(1998) 03 CAL CK 0032

In the Calcutta High Court

Case No : G.A. No. 653 and 874 of 1998 and W.P. No. 356 of 1998

Kanchan Oil Industries Ltd. APPELLANT

Vs

West Bengal Essential Commodities Supply Corporation RESPONDENT

Date of Decision : 25-03-1998

Acts Referred:

Citation : (1999) 1 ILR (Cal) 372

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Judgement

Ruma Pal, J.—The grievance raised in the writ application relates to the allotment of Malayasian RBD Palmolein Edibile Oil (hereinafter referred to as the Oil).

2. The case of the Petitioners is that the writ Petitioner No. 1 had offered to purchase 1000 MT of the oil pursuant to a Tender Notice dated December 24, 1997 issued by the Respondent corporation. On January 14, 1998 the Petitioners offer was accepted in writing.

According to the Petitioners the contract was concluded between the Petitioner No. 1 and the Corporation for supply of 1000 Metric Tonnes of Oil by the Corporation to the Petitioner No. 1 at Rs. 28, 260 per MT. The Petitioners deposited the entire security deposit of Rs. 5 lakhs. According to the Petitioners the initial period of 10 days fixed by the letter of acceptance for lifting the oil was waived by the Corporation and the Petitioners were allowed to pay for and lift the oil in instalments.

The Petitioners wrote a letter on January 18, 1998 undertaking to lift 750 MT within 30 days of lifting the first consignment of 250 MT. There was no response to this letter. It is the Petitioner''s case that the Respondent authorities accepted this condition and issued delivery orders to the Petitioners. A total amount of for 289.07 MTs of the Oil was lifted by the Petitioners. By letter dated February 6, 1998 the Respondent authorities sought to limit the time for the Petitioner to deposit the whole amount due in respect of the balance quantity of oil allotted to the Petitioner and to lift the oil by February 11, 1998. Notice was also given that if the price was not deposited by February 11, 1998, the security deposit furnished would be forfeited and the offer would stand cancelled. The Petitioner went on February 17, 1998 with pay orders for a further 250 MT. The Respondents refused to accept this.

3. The writ application was filed on February 19, 1998. The Petitioners have challenged the letter dated February 6, 1998 and have claimed that the Respondent authorities were delivering the balance quantity of 605.72 MTs of the oil to third parties at a high price. The Petitioner has accordingly prayed for a direction on the Respondent authorities to deliver the balance quantity of the oil to the Petitioners at the rate of Rs. 28,260 per MT.

4. On February 23, 1998 an application was made (GA No. 653 of 1998) by Pansari and Vegetable Oils Private Ltd. (hereinafter referred to as Pansari) for leave to be added as a party Respondent. Pansari was allotted 600 MT on January 7, 1998. It deposited 2 lakhs as security. Before it completed lifting of the 600 MT he was allotted a further 600 MT on January 20, 1998. No further deposit was taken from it. Pansari also received the notice dated February 6, 1998. It deposited the balance price by February 11, 1998 but did not lift the balance of the oil allotted to it by February 11, 1998 in terms of the notice dated February 6, 1998.

5. In Pansari''s application it is stated that on the very next day, i.e. February 12, 1998 a contract had been entered into between the Respondent authorities and Pansari by which the Respondent authorities agreed to sell 1000 MTs of the oil to Pansari at the very same price of Rs. 28,260 per MT provided the entire value was deposited by February 16, 1998 and the quantity lifted by February 23, 1998.

6. It appears from the records produced by the Respondent Corporation that Pansari asked for time to make payment and lift the quantity allotted under the Sale Order dated February 12, 1998. It also appears from the record that the Chairman of the Corporation, who is also the Minister in Charge, by an order dated February 16, 1998 directed that Pansari should be allowed to deposit 50% in cash in advance and the balance by February 23, 1998. Lifting was to be completed by February 23, 1998. According to Pansari the price was revised on February 17, 1998 when the Respondent authorities called upon Pansari ''along with the other intending purchasers'' for negotiation to make a better offer for the 1000 MTs of oil. Pansari agreed to the rate of 29,250 per MT in place of 28,260 per MT. The Respondents accepted the same by making an endorsement on a copy of a letter dated February 19, 1998 written by Pansari.

