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

Date of Judgement: 16th March, 2018

+ FAO(OS) 272/2017 & CM APPL. 37538/2017

FOOD CORPORATION OF INDIA ... Appellant
Through: Mr. Rajeev Sharma, Adv.

Versus

M/S GREWAL RICE & GENERAL MILLS & ANR

... Respondents
Through: Mr. Kumar Dushyant Singh
with Mr. Siddharth Dutta, Advs
Mrs. Bharathi Raju, CGSC with
Ms. Saakshi Agrawal, Advs for
UOI.

CORAM:-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR JUSTICE C. HARI SHANKAR

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(JUDGMENT)

C. HARI SHANKAR, J.

1. We had, *vide* our order dated 16th March, 2018, dismissed the present appeal, stating that the reasons for dismissal would follow. This judgement proceeds to record the said reasons.

2. The appellant seeks, by means of the present appeal, filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act"), to challenge an order dated 19th July, 2017 passed by the learned Single Judge in IA 7953/2017, preferred

by the appellant in OMP 690/2012 (in which the present appellant was the petitioner).

3. Inasmuch as the impugned order is brief, it may be reproduced, *in extenso*, as under:

“ This application is filed by the respondent for direction to the learned Arbitrator that the order dated 30.01.2015 passed by this Court be implemented regarding leading of evidence and permission of cross-examination etc. Earlier the learned Arbitrator had passed the Award on 26.4.2012. In a challenge to the Award before this court, this court on 30.1.2015 set aside the Award and remitted the matter back to the learned Arbitrator for deciding the claims filed by the petitioner on merits, in accordance with law.

The grievance of the applicant / respondent appears to be that when the matter was taken up afresh by the learned Arbitrator an application filed by the respondent seeking cross-examination of the claimant's witness and application for bringing the entire original documents was dismissed. A perusal of paragraph 6 of the order passed by the learned Arbitrator dated 28.4.2017 dismissing the application filed by the respondent seeking cross-examination of the claimant's witnesses would show that the learned Arbitrator has taken a view that implicit in the order of this court dated 30.1.2015 is the direction that the matter has been remitted back for the limited purpose of passing a fresh Award on merits on the basis of the existing record. Hence, a view was taken that directions of this court do not warrant any further evidence being recorded.

I dispose of this application with a clarification that it would be for the learned Arbitrator to take a decision regarding any request made for additional evidence/cross-examination and a bar to the same cannot

be read in the order passed by this court dated 30.1.2015.

Application stands disposed of.

Dasti. ”

4. The controversy in the present case being limited, an equally limited recital, of the factual matrix wherein it arises, would suffice.

4.1 On 7th October, 1994, the appellant entered into an agreement with the respondent, for storage-cum-milling of paddy. The period of performance of the agreement was up till 28th February, 1995. On 6th November, 1997, a legal notice was issued, by the appellant to the respondent, alleging that, despite extension, of the period of performance, by the appellant, till 31st May, 1995, the respondent had failed to complete milling of the paddy by the said date, resulting in liability, on the respondent, to pay an amount of Rs. 52,45,943.09. No response being forthcoming from the respondent thereto, the appellant, on 20th February, 1998, approached the Indian Council of Arbitration (ICA) for appointment of an arbitrator, in accordance with the arbitration clause contained in the agreement aforesaid. The ICA, however, refused to appoint an arbitrator, stating that the arbitration clause in the agreement was not in terms of the clauses governing the ICA. The appellant, thereupon filed OMP 173/1999 before this Court, under Section 11(6) of the 1996 Act, which was dismissed, by this Court, *vide* order dated 10th February, 2000. The appellant moved the Supreme Court, thereagainst, by way of Civil Appeal 4655-4809/2003, which was allowed *vide* judgement dated 17th July, 2003,

with a direction, to the ICA , to nominate an arbitrator, as sought by the appellant.

