Sahakarmaharshi Bhausaheb Thorat ... vs Thyssen Krupp Industries India P.Ltd on 14 February, 2025

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Bench: Abhay S. Oka

2025 INSC 219 NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3194 OF 2014

SAHAKARMAHARSHI BHAUSAHEB THORAT
SAHAKARI SAKHAR KARKHANA LTD . … APPELLANT

versus

THYSSEN KRUPP INDUSTRIES INDIA
PVT.LTD. … RESPONDENT

JUDGMENT

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. The issues involved in this appeal are limited, but the litigation has a chequered history. An agreement was executed on 17th November 1992 by and between the appellant and the respondent. Under the said agreement, the respondent agreed to design, procure, manufacture and supply to the appellant machinery and equipment for a continuous fermentation process based on the Encillium process, patented by the National Chemical Laboratory, Pune (for short, 'the NCL'). The agreement contained an arbitration clause. The total consideration was of Rs. 93,20,000/-. One of the clauses in the agreement was that the fermentation plant that was to be supplied by the respondent must have a guaranteed minimum yield of 280 litres of alcohol per metric tonne of Molasses. According to the appellant's case, when the agreement was entered into, the existing yield in their factory was 245 litres per metric tonne of Molasses. Under the agreement, the plant and machinery were to be supplied within a period of five and half months from the effective date of the agreement, i.e., by 15th May 1993, for a total consideration of Rs.93.20 lakhs.

2. According to the appellant, there was a delay of about 24 weeks in the delivery of the machinery. The appellant's case was that four trial runs were conducted on the machinery supplied by the respondent. The yield was much less than the guaranteed yield of 280 litres per metric tonne of Molasses. The maximum yield in trial runs was 237.68 litres per metric tonne of Molasses. Therefore, on 19th October 1994, the appellant issued a legal notice to the respondent claiming a sum of Rs. 237.83 lakhs as damages. As expected, the respondent disputed the said claim. That is how the appellant invoked the arbitration clause by appointing its nominee arbitrator.

3. According to the appellant's case, a memorandum of understanding dated 24th July 1995 (for short, 'the MOU') was executed by and between the parties without prejudice to their rights and contentions. It provided for conducting one more trial run for 15 days after necessary modifications were made in the machine as suggested by the NCL. The modifications were to be made by the respondent at its own cost. By the MOU, the quantum of liquidated damages under clause 15 of the agreement was increased to 20% of the contract value, i.e. Rs. 18.64 lakhs, which would be payable if the machine failed to give guaranteed performance. According to the appellant's case, the fifth trial run conducted in August 1995 generated a yield of 224.54 litres per metric tonne of Molasses.

4. The appellant filed a statement of claim before the Arbitral Tribunal, claiming damages of Rs.233.75 lakhs. Broadly, the following claims were made:-

a) For a delay of 24 weeks in the supply of plant and machinery

- Rs.4.66 lakhs, which is 5% of the contract price

b) Liquidated damages equivalent to 20% of the contract value – Rs.18.64 lakhs;

c) On account of the failure of guaranteed performance of steam and power consumption - Rs. 9.30 lakhs at 10% of the contract value;

d) Loss caused due to short production – Rs. 48.45 lakhs;

e) The amount spent by the appellant on payment of the price to the respondent, civil work, and supervision – Rs. 107.54 lakhs; and,

(f) Interest at the rate of 18% on the claim amount of Rs. 107.54 lakhs from May 1993 till 31st August 1995 – Rs.45.16 lakhs --

Total 233.75 lakhs.

