

(2014) 02 AHC CK 0084

In the Allahabad High Court

Case No : C.M. Writ-C Nos. 35296, 36934, 38886, 38972, 39558, 39587, 39589, 39597, 39599, 39600, 39601, 39618, 39936, 39940, 39949, 39973, 39977, 39978, 39979, 39980, 39981, 39982, 40223, 40224, 40226, 40611, 40618, 40619, 40740, 40741, 40859, 40861, 40862, 41167,

M/s. Maa Bhawani Rice Mill and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 24-02-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 8
Constitution of India, 1950 — Article 14, 143(1), 226
Essential Commodities Act, 1955 — Section 3, 3(5)

Citation : (2014) 103 ALR 794 : (2014) 4 AWC 4286

Hon'ble Judges : Vineet Saran, J;Manoj Misra, J

Bench : Division Bench

Advocate : Mayank Agrawal, Manish Goel, Ankit Kumar Gaur, Ramendra Ashthana, Anupam Kulsreshta, Gyanendra Prakash Srivastava, Sri Kant Shukla, Indrasen Singh Tomar, Anil Kumar Singh, Rahul Agrawal and J.J. Munir, Advocate for the Appellant; N. Mishra, N.P. Singh, P.K. Singh, R.K. Singh, A.K. Srivastava, V.B. Mishra, R.G. Tripathi, C.B. Yadav, Addl. Advocate General and S.S. Singh, Addl. C.S.C, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Vineet Saran and Manoj Kumar Gupta, JJ.—The Central Government, in order to fulfil its constitutional commitment of ensuring equitable distribution of material resources, eliminating inequalities and preventing exploitation of farmers and the poor, at the hands of rich and the affluent, has been purchasing food-grain from farmers at a price called "minimum support price". The food-grain so purchased is harnessed into the central pool for distribution through Public Distribution System (P.D.S.) and other welfare schemes. For achieving the aforesaid avowed objective, the Government has framed various Control Orders, under the provisions of Essential Commodities Act, 1955 and also issues notifications/

executive instructions, from time to time. In case of paddy, it is purchased from farmers at minimum support price, notified every year. Thereafter, it is given for milling to licensed rice-millers (for short, "miller"). In the process, the husk and bran layers are removed from paddy, resulting in the production of rice. The miller has to return the rice, of the specified quality and quantity to the Government. The miller is paid predetermined sum as hulling charges. This is called "Custom Milling of Rice" (hereinafter, for short, such "rice" will be referred as "C.M.R."). The other source of procuring rice for central pool is by compelling the millers and dealers to sell a specified quantity of the same to the Government at a specified price. This is done under the statutory levy system. Rice so procured is called "levy rice".

2. The dispute in this bunch of writ petitions is between the Government and the millers on account of alleged non-delivery of C.M.R. by the millers. The stand of the Government is that the millers have failed to carry out their statutory and contractual obligations, by either not delivering the C.M.R. within, the specified time or making available C.M.R. which was of inferior quality, not according to the prescribed specifications, thus, compelling the Government to recover the value of the deficit C.M.R. from the millers by coercive measures and further debar/blacklist them from carrying milling operations, in future.

3. On the other hand, the rice millers have their own tale of woes. According to them, they have already supplied substantial part of C.M.R., but at later stages, since there was shortage of storage space in F.C.I. godowns, therefore either movement challans were not issued despite request or where the millers offered the C.M.R. at F.C.I. godowns, it was rejected on pretext of it being of inferior quality. It is submitted that the millers have always been and are still ready and willing to supply the C.M.R., but the action of the Government in adopting coercive measures, without any adjudication by any independent arbiter or Court of law as to who is at fault, is ex facie illegal, arbitrary and capricious. It is a death knell to the industry as a whole and will not only ruin the millers, but will also not be in larger public interest.

4. Thus, the bone of contention between the parties is that who is at fault. Whether it is the miller, who have failed to supply the C.M.R. or the Government which had refused to accept the C.M.R. because of shortage of storage space in F.C.I. godowns, and is now passing the buck on the millers? Several other ancillary issues also arise between the parties, which will be dealt at appropriate place.

5. Since, common issues of fact and law arise for consideration in this bunch of writ petitions, therefore, these were heard together and are being decided by this common judgment. Writ petition No. 35296 of 2013 Maa Bhawani Rice Mill and another v. State of U.P. and others is treated to be leading petition and generally, the pleadings and material therein have been referred in this judgment. Wherever required, pleadings and evidence have also been referred; from other petitions.

6. The power to direct a rice miller to convert paddy into rice emanates from the provisions of The Uttar Pradesh Rice and Paddy (Levy and Regulation of Trade) Order, 1985, framed in exercise of powers u/s 3 of the Essential Commodities Act. Some of its provisions, relevant for resolving the controversy between the parties, are reproduced below:

2. (c) "Custom Milling" means milling of Paddy, not belonging to the miller, into rice in his rice mill on payment of milling charges in cash or in kind.

(i) "Paddy" means rice in husk;

(1) "Rice" means raw or parboiled rice;

18. Power to direct a rice mill to convert paddy into rice.--The State Government may direct any licensed rice mill to convert any stocks of paddy into rice held by the State Government or its agencies on such terms and conditions as may be notified by the State Government from time to time:

Provided that the quantity of paddy to be given to a rice mill by the State Government or its agencies during one kharif marketing season beginning from 1st October shall not exceed forty per cent the annual licensed capacity to be calculated on an average of 300 working days.

Explanation.--For the purpose of this clause, the licensed milling capacity of any licensed rice mill shall be the same as mentioned in the licence issued under the Rice Milling Industry (Regulation) Act, 1958 and the rules made thereunder.

23. Duty to comply with order.--Every licensed miller or licensed dealer to whom an order or direction is given under any power conferred by or under this Order shall comply with such order or direction.

7. The procurement of paddy from farmers and its conversion into rice is regulated by executive instructions/Government Orders, issued every year. The paddy procurement scheme of State Government for the year 2011-12 is regulated by Government Order dated 19.9.2011. Some of the salient features of the scheme are as follows:

(i) The procurement of paddy will start from 1.10.2011 and will continue till 28.2.2012.

(ii) The minimum support price of paddy for common variety of rice is Rs. 1,080/- per quintal and Rs. 1,110/- for Grade A variety.

(iii) The purchase target of paddy was 25 lacs metric tonnes and can also exceed.

(iv) Entire custom milled rice will be stored in F.C.I. godown.

(v) Food Department of the State Government, F.C.I., and 7 other named Co-operative Societies are to act as procurement agencies.

(vi) In all 3000 procurement centres will be opened throughout the State.

(vii) All facilities will be made available to farmers who come to sell their paddy. Payment to farmers will be made by the procurement agencies.

(viii) Transport contractors appointed by Food Commissioner are to transport the paddy to the assigned mill for hulling.

(ix) After hulling of paddy, it will be the responsibility of Rice Miller, District Manager, procurement agency and concerned Regional Food Controller to ensure that the C.M.R. is delivered by the rice millers at the assigned F.C.I. godown. The Centre uncharge of procurement agency will issue movement challan and on acceptance of rice, the Depot Incharge, F.C.I. will issue an acknowledgement.

(x) Procurement agency will receive payment of C.M.R. from F.C.I., as per approved rates.

(xi) If C.M.R. is refused by the F.C.I., the concerned procurement agency will be able to dispose of the C.M.R. by commercial sale. In the process, if any loss is suffered, it will be compensated as per the terms of agreement between the procurement agency and the miller.

(xii) For Grade A paddy, C.M.R. will be supplied by treating the recovery rate as 67%.

(xiii) Before delivering paddy to miller, it will be mandatory to get the agreement executed with the miller and to obtain the bank guarantee.

(xiv) Miller will be supplied paddy which should match the bank guarantee; in case, any miller is supplied paddy in excess of bank guarantee, additional amount of bank guarantee will be obtained.

(xv) The quantity to be delivered to miller at a time will be as determined by the District Food Marketing Officer and District Manager of the, procurement agency. It will be insured that next lot of paddy is delivered to the miller only on receipt of C.M.R. against paddy already delivered.

