
(2018) 06 DEL CK 0019

Delhi High Court

Case No: FAO(OS) (COMM) 104 OF 2018 & CAV 464 OF 2018 & CM APPL. 20010- 20011
OF 2018

IRCON
INTERNATIONAL LTD

APPELLANT

Vs

PATIL RAIL
INFRASTRUCTURE
PVT LTD

RESPONDENT

Date of Decision: June 1, 2018

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34

Hon'ble Judges: S. RAVINDRA BHAT, A. K. CHAWLA

Bench: Division Bench

Final Decision: Dismissed

Judgement

1. The appellant (hereafter "IRCON") unsuccessfully challenged an arbitration award (dated 6 August, 2015) under Section 34 of the Arbitration

and Conciliation Act, 1996 (hereafter the "Act"); the award allowed some claims of the respondent (hereafter described as "Patil"), along with interest.

2. The facts are that IRCON awarded the work of "Manufacture, Supply, Transportation and Delivery of Pre-stressed Mono-Block Concrete

Sleepers for Broad Gauge Railway Track (1676 mm) suitable for 60 kg rail section, for the restoration of various railway lines in Northern Province of

Sri Lanka to Patil, by an agreement dated 14.05.2012. IRCON alleged that Patil was liable for the sleepers supplied by it and later found to have

developed cracks. IRCON relied on Clause 8 of the Letter of Acceptance (LOA) and Clause 15 of the Special Condition of Contract (SCC),

hereafter), and sought replacement of such defective sleepers, during the "Defect Liability Period". Patil alleged that the cracks had not appeared

due to any manufacturing defects; the resultant disputes were referred to arbitration leading in the Impugned Award.

3. Before the single judge, it was contended that the award misconstrued, Clause 8 (of LOA) and Clause 15 of SCC stating that the condition

triggering liability, as construed, i.e. manufacturing defects, was unwarrantedly superimposed and was never part of the contract. The single judge

dealt with this contention, as well as the other submissions, to the effect that the onus of proving the defect was wrongly laid upon IRCON and after

noticing the limited scope of interference under Section 34 of the Act held as follows:

"10. In any case, the Arbitrator has interpreted the above two Clauses and such interpretation, in my opinion is plausible and in fact correct. In

Associate Builders v Delhi Development Authority (2015) 3 SCC 49, the Supreme Court has cautioned that the Court, in exercise of its power under

Section 34 of the Act, would not be competent to set aside the Arbitral Award merely because it does not agree fully with the interpretation of the

agreement given by the Arbitrator. If such interpretation of the agreement by the Arbitrator is plausible, the Award has to be upheld. I may only quote

the relevant observation of the Supreme Court in this regard:

42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads: xxxxxx 42.3 (c) Equally, the

third subhead of patent illegality is really a contravention of Section 28 (3) of the Arbitration Act, which reads as under:

28. Rules applicable to substance of dispute. (1)-(2) (3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract

and shall take into account the usages of the trade applicable to the transaction.

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an

arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. 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.

11. It is further contended by learned senior counsel for the petitioner that the Arbitrator has erred in putting the onus of showing the reasons for

development of cracks in sleepers on the petitioner rather than the respondent. He submits that once it is admitted that the sleepers have developed

cracks within the Defect Liability Period, it was for the respondent to have shown the cause thereof and by putting the onus of proof on the petitioner,

the Arbitrator has clearly erred in law and on facts.

12. I am unable to agree with the above submission of the learned senior counsel for the petitioner. In the present case, once the cracks were noticed,

the sleepers were tested again by the parties themselves and thereafter even by the Sri Lankan Railways. During the arbitration proceedings, the

Arbitrator, in exercise of his powers under Section 26 of the Act, appointed an expert from IIT Chennai to again retest the sample sleepers and give

his report on the causes for the defects. In all these tests, it was not shown that the cracks were developed due to any manufacturing or transportation

defects on part of the respondent. As noted above, once this conclusion is reached, for what cause the cracks actually appeared loses all its

significance as the respondent could be held liable only if the cracks were developed due to manufacturing defects or defects during the course of

transportation or supply and not otherwise.

