IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/657/2024
UNION OF INDIA AND ORS
VS
RAHUL KUMAR THAKUR

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR

For the petitioners … Mr. Asok Kumar Chakraborty, Ld. ASG,
Mr. Souvik Nandi, Sr., Adv.
Ms. Amrita Pandey, Adv.

For the respondents … Mr. Krishnaraj Thaker, Sr. Adv.
Mr. Debrup Bhattacharjee, Adv.
Mr. Rohan Kumar Thakur, Adv.

Hearing concluded on: 29.01.2025
Judgment on: 05.03.2025

Shampa Sarkar, J.:-

1. This is an application under section 36(2) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as the said Act), for unconditional stay of the award dated October 9, 2023, passed by the learned sole Arbitrator. The learned Arbitrator was appointed by the Hon'ble Apex Court in Civil Appeal No. 7038 of 2021. The respondent was the claimant in the arbitration proceeding.

2. The background of the case leading to the dispute is that, sometime in 2016, the railways floated a tender for leasing of parcel cargo express train (for short PCET) from Chitpur to Kalyan on round-trip basis, for a period of six years. The respondent participated in the tender process and was the highest bidder. Sometime in January 2017, the Chief Commercial Manager/FM issued a letter, inter alia, stating that the offer of the respondent for taking lease of the PCET from Chitpur-Kalyan-Chitpur, for two round trips (fortnightly) in a month, (containing 20 parcel vans and one break van), on round-trip basis for a period of six years at a lump sum freight of Rs.31 lakhs + 2% development charges, totalling to Rs.31.62 lakhs and applicable sales and service tax etc., had been accepted. On February 17, 2017, an agreement was executed between the petitioners and the respondent. The respondent submitted security deposit to the extent of Rs.75,88,800/-. The allegations of the petitioners against the respondent were that, frivolous issues were raised, almost forcing the petitioners to come up with a timetable for departure and arrival of the trains and to ensure stoppage at the enroute station.

3. The respondent started operation from February 28, 2017, but continued to pressurize the petitioners to come up with a revised time schedule. The respondent complained that, out of total of 14 rakes, which were scheduled to operate from February 2017 to November 2017, only two were made to depart and reach Kalyan, although, payment had been made by the respondent, in its entirety. The respondent started negotiating with the petitioners and insisted that the Kalyan bound trips should be suspended and instead, Chitpur bound trips should be allowed. Such request was contrary to the terms of the agreement as per the petitioners. The respondent stopped making payments of the lease rentals. The petitioners raised their contractual demand. The respondent terminated the agreement and invoked the arbitration clause.

4. The learned Additional Solicitor General submitted that this was a fit case for unconditional stay of the award as the learned Arbitrator had allowed the claims beyond the scope of the agreement. The learned Arbitrator relied on a circular of the railways, which did not form part of the contract. The said circular was treated as the applicable policy of the railways, in order to cause unjust enrichment to the respondent. Reliance on

extraneous materials, which did not form part of the record, rendered the award perverse and unreasonable. The findings of the learned Arbitrator would shock the conscience of a reasonable man. The learned Arbitrator failed to take into consideration that, the respondent acted beyond the terms of the agreement by not paying the lease rental, by asking the routes to be changed and by insisting on a timetable. Further, the respondent could not act in breach of the terms of the agreement and terminate the contract unilaterally. The respondent could not claim, as a matter of right, that the railway authorities should prepare a specific time table for those PCETs. The timetable for those trains were prepared by taking into consideration the entire schedule of the trains in the said zone. The railways could not create a special timetable for the respondent. Such obligation was not a part of the agreement. It was urged that the learned Arbitrator also ignored the evidence which demonstrated that the respondent intentionally failed to load the cargo from Chitpur to Kalyan, on six dates. The respondent failed to organize his business, procure customers, as the result of which, the loading of the cargo was not done. The fault was on the part of the respondent. This could not be attributed to the petitioners, on

the ground that the petitioners failed to provide the proper time schedule as to when the trains would arrive and the rakes would be available for loading. There was no evidence before the learned Arbitrator which would show that, the respondent had adequate orders or customers and had mobilized the cargo, but could not load the same due to non-availability of the rakes.

