

\$~17

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 25th March, 2019

+ **O.M.P. 379/2009**

M/S M.V.R INDUSTRY LIMITED Petitioner
Through: Mr. Shashank Mishra and Mr. P. I.
Jose, Advocates. (M:9999235354)

versus

M/S TRIBAL COOPERATIVE MARKETING Respondent
Through: Mr. Buddy A. Ranganadhan, Mr.
Raunak Jain, Mr. Vishvendra Tomar
and Mr. Rohan Ahlawat, Advocates
(M:9810143840) with Mr. N. L.
Jangid D M, AR in person.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter 'the Act'*) has been filed challenging the award dated 20th May, 2005 passed by the Ld. Sole Arbitrator.
2. The Tribal Cooperative Marketing Development Federation of India Limited (*hereinafter, 'TRIFED'*), is a Multi-State Cooperative Society of the Government of India, which is engaged in the procurement/storage/processing of agro based products collected/grown by tribals throughout India. The contract in the present case with M/s. M.V.R. Industries Limited (*hereinafter 'MVR'*) was for supply/procurement of 25,000 metric tonnes (*'MT'*) of raw cashew as per agreement dated 16th March, 1995. TRIFED was to invest its own funds and purchase the products from tribals. The products so procured were to be stored in various godowns/warehouses. As per the agreement, the schedule for procurement and for payment was

clearly stipulated. MVR was to take delivery of the various quantities of raw cashew procured, and if the stocks were not lifted, interest was liable to be paid by MVR at the agreed rates. Due to the delays in lifting of stock, if there was any deterioration of the products, the same was the responsibility of MVR. Lifting was to commence from May, 1995 and was to continue till November, 1995.

3. The case of TRIFED is that though MVR took delivery of various quantities of raw cashew, it thereafter, stopped taking delivery and only 3858.902 MTs of cashews were lifted by MVR as against the agreed quantity of 14,034.4214 MTs, which was procured. This led to TRIFED disposing of the entire un-lifted stock in the open market, as a result of which TRIFED suffered huge losses due to such sale. It is, however, MVR's case that it had made excess payments to TRIFED. Disputes arose between the parties and the matter was referred to a Ld. Sole Arbitrator by this Court vide order dated 31st January, 1996. Due to demise of the appointed Arbitrator i.e., Mr. Justice G. C. Jain, thereafter, Mr. Justice Jaspal Singh (retired) was appointed as the Sole Arbitrator.

4. The newly appointed arbitrator continued with the proceedings from the stage where the earlier Arbitrator had left the matter. Before the Ld. Arbitrator, MVR appeared through its counsels and led evidence. Last date of appearance on behalf of MVR before the Ld. Arbitrator was 23rd September, 2004. After the said date, since MVR stopped appearing in the matter, Ld. Arbitrator issued repeated notices to MVR. On 9th September, 2004, Ld. Arbitrator records as under:

“Arrears of arbitration fee have again not been cleared by the Claimant MVR Industries. I have, in this

regard, received a fax from Mr. Jose Advocate for the Claimant. The learned Counsel of TRIFED states that the proceedings, as far as the Claim of MVR Industries is concerned, should be terminated. Since Mr. Jose is not present today, I would rather like to hear him too on this aspect the matter. Put up on 23rd September, 2004 at 4:00 pm.”

5. On 23rd September, 2004, Ld. counsel for MVR made the following statement.

“Statement of Mr. P. I. Jose, Advocate.

I have no instructions to appear on behalf of M.V.R. Industries & be allowed to withdraw.”

6. In view of the said statement, the Ld. Arbitrator issued notice for appearance to MVR vide registered AD/ post. Original envelopes and speed post receipts are on the arbitral record. Again, on 29th October, 2004 fresh notice was issued to MVR. Original registered AD slips are on record. It was then noticed that the registered cover was received back unserved. Accordingly, fresh notice was issued. On 25th November, 2004, the following order was passed by the Ld. Arbitrator.

“Notices were sent by registered cover at two addresses. One registered cover sent at Anna Salai, Madras address has been received back with the report “left”. The other sent at Pondicherry address has not been received back & is taken to have been served. Since none is present on behalf of MVR Industries, it is proceeded ex-parte.

Affidavits by way of evidence be filed by TRIFED within two weeks. Put up on 15/12/04 at 3:00 pm.