(xvi) At the time of delivery of C.M.R., its quality will be tested by technical assistants of F.C.I., in presence of representatives of the procurement agency. In case of dispute, three samples will be jointly drawn and sealed. One of the samples will be tested jointly by District Level officer of procurement agency and Manager (Quality Control), F.C.I. If dispute persists, the other samples will be tested jointly by Regional Manager of Procurement Agency or Regional Food Marketing Officer alongwith Regional Manager of (sic).

(xvii) Each miller will be responsible to deliver C.M.R. within 20 days at the assigned F.C.I., depot and whereafter holding charges will be payable by a miller at the rate Rs. 1/- per quintal per day. In case, C.M.R. is not accepted because of shortage of storage space, the miller will not be liable to pay-holding charges.

(xviii) State Government and the procurement agencies will be entitled to realise their stun due on the miller from the bank guarantee as per the terms of the

agreement. In case, the miller fails to supply the C.M.R. to the State Government and procurement agency or supplies C.M.R. of inferior quality resulting in losses to the Government, the same can be realised as arrears of land revenue and the miller will be debarred for five years from carrying out the custom milling.

8. As per the provisions of the Control Order and the Paddy Purchase Scheme, the millers have entered into agreement with the State Government. A sample agreement has been filed as Annexure 7. It provides for terms and conditions on which the millers have agreed to convert paddy into rice. It regulates the rights and liabilities of the parties, stipulates the forum for resolution of disputes and the mode for recovery of damages, if any, suffered by the Government.

9. According to the stand of the State Government, it had procured 2321156.36 metric tonnes of paddy in Basti division, during the paddy purchase year 2011-12, which was delivered to rice millers for hulling. As per prescribed stipulations, 67% by weight was to be supplied as C.M.R. which comes to 1555174.76 metric tonnes. Until 31st March, 2012, the last date fixed for acceptance of C.M.R., the total quantity received at F.C.I., godown was 1242090.11 metric tonnes, thus leaving a deficit of 313084.65 metric tonnes. Similar deficit in C.M.R. was noticed in certain other parts of the State.

10. It seems that because of deficit supply of C.M.R. by 31st March, 2012, the State Government requested the Central Government to extend the time limit for delivery of C.M.R. at F.C.I. godown. The Central Government conveyed its approval by letter of Director, Ministry of Commerce Affairs, Food and Public Distribution, New Delhi dated 30th October, 2012, extending the time up to 31st December, 2012 (CA-4). This time limit was further extended by the Central Government by order dated 31st January, 2013 and in pursuance whereof the Commissioner, Food and Civil Supply Department, Uttar Pradesh, Lucknow passed an order dated 14th November, 2013. Even thereafter, the balance C.M.R., in Basti division was to the extent of 157178.36 metric tonnes.

11. Thus, according to the Government, it had given sufficient opportunities to the millers to supply the deficit C.M.R. and has been, in fact, very soft against the millers. According to the State Government, even then, the millers failed to deliver the C.M.R., compelling it to adopt coercive measures against the millers as per the Paddy Purchase Scheme for the year 2011-12 and the stipulation in the agreement.

12. In almost all the writ petitions, challenge is to the order of Special Secretary, U.P. Government, Lucknow dated 3rd June, 2013 whereby, Commissioner, Food and Civil Supply, Lucknow, was directed not to give any further extension for delivery of C.M.R. and to recover value of deficit C.M.R. by invoking Clause 29.5 and 38.3 at the Paddy Purchase Scheme. Further challenge is to consequential public notices/individual notices issued to millers, to make good the deficit C.M.R. or pay price of the same at the rate 1921.53 per quintal (which varies district-wise on account of difference in certain variables like, transportation

charges etc.), failing which coercive action will be taken. In some cases, such notices have been followed by recovery certificates and citation to appear. The amount of loss has been calculated by assuming commercial value of deficit C.M.R. to be the price fixed by the Central Government for payment to the procurement agencies. In some cases, orders for debarring the millers from carrying out C.M.R. operation for five years, have also been passed and are subject-matter of challenge in this bunch of writ petitions.

13. A preliminary objection was raised by Sri C.B. Yadav, Additional Advocate General regarding maintainability of writ-petitions contending that the dispute between the parties being in the realm of non-statutory contract, the writs invoking extraordinary jurisdiction of this Court be dismissed, in view of following decisions:

1. National Highway Authority of India Vs. Ganga Enterprises and Another, .
2. Bareilly Development Authority v. Ajay Pal Singh 1989 AWC 425.
3. Ram Nagar Allottees Association and Others Vs. Lucknow Development Authority, .

14. Sri Ved Vyas Mishra advocate, appearing for the procurement agencies placed reliance on certain other decisions on the same points which are as follows:

- A. State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd., .
- B. Sri. Tarun Kumar Chhabra Vs. U.P. Awas Evam Vikas Parishad, and others, .

15. We have minutely gone through all the judgment cited on behalf of the respondents. We find that in none of the decisions, it has been held by the Apex Court that where the dispute arises out of a contract, there is absolute bar for the Writ Court to entertain the writ petition. On the other hand, there are catena of decisions of the Apex Court, holding that in appropriate cases, even in matters arising out of contract, the Writ Court can interfere. In the case of ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, , it has been held that if on a given set of facts, the State action is arbitrary, then, even in the matters of contract, an aggrieved party can approach the Court by way of writ under Article 226 of the Constitution and the Court depending on facts of the said case, is empowered to grant the relief. The Supreme Court observed that:

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the Court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this Power (see Whirlpool

Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and this plenary right of the High Court, to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.

16. In *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, , the Apex Court held that non-arbitrariness in State action is basic rule of law, which embraces within it, the action of the State, even in the matters of contract. It was held as follows:

.....In our opinion, it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 in contractual mattersThis is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.

22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of the non-arbitrariness at the hands of the State in any of its actions.

23. Thus, in a case like the present, if it is shown that the impugned State action is arbitrary and, therefore, violative of Article 14 of the Constitution, there can be no impediment in striking down the impugned act irrespective of the question whether an additional right, contractual or statutory, if any, is also available to the aggrieved persons.

17. The Apex Court while answering the presidential reference under Article

143(1) of the Constitution of India in *In Re: Special Reference No. 1 of 2012*, had, after examining a large number of decisions, concluded as follows:

170. The legal propositions laid down in the instant judgment in *Shrilekha Vidyarthi* case may be summarised as follows:

170.1. Firstly, State actions in the contractual field are meant for public good, and in public interest and are expected to be fair and just.

170.2. Secondly, it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 of the Constitution of India in contractual matters.

170.3. Thirdly, the fact that a dispute falls in the domain of contractual obligation, would make no difference to a challenge raised under Article 14 of the Constitution of India on the ground that the impugned act is arbitrary, unfair and unreasonable.

170.4. Fourthly, every State action must be informed of reason and it follows that an act uninformed by reason is arbitrary.

170.5. Fifthly, where no plausible reason or principle is indicated (or is discernible), and where the impugned action *ex facie* appears to be arbitrary, the onus shifts on the State to justify its action as fair and reasonable.

170.6. Sixthly, every holder of public office is accountable to the people in whom the sovereignty vests. All powers vested in a public office, even in the field of contract, are meant to be exercised for public good and for promoting public interest.

170.7. and seventhly, Article 14 of the Constitution applies also to matters of Governmental policy even in contractual matters, and if the policy or any action of the Government fails to satisfy the test of reasonableness, the same would be unconstitutional.

18. From the aforesaid judgments of the Apex Court, it can safely be inferred that there is no absolute bar in entertaining the writ petition arising out of contractual matters. Though, the exercise of powers has to be with due caution, on limited grounds. We, thus, overrule the objection of the respondents that since the writ petition arises out of contract, these should therefore, be dismissed as not maintainable.

