

**In the High Court at Calcutta
Original Civil Jurisdiction
Commercial Division**

The Hon'ble Justice Sabyasachi Bhattacharyya

**AP-COM No. 208 of 2024
[Old Case No. AP No. 245 of 2021]**

**Union of India
Vs
Senbo Engineering Limited**

For the petitioner : Mr. Satyendra Agarwal, Adv.
Mr. Subhankar Chakraborty, Adv.
Ms. Ruchira Manna, Adv.

For the respondent : Mr. Dhruba Ghosh, Sr. Adv.
Mr. Nilay Sengupta, Adv.
Mr. Sujit Banerjee, Adv.
Mr. Altamash Alim, Adv.
Ms. Ananya Barik, Adv.

Hearing concluded on : 15.07.2024

Judgment on : 05.08.2024

Sabyasachi Bhattacharyya, J:-

1. The Union of India, through the General Manager of the Metro Railway, has filed the present challenge under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) against an award whereby several monetary claims of the claimant/respondent were allowed.
2. Learned counsel for the petitioner argues that the three-member Arbitral Tribunal decided on the validity of termination of the contract of the claimant despite such relief having not been sought by the claimant in its statement of claim. That apart, termination falls under

the 'excepted clauses' of the contract and thus, could not have been adjudicated upon by the Tribunal.

3. Claims 1, 2, 3, 7 and 8, which were all allowed, are excepted matters as per Clause 63 of the General Conditions of Contract (GCC). While determining claim no.1, the Tribunal went into the veracity of measurements and based its award on the basis of such measurements, which falls within the excepted clauses as well.
4. The contract between the parties specifically states that no interest is payable, despite which, under claim no.11, the Tribunal granted interest to the claimant. It is argued that, as per Section 31(7) of the 1996 Act, interest cannot be granted unless agreed upon, which agreement is absent in the present case.
5. The matter of measurement with regard to the bills/termination owing to default of contractor falls under Clause 62, which is also one of the excepted matters under Clause 63 as per learned counsel for the Railways.
6. Despite there being disputes regarding payment of bills, the claimant could simultaneously have continued the work within the provisions of the contract between the parties. Clauses 39(1) and 39(2) contemplate rates for extra items of work and Clause 43(1) deals with monthly statement of claims. However, without availing of the same and despite being given repeated opportunities, the claimant abandoned the work midway, for which the termination took effect in accordance with law and the contract.

7. Although there were no monthly claims under Clause 43(i), the Tribunal went on to allow the claims of the claimant.
8. Despite it being indicated in the award that there was some duplication, the Tribunal went ahead to pass the award in favour of the claimant. It was recorded by the Tribunal in paragraph no. 8.3.2 of the award that work was abandoned by the contractor.
9. It is next argued that new claims, which were not part of the original claim, were allowed, which was contrary to the contract between the parties. Whereas claims 1, 2, 3, 11 and 12 were not part of the original claims, claim nos. 5, 6, 8, 10 were increased.
10. Clause 46(3) contemplates that on-account payments do not prejudice the final settlement.
11. The Tribunal, while deciding the counterclaim of Railways, re-wrote the contract between the parties contrary to the order passed on November 17, 2017 in APO No. 507 of 2017 arising out of AP No.934 of 2017, an application under Section 9 of the 1996 Act. Vide order dated January 15, 2020 passed in AP No. 491 of 2019, costs were awarded, to be paid by the petitioner to the State Legal Services Authority. However, the Tribunal adjusted the cost amount with the counterclaim which, according to the petitioner, was illegal.
12. Learned senior counsel appearing for the claimant/respondent submits that the Arbitral Tribunal interpreted the terms of the contract which was within its domain and not susceptible to challenge. Moreover, the views taken by the Tribunal were plausible

views and, merely because another view is possible, cannot be substituted by such alternative view by this Court.

