

(2004) 09 DEL CK 0095

In the Delhi High Court

Case No : WP (C) 2163 of 1996, 4504 of 1997 and 6154 of 2003

SIEL Ltd., Modi Sugar Industries and RB Narain Singh Sugar Mills and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 24-09-2004

Acts Referred:

Constitution of India, 1950 — Article 22, 226
Essential Commodities Act, 1955 — Section 3(2), 3(3C), 7
Sales of Goods Act, 1930 — Section 23, 23(2), 25, 26, 39

Citation : (2004) 114 DLT 446 : (2004) 138 PLR 51

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Jayant Bhushan and Manish Kumar Bishnoi, Raghav Mathur and Anil Dutt, for the Appellant; Amit Gupta, for Kailash Gambhir in WP(C) 6154/2003, Sanjeev Sachdeva, Priya Puri and Vibhav Srivastav, in WP(C) 2163/1996 and 4504/1997 and Ashish Wad and Neeraj Kumar for respondent No. 5 in WP(C) 4504/1997, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The challenge to the right of the Food Corporation of India to adjust the amounts on account of wet and short supply of levy sugar in the past from the amount to be paid at the current period of time has given rise to these petitions filed by three different sugar mills.

2. The contours of the controversy revolve around levy sugar. Sugar is an essential commodity under the Essential Commodities Act, 1955 and u/s 3(2)(f) of the said Act, the Central Government has the power to require any manufacturer of sugar to sell sugar produced by it to the Central Government, or the State Government or to a Corporation owned or controlled by such Government for purposes of making available sugar at fair price. This is known as the levy sugar. The price payable for such levy sugar is fixed by the Central Government by an order made u/s 3(3C) of the said Act. Such levy sugar price is fixed from year to year.

3. It is stated in the petition that though the sugar year commences from October and the levy sugar price ought to be notified in October, the same was not being done and for 1993-94, the old price of 1992-93 was temporarily notified as the price and the final price was notified in January, 1994. Thus, on 18.3.1994, the Central Government informed the sugar factories that the differential between the two notified prices would be reimbursed and the sugar mills were advised to submit their claims for reimbursement. This decision was communicated to the Food Corporation of India vide letter dated 3.5.1994 asking it to make payment for reimbursement of the differential sugar price. In pursuance to these, the sugar mills lodged their claims. However, the full amount was not reimbursed which has given rise to the dispute between the parties. It is not necessary to go into the details of the amounts because that is an issue not to be really decided and it is only the principle which will have to be settled.

4. The claim of the Food Corporation of India is that in the past there was wet/short supply of sugar by different mills and the amount over-paid to the mills on that account is liable to be adjusted against the amounts payable at that stage of time to the sugar mills. It may be noticed that these amounts relate to almost a period of 15 years before the deduction and over this period of time, the Food Corporation of India was following up the matter with the Railway Authorities for such reimbursement which was declined by the Railways. It is in fact the contention of the petitioner that it is such refusal of the Railways to pay the amount, coupled with convenience of having the amounts to be remitted to the petitioner with the Food Corporation of India, which has given rise to the impugned direction, despite the fact that the levy sugar was loaded in railway wagons against clear railway receipts and the consignee was required to pay under the contract for sale.

5. It may be further noted that these adjustments have been made not only for supplies made to Food Corporation of India but to other entities also. In Civil Writ Petition 2163/1996, two such entities are the UP Cooperative Federation Limited and the Delhi State Civil Supplies Corporation. In Civil Writ Petition 4504/1997, apart from the said two entities, is also the Punjab State Civil Supplies. It is also relevant to note that the said respondent has filed an affidavit to the effect that the levy sugar has been lifted by the said respondent without any complaints and it has no dispute with the petitioner. In Civil Writ Petition 6154/2003, it is only the Food Corporation of India.

6. Learned senior counsel for the petitioner referred to the Circular dated 3.5.1994 dealing with the issue of reimbursement of differential ex-factory levy price. In terms of the said Circular, the claim was to be submitted to the Sugar Directorate for scrutiny and the Government of India in turn was required to forward the same duly verified/sanctioned to the Food Corporation of India Headquarters for onward transmission to the concerned Regional Offices for payment. It was thus submitted that the only role of the Food Corporation of India was to make payment in terms of the amount certified by the Government

and the Food Corporation of India was thus holding the money received from the Government in Trust to be paid to the petitioners.

