

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction

Commercial Division

Present:

The Hon'ble Justice Shekhar B. Saraf

APO / 74 /2022

IA NO. GA / 1 /2022

Gainwell Commosales Private Limited

VS

Minsol Limited

(Formerly Cuprum Bagrodia Limited)

For the Petitioner : Mr. Surajit Nath Mitra, Sr. Adv.
Mr. Anirban Ray, Adv.
Mr. Shaunak Mitra, Adv.
Mr. Anupam Dasadhikari, Adv.
Mr. Rishav Dutta, Adv.
Mr. Shayak Mitra, Adv.
Ms. Prerona Banerjee, Adv.

For the Respondent : Mr. Ranjan Bachawat, Sr. Adv.
Mr. Debnath Ghosh, Adv.
Ms. Rajshree Kajaria, Adv.
Mr. Sayan Roy Chowdhury, Adv.
Mr. Kushal Bhattacharjee, Adv.

Last heard on: November 24, 2022

Judgment on: December 15, 2022

Shekhar B. Saraf, J:

1. The petitioner in the instant application [being A.P.O. No. 74 of 2022] under Section 37 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as 'the Act'] is a company incorporated as per the provisions of the Companies Act, 2013. The petitioner is a major supplier of Caterpillar construction, mining and power solutions and is one of the market leaders in the business of manufacturing of High Wall Mining Systems.
2. The respondent is a company incorporated as per the provisions of the Companies Act, 2013 and it carries on business in mining activities.
3. The petitioner has challenged the Order dated July 22, 2022 [hereinafter referred to as the 'Impugned Order'] passed by the learned arbitral tribunal consisting of three arbitrators [hereinafter referred to as 'the Tribunal']. An application for stay of the Impugned Order [IA NO. GA 1 of 2022 in A.P.O. No. 74] has also been filed. Both the applications are being conjointly decided.

Relevant Facts

4. The petitioner entered into a 'Contract for supply of Gainwell High Wall Mining System' dated May 10, 2019 [hereinafter referred to as 'the

Agreement'] with the respondent. The petitioner was to supply a High Wall Mining System [hereinafter referred to as 'HWM System'] together with a cutter module.

5. As per the Agreement, the consideration for the HWM System was Rs. 60,12,93,000/- (plus taxes) and was to be paid tranches as indicated in Clause 4 of the Agreement. The tranches are indicated below:
 - a) Rs. 6,00,00,000/- to be paid along-with signing of the Agreement.
 - b) Rs. 6,00,00,000/- to be paid within 30 days from the date of signing of the Agreement against the receipt of the initial component packages of TRAM frames and Plantaris, Track Column etc., at Asansol from Caterpillar Inc.
 - c) Rs. 12,00,00,000/- to be paid within 90 days from the first payment and against receipt of major components like base frame, super beams and fair field gear cases at Asansol.
 - d) 50% of the basic contract value plus 100% of the taxes and duties to be paid against despatch of the HWM System.
 - e) Remaining amount of contract to be paid against acceptance of the HWM System.

6. A sum of Rs. 24,00,00,000/- (approximately) was received by the Petitioner without prejudice to its contention that these were delayed payments made by the Respondent.
7. The respondent filed an application on June 26, 2021 under Section 17 of the Act and prayed before the Tribunal for an independent third party/technical person/representative of Caterpillar Inc. in whose presence inspection and testing of HWM System and cutter module would be carried out.
8. The Tribunal vide order dated December 22, 2021 directed for depositing the entire balance price of the EWM System in an Escrow Account to be opened in the joint names of the advocates of the parties, who would act as escrow agents. It also directed that pre-despatch testing would be carried out in the presence of a special officer. It further ordered that in case the EWM System performs satisfactorily for a continuous period of 96 hours as per Exhibit C of the Agreement, the escrow agents would release the monies to the petitioner upon certification of such fact by the parties before the Tribunal.
9. The petitioner on January 18, 2022 filed another application under Section 17 of the Act before the Tribunal, praying for (a) appointment of

a special officer for inspection of the site at Nimcha and to ascertain readiness and preparedness of the site for performing performance test and the reassembly site, in terms of the agreement, and (b) release of the balance amount in favour of the petitioner by the respondent. Thereafter, affidavits were exchanged in relation to the said application. The respondent on January 20, 2022 also filed an application under Section 17 of the Act, praying for rectification of the defects and/or discrepancies before the Tribunal.

