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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 25th October, 2018

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O.M.P. 534/2012

FOOD CORPORATION OF INDIA

..... Petitioner

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

versus

**M/S SHANKAR RICE AND GENERAL MILLS &
OTHERS**

..... Respondents

Through: None.

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 19th December, 2011 passed by the Learned Sole Arbitrator.

2. The Petitioner – Food Corporation of India (*hereinafter*, 'FCI') and M/s Shankar Rice and General Mills (*hereinafter* 'miller') had entered into two milling agreements dated 8th November, 1994 and 15th November, 1994. Under the said contracts, the miller was to mill the paddy and supply the rice to the Petitioner. The total quantity of paddy of superfine, fine and common varieties was 31,791 bags containing 29687.94 quintals of paddy. The performance of the miller in milling of the paddy is as under:

- a) Superfine variety paddy – 438.34 quintals milled, however no resultant rice was supplied by the miller to the FCI by 31st May, 1995;
- b) Fine variety paddy – Out of 12150.25 quintals of paddy, the miller milled and supplied the resultant only in respect of 4506.95 quintals

of paddy by 31st May, 1995;

- c) Common variety paddy – The miller milled and supplied resultant rice of 4744.65 quintals of paddy by 31st May, 1995.

The balance paddy was to the tune of 19995 quintals.

3. FCI had invoked arbitration claiming 1^{1/2} times rate of the unmilled paddy as the economic cost. This claim of the FCI was rejected by the Learned Arbitrator.

4. A perusal of the award shows that the FCI, after entering into contracts with the miller, had for various reasons advertised the open sale of unmilled paddy. It was the case of the miller that though the miller was ready and willing to mill the paddy and supply the rice, the FCI did not have adequate godown space to store the same and the FCI also did not communicate to the miller the place where the delivery was to be given. The Learned Arbitrator has recorded the submissions of the miller as under:

“11. Regarding the superfine paddy of 438.34 quintals, Shankar Mills pointed out that they could not mill the paddy as the FCI did not indicate the godown where they could deliver the resultant superfine rice. Shankar Mills further claimed that in pursuance of the open sale policy of the Government of India dated 14/03/1995, Shankar Mills purchased the balance quantity of fine paddy of 4004 quintals @ Rs.422 per quintal and thereafter 1495.57 quintals of fine paddy @ 391.02 per quintal. These per quintal rates of fine paddy were fixed by the Government of India in their open sales policy of 14/03/1995. On receipt of the amount as per the rates of paddy in the open sales policy of Government of India, the FCI issued release order in favour of Shankar Mills for the aforesaid quantity of fine paddy. Shankar Mills claimed that they had milled and supplied 9947

quintals of fine rice to the FCI. They were to supply the balance quantity of resultant fine rice but as they purchased the balance quantity of fine paddy in pursuance of the open sale policy of the Government of India of 14/03/1995 their obligation to supply fine rice to the FCI as per the contracts was filled. Therefore, the FCI's claim of one-and-half times the economic cost of balance quantity of fine paddy was totally bereft of any justification.

12. Regarding the IR-8 paddy of 8099.35 quintals, Shankar Mills pointed out that they could not mill the paddy as the FCI did not indicate the godown where they could deliver the resultant rice. Shankar Mills also pointed out that their repeated requests to the FCI to provide storage space for resultant rice by milling fine and IR-8 paddy lying in stock with them in joint custody produced no favourable response from the FCI. Shankar Mills also pointed out that the FCI refused to accept any resultant rice from Shankar Mills as their godown at Chandigarh was full to its capacity. Therefore Shankar Mills had no other option but to take advantage of the open sale policy of the Government of India announced on 14/03/1995 and purchased the paddy lying in stock with them by end of March 1995 by depositing money with the FCI at the rate of Rs.422 and 391 per quintal (i.e. the open market sale price rate of the Government of India). As already mentioned, the FCI gave Shankar Mills the release order for the aforesaid quantity of paddy to be sold in pursuance of the open sale policy. Briefly stated, the stand of Shankar Mills was that as they have purchased the balance quantity of fine paddy lying in stock/storage with them under the Open Sale policy of Government of India at the approved rate, there was no merit in the FCI's claim that they were liable to pay one and a half times the economic cost of fine paddy for the balance quantity of paddy for which they did not supply the resultant rice.