4.2 In compliance therewith, a sole arbitrator was appointed, by the ICA, to arbitrate on the dispute between the appellant and the respondent. Statement of Claim was filed, before the sole arbitrator, by the appellant and written statement, in response thereto, was filed by the respondent. Affidavits in evidence were also filed by the appellant and the respondent.

5. On 15th July, 2011, the following order was passed by the sole arbitrator:

*“ Both the parties have filed duly sworn affidavit(s).
The same have been placed on record.*

The counsels were directed to produce the deponents for cross-examination and to file supporting documents. The counsels for both the parties have expressly submitted that they do not want to cross-examine the deponents and further requested that the hearing be fixed for final arguments.

After going through the replies, counter replies, affidavits(s) of both the parties, the following issues are framed on which both the parties will advance their arguments.

1. Whether the appointment of Sole Arbitrator to adjudicate the present dispute between the parties is non-est and these proceedings without jurisdiction for the reason set out in preliminary objections by the respondent?

2. *Whether there was a settlement of the dispute between the parties, in the year 2006, if yes its effects?*

3. *Whether the present reference to Arbitration is barred by limitation?*

4. *Whether the Senior Regional Manager/Distt. Manager, FCI was duly authorized to file the statement of claim?*

5. *Whether the respondent committed a breach of agreement dated 7.10.1994?*

6. *Whether the Claimant is entitled to claim amount of Rs. 52,45,943/- or any part of that amount from the respondent?*

7. *Whether the Claimant is entitled to recover interest, cost, if any, if so, for what amount, rate and period?*

8. *Relief.*

The next date of hearing is fixed for 17th September, 2011 at 11:00 AM at Federation House, Tansen Marg, New Delhi, for final arguments."

6. The sole arbitrator proceeded, on 26th April, 2012, to pass an award, in the aforementioned arbitral proceedings between the appellant and the respondent, holding that a deed of settlement had been legally and validly executed, between the appellant and the respondent, in 2006, in which it had been agreed that the appellant would not pursue its claims against the respondents as the disputes

between them stood finally settled. As such, the learned sole arbitrator held that the dispute was no longer arbitrable, and rejected the claim petition of the appellant on this short ground.

7. Aggrieved thereby, the appellant moved this Court, under Section 34 of the 1996 Act, by way of OMP 690/2012.

8. *Vide* order dated 30th January, 2015, a learned Single Judge of this Court set aside the aforementioned award dated 26th April, 2012, passed by the learned sole arbitrator, holding that the “settlement” stated to have been entered into, between the appellant and the respondent, was not valid, on account of its not having been approved by the Chairman and Managing Director (CMD) of the appellant. As such, it was held that the learned sole arbitrator had erred in holding the claims of the appellant,, not to be arbitrable and in dismissing them on that ground. The award dated 26th April, 2012, of the learned sole arbitrator, was, therefore, set aside and the matter was remanded back to the sole arbitrator for deciding the claims of the appellant on merits, in accordance with law.

9. In the said remand proceedings, an application was moved, by the respondent on 13th November, 2015, before the learned sole arbitrator, praying for grant of an opportunity, to the respondent, to cross-examine the appellant’s witness, and, for that purpose, to direct the appellant to bring the entire original documents / record for such

cross-examination. The said application deserves to be reproduced, *in extenso*, as under:

“APPLICATION FOR CALLING THE WITNESS OF THE CLAIMANT WHO FURNISHED HIS AFFIDAVIT FOR THE CROSS-EXAMINATION BEFORE SUBMITTING THE WITNESS ARGUMENTS IN THIS REFERENCE.