7. The letter of Pansari dated February 19, 1998 read as follows:

Re.: Sale Order No. ECSC/OIL/XVIII/12/120 dt. 12.2.98 issued in our favour for 1000 MT of edible Grade RBD Palmole in Oil.

With reference to your earlier letters on the above subject, we request you to kindly issue instructions to accept part payments and issue Delivery Orders against the same.

We further request you to kindly extend the time for balance payment and lifting of the goods.

8. The endorsement of the General Manager of the Corporation on this letter is also dated February 19, 1998 and reads as follows:

Considered. In view of the Corporation''s decision to revise sale price of RBD Palmole in oil the prayer for extension of time for payment and lifting is allowed. Payment of sale value in instalment is allowed subject to the condition that 50% of the amount shall be paid in advance.

9. According to Pansari it had accordingly arranged for an aggregate sum of Rs. 2,27,00,000. However, the pay orders annexed to its application are dated February 12, 1998. The arrangement for payment was clearly in terms of the sale order dated February 12, 1998 and not pursuant to any subsequent decision on February 19, 1998.

10. The writ application was listed before this Court on February 24, 1998. None appeared on behalf of the Respondent Corporation. As evidence of service of the petition on the Respondents could not be shown by the Advocate for the Petitioners, no interim order was passed on that date as prayed and the matter was adjourned till February 26, 1998. However, it appears from Pansari''s application as well as the records subsequently produced before this Court, that the Respondent authorities had been served with the copy of the writ petition on February 20, 1998 and did not choose to appear before Court on February 24, 1998.

11. As it subsequently transpired, on February 24, 1998, the Corporation allotted the available quantity of oil between Pansari and another tenderer viz. Ruchi Soya Industries Ltd. (hereinafter referred to as Ruchi Soya) at the rate of Rs. 29,250 per MT. According to the Corporation''s written note of argument. Pansari and Ruchi Soya deposited Rs. 1,24,31,250 and Rs. 1,02,37,500 plus sales tax and storage charges for 450 MTs, 350 MTs, respectively on February 24, 1998, delivery orders were issued on February 24, 1998 to them and they lifted a quantity of 244 MTs between the two of them prior to February 26, 1998. The statement is partly incorrect. Ruchi Soya has admittedly not paid storage charges at least till March 19, 1998. This is clear from a letter dated February 26, 1998 which was received by Ruchi Soya on March 19, 1998. In the letter dated February 26, 1998 the General Manager had written to Ruchi Soya saying as follows:

The undersigned has been directed to request you to pay the storage rent of Rs. 2,00,000/- (Rupees two lakhs) only within two working days without fail which has not been paid by you in terms of the sale order quoted under reference above.

12. On February 26, 1998 the matter appeared before this Court pursuant to the earlier direction. On that date Pansari sought to withdraw its application for addition of party. It Was not disclosed to the Court either by the Respondent authorities or by Pansari that Ruchi Soya was anywhere in the picture. It was not said that Sale Orders had been issued on February 24, 1998 to Pansari and Ruchi Soya or that delivery had taken place. In fact the Corporation only produced a Xeroxed copy of page 30 of the relevant file but not the original records. In this extract of the note sheet dated February 19, 1998 the General Manager records that on a communication received by the Commissioner of the Corporation from the Managing Director of Kusum Products and a subsequent verification in the open market it was found that the price of the cost of the oil varied from Rs. 30,000 to Rs. 31,500 per MT. The xerox extract of the note sheet dated February 19, 1998 further records the Ruchi Soya, Kanchan Oil and Pansari had been, called for negotiations on February 17, 1998. Ruchi Soya revised its offer at Rs. 29,100 per MT exclusive of sales tax and storage cost of Rs. 2,350. The writ Petitioner had agreed to accept 350 MTs at the highest rate and Pansari had agreed to accept the balance of the stock at the rate to be fixed by the Corporation. The General Manager accordingly recommended that the offer of Pansari should be accepted at the rate of Rs. 29,250 per MT excluding Sales Tax.

