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

Date of decision: 23rd October, 2018

+ **O.M.P. (COMM) 333/2016**

NEELAM SHARMA

..... Petitioner

Through: Mr. Rajesh Chhetri, Mr. Pawan Upadhyay, Mr. Rajeev Chhetri & Ms. Meenakshi Rawat, Advocates (M-9891675255).

versus

FOOD CORPORATION OF INDIA & ANR. Respondents

Through: Mr. Paritosh Budhiraja, Ms. Surabhi Maheshwari & Mr. Ashwani Ahuja, Advocates for R-1 (M-9810100237).

AND

+ **O.M.P.(COMM) 335/2016**

FOOD CORPORATION OF INDIA

..... Petitioner

Through: Mr. Paritosh Budhiraja, Ms. Surabhi Maheshwari & Mr. Ashwani Ahuja, Advocates for R-1 (M-9810100237)

versus

MAHAVIR RICE AND GENERAL MILLS
AND PARTNERS

..... Respondents

Through: Mr. Rajesh Chhetri, Mr. Pawan Upadhyay, Mr. Rajeev Chhetri & Ms. Meenakshi Rawat, Advocates for R3 (M-9891675255) .
None for other Respondents.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. OMP (COMM) 333/2016 has been filed on 9th July, 2012 challenging the award dated 27th January, 2012. The counsel for the Respondent submits

that the petition is not maintainable as it is filed beyond the period specified in Section 34 of the Arbitration and Conciliation Act, 1996. The award challenged in OMP (COMM) 335/2016 relates to the non-grant of interest for the period 1st March, 1995 to 21st March, 2010.

2. Disputes arose out of an agreement dated 21st January, 1995 which was entered into between the Petitioner and the Respondents. The same relates to milling of paddy, which was to be done by the Respondents. FCI had invoked arbitration and raised claims against the Respondents. Award dated 27th January 2012 was passed by the Ld. Sole arbitrator. Operative portion of the award is set out herein below:

“23.14 As discussed above, I allow the claim of Rs.84,27,253 (Rs. Eighty four lakhs Twenty seven Thousand and Two hundred fifty three only) in favour of the claimant against the respondents towards shortage and drainage suffered by the claimant on account of the breach agreement dated 21st January, 1995 by the respondents.

3. OMP (COMM) 335/2016 filed by the FCI is limited to the interest component in the award. The claim of FCI was for interest @18% from 1st March, 1995 till date of payment. The Arbitrator granted 18% p.a., but only from 22nd March, 2010, i.e., from the date the Indian Council of Arbitration issued notice to the Respondents.

4. A perusal of the award shows that the Learned Arbitrator had issued notices to the partners of Mahavir Rice and General Mills (*hereinafter, ‘miller’*). The first notice was issued on 22nd March, 2010 by registered post where the endorsement was recorded at internal page 9 of the award that Mrs. Neelam Sharma had refused to accept the notice. Subsequently, another

notice dated 14th May, 2010 was issued where the endorsement was “left”. Notice was also published in the newspapers in Punjab Kesary and Jagbani on 30th September, 2010. Again in the Tribune on 16th December, 2010 and in Jagbani on 16th December, 2010, notices were published. Thus, all steps were taken by the Arbitrator to ensure that the millers are duly served in the arbitration proceedings. However, the millers chose not to appear before the Arbitrator leading to the ex-parte award. Insofar as the OMP(COMM) 333/2016 is concerned, as per page 19 of the petition, the Petitioner claims that no copy of the award was ever received by the Petitioner. The relevant para at page 19 is set out herein below:

“...

No copy of the Award qua the present matter is ever received upon the Petitioner. The Petitioner came across and received a photocopy of the award which was annexed to the objection Petition filed by the FCI. This is the only occasion where the petitioner came to know about the arbitration proceedings which was already decided ex-parte. The Petitioner has not got any opportunity to defend his case on merits.”

5. Mr. Paritosh Budhiraja, Ld. Counsel for the Food Corporation of India (*hereinafter*, ‘FCI’) submits that the FCI had filed OMP 450/2012 which is now numbered as OMP (COMM) 335/2016. The said petition was duly sent to all the partners of the miller. In fact, a perusal of the records of the said OMP (COMM) 335/2016 shows that the petition was sent on 5th May, 2012. Considering that the petition of FCI was served on Mrs. Neelam Sharma only when it was sent on 5th May, 2012 by FCI, the present petition is not time barred as it was filed on 9th July, 2005.

6. The question that thereafter arises is whether Mrs. Neelam Sharma

was proceeded ex-parte in the arbitration proceedings incorrectly. The Learned Arbitrator had taken all steps to serve Mrs. Neelam Sharma who obviously, with complete knowledge, failed to appear in the arbitration proceedings. Thus, the award is not liable to be set aside on the ground that Mrs. Neelam Sharma was wrongly proceeded ex-parte.

7. However, this Court is now examining the matter on merits. In the present case, the parties had entered into a milling contract dated 21st January, 1995 for storing and milling of paddy. The miller was supplied a total quantity of 25631 bags (16658-95-00 quintals) of paddy. Against the paddy supplied, the miller supplied only 2220 bags of rice (1414-17-900 quintals) by 31st May, 1995. Thus, there was a balance of 15229.52.200 quintals of paddy lying with the miller

8. The FCI issued a notice for the sale of unmilled paddy in the open market. Option was given to the miller to purchase the same. However, the miller did not purchase the said paddy. Thus, the FCI retrieved 15229.52.200 quintals of paddy and sold the same in the open market. Since, the unmilled paddy was simply sold, without the FCI being able to sell the same duly milled and converted into rice, the FCI raised claims at 1½ times the economic cost of paddy as per the contract and approached the Indian Council of Arbitration for appointment of an arbitrator.

9. 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.

10. 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.”

11. 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.

12. In the present case, Id. Counsel for the Mrs. Neelam Sharma has specifically relied upon a statement which was generated by the FCI, which showed that there were no dues qua the miller M/s. Mahavir Rice and General Mills. The note appended below the said statement is relevant and is extracted below

“REMARKS:- In the cases where NDL's not yet released, it is due to instructions received to lodge the claims treating cutoff date 31.05.1995. However, the parties had delivered either rice DR cost of paddy against sale policy of paddy lying with them well before 31.08.1995. However, nothing is recoverable from them.”

13. 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 sustainable and is liable to be set aside. OMP (COMM) 333/2016 is allowed.

14. In view of the findings above, the challenge by FCI to the award, accordingly fails. OMP (COMM) 335/2016 is dismissed.

PRATHIBA M. SINGH, J.

OCTOBER 23, 2018

Rahul

