**IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment delivered on: 5th July, 2022*

\+ **O.M.P. (COMM) 82/2022 and IA Nos.1929/2022, 1931/2022**

**FOOD CORPORATION OF INDIA** ..... Petitioner

versus

**M/S ADANI AGRI LOGISTICS LTD.** ..... Respondent

**Advocates who appeared in this case:**

For the Petitioner : Mr Gourab Banerjee, Senior Advocate with Mr. Manoj, Ms. Aparna Sinha & Mr. M.T. Reddy, Advs.

For the Respondent : Mr. Ramji Srinivasan, Sr. Adv. with Ms. Simran Brar, Mr. Srisatya Mohanty, Ms. Ambika, Ms. Rajshree Chaudhary, Mr. Pawan Yadav & Mr. Amit Garg, Advs.

**CORAM**
**HON'BLE MR JUSTICE VIBHU BAKHRU**

**JUDGMENT**

**VIBHU BAKHRU, J**

1. The petitioner (hereafter **'FCI'**) has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the '**A&C Act**') impugning an arbitral award dated 02.10.2021 as corrected by orders dated 30.10.2021 and 12.11.2021 (hereafter the '**impugned award**') passed by an Arbitral Tribunal comprising of three members (hereafter '**the Arbitral Tribunal**').

2. The impugned award has been rendered in the context of the disputes that have arisen between the parties in connection with two separate Service Agreements dated 28.06.2005. The said agreements are similar in material aspects. Whereas, one Service Agreement relates to facilities in respect of Circuit-1 (Moga, Chennai, Coimbatore and Bangalore); the other Service Agreement relates to Circuit-2 (Kaithal, Navi Mumbai and Hooghly). Since the disputes relate to the Clauses of the said agreements which are similarly worded, for convenience, both the agreements are hereafter referred to as '**the Agreements**' or singularly as '**the Agreement**'.

***Factual Context***

3. In June 2000, the Government of India introduced a national policy (hereafter '**the Policy**') for handling, storage and transportation of food grains. Due to high costs for setting the infrastructure required for handling and storage of food grains, the Policy encouraged private sector participation to build the storage capacity for storing the grains procured by Government Agencies on payment of storage charges.

4. Rail India Technical Enterprises Ltd (hereafter '**RITES**') was appointed as the Project Consultant, *inter alia,* to assist and advice the petitioner (hereafter '**FCI**') in selecting a Developer-Cum-Operator (hereafter **'DCO'**) through a transparent bidding process.

5. RITES proceeded to invite global tenders from private sector developers for setting up storage facilities. Pursuant to the aforesaid invitation to tender, M/s Adani Exports Ltd and M/s Adani Ports Ltd

formed the respondent company (hereafter '**Adani**') which submitted its proposal. On the recommendation of RITES, the Board of FCI approved Adani's proposal/bid.

6. Subsequently, on 18.07.2005, a Letter of Acceptance of Proposal (LAP) was issued to Adani, it was selected as the DCO. On 28.06.2005, the parties executed the Agreements. The parties agreed that Adani would develop and operate food grains handling, storage and transportation facilities as specified in the Agreements. The Agreements stipulated that the facilities would be developed, implemented and operated by Adani on a commercial Build, Own and Operate (BOO) basis.

7. In terms of the Agreements, the facilities for the two Circuits, Circuit 1 (Moga-Chennai-Coimbatore-Bangalore) and Circuit 2 (Kaithal-Navi Mumbai-Hooghly), were to be completed within thirty-six months from the date of execution of the respective Agreements.

8. The Agreements were for a term of twenty years from the Operations Date. The Operations Date was agreed to be the date on which the facilitates in respect of the Circuit were commissioned and Adani commenced providing the services on a commercial basis. FCI agreed to pay the storage-cum-handling charges (hereafter the '**SCH charges**') on a monthly basis as specified in Annexure 15 of the Agreement.

9. Although, the complete facilities were not commissioned within the prescribed period, Adani developed certain depots, which were

capable of being used for storage purposes. It thus proposed that FCI use the said depots on payment of certain usage charges. FCI agreed to the same. By a letter dated 09.05.2007, FCI confirmed that the depots had been operationalized in the year 2007 and therefore, the twenty years guarantee period had begun in the year 2007. Moreover, it was agreed by the parties that for the year 2007, the charges would be paid on actual utilization basis and the commitment for payment for full capacity would commence on commissioning of the complete facilities.

10. In terms of the Agreements, the SCH charges were subject to variation in proportion to the Wholesale Price Index (WPI). The Charges were to be increased every year based upon 70% of the inflation rate determined on the basis of Wholesale Price Index (WPI) recommended by the Government of India by taking previous year's WPI Index as the base.

11. FCI paid the charges for storing food grains at the facilities established by Adani on actual utilization basis and did not increase the rates commensurate with the increase in WPI. This issue was raised by Adani by a letter dated 09.05.2012. Adani claims that it is entitled to escalation based on WPI from the year 2008 by taking WPI for the year 2007 as the base.

12. A Supplementary Agreement to the Agreements (hereafter **'the Supplementary Agreement**') was executed between the parties on 12.02.2013 and the Agreements stood modified to a certain extent. These changes included fixing of the SCH Charges for the base depot

and field depots until the required number of wagons – in terms of the Agreements – were purchased.

13. By a letter from FCI dated 19.11.2013, the SCH Charges were restored to the original agreed value with effect from 28.09.2013. One of the disputes between the parties is whether WPI based escalation is applicable with effect from 28.09.2013 or an earlier date.

