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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 14th December, 2018

+ **O.M.P. 451/2012**
FOOD CORPORATION OF INDIA, FEROZEPUR Petitioner
Through: Mr. Mohan Lal Sharma, Advocate.

versus

M/S BRAR RICE AND GENERAL MILLS AND
ORS Respondents
Through: Mr. Rajesh Chhetri, Mr. Pawan
Upadhyay, Mr. Rajeev Chhetri &
Ms. Meenakshi Rawat, Advocates
(M-9891675255)

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 12th December, 2011 passed by the Learned Sole Arbitrator.
2. The Petitioner – Food Corporation of India (*hereinafter*, 'FCI') and M/s Brar Rice & General Mills & Ors. (*hereinafter* 'miller') had entered into a milling agreement dated 24th January, 1995. Under the said contract, the miller was to mill the paddy and supply the rice to FCI, on or before 28th February, 1995. As per the contract, FCI had supplied 35374 bags (22993 quintals) of paddy to the miller for milling and to be delivered to the FCI by 28th February, 1995. It is claimed by the FCI that the miller had milled only 1662 bags (1058 quintals) of paddy and 750 bags (709 quintals) of rice was supplied to the FCI by 28th February, 1995. The milling was also not completed by the extended date of 31st May, 1995. The balance paddy was not milled and had to be sold by FCI at a lower price in the open market.

The FCI, however, alleging breach of the agreement on part of the miller invoked arbitration for failure to mill the paddy on or before 28th February, 1995, claiming 1^{1/2} times rate of the unmilled paddy as the economic cost.

3. The miller on the other hand claimed that the agreement dated 24th January, 1995 was a forged and fabricated document insofar as the partner who had signed the agreement, i.e., Mr. Kirpal Singh, has passed away on 27th November, 1994 i.e., nearly two months before entering into the contract. His son, Mr. Kuldip Singh, was not a partner and thus, was not authorised to sign the agreement. Thus, there does not exist a valid and enforceable agreement between the FCI and the miller. On the merits of the dispute as well, it is the claim of the miller that it was the FCI that was in breach of the agreement, as they notified the sale of the paddy in the open market, before expiry of the extended period of the contract, thus, not giving the miller the opportunity to mill the paddy. Thus, the miller filed a counter claim for Rs.1,43,56,487/- before the Ld. Arbitrator, on the following grounds:

- The paddy was of inferior quality, due to which the percentage of broken rice retrieved, increased;
- The miller had spent a large amount of money on engagement of labour, but was not given an opportunity to perform the contract;
- The miller had to suffer loss of milling charges and forfeit the security amount deposited.

4. The Ld. Arbitrator, on the objection that the agreement was invalid and forged held that admittedly, Mr. Kirpal Singh had passed away before the agreement was signed, however, going by the fact that the stamp paper used for the agreement, shows that it was purchased by him. Further, it is

agreed between the parties that the terms of the contract were negotiated by Mr. Kirpal Singh, and his son had signed the agreement with full knowledge and consent of the other partners.

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

“In this connection the claim laid by the F.C.I. in the balance sheet of being entitled to 1-112 times of the economic cost in respect of the paddy left unmilled, Rs.1,31,39,768/- after adjusting the amount fetched by sale of the same, is not tenable, for the reason that the fixation of the rate of economic cost being arbitrary and unilateral was not binding on the respondents. All that the respondents are liable in law to pay on account of breach of contract by them, would be the difference between the procurement price and the total amount fetched by the sale of unmilled paddy, along with certain other amounts e.g. cost of gunnies etc, the total amount of which as stated above comes to Rs.10,60,743/-.

The respondent's contention that the claimant is liable to forfeit the right to claim the difference between the sale price of unmilled paddy and its procurement price, as compensation, because they did not try to first get the paddy in Balance milled by any other miller to arrive at the figure of loss, if any, is also not tenable on the face of it, as clause 13 in the. agreement is a mere enabling provision and is not mandatory. Further about six months having elapsed since procurement, any further delay would have made the paddy unfit to yield the full percentage of rice in shelling. The act of the claimants to sell the same was thus in consonance with the principle laid down in sec. 73 of the contract Act, making it obligatory to take steps to minimize the damages.

The respondents thus as discussed above are found liable to pay by way to damages to the claimant the amount of Rs.1 0,60,743/- for breach of contract by them (respondents).”

6. The Ld. Arbitrator has awarded to the FCI the difference between the amount actually recovered and the sale price of unmilled paddy as per the open sale notice.

7. The economic cost in respect of unmilled paddy which was a claim of FCI for sum of Rs.1,31,39,768/- has been refused and the said part of the award does not call for any interference inasmuch as none of the paddy was either pilfered or diverted. This Court in **FCI v. S. K. International [OMP 487/2011 decision dated 23rd October, 2018]** 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.”

8. Insofar as the FCI's right to obtain the right price for unmilled paddy as per the sale price in the open sale notice is concerned, the Arbitrator has already taken that into consideration and has awarded a sum of Rs.10,60,743/-. Insofar as the award of this amount to FCI is concerned, the Miller has filed a challenge to the award in the District Court, Ferozepur. No interference is called for in the award in so far as the objections of FCI are concerned. The petition is dismissed.

9. The miller will have to however reimburse to the FCI 50% of the costs of arbitration, paid by FCI to the ICA, and as directed by the Arbitrator.

**PRATHIBA M. SINGH
JUDGE**

DECEMBER 14, 2018/Rahul