



**In the Court of LXXXIV Addl. City Civil and Sessions
Judge (CCH-85 Commercial Court) Bengaluru**

Dated this the 29th day of March 2023

Present: Smt.H.R.Radha B.A.L., LL.M.
LXXXIV Addl. City Civil and Sessions Judge,
(CCH-85 - Commercial Court)
Bengaluru

Com.A.S.No.64/2011

Petitioner	M/s Simmons Machine Tools Corporation, (A company incorporated under the relevant corporate laws of the United States of America), #1700, North Broadway, Albany, New York - 12204 (By Sri.A.Mohan Vijay, Adv.)
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Vs

Respondents	1. The General Manager, Rail Wheel Factory, Yelahanka, Bengaluru - 560 106 2. The Chief Mechanical Engineer, Rail Wheel Factory, Yelahanka, Bengaluru - 560106 (Sri.Sathish B., Addl. Central Govt. Standing Counsel) 3. Sri.M.Ravindranath Reddy, Presiding Arbitrator and Chief Engineer/CN/West, South Western Railway, Bengaluru-560 009 4. Sri.U.Subba Rao, Joint Arbitrator and Chief Workshop Engineer, Rail Wheel Factory, Yelahanka, Bengaluru - 560 106 5. Sri.P.Srinivasu, Joint Arbitrator and Senior Divisional Mechanical Engineer, South Western Railway, krishnarajapuram, Bengaluru - 560 036
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Date of Institution	18.08.2011		
Nature of the petition	Sec.34 of the Arbitration and Conciliation Act		
Date on which judgment pronounced	29.03.2023		
Total Duration	Years	Months	Days
	11	07	11

LXXXIV Addl. City Civil and Sessions Judge
(CCH-85 Commercial Court) Bengaluru

JUDGMENT

This is the claimant's petition U/s 34 of the Arbitration and Conciliation Act, 1996 ('the Act' for short) for setting aside the arbitral award dated 21.05.2011 passed by the respondents 3 to 5 herein ('the Arbitral Tribunal' for short) in the matter of arbitration of disputes arising out of the agreement dated 16.02.2001 for the work of design, manufacture, supply, erection, testing and commissioning of fully automatic wheel and axle assembly complex with PLC system at the Rail Wheel Factory, Yelahanka, Bengaluru.

2. This arbitration suit was transferred from CCH-11 to CCH-42 on 01.12.2014 and, later withdrawn from CCH-42 and made over to this court for disposal by notification dated 12.12.2022.

3. For clarity, the claimant is referred as 'Simmons' and the respondents 1 and 2 jointly, as 'RWF'.

4. Brief facts leading to filing of the petition are that the contract dated 16.02.2001 for the work of design, manufacture, supply, erection, testing and commissioning of fully automatic wheel and axle assembly complex with PLC systems at RWF, Yelahanka was entered into by RWF and Simmons. The contract period was upto 29.09.2001 and RWF extended the same upto 31.05.2002 without liquidated damages. It was once again extended from 31.05.2002 to 28.02.2003 with liquidated damages. The disputes arising on account of the same was referred to arbitration in terms of the agreement; and the General Manager of RWF appointed the Arbitral Tribunal.

5. The claimant submitted the claim for refund of the amount deducted towards liquidated damages alleging that RWF delayed the inspection at their facility in the USA;

erection of machinery could not be completed by 31.05.2002 due to technical problems encountered during its commissioning involving the proving out trials, performance guarantee trials and integration of various control systems. RWF sought experts for proving the accuracy for individual machines but failed to provide good wheels and axles for testing and proving; only rejected wheels and axles were provided for trial. The experts who arrived in August 2002 sought non standard and standard wheels and axles for trials. The problems was with the axles supplied as the same was not as per the contractual specification. On furnishing trial report on 05.09.2002 from 11.08.2002 to 03.09.2002, RWF insisted for joint trial. Having requested them to try a combination of N & N/8 finish to solve stick slip problems, RWF again raised concern about wheels and axles having accuracy as per the contractual drawings. Due to quality of axles supplied there was problem with the pressing section resulting in loss of considerable time and effort. Liquidated damages was levied by Railway Board despite RWF recommending for partial waiver of the same in May 2005.