13. It is argued by the respondent that the claims allowed by the Arbitral Tribunal do not fall within the 'excepted' matters under Clause 63 of the GCC.
14. The amounts awarded by way of compensation for wrongful encashment of the Bank Guarantees are not 'interest' within the meaning of Clause 64(1)(iii).
15. Thus, it is argued that the present challenge ought to be dismissed.
16. The respondent argues that the impugned award was passed upon hearing both parties and taking into consideration all the evidence and arguments made by the parties.
17. Para 3.4 of the award records that both the claimant and respondent presented themselves for the meeting and had stated that they were satisfied with the full opportunity given to them to present their cases. Hence, they cannot have anything further to say. It is pointed out that no application under Section 18 of the 1996 Act has been filed by the petitioner alleging lack of proper opportunity being given to present its case. Thus, such ground taken in the application under Section 34 is an afterthought.
18. The pleadings in the Section 34 application, it is argued, are bald allegations without any particulars. The tests of Section 34 are not met, it is argued.
19. Learned senior counsel for the claimant/respondent cites *Food Corporation of India vs. Forbesganj Jagdish Mills Ltd.* reported at

(2000) SCC OnLine Cal 612. In support of the proposition that the Court, under Section 34 of the 1996 Act, is not sitting in appeal until and unless the award is bad on the face of it and that the Arbitrator is the best judge.

20. Learned senior counsel also cites *National Highway Authority of India vs. Gammon India Ltd.* reported at (2014) SCC OnLine Cal 17407 for the proposition that the Court cannot have a re-look into the conclusion arrived at by the Arbitrator. If the Arbitrator interprets a clause in a particular manner, the Court would not interfere with the same, since it is not sitting in appeal.
21. It is not permissible for the Court to interfere with the Arbitrator's view merely because another view would be possible. The Arbitrator, it is argued, is the best judge of quality as well as quantity of evidence, particularly since each of the three members of the Tribunal were well experienced in such matters and were chosen by the parties consciously due to their special knowledge in resolving disputes.
22. Again, it is argued that interpretation of contract is for the arbitrator to decide and under law, the arbitrator is made the final arbiter of disputes between the parties.
23. Learned senior counsel for the claimant/respondent next relies on *Sutlej Construction Ltd. v. State (UT of Chandigarh)* reported at (2018) 1 SCC 718 for the proposition that the Court ought not re-appreciate evidence as long it is not a case that the award is completely without reason. The Court, in the said case, referred to *Associate Builders v. Delhi Development Authority* reported at (2015) 3 SCC 49 in holding

that an award can be set aside if it shocks the conscience of the Court and not when the Court thinks it to be unjust on the facts of the case.

- 24.** The arguments regarding the claims falling within excepted matters, it is contended, is baseless and speculative.
- 25.** Learned senior counsel for the respondent next cites *H.L. Batra and Company vs. State of Haryana and another* reported at (1999) 9 SCC 188 in support of the contention that additional claims filed by the claimant pertaining to the contract do not enlarge the award contrary to law and are within the terms of reference.
- 26.** The Arbitral Tribunal, in paragraph 8.3.1 of the award, has rightly decided regarding the ground qua termination of contract raised by the petitioner in the present application under Section 34. It was correctly observed by the Tribunal in paragraph 8.3.3 to 8.3.4 that the Railways themselves seemingly created the circumstances for making the contractor unable to perform; hence, the termination of the contract was held to be without merit.
- 27.** The Security Deposit was submitted by the respondent as a security for the completion of work and since the contract was rendered impossible to perform due to laches of the petitioner, there is no reason why the said amount should not be released in favour of the claimant/respondent.
- 28.** Since the work could not be done owing to the petitioner's failure in not handing over the encumbrance free site, delay in the execution of the project is attributable to the petitioner and, as such, interest on mobilization advanced was rightly directed to be paid in favour of the

claimant. The claimant/respondent cannot be made to suffer due to laches of the petitioner.