13. For the reasons stated in the order dated February 26, 1998 this Court directed the Respondents to keep aside 605 MTs being the balance quantity of the Petitioner''s original allotment of the oil for a period of two weeks or until further orders of the Court whichever is earlier. The interim order is continuing.

14. On March 9, 1998 Ruchi Soya made an application for leave to intervene and for modification of the order dated February 26, 1998 so as to allow Ruchi Soya to lift the balance 280.795 MTs of the Oil. The application of Ruchi Soya (GA No. 874 of 1998) in so far as it relates to the addition of Ruchi Soya as a party Respondent is allowed.

15. In its application Ruchi Soya has stated that on February 24, 1998 the Corporation offered 350 MTs of Oil to Ruchi Soya at Rs. 29,250 per MT. A sale order was issued on the same date. Ruchi Soya was asked to deposit the price on the same date. The entire price along with West Bengal Sales Tax was deposited on the same date. The delivery of 59,205 MTs was taken by Ruchi Soya on February 25, 1998 and February 26, 1998 and the balance could not be taken because the oil had solidified. Ruchi Soya has claimed that it did not know about what oil had been allowed to either the writ Petitioners or Pansari. It is, however, claimed that on February 24, 1998 it had sold the 350 MTs of oil to M/s. Bharat Margarine Limited at Rs. 33,750 per MT through a broker.

16. The Court has scrutinised the original records produced by the Respondents from which it appears that there is a sorry state of affairs in the management of the Corporation. The case made out by the Corporation before this Court is also contradictory and inconsistent.

Indeed the manner in which the sale of the oil has been sought to be effected by the Corporation is in deviation from all recognised norms to be followed by Government Authorities.

17. On December 15, 1997 the General Manager of the Corporation had issued a notification constituting a Tender Committee for the Corporation with 3 officers under the Chairmanship of the General Manager. The three officers are CAO, AOIA (Cell) and the Divisional Head concerned. The committee was to function in respect of all types of tenders initiated from any division/cell of the Corporation. No tender was to be placed for decision before the Managing Director without the recommendation of the Committee. The Committee was to start funtioning with immediate effect and had the approval of the Managing Director.

18. The Corporation had issued a sale notice for purchase of the oil on December 24, 1997 for sale of the oil on as is where is basis. The last date of receipt of the tender was December 30, 1997. There were several offers received by the Corporation. The bed sheet shows that the highest offer was that of Ruchi Soya at Rs. 28,250 per MT for 1500 MTs. The offer of one Narayan Das Agarwal of Rs. 28,200 per MT for 350 MTs was accepted by the Corporation. Ruchi Soya filed a writ application challenging the acceptance of Narayan Das Agarwal''s offer. ''A settlement'' was arrived at between Ruchi Soya and the Corporation. Ruchi Soya withdrew its writ application.

19. Narayan Das Agarwala resiled from his offer.

Pansari and the writ Petitioner raised their offers to Rs. 28,260.00. As a result by letter dated January 13/14, 1998 the Petitioner''s offer for purchase of oil Rs. 28,260 from the storage Tank of the Corporation at Budge Budge was accepted. The Petitioner was required to submit security deposit of Rs. 5,00,000 and the price of the oil together with sales tax within 3 days and obtain delivery orders. The entire stock of 1000 MTs was required to be lifted within 10 working days from the date of deposit of the security money. Ruchi Soya was allotted 1200 MTs at Rs. 28,260.00 per MT by the Corporation by letter dated January 19, 1998 subject to the same terms and conditions as the Petitioners. A similar acceptance in respect of 600 MTs was issued to Pansari on January 7, 1998 and separately for 600 MTs on January 20, 1998.

20. On January 18, 1998 the Petitioner wrote the following letter to the General Manager of the Corporation.

Dear Sir,

We are thankful to you for the allotment of RBD Palmolein Oil of 1000 MT. Please make that Sir 750 MT. Oil will be lifted within 30 working days after lifting of first consignment. We have already given necessary security with all necessary documents what is upto your satisfaction.

