

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

FAO CARB No.20 of 2023 (O&M)

Reserved on : 07.07.2023

Pronounced on: 08.08.2023

Union of India

..... Appellant

VERSUS

M/s ISGEC Heavy Engineering Limited and others

..... Respondents

**CORAM: HON'BLE MR. JUSTICE G.S. SANDHAWALIA
HON'BLE MS. JUSTICE HARPREET KAUR JEEWAN**

Present: Mr. Sourabh Goel, Advocate, for the appellant.

Mr. Akshay Bhan, Sr. Advocate with
Mr. Sushant Kareer, Advocate and
Mr. Shantanu Bansal, Advocate, for the respondents.

HARPREET KAUR JEEWAN, J.

The present appeal has been filed impugning the order dated 23.01.2023 passed by the Additional District Judge, Patiala, whereby the objection petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act) filed by the appellant challenging the Arbitration Award dated 28.09.2020 passed by the Arbitration Tribunal was dismissed.

2. As per the facts on record, the respondent-contractor (hereinafter referred to as “the contractor”) is engaged in providing engineering products such as process Equipment, Power Plants, Boilers,

Plants & Machinery, Mechanical & Hydraulic Presses, Steel & Iron Castings, Contract Manufacturing and Trading, civil works etc. A purchase order No.01/17/4513/1/564187 dated 19.11.2016 for a total amount of Rs.17,31,11,872/- for supply of 40 Nos. 16 Cylinder Alco Engine Block fully machined was issued to the Contractor by the diesel loco Modernization Works, Patiala-appellant (hereinafter referred as “the Railways”) and the delivery of the same was to be made within eight months from February, 2017 i.e. upto 30.09.2017. The delivery period was extended upto 30.11.2018 vide amendment No.1 dated 23.10.2017 and the value of the purchase order was reduced to Rs.16,29,60,000/- vide amendment No.2 dated 13.06.2018. The delivery period was further extended upto 30.09.2019 vide modification advice No.000118 dated 09.01.2019. Prior to this purchase order, the petitioners have also issued two purchase orders i.e. dated 03.10.2013 for supply 10 Nos. Engine Blocks (subsequently quantity enhanced to 20 Nos.) and the purchase order dated 08.04.2016 for supply of 15 Nos. Engine Blocks. The purchase order dated 03.10.2013 was marked as ‘Development Order’ and the subsequent purchase order dated 08.04.2016 was marked as ‘Trial Order’. As per letter dated 30.04.2015, the railway had imposed a condition on the Contractor to get one engine block prototype inspected/cleared by RDSO against their previous purchase order dated 03.10.2013. The respondents vide letter dated 30.05.2015 intimated that they would be ready for inspection on 15.06.2015. The final clearance by the RDSO was issued vide letter dated 25.08.2017.

2.1 The respondent-contractor completed the supply within the extended period, however, the Railways deducted a sum of Rs.1,56,44,160/- and withheld the same on account Liquidated Damages. The Contractor raised a total claim of Rs.2,13,88,330/- inclusive of the balance payment of Rs.1,56,44,160/- alongwith interest against the appellant and the matter was heard and decided by the Arbitral Tribunal and an award dated 28.09.2020 was passed. The Arbitral Tribunal observed that the reduction made by the appellant towards the Liquidated Damages were not justified, as such, a sum of Rs.1,56,44,160/- was decided to be paid by the appellant to the respondent-contractor within a period of 60 days from the date of the award failing which the petitioner was held to pay interest @ 12% per annum with effect from the date of the award till actual payment.

3. The appellant-Railways challenged the findings of the Arbitration Tribunal by way of filing objection petition under Section 34 of the Act. Reply to the said objection petition was filed by the respondent-contractor contesting the objections raised in the said petition. After hearing the counsel for the parties, the Additional District Judge, Patiala dismissed the petition vide order dated 23.01.2023.

3.1 The Additional District Judge, Patiala observed that the matter was referred to the panel of Arbitrator on the joint request of the parties. It was observed that the Arbitrator had given hearing to both the parties and afforded full opportunity. While holding that the condition for Liquidated Damages was not a mandatory clause, simply on the ground

that a clause has been inserted in the agreement providing a provision for Liquidated Damages, the manufacturing company cannot be held entitled to pay the Liquidated Damages. The observation made by the Arbitrator in para No.7.16 that there was linkage between the three purchase orders which was explained and it was observed that the supply under the purchase order was to begin only after the supply of the previous order could be completed. The supply qua the subsequent purchase order could not have commenced before the supply of the previous orders was accomplished. The Court observed that as per the provisions of Section 34 of the Act, the interference to an award passed by an arbitrator can only be made in an eventuality where the award is improper and lacks reasoning or that there is a flaw in the decision making process or the award is based upon impropriety or perversity in the reasoning. It is also observed that the Court shall not sit in a Court of appeal or re-appreciate the evidence.

