Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION (L) NO. 1372 OF 2019

Elegant Forge & Equipment Pvt Ltd ...Petitioner
Versus
Shree Ganesh Forging Ltd ...Respondent

Mr Alankar Kirpekar, *with Sagar Kasar, Amol Wagh & Shekhar Bhagat, i/b Sagar Kasar, for the Petitioner.*
Mr Kunal Dwarkadas, *with Aurup Dasgupta, & Jinal Vani, i/b Jhangiani, Narula & Associates, for the Respondent.*
Mr DG Kher, *Court Receiver is present.*
Mr A Malvankar, *Section Officer from the Office of Court Receiver, is present.*
Representatives of the Petitioner and the Respondent are both personally present in Court.

CORAM: G.S. PATEL, J.
DATED: 9th & 10th December 2019

PC:-

1. On 18th November 2019, I passed the following order:

> "1. The parties entered into a Memorandum of Understanding ("**MoU**") dated 5th April 2019. A copy is at Exhibit "B" to the Petition. Clause 19 provides for a resolution of disputes by an arbitration according to the Arbitration and Conciliation Act, 1996. Clause 20 says that the Courts in Mumbai, where this MoU was executed, will have jurisdiction. **The MoU proposed the sale by the**

respondent company to the petitioners of the respondent's plant and machinery at its factory at Trans Thane Creek Industrial Area of MIDC, Thane Belapur Road, Pawane, Navi Mumbai 400 705. This was to enable or assist the the respondent in clearing its dues to the State Bank of India.

2. **A list of the machinery is annexed at Schedule I from pages 29 to 37**.

3. The submission by Mr Kirpekar for the petitioner is that now that disputes have arisen between the parties, the petitioner should be entitled to remove this machinery for its own use or for disposal in such manner as the petitioner thinks fit.

4. **Mr Dasgupta for the respondent makes a statement on instructions that the petitioner is at liberty to remove the machinery, and has always been at liberty to do so. To this, Mr Kirpekar's response is that every time the respondent has attempted to do so, there has been some obstruction on site.**

5. That is one problem. **The second is that parties do not seem to be in agreement as to how much of this list at Schedule I has already been removed by the petitioner**.

6. Until then, the respondent makes a statement in terms of prayer clause (c). This is noted and accepted.

7. **Once the Court Receiver has submitted a report on this inventory, I will make a further order regarding the removal by the petitioner of available equipment and issue further directions in regard to any disputed items.**

8. The Court Receiver is requested to submit his report within a week.

> 9. List the matter on 9th December 2019.
>
> 10. Authorised representatives of both sides are at liberty to remain present when the Court Receiver makes his inventory. The Court Receiver will give notice of his visit to the Advocates for the petitioner and Advocates for the respondent at least five days in advance."

(*Emphasis added*)

2. Notably in this order Mr Dasgupta who then appeared for the Respondent did not have instructions to say, and did not say, that there was a single item of machinery at site that was *not* the subject matter of the agreement, i.e. items over which the Petitioner had no claim and which belong to the Respondent exclusively. The only disagreement was on which items *had already been removed* by the Petitioner. It is for that reason that the Respondent made a statement in terms of prayer clause (c), which contains a reference to the machinery listed at Schedule I to the MoU in question.

3. Following the previous order, the Court Receiver went to the site. There is a compliance report and an inventory of 47 pages. Distinct items are listed. The number of units of each item are also noted. The remarks column notes which of the items are available at site. However, in some cases — though not all — the remarks include not just the existence of the machine at site, but also certain other details.

4. Mr Dwarkadas for the Respondent now attempts an argument on instructions that there are indeed items that are beyond or outside the list or schedule annexed to the MoU. He is instructed to say that these additional items belong to the Respondent and are not the subject matter of the agreement. As an example, he points to item 17 at page 3, a Robotic Gantry Automation System for Flange Component on the Machining Line. The remark is this is available with 'Fanuc Robot 3 numbers with operating panels Fanuc robot grip & electrical panels with stabilizer'. Mr Dwarkadas's instructions are to state that there was only one robot, not three; or one robot arm, not three.