5. The Arbitral Tribunal, by an award dated 20th June 1999, granted the following amounts to the appellant:

a) Liquidated damages for delay in delivery of the plant and machinery – Rs.2.09 lakhs

b) Refund of the price paid and incidental amount spent over the plant – Rs. 107.54 lakhs

c) Past interest – Rs.28.74 lakhs

d) Compensation for actual loss suffered in the yield of alcohol -

Rs. 21.42 lakhs -- Total Rs.159.79 lakhs.

e) Costs of Rs.1.50 lakhs

6. Both parties challenged the award by filing objections under Section 30 of the Arbitration Act, 1940 (for short, 'the 1940 Act'). By a judgment dated 6th May 2000, the learned Civil Judge set aside the Award and remanded the same for fresh adjudication by the Arbitral Tribunal. Both the parties challenged the order of the Civil Judge before the High Court. By judgment dated 20th October 2000, the High Court held that the claim of Rs.107.54 lakhs was beyond the jurisdiction of the Arbitral Tribunal. However, the High Court upheld the claim for liquidated damages for the delay in delivery of Rs.2.09 lakhs, compensation for actual loss suffered in the yield of alcohol of Rs.21.42 lakhs, and arbitration cost of Rs.1.5 lakhs.

7. The appellant filed an appeal before this Court against the judgment of the High Court. By a judgment and order dated 7th May 2002, this Court set aside the order of the High Court and restored the order of the Civil Court. This Court held that the claim of Rs.107.54 lakhs and interest raised by the appellant was certainly arbitrable before the Arbitral Tribunal and was not beyond the scope of reference. In short, the order of remand passed by the Civil Court was restored by this Court.

8. The award after remand (for short, 'the second award') was made on 24th November 2002 by the Arbitral Tribunal. The second award accepted the following claims:

a) Rs.2.09 lakhs as liquidated damages for delay in supply of machinery;

b) Rs.18.64 lakhs as damages for actual loss suffered in the yield of alcohol during five performance trials;

c) Rs.68.15 lakhs as damages for loss suffered due to non-

performing machinery and equipment; and

d) Rs.10.63 lakhs being the past interest leviable on damages of Rs.68.15 lakhs.

9. Again, both the parties filed objections under Section 30 of the 1940 Act. By a judgment dated 6th November 2004, the Civil Court substantially upheld the second award except for the direction to pay interest of Rs.10.63 lakhs on the ground that interest cannot be made payable on the amount of

damages till it is quantified.

10. Being aggrieved by the judgment of the Trial Court, the respondent preferred an appeal in which the appellant filed cross- objections. By the impugned judgment dated 6th February 2012, the High Court allowed the appeal and dismissed the cross-objections of the appellant. The High Court set aside the second award to the extent of a claim of Rs.68.15 lakhs. It was held that this claim was based on speculative and imaginary calculations. As regards the claim of Rs.2.09 lakhs and Rs.18.64 lakhs, the High Court recorded that the respondent has accepted the liability. On 13th April 2012, this Court issued a notice. The appellant was directed to deposit the amount involved with the High Court Registry by way of interim relief. SUBMISSIONS

11. Shri Vijay Hansaria, learned senior counsel appearing for the appellant, stated at the outset that the appeal is confined to the rejection of Rs.68.15 lakhs being damages for loss suffered due to non-performance of machinery and equipment. The learned senior counsel submitted that even under the 1940 Act, the scope of interference by the Civil Court was limited. He placed reliance on the decision of Madnani Construction Corporation (P) Ltd. v. Union of India & Ors.1

12. The learned senior counsel invited our attention to clauses 15.2 and 15.3 of the contract. These clauses were applicable when the plant supplied or commissioned and utilised by the purchaser yields below the minimum guarantee of 280 litres per metric tonne. (2010) 1 SCC 549

13. The learned senior counsel has invited our attention to the findings recorded by the Arbitral Tribunal in the second award. He submitted that the respondent never disputed the non-commissioning of the plant but stated that the machinery and equipment supplied are complete without any defect or fault as per the rated capacities mentioned in the parameters. The learned senior counsel submitted that the claim of liquidated damages and breach of warranty were separate and independent claims and were rightly granted by the Arbitral Tribunal. The learned senior counsel, therefore, submitted that the appellant's claim, to the extent of Rs.68.15 lakhs, deserved to be accepted.

