IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

The Hon'ble Justice Sabyasachi Bhattacharyya

AP/105/2021
IA NO: GA/1/2021, GA/2/2021

UNION OF INDIA
VS
M/S J K ENTERPRISE

For the Petitioner	:	Mr. Satyendra Agarwal, Adv. Mr. B. Bag, Adv. Mr. G. Malik, Adv.
For the respondent	:	Mr. Malay Kr. Das, Adv. Mr. Sourav Chatterjee, Adv.
Hearing concluded on	:	08.07.2024
Judgment on	:	11.07.2024

Sabyasachi Bhattacharyya, J:-

1. The respondent in an arbitral proceeding has preferred the present challenge under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as, "the 1996 Act"), against an award passed by the sole Arbitrator. Out of the several claims made by the claimant/present respondent, four items were allowed by the Arbitrator.
2. Claim no.1 pertained to 2596 numbers of Conductor Rail Support Insulators, Item no.2 relates to Value Added Tax (VAT) @ 4% on the sum awarded as the price of item no.1, claim no. 3 pertains to VAT @ extra 1% and item no.4 grants extra 1% VAT relating to claim no.1.

3. Learned counsel for the petitioner argues that the interest component awarded by the arbitrator is contrary to clause 15.4 of the tender document which specifically provides that no claim shall lie against the purchaser in respect of interest.
4. It is further contended that Section 31(7) of the 1996 Act binds the arbitrator to the contract between the parties. If the parties agree to non-imposition of interest, it is beyond the jurisdiction of the arbitrator to grant the same.
5. Section 28(3) of the 1996 Act, it is argued, stipulates that while making an award, the tribunal shall in all cases take into account the terms of contract and trade usages applicable to the transaction.
6. Insofar as claim no. 2 is concerned, it is argued that Clause 21 of the Special Conditions of Contract (SCC) contains a denial clause which precludes the supplier from any benefit due to change of any statutory levies, customs duty variation, etc. which comes after expiry of the original delivery period as per the Purchase Order/Letter Of Credit. The time for completion of the supply was extended at least five times and the VAT calculated under claim no. 2 pertains to a period after the expiry of the original delivery period. Thus, Clause 21 debars such claim.
7. It is contended by the petitioner that the petitioner railways had short closed the contract without any financial repercussion in terms of Clause 5 of the tender document. Clause 5 clearly contemplates $\pm$30% as the leeway by way of option clause. The short closure of 2596 items which comprises claim no.1 was within the said percentage and as

such, the railway reserved the right to short close the same without even assigning any reason. Hence, the said short closure did not comprise of a breach of the agreement; rather, the same fell within the purview of the tender conditions. Such aspect was not considered by the Arbitrator at all.

8. It is contended that in view of the short closure clause and/or the short closure not being challenged by the petitioner, the Arbitrator acted *de hors* jurisdiction in granting the reliefs on the premise that such short closure was contrary to the contract.

9. Learned counsel cites *Shri H.D. Vashishta vs. M/s. Glaxo Laboratories(I.) (P.) Ltd,* reported at *AIR (1979) SC 134* and *Bhagat Singh and others, Vs. Jaswant Singh,* reported at *AIR (1966) SC 1861* for the proposition that all material facts necessary to constitute a cause of action must be averred in the plaint and where a claim has never been made, no amount of evidence can be looked into in support of the same.

10. With regard to the proposition that the arbitrator cannot grant *pendente lite* interest if the agreement between the parties prohibits the same, learned counsel cites the unreported judgments in *Civil Appeal Nos. 15545-15546 of 2017 (Sri Chittaranjan Maity Vs. Union of India*), and *APO 156 of 2018* arising out of *AP 423 of 2009 (Union of India Vs. A.K. Mukherjee).*

11. Learned counsel also cites *M/s Rashtriya Chemicals & Fertilizers Ltd Vs. M/s Chowgule Brothers & Others,* reported at *AIR (2010) SC 3543*

and *Oil & Natural Gas Corporation Ltd Vs. SAW Pipes Ltd* reported at *AIR (2003) SC 2629* in support of the same contention.

12. Learned counsel relies on *Civil Appeal Nos. 8817 of 2010 (Oil & Natural Gas Corporation Vs. M/s Wig Brothers Builders & Engineers Pvt. Ltd)* where it was held that the award of the arbitrator in violation of the bar contained in the contract has to be held as one beyond his jurisdiction.

13. While controverting the arguments of the petitioner, learned counsel for the claimant/respondent places strong reliance on *Associate builders Vs. Delhi Development Authority reported at (2015) 3 SCC 49,* where the scope of interference under Section 34, read with Section 5 of the 1996 Act, was discussed.