10. The Tribunal vide order dated February 14, 2022 laid down the modus operandi for transport of the HWS System and directed the special officer to oversee such transport operation. It also ordered that once the HWM System reached the respondent's site and is made ready for reassembly and testing, the Special Officer would be informed of the same and re-assembly and testing should commence in his presence.
11. The petitioner filed an application for clarification of the order dated February 14, 2022. The Tribunal vide order dated February 18, 2022 stated that the Special Officer would oversee the re-assembly and testing of the HWM System, during which time the representatives of the petitioner would be present at the site as per Clause 7.5 of the Agreement.

12. The Tribunal, upon oral representation of the parties, vide order dated March 7, 2022 modified orders dated December 22, 2021 and February 14, 2022. Instead of depositing the entire residual amount in the escrow account, the Tribunal directed the respondent to open an interest bearing fixed deposit account comprising 50% of the basic contract value plus 100% of taxes and duties payable on the HWM System in favour of the petitioner's advocate, Mr. Nand Gopal Khaitan. The Tribunal re-iterated that the entire amount will be paid only after satisfactory performance of the HWM System for a continuous period of 96 hours, as per the Agreement. The Tribunal further stated that Mr. Nand Gopal Khaitan will encash the fixed deposit and make over payment to the petitioner as and when it makes further orders.
13. After various delays, the process of despatch was completed on April 7, 2022. The petitioner made another application under Section 17 of the Act on May 13, 2022 with the primary prayer for (a) a direction upon Mr. Nand Gopal Khaitan to encash the fixed deposit for an amount of Rs. 40,88,79,240/- and to hand over the same to the petitioner. The said application was heard on July 10, 2022 and July 13, 2022.
14. An application under Section 17 of the Act was made by the respondent on July 13, 2022 praying primarily for (a) restraining the petitioner from obtaining any amount from Mr. Nand Gopal Khaitan, (b) restraining Mr. Nand Gopal Khaitan from encashing the fixed deposit

and (c) a direction to carry out the reassembly and testing of the HWM System with immediate effect. The Tribunal indicated in its order dated July 13, 2022 that the applications dated May 13, 2022 and July 13, 2022 were to be decided by a common order by the Tribunal.

15. The Tribunal vide the Impugned Order directed Mr. Nand Gopal Khaitan to release 50% of the basic contract value plus 100% of taxes and duties payable upon furnishing of a bank guarantee by the petitioners of the said amount. The balance amount, being the interest accrued on the fixed deposit amount, was instructed to be kept in an interest bearing fixed deposit. The part of the Impugned Order which requires furnishing of the bank guarantee has been challenged by the petitioner.

The Submissions

16. It is apposite now to mention the contentions put forth by counsels of both sides.
17. Mr. S. N. Mitra, learned senior advocate, appearing on behalf of the petitioner has put forward the following arguments:

- a. The Tribunal could not have put an additional requirement of furnishing a bank guarantee for payment of 50% of the basis contract value plus 100% of the taxes and duties to be paid against despatch of the HWM System. The said payment was to be made upon despatch, without any conditions, as per the Agreement. Such a requirement is de hors the contract and the Tribunal could not have done so, that too after recording that it could not re-write the Agreement. The petitioner has relied upon ***MD, Army Welfare Housing Organisation v. Sumangal Services (2004 [9] SCC 619)*** and ***Indian Oil Corporation v. Shree Ganesh Petroleum (2022 [4] SCC 463)*** for the said proposition.
- b. The respondents have not displayed circumstances which suggest that the petitioner will not be able to meet its alleged liability that may arise.
- c. The Impugned Order was passed on the basis of allegations made in the application of the respondent dated July 13, 2022, which was never moved or heard. The said application was not even recorded in the minutes of the hearing of the same date.
- d. The Impugned Order has been passed without giving the petitioners a chance of dispelling the allegations made in the application dated

July 13, 2022 filed by the respondent. This is in gross violation of the fundamental principle of fair play and/or natural justice.