14. Shri Chander Uday Singh, learned senior counsel appearing for the respondent, has also made detailed submissions. The learned senior counsel appearing for the respondent submitted that the finding on the issue of the entitlement of the appellant to the sum of Rs.68.15 lakhs has been correctly recorded by the High Court. The learned senior counsel submitted that Section 74 of the Indian Contract Act, 1872 (for short, 'the Contract Act') makes it clear that where a contract contains a clause stipulating liquidated damages, and the contract is broken, the party complaining of the breach is entitled to receive such sum, not exceeding the mentioned amount. The learned senior counsel also urged that in view of Clause 21 of the agreement, the claim made by the appellant that they were unable to use the machinery cannot be accepted. The learned senior counsel submitted that the High Court had already concluded the issue of the grant of the claim of Rs.107.54 lakhs in the earlier round. He stated that no interference is called for in the view taken by the High Court.

15. The appellant's submission was that they could not use the supplied machinery and that the machinery was no better than scrap because the fermentation performance was lower than

promised. To deal with the said submission, the learned senior counsel for the respondent relied upon clause 21 of the agreement. He submitted that the appellant did not call upon the respondent to replace the machinery. At no stage is it claimed that the appellant had replaced the machinery at the respondent's cost. He pointed out that in paragraph 16 of the claim, the appellant stated that the agreement does not provide any specific clause for the total failure of the plant. Therefore, as per the Contract Act, the seller is liable for the actual damages. The learned senior counsel appearing for the respondent submitted that what was claimed by the appellant in the correspondence was a refund of the price. He submitted that the applicability of Section 59 of the Sale of Goods Act for a refund of the price or by way of damages is contrary to the express terms of the agreement. He would, therefore, submit that the liability of the respondent was restricted to Rs.18.64 lakhs as damages.

OUR VIEW

16. There were three contracts between the parties. The first is the agreement dated 17th November 1992 (for short, 'the agreement'). Under the agreement, the respondent undertook to design, procure, manufacture and supply to the appellant machinery and equipment for modernisation with a continuous fermentation process based on the Encillium process developed by the NCL. The total price was Rs. 93.20 lakhs which the appellant paid. It was provided that delivery of machinery and equipment would start from 1st December 1992 and be completed within five and half months from the agreement's effective date. Clause 8 of the agreement incorporated the performance guarantee. The first part of the performance guarantee was regarding the specifications of the machinery and equipment, and the second part of clause 8 provided that all the machinery and equipment of the continuous fermentation plant would be brand new. What is relevant is sub-clause C of clause 8, which reads thus:

> "C. That the capacity and efficiency of the machinery and equipment of continuous fermentation plant shall be fulfilled after one month from the start of operation, all units work to their rated capacities and efficiencies fermentation efficiency minimum 90% yielding 280 litres of alcohol/ton of molasses (47% F.S) and with performance specified in annexure B and D."

17. Clause 15 provided for the penalties and liquidated damages.

a. It provided that if the respondent fails to deliver the machinery and equipment within a stipulated time, the respondent shall pay the liquidated damages equal to 0.25% of the contract price for every completed week of delay subject to a maximum of 5% of the contract price for delay in delivery; b. Rs.1 lakh as liquidated damages for every one litre less production of alcohol than guaranteed figures as specified in Annexure B;

c. 1% of the contract price, which is equivalent to Rs.93,200/- for every 0.1 kg/1 litre more steam consumption at any stage than guaranteed figures subject to a maximum of 3% of the contract price.

d. Rupees 1,39,000/- equivalent to 1.5% of the contract price will be payable as liquidated damages for every 10 kwh more power consumption at any stage than guaranteed figures subject to a

maximum of 2% of the contract price.

e. The penalties/liquidated damages payable against non-

performance of fermentation section and penalties/liquidated damages payable for guaranteed performance towards steam and power shall be limited to a maximum of 10% of the contract price.