19. The second objection relating to maintainability of the writ petition as raised by the respondents was on the ground that the discretionary and equitable jurisdiction should not be exercised to interfere with economical and financial policy of the State Government. It is contended that the millers are estopped from challenging the paddy procurement policy of the Government, having not objected to the same while receiving the paddy. For the said purpose, reliance has been placed on the following decisions:

1. D.C.M. Shri Ram Industries Ltd. v. State 2007 (4) ADJ 150;
2. Puravankara Projects Ltd. Vs. Hotel Venus International and Others, ;
3. Amlan Jyoti Borooah Vs. State of Assam and Others, ;
4. Arun Kumar Agrawal Vs. Union of India (UOI) and Others, ;
5. East U.P. Sugar Mills Association and Others Vs. State of U.P. and Others, .

20. We have examined the aforesaid decisions cited on behalf of Counsel for the respondents. In some writ petitions, a challenge has also been laid to the paddy procurement policy of the State Government and the agreement entered into between the millers and the State Government, on the ground that the policy and the agreement contain unilateral, arbitrary, one sided clauses and the petitioners cannot be compelled to perform the same. However, we find that all the millers have duly entered into the agreement at the start of Kharif season and all the writ petitions were filed after the Kharif season and even after the extended period for return of C.M.R., is over. Admittedly, the millers have taken paddy from the State Government and the procurement agencies on the basis of aforesaid policy and the agreement and therefore, at this distance of time, the petitioners cannot be permitted to challenge the same. For the said purpose, we uphold the contention of learned Counsel for the respondents and refuse to go into the questions relating to the challenge laid to certain clauses of paddy procurement policy and the agreement. Since the contention of Counsel for the respondents raised in this regard is being upheld, therefore, we do not consider it necessary to examine various judgments cited by the respondents on the aforesaid proposition of law.

21. We now proceed to examine whether State action can be said to be arbitrary and whimsical, so as to warrant interference by the Writ Court, or does it pass the test of fairness under Article 14 of the Constitution of India.

22. Clause 29.5 and 38.3 of the Paddy Purchase Scheme of the State Government for the year 2011-12 which have been invoked by respondents, are as under:

23. According to the petitioners, Clause 29.5 has been wrongly applied. It gets attracted only to those cases where upon refusal by F.C.I., to accept the C.M.R. on the ground that it is not as per the prescribed specifications, the same is sold by commercial sale by the procurement agency, and in the process, it suffers a loss, by not getting proper price. In such cases, loss suffered in the process, can be recovered as per Clause 38.3 and the provisions of the agreement, both of which provides for recovery of damages as arrears of land revenue. It is contended that in none of the cases, the procurement agencies have till date effected commercial sale of C.M.R., rejected by the F.C.I. Rather, the C.M.R. has been returned to the millers. Thus, Clause 29.5 is not attracted.

24. We have carefully gone through the facts of each case and we find that in

none of the cases, the procurement agencies have, as yet, effected commercial sale of the C.M.R., rejected by the F.C.I. Thus, it was not possible to quantify the loss suffered in the process, a condition precedent for applicability of Clause 29.5 of the Government Order. In view of it, we have no hesitation in accepting the contention of the millers that Clause 29.5 does not get attracted.

25. In some cases, notices have been issued directing the millers to deposit the commercial value of deficit C.M.R. at the rate of Rs. 1,921.53/- per quintal (slight variation from district to district because of difference in transportation charges), failing which commercial sale would be held. This is putting cart before the horse. The commercial sale under Clause 29.5 is not dependent on the millers failing to deposit the price of C.M.R. It was to-be carried out if the C.M.R. supplied was not of prescribed specification. Loss suffered in the process could be recovered by taking recourse to Clause 29.5. Thus; the threat to proceed under Clause 29.5 is based on a wrong premise and a complete misunderstanding of the terms of the scheme.

26. Sri C.B. Yadav, Additional Advocate General and Counsel for F.C.I., Sri R.K. Singh and Sri A.K. Srivastava, and for the procurement agencies, Sri V.B. Mishra, Sri Ram Gopal Tripathi, Sri Nipendra Mishra, have drawn our attention towards Clause 38.3 of the Government Order which has also been invoked. According to them, Clause 38.3 empowers the State and the procurement agencies to recover the loss suffered on account of non supply, as well as on account of supply of inferior quality of C.M.R. Apart from it, there are ample provisions in the agreement, which are sufficient to sustain the impugned action. For the said purpose, reliance has been placed on the following clauses of the agreement:

2. (e)(i) The above quantity of rice to be delivered by the miller to the Regional Food Controller shall conform to the specifications laid down in the orders by the State Government from time to time u/s 3 of the Essential Commodities Act, 1955 (hereinafter referred to as. the said orders). If the rice to be delivered by the miller does not conform to the specifications prescribed by the said orders (called the prescribed specifications) the miller will compensate the Government at the rates prescribed in the said orders on such quantity of rice which is not found to conform to pre-scribed specifications.

(ii) If the miller delivers rice which is above the rejection limit mentioned in prescribed specifications, the Regional Food Controller shall reject such rice and the quantity so rejected shall be made good by the millers within 7 days of rejection and such supply shall be of the same variety as the miller would have delivered had there been no rejection.

(iii) If the miller supplied rice less in quantity than the recovery percentage mentioned in sub-clause (d) the miller shall compensate the State Government for the quantities of rice in short supplies at the rate of one and half times the prevailing market price of the concerned variety of rice. The decision of the Regional Food Controller regarding variety, specifications and prevailing market

price under sub-clause (d) and (e) shall be final and binding on the miller.

11. Any loss occurred to the State Government due to non-delivery of custom milled rice by or due to production of such rice which is not as per specifications, will be recovered as land revenue from the miller.

27. Counsel for the respondents have also drawn our attention to the storage scheme for C.M.R. issued jointly by the District Officers, F.C.I., and procurement agency. It is thus contended that there was no shortage of storage space in F.C.I., godowns and the millers have defaulted in supplying the C.M.R.; therefore, the impugned action is fully justified.

28. Per contra, Counsel for the millers submitted that though the power to recover loss, if suffered by State or procurement agencies, as stipulated by Clause 38.3 cannot be disputed, but for that, there has to be an adjudication by some independent arbiter or Court of law, as to who is at fault. A claim for damages cannot ipso facto empower the State to be Judge in its own cause, in determining who is at fault and also in assessing the damages and thereafter, proceeding to recover the same by adopting coercive measures. According to them, the petitioner millers are not at fault. The petitioners have alleged that they have- made efforts to deliver the C.M.R. but either the movement challans have not been issued, or if issued, the C.M.R. has not been accepted on the pretext of it being of inferior quality, although the true reason was the shortage of storage space at F.C.I. godowns. In some cases, it is alleged, that gunny bags have not been supplied. In such circumstances, according to the millers, the fault lies on the part of the State and the procurement agencies and the millers have been made a scapegoat. It is further contended that, in fact, the millers have suffered huge losses as a result of such illegal and arbitrary action of the authorities. They were compelled to store the C.M.R., which with passage of time deteriorated in quality. According to them, the rice is hygroscopic substance and deteriorates in quality, if stored for long duration. Reliance has been placed on the booklet by Agmark (SA-2), in order to buttress the aforesaid submissions.

29. Counsel for the petitioners, in support of their contention that there was shortage of storage space in F.C.I., godowns, have referred to various documents and pleadings in their respective writ petitions, some of which are as follows:

A. Letter by Principal Secretary, U.P. Government, Food and Civil Supplies, Lucknow dated 12.12.2012 (S.C.A.-7) addressed to the Government of India, requesting for extension of time for delivery of balance C.M.R., wherein, one of the reasons assigned for the delay in delivery of C.M.R. is the shortage of storage space in the F.C.L. godowns. Acting on the aforesaid letter of the Government of Uttar Pradesh, the Central Government by order dated 11.1.2013, extended the time for supply of C.M.R. till 31.3.2013.

B. Letter of the Government of India dated 14.8.2013 (S.C.A. 10), in which delay in delivery of food-grains, particularly C.M.R. has been stated to be inter alia, on account of "non-acceptance of delivery by F.C.I. due to constraint of space or/

and shortage of technical staff".

C. Order dated 15.10.2012 issued by the Special Secretary, U.P. Government, Lucknow (S.C.A.-6), communicating the decision of the Central Government dated 12.10.2012, accepting the request of the State Government for exemption in supply of balance levy rice for the year 2010-11 and 2011-12. It has been admitted in the said order that one of the reasons why required target of levy rice could not be met, was shortage of storage space.

