

(2018) 03 DEL CK 0402

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 251 Of 2016

Ircon International Limited

APPELLANT

Vs

Patil Rail Infrastructure Pvt. Ltd.

RESPONDENT

Date of Decision : 12-03-2018

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 26, 28(3), 34, 34(2)

Citation : (2018) 03 DEL CK 0402

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : J.P. Sengh, Chandan Kumar, Manisha Mehta, Vaishali Tanwar, Mrigha Skekhar, Kunwar Shashank

Final Decision : Dismissed

Judgement

Navin Chawla, J

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 06.08.2015 passed by the Sole Arbitrator allowing certain claims of the respondent along with interest.

2. The disputes between the parties arose in relation to the work of 'Manufacture, Supply, Transportation and Delivery of Pre-stressed Mono-Block Concrete Sleepers for Broad Gauge Railway Track (1676 mm) suitable for 60 kg rail section, for the restoration of various railway lines in Northern Province of Sri Lanka' awarded by the petitioner in favour of the respondent vide agreement dated 14th May, 2012.

3. The bone of contention between the parties is whether the respondent could have been held liable for the sleepers that were supplied by it and were later found to have developed cracks. Relying upon Clause 8 of the Letter of Acceptance and Clause 15 of the Special Condition of Contract, the petitioner had called upon the respondent to replace the alleged defective sleepers during the

Defect Liability Period. As the respondent claimed that the cracks had not appeared due to any manufacturing defects, the disputes were referred to the arbitration and have resulted in the Impugned Award.

4. Learned senior counsel for the petitioner submits that the Arbitrator has completely misread the Clause 8 of the Letter of Acceptance and Clause 15 of Special Condition of Contract and has imported a condition that the defects must be "manufacturing defects" which qualification is otherwise not there in the plain reading of the two Clauses. He submits that the Arbitrator instead of interpreting the contract has in fact, rewritten the same by putting the above condition in the Clauses, inasmuch as, both Clause 8 of the Letter of Acceptance and Clause 15 of the Special Condition of Contract do not restrict the defects only to 'manufacturing defects'.

5. I am unable to accept the above arguments of the learned senior counsel for the petitioner.

6. The contract in question, as noted above, was one of manufacture, supply, transportation and delivery of the sleepers. The defects in Clause 8 of the Letter of Acceptance and Clause 15 of the Special Condition of Contract could therefore, only relate to the defects in manufacture, supply, transportation and delivery and no other defects.

7. I would first quote the Clause 8 of the Letter of Acceptance and Clause 15 of the Special Condition of the Contract:

"8 DEFECT LIABILITY PERIOD

In terms of clause 15 of the special condition of contract, the Defect Liability Period for the sleepers supplied shall be 24 (Twenty Four) months from the date of completion of the supply of the entire quantity of supplies. You will be required to replace any material found defective and notified by IRCON within the above period. In event of your failure in promptly replacing the defective material notified by IRCON, IRCON shall have the full right/liberty to withhold your due payment and en-cash the bank guarantees submitted by you. IRCON's decision in this regard shall be final and binding on you.

15. DEFECT LIABILITY PERIOD

The Defect Liability Period for the materials supplied shall be 24 (Twenty Four) months from the date of completion of the supply of the entire quantity of supplies. The supplier shall be required to replace, any material found defective and notified by the purchaser within? the above period. In event of failure of the supplier in promptly replacing the defective material notified by the purchaser, the purchaser shall have the full right/liberty to withheld any due payment to the supplier and en cash the bank guarantees furnished by the supplier. The purchaser's decision in this regard shall be final and binding on the supplier."

8. The above Clauses have to be read along with the Clause 25 of the Special

Conditions of Contract, which is reproduced herein below:

"25.0 Inspections and Tests

25.1 The Supplier shall at its own expense, and at no cost to the Purchaser, carry out all such tests and/or inspections of the Goods and Related Services as are specified in SCC and Technical Specifications of this bid document.

