

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

+ **OMP 55/2015**

Reserved on: 3rd January, 2018

Date of decision: 1st February, 2018

FCI

.....Petitioner

Through: Mr.Rajeev Sharma, Adv.

Versus

M/S KULTAR SINGH AND BROTHERS AND ORS

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed by the petitioner challenging the Impugned Arbitral Award dated 12.09.2014 passed by the Sole Arbitrator appointed by the Indian Council of Arbitration in Arbitration Case No. 907/2010 titled Food Corporation of India v. M/s Kultar Singh & Brother and others.

2. The disputes between the parties relate to the claim of damages by the petitioner under the Agreement for 'Storage-Cum-Milling of FCI Paddy Stored in Millers Premises into Conventional Raw/Parboiled Rice' dated 21.02.1995 (hereinafter referred to as the 'said agreement').

3. In terms of the said agreement, the petitioner had supplied 18,560 bags = 12064-00-000 quintal of paddy of super fine quality to the respondent no. 1 for the purpose of storage and milling of the rice. Some of the terms of the said agreement are reproduced herein below:-

“4. The miller shall deliver to the corporation a quantity of whole rice equal to the various types of paddy lifted and shelled by him with 2% driage allowance on standard procurement weight with district wise out – turn given below:-

<i>District Rice</i>	<i>Variety</i>	<i>Rice Recovery</i>	
		<i>Parboiled</i>	<i>Raw</i>
-----	<i>Common</i>	70%	69%
-----	<i>Fine/Superfine</i>	68%	67%

The above rice recovery ratio and specifications shall be subject to amendment by FCI / Govt. of India.

Paddy will be issued on DFSC pattern.

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7. The miller shall be responsible for the safe custody of paddy issued to him for milling and delivery of rice, as per agreed and recovery of out - turn ratio. Miller shall also make good the losses that may be incurred in paddy / rice during transit/storage at 1.5 times the economic cost of the variety of paddy/rice towards the shortfall.

*8. i) The miller shall ensure that the resultant rice after milling of paddy is aerated for 72 hours before begging.
ii The degrees of polish given to rice shall be 3 to 5% and shall not contravene the provisions of rice Milling Industries*

(Regulation and Licensing) rules, 1959 as amended from time to time.

iii In case there is shortfall in the recovery of rice. The miller shall pay to the corporation the cost of paddy equivalent to the shortfall at the rate of 1 & half times the economic cost of paddy.

iv The byproducts viz ; broken rice , rice kani , nakoo , phak and rice bran etc obtained in the shelling of paddy shall be the property of the miller and the Corporation shall have no responsibility in regard to these.

v The miller will be paid shelling and other charges at the milling operations are completed and the entire rice is delivered to FCI

9. i) The entire quantity of rice of all varieties delivered miller to the corporation shall confirm to the specifications as fixed by the Govt. of India as amended from time to time and in any other orders or NOTIFICATIONS issued by the Govt. of India from time to time. The stocks of rice not confirming to the specifications so laid down, shall be liable to be rejected in respect of such quantity of rice which is not found to be within specifications and the miller shall be liable to offer fresh stocks of rice confirming to the specifications to the corporation. In the event of his failure to supply rice within the prescribed specifications, he shall be liable to pay to the corporation for the quantity of rice short supplied at the penal rate of one and half times, the economic cost of the converted variety of paddy equivalent to the shortages. The decision of the Sr. Regional Manager, Food corporation of India Punjab (Hereinafter referred to as the SRM) in this behalf shall be final.

ii) The stocks of rice shall also be subject to the inspections of the staff of the corporation at the time of delivery. Any quality allowance determined in FCI Laboratory according to the specifications shall be recovered from the millers.

iii) The miller shall complete delivery of rice within 10 days of issuance of paddy to him and rice due to the corporation on the total quantity of paddy issued to him or in joint

custody released at regular interval shall be delivered not later than the, 28th February, 1995. The miller shall further ensure milling of paddy and delivery of rice in the following manner:

<i>October/November</i>	<i>20%</i>
<i>December</i>	<i>26%</i>
<i>January</i>	<i>26%</i>
<i>February</i>	<i>28%</i>

However, in case the process of milling is slowed down due to operational exigencies beyond the control of miller/SRM may consider and extend the above mentioned milling Schedule.

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“12. The miller agrees to and shall simultaneously with the execution of this agreement, pay to the corporation a sum of Rs. 30,000/- (Rs. Thirty thousand only) or at the rate of Rs. 5/- per qtls. of total paddy, whichever is less, as security deposit towards fulfillment of this agreement, in cash or through bank draft within one week of issuing of acceptance letter.

The corporation shall not be liable to pay any interest on security deposit. The security deposit obtained in respect of one contract shall not be treated as security deposit for another.”

