

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :16.04.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.325 of 2016

Savorit Limited
(United India Roller Flour Mill Division)
Rep. By its Director, Mr.P.Murugesan
22, North Terminus Road
Tollgate, Chennai - 600 081 ... Petitioner

vs.

1. The Chairman & Managing Director
The Tamilnadu Civil Supplies Corporation
12, Thambusamy Road
Kilpauk, Chennai - 600 010
2. The Senior General Manager (North)
The Tamilnadu Civil Supplies Corporation (North)
Gopalapuram
Chennai - 600 086
3. Mr.A.Hastings Hope
The Arbitrator
18/22, I Main Road
North Jagannatha Nagar
Villivakkam, Chennai - 600 049 ... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, Read with Order 14 Rule 8 of the O.S rules, pleaded to set aside the award passed by the third respondent in Case No.BS.13/2015 dated 25.01.2016 and further directing the respondents to refund an amount of Rs.82,36,749/- Rupees Eighty Two Lakhs Thirty Six Thousand Seven Hundred and Forty Nine only) with interest @24% per annum and costs.

For Petitioner : Mr.R.Devaraj

For Respondents : Mr. S.Saravanan for R1 and R2

ORDER

This 'Original Petition' ('OP' for brevity) has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity) assailing an 'arbitral award dated 25.01.2016' ('impugned award' for brevity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a sole Arbitrator.

2.Before proceeding further, it is necessary to make it clear that in A & C Act, with regard to recourse against arbitral award, a legal proceeding for setting aside an arbitral award has been referred to as 'application' in Section 34 of A & C Act. However, such a legal proceeding assailing arbitral awards under A & C Act are being given the nomenclature 'Original Petition' in this Registry and therefore, I am referring to the instant proceedings as 'OP' for the sake of convenience and clarity.

3.Central theme of this lis is supply of 'Fortified Atta' (hereinafter 'FA' for brevity) to the 'Tamil Nadu Civil Supplies Corporation' ('TNCSC' for brevity). It is not in dispute that this FA was for the purpose of distribution by TNCSC as part of its activity i.e., 'Public

Distribution System' ('PDS' for brevity). TNCSC invited tenders for supply of FA and 'M/s.United India Roller Flour Mill (a Division of Savorit Limited)', which shall hereinafter be referred to as 'Contractor', was the successful bidder. It is not in dispute that supply of FA by Contractor to TNCSC commenced in March of 2009 and it continued till March of 2012. It is also not in dispute that for such supply, there were 5 agreements for five different periods between March of 2009 and March of 2012. These five agreements are dated 08.09.2009, 29.10.2009, 25.08.2010, 23.02.2011 and 30.01.2012. There is also no dispute or disagreement that these five agreements are adverbatiem the same as far as the crucial and critical covenants are concerned.

4. It is submitted that supply of FA through PDS was discontinued by TNCSC owing to a policy decision taken by the Government of Tamil Nadu in this regard and this Court is informed that this happened in April of 2012.

5. There is no dispute or disagreement that supply of FA by contractor to TNCSC had to be done within stipulated/agreed time frames, that there is also provision of imposition of penalty if there is delay in supply within the stipulated / agreed time frames.

6. The aforesaid 5 agreements between the contractor and TNCSC shall be collectively referred to as 'said agreement' in singular for the sake of convenience and clarity. With regard to time frame within which the FA had to be supplied by the Contractor to TNCSC and penalty for delay if any, the same has been adumbrated and covenanted in Clauses 8 and 9 of said agreement, which read as follows:

'8. DELIVERY SCHEDULE:

As the stocks is required urgently to ensure un-interrupted supply to PDS, TNCSC Limited is very keen in getting the stocks within the stipulated time every month.

(i) The miller has agreed to lift the allotted quantity of Wheat either white Wheat or red Wheat every month before 2nd week in advance pertaining to the next month and supply Fortified atta in 3rd week in one Kg packet at Ex-mill delivery basis to TNCSC, so that the Fortified Atta can be moved to all retail shop in the fourth week since advance movement are commencing from 25th of every month in all Districts.

(ii) The miller has agreed to complete the supply of Fortified Atta before 3rd week of every month as per allocation.

(iii) This Corporation will move the Fortified Atta from the Mill to TNCSC godowns.

(iv) No extension of time will be considered beyond the time schedule. Hence the delivery schedule fixed by the TNCSC Limited should be kept up at any cost.

9) PENALTY ON DEFAULT/EXTENSION OF TIME:

In exceptional circumstances and if it is

sufficiently proved that the delay in supply is due to the circumstances beyond the control of the Tenderer, extension of time will be granted at the discretion of the SRM/RM who executed the agreement subject to the following conditions.