7. In so far as the mode of delivery is concerned, learned senior counsel for the petitioner referred to the procedure followed and in that behalf referred to the order dated 22.10.1993 of the Ministry of Food published in the Gazette of India which required the delivery at the buyers option into (i) railway wagons, or (ii) the buyers carts, lorries, other means of transport at the factory gate/factory go-down. The order dated 26.10.1993 was also referred to for the said purpose to show that the levy sugar was to be delivered at factory or dispatched by rail, as may be desired by the consignee.

8. The claim submitted by the sugar companies was for both supplies made to FCI and others and the sugar companies were informed by the Central Government of the letters issued to the FCI for payment of the amounts. The FCI, however, initially issued instructions for deduction of the amounts about the shortages for the last two years but the matter further expanded for even up to 15 years. This was naturally disputed by the petitioners.

9. Learned senior counsel for the petitioner referred to the Circular of FCI dated 17.11.1972 which provided for cheques/demand drafts to be kept ready and to be handed over to the mills as soon the railway wagons are made available as the mills may hesitate loading wagons unless full payment is made particularly when ""consignees will be FCI and ownership of cargo will be changed as soon as the stocks are loaded"". It was thus contended that the property in the goods passed as soon as the sugar was loaded in the wagons. It may, however, be pointed out that the same circular also provided for the statutory responsibility of the sugar mills to provide suitable donnage (water-proofing) at their cost at the time of loading.

10. Learned senior counsel for the petitioner thus submitted that the only defense taken by the respondents for the inordinate delay in making the claims is that though the petitioner used to obtain clear RRs from the Railways, the Railways did not accept the claim when shortages were noticed in seal-intact wagons. This is stated to be so on the basis of some internal circular of the Railways absolving them of their liability in cases of seal-intact wagons.

11. Learned senior counsel for the petitioner referred to the provisions of the Sale of Goods Act, 1930 (hereinafter referred to as "the said Act"). Section 23 of the said Act is as under:

""23. Sale of unascertained goods and appropriation.-- (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2) Delivery to carrier.-- Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.'''

12. A reading of the aforesaid provision thus shows that where the buyer does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. However, u/s 25 where the contract is for sale of specific goods which are subsequently appropriated to the contract and the goods are sent by Railways against RRs, the seller is prima facie deemed to reserve the right of disposal. Section 25 is as under:

25. Reservation of right of disposal.-- (1) Where there is a contract for the sale of specific goods or where the goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled .In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled .

(2) Where goods are shipped or delivered to a railway administration for carriage by railway and by the bill of lading or railway receipt, as the case may be, the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer of the price and transmits to the buyer the bill of exchange together with the bill of lading or, as the case may be, the railway receipt, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading or the railway receipt if he does not honour the bill of exchange; and, if he wrongfully retains the bill of lading or the railway receipt, the property in the goods does not pass to him.'''

13. Section 39 deals with delivery to carrier or wharfinger and the delivery of the goods to the carrier is prima facie deemed to be delivery of the goods to the buyer. Section 39 is as under:

39. Delivery to carrier or wharfinger.-- (1)Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorised by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat

the delivery to the carrier or wharfinger as a delivery to himself, or may held the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit and if the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit.""

14. Learned senior counsel for the petitioner thus contended that these goods were duly appropriated by the respondents without any demur or protest and there is no allegation of any collusion with the officers of the FCI at the stage of delivery, whatever be the value of such an allegation.

15. Learned senior counsel for the petitioner referred to the judgment of the Supreme Court in *Ossein and Gelatine Manufacturers Association of India Vs. Modi Alkalies and Chemicals Limited and Another*, dealing with the delivery of goods through a railway wagon. The consignment was sent f.o.r. (free on rail contract) the seller's station and it was held that the property in the goods along with the risk in the goods was transferred to the buyer as soon as the goods were loaded in the railway wagons at seller's station as per the terms of delivery. The seller was held not responsible for the subsequent loss of goods in transit and entitled to full payment of agreed price without any deductions. The Supreme Court referred to Halsbury's Laws of England as under:

""...In Halsbury's Law of England, 4th Edition (Volume 41) at page 800, para 940 it has been mentioned that:

""Under a free on rail contract (f.o.r.) the seller undertakes to deliver the goods into railway wagons or at the station (depending on the practice of the railway) at his own expense, and (commonly) to make such contract with the railway on behalf of the buyer as is reasonable in the circumstances. Prima facie the time of delivery f.o.r. fixes the point at which property and risk pass to the buyer and the price becomes payable.""

The Supreme Court further observed in paras 13, 15 and 16 as under:

""13. The question as to the meaning of f.o.r. contract fell for consideration in the case of *Girija Proshad Pal v. National Coal Co. Ltd.* AIR 1949 Cal 472, P.B. Mukharji, J. as His Lordship then was observed in para 11 as follows:

""The words f.o.r. are well known words in commercial contracts. In my judgment they mean when used to qualify the place of delivery, that the seller's liability is to place the goods free on the rail as the place of delivery. Once that is done, the risk belongs to the buyer.