Sir, we are also interested to extend a quantity by 250 MT in addition to 1000 MT in addition to 1000 MT.

So you are requested to issue us necessary order for extended quantity.

Your kind favour for allotment of oil to save our sick unit working which employ more than 300 total peoples in the backward District, Midnapore.

Hope you will do needful.

21. On January 28, 1998 the Petitioners wrote to the General Manager of the Corporation as follows:

Sub: Prayer for extention of Time Limit.

Please be informed that we have deposited amount for 200 MT, RBD Palmolein Oil upto 28.1.98 and lifting is going. As you know our company is sick unit and we are arranging funds and we hope we can lift entire 1000 MT within February 1998.

We solicit your kind favour to kindly extend the validity for month of February, 1998.

Thanking you.

22. On February 6, 1998 identical letters were written to the Petitioners, Pansari and Ruchi Soya with reference to the sale orders placed on them.

Sub.: Deposit of Price of RBD Palmolein Oil vis-a-vis lifting thereof in due time.

Ref.: This office offer/sale order (as applicable).

The undersigned has been directed to inform you that ten days time given to you for deposit of money and lifting against the above said Sale Order has already expired. But you have not yet deposited the value of the oil offered to you.

However, the time of deposit of the money and lifting against the above said offer has been extended by the Competent Authority till 11.2.98.

Hence, if you fail to deposit the price by 11.2.98 then Security Deposit furnished by you will be forfeited and the offer shall stand cancelled.

This is for your kind information and necessary action please.

23. Both Ruchi Soya and Pansari deposited the balance price by February 11, 1998. The Petitioner did not; however, the lifting of the oil by Ruchi Soya and Pansari was not completed within the time specified by the notice.

24. On the facts as noted it is not clear that the Respondents had agreed to the Petitioner''s proposal that the lifting period would be extended by 30 days after the first consignment. There is no letter of acceptance by the Respondents but there is no letter of rejection either. It is also true that the Corporation had not insisted on the time fixed by the Original Sale Orders for lifting of the allotted quantities of oil. In fact even the letter dated February 6, 1998 was not implemented in full. Both Pansari and Ruchi Soya were permitted to lift the

balance beyond the time specified in the notice dated February 6, 1998. In fact what the Petitioner had proposed on January 28, 1998 had been accepted by the Corporation on February 12, 1998 and by the Chairman on February 16, 1998 far as Pansari was concerned.

25. The claim of the Petitioner to the balance 605 MTs as originally allotted to the Petitioner as a matter of right cannot be sustained before this Court. The Petitioner''s case that there was an acceptance of payment on February 12, 1998 in respect of 50 MTs thereby amounting to a waiver of the time limit fixed by the letter dated February 6, 1998 is unacceptable. It is clear from the letter dated February 11, 1998 written by the Petitioner that the pay order for 50 MTs was dated February 11, 1998 and was therefore accepted by the Corporation. The Court cannot compel the Respondents to accept the Petitioners prayer for extension of time.

But the Court can go into the reasons why the Petitioner''s prayer was rejected. The Petitioner''s right to at least be considered for allotment of the balance oil can be established dehors the contract and the exercise of the power of allotment can be questioned under Article 14 see Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, The decisions cited by the Corporation to the effect that the rights of parties to a non-statutory contract even where the State is a party.must be decided by the contract terms and not by constitutional provisions Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, and State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., are therefore distinguishable on facts. Besides when a challenge has been thrown to the allotment of the oil by a governmental organisation such as the Respondent Corporation, the Court is empowered and is bound to see whether the allotment of the oil was made legally.

26. It is abundantly clear that the conduct of the Corporation in this regard is not free from arbitrariness.

Both Pansari and Ruchi Soya have been given preferential treatment.

27. Pansari had in fact obtained two delivery orders under the original allotment for 600 MTs each, upon deposit of security deposit only in respect of 600 MTs. The second allotment of 600 MTs was made before lifting under the first allotment was complete.

