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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 17th November, 2018
+ **O.M.P. 204/2014**

FOOD CORPORATION OF INDIA, FEROPUR Petitioner

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

versus

A.V. INDUSTRIES 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 26th October, 2013 passed by the Learned Sole Arbitrator.

2. The Petitioner – Food Corporation of India (*hereinafter*, ‘FCI’) and M/s A.V. Industries and Partners (*hereinafter* ‘miller’) had entered into a milling agreement dated 20th February, 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 24515 bags (15934-75-000 quintals) of superfine variety paddy and 160 bags (104-00-000 quintals) of common 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 8209 bags (5229-04-000 quintals) of superfine variety paddy by 31st May, 1995. The balance paddy as on 1st June, 1995 in 16306 bags (10598-98-000 quintals) of superfine

variety paddy and 160 bags (104-00-000 quintals) of common variety paddy 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. The miller also relied upon that statement of balance paddy prepared by FCI, whereby the under the column “balance paddy” the quantity shown to be due qua the miller was “NIL”. In this statement, the miller’s name appeared at Sr. No.12 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 from the miller.

4. 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.
5. 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.”

6. The Ld. Sole Arbitrator, considering all the facts and circumstances prevalent, arrived at the following conclusion:

“The recommendations of the Zonal committee referred to by the defendant were not approved by the Managing Director and the Chairman of the Corporation and therefore cannot be taken into consideration.

As regards defendants’ argument that paddy could not be milled due to non-issue of release order by Claimants, it may be noticed that as per clause 14(i), the lifting of paddy shall be limited to the advance rice delivered by the miller to the Corporation. The defendant has not shown any instance where rice was produced before Claimant and paddy was not released to it. This argument is therefore dismissed.

The notice of sale of paddy was a general notice and was meant for sale after 31.5.1995. Even after this date the milling has been going on and has been accepted in the defendants’ case as well. In any case the notice of sale does not authorise the defendants to take an unilateral decision to call off the milling of the paddy and the delay on this ground can not be accepted.

The defendant has heavily banked upon the fact that no paddy was left with them by 31/08/1995. This contract was not aimed at giving account of paddy whether milled or un-milled within the specified period. The aim of the contract was to ensure the milling of the paddy by a specified date which was not done by the defendant. Even the statement showing positions as on 31.5.1995 and 31.8.1995 which was relied upon heavily by the defendant shows in column no.47 which relates to defendant, that only 8209 bags and 5229-04-000 quintals of paddy had been milled by defendant till 31.5.1995.

It is therefore established that the respondent were at

default because they did not mill the paddy within the specified period.”

7. Despite the above conclusions, the Ld. Sole Arbitrator held as follows:

“However, the Claimant is relying upon provision in the agreement for a payment of 1½ time of economic cost for damages. But no such damage is mentioned in the contract in this type of situation. The Claimant could recover 1½ time of the economic cost of paddy only under the provision of clause 7 or clause 8(iii) or clause 9(i) of the agreement. Clause 7 relates to shortage paddy/rice during transit shortage, clause 8(iii) relates to shortage of recovery of rice, and clause 9(i) relates to the supply of rice not within prescribed specification. None of these conditions is existing in this case. The loss on account of the sale of rice has nowhere been mentioned in the agreement and no damage has been prescribed for such loss. Claimant is therefore not entitled to any claim except the forfeiture of security. Under these circumstances, the claim of Rs.52,28,362.63 lodged made by the Corporation is not allowed.

The petition is accordingly dismissed.

Both parties shall bear their own cost of arbitral proceeding.”

8. The Learned Arbitrator came to the following conclusions:

- i) that the Zonal Committee’s report was not approved by the Managing Director and Chairman of FCI. Hence, it cannot be taken into consideration;
- ii) the miller’s argument that since the release order was not issued by FCI, he could not mill the paddy, was rejected;
- iii) that the notice for open sale was a general notice and did not permit the miller to stop the milling of the paddy;

- iv) the purpose of the milling contract was to give the milled paddy in the form of rice;
- v) the 1 ½ economic cost is not liable to be granted as the conditions under clause 7 or clause 8(iii) as also clause 9(i) of the milling agreement have not been fulfilled;
- vi) no clause pertaining to loss incurred on account of non-milling of paddy is contained in the agreement.

Thus, the claims of FCI were not allowed.

9. The conclusion of the Learned Arbitrator is still in favour of the miller and no claims of the FCI have been awarded. While upholding this conclusion of the Learned Arbitrator, this Court however finds that the findings in respect of the binding nature of Zonal Committee report and the second finding in respect of release orders having not been issued, are both not tenable.

10. As recorded in the findings in *FCI v. S.K. International (supra)*, the FCI had entered into settlements with a large number of millers, and had also issued open sale notices as a conscious and deliberate decision. These decisions could not have been done away with by simply arguing that some individual in the FCI has not approved these actions. In such cases, the doctrine of Indoor Management would apply inasmuch as FCI being a responsible organisation cannot claim that public notices were issued without due approval, settlements were entered into without due approval, and arbitrations were commenced without due approval. Such submissions if given credence to, would make it extremely difficult for a third party to deal with the FCI. Millers are not expected to know the procedure to be followed by FCI within their own organisation. These findings of the Learned

Arbitrator are thus not liable to be sustained.

11. As per clause 2 of the contract, the paddy, though stored in the warehouses of the millers, was kept in joint custody. In order for the miller to be able to mill the paddy, release orders were required to be issued. The finding of the Learned Arbitrator that release orders were not required is, thus, not correct and contrary to the contract.

12. Insofar as the open sale notices are concerned, these notices gave a clear option to millers to purchase the unmilled paddy. The reasons for the same are not far to seek. The next season had arrived, and the FCI did not have sufficient space for storage. Thus, the decision for open sale was therefore taken as a policy matter after due deliberation. This has been discussed in detail in *FCI v. S.K. International (supra)*. The decision for open sale was based on several factors and is reflected in a large number of documents, including minutes of meetings, letters, etc. Thus, this finding of the Learned Arbitrator on this count is also not tenable.

13. The Learned Arbitrator has not awarded any damages to the FCI. The award except in respect of observations made above, does not require interference.

14. The objection petition is, accordingly, rejected. However, it is made clear that the miller would have to reimburse the FCI's cost of arbitration, which the FCI deposited even in the miller's share.

PRATHIBA M. SINGH
JUDGE

NOVEMBER 17, 2018
Rahul