13. *Regarding the IR-8 paddy, Shankar Mills submitted that out of 8099.35 quintals of paddy they have milled 6977.42 quintals of paddy within the due date of 31/05/1995. They could not mill the balance quantity of paddy as the FCI failed to provide them storage space for the resultant rice either at their own depot or at their hired depot at Chandigarh.”*

5. A perusal of the above submissions made by the miller before the Arbitrator shows that FCI itself taken a policy decision to resort to having an open sale of unmilled paddy and under the said policy, the miller was given the option to purchase the unmilled paddy. In para 11 of the award, it is categorically recorded that M/s Shankar Mills had milled and supplied some part of the paddy and the balance was purchased by them at the approved rate.

6. This Court 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.
7. 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.”

8. Apart from this, as per letter dated 8th November 2005, referred to in ***FCI v. S. K. International (supra)*** the clear understanding was that in cases where disputes were settled, no arbitrations were to be initiated. The said letter reads as under:

***“FOOD CORPORATION OF INDIA
REGIONAL OFFICE: PUNJAB
BAY NO.34-38, SECTOR 31-A
CHANDIGARH***

*No.D/22(4)/Paddy-sh-cum-stg./ICA-corres/
94-95/Vol.III/*

Dated :- 08-11-2005

*The District Manager,
Food Corporation of India,
Distt. Office,
Amritsar/Bhatinda/Chandigarh/Faridkot/
Ferozepur/Gurdaspur/Jalandhar/
Ludhiana/Patiala & Sangrur.*

*Sub:- 374 Paddy shelling cases pending
with ICA New Delhi relating to
Paddy shelling contract 1994-95
...regarding.*

Sir,

*Kindly refer to the communication on the
subject cited above.*

*In this context, it is informed that the above
matter has been examined in this office in
consultation with AGM(Legal) and Finance(local).
The photo copy of relevant noting sheet. Report of
Zonal Office Committee dated 24.8.04 & letter of
Zonal office No.Proc.30(64)Rice Millers of Ph/94-
95/05/NZ/Vol.XII dated 14.10.05 are enclosed
herewith.*

The detailed list of Arbitration cases as mentioned in Zonal Office Committee report is given under:

- (a) No. of cases where NDCs have been already issued – 73 cases
- (b) No. of cases where FCI has been able to recover the required percentage of rice or also cash in lieu of rice for the rest of the paddy stocks resulting therein that FCI does not have any claim/demand from the party = 261 cases
- (c) No. of cases consequent upon pilferage/dispersal of stocks by the parties at their own without knowledge of FCI. FIRs were filled followed by court cases both criminal cases/ recovery suits – 40 cases.”

Negotiations may be held with these 40 millers who wish to deposit FCI claim for settling the long pending dispute out of court/Arbitration.

You are therefore, requested to examine each and every case in the light of direction imparted by the Committee report of Zonal office and further requested to get compromise petition from such rice millers in consultation with FCI empanelled Advocate to be submitted to ICA indicating security deposits. After that take up the matter with ICA for refund of tentative amount deposited with ICA in each case for FCI share. The above said process be completed within fortnight positively. Further requested to furnish party-wise(details as listed) under Col.A.B & C details of cases to this office immediately.

Encls:- Photo copy of Zonal office
Committee report.

2. Photocopy of letter no. Proc.
30(64)Rice Millers of

Ph/94-95/05/NZ/
Vol.XII dt 14.10.2005

Yours faithfully,

Sd/-
Assistant General Manager (Comml.)
for Regional Manager”

The said settlements were to be out of court/Arbitration. However, despite the same, arbitrations were initiated and claims were pursued.