18. At this stage, it is also important to note clause 21 of the agreement which reads thus:

> "21.1 For a period of twelve months from the date of commission of the continuous fermentation plant or eighteen months from the date of last supply whichever is earlier called the maintenance warranty period the seller shall remain liable to rectify / replace any parts thereof such as may be found to be defective or below the rated. Capacity under proper use and maintenance arising due to faulty design, materials, or workmanship. The purchaser shall give the seller notice in writing stating the particulars of the defects or failures and the seller shall there upon make good the failures and the seller shall there upon make good the defective or underrated equipments or replace the same free of cost to make it comply with the requirements of the continuous fermentation plant. If the seller fail to do so within reasonable times so as to require the production loss to the minimum as required by the purchaser, the seller the whole any portion of the cost of the seller the whole or any portion of the machinery and equipment, as the case may be, which is defective or underrated or fail to fulfil the requirements of the agreement and may recover the actual cost thereof from the seller adjust the same from any balance payment to be made to the seller; or recovery by raising debit notes.
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> Such rectification/replacement shall be carried out by the purchase wing in a short time as possible and at a reasonable price and under advice to the seller. In case of such rectification/ replacement by the purchaser, the seller shall be liable to pay purchaser the whole cost of such rectification replacement done and the defective equipment on being replaced shall be taken away by the seller at their own cost. The purchaser shall have the right to operate the machinery and equipment after the commission in date of the continuous fermentation plant except that this shall not be considered to permit operation of any equipment which may be materially damaged by such operation before any required rectification or alteration have been carried out.
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> 21.2 If it becomes necessary for the seller to replace or renew any defective part of the continuous fermentation plant and machinery under this clause the provisions of the first paragraph of this clause shall apply to the parts of the machinery and equipment so replaced or renewed until the expiration of one month from the date of such replacement or renewal, or until the end of the aforesaid maintenance period of twelve months whichever is later.

> 21.3 The rectification or new parts will be delivered for purchasers distillery site. The seller shall also bear the cost of rectification / replacement carried out on their behalf by the purchaser as mentioned above at the continuous fermentation plant site. At the end of the maintenance period, seller liability shall case. first paragraph of this clause, the purchaser shall be entitled to benefit of any guarantee given to the seller by the original supplier or the manufacturer of such plant and machinery.
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> 21.4 The responsibility of the seller for rectification replacement under this clause shall extend to the actual cost of rectification / replacement of the defective items of the continuous fermentation plant and machinery and shall not in any way be deemed to be limited to the amount of the performance guarantee." (emphasis added)

19. A supplementary agreement was executed on the same day in which the respondent agreed to pay liquidated damages of Rs. 2 lakhs for every one litre less production of alcohol subject to the maximum ceiling of 10% of the contract price.

20. The third agreement executed between the parties was styled as the MOU, under which the respondent agreed to supervise the reaction and commissioning of the machinery.

21. Now, we come to the claim made by the appellant. Before we refer to the claim, we must note that the real controversy remains confined to the claim granted by the Arbitral Tribunal to the sum of Rs.68.15 lakhs towards the damages for loss suffered due to non-performing machinery and equipment and, consequently, the interest thereon.

22. The case made out in the claim is that the respondent failed to commission the plant successfully so as to give guaranteed performance as per the agreement. Therefore, production loss continued. The following claims were made:

> a) Delay in supply of plant and machinery beyond the period of five and a half months from the effective date of contract – Rs.4.66 lakhs;
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> b) Damages on account of the failure to provide guaranteed performance of continuous fermentation plant – Rs.18.64 lakhs;
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> c) Failure of guaranteed performance of steam and power consumption – Rs. 9.30 lakhs;
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> d) Actual loss of production – Rs. 48.45 lakhs; and
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> e) Amount spent by the appellant on account of acquiring the plant, including the cost of the plant paid to the respondent, civil work and supervision charges – 107.54 lakhs.

f) Interest at the rate of 18% on the claim amount of Rs.

107.54 lakhs from May 1993 till 31st August 1995 – Rs.45.16 lakhs.

Accordingly, a total claim of Rs.233.75 lakhs was made. However, while making the prayer, the loss suffered during the trials was not claimed.