D. Reliance has been placed on an order passed in Public Interest Litigation by Lucknow Bench of this Court on 27.6.2012 in writ petition (Misc. Bench) No. 5223 of 2013 (P.I.L.): *We The People v. Union of India and others*, in which this Court taking note of the news item published in the Dainik Jagran that "food grains in gunny bags are lying in the open, in the Mandi and railway yards and is rotting" had taken serious note of the situation and had issued various directions for proper storage and distribution. (Annexure 14).

E. Reliance has also been placed on certain orders passed in writ petition No. 38931 of 2012 filed by a miller *M/s. Balaji Foods and others* (Annexure 19) complaining that the Government is refusing to accept levy rice and whereupon various directions were issued from time to time by this Court, to accept the same. Much emphasis has been laid on the counter-affidavit filed in the said case (Annexure 29) and particularly on paragraph 15 thereof, wherein it has been averred "that due to the non availability of the storage capacity in the concerned godown of the Food Corporation of India in the District, the answering respondents are incapable to make storage of Custom Milled Rice as per the policy decision of the Government.....

30. It has been asserted in Paragraph 18 of the writ petition that because of decreasing storage space, the officials of F.C.I., slowed down acceptance of C.M.R. with effect from 1.1.2012. It has been further alleged that the problem got compounded because of shortage of class 3 employees with the F.C.T. In support of the said contention, reliance has been placed on the order dated 1.12.2012 (date wrongly mentioned as 1.12.2011) by Regional Food Controller, Basti Region, Basti which indicates that various disputes arose in connection with delivery of C.M.R. at F.C.I., godown, Basti and in order to resolve the problem, a meeting was held on 30.11.2011 between the officials of F.C.I., and the Food Department of Government of U.P. (Annexure 11). This, according to the petitioners, was on account of refusal on part of F.C.I., officials to accept the C.M.R.

31. The petitioners have also drawn our attention towards various communications between the official of F.C.I., the Food Department of U.P. Government and the procurement agencies which also indicate that various problems arose in acceptance of C.M.R. at F.C.I., godowns because of shortage of storage space. These communications go to show that large number of trucks were lined up in front of various F.C.I., godowns and the officials of F.C.I., created

different sort of hindrances in acceptance of C.M.R. In this regard, reference may be made to the following:

A. On 27th September, 2012 the Regional Food Controller, Basti Division, Basti (Annexure 24) wrote to the Special Secretary, Food and Civil Supplies, Anubhag-4, U.P. Government, Lucknow that in three eastern districts of the State, namely Basti, Sant Kabir Nagar and Siddharth Nagar, 27027 metric tonne of C.M.R. is yet to be delivered. 15 lots of C.M.R. were sent for delivery to Pairah and C.W.C. depot of F.C.I. but it was not accepted. It was further brought to his knowledge that a meeting or representatives of procurement agency and Sri Vijay Bhaskar, Assistant General Manager, Quality Control, F.C.I., took place on 24.9.2012, but it yielded no result because of apathy shown by him. It was brought to his knowledge that the price of rice is going up in the market everyday and in such circumstances if the C.M.R. is accepted, it will be in public interest.

B. By letter dated 25th August, 2012, the Commissioner, Food and Civil Supply, Lucknow in his letter addressed to the General Manager, F.C.I., and all Regional Food Controller, Uttar Pradesh, had stated that the balance C.M.R. of 1.87 lac metric tonne will be delivered at F.C.I., godowns by 30th September, 2012 and which is likely to result in shortage of storage space in F.C.I., godowns. He therefore suggested that the wheat meant for distribution through public distribution system be lifted from covered godowns of F.C.I., and not from that lying in the makeshift cap/plinth, so that storage space is created. According to the petitioners, this letter gives an indication of shortage of storage space in F.C.I., godowns (Annexure 23).

C. By letter dated 15th May, 2012, Senior Manager, P.C.F., Basti Mandal, Basti (a procurement agency) wrote to the Regional Manager, F.C.I., Gorakhpur that 40 trucks loaded with C.M.R. are standing at the F.C.I., godown but the officials of F.C.I., are not accepting the C.M.R. The same is also the position at Dumariyaganj depot of F.C.I. This is causing harassment of the millers and they are unnecessarily saddled with halt-age charges by the transporter. The millers are ready to deliver the C.M.R., but it is not being accepted by F.C.I., without any justification. Request was made to solve the problem (Annexure 22).

D. Letter dated 11th May, 2012 by Managing Director, U.P. Cooperative Federation Ltd. another procurement agency to the General Manager, F.C.I., Lucknow raising grievance that proper arrangements are not available at F.C.I., depots, creating hindrance in delivery of C.M.R. About 250 trucks are stranded in front of F.C.I., godown for last 20 days, but the rice is not being permitted to be unloaded. A request was made to issue necessary direction so that the C.M.R. is accepted forthwith (Annexure 21)..

E. Letter of Senior Regional Manager, P.C.F., Basti Division Basti dated 2nd April, 2012 to the General Manager, P.C.F., Lucknow (Annexure 20) bringing to it's notice that 60 trucks loaded with C.M.R. are held up in front of F.C.I., godown at

Basti since 23rd March, 2012, because of indifference shown by the officials of F.C.I., the C.M.R. is not being accepted. Request was made to forthwith ensure acceptance of the C.M.R.

F. The copy of letter dated 10.10.2012 by Senior Marketing Inspector, Saltawa, District Basti to the District Food Marketing Officer, Basti (Annexure 26), according to which as per office memo dated 4.10.2012 issued by the office of District Food Marketing Officer, Basti, a roster for acceptance of ten lots of rice was issued wherein M/s. Balaji Foods has to supply 18 metric tonne of C.M.R., is not being honored by the officials of F.C.I. It has been stated in the letter that as per the aforesaid roster, M/s. Balaji Foods by challan No. 7450 truck No. UP 26/8499, challan No. 3151 truck No. UP53F/3432 total 180 quintal and M/s. Devi Sharan Industries, Saughat by challan No. 003993, truck No. UP78B/5427, Challan No. 003992, truck No. UP78T/9671 total 180 quintal C.M.R.. was brought for delivery at F.C.I. godown, Paurah. The Marketing Inspector was personally present to supervise the delivery of C.M.R. at F.C.I., godowns but the Manager, F.C.I., Sri Sant Ram Yadav refused to accept the C.M.R. on the ground that there is shortage of storage space. Thus, attempt to deliver the C.M.R. at Basti Depot also failed.

G. Reliving on the order of the Regional Food Controller, Basti dated 1.12.2011 (Annexure 11), it has been contended in paragraph 21 of the writ petition that technical assistants of F.C.I., were not accepting more than 15 lots of rice in a day, under any situation. It is stated that only 4050 quintal of rice was being taken on daily basis and large number of trucks loaded with rice were kept waiting, sometimes for weeks, and the millers were at times paying up to Rs. 5,000/- per day as halting charges, to the transporter. But there was no one to listen to the grievance of the millers.

H. Inspection report dated 2.11.2012 whereby the mill premises of M/s. Maa Bhagwati (Annexure No. 9) was inspected on 2.11.2012 by Marketing Inspector and he found entire balance quantity of C.M.R. lying stored in the mill premises. It was noted in the report that the owner informed him that the C.M.R. relates to lot No. 49, 50, 52, 53 and 54 which were dispatched to F.C.I., godowns but were returned for certain reasons, one amongst them being shortage of storage space in F.C.I., godowns. It was noted by him that the rice stored is found to be of satisfactory quality.

32. Large number of movement challan have also been brought on record by various writ petitioners, which demonstrates that in several cases, the C.M.R. has been rejected without assigning any reason and in some cases, according to the petitioners, where, reasons have been given, it is only without carrying out actual testing and also without following the procedure prescribed. According to the petitioners, it was adopted as a ploy to refuse acceptance of the C.M.R., in view of shortage of storage space in F.C.I., godowns. To demonstrate the same, the petitioner in writ petition No. 35296/2013, had brought on record, copies of movement challans filed at pages 98 to 101 which evidences rejection of C.M.R.

on the ground that the bags of C.M.R. were not properly stamped and stenciled. Movement challan at pages 91 and 92, relating to lot No. 49 evidences that C.M.R. has been rejected without assigning any reason.

