per metric ton, but the price charged was to be in Indian Rupees, and terms as per Press Note (Ex. DW1/2) would apply. The press note (Ex. DW1/2) states that the FCI could revise the prices in Indian Rupee (Ex. DW1/2) with every change or fluctuation of 1% in the Dollar – Rupee exchange rate. This adjustment was to be computed by taking the Dollar buying rate at Rs.36.28/-. Day to day fluctuations below 1% were to be ignored.

16. However, the most significant and important stipulation in the Press Note dated 2nd February, 1996, Ex. DW1/2, was the stipulation that the sale price would not be lower than the price applicable to domestic sales. In other words, the sale price for

supply of wheat for export would not be lower than the price so fixed and applicable for the domestic sales made by the FCI.

17. Associateship Agreement (Ex. PW1/D1) is dated 29th December, 1995, whereas the letter of the Government of India and the Press Note (Ex. DW2/4 and DW1/2, respectively) were issued subsequently on 6th February, 1996 and 2nd February, 1996. The appellant has not disputed or challenged the letter (Ex. DW2/4) or the Press Note (Ex. DW1/2). The purchases from FCI have been after 2nd February, 1996. The appellant and the respondents including FCI were bound by the letter of the Government of India (Ex. DW2/4) and Press Note (Ex. DW1/2).

18. We would however, also examine the terms of Associateship Agreement (Ex. PW1/D1) to ascertain, whether any purchase price was fixed.

19. The Associateship Agreement dated 29th December, 1995, (Ex. PW1/D1), does not have any specific stipulation or clause relating to or specifying the price at which the wheat was to be procured from or sold by FCI for export to Iran. The Associateship Agreement dated 29th December, 1995 is silent.

20. The clauses of the Associateship Agreement (Ex. PW1/D1) relied upon by the appellant and PEC read as under:-

“WHEREAS Tinna is interested in exporting Indian wheat from India and have approached PEC to assist them in their marketing efforts and have entered into an MOU dated 9.11.95 for export of agro products to Iran.

AND WHEREAS PEC has agreed to assist Tinna for export of wheat to Iran, PEC shall in association with Tinna take up the issue with MOU/FCI for allocation of the entire quantity of 100.00 MT of wheat from FCI stock and the freezing of applicable price of wheat as on dated of signing of the contract between PEC and GTC of Iran.

1. Tinna will arrange to supply 100,000 M/tones of Indian wheat at a price of US\$ 180.00 per MT on the basis of FOA stowed and trimmed one safe barth Vizag (India), as per specifications agreed in the Export contract – a copy of which is attached at Annexure-I and forms an integral and inseparable part of this Associateship Agreement.

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3. PEC service charges would be 1.5% (one and a half percent) of FOH Value i.e. US\$ 270 per MT.

4(a). PEC will negotiate documents against the L/C to be opened by Foreign Buyer for which Tinna shall provide documents as per terms and conditions of the L/C to PEC to prompt negotiation. In the event PEC receives payments under reserve from the negotiating bank due to discrepancy in the documents, PEC will release the payment to Tinna after the reserve has been lifted PEC shall, within 16 days of realization of export proceeds, transfer the amount after rating PEC's service charges to Tinna. All cost incurred by PEC towards bank charges against the contract/ L/C including confirmation and negotiation charges, transit period overall interest etc., shall be to Tinna's account.

(b). If there is a delay of more than 15 days in receiving the payment by PEC from the Iranian Bank, Tinna shall make suitable/necessary efforts in ensuring that the payment received by PEC expeditiously.

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12. Procurement of wheat shall be entirely the responsibility of Tinna. PEC may, however, without being liable or

responsible in any manner assist Tinna in arranging licenses, shipping space etc., at the request of Tinna.

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14. Tinna shall be responsible for arranging dedicated berthing and bulk loading facilities of Vishakhapatnam Port for vessels nominated by the foreign buyer to ensure timely shipments. Tinna shall also ensure contractual loading rate of 2500 MT per day Demurrage/Dispatch, if any, however, shall be to Tinna's account.

