

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present :

Hon'ble Justice Moushumi Bhattacharya

A.P.- COM 198 of 2024

Union of India, General Manager South Eastern Railway

Vs.

M/s. Electro Steel Casting Limited

For the petitioner : Mr. Siddhartha Lahiri, Adv.
Mr. Siddhartha Lahiri, Adv.
Ms. Amrita Pandey, Adv.
Mr. Ghanshyam Pandey, Adv.

For the respondent : Mr. S.N. Mookherjee, Sr. Adv.
Mr. Samrat Sen, Sr. Adv.
Mr. Paritosh Sinha, Adv.
Mr. Rajesh Gupta, Adv.
Mr. Amitava Mitra, Adv.
Ms. Manali Bose, Adv.
Ms. Antara Choudhury, Adv.
Mr. Dhruv Chadda, Adv.

Last heard on : 26.02.2024

Delivered on : 29.02.2024.

Moushumi Bhattacharya, J.

1. The Union of India represented by the General Manager, South Eastern Railway, has applied for setting aside of an Award dated 10.8.2020; as corrected on 7.11.2020 under section 34 of The Arbitration and Conciliation Act, 1996. The impugned Award was passed by an arbitral tribunal consisting of three learned arbitrators.
2. The impugned Award was made on a claim of the respondent / Award-holder Electro Steel Castings Limited including for the market value of the Rakes, loss of freight rebate and loss of profit. By the impugned Award, Electro Steel was awarded a sum of Rs. 232.44 crores along with interest at 9% per annum from the date of the Award till full recovery. The counter-claim of the petitioner / award-debtor was rejected.
3. The award-debtor has assailed the Award on the ground that the award is perverse in failing to consider relevant materials and taking into account matters which were not within the contemplation of the dispute. The argument of perversity is based on limitation, the Award of the claim for market value of rakes being contrary to the method for assessment contained in the Agreement, the Award for loss of freight rebate being in disregard of the evidence and the Award for loss of profit being contrary to the Wagon Investment Scheme (WIS).
4. The Court proposes to discuss each of these heads and the arguments in context.
5. The Court is required to deal with the facts and documents placed since the argument is of perversity.

The List of events

6. The sequence of relevant events should be briefly stated before the Court delves into the competing submissions made on behalf of the parties.
7. The Ministry of Railways, Government of India introduced a Wagon Investment Scheme (WIS) on 30.3.2005. The object of the WIS was to enable investors to procure wagons from approved builders. The investors were entitled to certain benefits including freight rebate and additional guaranteed number of rakes without freight rebate in return for the investment.
8. The respondent applied to two BOX N HS rakes of 122 wagons including 4% spares for each rake under the WIS. The respondent's application was forwarded by the South Eastern Railway to the Railway Board subject to the condition that the rakes will be inducted after construction of respondent's private siding at Barajamda. The Railway Board accepted the respondent's proposal on 16.5.2007. The parties entered into an agreement on 9.1.2008 pursuant to the WIS and the approval granted by the Railway Board.
9. In terms of Clause 16.0 of the WIS, any change in terms and conditions of the agreement could only be made by mutual consent of both parties. On 26.9.2008, 3.2.2011, 27.7.2011 and 1.8.2013, circulars were issued by the petitioner Railways which in effect made unilateral changes to the WIS. In 2014, these circulars were challenged before the Delhi High Court by other similarly-placed WIS investors. The Delhi High Court, by an order dated 29.6.2015, held that the circulars amounted to altering the basic structure of

the agreement by modifying the essential terms and conditions. By a judgment dated 3.11.2015 the Division Bench of the Delhi High Court affirmed the view taken by the Single Bench. The Special Leave Petition arising from the said judgment was also dismissed by the Supreme Court on 28.11.2017.

10. The respondent issued a notice for termination of the agreement on 17.6.2016 and invoked the arbitration clause in the Agreement on 3.10.2016.

11. The arbitration proceedings between the parties culminated in the impugned Award dated 10.8.2020, as corrected on 7.11.2020.

Limitation

12. The award-debtor has argued that the notice issued by the award-holder under section 21 of the Act is barred under Article 113 read with Article 137 of the Schedule to the Limitation Act, 1963 since the challenge to the impugned Circulars were made after 3 years from the dates of issue of the Circulars.

13. The award-holder, on the other hand, places the Circulars which led the award-holder to terminate the Agreement on the ground of unilateral changes made to the terms and conditions of the WIS and the orders passed by the Delhi High Court.