6. The RWF filed statement of defense admitting the contract and the levy of liquidated damages for the extended period from 31.05.2002 to 28.02.2003 contending that after the machinery erection was completed during second week of June 2002, they advised Simmons to seek help from the experts as the engineers were unable to turn out even one wheel set per day. The machinery was not through as wheel sets pressed were rejected due to defects such as high tonnage even as 31.07.2002; and the Simmons was made aware of these problems by letter dated 27.08.2002. It was the Simmons who requested for rejected wheel sets for trial, as recorded in the minutes of meeting dated 19.07.2002. The pressed wheel sets were not meeting RWF's requirement; and out of 96 wheel sets tried by Simmons, only 5 were within the specified parameters. By letter dated 19.08.2002 Simmons requested for 12 good axles and 24 wheels to prove accuracy and repeatability without mentioning the problem if any with axles; wheel borers were performing as per the specification. They requested Simmons to try a combination of N & N8 finish to solve stick slip problem. Due to problems experienced with axles Simmons sought for time till 30.11.2002 without liquidated damages but the same was

not agreed. The taper was slightly high, the wheel sets pressed were good and this meant that there was no correlation between the taper and the misfits. Inconsistency in the axles was claimed to be the cause for the delay by Simmons. Only as a goodwill gesture they recommended for partial waiver of liquidated damages but the Railway Board turned down the same on the ground that Simmons was bound to perform work and complete the same as per the contractual terms.

7. After considering the material on record, the Arbitral Tribunal has disallowed the Simmons' claim for refund of liquidated damages of US \$ 601042.83 by the impugned award dated 21.05.2011.

8. Aggrieved by the same, Simmons has sought for setting aside the impugned award on the ground that it is opposed to public policy. The Arbitral Tribunal committed serious error in digressing from the core grievance that RWF was required to supply axles of particular specification (taper and finish) to enable them to perform trial and performance guarantee test for successful commissioning of the assembly complex. Clause 2.18 has not been properly appreciated as also the documents demonstrating

that RWF failed to respond to their requests. The Railway board ought not to have levied and recovered liquidated damages when they were entitled for extension of time. Due to inconsistency in surface finish of axles at the wheel seat and negative taper, supplied by RWF they were unable to progress in the commissioning work. The delay was solely due to supply of axles and wheels being not as per standard, for consistency trial. RWF recommend for waiver of liquidated damages having regard to complexity in the wheel mounting press arrangement commissioned by them; there was no breach on their part. When the contract contained clause for extension of time in certain contingencies by payment of fine / penalty for such period where the work remained unfinished, the time cannot be treated as the essence of contract. RWF committed breach by not supplying materials of required specification. When no loss was caused to RWF, they could not have forfeited the amount towards liquidated damages; the impugned award contravenes Sec.74 of Indian Contract Act and the impugned award should be set aside as the findings are based on extraneous material.

9. RWF has filed the statement of objections contending that arbitral award can be set aside on the grounds stipulated U/s 34(2)(a) and (b) of the Act only if proof of the conditions mentioned therein is provided and Simmons has not made out any of the grounds U/Sec.34. It is not the case that the Arbitral Tribunal was under some incapacity or there was no valid arbitration agreement or they did not have notice of appointment of Arbitral Tribunal or the award deals with dispute not in accordance with the agreement or that the dispute was not capable of settlement by arbitration under any Indian law or the impugned award is in conflict with public policy of India. This court can neither reappreciate the facts and evidence nor enter into the merits of the dispute. Simmons is only complaining of incorrect reasoning on the part of Arbitral Tribunal and therefore, the petition is not maintainable.

