
(2019) 01 DEL CK 0333

In the Delhi High Court

Case No : Civil Writ Petition No. 3264 Of 2018, Civil Miscellaneous No. 12871 Of 2018

Patil Rail Infrastructure Private Limited

APPELLANT

Vs

S. L. Gupta And Anr

RESPONDENT

Date of Decision : 25-01-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9, 34, 37

Citation : (2019) 3 R.A.J. 408 : (2019) 257 DLT 683 : (2019) 5 AD(Delhi) 20

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : R. K. Sanghi, Ishan Sanghi, Satyendra Kumar, Jayant Mehta, Gauhar Mirza, Mohit, Pranav Gopalakrishnan

Final Decision : Allowed

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition impugning the letter dated 17.10.2016 (hereafter "the impugned letter") and a show cause notice dated 29.06.2016(hereafter "the impugned notice"). In terms of the show cause notice dated 29.06.2016, the petitioner was called upon to submit its explanation / statement of defence as to why the petitioner should not be banned from business dealings with respondent no. 2 (hereafter "IRCON"). It is alleged in the impugned notice that there were various lapses on the part of the petitioner in production of railway sleepers at its plant at Thirumanglam, Madurai, Tamil Nadu. The impugned letter was sent by respondent no.1 to the Principal Chief Engineer, Southern Railway Headquarters, calling upon the said addressee to look into the matter relating to supply of poor quality of sleepers by the petitioner, and to call for explanation in this regard from the petitioner.

2. The petitioner contends that the impugned letter and the impugned notice are wholly unsustainable, as the issues raised therein were subject matter of

disputes between the parties, which were referred to arbitration, and all disputes stands concluded in terms of the arbitral award passed in favour of the petitioner. The petitioner contends that it is now no longer open for IRCON to raise such issues.

3. IRCON disputes the aforesaid contention. It is contended on its behalf that issues raised in the impugned letter and the impugned show cause notice were not the subject matter of proceedings before the Arbitral Tribunal and, thus, IRCON is not precluded from taking action in this respect.

Factual Background

4. The petitioner is a company incorporated under the Companies Act, 1956, and is engaged in manufacture and sale of Pre-stressed Mono Block Concrete Sleepers for Broad Gauge Railway Tracks. IRCON is a public sector undertaking, engaged in infrastructure development and consultancy relating to Railways. Respondent no.1 is the Project Director/Executive Director of IRCON.

5. On 14.05.2012, IRCON entered into a contract with the petitioner for the manufacture, supply, transportation and delivery of Pre-stressed Mono Block Concrete Sleepers (laying) track and special sleepers for laying down of Broad Gauge Railway Track (1676 mm) with 60 kg rail section, as per Indian Railway specifications, for the contracts of restoration of various railway lines in Northern Province of Sri Lanka.

6. In terms of the said contract, the petitioner supplied the pre-stressed mono-block concrete sleepers (hereafter "sleepers") manufactured at its plant at Thirumanglam, Tamil Nadu.

7. On 17.06.2013, the petitioner received a communication from IRCON stating that the railway sleepers supplied by it had developed cracks. IRCON relied upon Clause 8 of the Letter of Acceptance and Clause 15 of the Special Conditions of Contract and, called upon the petitioner to replace the allegedly defective railway sleepers. The petitioner addressed a series of letters to IRCON contending that since, contractually, the delivery was complete post inspection, no liability could be fastened upon the petitioner. And, even otherwise, the defects which arose were not manufacturing defects attributable to the petitioner. Consequent to the failure of conciliation proceedings, the parties appointed a sole arbitrator to adjudicate the disputes between them.

8. It is stated that the arbitrator visited the site and directed the parties to conduct joint tests of the sleepers and submit a report. Indisputably, the allegedly cracked sleepers were subjected to various tests at IIT, Chennai in the presence of both the parties. The said sleepers did not fail any test relating to any parameter and the report regarding the same was submitted to arbitral Tribunal.

9. The Arbitral Tribunal delivered an award on 06.08.2015 (hereafter "the Award"). The Arbitral Tribunal concluded that the petitioner was not responsible

for the cracks that had developed in certain sleepers.

10. In view of its conclusion, the Arbitral Tribunal, inter alia, awarded a sum of Rs. 89,51,304/- in favour of the petitioner and against IRCON as the said amount was withheld by IRCON on account of the alleged defects in the sleepers supplied by the petitioner.

