

M/s Lakshmi Overseas Ind. Ltd. presently known as M/s Lakshmi Energy and Foods Ltd.

Versus

..... Respondents

Present:- Mr. V.K. Jindal, Senior Advocate, with
Mr. R. Kartikeya, Advocate,
for petitioner.

Mr. K.B. Raheja, Advocate,
for respondents.

1. Whether the Reporters of local newspaper may be allowed to see the judgment ?
2. To be referred to the Reporter or not.
3. Whether the judgment should be reported in the digest ?

Petitioner-M/s Lakshmi Overseas Ind. Ltd. presently known as M/s Lakshmi Energy and Foods Ltd. by way of present revision under Article 227 of Constitution of India, has impugned order dated 8.4.2013 (Annexure-P-8), passed by the learned District Judge, Chandigarh, vide which the order passed by the Arbitrator dated 16.12.2003 was set aside and the case was remanded to the Arbitrator for deciding the dispute afresh on merits.

Brief facts of the case are that Punjab State Warehousing Corporation through its District Manager, Fatehgarh Sahib, referred a dispute to the Arbitrator, namely, Shri G.S. Aggarwal, IAS (Retd.), Sole Arbitrator, making claim for recovery of Rs. 1,77,73,117/- plus interest at

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the rate of 21% upto 15.2.2003 with future interest at the rate of 21% per annum till the date of realization.

It comes out that during the crop year 1993-94, the petitioner rice miller was allotted the work of custom milling of paddy and delivery of its resultant rice to Food Corporation of India in its account. It comes out that there was Arbitration Agreement dated 12.10.1999 (Annexure-P-9) between the parties regarding storage of paddy in their mill premises. The petitioner was to mill the same as per terms and conditions mentioned therein and delivered it as per the terms of the agreement. The petitioner delivered limited quantity of rice and did not maintain the schedule as agreed. On account of alleged breach committed by rice miller-petitioner, the matter was referred to arbitration. The Sole Arbitrator, Shri G.S. Aggarwal, IAS (Retd.), while dealing with the matter came to the conclusion that present dispute regarding shortfall in recovery of rice has been specifically provided in Sub-clause (iii) of Clause 8 of the Agreement and dispute regarding late delivery of rice in Sub-clause (ii) of Clause 9 of the Agreement. While referring to Clause 22 of the Agreement, it was held that all the disputes except to any matter the decision of which is expressly provided for in the contract are referable to the Sole Arbitrator. The Arbitrator held that present dispute falls within the excepted matters. Therefore, he dropped the matter at preliminary stage. In appeal, the learned District Judge, Chandigarh, while relying upon the case laws came to the conclusion that the matter does not fall within the 'excepted matters' and, therefore, remanded the matter to the Sole Arbitrator for afresh decision.

I heard heard the learned counsels for the parties and have also carefully gone through the file.

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It is necessary to reproduce the clause for which the Director of respondent Corporation is to take a decision. The relevant extract of Clause 8 (iii) is reproduced as under :-

'8. The miller shall ensure that :-

- i) xxxxxxx xxxxxxx xxxxxxx
- ii) xxxxxxx xxxxxxx xxxxxxx
- iii) In case there is a shortfall in the recovery of rice provided in sub-clause (i) above the miller shall pay to the Government the price of rice fixed by FCI plus interest at the rate of 21 % from the date it become payable till the date of actual realization equivalent to the shortfall.
- iv) xxxxxxx xxxxxxx xxxxxxx
- v) xxxxxxx xxxxxxx xxxxxxx'

Clause 9 of the Agreement is reproduced as under :-

'9. The entire quantity of rice of all varieties delivered by the miller to the Government 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 from time to time. The stocks of rice not conforming to the specifications and the miller shall be liable to pay to the Government or Procuring Agency for the quantity of rice short supplied, a penalty at the custom milling rate fixed by Govt. of India plus 21% interest from the date it becomes payable till the date of actual realization of the converted variety of rice. The decision of the Director Food and Supplies

Punjab (hereinafter referred to as the Director) in this behalf shall be final.