5. On its own, this argument is without substance for several distinct reasons. First, there are no exclusions to the MoU itself. The very item appears in the schedule to the MoU. It is shown as having something called lines. Whether or not these are robot arms is irrelevant. Nowhere has the respondent said either in the agreement, or on the last occasion before me, or in any correspondence prior to the filing of the petition that there exist on site items that are outside the subject matter of subject MoU.

6. The reason this could not have been said, and cannot be said, is clear from the first recital in the agreement itself. The whole of the Respondent's plant and machinery was collateral security to a consortium of Banks led by the State Bank of India. The entire purpose of this agreement was to be able to put the Respondent in funds to clear its debt. In fact, recital 2 at page 23 makes it clear that this consideration was to be paid by the Petitioner directly to the State Bank of India. This is how clause 2 reads:

> "2. The Vendor approached the Purchasers and offered the Purchasers to sell its plant and machineries with a view to clear part of its liabilities towards SBI. Accordingly, negotiations took place between the Vendor and Purchasers. It was agreed by and between the Vendor and Purchasers that the Vendor would sell the plant and machineries to the Purchasers for a consideration of an amount of Rs. 17.50 crores. In pursuance to said deal, it was agreed between both the parties that the Purchasers would pay an amount of Rs. 17.50 crores to SBI on behalf of Vendor in respect of part of dues under OTS scheme and in consideration the Vendor would sell the plant and machineries to the Purchasers after obtaining the comfort from Asrec Assets Reconstruction Company & Invent Assets Reconstruction Company (herein after referred to as AR's for short)."

7. There is no mention anywhere of any item being excluded.

8. The other reason this argument cannot be accepted is that this item at page 3 is not the only one with an additional description. There is, for example, at item 7, an air compressor available at site with a motor. It is nobody's suggestion that the motor is separate from the machine. This is also true of a vertical milling machine at item 13, which is said to be available at site with a motor and an operating panel. If it is the suggestion of the Respondent that the motor and the operating panel are separate items, then that is an argument to be stated to be rejected. If this line of argument is to be accepted, it is difficult to understand what, if anything, is to be made of the remarks in relation to item 6 at page 2, a furnace available with a heating and pumping unit and a blower. A furnace without a heating pumping unit and a blower is merely a box and is useless to almost everybody. The Petitioner was hardly like to throw good money for scrap.

9. Mr Dwarkadas seeks time to take instructions or to put on affidavit material showing that these additional items belong to the Respondent. I have refused the slightest adjournment. This entire argument seems to me to be a latter day epiphany conjured up to delay the delivery of the machine — a complaint that, as we have seen, Mr Kirpekar made on the first day. If the Respondent had any material to support what he instructs Mr Dwarkadas to say, then he should have had that documentation, or copies of it, in Court. He could have filed an affidavit. He has done nothing of the kind and only seeks time. Of course, it is not accident that this is done with barely a few days left in the rest of this court term.

10. Clearly, the attempt is to take advantage of a detailed noting made by my Court Receiver, and nothing else. Until that happened, the Respondent did not once say that any single item of machinery, or anything attached to any machinery, fell outside the ambit of the MoU.

11. In any case, I am now firmly of the view that the current practice of arriving in court and arguing something and then seeking adjournments 'to take instructions' is nothing but a deliberately dilatory ploy or tactic. It happens too often, and it must now. It must be deprecated. If a party instructs his lawyer to argue something then it is not reasonable to expect that his lawyer must be given something more than a mere say-so, i.e. must be furnished with supporting materials on which to make that argument. The practice also assumes that courts have nothing at all to do but crowd the next day's listing with today's spilled over matters. It is one thing to take time on an unexpected aspect that comes from the other side (or from the court itself, as sometimes happen). It is quite another, and wholly unacceptable, for a party to send his lawyers into battle unarmed with what is obviously necessary.

12. Mr Dwarkadas is also instructed to say that these so-called 'additional' items are expensive. That reinforces my view, for if indeed that be so, the Respondent must have had the necessary supporting material, ought to have had it in court, and ought to have shown it to Mr Dwarkadas and Mr Dasgupta. And nothing explains why this realization came to the Respondent only now, *after* my order of 18th November 2019, and why he did not instruct Mr Dasgupta to say this in the first place on that day.

