

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

% Judgment delivered on: 12.01.2012

+ FAO(OS) 212/2002 & FAO(OS) 266/2002

FAO(OS) 212/2002

AURO INDUSTRIES LIMITED

...APPELLANT

VERSUS

TRIBAL COOPERATIVE MARKETING  
DEVELOPMENT FEDERATION OF INDIA  
LIMITED AND ANR.

...RESPONDENTS

FAO(OS) 266/2002

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DEVELOPMENT FEDERATION OF INDIA  
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AURO INDUSTRIES LIMITED & ANR.

...RESPONDENTS

**Advocates who appeared in this case:**

For the Appellant : Mr. Rajiv Talwar and Mr. Nipu Patiri, Advocates in  
FAO(OS) 212/2002 and Mr. Alakh Kumar, Advocate  
in FAO(OS) 266/2002

For the Respondent: Mr. Alakh Kumar, Advocate in FAO(OS) 212/2002  
and Mr. Rajiv Talwar and Mr. Nipu Patiri, Advocates  
in FAO(OS) 266/2002

**CORAM :-**

**HON'BLE MR JUSTICE SANJAY KISHAN KAUL**

**HON'BLE MR JUSTICE RAJIV SHAKDHER**

**SANJAY KISHAN KAUL, J (ORAL)**

CM No.679/2002 (Exemption) in FAO(OS) 266/2002

Allowed subject to just exceptions.

CM No.677/2002 (Stay) in FAO(OS) 266/2002

This application has become infructuous in view of the order passed on the subsequent stay application being : CM No.936/2006 on 04.04.2006 and thus stands disposed of.

CM No.678/2002 (condonation of delay of 15 days in filing the appeal) in FAO(OS) 266/2002

Heard.

The delay of 15 days in filing of the appeal is condoned and the application is allowed.

CM No.12183/2006 (condonation of delay) in FAO(OS) 266/2002

The delay in filing of RP No.321/2006 was condoned on 08.09.2006 but the application was not disposed of.

The application accordingly stands disposed of.

FAO(OS) 212/2002 & FAO(OS) 266/2002

1. We may note that this appeal was dismissed by a non speaking order on 22.01.2003 and that order was set aside by the Supreme Court vide order dated 20.08.2004 on account of that short ground alone. This appeal has to be examined on merits alongwith the appeal of the opposite party which was admitted on 10.07.2002.

2. The dispute between the parties arises out of an agreement dated 17.12.1994 in terms whereof Tribal Cooperative Marketing Development

Federation of India Limited (in short, TRIFED) was to procure 15000 Metric Tone of Cotton (Kapas) for Auro Industries Limited (in short, Auro). The procured kapas was to be processed/pressed in the gining and pressing units located near the procurement centres, to be taken on lease by TRIFED at their cost and risk, and was to be sold to Auro or its nominee as per the schedule laid out in the agreement. The delivery schedule is stated to be subject to the actual quantity procured and the delivery was to be taken by Auro against 100% payment for each lot of delivery. One of the terms of the agreement was that, TRIFED was to be held responsible for any short procurement and no claim for damages could be made against it, on account of, any short supply / procurement.

3. Clause 14.5 of the agreement stipulated that in the eventuality that Auro failed to make full payment to TRIFED and lift the quantity of the kapas as per schedule, Auro would be considered to have committed a breach of the terms and conditions entitling TRIFED to forfeit the security deposit and all the stocks remaining unlifted would become the sole responsibility of TRIFED with right to TRIFED to dispose it of in any manner it deemed fit and proper, at the risk and cost of Auro. The relevant clause 14.5 reads as under :-

“14.5 In the event of the Party’s failure to which full payment to TRIFED as prescribed in Clause 15 and lift the quantity of the commodity as per schedule mentioned in Clause 14.1 of this agreement, the agreement, in which case Trifed shall reserve the right to forfeit the security deposit and all the stocks / quantities which remain un-lifted by the party will become the sole and absolute property of TRIFED and TRIFED will be free to disposal of the said

stocks in any manner considered fit and proper at cost and risk of the party. Any losses suffered by the TRIFED in the process of the disposal of the said stocks to any other party(ies) will be realizable from the party alongwith any outstanding dues that are payable by the party at that time through the process of law if not paid within the fortnight.”

4. It is an undisputed position that TRIFED procured only 2531 MT out of the contracted quantity of 15,000 MT and Auro lifted 1900 MT from time to time as per the extended schedule agreed to between the parties and paid in all Rs.2,87,22,000/- towards the full amount payable. The Auro had also deposited a sum of Rs.27 Lakhs as security with TRIFED in terms of Clause 17 of the Agreement.