- e. Adequate reasons have not been given for placing the additional requirement of securing the said amount by way of furnishing a bank guarantee, as the Agreement required such payment without any security, but merely on despatch of the HWM System.
 - f. Such a requirement could not be placed considering that the respondents had not complied with their contractual obligation of making the reassembly and mining site ready.
 - g. Grave injustice would be caused to the petitioners if they are required to carry out the reassembly process without receiving its legitimate dues as per the Agreement. Furthermore, payments have to be made to suppliers.
 - h. The respondent has already received the machine and is enjoying non-payment of the entire amount which has become due and payable.
18. Mr. Ranjan Bachawat, learned senior advocate, appearing on behalf of the respondent made the following submissions:

- a. The delivery of the machine has been delayed and there is a chequered history with regard to its authenticity. There are apprehensions that it does not match the contractual specifications and certain parts are of cheap, inferior and duplicate characteristics.
- b. The instant application is merely an attempt to stall the hearing of the arbitration proceedings and to refuse inspection, testing, reassembly and commissioning of the HWM System. The petitioner will merely appropriate the amount deposited with Mr. Nand Gopal Khaitan.
- c. The Impugned Order was not passed only on the basis of the application dated July 13, 2022 and it is denied that the senior advocate appearing on behalf of the petitioner did not have an opportunity to controvert the same.
- d. Both the parties had consented to the Tribunal's order dated December 22, 2021 and March 7, 2021 vide which the respondent had to part with sums of money even before the contractually stipulated timelines. Such consent reneged from strict compliance of the Agreement. The petitioner cannot now disagree to the Impugned Order's requirement of furnishing a bank guarantee, which is yet another attempt by the Tribunal to balance equities and pave the

way for the undertaking of fundamental contractual obligations while keeping the dispute in abeyance for future resolution.

- e. The respondent had entered into another agreement with the petitioner wherein the petitioner had to supply a Low Seam Cutter Module. The petitioner has failed to deliver even with respect to that agreement despite orders of the tribunal in another arbitral reference and having received 90% of the payment. Therefore, there are reasonable apprehensions that the same would be repeated with respect to the HWM System and the Agreement.

Issues

- 19. Upon analysing the arguments put forward by both the parties, I am of the view that the following issues are required to be addressed by me to resolve the dispute between the parties:

A. Whether the Tribunal has acted de hors the Agreement while passing the Impugned Order?

B. Whether the Impugned Order deserves to be set aside?

Analysis of Submissions

20. Preliminarily, the scope of interference with orders of the Tribunal under Section 37 of the Act, even if passed under Section 17, is very limited. The Delhi High Court in **Sanjay Arora v. Rajan Chadha and Ors.** [2021 SCC OnLine Del 4619] has noted that:

“19. This Court has already opined, in Dinesh Gupta v. Anand Gupta and Augmont Gold Pvt Ltd v. One97 Communication Ltd that the considerations guiding exercise of appellate jurisdiction under Section 37(2)(b) are, fundamentally, not really different from those which govern exercise of jurisdiction under Section 34 of the 1996 Act.

20. It is only, therefore, where the order suffers from patent illegality or perversity that the court would interfere with the order of the learned Arbitral Tribunal, under Section 37(2)(b). This is because, unlike appeals under other statutes or under the CPC, appeals against orders of arbitral tribunal are subject to the overarching limitations contained in Section 57 of the 1996 Act, read with the Preamble thereto, which proscribes interference, by courts, with the arbitral process, or with orders passed by learned Arbitral Tribunal, save and except on the limited grounds envisaged in the 1996 Act itself.”

I am in complete consonance with the above view.

21. We must now discuss the powers under Section 17 of the Act. The 2015 Amendment to the Act has amplified the powers granted to arbitral tribunals to provide interim relief under Section 17. The power is now almost *pari passu* the powers that a court exercises under Section 9 of the Act. Therefore, it would not be innocuous to pre-suppose that the principles guiding the exercise of the powers under both these sections must be similar. The Apex Court in ***Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited (2022 SCC OnLine 1219)*** delineated the guiding factors in the exercise of power under Section 9 of the Act. A few relevant paragraphs are extracted below:

“39. In deciding a petition under Section 9 of the Arbitration Act, the Court cannot ignore the basic principles of the CPC. At the same time, the power Court to grant relief is not curtailed by the rigours of every procedural provision in the CPC. In exercise of its powers to grant interim relief under Section 9 of the Arbitration Act, the Court is not strictly bound by the provisions of the CPC.

