

**(2012) 05 DEL CK 0531**  
**In the Delhi High Court**  
**Case No : O.M.P. 480 of 2006**

|                                         |            |
|-----------------------------------------|------------|
| Indian Railway Construction CO. (Ircon) | APPELLANT  |
| Vs                                      |            |
| Royal Forgings PVT. Ltd. and Anr        | RESPONDENT |

**Date of Decision :** 31-05-2012

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 34, 34(2)

**Citation :** (2012) 05 DEL CK 0531

**Hon'ble Judges :** Dr. S. Muralidhar, J

**Bench :** Single Bench

**Advocate :** Chandan Kumar, for the Appellant; Anjani Aiyagari, for the Respondent

**Final Decision :** Allowed

## **Judgement**

Justice S. Muralidhar

1. The challenge by the Petitioner Indian Railway Construction Company ("IRCON") in this petition u/s 34 of the Arbitration and Conciliation Act, 1996 ("Act") is to an Award dated 30th June 2006 passed by the learned sole Arbitrator in the dispute between IRCON and the Respondent No.1 Royal Forgings Private Limited ("RFPL") arising out of the contract for supply of Double Shank Elastic Spikes ("DSES") which a fastener used for holding the railway track to wooden sleepers. It is stated that in terms of Clause 15 of the Special Conditions of Contract ("SCC"), time was the essence of the contract. In Clause B 6.3.8, Technical Specifications ("TS") as set out in Annexure-III of Purchase Order ("PO") dated 24th July 2001, it was provided that the finished product should have specific marking. It was provided that each component of the fastener shall "in addition to manufacturer's name, also carry the initials "BR" and the last two digits of the year of manufacture. The delivery was to be made by the Respondent No.1 herein at Ishurdi, Bangladesh by meeting the entire cost of transportation, insurance and tax liabilities except custom duty. Clause 12 of SCC made it clear that the supply of material and its delivery at Ishurdi, Bangladesh

was to be the supplier's responsibility and that IRCON would not be able to extend any help except for the payment of custom duty in Bangladesh. Clause 25.1 specified that the supplier was to communicate the relevant dispatch particulars immediately after the despatch to the consignee. Documents which were required to be sent as per the PO are as under:

- i. Commercial invoice
- ii. Packing list
- iii. Transport consignment note
- iv. Certificate of origin
- v. Full transit insurance cover
- vi. Test certificates.

2. Initially the PO dated 24th July 2001 was placed for supply of one lakh pieces. After the successful completion of that supply, an additional order for one lakh pieces was placed on 25th February 2003 which was also completed. By its letter dated 6th May 2003 the Petitioner placed on the Respondent No.1 a further order for supply of 50,000 pieces of DSES which was to be made by 31st May 2003.

3. The case of IRCON is that despite agreeing to the above schedule, Respondent No.1 did not supply the stipulated extra quantity within time. The extension of time was granted up to 20th June 2003 and thereafter up to 5th July 2003. According to IRCON, due to non-supply of the additional quantity it was constrained to procure and use concrete sleepers and incurred an additional expenditure of Rs. 6,65,600 for completing the project.

4. The dispute that arose between the parties due to non-supply of 50,000 pieces was referred to the learned sole Arbitrator. There were 10 claims raised by the Respondent No.1 towards various heads of which learned Arbitrator rejected Claim No. 2 relating to reimbursement of excise duty, Claim No. 5 in relation to loss of profit, Claim No. 7 towards loss of business opportunity, Claim No. 9 as well as Claim No. 10 concerning the interest on Claims 1 to 8. As regards Claim No. 6 it was agreed between the parties that the second deposit and earnest money would be released to the Respondent No.1. Against Claim No. 1 for undelivered consignment, the learned Arbitrator awarded an amount of Rs. 33,58,361. Against Claim No. 3 which was for reimbursement of cost of storage and transport, the learned Arbitrator awarded an amount of Rs. 19,000. Against Claim No. 4 for loss of export benefit, a sum of Rs. 3,39,590 was allowed and against Claim No. 8 towards cost of litigation, an amount of Rs. 25,000 was awarded.

5. The counter claim of IRCON for a sum of Rs. 6,65,600 towards loss incurred by it as a result of procuring the concrete sleepers instead of wooden sleepers due to non-supply of 50,000 pieces of DSES by the Respondent No.1 was rejected.

6. This Court has heard the submissions of Mr. Chandan Kumar, learned counsel for IRCON and Ms. Anjani Aiyagari, learned counsel for the Respondent No.1.

7. It is submitted that time was the essence of the contract and delivery of 50,000 pieces of DSES having not been made within the time, Respondent No.1 was not entitled to any compensation. Further, Respondent No.1 had not proved that 50,000 pieces had been manufactured by it. More importantly it was not shown that pieces of DSES were manufactured after 6th May 2003. It was also not shown that 50,000 pieces had marking of "BR" as well as the year of manufacture in two digits. It is submitted that the inspection undertaken during the pendency of the arbitral proceedings showed that pieces did not have marking "BR". This was erroneously rejected on the reasoning that it was a minor lapse. On the other hand it is contended by the Petitioner that the pieces found in the store of Respondent No.1 without the initials "BR" meant that they were not attributable to the contract or manufactured for it.