13. Had there been such excluded items, given the detailed and comprehensive listing in the Schedule to the MoU, these would certainly have been listed as items not to go to the Petitioner. There is no such list of exclusions. It follows, therefore, even at the date of the MoU, the Respondent made no such claim.

14. Further, the Respondent would also then have to show, given the recitals in the MoU, that these so-called 'additional' items were not secured to SBI, were not collateral, and were excluded from the debt the Petitioner discharged on the Respondent's behalf. This, too, is not shown.

15. The last submission that the Respondent should be 'given an opportunity to make good' his case overlooks all these aspects. It also overlooks that these are *commercial* arbitration matters, covered by a dedicated statute, the essence of which is a speedy and fast-track disposal. That statute does not lend itself to the leisurely filing of endless affidavits only to delay the matter.

16. Had the Respondent been able to point to a single document, facet or circumstance that even prima facie supported what he instructs Mr Dwarkadas to say today, or brought to court a single piece of paper to show the exclusion of these so-called additional items from the Schedule to the MoU I might have considered a very short adjournment. But I refuse to do so to allow the Respondent time to drum up something he should and ought to have had in court today, and certainly could have said at the very first opportunity.

17. Barring oral instructions to Mr Dwarkadas, there is simply nothing at all.

18. In any case, if the Respondent does have any counter-claim for the value of these so-called additional items, it can always make it in arbitration subject, however, to all arguments under Section 16 of the Arbitration and Conciliation Act 1996. Of course, the

Respondent will still have to prove their exclusion from the Schedule to the MoU.

19. At this stage, I have not allowed to the Petitioner to remove the goods but by my previous order directed the Court Receiver to make a report. The Petitioner will now remove the goods under the supervision of the Court Receiver. The removal process will begin from 8.00 am on 11th December 2019 and will continue during daylight hours each day until completion. Costs of the removal are to be borne in the first instance by the Petitioner, subject to a claim in arbitration for recovery of these costs.

20. The agreement in question demonstrably has an arbitration provision in clause 19, which reads thus:

> "19. Any dispute arising out of or in relation to or in connection with this MEMORANDUM OF UNDERSTANDING shall be referrable to an Arbitrator as per the provisions of the Arbitration and Conciliation Act 1996."

21. By consent, parties agree on the nomination of Mr Gautam Ankhad, an Advocate of this court to decide the disputes and differences between the parties arising from the MoU dated 5th April 2019.……… [1]

22. The Court Receiver's compliance report is noted.

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1 Sub-paragraphs deleted in view of the additional order from paragraph 26 onwards.

23. The Court Receiver's costs, charges and expenses will be borne at the first instance by the Petitioner, subject to claim in arbitration for recovery. Similarly, the costs of this Arbitration Petition may also be recovered in the arbitration.

24. Mr Dwarkadas seeks stay of the order for removal of machinery. For reasons that suggests themselves, the application is rejected.

25. The Arbitration Petition is disposed of in these terms. There will be no order as to costs.

10th December 2019 at 3:00 pm:

26. I passed the foregoing order yesterday afternoon in Court. At 11.00 am this morning, it was mentioned after notice. The complaint, and regrettably there is no other word for it, was that my order had 'not been uploaded yet'. It is difficult to find sufficient words to deprecate this short of describing it as an unacceptable attack on the Court. I do not know what else to make of it. The order itself was dictated in Court yesterday. It was transcribed in full that very day in keeping with my regular practice. It was send to me in soft copy along with nearly 40 other orders also passed yesterday. I corrected all these personally and sent them back to my staff at about 11.00 pm. These were then printed out this morning, checked, signed, and given to the staff to prepare for despatch by 11.00 am this morning. That is my routine and I do not make any exceptions unless there is an absolute emergency. There was no such emergency and I do not see how it is possible in the normal circumstances to turn around a day's order any faster than this. The despatch by the staff itself takes time because every matter has to be entered in a separate despatch register and properly logged before it is uploaded. Whatever be the Respondents' anxiety, it cannot used by either him or on his instructions by his Advocates to quite literally pillory the Court. I trust this will not happen again. I am letting it pass with this comments, but I am doing so only this one time.

