

\$~5

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

Date of decision: 17th November, 2018

+ **O.M.P. 203/2014**

FOOD CORPORATION OF INDIA, FEROZPUR Petitioner

Through: Mr. Mohan Lal Sharma, Advocate
(M-9811537909).

versus

JAI BHARAT RICE MILLS AND PARTNERS &
ORS

..... Respondents

Through: Mr. Rajesh Chhetri, Mr. Pawan
Upadhyay, Mr. Rajeev Chhetri & Ms.
Meenakshi Rawat, Advocates.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenges the award dated 23rd October, 2013 passed by the Learned Sole Arbitrator.

2. The Petitioner – Food Corporation of India (*hereinafter*, 'FCI') and M/s Jai Bharat Rice Mills and Partners (*hereinafter* 'miller') had entered into a milling agreement dated 3rd January, 1995. Under the said contract, the miller was to mill the paddy and supply the rice to FCI. As per the contract, FCI had supplied 18397 bags (11957.25 quintals) of superfine variety paddy to the miller for milling and to be delivered to FCI by 28th February, 1995. It is claimed by FCI that the miller had milled only 9858

bags (6279.77 quintals) of paddy by 28th February, 1995. The balance paddy in 8539 bags (5549.31.700 quintals) was not milled and had to be sold by FCI at a lower price

3. The FCI, alleged breach of contract by the miller and invoked arbitration for failure to mill the paddy on or before 28th February, 2018, claiming 1^{1/2} times rate of the unmilled paddy as the economic cost. The miller on the other hand claims that it had performed its part of the contract satisfactorily and there was no unmilled paddy lying in its premises as it had sold by the FCI. It also referred to a zonal committee report which classified the cases of such kind into 3 categories which are:

- Category no.a – cases where No Demand Certificates (NDCs) are issued by the FCI;
- Category no.b – cases in which the FCI has been able to receive the required percentage of rice and/or cash in lieu of rice for the rest of the paddy stocks resulting therein that FCI does not have any claim/demand from the miller;
- Category no.c – cases of pilferage/dispersal of stocks of their own without knowledge of FCI.

4. As per this report, it was decided that when an NDC has either been issued or the FCI had been successful in mitigating its losses, no claim would arise against the miller. Pursuant to the said Report, the FCI had already issued a 'No Demand Certificate' and 'Certificate of Refund of Securities' to the miller duly signed by FCI on 26th February, 1996. Thus, the miller squarely fell in category (a) as per the report of the Zonal Committee, and no case could have been brought against it.

5. The miller also relied upon a statement of balance paddy prepared by

FCI, whereby under the column “balance paddy” the quantity shown to be due qua the miller was “NIL”. The miller also relied upon the remark at the end of the statement which reads as under:

“In the cases where NDCs not yet released, it is due to the instructions received to lodge claims treating cutoff date 31.05.1995. However, the parties have delivered either rice or cost of paddy against the said policy of paddy lying with them well before 31.08.1995. However, nothing is recoverable from them. This document shows that there is “Nil” balance in the mill premises on or before 31.08.1995. It also shows that there is no shortage in un-milled paddy which was sold/retrieved by the claimant.”

In this statement, the miller’s name appeared at Sr. No.59 and as per the FCI’s own admission they had deposited the entire balance paddy with the FCI pursuant to the open sale notice, and there was nothing due qua it.

6. In light of the above facts and circumstances, the Ld. Sole Arbitrator passed the following award:

“The Claimant is not entitled for claim as claimed in the claim petition on the following:

- (i) In view of the details relating to the Respondent which is at Sr. No.6 in the statement showing the position of paddy stored in the mill premises, paddy milled, rice delivered upto 31.5.1995 and 31.8.1995 for the crop year 1994-95.*
- (ii) In terms of clause 7 of the Agreement the Respondent is liable to made good the losses that may be incurred in paddy/rice during transit/storage at 1.5 times the economic cost of variety of paddy/rice towards the shortfall. In the instant case there is no shortage in the resultant rice and in paddy which was retrieved by the Claimant. In any event the Claimant has*

failed to prove that there is a shortfall in terms of clause 7 of the agreement.

