

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 02.08.2021

Date of Decision: 11.08.2021

+ **FAO(OS)(COMM) 97/2021 & CM APPLs. 23582-83/2021**

BENTWOOD SEATING SYSTEM P LTD.Appellant

Through Mr.S.D.Singh with Mr.Rahul
Kumar Singh, Mr.Jitender
Singh and Ms.Meenu Singh,
Advs.

versus

AIRPORT AUTHORITY OF INDIA Respondent

Through Mr.K.K.Rai, Sr. Adv. with Mr.
Digvijay Rai, Mr.Aman Yadav,
Ms.Sreoshi Chatterjee and
Mr.Ramkrishna Veerendra,
Advs.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J.

1. This appeal has been filed by the appellant under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the judgment and order dated 27.05.2021 passed by the learned Single Judge of this Court in O.M.P. (COMM) No.262/2019, titled *Airports Authority of India vs. Bentwood Seating*

System (P) Ltd., allowing the said petition filed under Section 34 of the Act by the respondent.

2. The above petition was filed by the respondent herein under Section 34 of the Act challenging the Arbitral Award dated 13.03.2019 passed by the learned Sole Arbitrator in arbitration case reference No. DIAC/2225/09-18 between the parties. By the Impugned Judgment, the learned Single Judge has been pleased to allow the said petition and set aside the Arbitral Award on the ground that the learned Arbitral Tribunal has failed to decide one of the principal disputes between the parties in relation to the submission of the respondent that the purchase order dated 13.07.2017 (hereinafter referred to as 'Purchase Order') issued by the respondent in favour of the appellant had been procured by the appellant by fraud.

3. The dispute between the parties arises out of the Purchase Order dated 13.07.2017 placed by the respondent on the appellant for supply of 4000 Stainless Steel Type Passenger Baggage Trolleys (hereinafter referred to as 'PBTs'). It need only be noticed that the respondent issued a Show Cause Notice dated 08.01.2018 to the appellant, calling upon the appellant to show cause why the contract should not be terminated as only 550 PBTs had been supplied till that date. The appellant replied to the Show Cause Notice on 17.01.2018, however, the respondent terminated the Purchase Order on 20.02.2018. The respondent also invoked the Bank Guarantee furnished by the appellant and debarred the appellant for a period of three years with effect from 20.02.2018 from participating in any tender of the

respondent in future. Aggrieved of the above, the disputes between the parties were referred to arbitration under the aegis of the Delhi International Arbitration Centre.

4. Before the learned Arbitrator the appellant prayed for the following reliefs:

- “(a) declare the action of the Respondent authorities as taken by them vide letter dated 20.2.2018, for cancelling/terminating the purchase order /contract No.5-C/1/2016-ARII (Tech.)/ PBT/ 262 for forfeiting the security deposit and blacklisting and debarring for a period of three years, being null and void and unsustainable in the eyes of law and the same be quashed accordingly and directions be issued to take supply of the 3450 PBTs by complying with the terms and conditions of the contract as per the LOI dated 13.7.2017 and agreement dated 30.8.2017;*
- (b) declare the action of the Respondent No.2 vide his communication dated 23.2.2018, for invocation of the Bank Guarantee, as null and void and directions be issued to return the Bank Guarantee being B.G. No.0262BG000162017 for a sum of Rs. 17,30,124.31 to the claimant*
- (c) award a sum of Rs.10,95,98,851/- in favour of the Claimant against the Respondents with the pendent lite interest @ 18 % per annum till its realization;*
- (d) award the cost of the present proceedings”*

(Emphasis supplied)

5. The learned Arbitrator vide the Award dated 13.03.2019 was pleased to set aside the termination order dated 20.02.2018 of the respondent, including the invocation of the Bank Guarantee as also the action of debarring the appellant. The learned Arbitrator also granted specific performance of the contract in the following terms:

“In view of the above, the Respondent - AAI is directed to carry out a one-time pre-dispatch inspection of the balance 3,100 stainless steel PBT's, allegedly available at the premises of the contractor/Claimant - BSS Ltd., at Kolkata, after giving an advance notice to the Claimant - BSS Ltd., within four weeks from the date of receipt of the instant Award. For such of these (-3,100 stainless steel PBT's) as are found to be in order, along with the 350 stainless steel PBT's (-inspected on 18.12.2017), which were sealed by the Respondent (at the factory premise of the Claimant - BSS Ltd. on 18.12.2017), the Respondent shall issue a 'clearance certificate', within a further period of two weeks. Thereupon, the stainless steel PBTs' will be dispatched by the Claimant – BSS Ltd., to the locations/airports indicated afresh by the Respondent - AAI, in consonance with the contractual agreement/purchase order, dated 13.07.2017. The Respondent - AAI shall release all payments in lieu thereof to the Claimant - BSS Ltd., in consonance with the contractual agreement/purchase order, dated 13.07.2017.”

6. The learned Arbitrator further directed payment to the appellant for 550 PBTs supplied by the appellant in November, 2017, alongwith interest at the rate of 10% per annum as also the refund of the Bank Guarantee amount alongwith the same rate of interest.

7. The Arbitral Award was challenged by the respondent before the learned Single Judge in form of the above-mentioned petition filed under Section 34 of the Act.

8. The learned Single Judge vide his Impugned Judgment dated 27.05.2021 upheld the finding of the learned Arbitrator insofar as it had set aside the termination notice dated 20.02.2018 of the respondent, however, still set aside the Arbitral Award by holding that the learned Arbitrator had failed to adjudicate on one of the essential issues, which was as to whether the Purchase Order had been procured by the appellant by fraud. The learned Single Judge further held that this was not a case where the reasons for the conclusion were sketchy or required a clarification, but one where the learned Arbitral Tribunal has not decided one of the principal disputes between the parties. He held that this defect cannot be cured by taking recourse to Section 34(4) of the Act.

9. The learned counsel for the appellant submits that the learned Single Judge has failed to appreciate that the submission of the respondent that the Purchase Order had been obtained by the appellant by fraud had been duly considered by the learned Arbitrator and deemed to have been rejected. In this regard he placed reliance on paragraph 24 of the Arbitral Award, wherein *inter alia* the following submissions of the respondent was recorded:

“.....It was asserted, that while participating in the bid process, the Claimant had expressed the name of M/s Suzhou Jinta Metal Working Company Ltd. (hereinafter referred to as, SJM

Ltd.), as the foreign bidder or the foreign manufacturer, who would supply the stainless steel PBT's. Firstly, it was contended, that the Claimant had placed on record various certificates, depicting satisfactory performance of stainless steel PBT's manufactured by SJM Ltd. Based on the acceptance of the credentials furnished by the Claimant - BSS Ltd., along with the bid documents (-including the certificates, depicting satisfactory performance of stainless steel PBT's manufactured by SJM Ltd.), the AAI had issued the purchase order (-dated, 13.07.2017), in favour of the Claimant. It was pointed out, that one of the certificates appended by the Claimant along with the bid documents, to demonstrate the eligibility of SJM Ltd., turned out to be false. In this behalf it was submitted, that the 'satisfactory performance certificate', allegedly issued by the Heathrow Airport Ltd. in favour of SJM Ltd., (-which was one of the documents, appended to the bid documents filed by the Claimant), to demonstrate the eligibility of the Claimant, was not a genuine certification by the concerned authorities of the Heathrow Airport Ltd.. Additionally it was submitted, that the stainless steel PBT's supplied by the contractor/Claimant to the AAI, in continuation of the contractual agreement/purchase order (-dated, 13.07.2017), were not certified by the manufacturer, namely, by SJM Ltd., as required. In order to support the instant contention, learned counsel for the Respondent placed reliance on an email dated 17.07.2018, addressed by the AAI to M/s SJM Ltd., the same is extracted below:-

"Sir,

Thank you very much Sir for responding now. During the period of your Authorisation (04.05.2017 to 03.05.2018), your Authorised Distributor/Associate M/s. M/s Bentwood Seating System Pvt.