11. It is relevant to state that IRCON had also raised a claim for a sum of US Dollars 0.45 million towards the cost of replacement of 18,904 sleepers. The Arbitral Tribunal rejected the said claim, as the Arbitral Tribunal did not accept that there were any manufacturing defects in the sleepers supplied by the petitioner.

12. Aggrieved by the same, IRCON filed an petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "A&C Act") for setting aside of the arbitral award (being OMP No. 251/2016 captioned "Ircon International Ltd. V. Patil Rail Infrastructure Private Limited").

13. The petitioner states that about twelve days after IRCON had filed the aforementioned petition before this Court, it issued the impugned notice calling upon the petitioner to show cause why business dealings with the petitioner should not be suspended/banned. The petitioner responded to the impugned notice by a letter dated 08.07.2016, requesting IRCON to withdraw the same.

14. Thereafter, on 13.07.2016, the petitioner filed a petition under Section 9 of the A&C Act being OMP(I)(Comm.) No. 295/2016 seeking stay of the impugned notice. The application was considered by a Coordinate Bench of this Court, and an order dated 29.06.2016 was passed staying the impugned notice. Despite the aforesaid order, respondent no.1 issued the impugned letter dated 17.10.2016 to Railway authorities.

15. Aggrieved by the same, the petitioner once again approached this Court on 01.12.2016. This Court passed an order restraining IRCON from addressing any such communications relating to the work done by the petitioner.

16. By a judgment dated 12.03.2018, this Court declined to interfere with the Award in question, and dismissed the application filed by the petitioner under Section 34 of the A&C Act (OMP No. 251/2016). IRCON did not accept the said decision and filed an appeal (FAO(OS) (COMM.) 104/2018) against the order dated 12.03.2018 passed by this Court, rejecting its application under Section 34 of the Arbitration & Conciliation Act, 1996 (A & C Act).

17. The aforementioned appeal was rejected by the Division Bench of this Court by a judgment dated 01.06.2018. Thereafter, IRCON filed a Special Leave to Appeal against the decision of the Division Bench, before the Supreme Court, which was also dismissed on 12.10.2018.

Submissions

18. Mr Sanghi, learned counsel appearing for the petitioner contended that the

disputes between the parties had been finally adjudicated by the Arbitral Tribunal and IRCON's claim that there were any manufacturing defects had been rejected. He submitted that in this view, it was not open for IRCON to commence proceedings for blacklisting the petitioner. He referred to the decision of a Coordinate Bench of this Court in Sai Consulting Engineers Pvt. Ltd. v. Rail Vikas Nigam Ltd. and Ors.: OMP (Comm.) 981 of 2012 and Prakash Atlanta JV & Ors. v. National Highways Authority of India & Ors.: W.P. (C) 7443 of 2009 in support of his contention that the question, whether a contractor could be blacklisted on account of a breach of contract, was required to be examined in terms of the dispute resolution clause between the parties. He also relied upon the decision of the High Court of Jharkhand in Sutlej Construction Ltd. v. State of Jharkhand: MANU/JH/0141/2005 in support of the aforesaid contention.

19. Mr Jayant Mehta, learned Counsel appearing for IRCON countered the aforesaid submissions. He advanced contentions, essentially, on three fronts. First, he submitted that the present petition was pre-mature as the petitioner was only issued a show cause notice and no punitive action had been taken by IRCON. Second, he submitted that the arbitration proceedings and proceedings for blacklisting a contractor were completely different proceedings, which were not related and independent of each other. He submitted that whereas the arbitral proceedings related to claims and counter claims in relation to a particular contract, the proceedings for blacklisting a contractor were general in nature and would affect all contractual dealings with the concerned contractor.

20. Third, he submitted that the subject matter of arbitral proceedings was entirely different from the allegations as mentioned in the impugned notice. He contended that the arbitral tribunal was, inter alia, concerned with the claim regarding withholding of payments on account of cracks that had developed in the sleepers supplied by the petitioner. He submitted that the allegations in the impugned notice were different inasmuch as they are related to (a) incorrect profiling and improper cover to HTS standards as the sleepers supplied by the petitioner were not found conforming with the specifications that required a clear cover of 37mm in the bottom of stamps and 27 mm on the top, and (b) casting of foreign material with sleepers and (c) use of poor quality of ingredients for casting of sleepers.