4. Learned counsel for the appellant has submitted that the dismissal of the objections under Section 34 of the Act is not justified.

4.1 Learned counsel for the appellant further submitted that the respondent-contractor did not commence the delivery at all and just three days before the last date of delivery i.e. on 27.09.2017, a request was made for extension of 14 months without liquidated damages. In terms of para Nos.11.2 and 11.4 of GCCSD, the extension was granted subject to leviable liquidated damages vide letter dated 27.10.2017 (Annexure A-4). Further extension of time was also granted upto 30.09.2019 vide

letter dated 09.10.2019 (Annexure A-7) subject to leviable Liquidated Damages. It was submitted that since the extensions upto 30.09.2019 were issued with liquidated damages and denial clause and the respondent-contractor accepted the said extensions with the said conditions and supplied the material, therefore, the Contractor was liable to pay the liquidated damages which has been wrongly denied by the Arbitrator. This fact has not been properly appreciated by the learned Additional District Judge, Patiala while dismissing the objections under Section 34 of the Act. The Court below had ignored the fact that the respondent-contractor continued the supply of the Engine Blocks against the Developmental order on 17 different occasions when the Prototype approval was pending before RDSO. The Court below has also failed to appreciate that the respondent-contractor has not taken any plea in the letter dated 27.09.2017 that the manufacturing process halted for want of inspection of one Engine Block by RDSO.

4.2 Learned counsel for the appellant further submitted that there was a specific stipulation in the agreement that the Railway was entitled to recovery Liquidated Damages @ 2% per annum from the Contractor in case of failure of supply of goods within stipulated time. The time and the date of delivery was the essence of the Contract, and as such the impugned order passed by the Court below is liable to be set aside.

5. On the other hand, learned counsel for the respondent-contractor submitted that the supply got delayed and delivery could not be given upto 30.11.2018 because the Prototype clearance was

supplied only on 25.08.2017 and the contractor had to first complete the supply against the earlier purchase order dated 08.04.2016 before starting the supply of the present purchase order dated 19.11.2016. As such, request was made to the respondent for extension of the delivery period. It was further submitted that the Arbitral Tribunal has rightly appreciated these facts while allowing the claim of the Contractor and the Court below has properly appreciated the facts and the reasons recorded by the Arbitral Tribunal while dismissing the objection petition. The Arbitrator has dealt with the grounds taken for the claim as well as the plea raised by the appellant. Reasonable opportunity has been granted to both the parties and the Arbitral Tribunal has rightly held that the clause of Liquidated Damages was not mandatory. As such, the appellant-railway was not held entitled to withhold the payment on account of Liquidated Damages on the ground of delay in delivery as the extensions were granted by the appellant after considering the reasons of delay.

6. We have considered the aforesaid submissions.

7. The present case requires determination of the question as to:-

“whether the appellant-Railways was justified in deduction of the amount as Liquidator Damages which was awarded to the respondent-Contractor by the Arbitral Tribunal?”

8. It is not disputed that the appellant-Railways deducted a sum of Rs.1,56,44,160/- on account of Liquidated Damages on the ground that the Supply Order was not completed upto 30.09.2017. As per the written request dated 27.09.2017 made by the respondent-Contractor, extension

of time for delivery was sought till 30.11.2018. The detailed reasons have been mentioned in the said request and therefore was allowed vide letter dated 23.09.2017 (Annexure A-4) whereby the period of delivery was extended upto 30.11.2018. However, it was mentioned that the extension is subject to leviable Liquidated Damages and Denial clauses. Similarly, the second request for extension of time for delivery was also accepted by the appellant-Railways vide letter dated 09.01.2019 (Annexure A-7) whereby the time was extended upto 30.09.2019. In the said letter the extension of delivery was also made subject to recovery of full Liquidated Damages.