14. It is argued that, the law was laid down therein that there cannot be any interference on the ground of perversity unless a finding is based on no evidence, the arbitral tribunal takes into account something irrelevant to the decision or ignores vital evidence in arriving at its decision.

15. It is argued that none of the grounds under Section 34 of the 1996 Act has been made out in the present case. For the said proposition, a co-ordinate bench judgment in the matter *of The Indian Iron & Steel Co. Ltd Vs. M/s J.G. Engineers Pvt. Ltd. reported at (2013) SCC OnLine Cal 54* is also relied on by learned counsel for the claimant/respondent.

16. It is argued that the Railways failed to provide storage space, as admitted in writing, for which the supply could not be effected by the claimant.

17. Moreover, it is argued that since the claimant suffered huge loss, having procured materials in terms of the orders of the Railways, the same was rightly compensated by the arbitrator.

18. It is argued that the Railway Authorities place reliance on a communication of 2015, which was after invocation of the arbitration clause, whereas by a communication dated September 11, 2014, the Railway Authorities had intimated the petitioner that the stores are neither required nor acceptable at present and had cancelled the purchase order by short closing the same arbitrarily.

19. It is argued that the approach of the arbitrator being neither arbitrary nor capricious, nor there being any perversity in the award or the same being opposed to public policy, the present challenge under Section 34 of the said Act ought to be dismissed.

20. The issue which is to be considered here is whether the Arbitrator committed a perversity or acted beyond jurisdiction in passing the arbitral award and/or whether the impugned award is *ex facie* illegal and/or opposed to public policy or otherwise comes within the ambit of Section 34 of the 1996 Act.

21. The first component of claim on which the impugned award was passed is a claim of the claimant/respondent regarding the price of the 2596 items not supplied to the award debtor/petitioner. By way of reasons/justifications for awarding such amount to the tune of Rs.

35,04,600/-, the learned Arbitrator only recorded that the award debtor could not provide the storage space within the validity of the P.O. as tender notice, though the rest 2596 numbers of material was kept ready by the claimant. It was also considered that the balance quantity was tailor-made item for use of the Metro Railway only.

22. The above adjudication is vitiated by several factors.

23. First, the arbitrator failed to take into account that such items were never supplied by claimant to the award-debtor and as such, under normal circumstances, no question arises of the award-debtor being directed to pay the price of the same.

24. The crucial factor which was required to be taken into consideration was whether the claimant was able to prove that it had kept ready the said materials at the relevant point of time. Not even an iota of evidence in that regard has been discussed by the arbitrator. In fact, it has been admitted by the claimant in paragraph no. 19 of the statement of claim that it would be ready to supply the balance quantity, if given the opportunity, in four months.

25. It is an admitted position, as also elicited by query of court from learned counsel for the claimant, that the claimant does not manufacture the products but procures the same from third parties for the purpose of supplying to the award-debtor. Hence, there does not arise any question of waiting for a period as long as four months for supplying such products if the claimant/award holder was all along ready with the material.

26. Thus, in the absence of any proof as to the claimant having kept the materials ready, there does not arise any question of loss being suffered by the claimant for refusal of the award-debtor to receive the same.

27. Importantly, Section 73 of the Contract Act embodies a principle which is cardinal to the fundamental policy of law in India, requiring actual loss to be proved through evidence for a claimant to be found entitled to unliquidated damages as in the present case. Here, the claimant has failed to substantiate or quantify such damages for not being able to supply 2596 nos. of Conductor Rail Support Insulator.

28. Another important aspect which was entirely overlooked by the arbitrator was the specific option clause in item no.5 of the note in the schedule of the requirement-cum-offer form accompanying the tender. As per the same, ±30% option was available to the purchaser, that is, the award-debtor. Out of the total requirement of 14500 items of Conductor Rail Support insulators, the balance amount of 2596 falls squarely within such margin of 30%. Hence, it was well within the rights of the purchaser/award-debtor, as recognised in the tender document itself, to refuse to purchase up to such extent of the materials. Since such right was vested in the purchaser/award debtor, the award debtor could not be saddled with the liability of breach of contract for refusing to accept the same. Hence, the question of any breach of contract does not arise; resultantly, the very premise of the said claim in item no.1, that is breach of contract leading to loss, is

absent even on a plain reading of the tender document and/or the contract between the parties.

29. Thus, the said part of the award was not only beyond the scope of the contract which formed the basis of submission to arbitration, but also opposed to the fundamental policy of Indian law and basic notions of morality or justice.