14. The relevant documents would show that the respondent terminated the Agreement in view of the petitioner making unilateral changes to the terms and conditions of the WIS in the Circulars dated 26.9.2008, 3.2.2011, 27.7.2012, 7.8.2012 and 1.8.2013. These changes were in violation of Clause 16 of the Agreement dated 9.1.2008 which provided that any change in the terms and

conditions of the said Agreement would only be done by mutual consent of both the parties.

15. While the petitioner claims that the changes were merely clarificatory, the respondent says that the changes amounted to amendments to the Circulars. The contentious issue on the nature of the changes was settled by way of a judgment delivered by a Division Bench of the Delhi High Court on 3.11.2015 in LPA 685 / 2018 which confirmed the judgment of the First Court of 29.6.2015. Both these judgments held that the Circulars altered the basic structure of the Agreement by modifying the essential terms and conditions of the incentives which were granted to the parties who had invested in the WIS. The respondent terminated the Agreement on 17.6.2016 and followed it up by a notice under section 21 of The Arbitration and Conciliation Act, 1996 Act on 3.10.2016 after pronouncement of the judgment by the Division Bench of the Delhi High Court.

16. Therefore, there is substance in the contention of the respondent that the judicial pronouncement by the Delhi High Court declaring the impugned Circulars amounting to modifications to the terms and conditions of the WIS was the cause of action for terminating the Agreement. The termination was made a little over 7 months of the judgment and hence, the notice under section 21 of the Act cannot be held to be barred by limitation. It is also relevant that the respondent's case was all along one of continuing breach and the right to invoke arbitration arose only when the contract was terminated on 17.6.2016.

17. The fact of continuing breach was taken note of by the arbitral tribunal in the discussion on Article 55 of the Schedule to the Limitation Act. The breach in the performance of the Contract on the part of the petitioner / award-debtor was in the form of failure to provide the freight rebate and failure to provide a guaranteed supply of rakes in accordance with Clause 7.1 of the Agreement. The Agreement contemplates the transactions between the parties to be in the nature of running and continuous action with a continuing obligation on the Railways for the supply of wagons.

18. Section 22 of the Limitation Act, 1963, which is relevant in this regard, envisages a continuing breach of contract where a fresh period of limitation begins to run with every act of breach. The terms of the Agreement also show that the breach extended beyond a single omission and occurred every time when the Railways refused to provide the benefits under the Agreement to the respondent. The respondent's claims crystallised on termination and its right to sue arose only at the point when the contract was terminated.

19. It is also relevant to state that the respondent did not challenge the validity of the Circulars but only the applicability of such Circulars to the respondent in view of Clause 16 of the Agreement which barred the petitioner from incorporating unilateral changes to the terms and conditions of the Agreement. The objection of the petitioner in relation to its claims and the point of limitation were comprehensively dealt with by the arbitral tribunal. The section 34 Court has a limited conspectus before it; and a statutory bar on re-

appreciation of evidence. Since limitation is a mixed question of law and facts, the Court is not inclined to interfere with the findings of the Tribunal.

20. The Court also finds that there is no patent illegality on the part of the arbitral tribunal in deciding the question of limitation. The Supreme Court in *Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)*; (2019) 15 SCC 131 curtailed the scope of an inquiry under section 34 of the Act even further by declaring that a mere contravention of the substantive law of India by itself will no longer be available as a ground for setting aside an arbitral award. The decisions cited by the petitioner in *J.C. Raja vs. Chairman Orissa Mining Corporation*; (2008) 2 SCC 444, *State of Goa vs. Praveen Enterprises*; (2012) 12 SCC 581 dealt with the purpose of section 21 of the Act and are distinguishable on facts. The present case is concerned with the respondent's section 21 notice which the Court finds to be within the period of limitation.

The Market Value of Rakes is Contrary to the Mode of Assessment Contained in the Agreement.

21. The petitioner argues that the impugned Award disregards the method of valuation stated in Clause 11.2 of the Agreement in arriving at the market value of the rakes. According to the counsel, the method of assessment should have been the depreciated value as per the Income Tax Rules minus the scrap value of wagons. Counsel submits that the Tribunal ignored the terms of the contract in arriving at the calculation.