25.2 The inspections and tests may be conducted in the premises of the Supplier at the point of production / delivery, and/or at the Goods' final destination, or at another place in the Purchaser's Country. Subject to GCC Sub-Clause 25.3, if conducted in the premises of the Supplier, all reasonable facilities and assistance, including access to drawings and production data, shall be furnished to the inspectors at no extra charge to the Purchaser.

25.3 The Purchaser or its designated representative shall be entitled to attend the tests and/or pre dispatch inspections referred to third party in GCC Sub-Clause 25.2, provided that the Purchaser shall bear all of its own costs and expenses incurred in connection with such attendance including, but not limited to, all traveling, boarding and lodging expenses.

25.4 Whenever the Supplier is ready to carry out any such test and inspection, it shall give a reasonable advance notice of at least one week, including the place and time, to the Purchaser. The Supplier shall obtain from any relevant third party or manufacturer any necessary permission or consent at their own cost to enable the Purchaser or its designated representative to attend the test and/or inspection.

25.5 The Purchaser may require the Supplier to carry out any test and/or inspection not required by the Contract but deemed necessary to verify that the characteristics and performance of the Goods comply with the technical specifications codes and standards under the Contract, provided that the Supplier's reasonable costs and expenses incurred in the carrying out of such test and/or inspection shall be added to the Contract Price.

25.6 The Supplier shall provide the Purchaser with a report of the results of any such test and/or inspection.

25.7 The Purchaser may reject any Goods or any part thereof that test and/or inspection or do not conform to the specifications. The Supplier shall either rectify or replace such rejected Goods or parts thereof or make alterations necessary to meet the specifications at no cost to the Purchaser and shall repeat the test and/or inspection, at no cost to the Purchaser, upon giving a notice pursuant to GCC Sub-Clause 25.4.

25.8 The Supplier agrees that neither the execution of a test and/or inspection of the Goods or any part thereof, nor the attendance by the Purchaser or its representative, nor the issue of any report pursuant to GCC Sub-Clause 25.6, shall release the Supplier from any warranties or other obligations under the

Contract.

(emphasis supplied)"

9. A reading of the above Clause would show that it is only a failure to pass the test concluding that sleepers do not conform to the specification, that goods can be returned by the petitioner and the petitioner can seek their replacement.

10. In any case, the Arbitrator has interpreted the above two Clauses and such interpretation, in my opinion is plausible and in fact correct. In *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, the Supreme Court has cautioned that the Court, in exercise of its power under Section 34 of the Act, would not be competent to set aside the Arbitral Award merely because it does not agree fully with the interpretation of the agreement given by the Arbitrator. If such interpretation of the agreement by the Arbitrator is plausible, the Award has to be upheld. I may only quote the relevant observation of the Supreme Court in this regard:

42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

xxxxxx

42.3 (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

"28. Rules applicable to substance of dispute. (1)-(2)

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."

11. It is further contended by learned senior counsel for the petitioner that the Arbitrator has erred in putting the onus of showing the reasons for development of cracks in sleepers on the petitioner rather than the respondent. He submits that once it is admitted that the sleepers have developed cracks within the Defect Liability Period, it was for the respondent to have shown the cause thereof and by putting the onus of proof on the petitioner, the Arbitrator has clearly erred in law and on facts.

12. I am unable to agree with the above submission of the learned senior counsel for the petitioner. In the present case, once the cracks were noticed, the

sleepers were tested again by the parties themselves and thereafter even by the Sri Lankan Railways. During the arbitration proceedings, the Arbitrator, in exercise of his powers under Section 26 of the Act, appointed an expert from IIT Chennai to again retest the sample sleepers and give his report on the causes for the defects. In all these tests, it was not shown that the cracks were developed due to any manufacturing or transportation defects on part of the respondent. As noted above, once this conclusion is reached, for what cause the cracks actually appeared loses all its significance as the respondent could be held liable only if the cracks were developed due to manufacturing defects or defects during the course of transportation or supply and not otherwise.