13. The Arbitrator, in the Impugned Award, has concluded that the sleepers supplied by the respondent meet the specifications provided in the

contract. I quote from the Impugned Award as under:

Ã, *****

14. The Arbitrator has rightly put the onus of proof on the petitioner to show that the cracks had developed due to any manufacturing defects. In any

case, the question of onus of proof, in the present case, loses all its significance as the Arbitrator has arrived at his final conclusion relying upon

various test reports as also the report of an Expert appointed by him, that is, after analysing all evidence led before him by both the parties.

15. In any case, the Arbitrator has considered all the evidence led by the parties before him in form of such reports, photographs produced by the

respondent and even site visit by the Arbitrator. Appreciation of evidence is the sole and exclusive domain of the Arbitrator. This Court in exercise of

its power under Section 34 of the Act, cannot re-appreciate the evidence so as to arrive at its own conclusion. The said exercise would be completely

outside the scope of its jurisdiction under Section 34 of the Act.

4. It is urged by IRCON and argued by its counsel Mr. Tejas Karia, that the Tribunal's interpretation of Clause 8 of the LOA and Clause 15 of

SCC was incorrect and has re-written the condition that a defect covered is only a "manufacturing defects" which was absent on a plain reading

of the two contracts. It was submitted that such interpretation is not only restrictive, but not justifiable on any reasonable construction of the terms of

the contract or any interpretation. Counsel submitted that while the Tribunal derives jurisdiction to operate within the framework of the express terms

of the contract, nowhere does the law authorize it to, in the process of interpretation virtually place itself and restrict a liability through an artificial

process that was never contemplated by parties. It was argued that the award and the impugned judgment ought to have noticed that the contract was

not only for manufacture, but also for supply, transportation and delivery of the railway sleepers. In these circumstances, if "after supply, the

purchaser could point out that a substantial number " over 12,000 sleepers were cracked, the question of placing the onus upon IRCON to prove

that the goods were defective on account of the respondent's fault, did not arise.

5. It was argued that the primary responsibility of the supplier (Patil) to ensure that the goods contracted for conformed to the quality and description

agreed for, was not discharged even by the inspection on the part of IRCON. Reliance was placed on Clause 25.8 of the SCC which provided that

(the) “Supplier agrees that neither the execution of a test and/or inspection of the Goods or any part thereof, nor the attendance by the Purchaser

or its representative, nor the issue of any report pursuant to GCC Sub-Clause 25.6, shall release the Supplier from any warranties or other obligations

under the Contract.” In these circumstances, argued counsel for IRCON, the restriction of liability only to manufacturing defects was wholly

unwarranted. The award was fundamentally flawed and smacked of palpable unreasonableness.

6. Mr. Kanwar Shashank, learned counsel for Patil, urged that this court should not interfere with the reasoning and conclusions of the single judge.

Given the limited mandate which the appellate court can exercise, the decision of the single judge, upholding the interpretation in the award, should not

be questioned. He also pointed out that each contention urged before this court was considered but rejected by the single judge; moreover the Tribunal

has the undoubted authority, in law to interpret the terms of contract between parties. That such an interpretation is not to the liking of the appellant

cannot be the basis for setting it aside. It was submitted that the interpretation adopted is not only plausible, but reasonable and in such cases, if it were

assumed that there is another interpretation, the existence of such interpretation cannot lead to the appellate court substituting its view.

7. The relevant conditions are extracted below. Clause 8 of the LOA reads as follows:

8 DEFECT LIABILITY PERIOD In terms of clause 15 of the special condition of contract, the Defect Liability Period for the sleepers supplied

shall be 24 (Twenty Four) months from the date of completion of the supply of the entire quantity of supplies. You will be required to replace any

material found defective and notified by IRCON within the above period. In event of your failure in promptly replacing the defective material notified

by IRCON, IRCON shall have the full right/liberty to withhold your due payment and en-cash the bank guarantees submitted by you. IRCON's

decision in this regard shall be final and binding on you. Clause 15 of the SCC and other relevant conditions read as follows:

15. DEFECT LIABILITY PERIOD The Defect Liability Period for the materials supplied shall be 24 (Twenty Four) months from the date of

completion of the supply of the entire quantity of supplies. The supplier shall be required to replace, any material found defective and notified by the

purchaser within the above period. In event of failure of the supplier in promptly replacing the defective material notified by the purchaser, the

purchaser shall have the full right/liberty to withheld any due payment to the supplier and en cash the bank guarantees furnished by the supplier. The

purchaser's decision in this regard shall be final and binding on the supplier.

