

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 10.04.2018

+ **O.M.P. (COMM) 312/2016 & IA No. 8092/2016**

**CONTAINER CORPORATION OF INDIA
LTD**

..... Petitioner

versus

TITAGARH WAGONS LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr M.M. Kalra and Ms Sonali Kumar.

For the Respondent : Ms Maneesha Dhir, Ms Sharmistha Ghosh
and Mr Mahipal Singh.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter 'CONCOR') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 01.03.2016 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by Justice R. P. Gupta (Retired), Presiding Arbitrator, Shri A. K. Srivastava and Shri K. K. Sood. The impugned award was rendered by majority with one of the arbitrators, Shri K. K. Sood, entering a dissenting opinion.

2. The impugned award was rendered in respect of the disputes that had arisen between the parties in relation to the contract for supply of BLC Wagons. The respondent (hereafter 'Titagarh') had delayed the supply of the Wagons and in terms of the contract between the parties, CONCOR had deducted liquidated damages from the consideration paid to Titagarh. Titagarh claimed that the delay was on account of CONCOR and for reasons beyond its control and, therefore, the levy of liquidated damages was neither justified nor permissible. The Arbitral Tribunal (by majority) accepted Titagarh's contention, albeit, to the extent of 12 days. It held that Titagarh was not responsible for the delay of a period of 12 days as the same was attributable to reasons beyond its control and, therefore, covered under the *force majeure* clause. Accordingly, by the impugned award, the Arbitral Tribunal has directed release of the liquidated damages to the extent attributable as a result of the said delay of 12 days.

3. CONCOR claims that Titagarh was responsible for the delay and the impugned award is erroneous and contrary to the terms of the agreement.

4. Briefly stated, the controversy arises in the following context:-

4.1 CONCOR invited tenders for manufacture and supply of Two Hundred and Seventy BLC Wagons (6 rakes of 45 BLC Wagons each). Titagarh submitted its bid pursuant to the aforesaid invitation to tender, which was opened on 20.09.2005. Titagarh's bid was accepted and a Notification of Award (hereafter 'NOA') was issued on 02.11.2005.

Thereafter, on 23.11.2005, the parties entered into a formal agreement (hereafter 'the Agreement'). In terms of the NOA, Titagarh was obliged to supply the first rake of 45 Wagons within 150 days of the NOA. The balance rakes were to be supplied progressively at the rate of one rake per month. In other words, the second rake was to be supplied within a period of 180 days from the NOA; third rake was to be supplied within a period of 210 days from NOA; fourth rake was to be supplied within a period 240 days; fifth rake was to be supplied within a period of 270 days of the NOA; and the sixth and last rake was to be supplied within a period of 300 days of the NOA. The entire supply of six rakes was to be completed by 29.08.2006.

4.2 Admittedly, none of the rakes were supplied within the time as specified in the NOA. A tabular statement indicating the delay in supply of Wagons is set out below:-

S.NO.	Activity	Total Period	Contractual Period	Actual Date (Ref.)	Delay of Days
1.	Supply of 1 st rake	D+150	01/04/2006	22/06/2006	82
2.	Supply of 2 nd rake	D+180	01/05/2006	10/07/2006	70
3.	Supply of 3 rd rake	D+210	31/05/2006	26/07/2006	56
4.	Supply of 4 th rake	D+240	30/06/2006	06/08/2006	37
5.	Supply of 5 th rake	D+270	30/07/2006	02/09/2006	34

6.	Supply of 6 th rake	D+300	29/08/2006	25/09/2006	27
	Cumulative Delay				306 days

4.3 Clause 22 of the Agreement provided for levy of liquidated damages of a sum equivalent to 0.50% of the delivered price for each week or part thereof of the delay in actual delivery subject to a maximum deduction of 10% of the contract price.

4.4 According to CONCOR, the cumulative delay was 306 days and CONCOR withheld liquidated damages to the extent of ₹2,28,38,706/- on account of such delay, from the consideration payable to Titagarh.

4.5 Titagarh disputed that any amount was liable to be withheld as liquidated damages and further made several representations in this regard. However, the same was not acceded to. Thereafter, on 22.05.2008, Titagarh served a legal notice seeking refund of the liquidated damages. CONCOR responded to the same by denying that the levy of liquidated damages was unjustified. This led Titagarh to invoke the arbitration clause and the Arbitral Tribunal was constituted.