- 29.** Owing to massive delays caused by the petitioner, the Bank Guarantees were extended, for which huge amount was incurred every time by the petitioner. Had the Arbitral Tribunal acted reasonably and unjustifiably, it could have allowed the claim of the respondent in respect of the Bank Guarantees in its entirety. However, the Tribunal, on proper evaluation of proof placed before it, allowed only such sums as it deemed fit and proper.
- 30.** Claim no.1(i) was allowed on admission of the Railways and claim no.1(ii) is also based on statements of Railways regarding the admitted Escalation Bill. Claim no.3 was for the principal amount of Bank Guarantees which were illegally encashed after termination of the contract and claim no.7 is in respect of interest wrongfully charged by the petitioner on mobilization advance even after original tenure of the contract, although the contract was not terminated due to any fault of the respondent. It is thus, submitted that the present challenge ought to be dismissed on merits.
- 31.** Upon hearing learned counsel for the parties, the Court comes to its conclusions as follows:
- 32.** The Supreme Court, in *Sutlej Constructionltd (supra)*, has amply laid down the contours of interference under Section 34 of the 1996 Act. In such a challenge, there cannot be any interference when the award is reasonable and on the basis of a plausible view. Re-appreciation of evidence cannot normally be done and when it comes to setting aside

of an award under the public policy ground, the award should shock the conscience of the Court. Merely because the Court thinks it unjust on the facts of the case, it cannot substitute its view for that of the Arbitrator to do what it considers to be justice.

33. In *H.L. Batra (supra)*, the Supreme Court also laid down the scope of arbitration where an award is set aside and a new arbitrator is appointed for settling of disputes. In such circumstances, it was held that the second Arbitrator's scope was not confined only to those claims which have been originally filed before the first Arbitrator.
34. Although the ratio of *Sutlej Construction ltd (supra)* is applicable, *H.L. Batra (supra)* has no application since in the present case, the question is not merely whether new claims can be made but whether there was a bar in making such new claims under the contract.
35. Clause 64(1)(ii) of the agreement between the parties provides that the demand for Arbitration has specified the matters which are in question or subjected to the dispute or difference as also the amount of claim item wise. Only such disputes or differences in respect of which the demand has been made, together with counter claims or set-off, shall be referred to arbitration and other matters shall not be included in the reference.
36. Thus, it is not a general case, as was being considered in *H.L. Batra (supra)*, where additional claims can always be incorporated later on. The very Arbitration Clause on the strength of which the disputes between the parties was referred in the instant case to arbitration, that is, Clause 64, in sub-clause(ii), restricts additional claims to be

made later on. If the Arbitral Tribunal derives powers from the self-same contract, it was not for the Tribunal to go beyond the agreement itself, as the parties themselves have chosen the procedure to be followed. Under Section 19(2) of the 1996 Act, the parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting its proceedings. Since the parties chose to exclude subsequent additional claims, the tribunal was bound by the same.

- 37.** In the present context, insofar as claim no.1(iv), claim no.4, claim no.5, claim no.6 , claim no.9 and claim no.10 are concerned, since the Arbitral Tribunal did not grant any award to the claimant/respondent, the said claims are not being dealt with, being beyond the subject-matter of the present challenge.
- 38.** Claim no.1(i) was granted by the Tribunal. In paragraph 9.1.1.4 of the award, the respondent/present petitioner was directed to release an amount of Rs. 1,20,09,342-/ to the claimant under the head of amount withheld on CC/30th/Account Bill. Although disputes as to measurement are precluded from arbitration, falling within Clause 22(5), which is one of the excepted clauses, while granting claim 1(i), the Tribunal based its award on the measurements of the petitioner-Railway itself. As such, there could not be any fault found with such adjudication, as the Tribunal did not enter into the merits of the measurements but relied on the measurements of the Railway itself.
- 39.** Insofar as the award on claim 1(ii), as incorporated in paragraph 9.1.2.3 of the award is concerned, the same was on the basis of the admitted 7th(final) Escalation Bill. It being an admitted position and

no adjudication on merits being entered into, the premise of the said component of the award cannot be faulted either on the same logic.