5. According to the learned ASG, the learned Arbitrator got swayed by the concocted and fabricated story of the respondent and proceeded to pass the award without looking into cogent evidence. Thus, the award was induced by untrue statements of the respondent and vitiated by fraud. The marketing freight circular No.02 of 2007, was a mere guideline and it never formed an essential part of the agreement. The respondent persuaded the learned Arbitrator to make and publish the award, on the basis of the said inapplicable circular, which makes the award vulnerable to the allegation of the same being effected or induced by fraud. The learned Arbitrator unfairly deprecated the stance of the witness of the petitioners when the witness was trying to explain and justify his answer. Voluntary statements of a witness were always permissible. By applying the provisions of the circular, the agreement between the parties was rewritten by the

learned Arbitrator. This was an act of fraud and corruption on the part of the learned Arbitrator as the arbitrator was persuaded to allow the claim without following the basic principles of law governing interpretation of contracts. The claim for loss of profit etc., should not have allowed, in the absence of any specific breach by the railways. The agreement was terminated by the respondent and not by the railways. The provisions of Sections 56 to 73 of the Indian Contract Act provided that, unless there was a specific breach, damages could not be allowed. The contract did not provide that any specific time schedule or timetable would be supplied to the respondent, to enable the respondent to load the cargo on those specific dates, as per the fixed timetable. The approach of the learned Arbitrator in discarding the evidence of the sole witness of the railways, were prima facie evidence of fraud and corruption in the making of the award.

6. The learned Additional Solicitor General relied on the decision of ***S.P Chengla Varia Naidu vs. Jagannath & ors.*** reported in ***AIR 1994 SC 853*** and submitted that fraud was an act of deliberate deception with a design to secure something by taking unfair advantage of another. In the facts of this case, the

respondent deliberately deceived the learned Arbitrator by placing reliance on the circular of 2007.

7. Reliance was further placed on the decision of ***Venture Global Engineering LLC vs. Tech Mahindra Ltd. & anr.*** reported in ***2018 1 SCC 656***. It was held that, fraud was proven, when it could be shown that a false representation was made knowingly, without believing in it and carelessly. The learned Arbitrator was influenced by the incorrect and false submissions made by the respondent and passed the award. The ratio in Venture Global (supra) was thus, applicable. Corruption, according to the learned ASG, was a dishonest or a fraudulent conduct by the person in power and in the instant case the learned Arbitrator made out a third case and passed the award for a hefty sum of money, to which the respondent was not entitled. The learned Arbitrator took it upon himself to ensure that the claim was allowed, in some manner or another.

8. Mr Thaker, learned Senior Advocate for the respondent submitted that the arguments advanced by the petitioners were on the merits of the award. Consideration of the merits of an award or the probability of the success of the award-debtor in getting the award set aside, could not be a ground for

unconditional stay of the award. The entire submissions on behalf of the petitioners were on how the learned Arbitrator had gone wrong in appreciating the evidence adduced by the parties, wrongly applied the circular and misinterpreted the provisions of law while holding the petitioners to be in breach of the contract.

9. According to Mr Thakkar, the learned Arbitrator was of the opinion that, when the railway authorities chose to remain silent on framing any timetable both in the offer letter as also in the agreement, the respondent deemed that the freight marketing circular No.02 of 2007, would be applicable. The circular provided that the PECTs would run on a fixed path with a scheduled timetable as far as possible. The timetable would be prepared by the originating leasing railways, in consultation with other zonal railways through which the trains would pass. The transit time of the train would be monitored by the operating department. The learned Arbitrator was of the further view that, the provisions of the circular provided that, the PECTs would run as far as possible on a scheduled timetable. Even if, the railway authorities could not adhere strictly to the timetable, the contractor could not be left to the hands of fate.

10. According to the Learned Arbitrator, the anvil and touchstone of Article 14 of the Constitution of India, would govern the action of the railways. The learned Arbitrator recorded the findings with regard to the arrangements made by the respondent to load the rakes and also the accumulated business from his customers at the station of origin as also the destination station.

11. Upon accumulation of the business from the customers, the respondent commenced operation at 00.05 hours of February 28, 2017. The first consignment was delayed unexpectedly and the respondent faced embarrassment and became accountable to the customers. On appreciating facts, the learned Arbitrator felt that the petitioners were required to maintain a timetable for the PECT, as the time required for completion of the journey by the said PECTs were an essential part for the performance of the contract. It was held that failure on the part of the petitioners to maintain a timetable and the consequent delay in running of the PECTs, caused huge loss to the respondent's reputation and business.

