

IN THE HIGH COURT OF DELHI

OMP 178/2000

Date of Decision: 15th April, 2002

Tribal Co-operative Marketing  
Development Federation of India Ltd. ....Petitioner  
through Mr. Manish Kumar, Advocate

versus

Auro Industries Limited & Anr. ...Respondents  
through Mr. Rajiv Talwar, Advocate

Coram:-

Hon'ble Mr. Justice J.D. Kapoor.

1. Whether Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? yes

**J.D. Kapoor, J.**(Oral)

1. These are objections preferred under Section 34 of the Arbitration Act, 1996. There is no gainsaying the fact that Section 34 of the Act has narrowed down the scope of interference with the award. Broadly the aggrieved party can challenge the award on the following grounds:-

(i) If it deals with the dispute not contemplated by or not falling within the terms of the submission to the Arbitrator.

(ii) if it contains decisions on matters beyond the scope of submissions to arbitration.

(iii) If the subject matter of the dispute is not capable of settlement under the law for the time being in force.

(iv) If the arbitral award is in conflict with the public policy of India.

2. This Sections also explains as to under what circumstances the award can be held to be in conflict with the public policy of India. According to this explanation the award is in conflict with the public policy of India if the making of it was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81. Section 75 pertains to termination of conciliation of proceedings and provides the circumstances under which the conciliation proceedings shall be deemed to have been terminated.

3. Section 81 reads as under:-

**81. Admissibility of evidence in other proceedings** - The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings -

(a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) admissions made by the other party in the course of the conciliation proceedings;

(c) proposals made by the conciliator;

(d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

4. Apparently the instant award has not been challenged on the ground of being in violation of either Section 75 or Section 81. The challenge is only confined to the award being in conflict with the public policy of India and against the terms of agreement.

5. Broad facts relevant for the purpose of the objections have been detailed by the Arbitrator and in short are as under:-

As per the agreement between the parties the petitioner/objector - Tribal Co-operative Marketing Development Federation of India Ltd. (in short TRIFED) was to procure 15,000 MTs of Cotton (Kapas) for the claimant during Kharif. The procured Kapas was to be processed in the ginning unit and was to be sold to the respondent/claimant or its nominee as per the schedule of the agreement. The delivery schedule was subject to the actual quantity procured. The respondent/claimant was to take delivery against 100% payment for each lot of delivery. One of the terms of the agreement was that the petitioner TRIFED will not be held responsible for any short procurement and no claim for damages would arise against it on account of any short supply/procurement.

6. As per clause 14.5 it was agreed that in the event of the claimant's failure to make full payment to TRIFED and lift the quantity of the commodity as per schedule the respondent would be considered to have committed breach of terms and conditions in which case the TRIFED would have the right to forfeit the security deposit and all the stocks remaining unlifted would become the sole property of TRIFED and it would be free to dispose off the same in any manner considered fit and proper at the cost and risk of the claimant. Admittedly

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the petitioner procured only 2531 MTs out of the contracted quantity of 15,000 MTs and out of the procured quantity the respondent lifted about 1900 MTs from time to time as per extended schedule agreed to between the parties and paid in all Rs.2,87,2000/- being full cost of the goods including interest, storage charges and insurance premium for that quantity. Besides this a sum of Rs.27 lacs was also paid towards security amount as per clause 17 of the agreement.

7. The case of the respondent is that the refusal by the TRIFED to allow lifting of the goods against payment of Rs.40,50,000/- received within the scheduled date amounts to breach of contract by the respondent and further the respondent in arbitrary and illegal exercise of its alleged discretion forfeited the security amount of Rs.27 lacs.

8. On the other hand the petitioner's case is that the Arbitrator has brazenly ignored the notices dated 16th June, 25th July, 25th August, 21st September and 13th October, 1995 sent to the respondent/claimant to lift the goods procured for it but it did not pay any heed and as per clause 14.5 of the agreement the petitioner had the right not only to forfeit the security deposit but also to dispose of the unlifted stocks in any manner considered fit and proper at the cost and risk of the claimant.