33. It has been contended that M/s. Maa Bhawani Rice Mill, petitioner in writ petition No. 35296 of 2013 has been engaged in milling of C.M.R. for last several years and has even been assigned the aforesaid work for the year 2012-13, in which it has been regularly supplying the C.M.R. and only 540 quintals were left to be supplied by the time writ petition was filed; it is stated in paragraph 16 that the same would be supplied within a week. According to the petitioner, it is not a fly-by-night operator but a well established, reputed business house and would never dare to withhold the C.M.R. knowing well the consequences of the non-supply of the same. Similar plea was raised in large number of other writ petitions, in order to prove the bona fides of the millers in such cases.

34. It has been further contended by the millers that according to Clause 38.2 of the Paddy Policy of the year 2011-12, in case C.M.R. is not delivered within 20 days at the assigned F.C.I., godown, the miller will be saddled with holding charges at the rate of Rs. 1/- per quintal per day. However, holding charges are not leviable when the delay in delivery was on account of shortage of storage space in F.C.I., godowns. It has been pointed out that in no case, holding charges have been levied on any of the rice millers; this is a clear indication of the admission by the respondents that the delay in delivery of C.M.R. is not on account of any fault of the rice millers but because of shortage of storage space in F.C.I., godowns.

35. It has been contended that in various cases, in order to avoid acceptance of C.M.R. because of shortage of storage space and to save their own skin, as the entire controversy in this regard was subject-matter of scrutiny in P.I.L. by Lucknow Bench of this Court, the officials of F.C.I., started rejecting the C.M.R. on false and fictitious reasons without carrying out the actual sampling and testing. It is contended that the millers were not associated in the process of testing as would be evident from the order dated 1.12.2012 by Regional Food Controller, Basti filed as Annexure 11. Thus, the entire action in this regard, is de hors the provisions of paddy procurement policy, the agreement and also the principles of natural justice. Now, the Government, by passing the buck on the petitioners, is seeking to recover the damages from them, which is per se illegal, and a result of colorable exercise of power.

36. It has been further contended that according to paddy procurement policy of the Government for the year 2011-12, F.C.I. will accept the C.M.R. only when it meets the specified quality, but it does not define or specify the same. Clause 2(e)(i) of the agreement provides that "rice to be delivered by the miller.....shall conform to the specification laid down in the orders by the State Government from time to time u/s 3 of the Essential Commodities Act, 1955". It has thus been contended that the specifications relating to the quality of rice can only be prescribed by issuing an order u/s 3 of the Essential Commodities Act,

1955. According to the petitioners, till date there is no order u/s 3 laying down the specifications in this regard. It has further been submitted that in so far as the Control Order of 1985 is concerned, it is also silent in this regard. Schedule V thereof, only enumerates the variety of paddy and rice and the ratio of length and width of the grains of paddy/rice which is only relevant in ascertaining whether rice/paddy contains the admixture of any variety of rice/paddy beyond rejection limit. It does not prescribe the specifications of C.M.R.

37. It has been further submitted that the specifications prescribed by the Central Government vide its letter dated 8.8.2011, which had been mechanically adopted by the State Government vide its letter dated 21.9.2011, cannot be equated with an order u/s 3 of the Essential Commodities Act, 1955, as according to section 3(5), an order made u/s 3 shall "in case of an order of a general nature or affecting a class or person, be notified in the official gazette; and in case of an order directed to specified individual, be served on such individual....." Indisputably, the order laying down specifications of the C.M.R. is an order of a general nature or at least an order affecting a class of person and thus would fall under Clause (a) of sub-section (5) of section 3 and has therefore to be notified in the official gazette. Admittedly, the letter of the Central Government dated 8.8.2011 laying down the prescribed specifications has not been published in the Gazette nor was the order of the State Government adopting such specifications. In view of it, these letters/orders cannot be said to have been passed u/s 3 of the Essential Commodities Act.

38. In case, the aforesaid argument of learned Counsel for the petitioners is to be accepted, the necessary corollary would be that the rejection of C.M.R. relying on the specifications prescribed by the Central Government and which have been adopted by the State Government, was an exercise de hors the provisions of the paddy procurement scheme and the agreement. Thus, it would not be a case where the rice millers have defaulted in supplying the C.M.R. or have supplied less in quantity than the recovery percentage, so as to ipso facto attract Clause 2(e) of the agreement.

39. From the aforesaid contentions made by learned Counsel for the millers and the material referred to above, it would be evident that there is a bona fide dispute between the parties as to who is at fault. It cannot be said that the plea raised by the millers is totally sham or a device to escape their liability under the agreement. It also cannot be held that it is only the millers who are at fault or that the entire blame for deficit supply of C.M.R. is attributable to them. It can only be decided after both the sides lead evidence in support of their respective cases. Therein, it is possible that stand of the millers is accepted or may be held to be baseless, but one thing is certain that it requires adjudication.

40. In the aforesaid background, we proceed to examine the issue whether the state was justified in adopting coercive measures against the millers for recovery of damages allegedly suffered by it, without recourse to any adjudicatory machinery.

41. It would be apt to revert to the relevant provisions of the paddy procurement scheme and the agreement. Clause 29.5 and 38.3 of the paddy procurement scheme uses the word (loss) and (compensation) and Clause 2(e) and 11 of the agreement makes use of the term "compensate", and "any loss occurred". Use of these words indicate that the claim is in the nature of compensation for the loss suffered. It pre-supposes existence of fault and breach on part of one party, for which compensation in terms of money is being claimed by the other party. Compensation is something that constitutes an equivalent or recompense; making things equivalent; satisfying or making amends. Blacks law dictionary defines "compensation" as "indemnification; giving an equivalent or substitute of equal value; that which is necessary to restore an injured party to his former position".

42. Thus, any claim for damages involves two stages, viz. (a) determination of question as to who committed breach of the terms of the agreement and (b) the amount of compensation to be awarded. There may be cases where a party admits breach on its part and in which case, one may directly come to the other aspect, i.e., the amount of compensation to be awarded for such breach. But when there is a dispute as to who committed breach, as in the instant case, it requires adjudication by a Court of law or authority competent to decide such questions. Likewise, the damages may be quantified in the agreement, called "liquidated damages" or where it is a claim for un-liquidated damages, it requires adjudication by person or authority or a Court of law, as the case may be. In the instant case, perusal of Clause 2(e)(iii) of the agreement would show that the damages payable in case of default on part of millers whether on account of non-delivery or delivery of rice which is not according to specifications, has been quantified and in this regard, the decision of R.F.C. has been made final and binding. However, the aforesaid clause does not empower the State to straightaway invoke Clause 38.3 of the paddy procurement scheme or Clause 11 of the agreement and proceed to recover the losses allegedly suffered by it, as arrears of land revenue. Such power is confined only to those cases where the breach is admitted to the millers. In other cases, where there is a dispute regarding the person committing breach, there has to be adjudication by an independent person or body or Court of law and not by the other party to the contract.