12. The learned Arbitrator considered the pleadings in paragraph 13 of the statement of claim and came to his specific

findings. The learned Arbitrator held that the petitioners had failed to fulfil their reciprocal obligations in the contract. The time-schedule in which the PECTs were supposed to run, could not be maintained and the respondent suffered irreparable loss and injury. Mr. Thakkar submitted that the learned Arbitrator also scanned the evidence adduced by the parties and arrived at the conclusion that, the claim should be allowed and the counter-claim of the petitioners for lease rentals, should be dismissed.

13. The issue before this court is whether the petitioners have been able to make out a case for unconditional stay of the award. According to the provisions of law, if it prima facie, appears to the court that, either the arbitration agreement or the contract which formed the subject-matter of the arbitral proceedings or the making of the award were effected or induced by fraud or corruption, an unconditional stay of the award can be granted. The case of the respondent was not that, either the arbitration agreement or the agreement containing the arbitration clause was effected or induced by fraud or corruption. The allegation was that the making of the award was induced by fraud and corruption and the learned Arbitrator acted on the

misrepresentation of the respondent and passed the award. While doing so, extraneous documents were taken into consideration with the intention to allow the claim at any cost. When the respondent failed to establish a case of breach, loss of profit, loss of business and loss of reputation, the 2007 circular was applied by the learned Arbitrator, inter alia, holding the same to be a policy or a guideline.

14. In the present case, this court does prima facie, find that there was either any omission or any concealment by the respondent or any act of undue influence in the making of the award. The facts do not reveal that either the learned Arbitrator or the respondent took the petitioners by surprise and tried to cheat the petitioners in any way. There had to be, prima facie, evidence of a wilful illegal act on the part of either the arbitrator or the respondent, which amounted to depriving the petitioners from their legitimate dues or legitimate rights.

15. Reliance placed by the learned ASG on the decision ***of S.P. Chengalavariya Naidu (supra),*** in which fraud has been defined as an act of deliberate deception with the design of securing something by taking unfair advantage of another, is not applicable to this case. There must be a deception in order to

gain by another's loss. A cheating, intended to get an advantage over another. The entire argument of the learned ASG and the findings of the learned arbitrator do not reflect that there was a deliberate deception with a design to secure something by taking unfair advantage of the railway authorities. I do not find that, the respondent had deceived the railway authorities in any manner.

16. In ***Venture Global Engineering LLC (Supra)***, the Hon'ble Apex Court relied on the decision of the ***House of Lords in Derry vs. Peek, (1889) L.R. 14 AC 337 (HL)***. It was held that fraud was proved when it could be shown that a false representation had been made, knowingly, without belief that it was the truth, or recklessly or carelessly.

17. The fact that the respondent placed reliance on the Circular of 2007, and the learned Arbitrator accepted the said circular as a policy, inter alia, holding that some kind of a schedule or timetable should have been made available to the respondent so that the respondent would be ready with the goods, deliveries and orders, cannot be termed as false representation. The award cannot be termed as a deliberate and wilful endeavour to accept a false and fabricated story of the respondent, only to put the petitioners in a disadvantage or to empower the respondent to

extract any illegal benefit from the petitioners. The view of the learned Arbitrator that the respondent could presume or expect that some kind of a time table or a time schedule cannot be prepared by the originating station, cannot be termed as corruption. The correctness of the view will be decided in the application for setting aside the award.

18. The learned Arbitrator was of the view that, when the contracting parties had entered into a business arrangement, both parties were required to discharge their obligations. It was held that, unless the railway authorities had provided an expected time schedule or had ensured that the PECTs ran on a particular path, by maintaining a time schedule as far as possible, it would not be possible for the contractor to run the business successfully.

19. According to the learned Arbitrator, leaving the contractor to the hands of fate, with sheer uncertainty as to when the rakes would be available for loading and the unexpected delays caused during the trips, led to loss of profit. The inability of the railways to provide a hassle-free transit of the PECTs, was a breach of the obligation under the agreement. These were the views of the learned Arbitrator based on the records and the evidence.

Whether such views are plausible views or are unreasonable and shocking to the conscience of the court, cannot be decided at this stage, while dealing with the prayer for unconditional stay of the award. Fraud and corruption should be *ex facie* available from the face of the records.