27. Since he made this application, I asked Mr Dasgupta whether I should treat this as his oral application for a recall or modification of the order, and, if so, would hear both sides at 3.00 pm. He accepted, and said he would give notice to Mr Kirpekar, which he has done.

28. At 3.00 pm I heard both sides extensively. The Respondent is personally present in Court.

29. The same arguments that were made yesterday are repeated. I am shown a spreadsheet of unknown origin and provenance. Its base or supporting documents are undisclosed. It is unsigned and undated but appears to have been prepared only after the Court Receiver's inventory. This is clear from the contents of this spreadsheet itself. This is taken on record and marked 'X1' for identification with today's date.

30. The argument from Mr Dwarkadas is that the MoU in recital 3 was limited to the items set out in Schedule I to it. The Court Receiver's inventory mentions other bits and pieces of machinery which Mr Dwarkadas generously calls 'accessories'. He says that were therefore never part of the agreement.

31. What the argument overlooks is this:

> "3. The Vendor has agreed to sell and the Purchasers have agreed to purchase its **<u>complete</u>** Plant & Machineries set out in Schedule 1, lying at the Vendor's premises upon the following terms and conditions."

(*Emphasis added*)

32. Mr Dwarkadas ignores the 'complete' and relies only on the words 'Schedule 1'. That is untenable. The agreement was in respect of the *complete* plant and machinery. As I said yesterday, recital 2 also said that the agreement was in respect of a purchase by the Petitioner of the Respondent's plant and machinery with a view to clear part of the Respondent's liability to the State Bank of India. How much exactly has the Petitioner has paid the State Bank of India? Mr Kirpekar totals up the amount including GST and an amount paid to the Respondent presumably as a little on the top and this amount is in excess of Rs. 20 crores. The Respondent is in no position to bring back any part of this amount.

33. Mr Dwarkadas invites my attention to Exhibit "A" which is a copy of the e-auction sale notice issued by the State Bank of India through its Stressed Assets Management Branch I. Obviously, the whole of the Respondent's property was collateralized to the State Bank of India. This included in Lot-I the immovable property of 16,329 sq mtrs at a reserved price of Rs. 78.78 crores with the entire plant and machinery. Lot-II was only the land and building and this had a reserved price of Rs. 56.78 crores. Lot-III was only the 'entire plant and machinery' with a reserved price of Rs. 22 crores.

34. What the submission overlooks are the terms and conditions of the e-auction at page 19 which make it clear that what was sold was on 'as-is-where-is' and '*as-is-what-is*' basis.

35. If the Respondent's version is correct, then, there must have been items which have been excluded from the auction and should have been specifically noted. This is nobody's case and there is not the slightest evidence of it even today, i.e. after being given a fifth opportunity to produce any such material. More than that, there ought to have been an exclusion even in the MoU.

36. What Mr Dwarkadas asks me to do is to arrive by a process of necessary implication at a conclusion that certain items were excluded from the MoU. That can never be. If the MoU speaks first of all or *complete* plant and machinery, then lists some plant and machinery, and the submission is that some plant and machinery lies outside the purview of the agreement, then any such exclusion must be specifically mentioned. It can never be inferred.

37. The argument is also wholly illogical because the inventory prepared by the Receiver and which, as I noted, run into some 47-

odd pages has different types of entries in the remarks column. Mr Dwarkadas would have it that only those items which have no qualifications or additions in the remarks column can be lifted. For example at page 2 item 8 is an air compressor and is said to be available in three units. But this is meaningless because it assumes that on the same page, a power press which is noted as being available with an electric motor is an item such that the MoU and the State Bank of India auction notice only covered the machine, i.e. the power press but not the motor. What a power press without a motor can conceivably be I cannot imagine. The same thing goes for the items described as 'furnace', for which the Respondent says the heating pumping unit and blower are excluded and not to be sold. If the item is a furnace and it does not have a heating pumping unit and a blower then it is quite simply not a furnace. It is just a box or more likely scrap. This kind of thing goes on endlessly to include includes furnaces, air receivers, blowers, compressors, cooling towers, lathe machines etc.