43. The Apex Court in State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli, had the occasion to consider similar controversy. In that case, Paddy Procurement Scheme, 1959 framed by State of Mysore was under consideration. Clause 12 of the agreement there under related to breach of conditions of the agreement and the consequences that would ensue on such breach. The State alleged that the respondents millers had committed breach of contract by making short delivery of rice and required payment of damages as assessed by the Deputy Commissioner. When the millers failed to pay the damages, the State initiated proceedings for recovery under the Revenue Recovery Act read with Clause 12 of the agreement which empowered the State to recover the amount

which may become due or payable to it under the agreement, as arrears of land revenue. The respondent millers seriously disputing any default on its part, instituted a suit for permanent injunction to restrain the State from perusing, the recovery proceedings. The suit was dismissed by the Trial Court but in appeal it was decreed. The State preferred a second appeal to the High Court. In the second appeal, a reference was made to the Full Bench, in view of two conflicting decisions of the Division Benches. The Full Bench answered the reference by holding that the State is not competent to adjudicate the question whether the miller has committed breach or not. The matter was taken up in appeal to the Apex Court by the State and the Apex Court concurred with the view of the Full Bench to the extent that the State cannot be an arbiter in its own cause and was thus not empowered to decide the question of breach. It was held that even if Clause 12 of the agreement is held to include the power to decide upon the question of breach, the same can only be confined to cases where the miller is not disputing breach on its part but in other cases where there is dispute in this regard, adjudication made by the State Officer cannot be sustained under law, because a party to the agreement cannot be an arbiter in its own cause. It was observed as under:

7. On consideration of the matter we find ourselves unable to accept the contention of Mr. Iyengar. The terms of Clause 12 do not afford scope for a liberal construction being made regarding the powers of the Deputy Commissioner to adjudicate upon a disputed question of breach as well as to assess the damages arising from the breach. The crucial words in Clause 12 are "and for any breach of conditions set forth hereinbefore, the first party shall be liable to pay damages to the second party as may be assessed by the second party". On a plain reading of the words it is clear that the right of the second party to assess damages would arise only if the breach of conditions is admitted or if no issue is made of it. If it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions the wording of Clause 12 would have been entirely different. It cannot also be argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages, as pointed out by the Full Bench, is a subsidiary and consequential power and not the primary power. Even assuming for argument's sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the Officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the

breach of conditions. In such a case the Officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12.

8. We are, therefore, in agreement with the view of the Full Bench that the powers of the State under an agreement entered into by it with a private person providing for assessment of damages for breach of conditions and recover) of the damages will stand confined only to those cases where the breach of conditions is admitted or it is not disputed.

44. The Apex Court took the same view in *Bharat Sanchar Nigam Ltd. and Another Vs. Motorola India Pvt. Ltd.*, . In that case, the B.S.N.L. which was appellant before the Apex Court had awarded a contract to the respondent Motorola India Pvt. Ltd. for a turnkey project on planning, engineering, supply, installation and commissioning of Indian mobile personal telecommunication system in various Telecom circles. It was awarded purchase order for phase I and phase II containing the terms for payment and schedule for delivery of goods. It provided for liquidated damages in the event of failure on the part of the respondents to meet the delivery schedule. The case of B.S.N.L. was that the respondent had failed to complete phase I and phase II of the project within the time schedule as provided under the tender document and therefore liquidated damages were imposed on the contractor as contemplated under Clause 16.2 of the tender document. The contractor disputed that there was delay on its part and invoking the arbitration clause, it filed a petition before the Kerala High Court u/s 11 of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator. Before the High Court, B.S.N.L. contended that imposition of liquidated damages by it is an "excepted matter" and therefore not subject to arbitration. The High Court held that the decision regarding quantification of liquidated damages comes under Clause 16.2 of the agreement which is "excepted matter", but the question whether there has been a delay on part of the contractor in discharging it's obligation for delivery under the agreement is not a matter which can be excluded from consideration by the arbitral tribunal. It was held that adjudication of the question whether there has been a delay on part of the contractor was a condition precedent for imposition and realization of liquidated damages. It was held as under:

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 (B.S.N.L.) 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.

24.It has been correctly pointed out by the High Court that the question of holding a person liable for liquidated damages and the question of quantifying the amount to be paid by way of liquidated damages are entirely different. Fixing of liability is primary, while the quantification, which is provided for under Clause 16.2, is secondary to it.

26. Quantification of liquidated damages may be an excepted matter as argued by the appellants, under Clause 16.2, but for the levy of liquidated damages, there has to be a delay in the first place. In the present case there is a clear dispute as to the fact that whether there was any delay on the part of the respondent. For this reason, it cannot be accepted that the appointment of the arbitrator by the High Court was unwarranted in this case. Even if the quantification was excepted as argued by the appellants under Clause 16.2, this will only have effect when the dispute as to the delay is ascertained. Clause 16.2 cannot be treated as an excepted matter of the fact that it does not provide for any adjudicatory process for decision on a question, dispute or difference, which is the condition precedent to lead to the stage of quantification of damages.

45. In a more recent judgment in J.G. Engineers Pvt. Ltd. Vs. Union of India (UOI) and Another, a similar controversy came up for consideration. Union of India therein contended that in view of Clause 2 and 3 of the agreement, the decision of the Superintending Engineer as regards compensation for delay was made final and binding on the contractor. It was contended that the arbitrator could not have gone into the question whether any breach has been committed or not. The Apex Court after interpreting various clauses of the agreement held that the question whether the other party committed breach cannot be decided by party alleging breach. Relying on the previous judgments in the cases of State of Karnataka v. Shree Rameshwara Rice Mills (supra) and B.S.N.L. v. Motorola India Pvt. Ltd. (supra), the Apex Court has held as under:

19. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a Court or an Arbitral Tribunal.

22. In view of the above, the question whether the appellant was responsible or the respondents were responsible for the delay in execution of the work, was arbitrable. The arbitrator has examined the said issue and has recorded a categorical finding that the respondents were responsible for the delay in execution of the work and the contractor was not responsible. The arbitrator also found that the respondents were in breach and the termination of contract was illegal. Therefore, the respondents were not entitled to levy liquidated damages nor entitled to claim from the contractor the extra cost (including any escalation

in regard to such extra cost) in getting the work completed through an alternative agency. Therefore, even though the decision as to the rate of liquidated damages and the decision as to what was the actual excess cost in getting the work completed through an alternative agency were excepted matters, they were not relevant for deciding Claims 1, 3 and 11, as the right to levy liquidated damages or chum excess costs would arise only if the contractor was responsible-for the delay and was in breach.

23. In view of the finding of the arbitrator that the appellant was not responsible for the delay and that the respondents were responsible for the delay, the question of the respondents levying liquidated damages or claiming the excess cost in getting the work completed as damages, does not arise. Once it is held that the contractor was not responsible for the delay and the delay occurred only on account of the omissions and commissions on the part of the respondents, it follows that the provisions which make the decision of the Superintending Engineer or the Engineer-in-charge final and conclusive, will be irrelevant.....

46. In *Iron and Hardware (India) Co. Vs. Firm Shamlal and Bros.*, , Chagla, C.J., held as under:

In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.

47. A Division Bench of our Court, in the case of *Shri Ganesh Rice Mills, Saharanpur v. State of U.P. and others* 1984 ALJ 272 was confronted with somewhat similar controversy. In that case, the State Government had entered into an agreement with the petitioner where under paddy in gunny bags was supplied for conversion into rice. The agreement contained a stipulation that gunny bags of paddy would be taken back by the State Government. After the petitioner had hulled the paddy and converted it into rice, the same was supplied to the Government in old gunny bags. The order impugned in that case was an order passed by the Commissioner, Food and Civil Supplies whereby the

petitioner therein, was held liable for the gunny bags having become worn out and unserviceable Rs. 4.50 per bag. The petitioner challenged the claim of Government by taking a stand that if the gunny bags have become unserviceable/ the same was on account of the act and omissions of the State Government because of failure on its" part to take the same back within reasonable time. The aforesaid stand of the petitioner was seriously refuted by the Government. It was held that the question whether the petitioners were right or the State Government is justified in its stand, raises a dispute which requires adjudication by the Civil Court or through arbitration, but the Government cannot legally claim the amount straight away.

48. The aforesaid enunciation of law, by Apex Court and by our own High Court/ in our opinion, represents the correct legal position. Consequently, the State Government was not justified in taking recourse to the recovery proceedings without there being any adjudication regarding the party committing breach of the terms of the contract.

49. Now, the question arises whether the claim of the State Government for compensation which is being seriously challenged by the petitioners, should be adjudicated by this Court or not. Sri C.B. Yadav, Additional Advocate General appearing on behalf of the State and Counsel for the procurement agencies and Food Corporation of India have vehemently urged that since it would involve determination of the disputed questions of fact, therefore, this Court should not go into these questions. It has been further urged that Clause 12 of the agreement is an arbitration clause and the petitioners should be relegated to the arbitration proceeding. Clause 12 of the agreement reads as under:

12. Every dispute, difference or question touching out of this agreement or the subject-matter thereof shall be referred to the arbitration of the following authorities as per value of the Government property involved:

A perusal of the aforesaid clause would show that it is wide enough to cover the present dispute between the parties.