A penalty of Rs.25/- (Rupees Twenty Five only) will be imposed per M.T. per day subject to maximum of Rs.500/- per MT for the quantity of Fortified Atta supplied belatedly beyond the due date of 3rd week every month.'

7. To be noted, this Court is informed that the terms 'miller' and 'tenderer' occurring in the covenants extracted and reproduced supra are references to 'Contractor'.

8. While on the said agreement, it may also be appropriate to mention that the arbitration agreement between the Contractor and TNCSC is in the form of a clause/covenant in the said agreement. The relevant clause is Clause 20 and the same reads as follows:

' 20. ARBITRATION:

(i) In the event of any disputes arising in respect of this deal including the interpretation of any of the clauses in the agreement other than matters in which the corporation's decisions shall be final, the matter shall be referred by the Corporation/miller to an Arbitrator who shall be selected by the Party from the panel of the Arbitrators approved by the **Board of Directors** of Tamil Nadu Civil Supplies Corporation Limited and

communicate the same within 15 days from the date of receipt of the letter from the Corporation along with the panel of the Arbitrator. If there is no reply from the miller within 15 days, the Corporation shall choose any of the Arbitrators referred above. The remuneration for the arbitrator shall be shared equally by the Tamil Nadu Civil Supplies Corporation Limited and the other party to the Arbitration. The venue of Arbitration shall be at the Regional Offices of TNCSC Limited. The decision of the Arbitrator shall be final and binding on both the parties to the Arbitration. The Arbitrator may with the mutual consent of the parties extend the time for making the award. The award to be passed by the Arbitrator is enforceable in the Court at Chennai city only.

(ii) In respect of the recovery of losses and damages the decision of the Corporation and in the case of any dispute referred to the arbitrator in respect of the grinding of the wheat such as whether or not the performance of the Miller is satisfactory or detrimental to the interest of the Corporation, etc., the decision of the Arbitrator shall be final and binding upon the Miller and the Miller shall not be entitled to pursue the same.

(iii) Notwithstanding the right to recover the dues by invoking the provisions of the Revenue Recovery Act or any other law for the time being in force, the Corporation shall also be entitled to Civil remedies through a Court of

(iv) The Miller shall be liable and

responsible to compensate the Corporation for any failure on the part of the Miller to perform any of the provisions of this agreement.

(v) In the event of the Miller having been declared insolvent or going into liquidation winding up of his business or making arrangements with his creditors or failing to observe any of the terms and conditions governing the deal, the Corporation shall be at liberty to terminate the deal forthwith without prejudice to any other rights or remedies under the contract, invoking the Bank Guarantee or any part thereof apart from the recovery of the sum or sums due for any damage, loss, charges, expenses or costs that may be suffered or incurred by the Corporation due to such factors and Miller's negligence or their workmen's performances or any other services under the contract. In all the above cases, the decision of the Corporation and in the case of dispute referred to Arbitration, the decision of Arbitrator as to the extent, nature and value of damages or loss shall be final and binding on the Miller.

(vi) It is agreed that any dispute arising out of non-fulfilment of any of the terms and conditions of the agreement will be subject to the jurisdiction of the court in the city of Chennai.'

9. Certain disputes arose between TNCSC and Contractor as TNCSC alleged that there was delay on the part of contractor in supply of FA. Saying so, TNCSC imposed penalty. Total penalty imposed by TNCSC for the

aforesaid 5 year period spanning March of 2009 to March of 2012 is Rs.82,36,749/- (Rupees Eighty Two Lakhs Thrity Six Thousand Seven Hundred and Forty Nine only) and the same has been set out in a tabulated form in the instant OP. As there is no dispute or disagreement about such imposition of penalty, this Court deems it appropriate to usefully extract the said tabulated form of articulation in instant OP. The same reads as follows:

I	H.O.Order No.BS10/117863/2008 dt.09.03.2009		
	Period from March 2009 to Feb 2010		
	Month	Metric Tons	Deducted Amount
1	June 2009	78.951	2000
2	Aug.2009	78.950	6933
3	Sept.2009	78.950	1300
4	Sept.2009	78.371	1643
	Total	236.272	11876