9. The fact that FCI settled with a large number of millers is not in dispute. In some cases, the settlement amounts have been less than 10% of the claimed amount due. Since the entire unmilled paddy has been sold pursuant to the open sale notices and there is a clear statement acknowledging that there are no dues from this miller, the award is not liable to be set aside.

10. The Arbitrator in the impugned award, in these facts, has held as under:

“To conclude, I hold that the FCI are entitled to the following amount on the basis of claims made by them against Shankar Mills.

<i>(i) Cost of gunny bags retained by the Shankar Mills for milling FCI paddy.</i>	<i>Rs.1,58,828/- (Rupees one lakh fifty eight thousand eight hundred twenty eight only)</i>
<i>(ii) Sales tax on retained gunny bags at (i) above at the rate of 4.4 percent</i>	<i>Rs.13,977/- (Rupees thirteen thousand nine hundred seventy seven only)</i>
<i>(iii) TDS towards income tax for milling charges of paddy at the rate of Rupees None per quintal.</i>	<i>Rs.2,722/- (Rupees two thousand seven hundred twenty two only).</i>
<i>(iv) Deduction towards resultant rice not conforming to quality specifications.</i>	<i>Rs.52,267/- (Rupees fifty two thousand two hundred sixty seven only).</i>
<i>(v) Driage allowance at 2%</i>	<i>Rs.96,315.42 (Rupees ninety six</i>

<i>unjustifiably claimed by Shankar Mills while purchasing the stock of 93969.14 & 2346.28 quintals fine paddy</i>	<i>thousand three hundred fifteen and paise forty two only).</i>
<i>Total amount</i>	<i>Rs.3,24,109.42 (Rupees three lakh twenty four thousand one hundred nine and paisa forty two only)</i>

22. I also hold that the amounts payable by the FCI to Shankar Mills in the facts and circumstances of the case are as follows:

<i>(i) Milling charges at Rs.9/- (Rupees nine only) per quintal for superfine and fine paddy milled by the Shankar Mills and resultant rice supplied to the FCI</i>	<i>Rs.1,23,793/- (Rupees one lakh twenty three thousand seven hundred ninety three only).</i>
<i>(ii) Stitching charges at the rate of Rs.1.25 per bag for the rice bagged and supplied to the FCI.</i>	<i>Rs.12,188/- (Rupees twelve thousand one hundred eighty eight only).</i>
<i>(iii) Security Deposit</i>	<i>Rs.30,000/- (Rupees thirty thousand only).</i>
<i>(iv) Cost of returned gunny bags already deposited by the Shankar Mills</i>	<i>Rs.1,00,000/- (Rupees one lakh only).</i>
<i>Total amount</i>	<i>Rs.2,65,981/- (Rupees two lakh sixty five thousand nine hundred eight one only).</i>

23. After deducting the amount of Rs.2,65,981/- as at para (22) ante from the amount of Rs.3,24,109.42 as at para (21) ante. The net amount payable by Shankar Mills to the FCI is Rs.58,128/- (Rupees fifty eight thousand one hundred twenty eight only).

24. I hold that the FCI will get interest at six percent per annum on the amount Rs.58,128/- after deduction

from the aforesaid amount an amount of Rs.13,977/- towards sales tax payable by Shankar Mills to the FCI as at para (21) ante and after deduction of Rs.2,722/- towards TDS on income tax on milling charges as at para (21) ante. The net amount Rs.41,429/- (Rupees forty one thousand four hundred twenty nine only) on which simple interest at six percent per annum is payable by Shankar Mills from 26-02-1998 when the FCI filed their claim for arbitration till the date of actual payment to the FCI. ”

11. Thus, in light of the above facts, the reasoning of the Arbitrator is sound and tenable inasmuch as once the FCI itself had fixed the rate for open sale of the paddy and the miller had purchased the entire unmilled paddy and paid the rate fixed by the FCI, the penal rate of the economic cost cannot be demanded by the FCI. Accordingly, the award does not warrant any interference. No other objections are pressed.

12. The OMP is, accordingly, dismissed.

PRATHIBA M. SINGH
JUDGE

OCTOBER 25, 2018

Rahul