Impugned award

5. Before the Arbitral Tribunal, Titagarh filed a Statement of claims, *inter alia*, claiming a sum of ₹2,28,38,706/- on account of liquidated damages withheld by CONCOR alongwith interest at the rate of 18% p.a. with effect from the date of withholding of the said

amount till 31.07.2009 amounting to a sum of ₹1,22,86,097/-. Thus, Titagarh claimed an aggregate amount of ₹3,51,24,803/-. In addition, Titagarh also claimed *pendente lite* and future interest at the rate of 15% on the above claimed amount.

6. CONCOR filed its written statement countering the case set out by Titagarh. It also filed a counter claim claiming a sum of ₹5,59,99,777.2/- as loss of profits on account of delayed supply of Wagons.

7. Based on the rival contentions and pleadings, the Arbitral Tribunal framed the following issues for determination:-

- “1. Whether the claimant is entitled to refund of the LD, if so what amount?
2. Whether the delay on the part of the Claimant is covered under force majeure clause of the agreement or for reasons beyond their control as alleged?
3. Whether the Respondent has failed to approve the manufacturing drawings within the contractually stipulated period. If so to what effect?
4. What is the effect of Respondent having extended period of supply of wagons by various communications to Claimant?
5. Whether the Counter Claimant/CONCOR is entitled to recover loss of profits as claimed, if so at what amount?

6. Whether the Claimant or Respondent is entitled to any interest, if so at what rate and for which period?
7. Whether the Claimant is entitled to the Claims raised in the Claim Petition?
8. Costs.”

8. In respect of issue nos. 2 & 3, the Arbitral Tribunal (by majority) concluded as under:-

“43. Thus we find that the Claimant can only take credit for the delay of 12 days in final approval of the Working Drawings/Detailed Drawings. In counting delays of supply of any Unit as alleged by Respondent, the same have to be decreased by 12 days for calculating L. D. payable. No other delay committed by them is excusable on the ground of force majeure or lapse of the Respondent. Issues 2 and 3 are decided accordingly.”

9. After adjusting for the aforesaid delay of twelve days, the Arbitral Tribunal concluded that CONCOR ought to have charged ₹1,62,40,857/- as liquidated damages. Reducing the same from liquidated damages of ₹2,28,38,706/- charged by the COCNOR, the Arbitral Tribunal held that a sum of ₹65,97,849/- had been withheld in excess. Accordingly, the Tribunal directed a refund of the said amount along with interest at the rate of 6% per annum. This amount was computed as ₹35,79,327/- upto 31.12.2015. Accordingly, the Arbitral Tribunal awarded a sum of ₹1,01,77,167/- (₹65,97,849 + ₹35,79,327/-) in favour of Titagarh. The Arbitral Tribunal also awarded future interest at the rate of 6% per annum on the awarded amount, but directed that the same would be payable, in the event, CONCOR failed

to pay the awarded amount within a period of three months from the date of the award.

10. Mr K. K. Sood, one of the arbitrators, entered a dissenting opinion.

Submissions

11. Mr Kalra, learned counsel appearing for CONCOR contended that once the parties had admitted that there was delay in supply of the rakes, the Arbitral Tribunal could not interfere with the levy of liquidated damages. He pointed out that the Arbitral Tribunal had rejected the contention that CONCOR was responsible for delay and, therefore, no fault could be found with the levy of liquidated damages. He further contended that the time taken by M/s RITES Ltd. (hereafter 'RITES') to submit the detailed drawing was a matter between Titagarh and RITES and the same provided no reason for CONCOR to excuse the delay in supply of Wagons. He also referred to the dissenting opinion of Shri K.K Sood and submitted that Titagarh was solely responsible for the delay, as it had not made the payment to RITES, immediately on receipt of the NOA. Thus, the delay in receipt of drawings from RITES did not absolve Titagarh of the consequences of delay in supply of Wagons.

12. He also referred to the decisions of the Supreme Court in ***Oil & Natual Gas Corporation Ltd. v. Saw Pipes Ltd.: (2003) 5 SCC 705; K. P. Poulose v. State of Kerala: AIR 1975 SC 1259; M/s Ispat Engineering & Foundary Works v. Steel Authority of India Ltd.:***

AIR 2001 SC 2516; State of Rajasthan v. Nav Bharat Construction Co.: 2006 (10) SCC 86; Steel Authority of India Ltd. v. Gupta Brothers Steel Tubes Ltd.: 2009 (10) SCC 63 and The Iron & Steel Col. Ltd. v. MS Tiwari Road Lines: AIR 2007 SCC 2064 in support of his contentions.