9. The Respondent-Contractor had made a statement of claim before the Arbitral Tribunal (Annexure A-8) whereby it has been specifically submitted in para No. 7 that prior to the Purchase Order in question the Railways has placed two orders for the same Engine Blocks vide Purchase Order dated 03.10.2013 for 10 nos and vide order dated 08.04.2016 for 15 nos. This fact is not disputed. It is further alleged that while the claimant (Contractor) was in process of executing these orders, the respondent-Railways issued a letter dated 30.04.2015 imposing a condition on the claimants-respondent to get one Engine Block Prototype cleared from RDSO against the previous order dated 03.10.2013. This adversely affected the manufacturing cycle of the Claimant and due to the procedural delays at RDSO end and numerous stages of clearance insisted by them in prototype clearance of one no Alco Engine Block. It also halted the whole production process of the Claimant as the delivery

against Purchase Order placed after the order dated 3.10.2013 could not be commenced. The appellant-Railways has replied to the said paragraph in the reply (Annexure A-9) alleging that the letter in question dated 03.10.2013 does not pertain to the Purchase Order dated 19.11.2016 which is the subject matter of arbitration. A plea was raised that imposition of condition of getting one prototype Engine Block cleared from RDSO was accepted by the Contractor. A further plea has been taken that the firm was clearly advised “to continue the supply of Engine Block to DMW as per conditions of purchase order” and there was no restriction on continuity of supply against the said Development.

11. This fact is not disputed that a condition was imposed upon the Contractor to get one Engine Block prototype cleared from RDSO by issuing a letter dated 30.04.2015 (page 1 of Annexure 2 of Annexure A-6). This letter was issued with regard to the previous Purchase Order No.01/13/1534/1/560656 dated 03.10.2013 and the reason for seeking one Engine Block prototype inspected by RDSO was mentioned as “to procure the quality spares”. As per letter dated 30.05.2015, the Contractor had issued a letter to the Director, Motive Power (page 2 of Annexure 2 of Annexure A-6) requesting to communicate the program for inspection of the Engine Block Prototype. Before that as per communication dated 04.05.2015 a detailed representation was made to the Railways through the Controller of Stores specifying that 3 Nos. Engine Blocks have already been supplied to DMW and the Contractor had completed fabrication stage for next 4 Nos. Engine Blocks at the time when the letter

dated 30.04.2015 was issued seeking a Prototype Clearance of One Engine Block. The Contractor had already started manufacturing and completed Engine Blocks and even supplied to DMW. The Contractor made a request for granting time for inspection of Prototype by RDSO. However, in order to make an effort to supply in time, the Contractor had requested the Railways by communication dated 30.05.2015 (Page 2 of Annexure 2 of Annexure A-6) for deputing a representative for inspection of Engine Block Prototype. Ultimately vide communication dated 25.08.2017 (Page 5 of Annexure 2 of Annexure A-6) the inspected Prototype Engine Block was cleared. These facts are not disputed by the appellant-Railways.

12. The Arbitral Tribunal had considered the argument raised by the respondent-Contractor that the delay happened because the Contractor could not supply the latter order before completing supplies in the earlier orders. The Arbitral Tribunal has also observed in para Nos.7.12 that the delay was not within the control of the Contractor as they were to complete the supply against the earlier order before starting the supply against the present order and they started supply against the present order immediately on completion of the supply against the previous order.

13. The Arbitral Tribunal has also considered the relevance of clause No.11.2, 11.4 and 11.5 of GCCSD which reads as under:-

“11.2 Time for and the Date of delivery as specified in the Purchase Order is the essence of the Contract. However, extension of Delivery date may be considered in deserving cases where genuine reasons exist. Such extension of

delivery dated (sic) may be considered with Liquidated damages and Dental Clause as per IRS conditions of Contract.

xxxx

11.4 Railway shall recover from the Contractor as agreed Liquidated Damages and not by way of penalty, a Sum equivalent to 2% (Two Percent) of the price of any stores (including elements of taxes, duties, freight etc.) which the contractor has failed to deliver within the period fixed for delivery in the contract or as extended for each month or part of a month during which the delivery of such stores may be in arrears where delivery thereof is accepted after expiry of the aforesaid period, subject to a maximum of ten percent of value of the delayed supplies.

xxxx

11.5 L.D. will not be waived unless reasons of delay in supplies are beyond the control of contractor.”

(emphasis supplied)

14. The Arbitral Tribunal observed that levying of Liquidated Damages is not a mandatory clause.

15. No doubt the appellants have extended the delivery time firstly upto 30.11.2018 and then upto 30.09.2019 subject to levy of Liquidated Damages but the Contractor had submitted detailed reasons while seeking the extensions and even subsequently made a detailed request dated 24.11.2018 (Annexure A-6) requesting for waiver of Liquidated Damages deducted from the supply bills. The said request was not considered. The GCCSD has been rightly held to be not mandatory. Keeping in view the clause 11.5 which has been referred above, provides that Liquidated Damages will not be waived unless reasons for delay in supplies are beyond the control of the Contractor. The Arbitral Tribunal

has considered the detailed reasons submitted by the claimants and the objections raised by the Railways in reply while holding that reasons were beyond the control of the Contractor. Therefore, levying of Liquidated Damages was not mandatory but the delay was for the reason which was beyond the control of the Contractor.

