

(2006) 08 DEL CK 0033
In the Delhi High Court
Case No : FAO (OS) 97 of 2006

Airports Authority of India

APPELLANT

Vs

I.C.M. Airport Technics

RESPONDENT

Date of Decision : 18-08-2006

Acts Referred:

Arbitration Act, 1940 — Section 15, 30, 31

Citation : (2006) 3 ARBLR 380

Hon'ble Judges : Hima Kohli, J;Dr. M.K. Sharma, J

Bench : Division Bench

Advocate : Harish Malhotra and Sunil Ahuja, for the Appellant; Vikram Kapoor and Pankaj Kapoor, for the Respondent

Final Decision : Dismissed

Judgement

Mukundakam Sharma, J.—This appeal is directed against the judgment and order dated 3rd January, 2006 passed by the learned single Judge whereby the learned single Judge has disposed of the applications filed under Sections 30 and 31 and 15 of the Arbitration Act, 1940, making the award passed by the learned Arbitrator on 15th March, 1994 Rule of the Court with a modification that the respondent shall be entitled to interest @12% p.a. instead of 18% per annum with effect from 1st September, 1991 till the date of the decree in respect of the agreement arrived at between the appellant and the respondent executed on 12th January, 1984, for supply, installation, testing and commissioning of a pallet/container storage and handling equipment at the International Cargo Terminal Building at the New International Terminal Complex at Delhi Airport. Dispute arose between the parties in respect of the work to be carried out and payments to be made. The same were referred to the Sole Arbitrator by the Chairman of the appellant in terms of the arbitration clause between the parties. The learned Arbitrator entered into the reference and received evidence adduced by the parties and thereafter made and published his Award on 15th March, 1994. Under the aforesaid Award, claim Nos. 1,3,4 and 7 of the respondent were partly

allowed by the learned Arbitrator while the other claims of the respondents were rejected.

2. Being dissatisfied with the aforesaid Award, the appellant filed an application under Sections 30 and 31 of the Act praying for setting aside the award passed by the learned Arbitrator in respect of the aforesaid claim Nos. 1,3,4 and 7. The respondent on the other hand, filed an application u/s 15 of the Arbitration Act which was also pending for consideration. The learned single Judge considered both the aforesaid applications and passed the judgment and order dated 3rd January, 2006 making the Award Rule of the Court with the modification as stated herein-above.

3. The appellant, being aggrieved by the aforesaid judgment and order, filed the present appeal in this Court on which we have heard the learned Counsel appearing for the appellant as also the counsel appearing for the respondent. We have also looked into the record placed before us for our consideration. Arguments were advanced by the counsel appearing for the appellant in respect of the Award as also against the impugned judgment and order so far it relates to claim Nos. 1,3,4 and 7.

4. So far as claim No. 1 is concerned, the same relates to claim for the delay in handing over the site, consequent upon which the respondent has suffered certain damages for which compensation was claimed. There is no dispute with regard to the fact that there was in fact delay in handing over possession of the site in question. The appellant, however, relied upon Clause 5.17.8 in support of their contention that no compensation was payable to the respondent despite the fact that there was delay in handing over possession of the site in question.

5. In order to appreciate the contention of the counsel appearing for the appellant, we extract below the provisions of Clause 5.17.8, on which heavy reliance is placed by the counsel appearing for the appellant:

If at any time there is hindrance in the execution of the work due to any reason whatsoever the authority shall not to be responsible and shall not entertain any claim whatsoever on any account from the contractor.

The Counsel has sought to submit that the delay in handing over the site in question to the respondent also would come within the ambit and expression "hindrance" in the execution of the work and, Therefore, the Award passed by the Arbitrator is in contravention of Clause 5.17.8. The learned Arbitrator also had considered such a claim made before him and held that Clause 5.17.8 of the Notice Inviting Tender speaks of "hindrance in the execution of the work" which is different from "handing over the site". It was also held by the learned Arbitrator that the execution of the work is a process which begins after the site is handed over and that the two acts are different and independent of each other. The aforesaid findings arrived at by the learned Arbitrator are findings of fact. We find no reason to take a different view than what is taken by the learned Arbitrator on the interpretation of the aforesaid Clause. The appellant failed to

hand over possession of the site in question in time, consequent upon which the respondent suffered certain damages like incurring extra expenses in engaging personnel over a longer period and the extra provisions for keeping insurance cover alive for a longer period and incurring extra expenses of travel, especially travel between Germany and India and for providing boarding expenses to the German Engineers and their salaries. It is also to be noticed that the Arbitrator did not allow the entire claim of the respondent holding that the entire claim made by the respondent as aforesaid cannot be believed to be so spent. Counsel appearing for the appellant has submitted that the aforesaid finding of the learned Arbitrator clearly establish that he has made certain guess work in respect of the damages stated to have been incurred by the respondent. Some guess work has to be made in the matter of assessing damages and compensation. In motor accident cases also, where damages are to be assessed, such guess work are made and the Supreme Court in its various decisions has upheld such guess work made for the purpose of assessing damages to be payable under the provisions of Motor Vehicles Act. There could be no dispute to the fact that due to the aforesaid delay the respondent has suffered damages for engaging employees and officers beyond the stipulated period and such expenses could have been avoided if possession was handed over to the respondent in time so that the workmen and the officers of the respondent were not to remain idle at the work site. In that view of the matter we find no error apparent on the face of the Award or in the conclusions and findings recorded by the learned Arbitrator as also by the learned single Judge in respect claim No. 1.