14. On 10.01.2014, Adani sent a letter to FCI stating that it would be willing to accept 28.09.2013 as the Operations Date if the twenty years period for the duration of the Agreements– as provided in Clause 4.1 of the Agreements – would also be reckoned from that date. However, FCI did not agree to the said proposition; it responded by a letter dated 21.10.2014 stating that the twenty-year guarantee period commenced on 11.05.2007.

15. In view of the dispute, Adani issued a notice dated 30.09.2014, invoking the dispute resolution mechanism and invited FCI to resolve the disputes by an amicable settlement. However, the parties could not arrive at a consensus. Consequently, by a letter dated 24.03.2017, Adani invoked the arbitration agreement and nominated Justice (Retd.) Iqbal Ahmad Ansari as an Arbitrator. On 14.06.2017, FCI issued a letter nominating Mr. Madhav Lal as an Arbitrator. Both the nominated Arbitrators appointed Dr. Justice (retd.) Arjit Pasayat as the Presiding Arbitrator and the Arbitral Tribunal was constituted.

16. The claims made by Adani before the Arbitral Tribunal are set out below:

| CLAIM No. | PARTICULARS | CLAIMED AMOUNT |
|---|---|---|
| 1. | Claim towards unpaid as also wrongly calculated storage cum handling charges on enhanced rates based upon wholesale price index for the period 2008 to 2017 | ₹198,80,08,884/- |
| 2. | Claim towards payment for utilisation by FCI of additional storage capacity over and above the designated capacities at the depots | ₹80,02,518/- |
| 3A.<br><br>3B. | Claim towards unpaid and wrongly calculated storage cum handling charges on enhanced rates based upon wholesale price index for the period April, 2017 to March, 2018<br><br>Claim for declaration that 11.05.2007 is the Operations Date under the Agreement | ₹38,36,19,390/- |
| 3C & 3D | Alternatively to claim 3 A & 3B, if FCI considered 28.09.2013 to be the operations date, then operations date would be treated as the starting point of the service period as well. AALL would be entitled to WPI based escalation from financial year 2013-14, and reduction of Annual Guaranteed Tonnage to 75% | |

| | | |
|---|---|---|
| | will be applicable from 28.09.2023 | |
| 4. | Claim towards recovery of wrongfully deducted service charges in terms of Annexure-15 of the Agreement read with Annexure-2 on account of 75% AGT by the unilaterally treating 11.05.2007 as the operations date | ₹19,75,92,265/- |
| 5. | Claim towards pre-claim pendente lite and post award interest | |
| 6. | Cost of Arbitration | ₹10,00,000/- |

17. The prayer clause in the Statement of Claim is set out below:

> "It is, therefore, most respectfully prayed before this Hon'ble Tribunal to pass an Award in favour of the Claimant and against the Respondent awarding the following:
>
> a) An amount of Rs.198,80,08,884/- towards unpaid and wrongly calculated storage cum handling charges for the period April, 2008 to 31st March, 2017 along with interest @18% per annum for Rs.107,88,57,828 from April, 2008 to 31st March, 2017 on the said amount totaling to Rs.306,68,66,712.
>
> OR
>
> IN THE ALTERNATIVE, direct that both the duration of 20 years as envisaged under Article 4.1 of the Service Agreement as also the

escalation based upon WPI for calculating storage cum handling charges, commence from 28.09.2013.

b) An amount of Rs.80,02,518/- for utilizing the Depots for storing more than the specified capacity along with interest on the said amount @18% per annum for Rs.37,92,510/- on the said amount for the period May, 2013 to 31st March, 2017 totaling to Rs.1,17,95,028/-

c) Pendente-Lite and Post Award interest @10% per annum on the amounts mentioned at (a) and (b) above.

d) A sum of Rs.38,36,19,390/- (Rupees Thirty-eight Crores Thirty six lakhs nineteen thousand three hundred and ninety) towards storage-cum-handling-charges based on WPI escalation for the financial year 2017-18 by treating 11.05.2007 as the Operations Date under the Service Agreement dated 28.06.2005 along with *pendente-lite* and future interest on the said amount @18% per annum as set out in Claim 3A above in favour of the Claimant and against the Respondent.

e) a declaration that 11.05.2007 is the Operations date under the Service Agreement dated 28.06.2005 and the Respondent is liable to pay Service cum Handling Charges to the Claimant under the service Agreement dated 28.06.2005 based on Wholesale Price Index (WPI) as published by the Reserve Bank of India by treating 11.05.2007 as the Operations Date during the pendency of the arbitration

proceedings and till expiry of the Service Agreement dated 28.06.2005, and that the Respondent is further liable to be directed to pay the Claimant all such amounts as may be deducted by it on this account during the pendency of the present arbitration proceedings with pendente-lite and future interest thereon @18% p.a. as set out in Claim 3B above;

in the alternative to prayers (d) and (e) above, the following prayers (f) and (g) be awarded:

f) In the event of this Hon'ble Tribunal holding 28.09.2013 to be the Operations Date under the Service Agreement dated 28.06.2005, to award a sum of Rs.19,75,92,265/- (Rupees Nineteen Crores Seventy Five Lakhs Ninety Two Thousand Two Hundred and Twenty-six) in favour of the Claimant and against the Respondent, along with any amounts which may be unilaterally deducted by the Respondent during the pendency of the arbitration proceedings by reducing AGT to 75% by treating 11.05.2007 as the Operations Date, together with *pendente lite* and future interest @18% per annum on the aforesaid amount of Rs.19,75,92,265/- (Rupees Nineteen Crores Seventy Five Lakhs Ninety Two Thousand Two Hundred and Twenty-six) and such other amounts as may be deducted by the Respondent by reducing AGT to 75% treating 11.05.2007 as the operations Date as set out in Claim 3C above.

g) In the event of this Hon'ble Tribunal holding 28.09.2013 to be the Operations

Date under the Service Agreement dated 28.06.2005 for the purpose of calculating the escalation based on Wholesale Price Index, the Claimant is entitled to a declaration that for the purpose of Annexure-2 to the Service Agreement dated 28.06.2005, the reduction in the AGT to 75% will be applicable from 28.09.2013 as set out in Claim 3D above.

h) Costs of the proceedings."

