

\$~16

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

Date of decision: 10th January, 2019

+ **O.M.P. 1066/2013, I.A. 25601/2015 & 14300/2016**

FOOD CORPORATION OF INDIA(AMRITSAR) Petitioner
Through: Mr. Mohan Lal Sharma, Advocate.
(M:9811537909)

versus

M/S LEKH RAJ DHAWAN RICE & GENERAL MILLS & ITS
PARTNERS AMRITSAR Respondent
Through: Mr. Arvind Kumar Tiwary, Advocate
for Gurucharan Rai. (M:9212596288)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. In the present case, the Food Corporation of India (*hereinafter*, 'FCI') entered into a contract for storage-cum-milling of paddy dated 20th October, 1994 with M/s. Lekh Raj Dhawan Rice & General Mills, Amritsar. The arbitration was conducted under the aegis of the Indian Council of Arbitration (*hereinafter*, 'ICA'). Disputes had arisen between the parties which were decided by the impugned award of the Sole Arbitrator dated 9th May, 2013.

2. An application under Order I Rule 10 CPC was filed in this case on 16th November, 2016 whereby FCI sought to implead the seven partners of the firm, who were inadvertently left out. Thereafter, the partners of the firm were represented by counsels. During the pendency of this application, it

was reported that the proposed Respondent Nos.4, 5 and 6 have also expired.

3. The matter was then placed before Court on 15th November, 2018 on which date, notices were issued to the counsels who were earlier appearing. Mr. Arvind Kumar Tiwary has appeared and put in his appearance for Shri Gurucharan Rai, one of the partners of the firm. Submissions have been heard on behalf of the Petitioner and the said Respondent. In view of the fact that this matter is covered by the judgment of this Court in ***Food Corporation of India v. S. K. International [OMP 487/2011 decision dated 23rd October, 2018]*** (hereinafter, '*FCI v. S.K. International*'), no useful purpose would be served by impleading the legal heirs of the proposed Respondent Nos.4, 5 and 6 who have since expired.

4. Both counsels have addressed their submissions.

5. The present petition has been filed challenging the award dated 9th May, 2013 by which the learned Sole Arbitrator has rejected the claim of FCI that it is entitled to 1.5 times economic cost of the unmilled paddy.

6. FCI i.e., the claimant before the learned Arbitrator had entered into an agreement dated 20th October, 1994 for storage-cum-milling of paddy. The total quantity of paddy stored in the miller's premises was 15412.15 quintals of common variety paddy, 7020.65 quintals of fine variety paddy and 864.50 quintals of superfine variety paddy. The Miller was to mill the paddy and return the same to FCI at the agreed price on or before 28th February, 1995. The date of completion was extended to 31st May, 1995. One of the clauses of the contract required the miller to pay 1 ½ times the economic cost of the paddy in the relevant season, in case of failure to supply the milled paddy.

7. As against the paddy stored in the miller's premises, the miller milled, 4112.29.40 quintals of common variety paddy, 2497.04 quintals of fine

variety paddy and 353.73 quintals of superfine variety paddy, and accordingly delivered the same to FCI by 31st May, 1995.

8. The FCI in the meantime issued, under a policy decision taken by the Government, a notice for open sale of paddy whereby millers were given an option to purchase the unmilled paddy failing which the same would be sold in the open market. The price was also fixed for such open sale. The Miller herein, purchased the unmilled paddy and paid the entire consideration as fixed in the said notice. However, the FCI was of the opinion that it is entitled to recover 1 ½ times the economic cost, despite the miller having purchased the unmilled paddy. The Miller did not agree to pay the amount demanded by FCI.

9. The FCI, alleged breach of contract by the miller and invoked arbitration for failure to mill the paddy on or before 28th February, 1995, claiming 1^{1/2} times rate of the unmilled paddy as the economic cost. The total damages calculated to be due by the FCI amounted to a sum of Rs.94,00,012.65/-. The miller, on the other hand, claims that it had performed its part of the contract satisfactorily and there was no unmilled paddy lying in its premises as it had sold by the FCI. The miller further submitted that it purchased the balance unmilled paddy from FCI, pursuant to the open sale notice, and thus, no claim of the FCI for damages can be entertained.

10. The findings of the Arbitrator are as under:-

“6. Main thrust of the argument of the claimant is that as per terms of the agreement the entire work of milling was to be completed and resultant rice handed over to the claimant by 28th February, 1995, which date was extended to 31st May, 1995 on the request of

the respondent in terms of the provisions of the contract. Part of the work was done and rice handed over to the claimant up to 31st May, 1995. Reliance in this regard appears to have been placed upon the provision of clause 7 and clause 8(iii) which relates to losses and shortfall in the delivery of the product. There is an independent provision relating to delay so caused. Clause 9(iii), while prescribing the time frame of the work to be done, vests the powers in FCI to give relaxation in this regard, which, of course, in the present case was given while extending the date of completion of work from 28th February, 1995 to 31st May, 1995. Letter dated 14.8.1995 issued by FCI enables the FCI staff to allow extension in appropriate cases. Visiting of penal consequences because of non-completion of the work within time frame is a provision of substantive and independent nature. As such, the same, if so required, should have been provided for by a specific distinct clause. There is substance in the argument of the respondent's counsel that to have two standards of treating the delivery of rice after milling is arbitrary and is not envisaged by the terms of the contract. The same being of a substantive provision calls for a specific provision in the agreement. Dependence on clauses relating to consequences of shortfall or losses does not help in the present situation. Clause 9(iii) is reliable to time frame. It does not have a penalty provision in the nature 1.5 times. Rather it is so liberally couched that it authorises senior officers of FCI to condone delays. No specific argument have been put forward in the claim in the matter of amount claimed against entry at Sr. No.17 of the balance sheet.

7. Admitted position on either side, is that there has been no discrepancy in the accounting of the total paddy. But the claim has arisen only because of the alleged non-milling of paddy by due date. A part of

paddy was sold through open sale and admittedly sold to the respondent at the rate declared by FCI. The basis of claim is that the respondent was required to mill the entire quantity and under the contract he was liable to pay 1 ½ times economic cost of the un-milled paddy.

Under these circumstances, and as discussed in this and preceding paragraphs, I do not find any justification in the claim and the same is liable to be rejected.”

11. This Court has had the occasion to deal with a similar matter of the same season 1994-95, in ***FCI v. S. K. International (supra)***. 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 in the said case:

- 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.
12. 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.”

13. This is also a case where the Respondent purchased the entire quantity of unmilled paddy pursuant to the open sale notice issued by the FCI. The Arbitrator has recorded specifically that no shortage or pilferage etc. was found. The entire paddy which was supplied to the Respondent was

accounted for. In view of the above, the impugned award calls for no interference. However, the miller shall pay its share of the costs of arbitration to the FCI.

14. The O.M.P. is dismissed in the above terms. All pending applications also stand disposed of.

PRATHIBA M. SINGH
JUDGE

JANUARY 10, 2019
Rekha

