

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
(Via Video Conference)

BEFORE:

The Hon'ble Mr. Justice Ravi Krishan Kapur

A.P No. 1073 of 2013

Rifle Factory, Ishapur & Others

-vs-

M/s. Tal Manufacturing & Solutions Ltd.

For the petitioners	: Mr. Pramod Kumar Drolia,
For the Respondent	: Mr. Sidhartha Mitra, Ms. U.S. Menon,
Heard on	: 03.01.2022, 27.01.2022, 03.02.2022
Judgment on	: 24.02.2022

Ravi Krishan Kapur, J.:

1. This is an application under Section 34 of the Arbitration and Conciliation Act, 1996 ('the Act').

The facts:

2. In May 2000, the petitioners published a tender inviting bids for 9 tooled up CNC VERT Machines Centre Mounted TALV 505 (the machines) and the connected spare-parts required for running of the machines. In response to the tender, the respondent submitted its bid which was duly accepted by the petitioners. The aggregate value of the machines was Rs.9,15,82,046/-. The petitioner also issued a Letter of Intent dated 3 December, 2002. Thereafter, the machines were

supplied by the respondent to the petitioners and also installed at the factory of the petitioners. The respondent also furnished a bank guarantee which was valid till the expiry of the warranty period. The machines had also been duly inspected and approved by both the parties.

3. Admittedly, the petitioners made payment of 90% of the value of the machines after retaining 10% of the total purchase value in terms of Clauses 26.03 and 27 of the purchase order. It is the balance 10% of the purchase price which remains due and payable by petitioners to the respondent and inter-alia forms the subject matter of the disputes between the parties. After continuous and uninterrupted use of the machines, the petitioners raised a dispute in respect of the measurement of the cycle time as recorded in the Minutes between the parties held on 11 May, 2004. Ultimately, it was decided that, the petitioners would achieve the agreed cycle time within a span of 3 months i.e. by August 15, 2004, whereupon the balance payment for the machines would be released. Subsequently, the parties agreed that the cycle time as modified had been achieved. This fact was also recorded in the Minutes of the Meeting held on 11 May, 2004. Thereafter, notwithstanding the fact that the machines had been duly installed and have been continuously and uninterruptedly in running condition, the petitioner has refused to pay the balance 10% of the purchase value of the machines.

The submissions:

4. It is submitted on behalf of the petitioners that, in passing the impugned award the Arbitrator did not record the oral evidence of the witnesses nor consider the documents furnished by the parties. It is also alleged that the Arbitrator did not consider the correspondence exchanged between the parties and ignored the letters dated June 27, 2005 and July 26, 2006 registering the complaints of the petitioners against failure of commissioning of 7 of 9 machines. It is also alleged that the Arbitrator did not take into consideration the letter dated 3 June, 2011 wherein the respondents had allowed the petitioners to make deductions as per the supply order from the outstanding amount due to the respondents. In support of their contentions, the petitioners relies on the decisions reported in *ONGC vs. SAW Pipes AIR 2003 SC 2629* and *Associate Developers vs. Delhi Development Authority AIR 2015 SC 620*. It is also submitted that the impugned award directs the petitioners to pay interest of 18% from the date of the award which is contrary to the decision *Vedanta Limited vs. Shenzhen Shandong Nuclear Power Construction Company Limited (AIR 2018 SC 4773)*. Accordingly, the petitioners pray for setting aside of the award.
5. On behalf of the respondent, it is submitted that, there are no grounds which warrant interference with the impugned award. The award is a reasoned award and has been passed after taking into consideration all the facts and circumstances of the case. The

Arbitrator has dealt with each of the issues raised by the parties. Moreover, no grounds contemplated under Section 34 or under any other section of the Act has been made out which warrant any interference with the award. In support of their contentions, the respondent has relied on the decisions of *P R Shah Shares and Stock Brokers Private Limited vs. BHH Securities Private Limited & Others* (2012) 1 SCC 594 and *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49.

My findings:

6. The grounds taken by the petitioners in this application can be inter-alia summarized in the following manner:
 - a) Ground Nos. I, II, III, IV, X, XI, XIII – ‘Interpretation of terms of the contract by the Arbitrator’.
 - b) Ground Nos. V, VI, VIII and XII – ‘Limitation’.
 - c) Ground Nos. VII, IX and XIV – ‘Possible view taken by the Arbitrator after considering the material evidence’.
7. The scope of challenge against an award passed under the Arbitration and Conciliation Act, 1996 is confined and limited. The grounds of challenge are primarily enumerated in section 34 of the Act. Under the provisions of the Code of Civil Procedure 1908, a full-fledged appeal inter alia permits a Court to re-appreciate the entire evidence, permits production of additional evidence and ultimately also empowers the Court to pass any decree or make any order which the Court may deem fit and proper. To this extent, an appeal is in someways, a

rehearing of the original proceeding with all the powers of the Trial Court.