II	H.O.Order No.BS10/117863/2008 dt.23.10.2009		
	Period from November 2009 to August 2010		
	Month	Metric Tons	Deducted Amount
1	Nov.2009	2370.921	87
2	Dec.2009	2500.000	49072
3	Jan.2010	2502.035	9530
4	Feb.2010	2499.757	65686
5	Mar.2010	2500.000	178695
6	Apr.2010	2499.991	1536157
7	May, 2010	2503.536	354
8	Jun.2010	2504.528	43894
9	Jul.2010	2500.000	417000
10	Aug.2010	2499.033	1078858
	Total	24879.801	3379333

III	H.O.Order No.BS10/47924/2006 dt.05.07.2010		
	Period from September 2010 to February 2011		
	Month	Metric Tons	Deducted Amount
1	Sep.2010	2493.483	890361
2	Oct.2010	1005.824	477768
3	Nov.2010	2001.177	577907
4	Dec.2010	1203.049	571450
5	Jan.2011	1249.153	462055
6	Feb.2011	1498.864	679166
	Total	9451.549	3658707

IV	H.O.Order No.BS10/99795/2010 dt.19.02.2011		
	Period from September 2010 to February 2011		
	Month	Metric Tons	Deducted Amount
1	Mar.2011	1000.151	446448
2	Apr.2011	1797.842	357822
3	May.2011	599.989	116565
4	Jun.2011	602.744	94072
5	Jul.2011	1495.477	2930
6	Oct.2011	1497.473	36477
	Total	6993.676	1054314

V	H.O.Order No.BS10/96334/2011 dt.25.01.2012		
	Period from September 2010 to February 2011		
	Month	Metric Tons	Deducted Amount
1	March 2012	2401.505	132519
	Total	2401.505	132519

Abstract	Metric Tons	Deducted Amount
<u>I</u>	236.272	11876
<u>II</u>	24879.801	3379333
<u>III</u>	9451.549	3658707
<u>IV</u>	6993.676	1054314
<u>V</u>	2401.505	132519
Grand Total	43962.803	8236749

10. Pleadings before the AT were in the form of a claim petition filed by the contractor, a statement of defence styled and captioned, 'Counter Statement' filed by TNCSC and a rejoinder filed by the contractor. A perusal of the impugned award reveals that this was also followed by written arguments.

11. After full contest, AT made the impugned award wherein and whereby AT rejected the claim petition made by the contractor and held that contractor is not entitled to refund of the aforesaid sum of little over Rs.82.36 lakhs, which was deducted by TNCSC.

12. Contending that the impugned award is liable to be set aside, instant OP has been filed by the contractor and instant OP has been presented in this Court on 30.03.2016. Notice was issued and respondent TNCSC has entered appearance. To be noted, contractor is the sole <https://hcservices.ecopra.gov.in/hcservices/> in the instant OP and respondents 1 and 2 are collectively being referred to as TNCSC. Also to be noted,

the sole Arbitrator, who constituted the AT, has been arrayed as Respondent No.3.

13. Considering the nature of the grounds on which the instant OP is predicated, it was not necessary to array the sole Arbitrator as a respondent in the instant OP. However, now that the main OP itself is being heard out and is being disposed of, this court is not embarking upon the exercise of directing deletion of the sole Arbitrator from the array of parties as that will cause procedural delay. This is mentioned for the purpose of OPs of this nature under Section 34 which are filed in future.

14. Be that as it may, today Mr.R.Devaraj, learned counsel on record for the contractor and Mr.S.Saravanan, learned counsel for TNCSC, who are contesting respondents, are before this Court.

15. Mr.Devaraj, learned counsel drawing the attention of this Court to a letter dated 03.11.2010 bearing reference Na.Ka.No.M/1/11283/2010 from TNCSC submitted that the delay is not attributable to the contractor and AT had erred in not taking this into account. To be noted, besides clauses 8, 9 and 20 of the said agreement, which have been extracted and reproduced supra, clause 19(b) is

'19. THE CORPORATION RESERVES THE RIGHT:

a).....