- (iii) There is no shortfall in recovery of rice by the Claimant against which the released orders were issued to the Respondent and therefore, in terms of clause 8(iii) of the Agreement the Claimant is not entitled to the economic cost.*
- (iv) There is no claim of the Claimant in view of the “No Demand Certificate for Contractor” and “Certificate for Refund of Securities” both dated 26th February, 1996.”*

7. This Court also has had the occasion to deal with a similar matter of the same season 1994-95, in ***FCI v. S. K. International [OMP 487/2011 decision dated 23rd October, 2018]*** (hereinafter, ‘*FCI v. S.K. International*’). The facts, in the present case, are similar to the said case. After a perusal of the various policy decisions of the government, the various circulars issued, etc., this Court has arrived at the following conclusions/findings:

- a. That during the season of 1994-95 a large number of contracts of similar nature were entered into;
- b. Though the paddy was stored in the miller’s premises, but it was in joint custody of the miller and FCI;
- c. That several millers had milled the paddy but FCI could not accept the supplies of the rice for various reasons.
- d. Various policy decisions were taken, pursuant to which the government decided to issue notices for open sale of unmilled paddy. The said open sale notices were issued in March, 1995 and August, 1995.

- e. Pursuant to the said open sale notices, several millers purchased the unmilled paddy or the same was sold in the open market.
 - f. Question of award of damages would have arisen if there was a breach of contract, whereas there was a supervening circumstance before the completion of the contract period i.e. the purchase under the open sale notices.
 - g. The Government also took policy decisions to enter into settlements with the millers.
 - h. Insofar as the millers, who had purchased the paddy was concerned, no legal claims were to be pursued against them.
 - i. Primarily legal claims were to be pursued against the millers who had pilfered or siphoned off unmilled paddy.
 - j. In several cases, no dues certificate and settlements were entered into.
8. Under these circumstances, in *FCI v. S. K. International (supra)*, this Court has held as under:

“38. The intervening circumstances of notices for open sale during the currency of the contract go to the root of the matter insofar as it relates to implementation of the contract by the millers. The documents on record do demonstrate that a policy decision was taken not to create distress for the millers due to various reasons, not attributable to the millers and in view of the same the decision for open sale with the preferential right to the millers to buy was taken. The FCI cannot be seen to argue that it is entitled to the price of the unmilled paddy at the rates fixed by it and in addition it is entitled to 1 ½ times the rate of the paddy in the form of the economic cost. Such a double benefit cannot be granted, especially in cases where

the millers have acted in a bonafide manner.

39. *The court cannot lose sight of the fact that awards have to be passed in consonance with public policy. The documents on record show that there were various levels of consultation which went into the decision to sell the paddy by means of open sale. This shows that the Government had reconciled to the fact that the best step to take was to sell in the market and recover the cost of the paddy. Further the FCI was also given a benefit of Rs. 120 crores by the Central Government to compensate for the losses suffered by it. This is evident from letter dated 29th March, 2000.*

40. *The initiation of arbitration claim against the millers in the light of open sale notices and the correspondence, which is set out in the present case, clearly seems to be an erroneous step by the FCI against the miller and the documents on record shows clearly that even in the settlements entered into by FCI, it did not insist on the 1½ times of the economic cost of paddy. FCI is clearly being selective in the manner in which the arbitration cases are being pursued for more than two decades now. The FCI itself having taken a decision and given the option to the miller to purchase the paddy or having recovered the cost of the paddy by selling in the open market, was clearly in the knowledge of the fact that it had taken a policy decision consciously not to press the claim of economic cost. Despite this, in the arbitration proceedings it raised claims for the same which are totally untenable - except in the case where the millers had indulged in pilferage and siphoning off of paddy. Thus, the claim of 1½ times of the economic cost is not liable to be granted in favour of the FCI, in the facts of the present case.”*

9. The claim for damages has been rejected on the ground that the entire unmilled paddy which was lying in the premises of the miller was permitted

to be sold. There was no shortage in the rice/paddy recovered from the miller's premises. The Ld. Arbitrator therefore rightly rejected the claim for damages on the basis of $1^{1/2}$ times the economic cost of paddy. Following the view in the *FCI v. S.K. International (supra)*, there is no allegation of pilferage or siphoning off of the unmilled paddy in the present case. Thus, the claim for damages is rejected rightly.

10. The objections of FCI are dismissed. However, it is made clear that the miller would have to reimburse to the FCI 50% of the costs of arbitration, paid by FCI and as directed by the Arbitrator.

11. OMP is dismissed accordingly.

PRATHIBA M. SINGH
JUDGE

NOVEMBER 17, 2018

Rahul