13. Ms Dhir, learned counsel appearing for Titagarh countered the aforesaid submissions made on behalf of CONCOR.

14. She submitted that immediately on receipt of the NOA, Titagarh had sent a letter to CONCOR, *inter alia*, stating that it could manufacture bogies on the basis of drawings approved previously and requested for permission for waiver of manufacture of the prototype. Simultaneously, Titagarh also sent a letter to RITES requesting it to furnish latest drawings. She stated that CONCOR responded on 11.11.2005 calling upon Titagarh to furnish drawings as per the Agreement as there were some changes in key drawings and, therefore, Titagarh was required to submit the latest drawings. She stated that Titagarh submitted the drawings for approval on 16.11.2005. Thereafter, on 15.12.2005, RITES handed over two prints of drawings to Titagarh and Titagarh in turn submitted the drawings received from RITES on 20.12.2005. CONCOR approved the said drawings on 29.12.2005 and Titagarh commenced manufacturing of Wagons, thereafter. She submitted that in terms of the Agreement, the drawings were to be submitted within a period of 15 days from the NOA and the same were to be approved by CONCOR within a period of 30 days, thereafter. She submitted that the initial set of drawings was submitted

well within the time; however, there was some delay in submission of the drawings received from RITES, since the same were received only on 15.12.2005. She earnestly contended that in this view, the decision of the Arbitral Tribunal that Titagarh was not responsible for any delay up to 29.12.2005 cannot be faulted.

15. Ms Dhir also contended that the conclusion arrived at by the Arbitral Tribunal was based on findings of facts and, thus, the same could not be disturbed in these proceedings. She referred to the decisions of the *Supreme Court in Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49; Sumitomo Heavy Industries Ltd. v. Oil and Gas Corporation Ltd.: (2010) 11 SCC 296 and PR Shah, Shares & Stock Brokers Pvt. Ltd. v. B. H. H. Securities Pvt. Ltd. &Ors.: (2012) 1 SCC 594* in support of her contentions.

Reasons and Conclusion

16. It is apparent from the above that the controversy between the parties is limited to the conclusion of the Arbitral Tribunal that Titagarh was not responsible for the delay of 12 days and that the same was on account of *force majeure*.

17. Notice of Award (NOA) expressly provided that the Wagons would be manufactured as per the 'key drawings' listed in Annexure-1 of the bid document and the detailed drawings would be obtained by Titagarh on payment from RITES. Clause 5 of the NOA specified the delivery programme. Clauses 3 and 5 of the NOA are relevant and are set out below:-

“3.0 The wagons shall be manufactured and supplied to key drawings (listed in Annexure-1 at page 56 of the Bid Documents) and detailed drawings which shall be obtained by M/s Titagarh Wagons Limited on payment from RITES Limited, Mechanical Design Division, 5th Floor, RITES Bhawan, 1, Sector-29, Gurgaon-122001. However, if required in addition, the supplied shall prepare his own working drawings based on the above key and detailed drawings. The key drawings, detailed drawings and any such working drawings prepared by supplier for manufacture shall be furnished for approval of the purchaser within 15 days of the issue of this Notification of Award in terms of Clause 1.2.1 of Section-IV, Technical Specification (Page 42) and Section V Schedule of Requirements of the Bid Documents.”

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“5.0 **Programme of Delivery**

The delivery programme shall be in accordance with Schedule of Requirements, Section-V (pages 39 & 40). This shall be as under:

S.No.	Activity	Time Period
1	Issue of the Notification of Award (NOA)	D
2	Submission of the Manufacturing Drawings	D+15
3	Approval of Manufacturing Drawings	D+45
4	Offer of Prototype Unit (5 wagons) for inspection at the Manufacturer's Works	D+90
5	Completion of inspection of the Prototype at Manufacturer's Works	D+120
6	Series Production of equipment: Rake No.1 (Commencement with	D+150

	supply of First Rake of 9 Units)	
	Rake No.2	D+180
	Rake No.3	D+210
	Rake No.4	D+240
	Rake No.5	D+270
	Rake No.6	D+300

Note: In terms of Clause 1.6 of Section-VI, Technical Specifications, the Supplier shall manufacture one prototype 5-Car unit for inspection and approval of the Purchaser or his authorized representative before commencement of series production.”

18. As stated above, the NOA was issued on 02.11.2005 and, therefore, in terms of the delivery programme as set out in Clause 5 of the NOA, the manufacturing drawings were required to be submitted by Titagarh within a period of 15 days of the NOA, that is, by 17.11.2005. CONCOR was required to approve the same within a period of 45 days of the NOA, that is, by 17.12.2005.

