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

Date of decision: 15th November, 2018

+ **O.M.P. 882/2012**

FOOD CORPORATION OF INDIA MOGA Petitioner

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

versus

SHIV SHANKER TRADING CO MOGA Respondent

Through: Mr. Kumar Dushyant Singh & Mr.
Siddharth Dutta, Advocates (M-
9811433704).

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 25th June, 2012 passed by the Learned Sole Arbitrator.
2. The Petitioner – Food Corporation of India (*hereinafter*, 'FCI') and M/s Shiv Shankar Trading Co. (*hereinafter* 'miller') had entered into a milling agreement dated 14th November, 1994. Under the said contract, the miller was to mill the paddy and supply rice to FCI. FCI had supplied 34,471bags (23,666.33 quintals) of superfine variety and 2,370 bags (1,540.50 quintals) of fine variety paddy to the miller for milling. The due date for milling and supplying the paddy was 28th February, 1995, which was extended till 31st May, 1995. It is claimed by FCI that the miller had

milled only 554 bags (352.99 quintals) of superfine paddy by 31st May, 1995. Thus, the balance remained unmilled with the miller even after lapse of the extended period of 31st May, 1995. This balance paddy was not milled and sold by FCI pursuant to the open sale notice.

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 economic cost of rate of the unmilled paddy. This claim of the FCI was rejected by the Learned Arbitrator on the ground that it did not have jurisdiction to entertain the matter, in the following terms:

“14. In view of the above discussion, this Tribunal concludes that it does not have the jurisdiction to adjudicate the disputes raised in this case. Accordingly, the arbitration proceedings in this case are terminated. With this order, the objection petition dated 16.07.2010 filed by the respondent u/s 16 of the Arbitration and Conciliation Act, stands disposed of.”

4. In the present case, however, the Ld. Sole Arbitrator made note of another aspect of the matter, based on the objection petition filed by the miller before it, i.e., the miller had settled the matter with FCI. However, he could not produce a copy of the said settlement. The stand of the FCI qua the settlement is recorded in the award passed by the Ld. Arbitrator as under:

“06. The second preliminary objection raised on behalf of the respondents is that keeping in view the facts of this case and facts of similar other cases, the claimant corporation constituted a committee regarding the pending cases of the crop year of 1994-95 in Punjab. It is further stated that head office of

the corporation instructed their District Managers to call the party (Millers) and got executed the deed of settlement so that the claimant could withdraw the arbitration references which are pending before the ICA. It is further stated that pursuant to the decision of the said committee, the performa for the deed of settlement was prepared and the deed of settlement was executed between the miller and the claimant at their District Headquarter. It is further stated that in the present case the deed of settlement was signed by the respondent Miller as well as the District Manger of FCI who is competent to execute the deed of settlement on behalf of the claimant corporation. It is further submitted that now the claimant has taken the plea that the said deed or settlement is not valid as the same was not approved by the board of directors of the claimant corporation. It is, however, submitted that the claimant cannot be allowed to take this plea at this stage. It may be relevant to note here that the report of the committee dated 24.08.2004, mentioned hereinabove, has been annexed by the claimant itself along with the list of documents filed on" behalf of the claimant which was received by this Tribunal along with the ICA letter dated 03.09.20 II. The claimant, thereafter, filed their rejoinder dated January, 2011”.

5. From the above stand of the FCI, it is clear that the miller had in fact entered into a settlement and signed the same. However, the FCI chose to resile from the same and commence arbitration on the ground that the settlement was not approved by its Board of Directors.

6. This Court in ***FCI v. S. K. International [OMP 487/2011 decision dated 23rd October, 2018]*** (hereinafter, '*FCI v. S.K. International*') has considered the entire matter in respect of millers who were similarly placed and has arrived at the following findings:

“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.”

7. Counsel for the FCI – Mr. Mohan Lal Sharma submits that the Ld. Arbitrator was wrong in holding that the Tribunal was not properly constituted and rejecting the claim petition of FCI under Section 16 of the Act.

8. Learned counsel for the Respondent has referred to a letter dated 2nd January, 2013 where it is clearly recorded that in cases where settlement deeds have been executed, the claims ought to be withdrawn in order to avoid further litigation costs. This being the clear stand of the FCI, the non approval of the Board is not a valid ground for resiling from the settlement and it is clear that there is no arbitral dispute in the matter.