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16. The contract shall come into force with affect from the date of execution of this agreement and shall remain in force till the completion of the milling. The Sr. Regional Manager however reserves the right.

a) To terminate the agreement with the miller for Shelling of paddy into rice at any time during its Currency without assigning any reasons. In that event the miller shall render complete accounts of paddy rice and gunny bags to the

corporation in its custody and also return the stocks as per direction of the corporation.

b) To withdraw from the contract, at any time, any milling work in respect of whole or part of the stocks covered by the contract not yet lifted by them if he considers it necessary to do so. The decision of SRM in this Regard shall be final and no claim shall be entertained against the corporation for any loss or damage suffered or alleged to have been suffered by the miller on account of such withdrawal of the work.

c) The miller shall be responsible to make good all Shortages in paddy, rice and gunny bags that might occur while in his custody till the entire stocks are returned. These shortages can with the consent of the corporation be made good in kind according to the specification and variety of paddy, rice and gunny bags involved. In case the miller fails to do so, recovery would be made from him for shortages of paddy and rice at 1&1/2 times the economic cost of equivalent paddy /rice according to the variety involved.”

4. It is the case of the petitioner that in terms of Clause 9(iii) of the said agreement, time was the essence of the said agreement and the process of milling was to be completed by 28.02.1995. It is further submitted that in terms of Clause 9(i) of the said agreement, in case of shortfall in the supply of rice, the petitioner was entitled to liquidated damages quantified at one and half times the Economic Cost of the converted variety of paddy. It is submitted that such Economic Cost is determined from Circular(s) issued from time to time.

5. It is the case of the petitioner that the respondent no. 1 milled only 5567-27-900 quintals i.e. 8740 bags of paddy and supplied 3785-75-000 quintals i.e. 4000 bags of parboiled rice. Taking into account the 2% driage allowance i.e. 113-62-000 quintals, total of 6383-10-100 quintals

equivalent to 9820 bags of paddy remained unmilled with the respondents as on 31.05.1995, when the extended time period for delivery of rice expired. As the respondent no. 1 did not seek any further extension of time in terms of Clause 9(iii), the remaining paddy was sold in the open market to mitigate the losses, for an amount of Rs. 22,73,642.05. Applying the formula of one and half times of Economic Cost on the balance paddy as on 01.06.1995, an amount of Rs. 33,19,294.87 was recoverable from the respondent and further adjusting the other amounts payable and receivable under the contract to/from respondent no. 1, the net recoverable amount was Rs. 32,91,681.65/-. The petitioner had claimed before the Arbitrator the above mentioned amount along with interest at the rate of 18% per annum from the date of the award and the cost of the Arbitration proceedings.

6. The Sole Arbitrator, by his Impugned Award has dismissed/rejected the claim of the petitioner holding therein that though the respondent was in default / breach of agreement, the petitioner had not been able to prove the damages it had suffered from such breach. It was further held that Clause 7 and 16(c) of the said agreement would not be applicable to the facts of the case. It was further held that the claim with respect to the balance quantity of paddy was inconsistent as total quantity mentioned by the Petitioner in its notice leading up to the arbitration proceedings was different to that mentioned in the “Balance Sheet” produced before the Arbitrator.

7. The petitioner has challenged the above Award contending that as the Arbitral Tribunal has acted in ignorance of Clause 9(i) read with

Clause 9(iii) of the said agreement, the Award has been passed in contravention of Section 28(3) of the Act.

8. At the outset I may note that there is no reference at all to Clause 9(i) in the Impugned Award. The Arbitrator has discussed the effect of Clause 7, Clause 16(c) and Clause 13 of the said agreement on the claim raised by the petitioner and held that Clause 7 and Clause 16(c) would have no application to the facts of the case. As far as Clause 13 is concerned, the Arbitrator holds that the same is applicable to the facts of the present case, however, as the Petitioner has failed to prove that it suffered any loss due to breach of the agreement by the Respondent, it was not entitled to succeed in its claim.

9. Clause 9(iii) of the said agreement gives the schedule of delivery of rice on a monthly basis and provides that all delivery must be made by 28.02.1995. Clause 9(i) of the said agreement states that in the event of respondent's failure to supply rice conforming to the specification as fixed by the Government, it shall be liable to pay the petitioner for the quantity short supplied at penal rate of one and a half times the Economic Cost of the converted variety of paddy equivalent to the shortages.

10. The shortage in supply of rice by the Respondent to the Petitioner within the stipulated period was proved before the Arbitrator. Therefore, violation of Clause 9(iii) duly stood proved and the Arbitrator also holds so in paragraph 24 of the Impugned Award reproduced herein below”:-

“24. It must be stated before proceeding further that the respondent was at default because they did not in accordance with the contract mill the paddy. Necessarily the claimant would be entitled to the damages suffered. Damage suffered would be the

one that is in normal parlance a loss on account of default on the respondent.”

11. The Arbitrator thereafter examined the claim of the Petitioner based on Clause 7 and 16(c) of the said agreement and rightly holds that the same are not applicable to the facts of the present case. Even the counsel for the Petitioner did not challenge the said findings.