18. FCI filed its Statement of Defence, however, it did not raise any counter-claims.

19. The Arbitral Tribunal rejected Claim nos. 1, 3A and 3B. It did not accept Adani's contention that it was entitled to escalation in charges based on WPI of the year 2007. The Arbitral Tribunal held that the same was not a part of the interim arrangement as agreed between the parties. Additionally, the Arbitral Tribunal held that such claims for the period prior to 15.01.2012, that is, for the years 2008-09, 2009-10, 2010-11 and partly for the year 2011-12, are barred by limitation as the same pertained to a period three years prior to 15.01.2015 – the date of invocation of the arbitration agreement.

20. The Arbitral Tribunal allowed Adani's claim for over utilization of storage facilities (Claim No.2) and awarded an amount to be computed at the rate of ₹500 per metric ton (MT) on a daily basis on actual utilization beyond the designated storage capacity of 2,00,000 MT after 15.01.2012. The Arbitral Tribunal directed that the amount be

calculated by the parties within a period of two months and be paid within a period of one month thereafter.

21. In so far as the alternative claims (Claim nos. 3C and 3D) are concerned, the Arbitral Tribunal held that the Service Period of twenty years – as provided by Clause 4.1 of the Agreement – would begin from 28.09.2013. And, the WPI for the Financial Year 2013-14 would be considered as the base for computing the escalated SCH charges payable for the subsequent period.

22. The Arbitral Tribunal awarded future interest at the rate of 8% per annum from the date of the award till its realization, in case the awarded amount was not paid by FCI within a period of one month.

23. Aggrieved by the impugned award, FCI has filed the present petition.

***Submissions***

24. Mr. Gaurab Banerji, learned senior counsel appearing for FCI has assailed the impugned award to the extent that the Arbitral Tribunal had held that the Service Period of twenty years would commence on 28.09.2013 and the said date would be treated as the Operations Date for the purpose of computing the Service Period. He submitted that the said finding is manifestly erroneous on two grounds. First, that the parties had expressly agreed that period of twenty years would be computed from May, 2007; and second, that the Arbitral Tribunal's conclusion is based on an erroneous assumption that by virtue of

Section 28(3) of the A&C Act, as amended by the Arbitration & Conciliation (Amendment) Act, 2015, it was not bound by the terms of the Agreement. He submitted that the Arbitral Tribunal erred in holding that the Penta Test as propounded by the Supreme Court in ***Nabha Power Ltd. v. Punjab State Power Corporation Ltd.: (2018) 11 SCC 508*** was applicable in the present case. He submitted that one of the tests as laid down by the Supreme Court was that the interpretation should not contradict the express terms of the contract between the parties. The Arbitral Tribunal has disregarded the same and therefore, the impugned award is contrary to the terms of the Agreement.

25. Mr. Ramji Srinivasan, learned senior counsel appearing for Adani countered the aforesaid submissions. He submitted that the term of twenty years is required to be computed from the Operations Date. He submitted that FCI had considered two separate Operations Dates; one for the purpose of commencement of the Service Period and the other for the purpose of calculating the escalation in the SCH charges. He submitted that the Arbitral Tribunal had merely reconciled the same. Whilst the Arbitral Tribunal had rejected Adani's claim for calculation of escalated SCH charges treating the WPI as on 11.05.2007 as the base; it had allowed Adani's alternative claim to treat 28.09.2013 as the Operations Date and computed the Service Period of twenty years with effect from the said date. He contended that FCI could not on one hand claim that escalation in SCH charges were required to be computed on the basis of WPI as on 28.09.2013 and at the same time Service Period be reckoned from 11.05.2007. He submitted that it was open for the

Arbitral Tribunal to read the agreement between the parties to make business sense and it had done so. He submitted that the question of interpretation of a contract fell squarely within the jurisdiction of the Arbitral Tribunal and therefore, it is not open for this court to interfere with the Arbitral Tribunal's decision in this regard. He submitted that the challenge laid by FCI is beyond the scope of Section 34 of the A&C Act.

26. He relied upon the decision of the Supreme Court in ***Paersa Kente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited: Civil Appeal No. 9023/2018*** and contended that the said decision fully covered the present case.

27. Lastly, he submitted that in the event, the court interferes with the impugned award, it should be set aside in its entirety and the question whether Adani is entitled to escalation based on WPI as on May, 2007 ought to be left open.