25.0 Inspections and Tests

25.1 The Supplier shall at its own expense, and at no cost to the Purchaser, carry out all such tests and/or inspections of the Goods and Related

Services as are specified in SCC and Technical Specifications of this bid document.

25.2 The inspections and tests may be conducted in the premises of the Supplier at the point of production / delivery, and/or at the Goods' final

destination, or at another place in the Purchaser's Country. Subject to GCC Sub-Clause 25.3, if conducted in the premises of the Supplier, all

reasonable facilities and assistance, including access to drawings and production data, shall be furnished to the inspectors at no extra charge to the

Purchaser.

25.3 The Purchaser or its designated representative shall be entitled to attend the tests and/or pre dispatch inspections referred to third party in GCC

Sub-Clause 25.2, provided that the Purchaser shall bear all of its own costs and expenses incurred in connection with such attendance including, but

not limited to, all traveling, boarding and lodging expenses.

25.4 Whenever the Supplier is ready to carry out any such test and inspection, it shall give a reasonable advance notice of at least one week, including

the place and time, to the Purchaser. The Supplier shall obtain from any relevant third party or manufacturer any necessary permission or consent at

their own cost to enable the Purchaser or its designated representative to attend the test and/or inspection.

25.5 The Purchaser may require the Supplier to carry out any test and/or inspection not required by the Contract but deemed necessary to verify that

the characteristics and performance of the Goods comply with the technical specifications codes and standards under the Contract, provided that the

Supplier's reasonable costs and expenses incurred in the carrying out of such test and/or inspection shall be added to the Contract Price.

25.6 The Supplier shall provide the Purchaser with a report of the results of any such test and/or inspection.

25.7 The Purchaser may reject any Goods or any part thereof that test and/or inspection or do not conform to the specifications. The Supplier shall

either rectify or replace such rejected Goods or parts thereof or make alterations necessary to meet the specifications at no cost to the Purchaser and

shall repeat the test and/or inspection, at no cost to the Purchaser, upon giving a notice pursuant to GCC Sub-Clause 25.4.

25.8 The Supplier agrees that neither the execution of a test and/or inspection of the Goods or any part thereof, nor the attendance by the Purchaser

or its representative, nor the issue of any report pursuant to GCC Sub-Clause 25.6, shall release the Supplier from any warranties or other obligations

under the Contract.

8. In the present case, the Tribunal interpreted these stipulations. The learned single judge notice that such an interpretation is a plausible one, even a

correct one. He relied on Associate Builders v. Delhi Development Authority (2015) 3 SCC 49, the Supreme Court which held that Section 34 of the

Act, should not be used to set aside the award merely because the court would not agree with the interpretation of the contract. It was held in that

judgment that:

“An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable

manner, it will not mean that the award can be set aside on this ground. 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.

9. It is settled law that if the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction (Ref MSK Projects

(I) (JV) Ltd v. State of Rajasthan 2011 (10) SCC 53; G. Ramachandra Reddy v. Union of India 2009 (6) SCC 414; McDermott International Inc. v.

Burn Standard Co. Ltd., (2006) 11 SCC 181 and Renusagar Power Co. Ltd. v. General Electric Co. 1984 (4) SCC 679). In Mc Dermott International

(supra), the Supreme Court clarified the Court’s inherent limitation by reason of Section 34 in such matters:

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of

construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature,

scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration

the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of

construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of

law. (See Pure Helium India (P) Ltd. v. ONGC [(2003) 8 SCC 593] and D.D. Sharma v. Union of India [(2004) 5 SCC 325]).

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless

it is found that there exists any bar on the face of the award.”

Likewise, in *Steel Authority of India v. Gupta Brothers* 2009 (10) SCC 63, the Court held that Section 34 would be attracted in cases where an

arbitrator "travels beyond the contract", or makes an award "contrary to the terms of the contract". Section 34 however, the Court stated,

cannot be used to set aside awards in which there was an "error relating to interpretation of the contract", or if it was based on a "possible

view of the matter", or if it was based on a finding of law in a case where a "specific question of law [had been] submitted to the arbitrator." In

short, it is not the courts' primary responsibility to examine the award as though they were sitting in appeal over it.