20. ***Ventura Global Engineering (supra)*** also propounded that, that concealment of material circumstances on the part of one of the parties to an arbitration agreement, thereby, leading the arbitrator to pass an award, was fraud. Therefore, if the party which ought to have disclosed material, wilfully withheld the same in order to deceive the arbitrator, such award should be set aside on the ground of fraud. These aspects are not available from the documents relied upon by the petitioners. The circumstances which led to the making of the award, prima facie, do not appear to be fraudulent. The definition of law as per the Indian law, does not apply to this case.

21. Section 17 of the Indian Contract Act, defines fraud as follows:-

> **17. 'Fraud' defined**.—
>
> "Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance,

> or by his agent', with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—
> (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
> (2)the active concealment of a fact by one having knowledge or belief of the fact;
> (3)a promise made without any intention of performing it;
> (4)any other act fitted to deceive;
> (5)any such act or omission as the law specially declares to be fraudulent. Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speaks, or unless his silence, is, in itself, equivalent to speech. Illustrations (a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.(b) B is A's daughter and has just come of age. Here the relation between the parties would make it A's duty to tell B if the horse is unsound.(c) B says to A—"If you do not deny it, I shall assume that the horse is sound". A says nothing. Here, A's silence is equivalent to speech.(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B."

22. The expression "making of the award" would mean that, the award must have been obtained by a party to the arbitration upon suppressing material evidence or by making false statements before the learned arbitrator in order to take an unfair advantage over the other party. The petitioners have not been able to, prima facie, establish that any of these situations had arisen in the making of the award. There is nothing on record to show that vital documents had been either concealed or

false statements had been made before the learned Arbitrator, which had a causative link with the facts constituting and culminating in the award.

23. In the case in hand, the arguments of the petitioners were on the ground that both the respondent and the learned Arbitrator wrongly relied on the policy of 2007 and the evidence of the railways were not given due credibility by the learned Arbitrator. The specific allegation was that, the learned Arbitrator had failed to take into consideration cogent evidence and had allowed the claims without the respondent having established the basis of such claims. Corruption by an Arbitrator will mean a moral obliquity. An honest mistake or erroneous appreciation of law may not appear to be reasonable to the court, but such defects in the award, cannot be an act of corruption on the part of the arbitrator.

24. Corruption of the learned Arbitrator should be such, that it would be, prima facie, evident from the award itself that the learned Arbitrator had tried to curb or prevent the course of justice. The burden of proof is rather high. The petitioners were required to discharge the burden by at least bringing to the notice of this court from the records and from the award that,

either the respondent had concealed relevant materials or had made false statements, which led the arbitrator to pass the award in their favour. The petitioners would have to show, prima facie, that the learned Arbitrator deliberately passed the award in abuse of the process of law and had illegally obstructed the course of justice.

25. The learned Arbitrator relied on clause 1.0 and 1.1 of the agreement, which is quoted below.

> "1.0. Assured Supply of VPs in leased Parcel Express Train.
> 1.1 Railway administration will provide to Lease Holder, a Parcel Cargo Express Train in conformity to Serial No. 1 of Salient Features of the scheme at prevailing accepted rate of the contract for the transportation of parcel traffic Ex Chitpur-to-Kalyan on round trip basis @ Rs. 31,00,000/- (Thirty One Lakh) only with frequency of two round trips per month for a period of Six years w.e.f 27.02.2017 to 26.02.2023. Lump sum teased freight shall be collected on the day of loading which will be calculated as per actual permissible carrying capacity of the Parcel Vans (VPH/VPs/VPU+SLR) supplied for loading. In addition to the freight charges as mentioned herein above Lease Holder shall have to pay 2% Development Charges and Service tax as applicable." (QUOTED)

26. The learned Arbitrator relied on the freight marketing circular No. 02 of 2007, to hold that an expected timetable should have been provided and the respondent was entitled to know roughly the time when the trains would arrive for loading at the originating destination. The relevant portion is quoted below:-

"**9.3.** :Punctuality of Train: The Parcel Express train will run on fixed path with scheduled time table as far as possible. The time-table will be prepared by the originating leasing railway in consultation with other zonal railways through the train passes. Transit time of train should be monitored by the Operating department." (QUOTED but highlighting in bold is mine)."