Intimation of these proceedings be sent to MVR Industries by registered covers at both the addresses.”

7. Since one of the registered covers was not received back by the Ld.

Arbitrator, the Ld. Arbitrator deemed the notice as having been served and proceeded *ex-parte* against MVR. Thereafter, the Ld. Arbitrator heard the matter from time to time and on 21st April, 2005, the Ld. Arbitrator reserved the matter for orders. The impugned award was passed on 20th May, 2005.

8. The Ld. Arbitrator framed the following issues:

1. *Whether the alleged termination of the agreement was illegal arbitrary.*

Note: *This issue covers the question if there was any termination of the contract.*

2. *Whether the respondents was not entitled to raise the bill or debit notes after 1.11.95?*

3. *Whether there was short delivery of cashew nuts and the claimants were entitled to refund of any amount alleged to have been overpaid, if so to what amount?*

(Note: This issue will deal with Claims Nos. 3, 4, and 5)

4. *Whether the respondents were justified in/ invoking the Bank Guarantees?*

5. *Whether the claimants suffered any loss of goodwill and/or business reputation if so, to what amount if and to what they entitled.*

6. *Whether the claimants were entitled to any overhead expenses, if so, to what amount?*

6A *Whether there was cancellation of export orders due to alleged breach of contract on the part of the Respondent? If [sic.] did the Claimants suffer any loss and were entitled to the same from the Respondents?*

7. *Whether the claimants were entitled to interest on that amount found due if so at what rate and for what percentage?*

8. *Whether the claimants committed the breach of the contract is Counter Claim (sic.)?*

9. *To what amount, if any, were the respondents entitled towards unsold stock?*

10. *Whether the respondents suffered any loss on the sale or raw cashew nuts, if so, to what amount were they entitled?*
 11. *Whether the respondents suffered any loss of profits on account of over invoicing of procured stock as alleged on account of blocking of funds invested in unsold quantities and/or unlifted quantities and loss of opportunities as mentioned in Claim No.4 of the Counter Claim?*
 12. *Whether the respondents suffered any damages on account of loss of reputation, if so, to what amount were they entitled?*
 13. *Whether the respondents were entitled to any amount on account of recurring cost after 1st July, 1996, if so, were they entitled to any amount from the claimants?*
 14. *Whether the respondents were entitled to any interest on the amount, found due, if so, at what rate and for what period.”*
9. The findings of the Ld. Arbitrator, on each of the issues, are as under:
- A. Issue No. 1:** There was no termination of agreement by TRIFED or MVR. In fact, the contractual relationship continued even after 1st November, 1995.
- B. Issue Nos. 2, 3, 4, 5, 6, 6A, 7, and 8:** The Ld. Arbitrator considered various clauses of the agreement including clauses 12.1, 12.2, 12.3, 12.4, 12.5, 12.6, 13, 3, and 7. Thereafter, the Ld. Arbitrator analysed all the quantities procured by TRIFED from the tribals, which were admitted facts. The Ld. Arbitrator, thereafter, records that an amount of Rs.18 crores was paid by MVR to TRIFED. In addition, Rs.6 crores was encashed by TRIFED through the Bank Guarantee. After considering the value of the quantity that had to be lifted by

MVR i.e., to the tune of Rs.15.8 crores, and combining it with the service charges, godown rent, insurance and 'other overheads', the total value of the quantity lifted by TRIFED was held to be Rs.20,18,94,791/-. Thus, as against the payment of Rs.18 crores, the value of the quantity lifted was almost Rs.20 crores. The plea of MVR that it had paid more to TRIFED was, therefore, rejected. The Ld. Arbitrator, further held that TRIFED was entitled, as per the agreement, not only to the price of procurement but also charges such as storage charges, insurance, statutory taxes, drying charges, interest, wherever due, handling charges, transportation charges, cost of gunny bags, fumigation charges, as also other incidental expenses. TRIFED was also entitled to service charges. The Ld. Arbitrator notes that considering all these charges that were to be paid by MVR to TRIFED and the fact that TRIFED's huge capital got blocked, temporarily, due to non-payments by MVR, the breach was, in fact, on the part of MVR. The Ld. Arbitrator comes to the following conclusions:

“As would be borne out from above it was the Claimant which was at fault and which had committed default in terms of the agreement entered into between the parties. This being the position the Claimant cannot be held to be justified in saying that it had suffered loss of goodwill and / or business reputation. This might have been so, perhaps, if TRIFED had defaulted and committed breach of the terms of the agreement and if the same had actually led to loss of goodwill or business reputation of the Claimant. As already noticed, it is not so. The TRIFED was far ahead in making procurements and drying the raw cashew nuts, storing them properly and calling upon the Claimant to lift the stocks against payment. Neither the

Claimant lifted the stocks as per the schedule nor made the payments as agreed. This being the position the Claimant also cannot be held entitled to any overhead expenses. For the same reason the Claimant cannot be held to be entitled to interest on any amount. Of course, this also disposes off Issue No.8 in as much as it is clearly bought out that it was the Claimant which had actually committed breach of contract.

In view of what has been discussed by me above, Issue No.2 to 8 go against the Claimant and in favour of the Respondent TRIFED. Since there was no breach of contract on the part of TRIFED. Issue No.6A also goes against the Claimant.”

C. Issues 9 and 10: The Ld. Arbitrator, after calculating all the costs of the stocks procured and the expenses incurred, concluded that from the open market sale of the unlifted stock of cashews, TRIFED suffered a loss of Rs.35,94,78,086/-.

D. Issue No. 11: nil award

E. Issue No.12: nil award

F. Issue No.13: nil award

G. Issue No.14: The Ld. Arbitrator held that TRIFED was entitled to sales tax, and interest at the rate of 15% p.a. from 1st July, 1998. After adding the loss, interest, sales tax etc., the total sum awarded was Rs.73,56,17,875/-.

10. The operative portion of the award reads as under:

“For the reasons given above the claims of the Claimant MVR Industry Ltd. are dismissed while some of the counter claims of the Respondent TRIFED are allowed in the light of above discussion. In view of what has been discussed above I pass an Award in favour of TRIFED and against the Claimant MVR Industry Ltd (MVR Industries Ltd) for a sum of

Rs.735618785.64. The TRIFED shall also be entitled to interest at the rate of 15% per annum on the said amount from the date of the Award till realization. Keeping in view the Memo of Cost filed by TRIFED, it is allowed costs assessed at Rs.6,11,102=00.”

11. The award has been challenged by Ld. counsel for MVR on two main grounds, viz., that MVR was never served with the notices and hence its documents and evidence were not considered. The second ground is that even on merits, the payments having been made in excess, such a huge sum of damages could not have been awarded.

12. Before going into the merits of the case, it is necessary to note that the present petition under Section 34 of the Act has been filed only on 20th May, 2009, i.e., four years after the passing of the impugned award on 20th May 2005. Explanation for filing this petition on 20th May, 2009 is contained at page 28 of the petition and reproduced herein as under:

“The petitioner states that even though the impugned award was passed ex-parte on 20.05.2005, the petitioner was not put on notice regarding the intention of the 2nd respondent to treat the petitioner ex-parte or regarding the closure of the proceedings prior to the passing of the final award. Even after passing the award in the year 2005, the same was not served upon the petitioner by the 2nd respondent and the petitioner became aware of the above award being passed only on 28.04.2009 when the said fact was mentioned in a proceeding pending before the XI Additional Principal Special Judge for CBI Cases, Chennai by the Ld. Counsel appearing for the CBI. Immediately, on 06.05.2009, the petitioner had through their counsel requested the 2nd respondent in writing to furnish a copy of the impugned award together with the proceedings and it is only thereafter a certified copy of the arbitral award has been received by the petitioner

on 09.05.2009. However, copy of the proceedings are still not received. Hence the petitioner is filing the present petition under Sec.34 of the Arbitration and Conciliation Act, seeking to set aside the impugned award.”

13. Ld. counsel appearing for TRIFED submits that the petition is barred by limitation, as MVR had knowledge of the arbitration proceedings right from 1998 till 2004. It voluntarily chose to stop appearing in the matter. Hence the delay is not liable to be condoned.

14. On the other hand, Ld. counsel for the Petitioner submits that a perusal of the arbitral record itself shows that the award, which was dispatched by the Ld. Arbitrator to MVR was received back unserved along with the AD card. Envelopes are also on record to show that the award was, in fact, never received by MVR. Thus, the petition is not barred by limitation as MVR had no knowledge of the award being passed and immediately upon acquiring knowledge of the award on 28th April, 2009, in some collateral proceedings pending before the CBI Judge, MVR took steps to prefer the present petition. It is further submitted by Ld. counsel for MVR that the address of MVR had changed as is clear from the Ministry of Corporate Affairs’ records and hence notice having not been served on the correct address, there is no service of the award on MVR in 2005.