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18. Tinna agrees to indemnify and shall always keep the PEC fully indemnified against all claims proceedings, demands, including but not restricted to those for any penalty and/or compensation, damages, losses, costs, taxes, duties, levies, cesses, charges and expenses and risk purchase in respect of or in connection with or in relation to or arising out of any matter under the Associateship Agreement and/or the Export Contract due to Tinna's failure to perform any of its obligations under the Export contract. Notwithstanding, anything contained in the Associateship Agreement, if for any reasons PEC is disabled or prevented from performing any of its obligations under the Export Contract it shall inform Tinna, who shall have no right to claim any payment whatsoever from PEC either by way or price, compensation, damages or otherwise, in respect of the wheat yet to be supplied in terms of the Associateship Agreement. Tinna shall keep PEC fully indemnified for the conduct of the employees in and outside India.

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21. The aforesaid clauses would indicate that the appellant and PEC had reached an agreement under which the appellant was to export wheat to GTC of Iran at US Dollar 180 per metric ton i.e. as per the contract between PEC and GTC of Iran. This price payable

in US Dollar was fixed. The appellant had agreed to abide by the terms and conditions of export contract between PEC and GTC of Iran. PEC was to be paid services charge of 1.5% of FOH value i.e.US Dollar 2.70 per metric ton. There were certain obligations on PEC regarding negotiation of documents etc.

22. Clause 12 had stipulated that procurement of wheat by the appellant would be the responsibility of the appellant. PEC without being liable or responsible, would assist the appellant in arranging license, shipping spaces etc. at the request of the appellant. Appellant was responsible for arranging dedicated berth and bulk load facilities of port etc. Under Clause 9, the appellant had agreed to fully indemnify PEC against all claims, proceedings, demands, including but not restricted to those of any penalty and compensation, damages, losses, costs, taxes, etc. This clause has been relied upon in the impugned judgment to negate and repel the claim of the appellant against PEC.

23. We would repeat with emphasis that the Associateship Agreement, Ex. PW1/D1, did not specify or state the purchase price i.e. the price which the appellant was to pay for procuring or purchasing wheat from FCI. What was specified and stated was that GTC of Iran would pay US Dollar 180 per metric ton and that PEC would be paid service charges at 1.5 % of FOH Value i.e.US Dollar 2.70 per metric ton. The appellant had agreed to abide by the said contract and signed the contract with the open eyes. It is not the

case of the appellant that they were compelled and forced to sign this contract.

24. FCI and PEC subsequently entered into a written contract Ex. DW1/3 on 6th March, 1996. As per the contract, (Ex. DW1/3), FCI had agreed to sell wheat at the prices mentioned therein. The prices mentioned were state-wise. The price applicable to the State of Andhra Pradesh was US Dollar 141.58 or Rs.5136.50 in Indian Rupee. The contract (Ex. DW1/3) had stipulated that the price would be charged in Indian Rupee. It was also stipulated that the price payable shall not be lower than the rates applicable to domestic sales. Further, FCI shall revise the price in India Rupee with exchange rate fluctuation of more than 1% with reference to Dollar–Rupee rates. For this purpose, the Dollar rate was taken as Rs.36.28. The fluctuations to the extent 1% were to be ignored. In other words, the stipulations in the Press Note dated 2nd February, 1996 (Ex. DW1/2) was specifically incorporated in the agreement between FCI and PEC, marked Ex. DW1/3.