15. It is also convenient to refer to the provision of Section 23(2) of the Indian Sale of Goods Act, 1930. This sub-section provides that:

""(2) Where, in pursuance of the contract, the seller delivers the goods to the

buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.'"

16. In the instant case, in view of the terms and conditions of the contract embodied in clause 11 of the schedule of acceptance of tender regarding the place of delivery "f.o.r. Jodhpur", the property in the goods passed immediately on from the seller after delivering the goods and loading the same in the railway wagons at Jodhpur for transmission to the buyer, the consignee, without reserving any right of disposal. The seller is deemed to have unconditionally appropriated the goods to the contract only u/s 26 of the said Act, the goods remained at seller's risk until the property therein is transferred to the buyer. As stated earlier that the property in goods has been transferred to the buyer by the seller by delivery of the goods and loading the same at Jodhpur in railway wagons. In this connection reference may be made to Section 39(1) of the said Act. Considering the aforesaid provisions of the Sale of Goods Act, 1930 as well as the terms and conditions of delivery i.e. "f.o.r. Jodhpur" the irresistible conclusion that follows is that the property in the goods together with the risk passed from the seller to the buyer i.e. from consignor to the consignee as soon as the goods were loaded in the railway wagons at Jodhpur as per the terms of delivery i.e. f.o.r. Jodhpur. Therefore, the finding of the trial court that the risk throughout remained with the appellant until the goods were actually delivered to the Commandant, COD, Kanpur is wholly wrong and illegal. The further finding of the trial court that the risk was governed with the condition No.4(1) of the schedule of acceptance of tender and the property in the goods i.e. the tents did not pass until the same were actually delivered to the Commandant, COD, Kanpur and the Commandant, COD Kanpur was not liable for loss of the tents during the period of transit by the railways is also illegal and bad. As stated hereinbefore on consideration of the place of delivery as well as the terms of delivery embodied in clause along with the risk in the goods passed from the appellant to respondent 5 when the goods were delivered and dispatched by railway wagons at Jodhpur i.e. FOR, Jodhpur. The consignee, Commandant, COD, Kanpur is Therefore liable for the price of 224 tents which was deduced by him from the other bills of the appellant. The findings of the trial court which were confirmed by the Division Bench of the High Court are, Therefore, liable to be set aside and the claim of the plaintiff-appellant should be decreed.'"

16. Learned senior counsel for the petitioner further submitted that the petitioner ought not to be relegated to a civil suit to establish his claims since it is not the quantification of the amount but the principle of law has to be laid down. On the principle being laid down, if there were some disputes about the quantum, only then the issue would arise of relegating a party to a civil suit. It was thus submitted that the present remedy under Article 226 of the Constitution of India is an appropriate remedy availed of by the petitioner and in this behalf reliance was placed on the judgment of the Supreme Court in Hindustan Petroleum Corporation Ltd. and Another Vs. Dolly Das, . It was observed in paras 7 and 9 as

under:

""7. In the absence of constitutional or statutory rights being involved a writ proceeding would not lie to enforce contractual obligations even if it is sought to be enforced against the State or to avoid contractual liability arising thereto. In the absence of any statutory right Article 226 cannot be availed to claim any money in respect of breach of contract or tort or otherwise. In the present case, the appellants have sought to exercise their powers u/s 7 of the Act and, Therefore, though the other consequences may be contractual in nature, the exercise of the right being under a statute, it cannot be said that the respondent could not approach the writ court.

9. We may now advert to the contention that the writ remedy is not appropriate in this case. Where interpretation of a contract arises in relation to immovable property and in working such a contract or relief thereof or any other fallout thereto may have the effect of giving rise to an action in tort or for damages, the appropriate remedy would be a civil suit. But if the facts pleaded before the court are of such a nature which do not involve any complicated questions of fact needing elaborate investigation of the same, the High Court could also exercise writ jurisdiction under Article 226 of the Constitution in such matters. There can be no hard and fast rule in such matters. When the High Court has chosen to exercise its powers under Article 22 of the Constitution we cannot say that the discretion exercised in entertaining the petition is wrong.""

17. Learned senior counsel for the petitioner in this behalf lastly contended that the payment was statutory in nature being an amount paid by the Government of India towards levy sugar price fixed under the Essential Commodities Act.