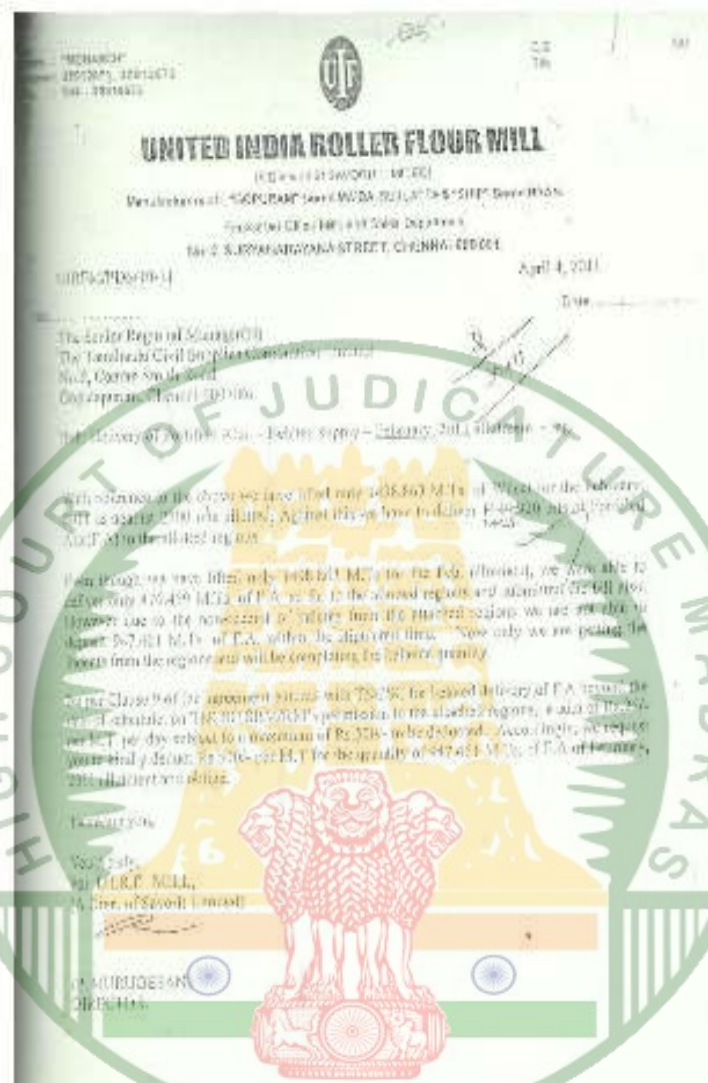
b) To terminate the agreement with the Miller at any time during the currency of deal whenever it is proved that the performance of the Miller is detrimental or not satisfactory in the interests of the government / corporation or if he is negligent or shows disinterest or the miller is convicted for criminal misconduct or is declared insolvent or has been detained under any law such as MISA, DIR, FERA, COFEPOSA, Essential Commodities act without prejudice to the rights of the Corporation. The corporation shall have the right to proceed further action against him for failure to fulfill the deal apart from the right of recovery of losses and damages of the Corporation.'

16. It is the stated position of TNCSC that they did not resort to termination of said contract as the supply of FA, as alluded to supra, was for the purpose of PDS (Public Distribution System).

17. With regard to the conclusion that has been arrived at by AT, it is seen that AT has taken into account a letter written by the Contractor to TNCSC. It is articulated in the penultimate paragraph of the impugned award and the relevant portion reads as follows:

and requested to deduct the amount for the belated supply. The claim for the refund of Rs.82,36,749 (Rupees Eighty Two Lakhs Thirty Six Thousand Seven Hundred and Forty Nine only) not at all maintainable and his claim petition deserves no consideration. Based on the enquiry and verification of the records claim statement, counter rejoinder and written arguments and other relevant connected records shows that the claimant has violated and breached the terms & conditions of the agreement. Therefore, the claim petition made by the M/s.Savorit Ltd., Chennai-81, is rejected and not eligible to claim the refund of Rs.82,36,749 (Rupees Eighty Two Lakhs Thirty Six Thousand Seven Hundred and Forty Nine only).

18.It is seen that the letter which the AT has referred to, is a letter dated 04.04.2011 from the contractor to TNCSC. The letter bears reference UIRFM/PDS/10-11 and considering the significance of the letter this Court deems it appropriate to extract and reproduce the letter in its entirety and the same is as follows:



19. In the aforesaid backdrop, learned counsel for Contractor, pressed into service a judgment of the Delhi High Court being *Indian Oil Corporation Vs. Lloyds Steel Industries Ltd.*, This order is dated 31.08.2007. It is reported in 2007 (4) ARBLR 84 Delhi. A perusal of the judgment of the Delhi High Court reveals that said case arose out of a contract awarded by Indian Oil Corporation for designing, detailed engineering, procurement, supply, fabrication, erection, testing and commissioning of

<https://hcservices.ecourts.gov.in/hcservices/>
petroleum Product Terminal Depots along the Kandla-Bhatinda

Pipe Line at Jodhpur. That was a case where there was cascading effect. Be that as it may, as rightly pointed out by learned counsel for contesting respondents, namely TNCSC, the said order pertains to Liquidated Damages and it does not deal with a scenario where there is a provision for the contract for imposition of penalty. Adverting to clause 9, learned counsel submitted that the instant case or the case on hand, is one where there is provision for imposition of penalty and therefore the aforesaid judgment does not apply to the facts of the instant case. I am unable to disagree with the learned counsel for TNCSC. In other words, learned counsel is correct in pointing out that the said case law does not apply to the factual matrix of the instant case. Furthermore, the aforesaid letter dated 04.04.2011 from the contractor, which has been scanned and reproduced supra, clearly nails the issue for the contractor and as a sequitur the argument of the learned counsel for contractor predicated on 03.11.2010 letter pales into insignificance.