Ltd. Kolkata, submitting Certain Documents claiming to be of yours, became qualified , had participated in the Competitive Tender Process, became successful, bagged the Order dated 13.07.2017 for supply of 4000 Nos. Passenger Baggage Trolleys to 13 Indian Airports, manufactured by you (M/s Suzhou Jinta Metal Working Company Ltd.), in three months time, that it by 12.10.2018 and all this time schedule is well within the validity of your Authorisation period (01.05.2017 to 3.05.2018). The Agency M/s. M/s Bentwood Seating System Pvt. Ltd., Kolkata who was your Authorised Distributor /Associate of your products had not executed the Supply. The Authorisation letter dated 04-05-2017 is one of the documents submitted by your Indian associate, which vide your mail below dated 17-07-2018, intimating us that your Authorisation of M/s. M/s Bentwood Seating System Pvt. Ltd. Kolkata for dealing your products India has expired, that is by 03.05.2018.

This issue before us and you is that the conduct and failure of your Indian Authorised Associate, during the period of validity of Authorisation in executing the Order, which the firm had bagged on the strength and credentials of the Manufacturer M/s Suzhou Jinta Metal Working Company Ltd.

At this juncture, As Airports Authority of India had Suffered a lot and Passenger /Customer handling has suffered at 13 Indian Airports, where these Passenger Baggage Trolleys should have been positioned for use by Sep/Oct 2017 and continue to suffer, and we need to make earliest alternative arrangements, it is required to get the Credential documents

claimed to be of M/s Suzhou Jinta Metal Working Company Ltd. which were submitted by you Indian Associate in the Tender process for taking further necessary action."

Through the above email dated 17.07.2018, the pointed issue on which SJM Ltd., was confronted by the Respondent was with reference to, "...This issue before us and you is that the conduct and failure of your Indian Authorised Associate, during the period of validity of Authorisation in executing the order, which the firm had bagged on the strength and credentials of the Manufacturer M/s Suzhou Jinta Metal Working Company Ltd. ...". The response to the email addressed by the AAI to M/s. SJM Ltd. dated 17.07.2018, extracted above was received by the Respondent -AAI, from M/s SJM Ltd. on the same day i.e., on 17.07.2018, The same is extracted below:

"What should I do?

I still have no idea."

It was also submitted, that through another email, dated 17.07.2018, M/s SJM Ltd. intimated the Respondent - AAI, as under:

"Dear All,

The authorize letter already expired now.

We have no intention to extend the authorization.

FYI and thanks!"

Based on the above responses, it was submitted on behalf of the Respondent, that even though the foreign supplier may have issued an authorisation letter in favour of the contractor/Claimant, before the issuance of the contractual agreement/purchase order, the

same having expired M/s SJM Ltd. was not willing to extend same any further. According to the learned counsel for the Respondent, the most important email on the instant aspect of the matter, was dated 03.07.2018, it was received by the AAI from M/s SJM Ltd. The above email dated 03.07.2018 is reproduced below:

"Dear Mr. Paul Manickam,

The company M/s Suzhou Jinta Metal working company limited has sent an email informing that there was a difference in target price between what was quoted by their company and what Air India had agreed and hence the proposal was not followed further and the business was discontinued. The same email was marked a copy to you also.

If you want us to proceed further we can continue to check their credentials.