RESPECTFULLY SHOWETH:

- 1. Under the above noted arbitration reference was fixed before this Ld. Arbitral Tribunal after the matter has been remanded by Hon'ble Delhi High Court, New Delhi.*
- 2. That on the last date of hearing, this Ld. Arbitral Tribunal passed an order for submitting the written arguments in support of the claim.*
- 3. That during the preparation of the written submissions, it has come to the notice of the counsel for the applicant/respondent that in this case, the affidavit has been furnished by the witness of the claimant and in this affidavit Shri Sandeep Sangal, mentioned various documents i.e. annexure have been referred but then original of the said documents have not been produced on record. Moreover, in this case, on the similar subject matter, earlier matter was referred to Shri N.L. Kakkar, Ld. Arbitral Tribunal who had rejected the reference on 29.3.1997. But this fact has also not been disclosed by the claimant in the pleadings as well as in the affidavit. Further, there was various documents which are most essential to put to the witness of the claimant for the cross-examination. Now in this reference, the merits of the claim is to be determined by this Ld. Arbitral Tribunal. So, the cross-examination of the witness of*

documents on record, the written submissions cannot be submitted to this Ld. Arbitral tribunal.

It is, therefore, prayed that the reference may please be fixed up for the cross-examination of the claimant's witness and he be further directed to bring the entire original documents/record for the cross-examination in the interest of justice and equity.

*Submitted by:
M/s Grewal Rice & General Mills,
Jagraon, Distt. Ludhiana (Punjab)''*

10. *Vide* order dated 28th April, 2017, the learned sole arbitrator rejected the above mentioned application of the respondent. In doing so, the learned arbitrator proceeded in a somewhat peculiar fashion. He first held that the order of remand dated 30th January, 2015 (*supra*), passed by the learned Single Judge of this Court, remitted the matter back to the sole arbitrator “for the limited purpose for passing the award on the merits of the case on the basis of the record and prior proceedings of this Tribunal”. In other words, the learned sole arbitrator was of the view that the order of remand allowed him only to examine the record before him and passed an award on merits. In view thereof, the learned sole arbitrator held, in para 8 of his order, that the application of the respondent, for permission to cross-examine the appellant's witness, was liable to be rejected. Having, thus, effectively opined that he had no jurisdiction to entertain the prayers of the respondent on merits, the learned Sole Arbitrator proceeded, nevertheless, to reject the said prayers on the ground that both parties had, on 15th July, 2011, waived the right of further cross-examination,

and that arguments before him were part-heard. Inasmuch as the documents filed by the appellant, which were stated to have provoked the respondent's request for permission to cross-examine the appellant's witness, were within the knowledge of the respondent even on 15th July, 2011, the learned sole arbitrator held the belated request of the respondent, to be permitted such cross-examination, to be unjustified. The learned sole arbitrator further held that the right to cross-examine the appellant's witness, which the respondent, of his own will and volition chose to waive on 15th July, 2011, could not "*be revived now at his sweet will and pleasure*". The right to be allowed cross-examination to be discretionary in nature, the learned sole arbitrator preferred to exercise the said discretion against the respondent, thereby rejecting the application of the respondent.

11. Provoked anew, the respondent re-approached this Court by filing an application (IA 7053/2017) in OMP 690/2012, for clarification of the order dated 30th January, 2015 (*supra*), passed by the learned Single Judge in the said OMP.

12. The impugned order, dated 19th July, 2017, allows the said IA 7953/2017, in the terms already set out in para 2 of the present judgement.

13. The amenability, of an order such as that impugned in the present case, to challenge in appeal, must necessarily be limited, as the order is, on its face, merely clarificatory in nature, and does nothing

more than allow the respondent to make a prayer, to the Learned Sole Arbitrator, for permission to cross-examine the respondent's witnesses and for issuance of a direction, to the appellant, to produce the original documents for the said purpose. The learned Single Judge has been careful not to express any view in the matter, one way or the other, and we, too, refrain from doing so. The impugned order merely opens the door to the respondent to make the said prayers, leaving it entirely in the discretion of the learned sole arbitrator to take a view thereon. We do not read the impugned order as either allowing the prayers, of the respondent, to be permitted to cross-examine the appellant's witness, or to direct the Appellant to produce the original records, in the arbitral proceedings; clearly, that ball is in the court of the learned sole arbitrator, and not in this court.