5. In view of the dispute having arisen between the parties, the arbitration clause was invoked and the disputes were adjudicated by Justice Charanjit Talwar (Retired), Arbitrator who made and published the award dated 07.03.2000 in favour of Auro awarding the following amounts :-

|     |                                                         |                |
|-----|---------------------------------------------------------|----------------|
| (a) | Towards recovery of adjusted amount [claim no.(a)]      | Rs.40,50,000/- |
| (b) | Towards recovery of security deposit [Claim no.(e)]     | Rs.27,00,000/- |
| (c) | Towards reimbursement of heaping charges [Claim no.(c)] | Rs.15,445/-    |
|     | TOTAL                                                   | Rs.67,65,445/- |

6. Auro was also held entitled to interest @ 18% p.a. on the aforesaid amount from 23.04.1996 (the date of entering upon reference) till date of realization apart from cost and expenses.

7. TRIFED aggrieved by the award filed objections under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) and the learned Single Judge in OMP 178/2000 partly allowed the objections vide the impugned order dated 15.04.2002. Thus, both the parties have assailed this judgment on different grounds arising from the interference by the learned Single Judge with the award and on account of non interference with the remaining part of the Award.

8. We have heard learned counsels for parties. It is an undisputed fact that a sum of Rs.40,50,000/- was deposited by Auro with TRIFED to allow lifting of the goods. It is a common case that no goods were lifted against this amount but on the other hand, TRIFED forfeited even the security amount of Rs.27 Lakhs on account of alleged breaches of contract by Auro for not lifting the requisite quantity. It is the say of the TRIFED that it had not only a right to forfeit the security deposit but to dispose of unlifted stock in any manner which it considered fit and proper. On the other hand, the stand of the Auro is that by granting extension of time to lift the cotton bales and, the consequent lifting of the material by Auro, TRIFED acquiesced and accepted their request for extension of time within which the obligations had to be performed by Auro.

9. The first part of the dispute relates to the payment of Rs.40,50,000/-. The Arbitrator on appreciation of evidence came to the conclusion that TRIFED had failed to establish the total cost of procured material or interest accrued thereupon and despite opportunity granted, failed to submit a

statement. On the other hand, Auro produced the statement showing that TRIFED had made profits by selling unlifted material and had not suffered any loss on account of non lifting of the goods. It is in these circumstances that the Arbitrator found in favour of Auro qua the issue of refund of the amount of Rs.40,50,000/- and this conclusion has not been interfered with by the learned Single Judge.

10. We find no reason to interfere with the view taken by the learned Arbitrator and adopted by the learned Single Judge. It is undisputed that the Auro did not lift any material against this amount deposited nor was TRIFED able to establish that it had suffered any loss on account of failure of Auro to lift the material. The learned counsel for TRIFED cannot even seriously dispute this legal principle that in the absence of any material establishing any damages, the amount could not have been appropriated, as the amount had been deposited towards the proposed lifting of the goods which were never sold.

11. The only other issue which arises from the award and the impugned order is that, the Arbitrator found that the forfeiture of security deposit was bad in law but that aspect has been interfered with by the learned Single Judge in the impugned order. In coming to such a conclusion, the learned Single Judge has relied upon clause 14.5 which gave TRIFED the right to forfeit the security deposit in the event of Auro failing to make full payment and lifting quantity of the commodity as per schedule. Such a default had certainly occurred on the part of Auro. The Arbitrator was, however, persuaded to declare the forfeiture as bad on account of the extended time granted by TRIFED to Auro to lift the cotton showing a liberal attitude. However,

learned Single Judge came to the conclusion that there was no condonation or waiver of the breach by TRIFED to give rise to the conclusion that it could not forfeit the security amount despite their being default on the part of Auro in complying with obligation to lift the goods. The appreciation of evidence has shown that repeated notices were sent by TRIFED to Auro to lift the cotton bales, which clearly established that TRIFED was insisting on Auro complying with its obligation.

12. We find nothing fallacious in such an approach adopted by the learned Single Judge in interfering with the award. It is trite to say that the Arbitrator is a creature of the agreement interse the parties and is bound by the terms and conditions thereof. The terms and conditions must be strictly complied with. It is not a case of a possible interpretation of the contract by the Arbitrator which would not call for interference, but the Arbitrator ignoring the established principle that if the contract provides for consequences of breach and breach has occurred, the opposite party is entitled to enforce its rights arising from the breach of the other party. We thus find no fault with this finding and learned counsel for Auro also really cannot dispute this principle.

13. Learned counsel for TRIFED seeks to raise the issue of interest being on the higher side as the awarded interest is 18% p.a. simple interest. We, however, find no discussion on this aspect in the impugned order. If such a plea has been urged before the learned Single Judge and not considered, then TRIFED ought to have moved the learned Single Judge on that aspect. Thus, the only sequitur is that the issue of interest was never raised before the learned Single Judge.

14. We may also notice in respect of the aforesaid that in the execution proceedings, the amounts stand fully recovered by the respondent but against bank guarantee furnished by the respondent. The respondent has thus also incurred bank guarantee charges for getting the amount released, which in a way lowers the net amount received by the respondent towards the interest component. For this reason also, we are not inclined to interfere with the aspect of interest.

15. In view of our aforesaid conclusion, both the appeals are dismissed, leaving the parties to bear their own costs.

16. The bank guarantee furnished by Auro be discharged and returned.

**SANJAY KISHAN KAUL,J**

**RAJIV SHAKDHER, J**

**January 12, 2012**

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