Regards,

Aparna Ganesan Consul (Comm)

Consulate General of India

Shanghai"

Based on the above extracted email, it was submitted, that M/s SJM Ltd. had intimated the Claimant - BSS Ltd., that it was not agreeable to supply the PBT's at the proposed rates. Accordingly, it was the contention of the learned counsel for the Respondent, that the contractor/Claimant could not produce the certificates mandated under Clause 4.2 of the 'Technical Specifications', because M/s SJM Ltd., had disassociated itself from any business association with the Claimant - BSS Ltd.. It was accordingly prayed, that besides upholding the termination order dated 20.02.2018, the Arbitral Tribunal should also pass an appropriate order, directing the return

of 550 stainless steel PBT's supplied by the Claimant (-at the Guwahati airport, and at the Imphal airport).....”

10. He submits that the plea of the respondent of the appellant having obtained the Purchase Order by fraud was therefore clearly noted by the learned Arbitrator in paragraph 24 of the Arbitral Award. The learned counsel for the appellant, making reference to paragraph 27 of the Arbitral Award submits that the learned arbitrator has also duly considered the above submissions. The relevant extract from paragraph 27 of the Award relied upon by the counsel for the appellant is reproduced herein below:

“27. I have given my thoughtful consideration to the submission advanced on behalf of the Respondent, as have been recorded in paragraph 24 above.....”

11. He submits that the above observation of the learned Arbitrator clearly shows that the learned Arbitrator was fully conscious of all the submissions made by the respondent before him. The same, unless accepted by the learned Arbitrator, would therefore be deemed to have been rejected by the learned Arbitrator.

12. He further submits that even if this case is to be considered as one where the learned Arbitrator has not given any reasons for his conclusion, recourse to Section 34(4) of the Act should have been resorted to by the learned Single Judge especially when the appellant had filed an application under Section 34(4) of the Act during the course of hearing before the learned Single Judge. In this regard he

places reliance on the judgments of the Supreme Court in ***Kinnari Mullick & Anr. vs. Ghanshyam Das Damani***, (2018) 11 SCC 328 and ***Dyna Technologies Private Limited vs. Crompton Greaves Limited***, (2019) 20 SCC 1.

13. On merit, he submits that even otherwise the plea of the respondent was liable to be rejected by the learned Arbitrator and has been rightly so rejected. He submits that the emails being relied upon by the respondent in support of its submission of fraud had not been duly proved by the respondent; they were not accompanied by a certificate under Section 65B(4) of the Indian Evidence Act, 1872 and therefore were inadmissible in nature. In this regard he places reliance on the judgment of the Supreme Court in ***Anvar P.V. vs. P.K. Basheer & Ors.***, (2014) 10 SCC 473.

14. We have considered the submissions made by the learned counsel for the appellant, however, find no merit in the same. From a reading of paragraphs 24 and 27 of the Award, it is clear that the learned Arbitrator apart from giving a declaration that he has considered the submissions advanced by the respondent, has not given any finding as far as the plea of the fraud urged by the respondent is concerned. In fact, a perusal of the Award would show that all other contentions of the respondent have been elaborately dealt with by the learned Arbitrator. It is apparent that the plea of fraud urged by the respondent has escaped the attention of the learned Arbitrator altogether. This submission has a vital bearing on the prayer of grant of specific performance of the Purchase Order made by the appellant

before the Arbitrator and granted by the Arbitrator in the Arbitral Award.

15. In *Dyna Technologies* (supra), the Supreme Court highlighted that while there is no dispute that Section 34 of the Act limits a challenge to an Award only on the grounds provided therein and an Arbitral Award should not be interfered with in a casual and cavalier manner, the necessity of providing reasons for the Award has been statutorily provided under Section 31(3) of the Act and that there is no gainsaying that arbitration proceedings, though not per se comparable to judicial proceedings before the Court, the Arbitral Award is to contain reasons which are intelligible and adequate. Such reasons need not be elaborate, but must have three characteristics of being proper, intelligible, and adequate. If the challenge to an Award is based on the ground that the same is unintelligible, the same would be equivalent to providing no reasons at all. Ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned Award. In absence of reasoning in the Arbitral Award, Section 34(4) of the Act can be resorted to cure such defects.