20. On other aspects, the grounds raised in instant OP qua challenge to the impugned award are generic and more in the nature of grounds that can be agitated/canvassed in a regular first appeal under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity). No elucidation is required to say that an OP of instant nature under

Section 34 of A & C Act is neither an appeal nor a revision. It is a limited review i.e., a review within the contours and confines of Section 34 of A & C Act. In this regard, this Court is also reminded itself of the Fiza Developers principle. Fiza Developers principle was laid down by Hon'ble Supreme Court in **Fiza Developers & Inter - Trade (P) Ltd. Vs. AMCI (India) (P) Ltd.** reported in (2009) 17 SCC 796 and the same is to the effect that proceedings under Section 34 are one issue summary procedure.

21. In the light of Fiza Developers principle and in the light of the grounds being generic and more in the nature of grounds of appeal, this court does not find the grounds fitting into any of the specific slots under Section 34 of A & C Act. To put it differently, no case has been made out calling for judicial intervention qua impugned award under Section 34 of A & C Act.

22. No patent illegality, which is so patent and obvious that no inferential process needs to be applied to deduce the same qua the impugned award, has been pointed out. Likewise there is nothing to show that the impugned award is in conflict with the public policy.

In the light of all that have been set out supra, instant OP fails and the same is dismissed. Considering the nature of the matter and the trajectory of the hearing, parties are left to bear their respective costs.

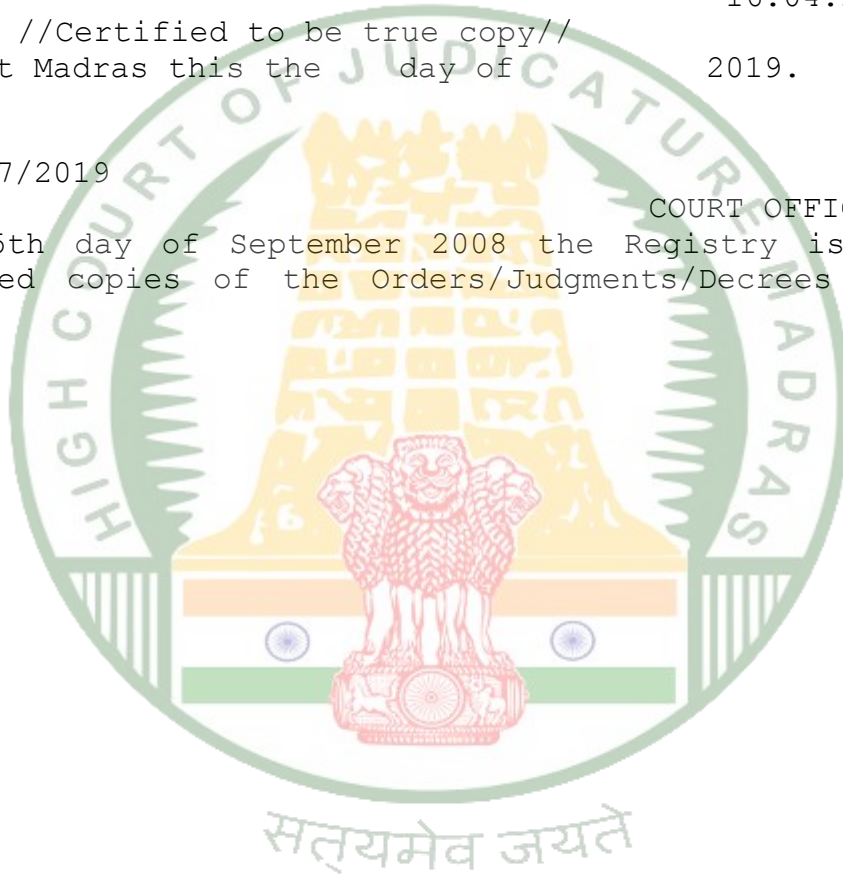
Sd./-M.S.J
16.04.2019

//Certified to be true copy//
Dated at Madras this the day of 2019.

JJ 09/07/2019

COURT OFFICER(O.S.)

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