18. Learned counsel for the respondents, on the other hand, contended that there was shortage in quantity and wet sugar found at destination even though the wagons were sealed and intact. In such a case, it was the duty of the FCI to ensure that the petitioners were only paid for the proper goods supplied since they were the whole-sellers/distributors across the country and the payment was routed through them.

19. The circular dated 17.11.1972 was referred to, to contend that it was provided in the circulars the mode and manner of delivery of the sugar bags as also the fact that it was the statutory responsibility of the sugar mills to provide suitable donnage at their cost at the time of loading. Thus, if there was any wet sugar, the petitioners were responsible. The Supreme Court judgment in M/s Marwar Tent Factory case (supra) was sought to be distinguished on the ground that the property in goods could pass only if the goods were loaded. If the goods were not loaded, there could be no question of passing of the property. Even though the goods were sent against RRs, it was submitted that under the arrangement between the petitioner and the FCI, sample checking used to be done at the stage of unloading to verify whether the full goods had been supplied or not.

20. Since it was not clear during the initial stages of arguments as to whether the FCI had put the petitioners to any notice of short supply or wet supply, the FCI was asked to verify as to whether they had at the relevant stage put Railways to notice and made a claim against the Railways or whether the petitioners were also put to notice. This was in view of the fact that if the goods had been appropriated after off-loading by the FCI, without putting the petitioner to any notice of such short supply or wet/sweated goods, the question of any claim against the petitioner would not arise. In pursuance thereof, certain documents were filed with an affidavit stating that the petitioners were put to such notice. These documents are in the nature of communication addressed to the Quality Inspector of the sugar mills.

21. Learned counsel for the respondents submitted that in view of the aforesaid position, the petitioners were deemed to have notice and in any case these were not matters which could be decided in writ proceedings and a trial had to take place in respect of the claim of the petitioners. It was also pointed out that the judgment in M/s Marwar Tent Factory case (supra) arose from suit proceedings in which the respective claims were adjudicated upon. It was further submitted that in so far as the time period is concerned, it is the contention of the respondents that the period of limitation for recovery of these amounts could be 30 years as it was in the nature of a Government levy being paid and it would be dues payable to the Government. All these facts could thus be determined only in a civil suit.

22. In respect of Civil Writ Petition 6154/2003 a plea of delays and laches has also been raised since this writ petition was filed much afterwards. A reference to the pleadings shows that the details of the withheld amount were communicated by the FCI to the petitioner therein vide letter dated 26.10.2002 and the details are as under:

1. Rs. 1,52,666.79 Withheld at the time of sugar dispatches during August 94
2. Rs. 44,522.97 Withheld at the time of sugar dispatches during July, 95
3. Rs. 4,00,000.00 Withheld through R.O. FCI Lucknow in Sept 95, differential cost of 1994-95
4. Rs. 4,27,581.00 Withheld by D.O. Sri Nagar (G) in Jan 2000 from differential cost of crop year 98-99
5. Rs. 41,102.00 Withheld by D.O. Sri Nagar (G) in March 2000 from differential cost of crop year 98-99
6. Rs.10,03,924.00 Withheld through R.O. Lucknow in April 2001 from differential cost of sugar 98-99 vide DM FCI Sri Nagar (G) letter No. FCI/SNG/Sugar/NOC/2000/442 dated 20/21.6.2000

Rs.24,27,542.36

23. Learned counsel for the respondents also referred to a communication dated 19.8.1994 informing the petitioners about the shortage and damages of sugar received. A statement has also been filed with the counter affidavit giving the summary of the shortages and the amounts withheld against it.

24. Learned counsel for the respondents, however, submitted that there could not be any time-bar though there was delay and this court ought to decide the issue since the larger issue was in any case being decided. Learned counsel referred to the Full Bench judgment of the Punjab High Court in *S. Gurmej Singh Hira Singh v. Election Tribunal, Gurdaspur*, AIR 1964 Punjab 337 where in para 7 it is observed that the undue delay as a circumstance disentitling the aggrieved party to invoke this court's jurisdiction under Article 226 is obviously not a statutory rule of limitation but that a party is expected to be reasonably prompt and vigilant in approaching the court.

25. I have given a thoughtful consideration to the submissions advanced by learned counsel for the parties.

26. In order to adjudicate the matter in dispute, it is necessary to segregate the two categories of cases: where goods have been supplied to the FCI and where goods have been supplied to other third parties. This is so since if the other third parties are not objecting and had accepted and appropriated the goods, the FCI is hardly in a position to deduct any amount on that account. That would be a case that both the consignor and the consignee have no dispute.