15. In response to this submission, it is submitted by Ld. counsel for TRIFED that the last known address of MVR was on record and as per Section 3 of the Act, written communication is deemed to have been served when sent to the last known place of business or mailing address by registered post.

16. On merits, it is submitted by Ld. counsel for MVR that out of the total

contractual sum of Rs.48,40,36,671/-, a sum of approximately Rs.43 crores has, in fact, been received by TRIFED. Rs.24 crores was paid by MVR and Rs.19,29,65,412/- has, in fact, been recovered by TRIFED by sale of 9205 MTs of cashews in the open market. Thus, the award for a sum of Rs.73,56,17,875.64/-, is completely unsustainable. He further submits that TRIFED has received almost the entire amount and value of the stock of cashew, and cannot be allowed to make profit in this manner, when admittedly payments were made by MVR. Moreover, the interest awarded is highly unreasonable.

17. On the other hand, it is submitted by Ld. counsel for TRIFED that the Ld. Arbitrator has passed a detailed award recording the losses incurred by TRIFED on each of the consignments, which were sold. MVR having chosen not to appear in the matter, cannot be allowed to challenge the arbitral award on merits. Further, it is submitted that the interest awarded is as per the stipulation in the contract itself.

18. Dealing first with the issue of limitation, this Court has seen the original arbitral record. MVR was the claimant in the case before the Arbitrator and TRIFED had filed counter claims. Evidence was also led on behalf of MVR. Witnesses had been cross-examined. MVR was, thus, fully conscious of the arbitral proceedings, which were pending. The address given by the claimant in its claim petition was 5th Floor, Rayala Towers-3, 781, Anna Salai, Chennai. Submission by Ld. counsel for MVR, that in 1999 the address had changed, is of no avail because MVR had participated in the arbitral proceedings right till 2004, without seeking any amendment in the memo of parties or without placing on record any new address. Thus, insofar as the change of address is concerned, MVR had a duty to inform the Ld.

Arbitrator for making an amendment in the memo of parties and to place its latest address on record. Having failed to do so, the Ld. Arbitrator had no option but to take the address on record as the correct address.

19. Moreover, a perusal of the arbitral record also shows that the Ld. Arbitrator had issued notices repeatedly to MVR. First notice was issued to Mr. P. I. Jose, Ld. counsel for MVR, who had made a submission that he did not have instructions and, accordingly, withdrew himself from the proceedings. Thereafter, the notice for appearance had been issued to MVR on, at least, three occasions. The said notice had been served at two different addresses - MVR Industries Limited, Anna Salai, Chennai and MVR Industries Limited, 112, Vellala Street, Pondicherry. Ld. Counsel for MVR admits that the Pondicherry address is the new address of the company from 1999. Ld. Arbitrator, after repeated notices, proceeded with MVR *ex-parte* as recorded in the order dated 25th November, 2004. The original registered post receipts, envelopes, AD cards, etc. which were received back, are on record, which clearly show the efforts that the Ld. Arbitrator put, in serving MVR. Finally, the award was also communicated to MVR at the Anna Salai, Chennai and Vellala Street, Pondicherry address. As far as these two addresses are concerned, the AD cards have been received back on record without envelopes. Thus, the award was, clearly, served upon MVR vide letter dated 20th May, 2005. The company thus had, complete knowledge of the arbitral award since the same was served as per Section 3 at the last known address, which was available with the Ld. Arbitrator. The present petition has been filed on 20th May, 2009 and is, clearly, barred by limitation.

20. Further, in view of the order dated 16th September, 2009, passed in
O.M.P. 379/2009

this petition, this Court has also examined the matter on merits. The submission on merits of MVR as contained in the written submission is that MVR had made excess payment and since TRIFED had received approximately, Rs.43 crores already and the total expenses made by TRIFED was only approximately Rs.48.40 crores, the award of Rs.73.56 crores is completely unsustainable.