21. He submitted that none of these allegations were subject matter of proceedings before the Arbitral Tribunal.

Reasons and Conclusion

22. The contention that the Courts normally do not interfere with proceedings which are at the stage of a show cause notice, is merited. However, this is a rule of self-restraint and this Court is not precluded from examining a challenge to a show cause notice in given cases. In the present case, it is the petitioner's contention that the proceedings instituted for blacklisting the petitioner are vexatious and have been instituted as a counter blast after IRCON had failed to

prevail in the arbitral proceedings. Given the narrow scope of the controversy, this Court considers it apposite to examine the controversy on merits.

23. The principal controversy to be examined is whether the proceedings for blacklisting initiated by the petitioner in terms of the impugned notice is arbitrary and unreasonable.

24. Before proceeding further, it would be relevant to note that the proceedings for blacklisting the petitioner are pivoted on an allegation that the railway sleepers supplied by the petitioner pursuant to the contract dated 14.05.2012, were defective. The relevant extract of the show cause notice indicating the alleged defects is set out below:-

"(a) Incorrect Profiling and improper clear cover to HTS Standards;

As per the technical specifications and approved drawings, 18 no. HTS strands have to be provided with specific profile along the length of sleepers with clear cover of 37 mm in the bottom of strands & 27 mm on top. However, in several Sleepers strands are found not conforming to profile and specified clear cover.

Correct Profiling of strands and proper clear cover are very essential for pre-stressed concrete sleepers and quality lapses in this regard raises serious doubt over the Quality Assurance and Quality Control (QA & QC) system of M/s PRIL As no record is found regarding rejection of sleepers by M/s PRIL on account of incorrect profiling and improper clear cover, it is apprehended that lots of sleepers will be having such defects. Therefore, all the sleepers can be rejected over the possibility of existence of incorrect profile and improper clear cover to HTS stands in all sleepers until M/s PRIL proves beyond doubt that such defects are not present in sleepers. Pictures of above defects are enclosed as Pic-1 to Pic-4.

(b) Casting of foreign material with sleepers:

It is found that several undesirable foreign materials such as Wooden Battens, Brick Bats, Iron Bolts, Iron Plates, Binding wires, and Dusting Cloth etc. are casted with sleepers. It is surprising that such gross level of quality negligence is observed by M/s PRIL which claims to be largest sleeper supplier to Indian railways. Such gross quality lapses call for strict deterrent measure like banning of business and also de-listing from approved vender of RDSO.

(c) Use of poor quality ingredients for casting of sleepers:

In several sleepers upon exposing of concrete ingredient, it is found that very poor quality aggregates and used for production of concrete and Casting of sleepers. The photographs depicting above defects are attached as Annexure-A.

In view of the above, it is kindly requested to look into the matter and may please call the agency for explanation in this case. Your intervention on the matter is essential to take up the case to worthy conclusion."

25. Admittedly, the said defects were in the knowledge of IRCON at the material time. IRCON had also withheld certain payments due to the petitioner for the supply made on account of alleged manufacturing defects. As noticed above, this was a subject matter of disputes before the Arbitral Tribunal.

26. A perusal of the Award indicates that the petitioner had raised a contention with regard to the defects as alleged in the impugned notice. The Arbitral Tribunal has noted the case set up by IRCON in paragraph 14 of the Award. Sub-paragraph 14.4 of the Award clearly indicates that IRCON had raised an issue with regard to the defects as mentioned in the impugned cause notice. Paragraph 14.4 of the Award is set out below:-

"14.4 Quality Assurance plan (QAP) violations were notified by Respondent's representative after factory visit in March 2014. There were a number of defects in manufacturing and the same were advised to the Management of the factory. The details have been given in R-9 of RD1. Also there were a number of sleepers received at site where honey combing was there or where the aggregate used was of poor quality or where the Concrete cover above the HTS wire was inadequate. In one such case, a wooden batten was observed in a concrete sleeper. Photographs of some of such sleepers have been given in documents by the Respondent before the Arbitrator and also shown to the Arbitrator during his site visit. Upon query from the Arbitrator, the Respondent has furnished the number of such defective sleepers as 963 in document RD4. This reflects poorly on the quality of sleepers being produced by the Claimant. The Respondent also has pointed out some instance of loose strand in one sleeper which could have possibly happened due to breakage of strands or slipping of cone and wedge or insufficient force application or detensioning of sleeper before the concrete attained full strength. Continuing further, the Respondent states that the Claimant did not have cut off device of the pretensioning system as required in accordance with clause 4.2 of T-39 1985".