12. The only contention raised by the Learned Counsel for the Petitioner is non-consideration of Clause 9(i) of the said agreement by the Arbitrator. Clause 9(i) is reproduced herein below:-

9. i) The entire quantity of rice of all varieties delivered miller to the corporation shall conform to the specifications as fixed by the Govt. of India as amended from time to time and in any other orders or NOTIFICATIONS issued by the Govt. of India from time to time. The stocks of rice not confirming to the specifications so laid down, shall be liable to be rejected in respect of such quantity of rice which is not found to be within specifications and the miller shall be liable to offer fresh stocks of rice confirming to the specifications to the corporation. In the event of his failure to supply rice within the prescribed specifications, he shall be liable to pay to the corporation for the quantity of rice short supplied at the penal rate of one and half times, the economic cost of the converted variety of paddy equivalent to the shortages. The decision of the Sr. Regional Manager, Food corporation of India Punjab (Hereinafter referred to as the SRM) in this behalf shall be final.

13. At the outset I note that before the Arbitrator and even in the present petition, reliance had not been placed on Clause 9(i) of the said agreement. This itself is sufficient to reject the submission of the Learned Counsel for the Petitioner as a party cannot be allowed to take new plea,

not taken before the Arbitral Tribunal, while challenging the Arbitral Award.

14. Even otherwise, in my opinion, Clause 9(i) of the said agreement would have no application to the facts of the present case. Clause 9(i) applies to the situation where the rice supplied by the miller is not meeting the standard/specification prescribed by the Government. In the present case, there is no dispute on the quality of rice supplied by the Respondent, in fact, Respondent never supplied rice but returned the paddy without milling.

15. A reading of Clause 7, 8(iii), 9(i) and 16(c) of the said agreement would show that these clauses prescribe Liquidated damages where the miller fails to supply the rice of specified quantity and even return the paddy, whether claiming loss in transit or storage or otherwise. In fact, clause 16(c) of the said agreement shows that the miller could even be asked to give equivalent quantity of paddy in case of shortage. Therefore, these Clauses of the said Agreement would have no application to the facts of the present case. Equally Section 74 of the Contract Act, 1872 would have no application to the facts of the present case. ***Steel Authority of India Ltd. vs. Gupta Brothers Steel Tubes Ltd. (2009) 10 SCC 63.***

16. On the question of award of damages on the finding of breach of agreement by the Respondent, the Arbitrator holds as under:-

“26) One would grant damages for the breach of the balance quantity. It is covered under the agreement but the same cannot be granted as the claim is inconsistent. It is worth mentioning that the claim is inconsistent. The total quantity of paddy given for milling was 18560 quintals. Notices of 20th July, 1996 and 20th January, 1998 speak that balance unmilled paddy was sold. The

unmilled quantity has been stated to be 5517-72-100 quintals. In the balance sheet it is pleaded that the respondent did not mill part quantity bag and the left out paddy and unmilled paddy that was sold in the market. The quantity sold is at variance with the quantity as stated in para 8 of the balance sheet. If that is so respondent cannot be made liable to pay damages for nearly 8489=5517-72-200 quintals of paddy. The annexed statement of account cannot be accepted.

From these facts it is obvious that no damages can be awarded as having not been proved.

The claim thus calculated is entirely hypothetical as the same has been worked out considering the notional cost of paddy at the time of stocking the same in the premises of the miller and at the time of sale.”

17. A reading of the above finding of the Arbitrator shows that there was variance in the quantity of unmilled paddy claimed by the Petitioner in its notice prior to the initiation of arbitration and in the 'Balance Sheet' filed with the Statement of Claim. This has not been controverted by the Petitioner in the Objection Petition.

18. Even otherwise, once the Clauses prescribing Liquidated Damages are held to be not applicable to the facts of the present case, it was for the Petitioner to have proved the loss suffered by it due to such breach. The Learned Counsel for the Petitioner has submitted that as the aim of the Petitioner while entering into contract, was procurement of rice, which is priced more in the market than paddy, the loss suffered by it was self-evident. I cannot agree with such submission. Though it is correct that the object of the said agreement was not to deal in paddy but to acquire rice of prescribed quality, it was for the Petitioner to have led evidence to

show how the price of rice fluctuated between the scheduled date in the agreement and thereafter. On the other hand, the Petitioner did not even lead evidence to show that it procured rice from open market once the Respondent had failed to supply the rice as undertaken in the said agreement. The claim of the petitioner, even in the present petition, is based solely on clauses providing for Liquidated damages, which in the facts of the case, were inapplicable. Party claiming compensation is under an obligation to plead and prove the loss suffered on account of breach. The burden of establishing losses, consequent entitlement to damages and the measure of damages is squarely on the petitioner and in absence thereof, the arbitrator cannot be faulted for having rejected such claim for damages. In absence of such proof of loss, the challenge to the Award cannot be sustained.

19. In view of the above, I find no merit in the present petition and the same is dismissed, with no order as to costs.

NAVIN CHAWLA, J

FEBRUARY 01, 2018/rv