13. The Arbitrator, in the Impugned Award, has concluded that the sleepers supplied by the respondent meet the specifications provided in the contract. I quote from the Impugned Award as under:

"15.17 To summarise, I therefore do not find the claimant responsible in any way for the cracked sleepers essentially because

(a) The Pattern of cracks only on top shows that they are flexural cracks caused by stresses because they are detected after passing of trains.

(b) The cracked sleepers were found to have more flexure strength than specified in RDSOT-39

(c) None of the cracked sleepers had any of the defects stated by Respondent like honeycombing, loose strands, defective aggregates etc.

(d) The expert engaged by me has concluded that the sleepers were manufactured according to specifications as per the contract and that the cracks were not due to any manufacturing defect and that the issues related to quality control in manufacture as pointed out by Respondent are unrelated to the observed cracking phenomenon."

14. The Arbitrator has rightly put the onus of proof on the petitioner to show that the cracks had developed due to any manufacturing defects. In any case, the question of onus of proof, in the present case, loses all its significance as the Arbitrator has arrived at his final conclusion relying upon various test reports as also the report of an Expert appointed by him, that is, after analysing all evidence led before him by both the parties.

15. In any case, the Arbitrator has considered all the evidence led by the parties before him in form of such reports, photographs produced by the respondent and even site visit by the Arbitrator. Appreciation of evidence is the sole and exclusive domain of the Arbitrator. This Court in exercise of its power under Section 34 of the Act, cannot re-appreciate the evidence so as to arrive at its own conclusion. The said exercise would be completely outside the scope of its jurisdiction under Section 34 of the Act. In *Associate Builders (Supra)*, the Supreme Court had reiterated the caution to be followed by the Court while exercising its power under Section 34 of the Act, which is reproduced as under:

"33. It must clearly be understood that when a court is applying the "public policy" test to an Arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the Arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his Arbitral Award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*, (2012) 1 SCC 594, this Court held:

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood."

16. Even otherwise, I do not find the conclusion arrived at by the Arbitrator to be in any manner incorrect.

17. Learned senior counsel for the petitioner has further argued that the findings of the Arbitrator are self contradicting in nature; while at one place he relies on the report of the expert from IIT Chennai to conclude that the cracks were not due to any manufacturing defect, on the other hand he rejects the report as far as it had concluded that the defects had occurred due to weak track bed. The Arbitrator has further held that the reason for the cracks could have been ascertained only by a track expert and in spite of such expert being not produced by the respondent, the Arbitrator holds that the cracks might have occurred due to defective/non-standard rolling stock coupled to some extent with loose packing below the sleepers on the rail seats.

18. I am again unable to agree with the submission made by the learned senior counsel for the petitioner. As noted above, for the purpose of adjudication of the

disputes between the parties, the only question relevant was whether the cracks had developed due to any manufacturing defect in the sleepers on part of the respondent. What actually caused the said cracks, was in my opinion, not the relevant question to be determined in the arbitration proceedings. The Arbitrator has concluded that various test reports show that the cracks in the sleepers were not due to any manufacturing defect and that should have been sufficient for a finding in favour of the respondent. The Arbitrator, in fact, goes further to examine the reason for the said cracks and concludes the finding as under:

"Therefore the only other possibility can be the type of rolling stock, their suspension arrangements, presence of wheel flats generating excessive stresses. I realise that the expert was not a track expert and therefore he could not have considered the complex phenomenon of rail/wheel interaction. Instead he only made a theoretical and rather too simplistic assessment and gave the reasons of cracks as due to improper laying of sleepers. I am of the view that the cracks might have occurred due to defective/non standard rolling stock (particularly of the ballast trains with poor maintenance of loco/wagons) coupled of course to some extant with loose packing below the sleepers at the rail seats(which conditions are widely prevalent at the time of laying).To this extant therefore I am unable to accept the report of the expert when he states that "the cracks appear to have been induced due to the loading by the train on a track that was not yet fully prepared."