9(a). They supplied axles of particular specification as evident from successful trials; installation was also accepted after performance was found to be satisfactory and performance guarantee test was completed. On behalf of Simmons M/s Pan India Tools Ltd. requested for good wheels and axles for testing whereas, Simmons requested

only for rejected wheel sets for trial; and being the manufacture of the equipment Simmons was not ready for trial. Since the erection of machinery was not complete and Simmons was unable to complete the work within the extended time, time was extended from 31.05.2002 to 28.02.2003 with liquidated damages. Even after two spells of extension of time Simmons failed to prove out of machinery; reason for delay was not the problem in the axles but the Simmons was not able to establish consistency output from the machinery. Thus the trial of machinery and prove out of capacity, took a very long time. Their goodwill gesture recommending waiver of liquidated damages cannot mean that Simmons addressed the main cause of delay.

10. Heard arguments.

11. The points that arise for the consideration of this court are:

1. Whether Simmons establishes that the impugned award is in conflict with public policy of India?
2. Whether the impugned award is liable to set aside on the ground U/s 34 (2)(b)(ii) of the Act, as prayed?

3. What order?

12. My findings on the above points are :

Point No.1: In the negative

Point No.2: In the negative

Point No.3: As per the final order for following

REASONS

13. The arbitration proceedings commenced in the year 2008 and the impugned award came to be passed on 28.11.2011. Therefore Sec.34 of the Act prior to amendment of the year 2019 is applicable and Simmons is required to furnish proof of the grounds U/s 34 (2)(a) of the Act if it was their case that they were under some incapacity; or there was no valid arbitration agreement; or they were not given proper notice of appointment of arbitrator/s or the arbitral proceedings or otherwise unable to present the case; or arbitral award deals with dispute not contemplated by or falling within the terms of submission to arbitration or contains decisions on matters beyond the scope of submission to arbitration; or the composition of Arbitral Tribunal or the arbitral procedure was not in accordance with agreement between the parties. It is not the case that the subject matter of the dispute is not

capable of settlement by arbitration and therefore Sec.34(2) (b)(i) also has no application to the case on hand.

14. Point No.1: The impugned award is challenged only on the ground that it is in conflict with public policy of India. The learned counsel for Simmons argues that 29.09.2001 was the original date fixed for completion of the work. RWF did not specify the wheels and axle particulars and delayed the project by four months. Clause 2.18 provides for extension of time without levying liquidated damages. The first two extension upto 31.05.2002 were granted without liquidated damages. The third extension was with liquidated damages. RWF not demonstrated the loss suffered by them on account of delay nor quantified the same; and even recommended for waiver/partial waiver of the liquidated damages. The Arbitral Tribunal ignoring all this has upheld levy of liquidated damages that too in the absence of proof of tangible loss and in contravention of Sec.74 of the Indian Contract Act and thereby rendered the impugned award in contravention of the public policy of India.

15. The following judgments are relied upon in support of the arguments of Simmons that the damages should be

based on actual loss and when that is not proved, liquidated damages cannot be awarded.

(a) **Welspun Specialty Solutions Ltd. Vs ONGC** reported in **AIR 2022 SC 1**

(b) **Kailash Nath Associates Vs Delhi Development Authority** reported in **2015 AIR SCW 759**

(c) **Fateh Chand Vs Balakrishn Das** reported in **AIR 1963 SC 1405**

(d) **Hind Construction Contractors Vs State of Maharashtra** reported in **(1979) 2 SCC 70**

16. The learned counsel for Simmons further argues that a finding based on no evidence is liable to be set aside on the ground of patent illegality and relies upon the judgment in **PSA Sical Terminals Vs Board of Trustee of V.O.Chidambranar Port Trust Tuticorin & Ors** reported in **AIR 2021 SC 4661**, in support of the same.

17. Per contra, the learned counsel for RWF contends that M/s Pan India Tools Pvt. Ltd. executed the work on behalf of Simmons. Rejected wheels and axles were provided for trial at the request of Simmons and RWF did not commit any breach. Despite the best efforts of Simmons, the pressed wheel sets did not meet; and not even one wheel set as per

specification, per day was pressed and the delay from 31.05.2002 was not attributable to RWF. Therefore, liquidated damages was levied as provided under the contract. No grounds are made out to interfere with the impugned award as the Arbitral Tribunal has considered all these facts and documentary evidence in detail.