***Reasons & Conclusions***

28. At the outset, it would be relevant to refer to the various clauses of the Agreement.

29. In terms of the Agreement, Adani was required to construct, design, finance, install, establish, own and operate the facilities in the Circuit(s). This included setting up of Base Depots with storage capacity of 2,00,00,000 Metric Tonnes (MT) at Moga (in Circuit no.1) and Kaithal (in Circuit-2). Adani was required to establish Field Depots

at Chennai, Coimbatore and Bangalore with the storage capacity of 25000 MT each as part of Circuit-1 and Field Depots at Navi Mumbai and Hooghly with storage capacity of 50000MT and 25000MT respectively, as a part of Circuit-2. In addition, Adani was required to procure at its own costs specified number of Special Bulk Foodgrain Wagons and lease the same to Indian Railways for transportation of foodgrains between Base Depots and Field Depots within the Circuit. In terms of Article 2.2(7) of the Agreement, the entire project including acquisition of project assets was required to be completed within the construction period of thirty-six months. In terms of Article 4 of the Agreement, it was agreed that the duration of the Agreement would be for a period of twenty years from the Operations Date (referred to as Service Period). Article 4 of the Agreement reads as under:

> **"4.1 Duration**
>
> This Agreement shall come into effect as of the date of its execution ("Effective Date") and shall continue in force for a period of twenty years from the Operation date ("Service Period") unless terminated earlier in accordance with the terms hereof or extended by the Parties by mutual agreement."

30. The terms "Operations Date" and "Service Period" are defined in the Agreements as under:

> **"Operations Date"** means the date on which the Facilities in the Circuit are commissioned and the DCO commences provision of Services

on a commercial basis by levy of Storage-cum-Handling Charges on FCI.

**"Service Period"** means the period as determined under Section 4.1 of this Agreement."

31. In consideration, FCI guaranteed payment of SCH charges for the Annual Guaranteed Tonnage (hereafter **'AGT'**) irrespective of level of usage of the facilities. In other words, FCI would be liable to pay SCH charges for AGT notwithstanding it did not utilize any part of the facilities. In terms of Annexure-2 to the Agreement, AGT for Circuit No.1 for the first ten years of the Service Period was agreed at 200000 MT for the Base Depot and 66700 MT for the Field Depots. For the latter half of the Service Period (i.e. 11 to 20 years), the AGT was reduced to 75% of the AGT as agreed for the first ten years. Similarly, AGT for the first ten years in respect of Circuit-2 was fixed at 200000 MT for the Base Depot at Kaithal; 133300 MT for the Field Depot at Navi Mumbai and 66700MT for the Field Depot at Hooghly. The said AGT would stand reduced to 75% of the said quantities, during the second half of the Service Period.

32. Admittedly, Adani could not establish the Project within the stipulated period of thirty-six months and the same was inordinately delayed. However, Adani did establish certain service facilities which could be brought to use. In the aforesaid context, discussions were held between the parties and it was agreed that pending completion of the

Project, FCI would use the depots established by Adani and pay for the same on actual utilization basis. This arrangement was finalized in the earlier part of the year 2007.

33. On 04.05.2007, Adani sent a letter confirming that the Depots would be ready for shipment of foodgrains by 1st July, 2007 and the same shall be utilized by FCI on actual utilization basis. The letter dated 04.05.2007 is relevant and the same is reproduced below:

> "The Chairman cum Managing Director,
> M/s. Food Corporation of India,
> 16-20, Barakhamba Lane,
> New Delhi-110 001.
>
> **Sub:- Discussions during meeting held on 3rd May '07**
>
> Dear Sir,
>
> This has reference to the meeting held on 3rd May '07, at your headquarters, regarding readiness of our Base depots. It was requested that AALL submit a letter for acceptance of depots on actual utilization basis. We would like to state as under:
>
> 1. The Committee consisting of the Independent Engineer & top officials of FCI had visited both the sites on 20th April '07, & have acknowledged that the sites are ready for receipt of foodgrains.
> 2. AALL Base depots of Moga & Kaithal shall accept the wheat, for storage from FCI, with immediate effect. We agree that FCI shall make payments to AALL on actual utilization basis, till the project is complete. However FCI shall put its best efforts to see that the maximum capacity of the depots is utilized.

3. We agree that the Operations for the year 2007 shall be considered as part of the 20 year guarantee period as per the Service Agreement between FCI & AALL.

4. The depots shall be ready for shipment of food grains by 1st July '07.

We are grateful for all the support extended to AALL, to enable us to start Operations of the Base Depots."

34. It is clear from the above letter that the parties had agreed that the operations for the year 2007 would be considered as part of the twenty years guarantee period. Thus, the parties agreed and understood that the Service Period of twenty years would commence from the year 2007 notwithstanding that the Project had not been completed. This was a clear departure from the terms of the Agreement. However, it is obvious that the parties had agreed to this arrangement as the parties felt that it was not apposite to keep the available storage facilities idle and unproductive notwithstanding the delay in completion of the Project.

35. FCI affirmed the aforesaid understanding as is evident from its letter dated 09.05.2007. The same is set out below:

"No.E.2(31)/2005/Bulk Project/Stg.III/S&C/QP/01 Dt: 9.5.2007

Shri S.K. Srivastava,
Joint Secretary (Stg. & Admn),
Ministry of CAF&PD
Deptt. of F&PD
Krishi Bhavan,
New Delhi

**Sub:- Development & Operation of Bulk Foodgrains handling, Storage & Transportation facilities**

**under BOO arrangement for circuit-I & II by M/s. Adani Agri Logistics Ltd.**

**Ref:- FCI Hqrs. Letter of even number dated 30.04.2007**

Sir,

You may kindly recall discussions in the Senior Level Monitoring Committee held on 11.4.2007 wherein M/S AALL had informed that the silos at Moga and Kaithal are ready for the receipt of the stocks and requested FCI to divert stocks of wheat, both in bulk and bag to the said locations.