22. Counsel appearing for the respondent relies on Clauses 11 and 12 of the Agreement and the fact that even if the contract does not provide for a stipulated method of valuation the claimant is entitled to value its claim based on customary methods of valuation.
23. Clause 12 of the Agreement provides for a scenario where the Agreement is terminated by the investor due to any alteration in the scheme whereby the ownership of the wagons would remain with the investor (the respondent in this case). This formula forms part of Chapter VII of Volume 1 of the Indian Railway Financial Code published by the Railway Board, Ministry of Railways. Moreover, since the wagons were to be transferred to the Railways, it was reasonable that the wagons should be valued as the Railways would itself value the wagons when they transfer the same from one Railway to another.
24. It is also stated that when the contract does not provide a stipulated method of valuation, the claimant is entitled to value its claim based on customary methods of valuation of all market rates which are reasonable and fair. The fairness of the valuation which was done in the present case would be evident from the method used by the award-debtor itself in connection with transfer of its wagons from one Railway to another.
25. Clause 11.0 of the Agreement – relied on by the award-holder – is concerned with wagons involved in accidents, where the wagons are condemned as a result of the accident and the Railways pay a nominal value at the time of condemnation. Clause 11.2 has no manner of application, since none of the wagons in the present case were involved in an accident. It is also

significant that the award-debtor did not come with any suggestion of an alternative method of valuation before the Tribunal for arriving at the value of the wagons / Brake Vans.

26. It is also correct that the Arbitral Tribunal has the final say on the quality and quantity of the evidence led before it and the referral Court can only interfere in a section 34 application where the view is an impossible one. The proviso to section 34 (2-A) makes it clear that an Award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

The Award on Account of Loss of Freight Rebate was in Disregard of the Evidence Available Before the Tribunal

27. The petitioner / award-debtor argues that allowing the claim for freight rebate was in ignorance / disregard of the evidence and that the Award-holder did not load any rakes under the WIS even after commissioning of the siding.

28. The respondent relies on section 73 of the Indian Contract Act, 1872 for the damage suffered on account of termination of the Contract and that the petitioner was estopped from challenging the validity of the grounds on which the respondent terminated the Agreement. According to the respondent, the only question which remained was the quantum of damages which was to be awarded in favour of the respondent by way of compensation in terms of section 73 since the respondent was unable to utilise the WIS rakes during the negotiable period of the Contract. Counsel submits that the respondent, as the

owner of the rakes, was entitled to a freight rebate of 10% on 6 rakes / month for 10 years. Of the total span of 7 years and 6 months from the date of commissioning of the rakes till the termination of the Agreement, the respondent was allowed to avail the WIS facility only for 9 months and was deprived of the facility for the balance period of 6 years and 9 months. Hence, the respondent was constrained to place indents for regular rakes to fulfill its iron ore consumption and register at different Railway sidings which led to a loss of freight rebate of 10%.

29. The rebuttal of the award-holder / respondent consists of admitted facts. The termination was before the end-time of the Agreement, i.e., before the respondent could avail of the full benefit of the Agreement of the WIS. Therefore, the respondent's loss of freight rebate of 10% under the WIS is factually correct. It is also admitted that the award-debtor did not put any meaningful question or suggestion on the respondent's claim for freight rebate at the time of cross-examination of the respondent's witnesses. There was no cross-examination on the respondent's entitlement to the claim of freight rebate or the claimed amount. Hence, the respondent's evidence of the claim and the quantum remained unchallenged. Therefore, the Arbitral Tribunal cannot be said to have faulted in relying on the evidence of the respondent's witnesses in this regard.

30. It is also relevant to state that the letters relied on by the petitioner including of 29th January, 8th April, 1st August, and 16th September, 2013 did not state that the respondent had no goods to transport. Moreover, the

respondent had adduced evidence before the Arbitral Tribunal that the respondent had transported substantial quantity of goods between December, 2008 – June, 2016 by disclosing more than 900 Railway receipts out of which more than 300 Railway receipts belonged to the period from January, 2013 - 17th June, 2016 (the date of termination).

31. Therefore, the petitioner's argument that the respondent did not place any rakes is factually without basis. The Arbitral Tribunal also found that the award-holder was terminated from loading WIS Rakes by the petitioner on the ground of non-mentioning of designated loading station due to lapses on the part of the petitioner itself and that the respondent could not benefit from the WIS after April, 2012 due to the unilateral changes made by the petitioner. This Court does not find any infirmity in the Tribunal's finding of the respondent being entitled to the claim for freight rebate also in view of there being no cross-examination in respect of the respondent's claim or the quantification thereof by the petitioner / award-debtor.

The Award on the respondent's claim for loss of profit was in disregard of the Wagon Investment Scheme policy

32. Counsel appearing for the petitioner argues that the Arbitral Tribunal disregarded the fact that the goods which were to be transported by the WIS rakes were solely for self-consumption of the respondent and that the Arbitral Tribunal should not have relied on Agreements between the petitioner and Sesa Goa Limited for allowing the claim for loss of profit.