10. The second issue, i.e. with respect to the argument that onus was wrongly placed on IRCON, the single judge noticed that, once it was apparent

that the sleepers had cracks, they were tested by the parties, and later by the ultimate use, i.e. the Sri Lankan Railways. In the arbitration proceedings,

the Tribunal, appointed an expert from IIT Chennai to retest the sample sleepers and report on the causes for the defects. These tests did not establish

that the cracks had developed due to any manufacturing or transportation defects attributable to Patil. In these circumstances, the Tribunal "and

later the single judge, quite correctly concluded that the rationale for holding Patil liable was not made out. The Tribunal observed that the respondent

Patil was not liable because of the following reasons:

"..a) The Pattern of cracks only on top shows that they are flexural cracks caused by stresses because they are detected after passing of trains.

(b) The cracked sleepers were found to have more flexure strength than specified in RDSOT-39

(c) None of the cracked sleepers had any of the defects stated by Respondent like honeycombing, loose strands, defective aggregates etc.

(d) The expert engaged by me has concluded that the sleepers were manufactured according to specifications as per the contract and that the cracks

were not due to any manufacturing defect and that the issues related to quality control in manufacture as pointed out by Respondent are unrelated to

the observed cracking phenomenon.

The terms of reference to the expert were as follows:

Whether the sleepers have developed cracks due to any manufacturing defect arising from any acts of omission of supplier either due to

workmanship or defective materials like cement, steel, steam curing aggregates, sand etc., by visiting the plant of the manufacturer and also testing

some samples of the cracked sleepers to ascertain whether they satisfy the RDSO Specification T-39/85 according to which these sleepers are stated

to have been manufactured under the contract.

11. Having regard to these facts, the court holds as unmerited IRCON's argument with respect to wrongful placing of onus upon it. It was not

shown that after receiving the report, IRCON made any effort to secure expert opinion for saying that Patil was in fact responsible for the cracks. It

does not argue that it was not afforded any chance to do so, by the Tribunal. The Tribunal in fact held that only a track expert could have ascertained

the reason for the cracks. The Tribunal also stated that:

Therefore the only other possibility can be the type of rolling stock, their suspension arrangements, presence of wheel flats generating excessive

stresses. I realise that the expert was not a track expert and therefore he could not have considered the complex phenomenon of rail/wheel

interaction. Instead he only made a theoretical and rather too simplistic assessment and gave the reasons of cracks as due to improper laying of

sleepers. I am of the view that the cracks might have occurred due to defective/non standard rolling stock (particularly of the ballast trains with poor

maintenance of loco/wagons) coupled of course to some extent with loose packing below the sleepers at the rail seats (which conditions are widely

prevalent at the time of laying). To this extent therefore I am unable to accept the report of the expert when he states that "the cracks appear to have

been induced due to the loading by the train on a track that was not yet fully prepared.

Incidentally I must also mention that I had visited the site in June 2014 and I found that the track laying conditions were excellent. However, I cannot

give much credence to this observation because it is quite possible that the Respondent had become more careful after the cracks were noticed.

However my conclusion about probable cause is based on the evidence of photographs at the time of laying as presented to me by the claimant.

12. In the present context, IRCON's submission that even the tests made and reports considered during the contract execution, were inconclusive

and not binding by reason of Clause 25.8, was an aspect that both the Tribunal and the single judge dealt with. The test relied upon by the Tribunal,

held the single judge, "was not confined to the test carried out at the time of the supply of the sleepers but even thereafter once the cracks had

been noticed. The sleepers were retested by the petitioner, thereafter by the Sri Lankan Railway Authority and finally by the expert appointed during

the course of the arbitration proceedings. As noticed above, and not disputed by the learned senior counsel for the petitioner, none of these test reports

indicate that there was any manufacturing defect in the sleepers so tested. Therefore, Clause 25.8 of the General Condition of the Contract, in my

opinion, would actually have no relevance to the facts of the present case. There is nothing unreasonable or illogical about these observations or

reasoning. Likewise, the single judge dealt with the other contentions with respect to of 11 Patil's liability having continued. The court finds no

valid ground to interfere with such findings.

13. In view of the foregoing discussion, this court is of the opinion that there is no merit in the present appeal. It is accordingly dismissed, without order

on costs.