19. There was no dispute that RITES had sent detailed drawings to Titagarh on 15.12.2005 and the said drawings were necessary for Titagarh to submit the working drawings. Admittedly, Titagarh had submitted the working drawings on 20.12.2005, which was approved by CONCOR on 29.12.2005. The principal controversy to be addressed was whether there was any delay attributable to Titagarh in securing detailed drawings from RITES. In this regard, Titagarh produced a letter dated 07.11.2005 (apparently sent within 5 days of the receipt of the NOA) requesting RITES to furnish the latest drawings. Although, this letter is disputed, the Arbitral Tribunal (by

majority) has accepted the same. It was contended on behalf of CONCOR that (a) Titagarh was responsible of procuring the drawings from RITES, as the same was a part of executing the Agreement, and CONCOR was entitled to recover liquidated damages for any delay in performance of the Agreement; (b) that there was delay on the part of Titagarh, as it had not made the necessary payment to RITES.

20. Insofar as the first contention is concerned, the Arbitral Tribunal referred to Clause 24 of the General Conditions of the Contract (GCC) (Force Majeure clause) and emphasized that any event beyond the control of the supplier would qualify as *force majeure*. Clause 24 of the GCC is set out below:-

“ 24. Force Majeure

24.1 Notwithstanding the provisions of Clauses 21, 22, 23, the supplier shall not be liable for forfeiture of its performance security, liquidated damages or termination for default, if and to the extent that, its delay in performance or other failure to perform its obligations under the contract is the result of any event of Force Majeure.

24.2 For the purpose of this clause, “Force Majeure” means an event beyond the control of the supplier and not involving the supplier’s fault or negligence and not foreseeable. Such events may include, but are not limited to, acts of the Purchaser in its sovereign capacity, wars or revolutions, fires, floods, epidemics, quarantine restrictions and freight embargoes.

24.3 If a Force Majeure situation arises, the supplier shall promptly notify the Purchaser in writing of such conditions and the cause thereof. Unless otherwise directed by the

Purchaser in writing, the Supplier shall continue to perform its obligations under the Contract as far as is reasonably practical and shall seek all reasonable alternative means for performance not prevented by the Force Majeure event.”

21. It is apparent from the above that it was not necessary for Titagarh to establish that the delay had been caused on account of the default on the part of CONCOR, and any delay for reasons qualifying as a force majeure event – that is, *event beyond the control of the supplier and not involving the supplier’s fault or negligence and not foreseeable* – would not attract the levy of liquidated damages. The Arbitral Tribunal had also rejected the contention that there had been delay on the part of CONCOR; however, the majority arbitrators, accepted that the delay in receipt of the drawings from RITES was beyond the control of Titagarh and, therefore, would qualify as a force majeure event in terms of Clause 24.2 of the Agreement.

22. Plainly, the said view can by no stretch be held to be perverse or contrary to the terms of the Agreement. Thus, this Court does not find that any interference with the impugned award is warranted in these proceedings under Section 34 of the Act.

23. In terms of Clause 24.3 of the Agreement, Titagarh was required to inform CONCOR in writing of any such condition that would constitute a force majeure event. The Arbitral Tribunal held that Titagarh had forwarded the drawings on 20.12.2015 for approval and the same were approved on 29.12.2005. This, according to the Arbitral Tribunal, obviated the necessary obligation on the part of Titagarh to

impress CONCOR of the force majeure event. Although, in terms of Clause 24.3 of the Agreement, Titagarh was obliged to promptly notify CONCOR of any force majeure event, the fact that no such formal notification had been issued does not necessarily imply that Titagarh was precluded from establishing occurrence of a force majeure event and stood disabled to contest any liability of liquidated damages resulting from such event. The Arbitral Tribunal found, as a matter of fact, that the delay in submission of drawings was for reasons beyond the control of Titagarh. This finding is not amenable to judicial review under Section 34 of the Act because the said finding is based on sufficient material and cannot be held to be perverse or wholly unreasonable so as to fail the *Wednesbury* test; that is, no sensible person could have arrived at such a conclusion.

24. Mr Kalra, had emphasized that Shri K. K. Sood had taken a contrary view in his dissenting opinion. However, this would be of little assistance to CONCOR; since, the findings of the majority in the impugned award cannot be held to be patently illegal or contrary to the Public Policy of India, the impugned award cannot be set aside in these proceedings. The scope of judicial review under Section 34 of the Act is limited and it is not permissible for a Court to re-appreciate the evidence and supplant its opinion over that of the Arbitral Tribunal. An arbitral award can be set aside only on the grounds as set out in section 34 of the Act. All the decisions cited by the learned counsel for the parties also underscore the above principle.

25. In view of the above, the present petition is unmerited and is, accordingly, dismissed. The pending application is also disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

APRIL 10, 2018
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