23. In the impugned judgment, the High Court has, in detail, considered the clauses in the agreement. The High Court referred to the notice dated 19th October 1994 addressed by the appellant to the respondent. In the said notice, the appellant claimed that a sum of Rs.107.54 lakhs had been spent on the plant and that the plant was not giving the required results as agreed, even optimum to the norms. Therefore, the sum of Rs.107.54 was a loss to the appellant. The High Court rightly rejected the appellant's contention that the claim for damages of Rs.107.54 has been concluded against the respondent. The High Court rightly observed that if that were so, this Court would not have confirmed the order of remand to the Arbitral Tribunal even on the said issue.

24. We have already quoted the relevant part of the agreement, particularly clause 8, which contains performance guarantees. Clause 15 is regarding penalties/liquidated damages. Penalties/liquidated damages were stipulated for the delay in delivering machinery and plant, failure to give the guaranteed performance of continuous fermentation plant, failure to provide a guaranteed performance with respect to steam, and failure to give a guaranteed performance with respect to power. Even the rates of liquidated damages have been laid down.

25. Then comes clause 21. Clause 21.1 provided that on the failure of the respondent to replace the defective or underrated equipment within a reasonable time, the appellant had the option to replace the same at the respondent's cost. Under clause 21, it was provided that the responsibility of the seller for rectification/replacement shall extend to the actual cost of rectification/replacement of defective items of the continuous fermentation plant and machinery.

26. Careful perusal of the claim made before the Arbitral Tribunal by the appellant shows that the claim for the sum of Rs.107.54 lakhs was not based on clause 21 of the agreement. It is not the appellant's case that the respondent was called upon to replace the plant and machinery, and as the respondent failed to do so within a reasonable time, the appellant replaced the plant and machinery by themselves. The claim was on account of a refund of the amount spent by the appellant on the plant, as is evident from paragraph 16 of the statement of claim. Paragraph 16 reads thus:

> “16. Purchaser had spent Rs. 107.54 lakh on the said plant. It is absolutely clear now that it will not give required results as agreed and all the investment goes waste. The agreement does not provide any specific clause for the total failure of plant. Therefore, as per contract act, seller is liable for actual damages. Since the entire plant goes waste seller is liable to pay for total investment of Rs. 107.54 lakhs and loss of interest at the rate of 18% per year from 1st May 1993 onwards.” The claim was not made in terms of Clause 21 of the Agreement. The claim was not on account of the breach of warranty. What is claimed is virtually the refund of the amount spent.

27. As stated earlier, there is a clause for liquidated damages under which a claim was allowed by the Arbitral Tribunal, which the respondent accepted. Under clause 21 of the agreement, the appellant had the choice of replacing the plant and machinery and seeking the cost of the plant and machinery and the installation cost from the respondent. However, the said option was not availed by the appellant. The agreement provided for liquidated damages in clause 15 on account of non-performance of the guarantees set out in clause 8. Assuming that the entire plant and machinery was a failure or scrap, the appellant had the right to replace the same and claim the cost from the respondent. However, that was not done by the appellant.

28. In view of what is stated in paragraph 16 of the claim filed by the appellant, Section 74 of the Contract Act needs to be considered, which reads thus: -

> "74. Compensation for breach of contract where penalty stipulated for.— 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, as the case may be, the penalty stipulated for.
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> Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.
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> Exception.—When any person enters into any bail- bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.
>
> Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested." (emphasis added)

29. The appellant got liquidated damages as provided in the agreement on account of breaches committed by the respondent. The claim for damages of the appellant will remain confined to what is expressly provided under the Agreement in view of Section 74 of the Contract Act. The appellant retained the plant and machinery and did not take the benefit of clause 21. Therefore, as rightly held by the High Court, the appellant was not entitled to the claim of Rs.68.15 lakhs as it was claimed in the statement of claim as the refund of the amount spent by the appellant on the acquisition of plant and machinery.

30. In the circumstances, we find absolutely no error in the view taken by the High Court, and accordingly, the appeal is dismissed.

.....J. (Abhay S. Oka) .....J. (Ujjal Bhuyan) New Delhi;

February 14, 2025.