33. On the other hand, counsel appearing for the respondent argues that the respondent did not raise this issue before the Arbitral Tribunal and has only taken this point at the time of argument. Counsel submits that the Agreement dated 9.1.2008 contained the mandate of WIS should only be used for self-consumption and not for Commercial dealings with third parties. Hence, the Tribunal's Award of loss of profit based on the respondent's Agreement with Sesa Goa is correct.

34. It is undisputed from the evidence on record that there was no cross-examination by the petitioner of the respondent's witnesses on the claim for loss of profit. In the absence of such, the evidence of CW 1 and CW2 (respondent's witnesses) remained unchallenged and has to be taken into consideration. The Arbitral Tribunal's decision in respect of the claim for loss of profit is clearly discussed in the impugned Award with reliance on annexures and invoices raised on Sesa Goa. The impugned Award is based on evidence which is uncontroverted and the Court is not inclined or even statutorily-authorized to interfere with the Tribunal's findings on the evidence. Although, the petitioner has relied on *Associate Builders vs. Delhi Development Authority; (2015) 3 SCC 49* and *PSA Sical Terminals Pvt. Ltd. vs. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin; 2021 SCC OnLine SC 508* on the point of perversity where the Award is not based on evidence or takes into account extraneous facts or ignores vital evidence, the impugned Award in the present case is replete with findings on oral and documentary evidence which was before the Arbitral Tribunal.

The Impugned Award Deals with a Dispute which falls outside the terms /
submission to Arbitration

35. Learned counsel appearing for the petitioner submits that the issue with regard to delay in construction of the private siding at Barajamda was not part of the notice issued by the respondent on 3.10.2016 for invocation of the Arbitration Agreement. Counsel submits that the Arbitral Tribunal went beyond the scope of the reference and returned a finding in that regard.
36. Learned counsel appearing for the respondent relies on an In-Principle approval of the Railways of 6.2.2006 to the respondent's application for setting up of private siding at Barajamda and a letter of 6.5.2007 of the Railway Board accepting the respondent's proposal to induct two Rakes and two Brake Vans. Counsel also relies on a letter of 5.9.2008 whereby the Railways confirmed having received two Rakes and clarified that the said Rakes were to be inducted in the future construction of private siding of the respondent.
37. The impugned Award shows that the respondent successfully demonstrated before the Arbitral Tribunal that the petitioner's breach and defaults of the Agreement resulted in the non-commissioning of the private siding at Barajamda and further that the respondent was directed to utilise an alternative siding for 9 months out of the contractual period of 10 years. It would further be evident that the petitioner cited delay in commissioning of the respondent's / claimant's private siding at Barajamda as one of the primary reasons for the petitioner's refusal to grant the claimant's entitlements under

the WIS. Therefore, the reason for the private siding at Barajamda not being commissioned on time was a crucial dispute which went to the root of the differences between the parties and was wholly within the scope of the Arbitration Agreement. Hence, there is no basis in the petitioner's stand that the Arbitral Tribunal acted beyond the contemplation of the references or arrived at a finding which was beyond the scope of submission to arbitration.

Rejection of the Petitioner's Counter Claim is Perverse

38. Contrary to the stand taken on behalf of the petitioner, the petitioner's counter claim was not based on any evidence and the tabulation contained therein was also not proved. The petitioner did not lead evidence on whether the Rakes which were to be allotted to the respondent were lying idle during the corresponding period or whether the petitioner had actually suffered any loss for the alleged non-placement of indents by the respondent. In any event, the petitioner also failed to rebut the objection raised by the respondent to the counter claim and hence failed to discharge the onus cast on the petitioner to substantiate the counter claim. The impugned Award on this score cannot be interfered with for the aforesaid reason.

39. The Court will not interfere with a plausible or even a possible view as long as the view taken is not perverse. The Court will only substitute its view if the Award contains findings which are ex facie perverse or impossible on the face of the record or the evidence which was before the Tribunal.

40. The petitioner has not produced any evidence of the Arbitral Tribunal ignoring vital facts or taking into account irrelevant facts or pronouncing on a issue without any evidence. None of the grounds available to an aggrieved party to seek recourse under section 34 of the 1996 Act has successfully been raised before this Court. The ground of perversity can only be accepted where the Arbitral Tribunal has arrived at findings or conclusions which are not supported by evidence or were entirely beyond the contemplation of the reference.

41. The above reasons persuade this Court to hold that there is no scope for interference in the impugned Award. The challenge to the impugned Award is dismissed. A.P COM 198 of 2024 (AP 129 of 2021 is accordingly dismissed without any order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)