18. RWF relies upon the judgment in **Navodaya Mass Entertainment Ltd. Vs M/s J.M.Combines** reported in **(2015) 5 SCC 698** in support of the argument that the scope of interference of the court is very limited in a petition U/s 34 of the Act. Once the arbitrator has applied his mind, reappraising of the material or substituting the courts views in the place of arbitrator's is impermissible. Only if there is error apparent on the face of the record and the arbitrator has not followed the statutory legal position the court would be justified in interfering with the award.

19. The judgment of the Hon'ble Supreme Court in unreported decision in the case of **State of Jharkhand & Ors. Vs M/s HSS Integrated SDN & Anr.** [Spl. Leave Appeal (c) No.13117/2019 dated 18.10.2019] rendered following the judgment in Associate Builders Vs DDA

reported in (2015) 3 SCC 49, is relied upon for the proposition that when the findings are recorded on appreciation of evidence, considering relevant provisions and the provisions of contract, the same cannot be interfered with.

20. It is well established that whether the time is the essence of the contract is to be ascertained by reading the entire contract and the surrounding circumstances. Interpretation of clauses of contract is in the domain of the Arbitral Tribunal. The Arbitral Tribunal in paras 3.1 and 3.2 of the impugned award has considered that the documentary evidence on record in detail to conclude that the delay beyond 31.05.2002 was not attributable to RWF.

21. The contentions raised by Simmons with regard to delay in commissioning of the machinery, reason for Simmons' inability to press wheel and axle as per the specification are all considered in para 3.5 of the impugned award and based on the documentary evidence, the Arbitral Tribunal has concluded that the delay occurred as the Simmons was not sure of the actual problem. On 13.12.2002 a letter was addressed by RWF detailing the

technical issues not sorted out by Simmons resulting in delay to carry out PG trial; and certain technical issues stood unresolved even as on 02.01.2003.

22. It is also noticed by the Arbitral Tribunal on the basis of the records that the centralized integrated supervisory control system was not functioning; it has problem such as measurement seat diameter not getting transmitted, data from the same not transferring to press recorder. Therefore, the findings of the Arbitral Tribunal with regard to delay on the part of Simmons despite RWF providing them with required support, is a finding of fact based on the documentary evidence. This court cannot upset the same by reappreciating the facts and evidence.

23. As noticed in para 3.4 of the impugned award on 30.08.2002 Simmons requested RWF for further extension of time under the contract from 30.05.2002 to 30.11.2002 without liquidated damages. As noted earlier, certain technical issues remained unaddressed even as on December 2002 and the same was pointed out by RWF in its letter dated 02.01.2003.

24. The period of contract was only one year and it was not spread over a long tenure, as in the case of Welspun Specialty Solution Ltd., relied upon by Simmons. RWF yet granted two extensions upto 31.05.2002 without liquidated damages to ensure performance and to uphold the integrity of contract, instead of repudiating the same. Therefore, the argument that the terms of contract ought to have been liberally construed to mean that time was not the essence, holds no water.

25. It is not the case of Simmons that the liquidated damages levied by RWF was contrary to the terms of contract. Clause 2.18 of the contract between Simmons and RWF provided for extension of time without liquidated damages only if the delay was attributable to RWF.

26. On the other hand, RWF's letter dated 24.05.2005 shows that Simmons requested for third and forth extension by letters dated 30.08.2002 and 17.01.2003 for the reasons not attributable to RWF. The final extension was granted upto 28.02.2003 with LD of Rs.2,90,57,950/- (Rs.1,19,27,599 + \$3,92,088.6) for delay in completion of contract after due approval from the Railway Board.

27. Sec.74 of the Indian Contract Act dealing with compensation for breach of contract where penalty is stipulated provides that when a contract has been broken if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or the penalty stipulated for, as the case may be.

28. Clause 2.20 of the contract provided for recovery of liquidated damages of a sum equivalent to 0.75% of the contract value of the works for each week or part of the week the contractor is in default, subject to a maximum of 10% of the value of the contract. There is no dispute that there was delay of 36 weeks from 31.05.2002 to 28.02.2003 attributable to Simmons. Though the same is more than 10%, RWF has calculated the liquidated damages at a maximum of 10% of the contract value as seen from Annexure-A in inc page 213 of the arbitral records.