25. Paragraph 20 of the plaint, gives breakup of the procurement /sales made by FCI to the appellant and the price paid by the appellant to FCI. The paragraph reads:-

"

<i>Month.</i>	<i>Qty.(MT)</i>	<i>Rate to be charged USD</i>	<i>Average exchange rate.</i>	<i>Amt. to be paid</i>	<i>Rate charged</i>	<i>Amt. paid</i>	<i>Excess Amt. paid</i>
<i>April</i>	<i>13,527</i>	<i>137.46</i>	<i>34.0</i>	<i>53229327.00</i>	<i>5073</i>	<i>68622471</i>	
<i>May</i>	<i>20,673</i>	<i>137.46</i>	<i>34.77</i>	<i>98806276.00</i>	<i>5073</i>	<i>104874129</i>	
<i>June</i>	<i>3,600</i>	<i>137.46</i>	<i>34.74</i>	<i>17191297.00</i>	<i>5073</i>	<i>18262800</i>	
<i>July</i>	<i>2,795</i>	<i>137.46</i>	<i>35.25</i>	<i>13543074.00</i>	<i>5073</i>	<i>14179035</i>	<i>635961</i>

"

26. The aforesaid table indicates that FCI had charged Rs.5073 per metric ton of wheat from the appellant. The said price is lower than the price of Rs.5136.50 stipulated in the Press Note dated 2nd February, 1996 (Ex. DW1/2) and the agreement between FCI and PEC dated 6th March, 1996 (Ex. DW1/3). It has been explained by FCI that Rs.5073 was the domestic sale price. This statement made in the written statement was affirmed in the oral evidence. The appellant has not contested that the domestic sale price of wheat

during the period when purchases were made was Rs.5073/- per metric ton.

27. We agree with respondents that regardless of fluctuation in the Rupee-Dollar exchange rates, the appellant was liable to pay minimum price or rate applicable to domestic sales. The appellant has not disputed or denied, that the minimum domestic sale price was Rs.5073/- per metric ton. This was the price at which the wheat was sold to the appellant.

28. Reliance is placed by the learned counsel for the appellant on the letter dated 27th February, 1996, Mark X, and letter dated 11th June, 1999 marked AP-I written by PEC to the appellant. The letter dated 11th June, 1999 marked AP-I was taken on record in this appeal vide order dated 24th March, 2015 disposing of CM No.2156/2013, with the observation that the same would be read against PEC if the same is proved in accordance with law. The said letter cannot be read in evidence against FCI. The letter dated 11th June, 1999 marked AP-I is somewhat ambiguous. It refers to the purported understanding with the Ministry of Finance that the price of wheat prevailing on the date when the contract was signed with GTC, Iran i.e. US Dollar 137.46 per metric ton was to be frozen for the entire contract. It also states that the price was increased to US Dollar 141.58 per metric ton which was accepted by PEC. At the same time, it is recorded that as per the contract between PEC and the appellant for execution of the contract for export of wheat to GTC of Iran, the appellant was responsible to deal with FCI and

had made direct payments to FCI against deliveries and hence, PEC was not responsible. We agree with the FCI that these documents would not tilt the balance and settle the issue in favour of the appellant. The letters were not written by FCI, the seller. The letter marked AP-I, written in 1999, long after the appellant had made payment @ Rs.5136/- per metric ton.

29. The letter dated 27th February, 1996 (Mark X) refers to the notification issued by the Government of India dated 6th February 1996 (Ex. DW2/4) for fulfillment of contract signed by PEC with GTC of Iran. We have reproduced the notification dated 6th February, 1996 (Ex. DW2/4) and interpreted the same.

30. The letter mark X was written by the Chairman, PEC to the Secretary of Ministry of Food with the request that the price of US \$ 141.58 should be kept firm and should not be subject to any upward revision. This was not accepted as the PEC and FCI had subsequently entered into contract dated 6th March, 1996 marked Ex. DW1/3. The terms between PEC and FCI were mutually settled and agreed. The said contract, as already noticed, incorporated the terms and conditions mentioned in the letter dated 6th February, 1996 marked Ex. DW2/4 and the Press Note dated 2nd February, 1996 marked Ex. DW1/2. The appellant was fully aware of the letter dated 6th February, 1996 (Ex. DW2/4) and the Press Note dated 2nd February, 1996 (Ex. DW1/2) and the terms and conditions mentioned therein, which were clear and categorical. There was specific stipulation that the price would not be less than domestic

sale price. Further, the price applicable to the State of Andhra Pradesh was fixed at US Dollar 141.58 or Rs.5136.50 in Indian Rupee. In fact the price charged and paid from the appellant is Rs.5073 which is lower than Rs.5136.50 stipulated in the Press Note dated 2nd February, 1996 (Ex. DW1/2).