8. It is stated by learned counsel for the Petitioner that in respect of 25,000 pieces alleged to have been dispatched on 23rd June 2006, no transporter's consignment note, transit cover insurance, test certificates were provided. Consequently, the manufacture date and date of despatch were not genuine. No certificate of insurance of the said quantity had been proved. No test report was sent in relation to the despatch of the goods on 23rd June 2003. Consequently, there was no compliance of the requirement of Clause 17 of the SCC.

9. The learned Arbitrator in the impugned Award noted in paras 6.4.1 and 6.4.4 as under:

6.4.1 ..... I agree with the Respondent that it is not complete waiver of inspection, but makes the Claimants responsible for testing the samples as per schedule in order to ensure that the material conforms to the specifications."

6.4.4 ..... I have already agreed with the Respondents that Claimants failed in not sending Test Certificates, Insurance Certificate, Transporter's consignment note and timely intimation regarding dispatch of 25000 nos. of DSES"

10. On the other hand it is pointed out by learned counsel for the Respondent No.1 that the Petitioner had never insisted the Respondent No.1 to send the test certificate and there has been complete waiver of the requirement of test as the Petitioner declined to depute Engineer for the same and instead directed the Respondent No.1 to dispatch the same. Respondent No.1 was not under any obligation to forward the test certificate to the Petitioner when the Petitioner had not even asked for the same or mentioned the same in any of its communications.

11. Accordingly it is submitted that the finding of the learned Arbitration is that there was not even a whisper from the Petitioner regarding lack of documents for import permit or any failure of Respondent No.1 was correct. In fact the Petitioner had requested Respondent No.1 by its letter dated 1st August 2003 to

hold the consignment as it was facing problem regarding import permit. It was further submitted that none of the specific grounds set out in Section 34 (2) (a) (i) to (v) or Section 34 (2) (b) (i) & (ii) were attracted to the present case.

12. It must be noticed that since doubts were being raised regarding the manufacture and existence of 50,000 pieces of DSES, the learned Arbitrator directed the Petitioner to depute a representative to visit the workshop of Respondent No.1 at Raipur to physically check the stock jointly and submit the report. The report submitted by the Petitioner's representative was to the following effect:

(i) The quantity of 50,575 was found as against 50,200 shown in stock register.

(ii) Test inspection reports of raw material production tests or sample tests were not available.

(iii) The DSES did not bear marking of BR (B" desk Rly) as required under the P.O. Technical Specification."

13. The learned Arbitrator noted the acceptance by the Respondent No.1 that DSES were not marked "BR". This was however sought to be explained by pointing out that even earlier, two lakhs numbers of DSES supplied were also not marked "BR". In the circumstances, the learned Arbitrator treated this as "a minor lapse" for which a token penalty of a maximum 1% could be imposed.

14. This Court is unable to appreciate the above finding of the learned Arbitrator which appears to be in the teeth of the facts brought on record and accepted by the Respondent No.1 itself. Once it was clear that date-wise manufacture of 50,000 pieces of DSES had not been furnished, and the marking of BR had not been done and further that Respondent No.1 did not sign the full documents required for the export formalities including inspection/test certificates/insurance certificate and transporter's consignment note, there was no question of awarding any compensation under Claim No.

1. Merely because in the letter dated 1st August 2003 the Petitioner did not mention about the lack of documents in obtaining import permit and it was silent up to 20th February 2004 could not lead to an inference that the Petitioner was perhaps feeling guilty in not taking or pursuing the supply from the Respondent No.1.

15. This Court, therefore, concludes that the Award in respect of Claim No. 1 is without any evidence and contrary to the express terms of the contract and also the joint inspection report. The Award in respect of Claim No. 1 for undelivered consignment cannot be sustained in law and is hereby set aside.

16. As regards Claim No. 3 for reimbursement of cost of storage and transport, again no document was furnished to the Petitioner about transportation and warehousing charges. The learned Arbitrator appears to have merely gone by surmises and conjectures in awarding Rs. 19,000 for cost of transportation of

25,000 pieces from Kolkata to Raipur. The Award in respect of Claim No. 3 is therefore, set aside.

17. Claim No. 4 was for US \$ 14500 for loss of export benefit to the extent of 20% of cost of supply order. This again was linked with Claim No. 1 which was for cost of the undelivered consignment, the award in respect of which has been set aside by this Court. The Award of Rs. 25,000 towards cost of litigation is also not justified. For all the aforementioned reasons the impugned Award cannot be sustained in law and is hereby set aside. Accordingly, the petition is allowed with no order as to costs.