40. Under claim 1(iii) of the claimant relating to the CC/31st On Account Bill, the Tribunal observed that an amount of Rs 1,12,69,519/- was recoverable from the claimant against the final bill. Apart from the said verdict going against the claimant/respondent, the same was based on detailed calculations, a summary of which was given in the award. Hence, the said component of the award cannot be interfered with at all at the instance of the respondent-Railway.
41. Coming to claim 2, the same pertained to recovery of Security Deposit, as retention money from the claimant's On Account Bills, for Rs. 10,48,723/-. The entire claim was granted by the Tribunal. The logic behind the same was furnished in paragraphs 8.3.1-8.3.4 of the award. In the said paragraphs, the tribunal categorically entered into the question whether the termination of the contract was proper and justified. While holding so, the Tribunal observed that the Railways themselves "seemingly created the circumstances" for making the contractor unable to perform. Solely on such premise, the Tribunal proceeded to declare the termination of contract to be without merit. However, it is well-settled that the Arbitral Tribunal is a creature of the contract between the parties. An arbitral tribunal is clothed with its powers by virtue of the agreement between the parties and, thus, cannot go beyond its charter as vested by the agreement, which is the source of its powers.

- 42.** The disputes and differences which can be referred to arbitration is governed by Clause 63 of the agreement between the parties in the present case, which specifically provides that the matters coming within the ambit of exception clauses as mentioned therein would not be arbitrable between the parties.
- 43.** Such “excepted matters” include Clause 61(1) and Clause 61 (2), the first of which pertains to the entitlement of the Railways to determine and terminate the contract at any time should, in its opinion, the cessation of work becomes necessary owing to the grounds mentioned therein.
- 44.** Sub-Clause (2) of Clause 61 provides for determination of contract under sub-clause (1), in which case if the contractor claims payments for expenditure incurred by him in the expectation of completing the whole work, the Railways are to admit and consider the same.
- 45.** However, the relevant clause here is Clause 62, which relates to determination of contract owing to default of contractor. The said clause also comes within the purview of “excepted matters”. Under sub-clause (vi) of Clause 62, abandonment of the contract is one of the grounds of determination. Such determination falls within Clause 62, which is an excepted matter in terms of Clause 63 which governs the disputes arbitrable between the parties. More importantly, the claimant never made any specific claim in the arbitral proceeding challenging the termination itself.
- 46.** The premise of the Railway retaining the security or retention money was the termination of contract, upon which the Railway is entitled as

per the contract itself to retain the Security Deposit. Without challenging the termination and despite the termination falling within the cloak of protection of excepted matters under Clause 62 of the agreement, the Arbitral Tribunal traversed palpably beyond its powers in adjudicating on such issue.

- 47.** Section 34 (2)(a)(iv) of the 1996 Act provides that an arbitral award may be set aside by the Court if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or if it contains decisions on matters beyond the scope of the submission to arbitration. The proviso thereto stipulates that if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside.
- 48.** Following such principle, the award on claim 2 is liable to be set aside.
- 49.** The Railway has also challenged the award on claim 3, regarding refund of Bank Guarantee, which has been dealt with by the Arbitral Tribunal in paragraph 9.3.7 of the award.
- 50.** The Railway/petitioner argues that the same is a new claim, beyond the purview of the original demand and, thus, falling beyond the scope of arbitration under Clause 64(1)(iii). However, this Court fails to satisfy itself on such count. The Bank Guarantees were by nature performance guarantees and mobilization advance guarantees. The furnishing of such Bank Guarantees was inextricably connected with performance guarantee and mobilization advance, which directly

emanate from the dues of the claimant on the bills for work done. They are not related to termination, since no clause in the agreement links the retention of Bank Guarantee with termination. As such, adjudication on such claim does not touch on the termination of contract, which is an excepted matter.

- 51.** Hence, the refund of the Bank Guarantees invoked by the respondent/petitioner cannot be seen as a new claim but comes squarely within the ambit of the original reference which touches upon non-payment on bills raised by the claimant for work done. Clause 61, sub-clauses (1) and (2) do not envisage forfeiture of Bank Guarantee amounts in excess of Security Deposit on termination. The Bank Guarantee amounts are not included within the Security Deposit, forfeiture of which is linked with termination; thus, the Arbitral Tribunal acted well within the confines of its jurisdiction in awarding such amount. Since this Court is not sitting in a regular appeal over the same, the factual adjudication of the Tribunal on claim 3 cannot be interfered with even if a different view were to be possible on the materials on record.
- 52.** The next disputed question which arises is the award on claim 7, as granted in paragraph 9.7.6 of the award.
- 53.** The Railway/petitioner takes an objection on the ground that Clause 64(5) of the agreement between the parties provides that where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date

on which the award is made. The Railway seeks to confuse the award component on claim 7 with 'interest'.