- (i) At the time of delivery, the stocks of rice shall be subjected to the inspection as per provisions of the Punjab Rice Procurement (Levy) Order, 1983. Any quantity allowance determined at the time of inspection according to the specifications shall be recovered from the Miller's Bills.
- (ii) The miller shall complete delivery of rice within 10 days of the issuance of paddy to him and rice due to the State Government on the total quantity of paddy issued to him or in joint custody released at regular intervals shall be delivered not later than the 29th Feb. 2000 or upto the period extended by Government of India from time to time. In the event of his failure to supply rice within the stipulated period he shall be liable for an interest @ 21% for the first year of default and @ 30% for the subsequent period on the custom milled price fixed by Govt. of India from the date it becomes payable till the date of actual realization towards the left over quantity/stocks of paddy. The decision of the Director in this behalf shall be final.'

Clause 17 of the Agreement is reproduced as under :-

'17. 60% rice shall be supplied in the 50 Kgs. Gunny

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bags to be made available by the miller, the cost of which shall be reimbursed at the rate fixed by the Government of India from time to time. Remaining 40% rice shall be packed in 95 Kgs. Gunny bags in which paddy is supplied by the Government. The rice shall be packed in standard size, double lines machine stitched bags. The Rice Miller shall keep proper account of all Gunny bags. The bags found surplus after the filling of rice shall be retained by the miller and the cost thereof shall be paid by the miler to the Government, at the rate to be fixed by the State Government from time to time.'

The claim made by the Managing Director, Punjab Warehousing Corporation shows that following disputes were raised by the Corporation :-

'7 That the respondent was required to deliver 84169.42 qtls. Rice common (@ 67% yield) and 203974.78 qtls. Rice from fine (@ 67% DFSC, 68% FCI pattern) which were due from aforesaid paddy by 31.12.2000 in the term of agreement. Further it was required to maintain the delivery schedule of rice as under :-

OCT./NOV.	20%
DEC	26%
JAN	26%
FEB	28%

8. That the respondent delivered limited quantity of rice and didn't maintain the schedule as agreed. Respondent delivered only 13018.00 qtls. Rice common filled in 13750 bags, and 194032.61 Qtl.

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Rice fine filled in 204714 bags to FCI. The detail is enclosed at annexure. The respondent by failing to adhere the delivery schedule of rice has committed breach of contract and have been liable to pay the compensation, to the claimant, as mentioned different clauses of the agreement, along with interest @ 2%.

That as stated above respondent failed to shell 13112.35 qtl. of common and 4720.59 of fine paddy stored with him in his premises within the stipulated period and thereafter, As such he failed to deliver the resultant rice as per Govt. policy. Stipulation 67% of paddy supplied to him. Accordingly, he has become level to pay economic cost of paddy. The claimant is entitled to recover the losses/damages/compensation as per different clauses of the agreement as detailed below :-

- I That as detailed above 660150 bags weighing 414942.96 Qtl. of paddy was shelled out of 672877 bags weighing 432775.90 Qtl. of paddy stored with the miller 13112.35 of common and 4720.59 of fine Qtl. of paddy was found short. This shortage is recoverable at economic cost of paddy as per clause 7 of the agreement and is calculated @ Rs. 927.21 per Qtl. of common variety of paddy and @ Rs. 980.43 per Qtl. of fine variety.

II That while supplying paddy to the respondent the said paddy stock was filled in 672877 gunny bags. The bag found surplus after filling of rice were to be retained by the miller respondent and cost paid to claimant. The respondent delivered 218464 bags of rice to FCI in PSWC A/C. Hence 454413 gunny bags were to retain by the respondent and their cost is to be paid to the claimants.

The above delivered rice was shelled out of 672877 bags of paddy it means after adjusting 218464 gunnies used in filling of rice 454413 gunny bags were left with the respondent. The value of these gunny bags is fixed is Rs. ____ + sale tax @ 4.4%. The total cost recoverable comes to Rs. 6485091.00, which is recoverable from the respondent on A/C of B Class bardana and Rs. 846089.00 on A/C of A Class bardana.

III That as at as per clause of the agreement quality allowance determined at the time of inspection of rice, according to specifications, were to be recoverd from the miller. The quality allowance i.e. the quality cuts imposed and deducted by FCI. On the delivery of rice given by the respondent in the account of PSWC is Rs. 467306.00. The detail is enclosed.