In view of the inadequacies pointed out by GM (Regions), Punjab and Haryana. It was decided that a team consisting of S/Sh. S.P. Kar, GM (A/Cs), R.N. Bhargava, GM (Engg.), GM (Punjab), GM (Hr) and Shri Ashok Kumar, Dy. Director (TFC) from Ministry may inspect both the base depots at Moga (Pb) and Kaithal (Hr) and submit factual report.

The team visited these Silos on 19th & 20th April 2007 along with the representatives of M/s AALL and the IE&A (GVC Energy Services Pvt. Ltd.), Dr. Ashok Kumar, Dy. Director (TFC), however, could not accompany the team due to his preoccupation in the Ministry.

The report of the team so received was circulated along with the meeting notice vide our letter dated 30.04.2007 (referred above). The Senior Level Monitoring Committee held its meeting on 3.5.2007 at FCI, HQRS. Copy of the minutes of the meeting is enclosed.

CMD, FCI desired to have the view of Ministry's representatives, ED (Engg), GM (Engg), CGM (A/Cs) and other participants and a common view was that we may start using the silos from the current season subject to the following conditions:-

1. M/s AALL will accept bagged cargo and debagging of stocks at silos will be done at their own cost.
2. Rent will be paid by FCI only on actual utilization basis.

3. <u>The guarantee period of 20 years will begin from the date of deposition of wheat stocks during the current season.</u>

M/s AALL have agreed to accept the above conditions. Copy of the letter dt. 4.5.07, containing undertakings of M/s AALL in this regard is also enclosed. Accordingly, the GM(Region) Punjab and Haryana will make requisite arrangements and dispatch stocks of wheat from mandies where procurement of FCI and State Agencies is on to the silos from the current season on the terms and conditions mentioned above. However, from next season, FCI will deliver the stocks both the bulk and bagged condition as per service agreement.

This is for your kind information and further directions if any from the Ministry."

[ underlined for emphasis]

36. As is apparent from the above, one of the conditions that was expressly mentioned is that the guarantee period of twenty years would commence from the date of deposition of wheat stocks during the current season (July 2007).

37. Adani reaffirmed the said understanding by its letter dated 05.06.2007. The said letter is set out below:

"June 5, 2007

The Chairman cum Managing Director,
M/s. Food Corporation of India
16-20, Barakhamba Lane,
New Delhi-110 001

**Subject:- Issue of wheat for Base Depots for FCI Silo Project**

Dear Sir,

We are grateful to FCI having agreed to supply us wheat in the current season. This will help us and FCI in better understanding of bulk Storage & Transportation using most modern technologies involved. We understand that the last order to your Field G.M.'s and Moga & Kaithal, has been for a quantity of 50,000 MT to be supplied to each of our Base Depots. In this connection, we have the following submissions for your consideration:

a) The cost of the project is Rs.600 Crores and the annual interest liability is Rs.85 crores.
b) There is a staff cost involved at Base Depots as well as Field Depots. There are also other consumables and material expenses like diesel, and machinery maintenance etc.
c) As a goodwill gesture, we have already accepted that the entire quantity for this year shall be coming in bagged form and we are incurring an additional expense of Rs.2.40 per bag.
d) <u>We have already given an undertaking to FCI for 2007 to be treated as the first year of Operations thereby reducing the project life by one year and also incurring full expenditure in the first year.</u>

In order to compensate for huge losses, it is requested that the Base Depot Silos may please be considered for filling-up to the brims.

Thanking you and assuring you our full cooperation."

[underlined for emphasis]

38. Thereafter, apart from acquiring the stipulated number of wagons, Adani substantially completed the Project. In the aforesaid context, one of the proposals discussed between the parties was that FCI discontinue payment on actual basis and pay SCH charges on AGT *albeit* at a reduced rate considering that Adani had not acquired the stipulated number of wagons. The same was discussed at a meeting of the Senior Level Monitoring Committee held under the Chairmanship of the CMD, FCI on 04.12.2012. The recommendations of the said Committee are set out below:

> "8. SLMC after deliberation made the following recommendations:-
>
> (a) As decided in its meeting held on 30.01.2012, M/s AALL would pay Rs.5.21 crore to FCI as liquidated damages for delay in completion of the project.
>
> (b) M/s AALL shall immediately place order for the balance 104 number of wagons.
>
> (c) Till the acquisition of the above number of wagons, M/s AALL would be paid storage-cum-handling charges for Guaranteed Tonnage at the reduced rates (storage-cum-handling rates have been reduced by accounting for savings on the balance wagons to be purchased including 4% wagon for maintenance spares not accounted for by CA in its report) as per report of the CAs and the reduced rental rates would be following:-
>
> (I) Rs.1842/- per MT for Base Depots (as against Rs.2000 MT incorporated in the Service Agreement).

(II) Rs.382/- per MT for Field Depots (as against Rs.415/- per MT as per the Service Agreement).

(d) The above recommendation of the SLMC may be applicable after its approval by the Board of Directors of FCI.

(e) Full Guaranteed Storage-cum-handling charges of Rs.2000/- per MT per annum for the Base Depots and Rs.415/- per MT per annum for the Field Depots would be restored as per the original service agreement on due certification acceptance of balance 104 wagons by the Railways."