14. For the sake of abundant caution, and in order to avoid any misgivings on this score, however, we clarify that this court has *not* expressed any view on the sustainability, of the request of the respondent, to be allowed to cross-examine the appellant's witness or for issuance of a direction, to the Appellant, to produce the original records. The respondent would, however, be entitled to urge the said prayers before the learned sole arbitrator, who would have to decide the same on merits.

15. We are conscious of the fact that the learned Sole Arbitrator has, even after opining that the order, dated 30th January, 2015, of this Court did not allow him to entertain the prayers made by the

respondent, proceeded, nevertheless, to reject the application on merits as well. Strictly speaking, the learned Sole Arbitrator ought not to have done so. Consequent on the clarification provided by the learned Single Judge vide the impugned order dated 19th July, 2017, the learned Sole Arbitrator would, therefore, have to reconsider his decision. No exception can, therefore, be found, with the said direction, as contained in the impugned order of the Learned Single Judge.

16. Probably conscious of the limited nature of the impugned order, and the necessarily equally limited scope of the interference therewith in appeal, Mr Rajeev Sharma, learned counsel for the appellant, urged, as his principal ground of attack, the maintainability of IA 7953/2017, primarily contending that the order, dated 28th April, 2017, was immune from challenge, as it was neither a final award nor an interim award.

17. This issue, in our view, is no longer *res integra*, having been settled by the recent judgement of the Supreme Court in ***Indian Farmers Fertilizer Cooperative Ltd vs Bhadra Products, (2018) 2 SCC 534***. The Supreme Court was concerned, therein, with the issue of whether an award, deciding the issue of limitation, could be challenged by the aggrieved litigant, under Section 34 of the 1996 Act. The learned sole arbitrator, in that case, passed an award, styled as a “First Partial Award”, rejecting the plea of limitation advanced by the respondent before him, i.e the Indian Farmers Fertiliser Cooperative

Ltd (“IFFCO”). IFFCO, thereupon, challenged this decision, of the learned arbitrator, by way of a petition to the learned District Judge, under Section 34 of the 1996 Act. The learned District Judge dismissed the said petition, holding that the “First Partial Award”, of the learned arbitrator, could not be said to be an “interim award”, and was not, therefore, amenable to challenge under Section 34 of the 1996 Act. An appeal, preferred by IFFCO thereagainst, to the High Court of Orissa, was dismissed, resulting in the Supreme Court being moved in the matter. It was sought to be contended, by IFFCO, before the Supreme Court, that the “First Partial Award” was an “interim award” and was, therefore, amenable to challenge under Section 34 of the 1996 Act. The decision of the learned District Judge, to the contrary was, therefore, it was contended, erroneous. We may, in this collection, reproduce Section 34(1) of the 1996 Act, as under:

“34. Application for setting aside arbitral award. —

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).”

The expression “arbitral award” is, in turn, defined, in clause (c) of Section 2 of the the 1996 Act, in the following terms:

“(c) ‘arbitral award’ includes an interim award;”

The expression “interim award”, however, sadly finds no definition, in the 1996 Act.

18. The contention of the respondents before the Supreme Court, in answer to the submissions of IFFCO, was that the “First Arbitral Award” was, in essence, neither a final award, not an interim award, but was merely an “order”, passed by the learned arbitrator in exercise of the powers, conferred on him, by Section 16 of the 1996 Act, to rule on his jurisdiction. Such an order, it was sought to be contended, being neither an “interim award”, nor a “final award”, could not be challenged under Section 34 of the 1996 Act, as was – in the said respondent’s submission – rightly held by the learned District Judge.