- 54.** However, the interest on mobilization advances which were sought to be refunded under claim 7 were payments which had already been made by the claimant to the Railways. The Arbitral Tribunal held that the 12% interest already charged by the Railways beyond the original completion date was without Authority and reduced the same to 5% interest. The effect thereof was that the Railways had to refund the balance amount after deduction of interest already paid to the Railways at the rate of 12% from interest calculated at 5%. The net effect of the said award-component is that an amount already deducted in excess by the Railways was directed to be partially refunded to the claimant.
- 55.** As opposed to the interest envisaged in Clause 64(5) which is an additional component of interest payable on an awarded amount, claim 7 comprised itself of an award for payment of money, being refund of excess interest already deducted from the claimant. Thus, there is a clear distinction between claim 7, which comprises of a direction to refund an amount already withheld by the Railway, from an additional component of interest imposed on an awarded amount by the Tribunal. In the present case, claim 7 did not comprise of any additional interest component of an award granted by the Tribunal but was itself a part of the principal arbitral award. Hence, such objection of the Railway is specious and hereby turned down.

- 56.** However, as far as claim 8 is concerned, as awarded in paragraph 9.8.4 of the award, the same is directly contrary to Clause 17A, sub-clauses (ii) and (iii) of the GCC. The said sub-clauses clearly provide that no other compensation, apart from necessary extension of time, shall be payable for works carried forward to the extended period and that even if there was a failure or delay on the part of the Railway to handover to the contractor possession of the lands necessary for execution of the works, such failure/delay shall in no way affect or vitiate the contract or entitle the contractor to damages or compensation therefor, but in any such case, the Railway was to grant such extension of the completion date as may be considered reasonable.
- 57.** Even in the teeth of such specific bar to extra compensation, the Tribunal, under claim 8, precisely granted such compensation. Claim 8 was refund of commission paid to its bank by the claimant for extension of Bank Guarantees from time to time beyond the original contractual period.
- 58.** It is to be considered that the extension beyond the original contractual period was sought by the claimant itself and accordingly granted by the Railway Authorities. After having asked for such extensions and being granted the same, the claimant is squarely covered by the bar under Clause 17A, sub-clauses (ii) and (iii) and cannot be held to be entitled to further damages or compensation therefor. The commission paid to the bank for extension of Bank Guarantee was willingly paid by the claimant for seeking the

extensions and if such commission is also directed to be borne by the Railway, the same would tantamount to additional damage or compensation for such extension, which is palpably barred under Clause 17A as discussed above.

- 59.** In such view of the matter, the said component of the award is also hit by Section 34(2)(a)(iv) of the 1996 Act, and thus ought to be set aside.
- 60.** Lastly, claim 11 pertained to interest on the awarded amounts which was granted by the Tribunal in paragraph 9.11.4 of the award. However, Clause 64(5) of the GCC is a clear bar to grant of interest, since it stipulates that where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made. Hence, the said component of the award is also vitiated by Section 34(2)(a)(iv) of the 1996 Act. The claim of interest being barred by the same agreement which clothes the Arbitral Tribunal with the power to adjudicate, the said bar had to be adhered to by the Tribunal. The interest component granted in the teeth of the bar was clearly violative of the contract between the parties and, being covered by the 'excepted matters', was beyond the scope of arbitrable disputes as envisaged by the agreement between the parties.
- 61.** In view of the above, insofar as the awards pertaining to claim nos.2,8 and 11 are concerned, those being beyond the scope of submission to arbitration and containing decisions on matters beyond such scope, are palpably violative of Section 34(2)(a)(iv) of the 1996 Act. Since those parts can be clearly segregable from the rest of the award in

terms of the proviso to Section 34(2)(a)(iv), those components of the award are liable to be set aside.

- 62.** Accordingly, AP-COM No. 208 of 2024 [Old Case No. AP No. 245 of 2021] is allowed in part on contest, thereby setting aside the impugned award of the Arbitral Tribunal insofar as it relates to claim nos. 2, 8, 11.
- 63.** There will be no order as to costs.
- 64.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)