50. It is now well settled that if there is an arbitration clause, then the Courts normally refrain from deciding the dispute covered by the arbitration clause and relegates the parties to the arbitration proceedings. In this regard, Counsel for the respondents have referred to certain decisions of the Apex Court which are as under:

A. Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, .

B. The Empire Jute Co. Ltd. and Others Vs. The Jute Corporation of India Ltd. and Another, .

For the said purpose, reliance has also been placed on certain Division Bench decisions of this Court, namely:

1. R.J. Industries v. The G.M., F.C.I., in writ petition No. 49058 of 2013, decided

on 16.9.2013.

2. Kishan Agro Rice v. State in writ petition No. 47630 of 2013, decided on 24.9.2013.

51. We respectfully agree with the view taken in the aforesaid decisions and hold that the dispute between the parties being within the ambit of arbitration clause, the same should be settle I through arbitration. We, thus, decline to adjudicate upon the rival claims of the parties, in this regard, and hold that the same can only be adjudicated by the arbitrator as per Clause 12 of the agreement.

52. The question which now arises is that who should invoke the arbitration clause. According to the petitioners, it is State Government which has laid a claim for damages which should invoke the arbitration clause. On the other hand, the Counsel for respondents have urged that it is the petitioners who are aggrieved by the action of the State Government and should therefore, invoke arbitration clause.

53. The Apex Court in the case of The Branch Manager, Magma Leasing and Finance Limited and Another Vs. Potluri Madhavalata and Another, while considering the scope of section 8 of the Arbitration and Conciliation Act, 1996 had held that where there is an arbitration clause, section 8 is in the form of legislative command to the Court to refer to the parties to arbitration. It was observed as under:

18. Section 8 is in the form of legislative command to the Court and once the prerequisite conditions as aforesaid are satisfied, the Court must refer the parties to arbitration. As a matter of fact, on fulfillment of the conditions of section 8, no option is left to the Court and the Court has to refer the parties to arbitration.

Similar view has been taken by the Apex Court in the case of Agri Gold Exims Ltd. Vs. Sri Lakshmi Knits and Wovens and Others, . After going through section 8 of the Arbitration and Conciliation Act, 1996, we are of the opinion that though section 8 in terms cannot be made applicable to the writ proceedings but the principle contained therein should normally be applied. Since, the rival claims of the parties is before this Court and the arbitration clause has been brought to the knowledge of this Court, therefore, it is not necessary that one or the other party should invoke the arbitration clause itself. Rather, this Court has full power to refer the dispute for being decided by the Arbitrator to be appointed as per Clause 12 of the agreement.

54. We have noticed that in most of the cases, the amount in dispute is above Rs. 10.00 lacs; though, in a very few cases, the amount is less than Rs. 10.00 lacs. Under Clause 12 of the agreement, claim of an amount above Rs. 10.00 lacs is to be referred for arbitration to Principal Secretary/Secretary, Food and Civil Supplies-and claim between Rs. 2.00 lacs to Rs. 10.00 lacs to the Divisional Commissioner, and upto Rs. 2.00 lacs to District Magistrate. Since the main issues which arise for consideration in various cases are identical, therefore, in

order to avoid conflicting orders and also to ensure convenience to both the parties, we direct the Principal Secretary/Secretary, Food and Civil Supplies to act as Arbitral Tribunal and decide the rival claim of the parties irrespective of the valuation of their claim.

55. The question now arises is the relief to which the petitioners are entitled to. Learned Counsel for the respondents placed reliance on certain decisions of Division Bench of this Court in contending that the similar writ petitions have been dismissed by this Court on the ground that the petitioners therein have the remedy of invoking arbitration clause. Relying on the aforesaid decisions, it was contended that the present bunch of writ petitions should also be dismissed. We, therefore, proceed to examine the ratio of the various decisions of the Division Bench on which reliance was placed by the Counsel for the respondents.

56. The first judgment is in Writ Petition No. 37141 of 2013, M/s. Sanjay Grain Stores and another v. State of U.P. and others decided on 16.7.2013. In that case, it appears that the petitioner therein wrongly representing that the last date for delivery of C.M.R. had been extended up to 30.9.2013, challenged action of the State in adopting coercive measures for short supply of C.M.R. A direction was also sought against the state to accept the balance C.M.R. It was in the aforesaid facts that this Court dismissed the writ petition observing that the petitioners therein would still have sufficient time to deliver C.M.R. to Food Corporation of India, the case having been decided on 16.7.2013 and extended time or delivery of C.M.R. according to the petitioners therein being 30.9.2013. The Court even went on to direct the Food Corporation of India to accept the deliveries of C.M.R. if it fulfils the quality specifications. It was further noted that Food Corporation of India which is a necessary party had not been impleaded. After going through the said judgment, we are of the opinion that the same was on peculiar facts of that case and based on the premise that sufficient time is still left with the petitioner of that case to supply the C.M.R. We do not find that any ratio of universal application has been laid down therein to bind this Court.

57. The next decision cited by the respondents is in the case of M/s. R.J. Industries v. The G.M., Food Corporation of India and others dated 16.9.2013 in writ petition No. 59058 where a Division Bench of this Court in which one of us (Manoj Kumar Gupta, J.) was also a member. The writ petition was dismissed with liberty to the petitioner to invoke the arbitration clause. The other judgment cited on behalf of respondents is in writ petition No. 47630 of 2013 M/s. Kisan Agro Rice Mill Amolia and another v. State of U.P. and another decided on 24.9.2013 in which also it has been held that the dispute between the parties is covered by the arbitration clause and consequently, it was dismissed, leaving it open to the petitioner to invoke the arbitration clause.

58. After going through these decisions, we conclude that the view taken by us in this judgment cannot be said to be at variance with that of other Division Benches of this Court, relegating the millers to arbitration proceedings. However, in none of those judgments, other issues which have been decided in this

judgment, were either considered or decided. A judgment is a precedent and has binding force on the question decided therein. The judgments of the other Division Benches would not be a hurdle, for this Court to delve on other issues or to grant relief, based on such findings.

59. From the discussion made above, it follows that the impugned recovery proceedings cannot be sustained in law as the claim of the State Government is yet to be adjudicated by the Arbitrator and unless adjudication takes place, the claim for damages cannot be said to be the sum due and payable to the State Government, so as to warrant recovery of the said amount by adopting coercive measures.

60. But at the same time, this Court cannot lose sight of the fact that the petitioners have been supplied paddy, against which C.M.R. has yet not been delivered. The question whether the non-delivery or short-delivery is on account of the fault of the Government or the petitioners, is yet to be decided, based on which an award in terms of money may be passed in favor of one or the other party, but indisputably, the paddy in the hands of the millers, does not belong to them. This Court cannot permit the petitioners to retain the same, awaiting decision by the Arbitrator, without putting them to terms. For the said purpose, we posed a specific question to the Counsel for the petitioners to come up with concrete offers, to show their bona fides: Thereupon, most of the Counsel for the petitioners, namely, Sarvshri Ramendra Asthana, Shrikant Shukla, Mayank Agrawal, Rahul Agrawal, G.P. Srivastava, A.K. Srivastava, J.S. Pandey, A.C. Srivastava and D.P. Singh have agreed to deposit the price of paddy.

61. At the same time, they laid a serious challenge to the commercial value of the rice (Rs. 1921.53/quintal: slight variation in different areas because of difference in transportation charges, etc.), being demanded from them. It has been contended that the provisional commercial value, as is sought to be realized from the millers, is in fact, the price of rice fixed by the central Government for payment to the procurement agencies. The same cannot ipso facto be the commercial value of the rice. The commercial value of the rice shall be such as is prevalent in the market at the relevant time, for which data has to be collected, and mind applied, before it is determined. It has been submitted that Clause 2(e)(iii) of the agreement contemplates a decision by the RFC, regarding prevailing market price, which pre-supposes application of mind. However, in every case, the authorities have mechanically asked for compensation at the rate fixed by the Central Government for payment to the procurement agencies. It includes various components which cannot be made applicable to the millers, such as (1) milling charges, (2) V.A.T., and (3) cost of gunny bags.