40. While it is true that the power under Section 9 of the Arbitration Act should not ordinarily be exercised ignoring the basic principles of procedural law as laid down in the CPC, the technicalities of CPC cannot prevent the Court from securing the ends of justice. It is well settled that procedural safeguards, meant to advance the cause of justice cannot be interpreted in such manner, as would defeat justice.

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48. *Section 9 of the Arbitration Act confers wide power on the Court to pass orders securing the amount in dispute in arbitration, whether before the commencement of the arbitral proceedings, during the arbitral proceedings or at any time after making of the arbitral award, but before its enforcement in accordance with Section 36 of the Arbitration Act. All that the Court is required to see is, whether the applicant for interim measure has a good prima facie case, whether the balance of convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition.”*

22. Mr. S.N. Mitra, learned senior advocate, argued during the hearing that the Impugned Order is intended to secure the amount in dispute in the arbitration, therefore the rigours of Order XXXVIII Rule 5 are attracted, but have not been strictly satisfied. Nothing has been proved to indicate that the petitioner would not be able to meet its alleged liability, if any arises in the future owing to non-functionality of the HWM System. However, such submissions are misguided. As a corollary to the Apex Court’s judgement discussed in the above paragraph, the arbitrators/arbitral tribunals, while exercising their power under Section 17 do not have to strictly confine their arms to the technicalities of CPC. The arbitral tribunal has to be guided by the basic principles followed while granting interim relief.

23. In ***Army Welfare (supra)***, the arbitrator had passed an interim order without a claim and a counter-claim filed before itself. The said interim order, after giving possession and right to construct on the said property to one of the parties, effectively rendered the arbitration proceedings infructuous. The order also went against the contract. The Apex Court held that the Arbitrator cannot, by an interim order, place parties in a situation which would travel beyond the subject of disputes and differences referred to the arbitrator. However, the Arbitration Act, 1940 was applicable to the agreement in dispute. The Apex Court itself in ***Army Welfare (supra)*** acknowledges that under Section 17 of the unamended Arbitration and Conciliation Act, 1996, an interim order can relate of protection of the subject matter of the dispute. We have already discussed that the amplitude of the powers under Section 17 has been extended vide the Act's recent amendments. Therefore, this case is distinguishable.

24. In ***Shree Ganesh (supra)***, an arbitral award was partly set aside under Section 34 of the Act. The part, which was set aside, allowed for alteration of contractual terms by increasing the per-month rent, in complete contradistinction to the rate given in the contract. The Court held that arbitrator cannot go beyond the contract. Firstly, the Apex Court was dealing with a setting aside application of a final award. The scope of power under Section 17 is completely different. Secondly, even

if the principle, that directions cannot be given dehors the agreement, can be adopted, the facts before the Court were such that the portion of the award was in complete defiance to the explicit rate given in the award. Both do not seem to be case in the circumstances before us, as will be discussed later.

25. The petitioner vehemently placed before this Court that the Tribunal passed the Impugned Order in complete violation of the Agreement, as there is no requirement of furnishing a bank guarantee for the payment due on despatch. In my opinion, there are no restrictions that require the Tribunal to only constrain itself to the contract while granting interim reliefs. The objective behind the wide powers granted under Section 17 of the Act is to preclude the arbitral proceedings from becoming infructuous, as long as the relief does not explicitly stand contrary to the contract.

Conclusion

26. The Tribunal has tried to resolve complexities and facilitate the carrying out of contractual obligations, even though belated, while keeping the points of dispute open for future deliberation. The Tribunal vide order dated December 22, 2021 laid down modalities for carrying out various stage-wise contractual obligations (pre-despatch testing, organization of

dispatch, post arrival re-assembling and testing, etc.). The Tribunal also directed the Respondent to deposit the entire amount into an escrow A/C held in the joint names of advocates of both sides. This was to be paid to Supplier after post-despatch performance testing for 96 hours. Even these modalities were not followed in terms of their respective timelines, but a certain portion of the transaction is complete (despatch is complete).

27. The order dated December 22, 2021 was modified vide order dated March 7, 2022 wherein instead of depositing the entire residual amount in the escrow account, the Tribunal directed the respondent to open an interest bearing fixed deposit account comprising 50% of the basic contract value plus 100% of taxes and duties payable on the HWM System in favour of the petitioner's advocate, Mr. Nand Gopal Khaitan. The Tribunal re-iterated that the entire amount will be paid only after satisfactory performance of the HWM System for a continuous period of 96 hours, as per the Agreement. Both these orders were accepted by both parties and though not in strict conformity with the agreement, were to facilitate the undertaking of the contractual obligations considering the underlying spirit of the Agreement. The respondent had to be out of pocket by 50% of the basic contract value plus 100% of taxes and duties payable on the HWM System, even before the despatch, which again was not rigidly as per the Agreement, but was accepted and acted upon.