27. The role of the FCI has to be appreciated taking into consideration the facts that the claims which could be paid to the petitioners are to be first submitted for certification by the Central government and thereafter payment has to be made. Once the claims are certified, the FCI is only an agency to disburse the amount. Its duty is only to remit the funds received from Government of India to the respective parties and nothing more than that. It cannot thus withhold the demand towards the differential price of levy sugar or levy sugar price unless it is entitled to do so in accordance with law.

28. Learned counsel for the respondents really could not seriously dispute this proposition that the FCI cannot detain the amounts on account of supplies made to third parties and the amount is liable to be remitted to the petitioners. It has to be appreciated that the case was not one of quantification of amount which would require any trial but the very principle of the right of the FCI to detain any such amount. The FCI being merely an authority to transmit the funds, I am of the considered view that the FCI is bound to remit the payments to the sugar mills for supplies made to third parties and it is not entitled to adjust any amounts against the payments to be so made merely by reason of the fact that the amount has come into the hands of FCI from the Central Government to be disbursed to the sugar mills.

29. The position is, however, a little different with supplies made to the FCI. Here also, the entitlement of the FCI, if any, to claim the adjustment can only arise if the FCI had taken the necessary steps. These steps had to be in accordance with the said Act dealing with the sale of goods. If the goods had been taken delivery of and appropriated without any demur or protest or intimation to the sugar companies of short supply or wet/sweated supply, then also the FCI is bound to make the full payment of the goods and thus there can be no question of adjustment of any amount on that account.

30. The only question which remains is in respect of a case where such intimation has been sent. The FCI has placed on record at random certain documents of intimation but these are communications addressed to the Quality Inspectors. The claim of the petitioner is that the property in the goods had passed on being loaded on to the railway wagons in view of the judgment of the Supreme Court in *M/s Marwar Tent Factory case* (supra). However, it is to be noticed that the said decision is arrived at after due trial. The present are the writ proceedings. The question would arise whether the intimation sent to the Quality Inspector is intimation in accordance with law, whether there was any further duty cast on the petitioner even after loading in view of the circular relied upon by both the parties of 17.11.1972 requiring the sugar mills to provide suitable donnage at their cost at the time of loading and whether there was any liability of the petitioner arising from checking at the cost of unloading. The period within which such claims can be made by the FCI is also disputed question on account of different provisions being relied upon by learned counsel for the parties for the claims made. It is not possible to settle this controversy in the present proceedings and thus, in my considered view, the petitioner must be relegated to the remedy of a civil suit in respect of the amount detained in that behalf.

31. The matter does not rest at this because the documents filed by the respondents are only sample intimations. The respondents are required to enquire into the matter and the petitioner is liable to be relegated to a civil suit only in respect of adjustments where intimation has been sent by the FCI to either the petitioner or the Quality Inspector and not for any other cases. Where no such intimation has been sent at the relevant stage of time after unloading, the respondent is duty-bound to remit the payment in that behalf and cannot claim the amount from the petitioner merely because the Railways are refusing to pay the amount. The refusal of the Railways cannot give rise to a claim against the petitioner which is not in accordance with law.

32. It is thus directed that the enquiry be made and completed within a period of three months from today and the petitioners be informed about the exact amounts detained and against which supplies along with the detail of the intimation sent about such short supply, wet/sweated supply before or at the stage of appropriating the supply so that the petitioners can take recourse to the legal remedy of a civil suit in accordance with law.

33. In so far as the writ petition 5154/2003 is concerned, there is no doubt that the writ petition has been filed after considerable delay. There is no satisfactory Explanation for the delay and though strictly speaking, the petitioner is not liable to be non-suited on the grounds of limitation, the petitioner ought to have approached this court in expeditious manner.

34. The second aspect regarding this writ petition is that all the supplies have been made to the Food Corporation of India and the Food Corporation of India has given details of shortages at the relevant stage of time by which the petitioner was put to notice including vide letter dated 19.8.1994. Even in respect of subsequent amounts, the petitioner has been put to notice. Thus, this is not a case where any further enquiry is required since there is material to show that the petitioner has been put to such notice. In this case, the petitioner has to be relegated to the remedy of a civil suit in accordance with law.

35. In view of the aforesaid, Writ Petition (Civil) 2163/1996 and Writ Petition (Civil) 4504/1997 are allowed to the aforesaid extent giving them liberty to file a civil suit in respect of the remaining claim in accordance with law. The amounts to be remitted to the respective petitioners within two months from today. Writ Petition (Civil) 6154/2003 is dismissed giving liberty to the petitioner to file a civil suit in accordance with law.

36. Parties are left to bear their own costs.