38. Indeed, it is not shown that any of these items are 'accessories' at all. They are components. The Respondents' argument is like saying that an air-conditioner can be lifted, but not its compressor; a room heater but not its heating coil; a ceiling fan without its rotor blades and motor; a washing machine without its drum. What is in fact being alleged is that Schedule I lists only the machines but not their 'accessories' and by this word 'accessory' I am suppose to understand essential integral and core parts as well, which are the heart of the machines. What, for example, is to be made of a compressor without a motor, a furnace without a heater or a lathe machine without a motor and a chuck? Carrying the analogy further, if the agreement is for sale of a motor car, according to the Respondent, this excludes its engine, steering wheel, pedals and everything else that is required to be make it a motor car (let alone an 'as-is-where-is' and 'as-is-what-is' motor car).

39. The purpose of appointing a Court Receiver was entirely different and was not intended to arm the Respondent with additional material to delay delivery. The complaint by Mr Kirpekar on the first day itself was that the Respondent was not making delivery. The only response was that there was a lack of clarity about which items had already been taken *by the Petitioner*. Nobody could point to this with any certainty and it is for that reason and that reason alone that I required an inventory to be made. It was not, as I noted in my order yesterday, anybody's case at any time on 18th November 2019 any items were excluded. Had that been stated, I should have noted it and had I inadvertently failed to do so surely an application for modification or speaking to the minutes could have been made. None of this was done.

40. Finally, it cannot be accident that the very first time that such a complaint comes to be made on record here is after the Receiver has completed the inventory. Mr Dwarkadas points to two letters from the Petitioner, both dated 10th May 2019 to urge that the Petitioner accepted the Respondent's contentions. In the first of these, the Petitioner wrote to the Respondent saying it was proceeding to take away the entire plant and machinery at this site. The second is said to be an email correspondence speaks of the plant and machinery as per Schedule I 'as-is-where-is' lying at this particular site. Mr Dwarkadas would have it on instructions that this was because the Respondent allegedly pointed out that there were other items not part of the MoU or the auction sale notice by the State Bank of India. This is equally surprising. If the Respondent does in fact say this then I would at the very least expect an email from the Respondent tot he Petitioner pointing this out. There is none. I am asked only to look into the difference in the wording in these two letters, both from the Petitioner, where the Petitioner refers in the second email to Schedule 1. But, as we have seen, there is nothing to show there is a list of excluded material, or that that the Petitioner knew that there was excluded so-called accessories. No such conclusion is possible. The two letters shown to me are taken on record and marked "X2" and "X3" for identification with today's date.

41. There is also no explanation why the Respondent has a complete absence of any documentation or records, correspondence, emails, inventory, stock lists or any kind of record whatsoever to show this alleged exclusion.

42. The second letter of 10th May 2019 in fact goes against the Petitioner because it is even wider than the first. It says that not only the items in Schedule I (which is a complete list and has no exclusions) but also says everything 'as-is-where-is' lying at Shree Ganesh Forgings Ltd which means that each and every thing lying there is to be removed now.

43. What is more interesting is what the Respondent does *not* say. He does not say that there is a stand-alone piece of machinery that is excluded because the machine itself is not listed in Schedule I to the MoU. I asked Mr Dwarkadas to show me even one such instance. He could not, and said there was no such information. Had that been shown, I would have accepted it.

44. I asked Mr Dwarkadas to produce even one invoice for any so-called accessory purchased after the date of the MoU or after the SBI e-auction notice. His client's representative is in Court. On instructions, Mr Dwarkadas agrees that his client has no such invoice.

