
(2018) 12 DEL CK 0128

In the Delhi High Court

Case No : Original Miscellaneous Petition No. 265 Of 2014

M/S Brar Rice & General Mills

APPELLANT

Vs

FCI & Anr

RESPONDENT

Date of Decision : 13-12-2018

Acts Referred:

Arbitration and Conciliation Act 1996 — Section 34

Citation : (2018) 12 DEL CK 0128

Hon'ble Judges : Prathiba M. Singh, J

Bench : Disposed Off

Advocate : Rajesh Chhetri, Rajeev Chhetri, Pawan Upadhyay, Meenakshi Rawat, Rajeev Sharma, Atul Tyagi

Final Decision : Single Bench

Judgement

Prathiba M. Singh, J

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenges the award dated 10th January, 2014 passed by the Learned Sole Arbitrator.

2. The Petitioner - M/s Brar Rice and General Mills (hereinafter, "miller"), had entered into an agreement for storage-cum-milling dated 21st April, 1995, with the Food Corporation of India (hereinafter, "FCI"). As per the agreement, FCI was to supply paddy to the miller, which was to be milled and the resultant rice was to be supplied to FCI. Accordingly, FCI supplied 40407 bags (26226-16 quintals) of superfine variety paddy and 640 bags (415-60 quintals) of fine variety paddy to be milled upto 28th February, 1995. The miller could not complete the milling of the paddy, and the agreement was extended upto 31st May, 1995. The miller milled 555 bags (353.55 quintals) of superfine paddy upto 31st May, 1995. The balance paddy of 33542 bags (21835-60 quintals) of superfine variety paddy and 640 bags (415-60 quintals) of fine variety remained unmilled with the miller.

3. It is the case of FCI that due to the failure of the miller, the balance paddy had to be sold in the open market at a lower price. It also alleged breach of contract by the miller and invoked arbitration for failure to mill the paddy on or before 28th February, 1995, claiming 1 ½ times economic cost of the unmilled paddy as damages. The miller on the other hand argued that the contract was extended upto 31st August, 1995, by which time the agreement of milling was converted into an agreement for sale of paddy, which the miller duly purchased from FCI. Thus, upon the sale of paddy by FCI to the miller, the miller had discharged all its obligations under the agreement, and was not in breach of the agreement.

4. In the facts and circumstances of the case, the Ld. Sole Arbitrator held that the price of the paddy was declining during the subsistence of the contract between the parties. Paddy being a perishable commodity which deteriorates with time, it was incumbent on the FCI to dispose of the paddy. The Ld. Arbitrator, further held that due to the breach of the miller in not milling the paddy by the stipulated date, FCI had to sell the balance paddy in the open market at a lower price.

5. Based on the above conclusions, the Ld. Arbitrator passed the following award:

"22. Thus, the net award is passed in favour of the claimant FCI for Rs.29,52,859.86 as per the following summary:

Loss on account of sale of bal. Superfine paddy

: Rs.28,86,863.40

Loss on account of sale of bal. Fine paddy

: Rs.64,530.46

Cost of gunnies

: Rs.4960.00

Rs.29,56,353.86

Less:

Milling Charges

: Rs.3494.00

Net Award

: Rs.29,52,859.86"

6. The miller has challenged the aforementioned award in the present petition. 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 been sold by the FCI. The miller argues that it was not in breach of the milling agreement, which was converted into an agreement for sale. According to the

millar, the agreement was extended upto 31st August, 1995, and it had purchased the paddy from FCI by 1st June, 1995. Thus, there was no breach of the agreement on the part of the miller.

7. On the other hand, the case of the FCI is that the miller was in complete breach of its obligations under the contract for milling. The miller deliberately did not mill the entire quantity of paddy which was lying with it. The fact that the miller was allowed to purchase the entire stock under the open sale notice issued by the FCI does not allow the miller to escape from the responsibility of having milled the paddy. Under the contract the 11/2 times economic cost of paddy is liable to be recovered as damages and the Ld. Arbitrator has merely followed the clauses of the contract. Ld. counsel further submits that the notice for open sale did not apply to the district Moga, Punjab and therefore the FCI is entitled to recover damages from the miller. Specific reliance is placed on the reasoning given by the Ld. Arbitrator in paragraphs 17 and 18 of the award, which as per the FCI is in accordance with the contract.

8. 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. Insofar as the millers, who had purchased the paddy was concerned, no legal claims were to be pursued against them.
- h. Primarily legal claims were to be pursued against the millers who had pilfered or siphoned off unmilled paddy.

i. In several cases, no dues certificate and settlements were entered into.

9. 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."

10. Since the entire unmilled paddy has been sold to the miller, pursuant to the open sale notices, and there is a clear statement by FCI admitting that the miller purchased it, the award of damages is liable to be set aside, on the same reasoning as in *FCI Vs. S.K.International*.

11. In view of the above facts, the reasoning of the Arbitrator that damages is

liable to be paid, as the FCI is entitled to the 1 ½ times economic cost is not tenable. The Policy decisions of the Government as also the FCI were not specific to any district but are applicable to the said season as a whole. The district of Moga and millers hailing therefrom cannot be treated differently from other millers in the surrounding areas. The FCI itself having offered the unmilled paddy for sale to the millers, cannot then turn around and claim damages. The economic cost is itself a penal rate which cannot be imposed unless and until actual loss or damage is proved. Accordingly, the award of the Ld. Arbitrator, insofar as it grants the penal rate of 1½ times the economic cost of paddy as damages to the FCI, is set aside. The miller has to reimburse to the FCI 50% of the costs of arbitration, paid by FCI to the ICA, and as directed by the Arbitrator along with the other amounts awarded by the Ld. Arbitrator. Let the same be paid within three months, failing which FCI would be entitled to simple interest at 8% p.a. on the awarded amount.

12. The OMP is disposed of in the above terms.