9. The request of the respondent/claimant for extension of time to lift the cotton bales was acceded to

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by the petitioner/objector lastly on 13th October, 1995. Admittedly the respondent/claimant had been lifting the cotton from time to time and on 18.10.1995 deposited Rs.40,50,000/- on account of the cotton bales account but the petitioner adjusted this amount against amounts payable by the respondent towards the cost of the material procured and the interest accrued thereon.

10. The first question before the Arbitrator as formulated by him was whether the amount of Rs. 40,50,000/- paid towards the price of the cotton bales lifted on 18th October, 1995 was liable to be adjusted towards outstanding amount of interest and towards cost of procurement. Second question was whether the forfeiture of security deposit was as per terms of the agreement or not.

11. However the learned Arbitrator came to the conclusion that since the petitioner/objector has not been able to establish the total cost of procured material or interest accrued thereon the plea of the respondent that it had been lifting the material by depositing the amounts as tentative assessment of the costs and that he was not provided with any break up of respective costs other administrative charges was accepted and rightly so.

12. What persuaded the learned Arbitrator to allow the claim of the respondent against the payment of Rs.40,50,000/- was that inspite of opportunities granted to the petitioner/objector the petitioner did not submit

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the statement of the procurement cost and the interest on the amounts due from the claimant whereas on the other hand the claimant produced the statement showing that the petitioner had made profits by selling the unlifted material and further that the petitioner had merely urged that it had suffered losses on account of non-lifting of the goods by the respondent as per schedule or agreed extended time without any back up of evidence. Courts are not required to indulge in fault finding exercise. Award in this regard needs no interference.

13. Now comes the second question regarding forfeiture of security deposit. There is no dispute that the respondent was put on notice by the petitioner vide letters dated 16th June, 25th July, 25th August, 21st September and 13th October, 1995 that the petitioner would sell the stocks in open market and take remedial measures if the respondent failed to lift the balance stocks.

14. It appears that the learned Arbitrator gave the undue advantage to the respondent/claimant by releasing the security deposit though there was total and complete breach of the terms of the agreement on the part of the respondents in this regard. Clause 4.5 gave the right to the petitioner to forfeit the security deposit in the event of respondent's failure to make full payment and lift the quantity of the commodity as per schedule.

15. Merely because the prayer of respondent/claimant for extending the time to lift the cotton was allowed by

showing liberal attitude does not mean that it had condoned or waived the breach or violation of the terms of the agreement committed by the respondent/claimant. Each case is to be scanned in the perspective of its own facts. In the instant case the fact that notices after notices were sent by the petitioner to the respondent for lifting the cotton bales cannot be lost sight off. The role of the Arbitrator was only to return the finding whether the respondent has committed any breach of the terms of the agreement or not and has made itself liable for forfeiture of the security amount and not to put the aggrieved party to the rigours of proving the losses suffered by it and putting it in jeopardy of substantiating its claim by way of evidence inspite of the fact that the aggrieved party had sent series of notices to claiming party to lift the goods procured for the said party. Such an approach by the learned arbitrator was legally wholly unsound and is difficult to accept.

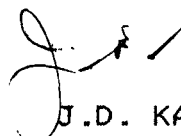
16. Any finding of the Arbitrator either on factual or on legal matrix if on subsequent examination is found to be wholly unsound the award is liable to be set aside as it amounts to factual or legal misconduct. In ordinary course the Court does not sit in Appeal nor is it required to reappreciate the evidence and the material on record produced before the Arbitrator. Even if there are erroneous findings of the Arbitrator as to the facts the Court should always refrain from interfering with it.

What should irk the Court is that perversity or illegality should be writ large on the face of the award.

17. However in the instant case the award is partly legally and factually untenable as the award which is permissible is severable from the one which is in violation of the terms of the agreement. The petitioner-objector was only entitled to forfeit the security amount whereas it had no right to adjust the payment received by it against the particular quantity of cotton bales towards procurement cost and interest accrued thereon. Had the petitioner been so serious about it, nothing prevented it by disposing off the unlifted stock. The petitioner cannot be allowed to have both ends of the cake.

18. In the result the objections are allowed only against the forfeiture of the security deposit and rest are dismissed.

15th April, 2002  
JK

  
J.D. KAPOOR,  
JUDGE