27. It was IRCON's case that the petitioner had supplied 963 number of sleepers that contained defects which are now listed in the impugned notice. However, it does not appear that IRCON had made any separate claim with regard to these sleepers. The case canvassed by IRCON before the Arbitral Tribunal was that such defects had also led to development of cracks in the sleepers supplied by the petitioner.

28. It is important to note that this contention was rejected by the Arbitral Tribunal.

29. The petitioner had challenged the Award by filing an application under Section 34 of the A&C Act. However, no specific ground was taken in the said application with regard to the afore-mentioned alleged defects. However, in the appeal preferred under Section 37 of the A&C Act against the order dated 12.03.2018 passed by the learned Single Judge, IRCON had specifically mentioned the defects, as are now alleged in the impugned notice and had

contended that the said defects had led to less flexural strength, and in turn caused cracks. Paragraph 9 of the Memorandum of Appeal filed before the Division Bench of this Court, (FAO(OS) (COMM) 104/2018) is set out below:-

"9. The Appellant has before the Ld. Sole Arbitrator, raised various quality control issues, in manufacture as well as certain defects in the Sleepers, received at site such as (i) Sleepers with inadequate cover, (ii) honeycombing, (iii) defective aggregates, (iv) Sleeper with batter, inside and some quality issues in manufacturing. The Ld. Sole Arbitrator has erroneously relying on the Expert Report has observed that none of these issues could manifest in cracks of this nature and further that none of the cracked Sleepers had any such defect. It is submitted that the said defects lead to less flexural strength and in turn cause cracks. The Ld. Sole Arbitrator has wrongly held that Sleepers had adequate strength as proved from various static bending tests."

30. In addition, IRCON had also annexed photographs of the defective sleepers indicating the defects that are alleged in the impugned notice.

31. In view of the above, it is not open for IRCON to now commence any proceedings which are premised on the allegation relating to manufacturing defects in the sleepers. Admittedly, the said defects were in the knowledge of IRCON at the material time and the issue relating to the said defects was raised before the Arbitral Tribunal, albeit, in the context of certain cracks that had developed in sleepers.

32. As noticed above, the contentions advanced by IRCON were not accepted by the Arbitral Tribunal. Clearly, in this view, it would not be open for IRCON to now commence proceedings for blacklisting the petitioner on the allegations of supplying defective railway sleepers after the IRCON had failed to prevail before the Arbitral Tribunal.

33. Even if, Mr Mehta"s contention that the issue of alleged defects was not a subject matter of disputes before the Arbitral Tribunal is accepted, it would, nonetheless, not be open for IRCON to initiate proceedings on the aforesaid allegations. The alleged defects were well within the knowledge of IRCON and had also been mentioned before the Arbitral Tribunal. The impugned notice is founded on the basis that the petitioner had breached its contractual obligations by supplying defective material. Undisputedly, the disputes with regard to supply of defective material fall within the scope of the arbitration clause and it was, thus, incumbent on IRCON to have raised the said dispute at the material time. It is certainly not open for IRCON to now commence proceedings for blacklisting the petitioner on the allegations regarding breach in the terms of the contract after having failed before the Arbitral Tribunal.

34. Even if the contention that such dispute was not raised before the Arbitral Tribunal is accepted (which this Court does not), the same is of little assistance to IRCON as it was incumbent upon IRCON to raise all such disputes at the material time.

35. In Prakash Atlanta JV (supra), a Coordinate Bench of this Court had set aside the order blacklisting the contractor as the allegations on which such action was premised was pending adjudication before the Arbitral Tribunal. It would not be open for IRCON to initiate a punitive action of blacklisting the petitioner on a contractual dispute in regard to which it is failed to succeed in an adjudicatory forum.

36. In view of the above, the present petition is allowed and the impugned notice dated 29.06.2016, as well as the impugned letter dated 17.10.2016, are set aside.

37. The pending application also stands disposed of.