Incidentally I must also mention that I had visited the site in June 2014 and I found that the track laying conditions were excellent. However, I cannot give much credence to this observation because it is quite possible that the Respondent had become more careful after the cracks were noticed. However my conclusion about probable cause is based on the evidence of photographs at the time of laying as presented to me by the claimant."

19. Learned counsel for the respondent further draws my attention to the terms of reference to the expert, which was confined only to the issue whether the sleepers have developed cracks due to any manufacturing defect and not to find the other causes for such cracks in the sleepers. I quote the terms of reference hereinunder:

"Whether the sleepers have developed cracks due to any manufacturing defect arising from any acts of omission of supplier either due to workmanship or defective materials like cement, steel, steam curing aggregates, sand etc., by visiting the plant of the manufacturer and also testing some samples of the cracked sleepers to ascertain whether they satisfy the RDSO Specification T-39/85 according to which these sleepers are stated to have been manufactured under the contract."

20. In view of the above, I find no contradiction in the Impugned Award so as to warrant any interference with the same.

21. Learned senior counsel for the petitioner further relies upon Clause 25.8 of

the Special Conditions of the Contract to contend that the test report could not have been relied upon by the Arbitrator for giving his finding in favour of the respondent. He submits that Clause 25.8 of the General Condition of the Contract expressly states that such test reports would not release the supplier from any warranty or any obligation under the contract.

22. While on principle the submission made by the learned senior counsel for the petitioner is correct inasmuch as any test conducted prior to the supply being made would not be binding on the parties if any defect is noticed thereafter during the process of laying of the tracks, on facts of this case, the said interpretation itself would not be sufficient to set aside the Impugned Award.

23. In the present case, as noted above, the test being relied upon by the Arbitrator are not confined to the test carried out at the time of the supply of the sleepers but even thereafter once the cracks had been noticed. The sleepers were retested by the petitioner, thereafter by the Sri Lankan Railway Authority and finally by the expert appointed during the course of the arbitration proceedings. As noticed above, and not disputed by the learned senior counsel for the petitioner, none of these test reports indicate that there was any manufacturing defect in the sleepers so tested. Therefore, Clause 25.8 of the General Condition of the Contract, in my opinion, would actually have no relevance to the facts of the present case.

24. Learned senior counsel for the petitioner lastly contends that the Defect Liability Period as provided in Clause 8 of the Letter of Acceptance and Clause 15 of the Special Condition of the Contract was twenty four months from the date of the completion of the supply of the entire quantity of the sleepers. He submits that if the cracks had been noticed within this period, there is an unqualified obligation on part of the respondent to replace the said sleepers and the report of the petitioner in this regard shall be final and binding on the respondent. I am again unable to accept the said submission of learned senior counsel for the petitioner. Firstly, as far as the period of defect liability is concerned, there is no dispute that in case there is any manufacturing defect found in the sleepers supplied by the respondent within a period of twenty four months of the supply, the respondent would have to replace the said sleepers, however, as noted above, it is the petitioner who could not prove that the cracks noticed in this case were due to manufacturing defects, therefore, the period would lose all its significance as far as this case is concerned.

25. Secondly, merely because the decision of the petitioner is stated to be final and binding on the respondent, it cannot be said that it takes away the right of the respondent to seek remedy there against in the arbitration. The petitioner does not contend that the decision of the petitioner on this aspect falls under the "excepted matters" as far as the arbitration is concerned. Therefore, any decision of the petitioner in this regard would be subject to adjudication through arbitration, which has happened in the present case with the arbitrator concluding against the petitioner.

26. In view of the above, I find no merit in the present petition and the same is accordingly dismissed, with no order as to cost.