IV That the respondent after delivery of rice in PSWC

A/C Kept the document with him and submitted late as detailed in annexure I. Consequently, the claimant suffer a loss of Rs. 968174.00 on A/C of delay receipt of payments from FCI. As such this amount is also recoverable from the respondent miller.

V That the income tax to be deducted on milling/stitching charges payable by the respondent is Rs. 129939.00 which is also recoverable from the respondent as statutory obligations.

VI That the respondent is liable to pay interest @ 21% per annum on A/C of 5832.40 Qtl. of rice after 31.12.2000 dated. This amount of interest is Rs. 12766.00 which is recoverable from the respondent.

9. Further the respondent is also liable to pay interest @ 21% per annum on the amount of cost of rice 8697.42 © and 3131.17 (f) the amount of interest in this A/C is also recoverable from the respondent.'

Clause 22 of Agreement is also reproduced as under :-

'22. ARBITRATION: All the disputes and difference 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 in the

contract) shall be referred to the sole arbitrator of 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 matters to which the contract relates and that in the course of his duties such as 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 in the event of the arbitrator being transferred, or vacating his office or being enable to act for any reason, the Director/Managing Director at the time or 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.

Provided further that any demand for arbitration in respect of any claim(s) of the miller, under the contract shall be in writing and made within one year of the date of completion or expiry of the period of contract, if the demand is not made within the period the claim(s) of the miller shall be deemed to have been waived off and released of all liabilities under the contract in respect

of these claims.'

Therefore, the arbitration clause makes it clear that all the disputes and differences except the matters, the decision of which is exclusively provided in the contract, are to be referred to the Sole Arbitrator.

Now, if a reference to Clauses 8 and 9 of the Agreement is made, it comes out that for the shortfall, the miller was required to pay Government price of rice plus interest at the rate of 21%, payable from the date of actual realization equivalent to shortfall. Clause 9 of the agreement provides for penalty at the rate fixed by Government of India plus 21% interest regarding stocks of rice not conforming to the specifications. Clause 9(ii) of the agreement provides for penalty for failure to supply rice within the stipulated period. The rate of interest is also provided for. Clause 17 of the agreement pertains to the gunny bags retained by the miller and the cost thereof is to be fixed by the State Government from time to time. In this way, regarding the late supply, short supply, cost of gunny bags etc. are specifically provided for in the agreement alongwith rate of interest. The claim made by Punjab State Warehousing Corporation, as reproduced above, goes to show that claim is for short supply, failure to adhere to the delivery schedule, cost of gunny bags etc. and claim of interest at the rate of 21%, decision of which has been specifically provided for in the contract. The learned District Judge, Chandigarh, has reversed the order of the Arbitrator while relying upon various authorities of Apex Court i.e. *Bharat Sanchar Nigam Limited and another Versus Motorola India Private Limited*, (2009) 2 Supreme Court Cases 337, *State of Karnataka Versus Shree Rameshwara Rice Mills, Thirthahalli*, 1987 (2) SCC 160, *Vishwanath*

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Sood Versus Union of India (supra) and General Manager, Northern Railway Versus Sarvesh Chopra, (2002) 4 SCC 95. At a look of authority of Apex Court in *Bharat Sanchar Nigam Limited and another (supra)* goes to show that in the said case, the Arbitrator was appointed by the High Court and the said order was under challenge. Therefore, appeal before the Apex Court was against the order appointing arbitrator to decide the dispute referred to by respondent. Therefore, the Apex Court was required to decide whether in view of arbitration clause in the tendered document provided in Clause 20 of the said document, the breach specified in Clause 16.2 is an excepted matter. While referring to said Clause 16.2, the Apex Court took the view that dispute was regarding quantum of liquidated damages assessed and levied by the purchaser. It was observed as under :-

'21. Having heard the learned counsel for the parties and after examining the judgment of the High Court and the other materials on record, we are of the view that this appeal must be dismissed. Clause 20 is the arbitration clause and provides that any question, dispute or difference arising under this agreement or in connection therewith would be referred to arbitration. To this, an exception is also provided which lays down that the matters, the decision to which is specifically provided under this agreement, would not be referred to arbitration. From a bare reading of Clause 16.2 of Section III of the tender document, it is clear that if the tenderer fails to deliver the goods and services on turnkey basis within the period prescribed, the purchaser shall be entitled to

recover liquidated damages and the quantum of the liquidated damages assessed and levied by the purchaser shall be final and not challengeable by the supplier.