8. On the other hand, in a challenge under Section 34 of the Act, the scope of interference is limited to a restricted review of the award on certain specified grounds enumerated under the Act. Thus, it is of utmost importance that in order to succeed, any petitioner must fall within one of those limited grounds of challenge available under the Act. Additionally, this is a summary proceeding where a Court ought not to sit in appeal over the award or reassess or reappraise the evidence. If the view of the Arbitrator is a “**possible**” view it passes muster and there is not much that a Court ought to do. It is true that on given facts and circumstances, I may have taken a different view of the matter. But, this is certainly not the test to be applied when hearing such applications. This approach, in my view, is integral to the success of an alternative dispute resolution mechanism.
9. The petitioner alleges that the Arbitrator had failed to acknowledge certain clauses of the agreement which relate to the performance of the machines and their maintenance work. It is also alleged that the Arbitrator has misinterpreted the warranty time frame based on the communication dated 27 July 2005. The petitioner states that the warranty period could not have commenced from 27 July 2005 since it was admitted by the respondents that the installation of 5 out of the 9 machines were not completed until 2009 as per the requirement of clause 22.01. I find that the Arbitrator has inter-alia held that,

based on the Minutes of the Meeting dated 27 July 2005, the warranty expired on 26 July 2006 and that the petitioner had raised no disputes with regard to the cycle time within the stipulated period. Hence, the petitioners were not entitled to any penalty or liquidated damages after the expiry of the warranty period pertaining to the cycle time of the machines. Ordinarily, an Arbitrator is the final authority of the facts and unless the appraisal is perverse or manifestly unreasonable, award ought not to be interfered with. Additionally, a Court ought not to sit in appeal over an award and reassess or reappreciate the evidence. (*P.R Shah, Shares and Stock Brokers Private Limited Vs B.H.H. Securities Private Limited and Others (2012) 1 SCC 594 @ para 21*). Accordingly, I find that the view taken by the Arbitrator is a plausible view and there is nothing in the award which is perverse or illegal or capricious.

10. Insofar as the aspect of limitation is concerned, I am of the view that this point has been duly considered by the Arbitrator. In fact, an issue had also been framed by the Arbitrator on this aspect. The Arbitrator has also dealt with this issue in the award and held as follows:

“On the basis of the discussions above, I hold that the claim of the claimant is maintainable and considering the diverse correspondence exchanged by and between the parties and the subsisting and various orders passed by the Learned District Court at Barasat as also the Hon’ble High Court at Calcutta, there is no question of the claimant’s claim being barred by limitation. The warranty period of the machines supplied and commissioned by the

claimant commenced from the July 27, 2005 which is evident from the minutes of the meetings held on the said date and stood expired after a period of one year on July 26, 2006. The respondents were definitely duty bound to release the balance payment of 10% of the purchase price and discharge and release the bank guarantee immediately thereafter. The Respondents' claim for liquidated damages or replacement of the machines was an afterthought and resorted to for the sole purpose of avoiding payment to the claimant."

11. I find nothing perverse nor unreasonable in the findings of the Arbitrator. I find that, the Arbitrator has taken a possible and plausible view of the matter and this does not, in my view, warrant any interference whatsoever.
12. Insofar as the evidence is concerned, the petitioners allege the Arbitrator has failed to consider the letter dated 3 June 2011 issued by the respondents whereby the respondents had allowed the petitioners to make deductions as per the supply order terms from the amount payable to respondents. It is further alleged that the Arbitrator failed to consider the Minutes dated 25 March 2009 wherein the parties had recorded that 5 out of 9 machines were not commissioned. I find that, the Arbitrator has held that the petitioners had stated in their letter dated 20 August 2011 that all the machines were being used for production activities since 18 July 2005. Moreover, the Arbitrator has held that there was no correspondence from the petitioners to the respondent complaining of any failure in

achieving the desired cycle time in terms of supply order dated 9 February 2003 or raising any claims or objection pertaining to the same within the warranty period. It has also been held by the Arbitrator that, the claims raised by the petitioners after the expiry of the warranty period were an afterthought had been raised only to avoid paying the respondent their legitimate dues. Accordingly, I find that there is nothing erroneous or perverse which justifies any interference with the award. In *National Highways Authority of India vs. ITD. Cementation India Limited (2015) 14SCC 21* it has been held that “It is thus well settled that construction of the terms of a contract is primarily for an Arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract”. I am of the view that the Court while considering challenge to an arbitral award does not sit in appeal over the findings or decision of the Arbitrator unless the arbitrator construes the contract in such a way that no fair-minded or reasonable person could do. In, *Dyna Technologies Private Limited vs. Crompton Greaves Limited 2019 (20) SCC1* it has been held that “....Courts should not interfere with an award because an alternative view on facts and interpretation of contract exists. The Court needs to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”.

13. For the forgoing reasons, I am of the view that there are no grounds which justify any interference with the impugned award. At the conclusion of the hearing, Advocates appearing on behalf of the petitioners prayed for reduction of interest which had been awarded by the Arbitrator. It was submitted that though the principal amount was admittedly payable, the interest component granted under the award be reduced. Mr. Mitra, Senior Advocate appearing on behalf of the respondent fairly conceded to a reduction of the amount of interest being 18% which has been awarded to the respondent. In view of the aforesaid, the award dated 16 May, 2013 is modified, by consent of the parties, to the limited extent that, further interest awarded under the award @ 18% from the date of the award till the date of the payment be reduced to 6% from the date of the award till the date of the payment.
14. With the aforesaid directions, AP 1073 of 2013 stands dismissed.

(Ravi Krishan Kapur, J.)