6. The next submission made by the learned Counsel appearing for the appellant is in respect of the finding recorded by the learned Arbitrator in respect of claim No. 3, which relates to price escalation. The learned Counsel appearing for the appellant states that there was no specific clause in the contract permitting any price escalation in respect of the contract in question. Similar arguments were made before the learned Arbitrator who had dealt with the clause of price escalation. Paragraph 4 of the Terms and Conditions deals with the price escalation which reads as follows:

4. Price Escalation:

Prices quoted shall be subject to the following escalation clause:

The variation in the cost of materials/components and labour up to the date of dispatch would be in accordance with the following formula....

It is submitted by the counsel appearing for the appellant that there was no mention of the escalation clause in the final document. Our attention is however drawn to Clause 4.1(c) of the Terms and Conditions which reads as follows:

(c) The following documents shall form part of the contract:

(i) Offer

(ii) All the correspondences and clarifications submitted prior to issue of the

contract.

In this connection we may refer to the letter of the respondent dated 7th July, 1982, wherein it was stated as follows:

...our office is to execute the work in accordance with the requirements of the terms and conditions stipulated, with the exceptions and amendments contained in our attachment, which are open for discussion with yourself

When the aforesaid Clauses are read together, it clearly establish that the offer of 7th July, 1982 would form part of the contract. It is true that although separately a price escalation clause was not mentioned in the contract but, by virtue of the provisions of Clause 4.1(c), the correspondences and clarifications submitted prior to the issue of the contract would also become subject matter of the contract. Consequently, the offer of 7th July, 1982 would also form part of the contract. That being the position, price escalation of the materials and equipments was a matter which could form subject matter of the claim and also could be subject matter of the Award published by the Arbitrator. The Arbitrator has categorically given his findings while making discussions in respect of claim No. 3 that no fault could be pointed out in the escalation price as worked out by the respondent in accordance with the formula given in the relevant clause and that the only objection raised was on the ground that the respondent had given invoices, dates etc without producing the original invoices. Even in respect of the objection raised about the non-production of the original invoices, the Arbitrator recorded that admittedly original invoices were given to the appellant at the time when running payments were received by the respondent during the progress of the work. These are findings of fact arrived at by the learned Arbitrator after perusing the entire record. This Court, sitting as appellate court, can neither re-appreciate the findings nor come to a contrary finding than what is recorded by the learned arbitrator.

7. The learned Arbitrator has also relied upon letter dated 26th June, 1991. The learned Arbitrator has stated that vide the above-said letter he was appointed by the Chairman to act as the Sole Arbitrator to decide and make award regarding the claims/disputes raised by the respondent as mentioned in the enclosed list which specifies items (2) and (3) as escalation of indigenous components and escalation of imported components. The Chairman of the appellant himself has considered that there are disputes with regard to the escalation of price of the indigenous and imported components and, Therefore, he referred the said disputes for consideration of the Arbitrator. Therefore, it is too late in the day for the appellant to make a submission that claim regarding price escalation could not have been entertained as the same is not a part of the contract. Counsel for the appellant seeks to submit at this stage that the said claim should not have been awarded by the learned Arbitrator as the delay in handing over the site has nothing to do with the procurement of the components. It is also submitted by him that the price escalation is also a factor relating to the delay and since already a claim is allowed in respect of claim No. 1, Therefore no second claim

could have been awarded for price escalation. The aforesaid submissions of the learned Counsel for the appellant are also found to be without any merit. The claim as against claim No. 1 pertains to delay in handing over the site whereas claim No. 3 pertains to the claim regarding price escalation and both the claims stand on two different footings. There is inherent difference between the two claims and, Therefore, the submission of the counsel appearing for the appellant has no force at all. In any case the learned Arbitrator having considered the aforesaid claim, which appears to be a claim made under the provisions of the contract itself, and having given the reasons for arriving at the conclusions, which are found to be cogent and valid, there is no question of any interference with the subject Award passed by the learned Arbitrator.

8. In this connection we may appropriately refer to the decision of the Supreme Court in Union of India (UOI) Vs. A.L. Rallia Ram, wherein the Supreme Court considered the scope of interference with the award of the arbitrator and held that the award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right, the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement. It is also further to be noticed that in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, the Supreme Court has held that if the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction and the same requires no interference.

9. The next submission of the learned Counsel for the appellant is with regard to claim No. 4 which is for reimbursement of taxes etc. There is no dispute of the fact that taxes would be paid by the appellant against demand on presentation of the suppliers bill. Such bills are required to be paid as per actuals. Having considered the submission of the counsel appearing for the appellant and having gone through the finding recorded by the learned Arbitrator, we find no error in the aforesaid conclusion arrived at by the learned arbitrator which was rightly upheld by the learned single Judge.

10. So far claim No. 7 is concerned, the same relates to payment of interest. The respondent claimed interest at 20% p.a. from 15th April, 1986, which is the date of completion of the work. The learned Arbitrator awarded 18% interest per annum from 1st September, 1991 till the date of payment. The learned single Judge has considered the aforesaid Award passed relating to payment of interest on the grounds stated in the impugned judgment and order and the same was modified, directing the same to be paid @ 12% p.a. The aforesaid modification of the award by the learned single Judge needs no interference at all as the interest which is awarded now is only @12% p.a. which is found to be very reasonable.

11. We find no merit in the appeal and the same stands dismissed accordingly.

The application for interim order also stands dismissed. Parties are left to bear their own costs.