39. Adani agreed to the aforesaid recommendations and sent a cheque for a sum of ₹5.21 crores towards liquidated damages under cover of its letter dated 09.01.2013 and also confirmed that it had placed orders for 104 (one hundred and four) number of BCBFG wagons. In the aforesaid context, the parties entered into the Supplementary Agreement dated 12.02.2013. The Supplementary Agreement is set out below:

**"SUPPLEMENTARY AGREEMENT**

THIS SUPPLEMENTARY AGREEMENT made on this the 12th day of February, 2013 between Food Corporation of India, a Body Corporate having perpetual succession formed under the Food Corporation Act, 1964 having its Headquarters at 16-20, Barakhamba Lane, New Delhi 110001 (India) (hereinafter referred to as "FCI, which expression shall, unless to the context otherwise requires include its successors) and

Adani Agri Logistics Limited, a Company incorporated under the Companies Act, 1956 having its Registered Office at "Adani House", Near Mithakhali Circle, Navrangpura, Ahmedabad – 380 009, Gujarat (India) (hereinafter referred to as "AALL", which expression shall unless the context otherwise requires include its permitted assigns and successors)

WHEREAS

Two Service Agreements were executed between FCI and Adani Logistics Limited on 28.06.2005 for Circuit 1 & 2 (hereinafter referred to as "Original Service Agreement") whereby AALL was entrusted with the project of developing Silos in different parts of the country on Build Own & Operate (BOD) basis with state of the art technology connected with own Railway Sidings and with specially designed Bulk Wagons for transportation of food grains.

WHEREAS

Subsequent to signing of the said Service Agreement, the name of M/s. Adani Logistics Limited has been changed to M/s Adani Agri Logistics Limited.

WHEREAS

1. Among others, it was one of the covenants of the Original Service Agreement that, the project shall be completed within a period of 36 months from the date of execution of the said Service Agreements dated 28.06.2005.

2. The Base Depots of Moga & Kaithal were ready as on April 2007 Field Depots were under construction and Wagons were not purchased by

AALL as on April 2007. AALL requested FCI to allow them to store wheat in the Base Depots, with an understanding that the year 2007 would be considered as first year of the 20 year guarantee period, and payments would be made on actual utilization basis till the project is complete.

WHEREAS

3. The Original Service Agreement for Circuit 1 & 2 dated 28.06.2005 provided, as part of the project, procurement of 400 Specially Designed Wagons with 4% maintenance spare Wagons by AALL, the details of which are as under:

| | |
|---|---|
| Wagons to be purchased | = 400 |
| 4% maintenance spaces | = 16 |
| Total | = 416 |
| Capacity @ 55 MT | = 22,880 MT |
| Wagons purchased | = 260 |
| Capacity @ 63 MT | = 16,380 MT |
| Wagons to be purchased in | |
| In terms of capacity | = 6,500 MT |
| No. of wagons to be purchased | = 103.17 (Rounded to 104) |

Thus, as per the original Service Agreement, AALL is still required to procure the balance 104 wagons.

AND WHEREAS

4. The recommendations of Senior Level Monitoring Committee (SLMC) in its meeting held on 4th December 2012 on the subject matter were also approved by the FCI by Board of Directors in its 352nd Meeting held on 20th December, 2012. That while approving the

proposal the board directed to execute a Supplementary Agreement between FCI and AALL incorporating the decisions thereon.

NOW THEREFORE THIS SUPPLEMENTARY AGREEMENT WITNESSETH AND IT IS AGREED BY AND BETWEEN THE PARTIES AS UNDER:

(I) AALL would pay Rs.5.21 Crores to FCI as liquidated

damages for delay in completion of the project.

(II) AALL shall immediately place order for the balance 104 number of Wagons.

(III) Till the acquisition of the balance 104 number of Wagons, AALL would be paid storage-cum-handling charges for guaranteed tonnage at the reduced rates and the reduced rental rates would be as under.

a. Base Depot : Rs.1842/- per MT (as against Rs.2000/- per MT as incorporated in the Service Agreement)

b. Field Depot : Rs.382/- per MT (as against Rs.415/- per MT as per the Service Agreement)

(IV) Full Guaranteed Storage cum Handling charges of Rs.2000/- per MT per annum for Base Depots and Rs.415/- per MT per annum for the Field Depots would be restored on guaranteed tonnage as per the Original Service Agreement on due certification and of balance 104 Wagons by the Railways.

(V) That the guaranteed tonnage at the reduced rate of handling charges would be applicable from

the date of signing of this Supplementary Agreement.

5. That in pursuance of the said decision of the SLMC and FCI BOD, AALL has paid an amount of Rs.5,21,00,000/- (Rupees Five Crore Twenty One Lakhs Only) on 09.01.2013 to FCI towards liquidated damages on account of delay in completion of the project and further that AALL has placed the order for purchase of the balance 104 Wagons and has also agreed to reduce rentals on guaranteed tonnage for the intervening period till the receipt of balance 104 Wagons and its certification and acceptance by the Railways.

6. This Supplementary Agreement forms an integral part of the Original Service Agreements dated 28.06.2005."

40. Recital no. 2 of the Supplementary Agreement expressly referred to the understanding between the parties that the year 2007 would be considered as the first year of the twenty-year guarantee period. There is no ambiguity in the agreement between the parties that the guarantee period of twenty years would commence from the year 2007. This is expressly confirmed by letters dated 04.05.2007 and 05.06.2007 sent by Adani. The Minutes of the Senior Level Monitoring Committee dated 04.12.2012 also reflect that Adani clearly understood that the Service Period of twenty years had commenced in the year 2007. At the said meeting, the representatives of Adani had lamented the loss of five years out of the guaranteed period of twenty years as reflected in the said Minutes of the Meeting. The recitals of the Supplementary Agreement also expressly record that Adani had requested FCI to store

wheat at the Base Depots with the understanding that the year 2007 would be considered as the first year of the twenty years guaranteed period although payments would be made on actual utilization basis.