21. As per the contract, the price for the cashew was fixed and TRIFED had made huge investments for purchasing the raw cashew from the tribals. The stock had to be lifted by MVR, which it, clearly, failed to do. The payments made by MVR are not in doubt. The Ld. Arbitrator has referred to several letters written by TRIFED giving MVR an opportunity to make payments and lift the stock. The award is based on the correspondence exchanged between the parties. Further, insofar as the losses are concerned, the Ld. Arbitrator has considered clauses 12.4 and 9C and has observed as under:

“As far back as on 1st of November 1995 TRIFED had written to the Claimant Company for release of Rs. 27 crores before 10th of November 1995. It was stated that in case of non release of the said amount TRIFED would have “no other alternative except to take remedial measures as per the terms of the agreement and dispose of the material in the local market at your risk and responsibility, besides encashing the bank guarantee furnished by you for this transaction. If TRIFED incurs any loss on such resale the same shall be recovered from you through Court of Law”. By its letter dated 4th of December 1995 the Claimant was told about its dilatory tactics in lifting the stock and in not making payments in time.

.....

The perusal of both these clauses would go to show that TRIFED had the right to dispose of unlifted stocks and that as neither the Claimant Company had lifted the stock nor made payments, the stock lying in the godowns was the property of TRIFED. For the reason already delineated the Claimant cannot be said to have any lien over the stock so procured and lying in storage. It was in this context that the Claimant had sent number of letters to the Claimant two of which have been specifically referred to by me above. It may also be pointed out that the Claimant Company had made an effort to stall the sale of the stock through the intervention to the court. That had failed and in this respect reference may be made to the order of the High Court dated January 31, 1996.

As already pointed above the total quantity procured was 14034.4214. Initial driage after procurements was 551.2436. Thus the net quantity was 13483.1778. Quantity lifted by the Claimant was 3858.9020 leaving a balance quantity of 9624.2758. From this is to be deducted shortage during storage which was as per TRIFED 418.4613. Thus the TRIFED was left with 9206.8155 MTs. It was this quantity which was sold in open market after inviting tenders. It further appears from the record that in the year 1995-1996 a total quantity of 493.9360 which had cost TRIFED Rs.19471921.90/- was sold for Rs.16673910.70/- resulting in a loss to TRIFED of Rs.2798011.20/-. In 1996-1997 TRIFED had sold 6783.0855 MTs which had cost Rs.324023738.61. The price recovered through sale was Rs.148408771.80/- resulting in a loss of Rs.175614966.81/-. In 1997-1998 TRIFED sold 1422.9460 Mts. for Rs.22404508/-. The said stock had actually cost TRIFED Rs.138191192.99/-. Thus on this sale TRIFED suffered a loss of Rs.115786684.83/-. The last sale was of 505.8480 MTs. The price recovered was Rs.5478223.00/-. Though it had cost TRIFED Rs.70756646.38/- leading to a loss of Rs.65278423.38/-. This last sale was in the year 1998-1999. In short thus through the sale of unlifted stock the TRIFED suffered a

loss of Rs.359478086.22/-."

22. From the above findings, it is clear that the losses suffered by TRIFED were to the tune of a sum of Rs.35,94,78,086.22/- on several consignments of cashew, which were sold in the open market. These losses have been awarded by the Ld. Arbitrator along with interest at the rate of 15% per annum.

23. Insofar as future interest is concerned, Ld. Arbitrator has awarded 15% simple interest per annum. The Ld. counsel for MVR has not been able to point out any error in the calculation of losses caused to TRIFED, as the figures were all admitted on record and were adduced in evidence by TRIFED's witness. The scope of Section 34 being limited in nature, a factual reappraisal cannot be made. Since, clearly, MVR had failed to adhere to its obligations, Ld. Arbitrator has no committed error in awarding the losses in favour of TRIFED. Insofar as the future interest is concerned, though the claimed interest rate is 24% per annum, Ld. Arbitrator has awarded 15% per annum.

24. On the totality of the facts, since it is submitted that MVR is in financial distress, if the total awarded sum of Rs.73,56,17,875/- is paid within three months from today, the rate of future interest would be 8% per annum, however, if the payment of amount is not made within three months, the rate of future interest awarded by the Ld. Arbitrator shall stand.

25. With these observations, OMP is disposed of.

PRATHIBA M. SINGH
JUDGE

MARCH 25, 2019/dk
(corrected and release on 29th March, 2019)