16. In view of the aforesaid reasons and keeping in view the detailed reasons recorded by the Arbitral Tribunal, we are of the considered opinion that no other view is possible than what has been recorded by the Tribunal and the same has been rightly upheld by the Additional District Judge, Patiala while dismissing the petition under Section 34 of the Arbitration Act. The scope of Section 34 of the Act and the scope of an appeal under Section 37 of the Arbitration Act has been discussed by the Hon'ble Apex Court in ***UHL Power Company Limited vs. State of Himachal Pradesh (2022) 4 SCC 116***, wherein it has been observed by the Hon'ble Apex Court as under :-

“16. As it is, the jurisdiction conferred on Courts under [Section 34](#) of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under [Section 37](#) of the Arbitration Act, the jurisdiction of an Appellate Court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In [MMTC Limited v. Vedanta Limited](#) 7, the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under [Section 34](#) of the Arbitration Act has been explained in the following words:

“11. As far as Section 34 is concerned, the position is well- settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this

Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.”

17. A similar view, as stated above, has been taken by this Court in [K. Sugumar v. Hindustan Petroleum Corporation Ltd.](#)⁸, where it has been observed as follows:-

“2. The contours of the power of the Court under [Section 34](#) of the Act are too well established to require any reiteration. Even a bare reading of [Section 34](#) of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.”

18. It has also been held time and again by this Court that if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned Arbitrator proceeds to accept one interpretation as against the other. In [Dyna Technologies \(P\) Ltd. V. Crompton Greaves Ltd.](#)⁹, the limitations on the Court while exercising powers under [Section 34](#) of the Arbitration Act has been highlighted thus:

“24. There is no dispute that [Section 34](#) of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. [Section 34](#) is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under [Section 34](#) is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.”

19. In [Parsa Kente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited](#)¹⁰, adverting to the previous decisions of this Court in [McDermott International Inc. v. Burn Standard Co. Ltd. And Others](#)¹¹ and [Rashtriya Ispat Nigam Ltd. V. Dewan Chand Ram Saran](#)¹², wherein it has been observed that an Arbitral Tribunal must decide in accordance with the terms of the contract, but if a term of the contract has been construed in a reasonable manner, then the award ought not to be set aside on this ground, it has been held thus:

“9.1It is further observed and held that construction of the terms of a contract is primarily for an Arbitrator to decide unless the Arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do. It is further observed by this Court in the aforesaid decision in paragraph 33 that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It is

further observed that thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.

9.2 Similar is the view taken by this Court in *NHAI v. ITD Cementation (India) Ltd.*, SCC para 25 and *SAIL v. Gupta Brother Steel Tubes Ltd.* SCC para 29.”

20. In *Dyna Technologies (P) Ltd.* (supra), the view taken above has been reiterated in the following words:

“25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need 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.”

21. An identical line of reasoning has been adopted in *South East Asia Marine Engg. & Constructions Ltd.[SEAMAC Limited] V. Oil India Ltd.* and it has been held as follows:

“12. It is a settled position that a court can set aside the award only on the grounds as provided in the [Arbitration Act](#) as interpreted by the courts. Recently, this Court in *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.* [*Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*], laid down the scope of such interference. This Court observed as follows :

“24. There is no dispute that [Section 34](#) of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral

award. [Section 34](#) is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under [Section 34](#) is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.”

13. It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator supported by reasoning. This Court in Dyna Technologies observed as under : (SCC p.12, para 25)

25. Moreover, umpteen number of judgments of this Court have categorically held that the Court should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need 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.”

[emphasis supplied]

17. In view of facts of the present case and the ratio of the aforesaid decision, we are of the considered view that the interpretation of the relevant clauses of the agreement between the parties and the various communications issued thereafter, the Arbitral Tribunal has arrived at a plausible and possible conclusion. The Additional District Judge, Patiala has rightly dismissed the petition under Section 34 of the Act by not interfering with the award passed by the Arbitral Tribunal.

18. As such present appeal has no merits and the same stands dismissed. Parties are left to bear their own costs.

19. Pending miscellaneous application(s), if any, also stand disposed of.

(G.S. SANDHAWALIA)
JUDGE

(HARPREET KAUR JEEWAN)
JUDGE

08.08.2023
Ramandeep Singh/Shivani Kaushik

Whether speaking / reasonedYes / No

Whether ReportableYes/ No