28. The letter dated February 6, 1998 was also allowed to be violated by Ruchi Soya and Pansari in that they were allowed to lift the oil after the date fixed.

29. Again, Pansari was given a sale order on February 12, 1998 to lift 1000 MT at the same price at which the Petitioner had offered to pay. Not only that, but the Chairman had also agreed to defer payment for and delivery of the oil.

30. The tendering process consequent to the sale notice dated December 24, 1997 came to an end with the allotment of the orders to the three tenderers and according to the Corporation with the payment and delivery pursuant to the

notice dated February 6, 1998.

The balance amount of oil available with the Respondent Corporation should therefore have been advertised. There was no warrant for the Respondent Corporation to enter into a private negotiations solely with Ruchi Soya and Pansari.

31. It is not established that negotiations were held on February 17, 1998 by the Corporation sending for all three tenderers as claimed by the Corporation. There is no letter calling the parties for negotiations and it is unbelievable and certainly unacceptable if true that a Governmental Organisation will call persons for negotiations orally. Indeed the letter written by Pansari to the Corporation on February 17, 1998 shows that Pansari had approached the office on February 17, 1998 with pay orders for payments at the previous rates pursuant to the Sale order dated February 12, 1998. A fax letter dated February 18, 1998 sent to the Commissioner of the Corporation by Pansari states that at 4 p.m. of the February 17, 1988 Pansari was astonished to learn that negotiation was going on for sale of the quantity of oil already sold to Pansari. Furthermore, the letter of Pansari dated February 19, 1998 does not mention the negotiation at all. On the other hand it refers to the sale order dated February 12, 1998 which appears from the records to have been entered into between the Corporation and Pansari for sale of 1000 MTs of the oil at the previous price.

32. The story of the revision of price and subsequent negotiation on the basis of the escalation of the market price is also unacceptable. As already noted the Commissioner of Food and Supplies was notified on February 17, 1998 by a personal fax received from Kusum Products at 11.30 in the morning that the minimum price for the oil inclusive of duty would be Rs. 34,500 to Rs. 35,000 per MT. The negotiation was held according to Pansari''s letter at 4 p.m. on February 17, 1998. According to the Respondents the negotiations were held after an alleged market survey held by the Respondents. There is no record of any market survey and in any event it is incredible that a market survey could have been ordered, held and completed before the negotiations had taken place.

33. It appears from the record that earlier the parties were called for negotiations by issuance of letters (Vide minutes of the Tender Committee held on December 22, 1997 when an earlier tender for sale of the oil was cancelled because the rate was too low. The Tender Committed took a decision to call for fresh quotations with a very short notice to be very widely published when the present market trend appeared to be optimistic. Why this procedure was not followed in respect of the balance quantity of oil when according to the Corporation the marked was ''optimistic'' is unexplained. It also does not appear from the records that the decisions taken in the matter of allocation of the balance oil were in consultation with the Tender Committee as constituted at all.

34. The Xeroxed extract of the note sheet referred to hereinabove speaks of the decision of the Chairman to allow payment by Pansari of 50 per cent on February

16, 1998 i.e. before the negotiations. In the endorsement of the General Manager on the letter dated February 19, 1998 the revised sale price is not mentioned.

35. The serious nature of the irregular conduct of the Corporation Officers in the matter is further apparent from the events which took place on February 19, 1998. The endorsement of the General Manager on Pansari''s letter accepting Pansari''s offer and granting him time to pay is not in keeping with the extract of the note sheet which bears the same date by which the General Manager merely recommended to the Managing Director for sale to Pansari at the revised price. This was also in violation of the notifications by which the Tender Committee was constituted. In fact the notification issued by the General Manager himself was clearly given a go-bye. Decisions were taken on the basis of personal communications on undisclosed principles and without any publicity at all.