45. One thing is evident. The Respondent has received significant monetary benefit from the Petitioner. There may be disputes of this or that machine and this can go to arbitration, and there may be other claims as well, but what the Respondent is now attempting to do is not only to retain the money or the benefit of that money that the Petitioner paid but also the equipment that the Petitioner paid for under the MoU. The result is clearly an opposition that is not only entirely without merit but is in its essence dishonest and should not be contemplated by any Court for an instant. It is troubling to see how far we have distanced ourselves from a time when a simple handshake would constitute a binding contract. Now even a written agreement, fully paid up, is sought to be reneged on. The Respondent cannot have both the Petitioner's money and the machines, or any parts of those machines.

46. The Respondent can also no longer be heard to complain of a lack of opportunity to put forward its case. It is on account of the Respondent's Advocates' request that I have had to spend another hour on this matter this afternoon. With the Respondent's only representative present in Court, I have encouraged his Advocates to ask him to produce the relevant material or at least to say whether he has it. He simply does not have any supporting material. There is, therefore, nothing that an adjournment will achieve. Other than putting on record this spreadsheet which is entirely subserving and prima facie dishonest, the Respondent has nothing.

47. I see no merit at all in the opposition.

48. The one thing remained was directions with regard to the Receiver. I will, therefore, now make an order in these circumstances on the petition in terms of prayer clauses (a), (b) and (c), which read thus:

> "(a) Pending the hearing and final disposal of the arbitration proceedings or at any time after the making of the Arbitral Award but before it is enforced in accordance with Section 36 of the Arbitration and Conciliation Act 1996, Court Receiver, High Court, Bombay be appointed as a Receiver under Order XL Rule 1 of C.P.C. in respect of the plant and machineries more particularly described in Schedule-1 of the said MoU dated 5th April 2019 at Exhibit "B" to the Petition hereto, with a direction to take possession of the said properties without giving notice of their visit to the Respondent and for that purpose, this Hon'ble Court be pleased to direct the Concerned Police Station to render Police Assistance for the purpose of taking

possession of the said properties and hand it over to the Petitioners and Petitioners be allowed to dismantle, remove, loading and unloading of the said plant and machineries;

(b) Pending and hearing and final disposal of the arbitration proceedings or at any time after the making of the Arbitral Award but before it is enforced in accordance with Section 36 of the Arbitration and Conciliation Act 1996, and after appointment Court Receiver as prayed for in prayer clause (a) the Petitioners be appointed as agent/s of Court Receiver during the period of dismantling, removal, loading and unloading of the said plant and machineries;

(c) Pending and hearing and final disposal of the arbitration proceedings or at any time after the making of the Arbitral Award but before it is enforced in accordance with Section 36 of the Arbitration and Conciliation Act 1996, the Respondent and their respective servants and agents be restrained by an order and injunction of this Hon'ble Court in any manner parting with possession, creating third party rights, alienating and/or encumbering with said Schedule-1 of the said MoU dated 5th April 2019 at Exhibit "B" to the Petition;"

49. The Court Receiver will continue until the entire plant and machinery is removed. The Court Receiver is not to sell the machinery. The Petitioner will, in the first instance, pay all costs, charges and expenses of the Receiver including during the making of inventory. The Court Receiver will invoice the Petitioner directly. Liberty to the Petitioner to include these costs in the claim in arbitration.

50. It is clarified that the Court Receiver will be at liberty to take assistance from the local police station. The officer in charge of the Turbhe Police Station will render all necessary assistance to the Court Receiver, acting on production of an authenticated copy of this order.

51. Mr Dwarkadas does say that he has no instructions to consent to the arbitration and there has been no invocation as yet. This is correct and, therefore, paragraphs 21 of the order passed yesterday will stand deleted.

52. The arbitration petition is disposed of in these terms, noting and accepting Mr Kirpekar's undertaking that the Petitioner will invoke arbitration within 90 days from today.

53. Mr Dwarkadas renews his application for stay of the order. There is nothing to stay. His client is in Court and is unable to provide a single piece of meaningful instructions. The application is rejected.

54. And to put too fine a point on it, no application for an early release of this order will be entertained. If any such application is made, I will impose costs on the advocates themselves. The advocates will have this order once it is uploaded in the normal course, and not a minute before.

(G. S. PATEL, J)