27. Paragraph 13 of the statement of claim, which was relied upon in the awrad is quoted below:-

"a. Due to the late arrival of the said train in the intermediate stations and/or final destination, the claimant could not deliver the consignment to its customers within the time frame as promised by him and due to delay in delivery of the said consignment, the customer of the claimant had lost trust in the claimant and accordingly, they became reluctant to transport their consignment through the claimant which ultimately culminated into loss of business to the claimant and the same would also appear from the various manifests submitted by the claimant at the time of commencement of the respective journey which would show that despite paying the advance freight, the claimant could not load any goods or had loaded lesser quantity than the scheduled capacity in the said parcen van as the customers of the claimant because of the time constraint was availing other modes to transport their goods despite having assured the claimant to transport through them, due to unexpected delay in running of the said train. Copies of the manifest evidencing that payment was made but no goods loaded or loaded lesser quantity of goods than scheduled capacity due to delay in transit are annexed herewith and is marked with letter "F".
b. It is pertinent to mention herein that the agreement for leasing of parcel cargo express train define the frequency of service in clause 7.0(i) of the agreement in the following terms :-

"7.0 Frequency of Service
(i) The Service will start with frequency of two trips per month. Later on, the frequency can be increased in

view of demand subject of availability of stock and operational feasibility with mutual consent at the rates on PRORATA BASIS as per policy guidelines of Board"

This itself goes to show that the claimant could have earned profit in the event the service of the rakes was as per the schedule time frame.

c. The claimant had arranged customers in the intermediate station for loading further goods in the said parcel cargo express train subject to the carrying capacity of each parcel van. However, due to unexpected delay in reaching the intermediary station, the customer had refused to give the consignment to the claimant after waiting for sufficient time, however, the claimant had to pay cost of the labours, who were engaged by the claimant for loading and unloading though entire arrangement became absolutely ineffective due to inordinate delay n arriving at the station. Furthermore, the claimant had to borne the waiting charge of the vehicle hired by the claimant for further transportation of the said goods from the stations. " (QUOTED)"

28. Reliance was further placed on the definition of "frequency in service" from the agreement itself. The definition provided that, the respondent was entitled to two trips per month, but due to unexpected delays and unavailability of a schedule, those trips could not be availed of. Out of the 14 rakes which were scheduled to operate between February, 2017 to November 2017, only two were, in effect, made to depart, although, the payment was made to the claim by the respondent to the railways in its entirety.

29. The learned Arbitrator relied on the evidence of Ananta Mukherjee, the railway's witness and arrived at the finding that the allegation of the petitioners that, the respondent intentionally did not load the cargoes was not correct. The learned Arbitrator was of the opinion that the evidence of Ananta Mukherjee clearly indicated that there was no fixed timetable for the PECTs, although, clause 9.3 of the Circular provided that some kind of time schedule was required to be maintained. Without the contractor knowing the time and the date as to when the trains would be available for loading, the respondent could not be expected to wait till eternity for the trains to arrive.

30. The learned Arbitrator also arrived at a specific finding that the agreement was terminated by the respondent in abidance to the provisions of the contract, upon giving two months' notice.

31. The decision in ***Union of India & Anr. Vs. Rashmi Metaliks Limited,*** reported in ***2023 SCC OnLine Cal 2272*** will not be applicable in the facts of this case, inasmuch as, the making of the award in the said case, was a result of deliberate suppression of material facts by the officers of the railways.

32. The decision of ***OPG Power Generation Private Limited vs Enexio Power Cooling Solutions India*** decided in ***Civil Appeal***

No. 3981 of 2024 was in support of the principles laid down with regard to breach of a contract. The decision is not relevant for the purpose of disposal of this application.

33. Under such circumstances, this court does not find any reason to grant unconditional stay of the award.

34. The award shall remain stayed unconditionally for a period of six weeks. The petitioners shall secure the entire amount of Rs.49,16,42,425/-, by cash deposit before the learned Registrar, Original Side, High Court, Calcutta, within the period of six weeks. The learned Registrar shall invest the same in an auto-renewable interest bearing fixed deposit in any nationalized bank. Upon such deposit, the award will remain stayed until disposal of the application under Section 34 of the Arbitration and Conciliation Act, 1996. In case of default, the stay shall automatically stand vacated.

35. There will be no order as to cost.

36. Parties are directed to act on the server copy of this judgment.

(Shampa Sarkar, J.)