36. What is most astonishing is that page 30 of the original note sheet is not a reproduction of the Xeroxed copy of page 30 of the note sheet produced before this Court on February 26. 1998. The original contains a further endorsement by the Managing Director on February 19, 1998 to the effect that if Pansari failed M/s. Ruchi Soya or the writ Petitioners could be offered the remainder at the same price. The xerox copy of the note sheet as produced on the February 26, 1998 did not contain the Managing Director''s endorsement. This would suggest that the endorsement was made subsequently. Let the copy of the extract of the note sheet as produced before this Court by the Corporation be kept in the safe custody of this Court with the Registrar (Original Side) in a sealed cover.

37. The original records also show that a decision was taken on February 19, 1998 by the Chairman/Ministry-in-charge allotting 350 MTs to Ruchi Soya and 400 MTs of oil to Pansari. This decision is based on no ostensible criteria. The decision reads:

Chairman/MIC

Both parties M/s. Ruchi Soya and M/s. Pansari may be allotted 350 MT and 400 MT respectively, M/s. Pansari should lift first a complete by 4.3.98 and balance quantity shall be lifted by M/s. Ruchi Soya by 13.3.98 positively.

38. After this there was a lull till February 24, 1998 i.e. the day on which the writ application was directed to be listed before this Court after notice. On February 24, 1998 there was a flurry of activity as already noted, it is of significance that Pansari who had asked for time to deposit the price in respect of 1000 MTs in installments when the rate was Rs. 28,260 per MTs and who had been allowed to deposit 50 per cent at the revised price, should have come prepared to deposit the entirety on February 24, 1998 at the revised price.

39. The hot haste in which the Respondents acted is prima facie evidence of mala fides. In P. Bhima Reddy Vs. State of Mysore and Others, in a similar situation the Supreme Court said:

It is rather surprising that the government acted so hastily and issued licences to Respondent No. 4 on or about September 18. It is not quite clear how licences in respect of 1168 shops could be issued on a single day. The effect of this precipitate action on the part of the government was that the Appellant could not on the next day obtain a stay of the operation of the High Court''s order. There is ground for suspecting that the government was favouring Respondent No. 4.

40. The Corporation has relied on the decision in Welcom Hotel and Others Vs. State of Andhra Pradesh and Others, where the Supreme Court has held that Petitioners who have suppressed fact''s and obtained an ex parte order do not deserve any consideration from Court. In the case before me, the order dated February 26, 1998 was not ex parte. The Corporation and Pansari were represented. The Petitioners may have suppressed the letter dated January 28, 1998. The Respondent authorities have not only suppressed facts, but have acted in a far more reprehensible manner. It does not lie in their month to raise the issue of suppression.

41. Therefore while rejecting the Petitioner''s claim as a matter of right to the balance 605 M Ts of the oil on the basis of the Petitioner''s contract, this Court sets aside the subsequent allotment of the oil in favour of Pansari and Ruchi Soya on the ground that it was wrongly done.

42. According to the Corporation the oil is fast deteriorating. If that were so there would be reason for the price increasing from Rs. 28,260.00 to Rs. 33,999.00 per MT a valuation which is clear from the alleged sale said to have been effected by Ruchi Soya on February 24, 1998. It also appears from the records that during this period several parties such as Bidhannagar (Saltlake) Wholesale Consumers'' Co-operative Society Ltd., Bal Gopal Agency had come forward offering to purchase the oil from the Corporation. They should have been given a chance to quote their rates and purchase the oil.

43. Pansari has in fact, claimed the entire quantity of the balance oil available. Ruchi Soya has claimed proportionate refund of the money paid by it together with interest if its sale is set aside. Neither of these reliefs are granted on this writ application. Pansari can certainly not claim the entirety without the proper procedure being followed for sale of the balance quantity of oil. As far as Ruchi Soya''s claim for refund and interest is concerned that is between Ruchi Soya and the Corporation and this judgment should not be construed as debarring the Corporation from refunding any amount to Ruchi Soya if applied for.

44. The writ application is accordingly disposed of by cancelling the sale orders in favour of Ruchi Soya and Pansari dated February 24, 1998 and directing the Corporation to sell the oil available with it after advertisement with short notice and strictly in accordance with law.