9. The Supreme Court order dated 17th July, 2003, is quite clear that the Indian Council of Arbitration had to appoint the Arbitrator and commence the proceedings. The Ld. Sole Arbitrator was accordingly appointed by the Indian Council of Arbitration and thus the Arbitrator ought not to have simply rejected the claim on the ground of lack of jurisdiction. However, it is requested by Mr. Sharma that the matter ought to be remanded to a fresh Arbitrator.

10. The stand of the FCI clearly shows that a settlement agreement was

signed by the miller but since it was not approved by the Board, the same is not binding on the FCI. If any dispute has been settled between the parties, the matter need not to be referred to arbitration inasmuch as if the disputes themselves have been settled, there exists no 'arbitrable dispute'. The objection that there is no Board Resolution that approved the settlement is a mere false bogey in as much as there are two letters, one referred to the in ***FCI v. S.K. International (supra)*** decision and one cited by the Miller which clearly show that a policy decision was taken by the FCI not to pursue those claims that were settled. The said two letters read as under:

Letter dated 8th November, 2005

***“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”*

11. Another letter Dated 2nd January, 2013 reiterates the position that the cases where settlement deeds have been entered into ought not to be pursued in courts/arbitration. The said letter reads as under:

*“FOOD CORPORATION OF INDIA
REGIONAL OFFICE; PUNJAB CHANDIGARH*

No.D/224(4)/Arb. Cases/94-95/Patiala/2010

Dated:- 01.02.2013

*The Area Manager,
Food Corporation of India
District Office, Amritsar/Bathinda/Chandigarh
Fandkol/Ferozepur/Gurdaspur/Jalandhar/
Ludhiana/Moga/Patiala/Sangrur*

*Subject:- 373 Arbitration Cases of Crop-year 94-
95.reg.*

*Ref:- Hqrs letter No.Proc.II/30 (6)/95-Vol.XVII dated
10.12.2012 and 17.12.2012 (copy enclosed)*

Sir

*In above references, it is apprised that legal
division of RO has further examined the matter and*

suggested that:-

1. In all such cases involving settlement deeds wherein the matter/case is pending before the arbitrators, the same be withdrawn forthwith to avoid further litigation costs and fee etc. to the conducting advocates.

2. In all such cases involving settlement deeds wherein complete claimed amount has been awarded ex-parte in favour of FCI and not agitated further by party/parties in question, execution be filed, if not already filed and necessary steps be taken to recover the awarded amount by FCI.

3. In all such cases involving settlement deeds wherein claimed amount has been awarded partially in favour of FCI and that to ex-parte and for which objections have been filed by FCI and the party in question has neither filed objections nor joined the proceedings before the Hon'ble Court the cases be withdrawn with liberty of the said court to file execution and to realize the awarded amount in consultation with our conducting advocate. However in similar cases wherein the party has joined the proceeding and have filed objections despite ex-parte award earlier the cases be contested in the right perspective in consultation with our conducting advocate.

4. In all such cases involving settlement deeds wherein claimed amount has been awarded partially in favour of FCI but the case is contested one and the respondent party (miller) has filed objections against the award and simultaneously FCI has also filed objections against the award of the claimed amount, the matters be contested in the right earnest in consultation with our conducting advocates.

5. In all such cases involving settlement deeds wherein the counter claims of the party has been accepted while rejecting the claim of FCI the same be contested in consultation with our conducting

advocate. However it can be withdrawn/settled, if party in question agrees to forego the counter claim so awarded.

Above proposal has also been approved by G.M(R) after examination of OD and concurrence of Regional Finance. Thus, for time being above decision may be complied. Further, for the cases already withdrawn/to be withdrawn, the Dos may also verify that the respondent party has not filed any claim against the Corporation apart from the present litigation as the same must also be withdrawn by it in the light of settlement deed.

For immediate necessary action please.

*Asst. Genl. Manager (proc.)
for General Manager (Region)”*

12. Since the factum of the settlement is not in dispute, there is no dispute to be referred to arbitration. It is seen that there are large numbers of millers with whom the FCI had settled its disputes as is evident from the findings in the ***FCI v. SK International (supra)***.

13. Since, there are no arbitrable disputes in this matter, no further reference is required to be made. The claim of FCI is therefore rejected and the OMP is dismissed.

**PRATHIBA M. SINGH
JUDGE**

NOVEMBER 15, 2018

Rahul