16. However, the above judgment would come to no avail to the appellant inasmuch as the present case does not reflect a mere defect of not giving reasons for the Award but the essential issue having escaped the attention of the learned Arbitrator altogether. It is a case of no finding rather than a finding not supported with reasons. This ground has also persuaded the learned Single Judge to not take recourse to Section 34(4) of the Act by observing as under:

“54. Considering the above, this Court is of the view that AAI’s defence that the Purchase Order had been procured by fraud was one of the essential issues that was required to be addressed by the Arbitral Tribunal. It is apparent from the plain reading of the impugned award that the Arbitral Tribunal has not addressed the said issue. The Arbitral Tribunal has proceeded on the basis that since the reasons as stated in the letter of termination were not merited, BSS was entitled for specific performance of the contract in question. However, if it is established that the Purchase Order had been procured by fraud, directing its specific performance clearly falls foul of the fundamental policy of Indian law. Since the aforesaid issues - that is, whether the Purchase order had been secured by fraud and if so, whether AAI was entitled to avoid the contract - were undoubtedly part of the principal controversy between the parties and in absence of any decision on the said dispute, the impugned award cannot be sustained.

55. The contentions advanced on behalf of BSS that in absence of reasons on the aforesaid issue, the present proceedings are required to be adjourned to enable the parties to resume arbitration, is unpersuasive. This is not a case where reasons for the conclusion are sketchy and require clarification. In the present case, the Arbitral Tribunal has not decided one of the principal disputes between the parties. This defect cannot be cured by adjourning the present proceedings to enable the Arbitral Tribunal to issue any clarification/reasons. More importantly, the decision on questions whether the Purchase Order was secured by fraud and whether AAI is entitled to treat the same as void would have a material bearing on the relief granted to BSS. The scope of Section 34(4) of the A&C Act is limited and it can be resorted to enable the arbitrator to cure certain curable defects.”

17. We are in agreement with the observations made by the learned Single Judge. The plea of grant of specific performance of the contract was dependent on the outcome of the defence raised by the respondent that the Purchase Order/contract itself was vitiated by fraud. This defence has clearly not been adjudicated upon by the learned Arbitrator. It is not the case of merely not recording reasons for his finding, but one where there is no finding by the learned Arbitrator on this issue. It cannot also be termed as a deficiency in the Arbitral Award which may be curable by allowing the Arbitral Tribunal to take measures which can eliminate the ground for setting aside the Arbitral Award, which was stipulated as one of the conditions for exercise of power under Section 34(4) of the Act in *Kinnari Mullick* (supra). A finding on this issue may in fact, bring about a total change in the Award.

18. The submission of the learned counsel for the appellant that the e-mails relied upon by the respondent in support of its submission of fraud were even otherwise not admissible, cannot be considered by this Court in its powers under Section 37 of the Act and could not even have been considered by the learned Single Judge in exercise of its powers under Section 34 of the Act. These are submissions which had to be considered by the learned Arbitrator in the first instance.

19. The learned counsel for the appellant in the end submitted that even if this Court was to uphold the Impugned Judgment passed by the learned Single Judge of this Court, this Court should restrain the

respondent from making any recovery of the amount paid to the appellant pursuant to the Arbitral Award. He submits that as the learned Single Judge has recorded the agreement of the respondent to go for arbitration, the respondent must be restrained from making recovery from the appellant till a fresh Arbitral Award is passed. He submits that the balance of convenience in this regard is in favour of the appellant inasmuch as the finding on the termination notice being invalid has been upheld even by the learned Single Judge.

20. We are afraid that in exercise of our powers under Section 37 of the Act, such an order cannot be passed. The appellant has to invoke appropriate legal remedies for obtaining the relief as now being prayed for before us.

21. In view of the above, we find no merit in the present appeal. The same is dismissed. There shall be no order as to costs.

NAVIN CHAWLA, J

MANMOHAN, J

AUGUST 11, 2021
RN/U/AB