41. Notwithstanding that there is no ambiguity relating to the agreement between the parties, the Arbitral Tribunal has proceeded to hold that the Service Period of twenty years began from 28.09.2013. The Arbitral Tribunal reasoned that although the parties entered into a Supplementary Agreement, the definition of the Operations Date as mentioned in the Agreement was not amended and the contract between the parties is required to be considered by applying the Business Efficacy Test. Further, the Arbitral Tribunal held that it could not have been the intention of Adani to have two operation periods - one commencing from the date on which the facilities were commissioned and the other commencing at an earlier date.

42. Insofar as the correspondence between the parties in the year 2007 is concerned, the Arbitral Tribunal has brushed aside the same by observing that *"the issue of currency of the 20 period was not germane in that context"*. The Arbitral Tribunal held that the Penta Test as propounded by the Supreme Court in ***Nabha Power Ltd. v. Punjab State Power Corporation Ltd.*** (*supra)* was applicable and that would lead to the inevitable conclusion that twenty years period (Service Period) is required to commence from 28.09.2013 and not from May, 2017.

43. The Arbitral Tribunal referred to the amended Section 28(3) of the A&C Act and noted that the said provision had been amended by deleting the words "in accordance with" and substituting the same with the words "having regard to". The Arbitral Tribunal observed that the said amendment was intended to overrule the effect of ***ONGC v. Saw Pipes Ltd.: (2003) 5 SCC 705*** wherein the Supreme Court had held that the contravention of the terms of the contract would result in the arbitral award falling foul of Section 28 and consequently, the public policy of India. The Arbitral Tribunal made the said observations in the context of the submission advanced on behalf of FCI that the Arbitral Tribunal is bound by the provisions of the contract between the parties. It is apparent that the Arbitral Tribunal has proceeded on the basis that it was not bound by the contract between the parties.

44. This Court is of the view that the impugned award is vitiated by patent illegality on the face of the award. There is no ambiguity in the contract between the parties. As noted above, the parties had modified the Agreement because Adani had failed to set up the Project within the stipulated period of thirty-six months. The parties had after discussions, partially modified the Agreement on two aspects. First, that the payments would now be made on actual utilization basis till completion of the facilities; and second, that the Service Period would commence from May, 2007. This understanding is expressly reflected in the letters exchanged between the parties; Minutes of the Meeting held on 04.12.2012, and the Supplementary Agreement dated 12.02.2013. Mr.

Srinivasan could also in no other alternative manner read the correspondence between the parties.

45. The Arbitral Tribunal's observation that the commencement of the Service Period was not relevant in the context of the exchange of communication and the Supplementary Agreement, is manifestly erroneous. It is clear from the communications that one of the vital conditions agreed between the parties for FCI to commence utilization of depots on actual utilization basis, was that the guaranteed period of twenty years would commence from such utilization. The conclusion of the Arbitral Tribunal runs in teeth of the express language of the letters exchanged as well as the Supplementary Agreement. This Court is of the view that this would amount to rewriting the contract between the parties, which admittedly the Arbitral Tribunal cannot do. It is not open for the Arbitral Tribunal to rework the bargain struck between the parties. Since there is no ambiguity in the understanding– which has also been expressly referred to in the Supplementary Agreement dated 12.02.2013 – that the guaranteed period of twenty years would commence from May, 2007, it was not open for the Arbitral Tribunal to render the award contrary to the same.

46. The reliance placed by Mr Srinivasan on the decision of the Supreme Court in ***Paersa Kente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited*** (*supra*) is misplaced. In that case, the respondent (Rajasthan Rajya Vidyut Utpadan Nigam Limited) had floated a tender for the joint venture to undertake coal block development, mining, transportation of coal and delivery. Adani

Enterprises Limited had successfully submitted its bid pursuant to the said notice. Thereafter, the respondent and Adani Enterprises Limited entered into a Joint Venture and Parsa Kente Collieries Limited (the appellant before the Supreme Court) was incorporated as a Joint Venture Company. The parties entered into a Coal Mining and Delivery Agreement for supply of coal. Thereafter, a Coal Mining Service Agreement was entered into between Parsa Kente Collieries Limited and Adani Enterprises Limited. In terms of the said Agreement, supply of coal was to commence within forty two/forty eight months from the date of allotment of coal blocks. Apparently, there was twenty one months delay in commencing supply of coal on account of certain *force majeure* events. The date for commencement of supply of coal was extended from 25.06.2011 to 25.03.2013 by mutual consent. In the aforesaid context, disputes arose between the parties, *inter alia*, relating to the price adjustment/escalation. One of the question that fell for consideration of the Arbitral Tribunal was whether the price adjustment/escalation was required to be computed from the initial date for supply of coal (25.06.2011 or 25.03.2013). The Arbitral Tribunal concluded that the price escalation was required to be computed by accepting 2011-12 (the year on which coal supply was to commence) as the zero year. The Arbitral Tribunal had reasoned that the delay in supply of coal was on account of obtaining clearance and during this period, there would have been hike in the labour charges, transportation charges etc.