29. The Hon'ble Supreme Court in the case of Welspun Specialty Solutions Ltd., M/s Kailash Nath Associates Vs DDA, relied by Simmons, has quoted with approval para 64 of the judgment in Saw Pipes case wherein it is held that-

“64. Section 74 emphasis that in case of breach of contract, the party complaining of breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. ... But if the compensation named in the contract for such breach is genuine pre estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him.”

30. Simmons has failed to demonstrate or to furnish proof of the Arbitral Tribunal unreasonably interpreting the clause pertaining to levy of liquidated damages. It is not their case that RWF had not suffered any legal injury due to delay in execution of the contract work. In fact Simmons sought waiver of damages but never objected on the ground that

the sum claimed was not reasonable or actual tangible loss.

31. Therefore, the ratio in the judgments relied upon by Simmons are of no avail. Since the liquidated damages was quantified under the contract, Simmons' argument that RWF should have proved actual loss or the impugned award is in contravention of Sec.74 of the Indian Contract Act, is not acceptable.

32. The next fold of argument of Simmons is that the Arbitral Tribunal ought to have treated the recommendation of RWF for waiver of liquidated damages as an act of estoppel against recovering the same. At the same time Simmons does not dispute that RWF, recommended for partial waiver of liquidated damages as an act of goodwill but the same was not considered by the Railway Board.

33. As discussed earlier, it is seen from RWF's letter dated 24.05.2005 Simmons request for extension of time from 30.05.2002 was not favourably considered and Railway Board was approached by RWF in the matter. Further extension till 28.02.2003 was granted only with the approval of Railway Board with liquidated damages in terms of clause 2.20 of the contract. After successful

commissioning of the machinery on 28.02.2003 it was performing satisfactorily. However, RAM side structure casting which got cracked after the warranty period was immediately repaired by Simmons free of cost through their local representative and also agreed to replace the damaged RAM side structure casting free of cost.

34. Having deputed the representative for maintaining the machine Simmons sought waiver of liquidated damages by letter dated 21.03.2005 and 19.04.2005. Considering the services extended by them even after the warranty period, RWF sent the proposal to Associate Finance for waiver of liquidated damages. The remarks of Associate Finance is extracted in the above letter wherein it is made clear that waiver of a liquidated damages as proposed should have the approval of the Railway Board as the extension of completion of contract with LD was sanctioned by it. The board however, rejected the proposal.

35. The Arbitral Tribunal has bestowed its attention to the documentary evidence on record and come to the conclusion that proposal for waiver of LD was a goodwill gesture and not within the purview of the terms of contract.

Therefore, the argument that the impugned award is contrary to public policy of India, does not merit consideration. Accordingly, the point for consideration is answered in the negative.

36. Point No.2: As held in PSA Sical Terminals Pvt. Ltd Vs Board of Trustees of V. O. Chidambranar Port Trust relied upon by Simmons and Associates Builders' case relied upon by RWF, this court cannot act as a court of appeal to correct errors of facts; 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 the arbitral award. 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 such score, once it is found that the arbitrator's approach is not arbitrary or capricious.

37. Having regard to the same and the discussion on point No.1, I am of the opinion that Simmons has failed to furnish proof of the grounds U/s 34(2)(a) of the Act or to demonstrate that the impugned award is contrary to public policy of India or to establish any patent illegality or error

apparent on the face of the impugned award. Therefore, the point for consideration is answered in the negative holding that no grounds U/s 34 of the Act are made out for setting aside the impugned award as prayed.

38. Point No.3: In the result, I pass the following:

ORDER

The petition U/Sec.34 of the Arbitration and Conciliation Act is hereby dismissed.

Issue copy of the judgment to the parties through e-mail as provided U/o XX Rule 1 of CPC, if email ID is furnished.

(Dictated to the stenographer, transcribed and typed by her, corrected and then pronounced by me in the open court on this the **29th** day of **March 2023**)

(H.R.Radha)

LXXXIV Addl. City Civil and Sessions Judge,
(CCH-85 Commercial Court) Bengaluru