22. xxxxxx xxxxxxxx xxxxxxxx

23. The question to be decided in this case is whether the liability of the respondent to pay liquidated damages and the entitlement of the appellants, to collect the same from the respondent is an excepted matter for the purpose of Clause 20.1 of the general conditions of contract. The High Court has pointed out correctly that the authority of the purchaser (BSNL) to **quantify the liquidated damages payable by the supplier Motorola arises once it is found that the supplier is liable to pay the damages claimed. The decision contemplated under Clause 16.2 of the agreement is the decision regarding the quantification of the liquidated damages and not any decision regarding the fixing of the liability of the supplier. It is necessary as a condition precedent to find that there has been a delay on the part of the supplier in discharging his obligation for delivery under the agreement.'**

The Apex Court held that dispute in the said case does not fall within excepted matters. The question involved in present case is entirely different.

In *State of Karnataka* (supra), the question was regarding terms of the contract and recovery of damages as arrears of land revenue.

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The learned senior counsel for petitioner has referred to several authorities of this Court in similar matters involving Punjab State Cooperative Supply and Marketing Federation Limited (Markfed) and Food and Supplies Department, wherein the Single Bench of this Court in *M/s Satguru Rice and General Mills Village Khera Gajju, District Patiala and another Versus Punjab State Co-operative Supply and Marketing Federation Ltd. (Markfed), Rajpura, District Patiala and another*, 2015 (8) RCR (Civil) 366 in similar circumstances held that it is covered within excepted matter and referred the matter to the Managing Director for decision.

In another Single Bench authority of this Court in *Shree Krishna Rice Mills Versus The Punjab State Co-op. Supply and Marketing Federation Ltd.*, 2003 (3) RCR (Civil) 254, it was held that dispute regarding economic cost and award of interest is covered as clause of agreement and it is decided by the Managing Director and need not to be referred to arbitrator.

Similarly, in another Single Bench authority of this Court in *Jai Ambe Rice Mills Versus Punjab State Civil Supplies Corporation Ltd. (PUNSUP) and others*, it was held that dispute regarding price for non delivery or dispute regarding price of non delivery of paddy as well as interest is covered within said agreement and being excepted matter, same is to be decided by the Managing Director himself and not by arbitrator.

Similarly, in another Single Bench authority of this Court in *Punjab State Civil Supplies Corporation Ltd. (PUNSUP) Chandigarh Versus M/s. Jai Laxmi Rice Mills, Mehraj Road, Rampura Phul and others*, in a case regarding short supply, it was held to fall within the short supply

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and was to be decided by the Managing Director.

Similar question arose before this Court in *M/s Lakshmi Energy and Foods Ltd. (formely M/s Lakshmi Overseas Industries Ltd.) Versus Punjab State Civil Supplies Corporation Limited and others*, decided on 26.3.2015. In the said case also, this Court took the view that matter falls within excepted clause of the agreement. Therefore, the award passed by the arbitrator was held to be without any jurisdiction and was set aside.

Reverting to the facts of the present case, the decision regarding short supply, late supply and price of gunny bags, is specifically provided for in the agreement and it is specifically provided in Clause 9 of the agreement that the decision of Director, Food and Supplies Punjab, shall be final in this behalf. In this case, no decision has been taken by the Director and consequently not disputed by present petitioner. Therefore, I am of the view that the sole arbitrator rightly held that dispute falls within excepted clause and is to be decided by the Director, Food and Supplies Department, Punjab. Therefore, same could not be referred to Arbitrator.

In view of what has been discussed above, order dated 8.4.2013 (Annexure-P-8), passed by learned District Judge, Chandigarh, is hereby set aside. Consequently, revision is allowed.

(KULDIP SINGH)
JUDGE

27.2.2018
sjks

Whether speaking / reasoned : Yes

Whether Reportable : Yes