31. We would observe that the FCI cannot be held liable on the basis of the said letters. The agreement dated 6th March, 1996 (Ex. DW1/3), binds them and PEC. FCI cannot be held liable to the appellant on the basis of these letters.

32. There is another factum which is to be noted. The appellant, while making payment and taking deliveries did not protest or raise any objection regarding the price charged. The appellant has not placed on record any communication or letter written by them to FCI or PEC that the price of Rs.5073 charged and paid by them to FCI was exorbitant/higher, and not the contracted price. Noticeably, the appellant was fully aware of the price charged, once the notification dated 6th February, 1996 (Ex. DW2/4) and the Press Note dated 2nd February, 1996 (Ex. DW1/2) were published and had become public documents. Deliveries were made by FCI to the appellant between April to July, 1996. The total quantity lifted was 40,355.98 metric ton.

33. The aforesaid view we have taken is also supported by the oral evidence and statement of witnesses.

34. Mr. Vijay, PW1, witness of the appellant, in his cross examination on 20th March, 2007 had accepted that FCI had rightly charged the price of wheat as per document D-1 and D-2 i.e. letter dated 6th February 1996 which has been also marked Ex. DW2/4 and Press Note dated 2nd February, 1996 which has been also marked Ex. DW1/2. PW1 in his cross examination on 25th July, 2007 had accepted that FCI had not made any offer to supply wheat at US Dollar 137.46 per metric ton to the appellant or any other exporter. On being asked to state the basis of the statement that the price of wheat was fixed and could not be unsettled, PW1 had stated that this was as per term no.4 of the Associateship Agreement dated 29th December, 1995 (Ex. PW1/D1). Reliance was not placed upon any other document or statement. We have already referred to the different clauses of Associateship Agreement dated 29th December, 1995 (Ex. PW1/D1) and find that there is nothing in the said document to support the said contention. The Associateship Agreement dated 29th December, 1995 (Ex. PW1/D1) did not fix the price. In response to another question, PW-1 has accepted that the final price of wheat was fixed only on 6th February, 1996. However, it was stated that PEC had re-negotiated the price with FCI without their consent.

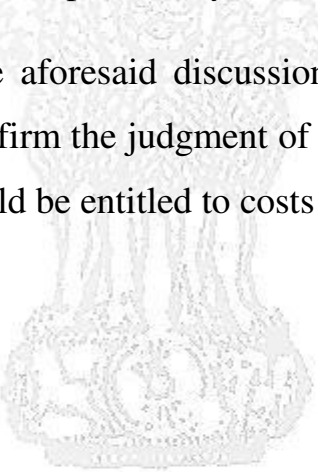
35. In view of the aforesaid discussions, we are clearly of the view that the price of the wheat as fixed vide letter /communication dated 6th February, 1996 (Ex. DW2/4) read with Press Note dated 2nd February, 1996 (Ex. DW1/2) was applicable. The appellant has

paid the said price which was charged and payable in Indian Rupee of Rs.5073 per metric ton.

36. The appellant has not been able to make out a case for refund of the price paid by it on the ground that the FCI could not have charged more than US Dollar 141.58 per metric ton.

37. The appellant did not lead evidence to show the conversion rates prevailing on the date when the sales were affected. In the plaint, there is no specific averment as to the exchange rates of Dollar –Rupee between April to July, 1996.

38. In view of the aforesaid discussion, we would dismiss the present appeal and affirm the judgment of the learned Single Judge. The respondents would be entitled to costs as per Rules.

 **SANJIV KHANNA, J.**

 **NAVIN CHAWLA, J.**

AUGUST 10, 2017
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