62. We, however, refuse to go into the question regarding fixation of the provisional commercial value of rice, by the Government, and leave it open to the petitioners to raise this question, also, before the arbitrator.

63. However, there is unanimity amongst the Counsel for the parties regarding the value of common variety of paddy, being Rs. 1,080/- per quintal (admitted in supplementary counter-affidavit of respondents dated 8.10.2013). The out turn ratio being 67%, the proportionate price of per quintal of C.M.R. tentatively comes to Rs. 1611.93 per quintal (as is evident from the letter of Zonal Accounts Officer, Food, Gorakhpur dated 10.6.2013 in writ petition No. 39599 of 2013, M/s. Jagdamba Enterprises v. State of U.P. and others. The value of paddy in possession of petitioners can thus be obtained by multiplying 1,080 with the quantity of paddy or 1611.93 with the deficit quantity of C.M.R.

64. In fact, in writ petition No. 39599 of 2013 M/s. Jagdamba Enterprises v. State, the petitioner had already deposited the proportionate price of paddy/C.M.R. @ 1611.94 per quintal. In certain other cases, the petitioners have shown willingness to deposit the price of paddy at the said rate, as in writ petition No. 41167 of 2013 M/s. Rohit Industries v. State, writ petition No. 41169 of 2013 M/s. Kanhaiya Industries v. State, writ petition No. 39936 of 2013 Ran Vijay Singh v. State, writ petition No. 43175 of 2013 Shree Murari Rice Mill v. General Manager Food Corporation of India and others, writ petition No. 39600 of 2013 M/s. Sahu Traders and another v. State of U.P. and others, writ petition No. 39601 of 2013 M/s. Malta Luxmi Aata and Rice Mills and another v. State of U.P. and others, writ petition No. 54464 of 2013 M/s. Ramji Prasad Jawahar Lal v. State of U.P. and others, writ petition No. 54583 of 2013 M/s. Narain Traders v. State of U.P. and others, writ petition No. 54584 of 2013 M/s. Ashirvad Industries v. State of U.P. and others, writ petition No. 55271 of 2013 M/s. Mohit Enterprises v. State of U.P. and others, writ petition No. 56140 of 2013, M/s. Maha Laxmi Mini Rice Mill and another v. State of U.P. and others, writ petition No. 42355 of 2012 Vishnu Industries v. State of U.P. and others, writ petition No. 69759 of 2013 M/s. Maa Sharda Udyog Avam Rice Mill and another v. State of U.P. and others and writ petition No. 69765 of 2013 M/s. Hans Mini Rice Mill and another v. State of U.P. and others Some of the petitioners and their Counsel declined to make any deposit.

65. It is well settled that merely because action of the State has been found to be illegal on certain scores, this Court is not bound to interfere. After all, exercise of power under Article 226 is discretionary. It is well within the power of this Court to direct the petitioners to part with the undue benefit accrued to them by being in possession of public property; they can be put to terms, before relief is granted to them. Such power of this Court was affirmed by the Apex Court in Shangrila Food Products Ltd. and another Vs. Life Insurance Corporation of India and another, , wherein has been held that:

It is well-settled that the High Court in exercise of its jurisdiction under Article 226 of the Constitution can take cognizance of the entire fact and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is normally exercisable keeping in mind the principle of equity. One of the ends of

the equity is to promote honesty and fair play. If there be any unfair advantage gained by party priory, before invoking the jurisdiction of the High Court, the Court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief.

66. Thus, after taking into consideration the entire facts and circumstances, and while balancing individual interest of the petitioners on one hand, and the public interest on the other hand, we consider it expedient to direct the petitioners to deposit the price of paddy/proportionate price of C.M.R. @ Rs. 1611.93 per quintal with the State Government within a period of one month from today. The petitioners will make a self calculation of the amount as per the figures of deficit C.M.R. given in the impugned orders and deposit the same within the period stipulated above, without prejudice to their rights and contentions before the arbitrator. Amount already deposited under interim order of this Court or in pursuance of the recovery certificates issued in particular cases, shall be adjusted while calculating the amount due, to be deposited under this order. Only, on such deposit being made, all recovery proceedings and consequential action, including orders debarring/blacklisting the millers from future hulling shall remain in abeyance. The Principal Secretary, Food and Civil Supplies will proceed to adjudicate upon the rival claims of the parties. The State Government as well as petitioners are free to file their respective statement of claims before the Arbitrator, who shall make all endeavour to conclude the arbitration proceedings within a further period of six months, uninfluenced by any observation made in this judgment. Recovery of any further sum from petitioners shall abide by the final outcome of the arbitration proceedings. Those who fail to deposit the price of paddy at the rate and within the timeframe as stipulated above, their writ petitions will be deemed to be dismissed. In some cases, the petitioners have raised dispute regarding quantity of paddy received and/or the quantity of deficit C.M.R. It shall be open to those petitioners to raise such dispute also before the Arbitrator, but for making deposit of the amount as directed by this Court, the figures mentioned in the impugned orders will be assumed to be correct, failing which their writ petitions will be treated to be dismissed.

67. Before parting, this Court is constrained to observe about the gross negligence and apathy shown by the State agencies in implementation of the scheme. If they would have acted with due diligence and caution, such a situation would not have arisen, inasmuch as, there were ample safeguards in the scheme itself. The first safeguard under the scheme was by way of regular inspection by the State authorities and the procurement agencies. For the said purpose, the first inspection was to be carried out before the start of the hulling season by the concerned Marketing Inspector/Senior Marketing Inspector/Mandi Secretary to verify the opening stock of wheat on 1.10.2011. Under Clause 33.1, procurement agencies were required to carry out monthly inspection. Under Clause 37.1, the procurement agencies and the officials at the district and regional level were required to review weekly progress in the implementation of the scheme and forward information to the Regional Food Controller and the

Accounts Officer regarding the quantity of C.M.R. outstanding against a miller. If it was found that the C.M.R. remains undelivered by a particular miller, the Regional Food Controller was required to stop acceptance of the levy rice from the miller. Under Clause 38.2, within one month from the date the purchase of paddy comes to an end, the Center incharge of the procurement agency and the officials of the Food department and the officials at the district and regional level were to ensure that the entire C.M.R. stands delivered. The District Food Marketing Officer was required to fill Form-I giving details of the paddy purchased, the C.M.R. received and the balance C.M.R. and the progress in this regard was to be intimated to the higher authorities in Form-II. This evidences that all figures at every stage were available with the authorities. Then how such an alarming situation was permitted to come into existence is not understood.

68. There is another major safeguard contained in Clause 32 which requires that the bank guarantee will be obtained from the millers in proportion to their milling capacity. It is Rs. 3 lacs for mills with capacity upto one tonne; Rs. 4 lacs with capacity upto 2 tonnes and Rs. 5 lacs above it. Under Clause 32.2, a miller was to be provided with only such quantity of paddy which co-relates with the bank guarantee furnished by it. In case any miller was to be supplied excess paddy, then it was incumbent upon the authorities to first require the miller to furnish additional bank guarantee, so as to cover the value of the paddy supplied to it. This was the responsibility of the Center incharge of the procurement agency and the district level officers. There was a further check under Clause 32.3, which required that next lot of C.M.R. would to be supplied to a miller only after receipt of C.M.R. against the paddy already supplied. In various writ petitions, there are specific allegations that the respondents have procured excess quantity of paddy, and thereafter started compelling the millers to lift more quantity of paddy than their hulling capacity. The authorities also did not care to obtain additional bank guarantee to cover the cost of the paddy supplied to the millers. In case, the same had been done, the present stalemate would have never occurred.

69. It may be noted that most of the cases are from the eastern region of the State. This demonstrates that the fault lies not in the scheme but it's implementation. The State and its officials and agencies are trustees, of public wealth. Since they are responsible for the present situation, we therefore, direct the Chief Secretary, State of U.P. Lucknow to hold an enquiry, and take remedial measures so that it is not repeated again. Writ petitions stand decided accordingly. No order as to costs.