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

Date of decision: 25th October, 2018

\+ **O.M.P. 579/2012**

FOOD CORPORATION OF INDIA, BHATINDA ..... Petitioner

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

versus

M/S HINDUSTAN RICE MILLS, RAMPURS PHUL BHATINDA ..... Respondent

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 29th February, 2012 passed by the Learned Sole Arbitrator.

2. The Petitioner – Food Corporation of India (*hereinafter, 'FCI'*) and M/s Hindustan Rice Mills (*hereinafter 'miller'*) had entered into a milling agreement dated 17th October, 1994. Under the said contract, the miller was to mill the paddy and supply rice to the FCI. FCI had supplied 38660 bags (25128.50.000 quintals) of fine variety to the miller for milling. It is claimed by FCI that the miller had milled only 15554 bags (9907.89.800 quintals) of paddy by 28th February, 1995. The miller had also milled 14433 bags (9193.82.100 quintals) and supplied 6160 quintals after 28th February, 1995. Thus, the miller had milled 19,491.55 quintals of paddy within the extended period till 31st May, 1995, and the balance paddy weighing 5,524.70 quintals was not milled and sold by FCI to the miller.

3. 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, 2018, 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 had, after entering into the contract with the miller, for various reasons advertised for 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 miller as under:

> *"The claim is barred by estoppel.*
> *That the Claimants have failed to establish any breach of contract.*
> *That the period of milling the paddy had been extended to 31-05-1995 and further to 31-08-1995. The Respondents milled 19,491.55 quintals of paddy within the extended period and the balance paddy of 5,524.70 quintals non milled was sold by Claimants to the Respondents as per government policy due to shortage of space even before the expiry of the extended date for milling.*
> *That the Claimant never served any notice of default at the time of sale of paddy.*
> *That the Claimant be asked to provide proof that the quality of rice delivered by the Respondents was not up to the mark to warrant quality cut.*
> *That if there was delay on the part of the Respondents why did the Claimant not invoke Clause 13 and get the paddy milled at the risk and costs of Respondents.*
> *That the Respondents had not violated Clause 16 as there was no shortages of paddy and rice. The Respondents had delivered rice and bought the balance paddy thus accounting the entire stored quantity of paddy.*

> *That the Claimants have no claim against the Respondents for any damages, interests, costs or any kind of dues."*

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. It is categorically recorded that M/s Hindustan Rice Mills had milled and supplied 19,491.55 quintals 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 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:

> *"According to the accounts rendered by the Claimant in paras 12 and 14 detailed above an amount of Rs.37,058.00 is payable by the Claimant to the Respondents. But the Respondents have not made a counter claim. Under such circumstances, I can only leave it o the good conscience of the Claimant FCI which is a Public Sector Undertaking to deal with it appropriately.*
>
> *The Claimant's claim for 1 ½ times economic cost of paddy is denied and the claim petition dismissed. Both parties will bear their own costs. The Award is made accordingly."*

11. 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 rates 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. The petition is, accordingly, dismissed.

PRATHIBA M. SINGH
JUDGE

OCTOBER 25, 2018
Rahul