19. As a sequitur, the respondent before the Supreme Court further contended that the appeal, of IFFCO, to the High Court under Section 37 of the 1996 Act, was also incompetent, as appeals, under Section 37(1), lay only against “*original decrees of the court passing the order, namely*

- (a) *refusing to refer the parties to arbitration under Section 8;*
- (b) *granting or refusing to grant any measure under Section 9;*
- (c) *setting aside or refusing to set aside an arbitral award under Section 34.”*

20. Adjudicating on the controversy, the Supreme Court noted, the outset, that Section 31(6) of the 1996 Act, which empowered the Arbitral Tribunal to, “*at any time during the arbitral proceedings, make interim award on any matter with respect to which it may make*

a final arbitral award”, was widely couched, in view of the expansive nature of the expression “any matter”. Para 8 of the report opines, on this issue, as under, in unmistakable terms:

“The language of Section 31(6) is advisedly wide in nature. A reading of the said sub-section makes it clear that the jurisdiction to make an interim arbitral award is left to the good sense of the Arbitral Tribunal, and that it extends to “any matter” with respect to which it may make a final arbitral award. The expression “matter” is wide in nature, and subsumes issues at which the parties are in dispute. It is clear, therefore, that any point of dispute between the parties which has to be answered by the Arbitral Tribunal can be the subject-matter of an interim arbitral award.”

(Emphasis supplied)

21. Applying this dictum to the present case, it is clear that the decision of the learned sole arbitrator, dated 28th April, 2017, though styled as an “order”, partook of the character of an “interim award”. The submission, of the appellant, to the contrary has, therefore, necessarily to be rejected.

22. That apart, the submissions of Mr. Rajeev Sharma really amount to missing the wood for the trees, as IA 7953/2017, which was decided by the impugned order dated 19th July, 2017, merely sought clarification of the earlier order, dated 30th January, 2015 (*supra*). The right of a litigant before a Court to seek clarification of the order of the Court can hardly be gainsaid - subject, of course, to the cautionary note, sounded by the Hon’ble Supreme Court in ***Zahira Habibullah***

Sheikh vs. State of Gujarat, (2004) 5 SCC 353, against the surreptitious camouflage of review applications as applications seeking clarification. In the present case, the occasion for the respondent to move the said application was the adoption, by the learned arbitrator, in his order dated 28th April, 2017, of the view that the order passed by this Court on 30th January, 2015 (*supra*) was limited in nature, allowing him only to decide the controversy before him on merits and foreclosing the right of the parties to either seek for production of additional evidence, or request for permission to cross-examine each others' witnesses. The impugned order dated 19th July, 2017, merely clarified that no such limitations were contained in the order dated 30th January, 2015 (*supra*), and that, therefore, there was no embargo on the learned arbitrator in taking a view on the said prayers made by the respondents.

23. We are at a complete loss to understand as to how such an order could prejudice either party. Having read the order dated 30th January, 2015 (*supra*), which has already been reproduced hereinabove we - like the learned Single Judge - are also unable to find, in the said order, any restriction on the learned arbitrator adjudicating on the request of the respondent, before him, to be permitted to cross-examine the witnesses of the appellant or even for directing the Appellant to produce the original record. Whether the said prayers, as made by the respondent, before him ought, or ought not, to be allowed, would be a matter on which the learned arbitrator would have to take a view, on merits, and we express no opinion

whatsoever, thereon. In doing so, however, the learned Sole Arbitrator would have to proceed uninfluenced by the observations made by him in his order dated 28th April, 2017, for the reasons already stated hereinabove.

24. We may also observe, in passing that, if the appellant's submission, that the order dated 20th April, 2017, of the learned sole arbitrator, was not an interim award, were to be accepted, the very maintainability of the present appeal, under Section 37 of the 1996 Act, may also be imperiled. However, in view of our findings hereinabove, we refrain from entering into that arena.

25. Clearly, therefore, the present appeal was an entirely unnecessary exercise, which has only served to further delay the arbitral proceedings. Such appeals, in the ultimate analysis, do disservice to the purpose and philosophy of the 1996 Act, which seeks to ensure prompt and expeditious resolution of disputes by the arbitral mechanism.

26. Subject to the above observations, the present appeal is accordingly dismissed, without any order as to costs.

**C. HARI SHANKAR
(JUDGE)**

ACTING CHIEF JUSTICE

MARCH 16, 2018/*gayatri*