47. The learned Commercial Court rejected the challenge to the arbitral award. However, the Division Bench of the High Court allowed the appeal preferred by the respondent and set aside the arbitral award. The matter was carried in appeal before the Supreme Court. The Supreme Court allowed the appeal and set aside the order passed by the Division Bench of the High Court. The Supreme Court found that there was no specific agreement that the appellant would supply coal in the year 2013 at the same price as agreed and without any price escalation.

48. In view of the express finding that there was no agreement between the parties that the appellant would supply coal at the same price without escalation, the Supreme Court found that the view of the Arbitral Tribunal was both possible as well as plausible. In the circumstances, The Supreme Court held that merely because some other view could have been taken, the High Court was not justified in interfering with the Arbitral Award. In the present case, there is no ambiguity that the parties had agreed that the twenty year guarantee period would commence in May 2007. This is not a case where the Arbitral Tribunal has taken a view regarding the intention of the parties in absence of any agreement; the Arbitral Tribunal has disregarded the express agreement and understanding between the parties. Thus, the decision in the case of ***Paersa Kente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited*** (*supra*) has no application in the facts of the present case.

49. One of the reasons that had persuaded the Arbitral Tribunal to hold that the period of twenty years will commence from 28.09.2013 is

that two different dates were not possible. One to calculate the escalation in SCH charges and the other for calculating the service period. The Arbitral Tribunal held that since it was clear that the escalation would be calculated on the basis of WPI as on 28.09.2013 as the base date being the date on which the facilities were fully commissioned; it would necessary follow that the Service Period of twenty years would also commence from the said date. This Court is unable to accept the said rationale. The parties are at liberty to choose different dates for different purposes. The fact that the escalation has to be calculated from the base date, that is 28.09.2013, would not necessarily lead to the conclusion that the Service Period must commence from the same date. The question as to the date from which the guarantee period of twenty years (Service Period) commences is required to be examined on the basis of agreement arrived at between the parties. In this regard, there is no ambiguity that the parties had agreed that the guarantee period would commence from the year 2007. Thus, notwithstanding that the escalation may be payable with 28.09.2013 being the base date, the guarantee period of twenty years would commence from the year 2007. This is what the parties in their commercial wisdom agreed.

50. This Court is unable to accept that the Arbitral Tribunal could by applying the business efficacy test alter the express contract between the parties.

51. The Penta Test as propounded by the Supreme Court in ***Nabha Power Ltd. v. Punjab State Power Corporation Ltd.*** (supra) is to serve

as a guide to determine the intention of the parties. If there is no ambiguity as to the contract between the parties, the said test has no application.

52. It appears that the Arbitral Tribunal had attempted to work out an equitable bargain between the parties. This is impermissible. It is not open for the Arbitral Tribunal to re-write the contract between the parties on any notion of equity. Notwithstanding that the Arbitral Tribunal finds the agreement entered into between the parties as inequitable, it is not open for the Arbitral Tribunal to re-write the same.

53. Insofar as Section 28(3) of the A&C Act as amended by virtue of the Arbitration & Conciliation (Amendment) Act, 2015 is concerned, the same may not be applicable, as in the present case, the arbitration had commenced prior to 23.10.2015. More importantly, Section 28(3) of the A&C Act as amended cannot be read to mean that an Arbitral Tribunal can render an award contrary to the contract between the parties. Undisputedly, the expression 'take into account terms of the contract' makes it necessary for the Arbitral Tribunal to render an award in conformity with the terms of the contract. An award may not be impeachable under Section 34 of the A&C Act on the ground that it appears to be contrary to one of the terms of the contract between the parties, which is not material. The question whether the arbitral award is liable to be set aside will necessarily have to be decided on the anvil of the grounds as set out in Section 34 of the A&C Act. The import of the amendment to Section 28(3) of the A&C Act is not to override the terms of the contract or encourage that the Arbitral Tribunal disregard

the same. It is to ensure that the limited scope of interference under Section 34(2)(b)(ii) or Section 34(2A) of the A&C Act is not expanded. An arbitral award which is contrary to the material terms of the contract between the parties would undeniably vitiate the award on the ground of patent illegality if the same goes to the root of the dispute. In ***PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin*:*(2021) SCC OnLine SC 508***, the Supreme Court has observed as under:

> "87....In our view, re-writing a contract for the parties would be breach of fundamental principles of justice entitling a Court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category."

54. In the present case, this Court is of the view that the impugned award is contrary to the contract between the parties and therefore, to that extent is liable to be set aside.

55. In view of the above, the impugned award to the extent it accepts that the guarantee period would commence from 28.09.2013 and not from May, 2007, is set aside. Accordingly, Claim nos. 3C and 3D are rejected.

56. This Court finds no infirmity with the findings of the Arbitral Tribunal that the escalation in SCH charges is to be computed on the basis of the WPI of 28.09.2013 as the base. None of the parties have challenged the said decision. Merely because the decision of the

Arbitral Tribunal to allow alternate claims is set aside, is no ground to set aside its findings on the issue of escalation.

57. It is clarified that this Court has not interfered with the impugned award inasmuch as it finds in favour of Adani in respect of Claim No.2 and holds that Adani would be entitled to receive ₹500/- per MT on a daily basis on actual utilization beyond the designated storage capacity of 200,00,000 MT post 15.12.2012.

58. The petition is disposed of in the aforesaid terms.

59. All pending applications are also disposed of.

**VIBHU BAKHRU, J**

**JULY 05, 2022**
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