28. The despatch was delayed. The Tribunal is yet to decide the party over which delay and/or breach of contract is attributable and has kept such deliberations open. The respondent contended before the Tribunal that defects were found during pre-despatch testing which were mentioned to the Special Officer. Furthermore, the Tribunal in its order dated February 14, 2022 records that the respondent's advocate mentioned that they were ready to take the said HWM System as the petitioner has stated on affidavit that these defects were cured. On this assurance, despatch was allowed by the Tribunal.
29. In the Impugned Order, the Tribunal considered that since despatch was complete, the 50% of the basic contract value plus 100% of taxes and duties payable on the HWM System must be paid to the petitioner. However, it noted that the claimant in its application dated July 13, 2022 had raised apprehensions on the basis of which certain protections must be granted. The Tribunal directed the petitioner to provide a bank guarantee to the extent of the Impugned Amount to N.G. Khaitan, on the furnishing of which, the Impugned Amount held in the fixed deposit would be encashed and given to the petitioner. It also directed that a fixed deposit be created for the interest that has accrued on the Impugned Amount.

30. So far, this Court finds no perversity to interfere with the Impugned Order. The respondent has stated till July 12, 2022 and even before, that the pre-despatch testing indicated divergence from specification mentioned in the Agreement. The respondent has averred that as per another agreement with the petitioner, supply of another Cutter Module is also required and that, indisputably, the said machinery has failed the performance tests continuously (subject of another arbitral reference). Hence, they have apprehensions about the performance of the HWM System in the current situation as well. The respondent prayed that such amount should only be given after re-assembly and passing of performance test.
31. At the cost of repetition, the aspect of delay has not been decided by the Tribunal. On a prima facie view, it is not possible to ascertain blame. Neither has the tribunal done so yet. It has merely prodded the parties to proceed with the Agreement. Delays seem to be attributable to both. The quality of the HWM System is uncertain. Given the facts and circumstances, while in the respondent's application dated July 13, 2022, there was no prayer for furnishing of bank guarantee, the Tribunal has directed for the same in order to balance the convenience and to protect against the future award becoming a mere paper award. The exercise of power seems to be adept and reasonable. Such exercise has not gone against the agreement, but facilitated it. Furthermore, earlier facilitations which were not in strict compliance with the

agreement were accepted by the parties (orders dated December 22, 2022 and March 7, 2022) as it imposed obligations upon the respondent. Simply because the Impugned Order imposes a similar facilitating requirement upon the petitioner (furnishing of a bank guarantee), the petitioner's objections seem hypocritical.

32. The petitioner has contended that the application dated July 13, 2022 was not taken up as evident from the minutes of the meeting of the same date. But the minutes demonstrate that the Tribunal dealt with the petitioner's application dated May 13, 2022 and wished to pass a 'common order'. The mention of a 'common order' is suggestive of it also planning to deal with the application dated July 13, 2022 by the respondent wherein it prayed for restraint upon any payments to be made to the petitioner. Therefore, it is inconceivable that the Tribunal intended not to take up the application dated July 13, 2022 as such intention is also not evident from the Impugned Order.
33. The Impugned Order elaborately discusses the history of the dispute without assigning any liability. In the portion where it discusses the payment of 50% of the basic contract value plus 100% of taxes and duties payable on the HWM System, the Tribunal has mentioned the apprehensions of both sides. However, the apprehensions are recorded in brief for both the sides. This does not lead to the inference that an opportunity was not given to both. The Tribunal has been thorough

with regards to facts and has done a commendable job in contractual facilitation while keeping disputes for future deliberation. This Court is not inclined to use its otherwise limited power under Section 37 of the Act to set aside the Impugned Order.

34. Issue (A.) is decided in the negative. Accordingly, Issue (B.) is also decided in the negative. The Impugned Order is not to be interfered with.
35. The arbitration application [A.P.O. 74 of 2022] and IA NO. GA 1/2022 is accordingly dismissed. There shall be no order as to cost.
36. Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)