30. Insofar as item nos.2 and 3 of the claim is concerned, the first of the two refer to Value Added Tax (VAT) and the second to extra VAT for materials not supplied at all by the claimant to the award debtor. The concept of value added tax is that the same is collected from the purchaser and deposited to the statutory authorities for materials actually supplied. Since the balance items were not supplied in the present case at all, no occasion arose for VAT being raised, collected and/or deposited before the authorities.

31. Thus, the said component of the award granting claim nos. 2 and 3 are based on fictitious claims having no material basis at all and thus fall beyond the pale of the dispute submitted to arbitration and/or the provisions of the contract embodying the arbitration clause itself.

32. Moreover, the arbitrator squarely overlooked Clause 21 of the General Condition Of Contract (GCC) which comprises of the denial clause and provides that the supplier will not be entitled to any benefit due to change of any statutory levies, custom duty variation and the like for a period after expiry of the original delivery period. In the present case, VAT was imposed subsequent to the expiry of the original delivery period since it is an admitted position that at least

five extensions were given to the claimant to complete the work. Thus, such claim is specifically debarred by Clause 21 of the General Conditions of Contract, which formed a part of the agreement between the parties.

33. The same logic applies to the grant of award in respect of claim no.4, also a VAT component which relates back to claim no.1.

34. Hence, the above components of the award fall outside the purview of the agreement between the parties, nay specifically barred by the contract.

35. It is well-settled that the very premise of arbitration is the consensus and concurrence between the parties to refer specific disputes to arbitration. The arbitrator is a creature of contract and as such, is bound by the terms of the agreement between the parties. Thus, being specifically debarred by the agreement and/or falling outside the purview of the agreement, the awards on the above components are categorically vitiated under Section 34(2)(a)(iv) of the 1996 Act, as well as by patent illegality as envisaged in Sub-section (2-A) of Section 34.

36. The short closure/termination was also not specifically challenged by the claimant. Thus, the premise of grant of the award on the balance items was palpably vitiated by patent illegality and perversity, since if the short closure remains unchallenged, it forms sufficient justification for non-payment of the price of the balance items and imposing value added tax thereon.

37. Next moving on to the interest awarded by the arbitrator, clause 15.4 of the bid document categorically provides that no claim shall lie

against the purchaser in respect of interest. Since the parties are bound by the contract, which itself is the basis of the reference to arbitration, the Arbitrator was also bound by the terms of the contract between the parties as embodied in the bid document.

38. Section 31(7) empowers the arbitrator to include in the awarded sum interest at certain rates. However, Section 31(7)(a) commences with the rider "Unless otherwise agreed by the parties...". Hence, since in the present case not only was there no agreement to impose interest but a specific bar to such imposition, the arbitrator traversed beyond the agreement and acted contrary to the agreement in granting interest against the award-debtor.

39. It has been held by the Supreme Court and this Court time and again that the award of the arbitrator in violation of a bar contained in the contract has to be held as one beyond his jurisdiction, requiring interference by the Court.

40. Section 31(7) has also been interpreted in *A.K. Mukherjee's* case following *Sri Chittaranjan Maity's* case, both of which are cited by the award-debtor, to mean that the arbitrator exercising Authority under the 1996 Act does not have any power to grant *pendente lite* interest, if the agreement between the parties prohibits the same, even if such prohibition does not expressly refer to the authority of the arbitrator. In *M/s Rashtriya Chemicals* (supra) and *Oil & Natural Gas Corporation Vs. M/s Wig Brothers Builders & Engineers Pvt. Ltd* as well as *Oil & Natural Gas Corporation Ltd Vs. SAW Pipes Ltd*, it was reiterated that the arbitrator cannot travel beyond the specific terms of the contract.

41. In such view of the matter, the impugned award is squarely vitiated, having travelled beyond the ambit of the agreement; rather, having been passed contrary to and in the teeth of specific bars stipulated in the contract between the parties.

42. The judgment of *Shri H.D. Vashishta* (supra) and *Bhagat Singh* (supra) also strengthens the view of this Court that in the absence of sufficient pleading and/or proof to substantiate the claim of loss of the claimant, the arbitral award itself suffers from patent illegality and is in contravention of the fundamental policy of Indian law as well as basic notions of justice.

43. The respondent has relied on *Associate builders (supra)* to highlight the circumstances under which there can be interference under Section 34 of the 1996 Act. Even going by the standards laid down therein, in view of the above discussion, it is found that the impugned award squarely comes within the grounds stipulated in Section 34 of the 1996 Act, and as such ought to be set aside.

44. Accordingly, AP No.105 of 2021 is allowed on contest, thereby setting aside the impugned award passed by the learned Arbitrator dated September 24, 2020.

45. There will be no order as to costs.

46. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)