
(2009) 01 DEL CK 0035
In the Delhi High Court
Case No : FAO (OS) No. 703 of 2006

Avi Coach Builders and Others

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 22-01-2009

Acts Referred:

Citation : (2010) 7 RCR(Civil) 2496

Hon'ble Judges : Vipin Sanghi, J;Mukul Mudgal, J

Bench : Division Bench

Advocate : Vivekanand, for the Appellant; Jyoti Singh and Amandeep Joshi, for the Respondent

Final Decision : Allowed

Judgement

Mukul Mudgal, J.—At the outset learned Counsel for the appellant has delivered in Court a compilation of documents stated to form part of the arbitral record. The same is taken on record. This appeal challenges the judgment of the learned Single Judge dated 11th September, 2006 upholding the award delivered by the Arbitrator on 30th September, 1991. The factual background may first be stated.

2. The respondent invited the quotations for construction of passenger coaches on the chasis to be supplied by the respondent. The appellant submitted its tender. Under the agreement initially one chasis was agreed to be provided to the appellant to enable the appellant to fabricate a proto-type of the coach. Upon the approval of the proto-type, the appellant was required to fabricate the remaining 30 coaches on the chasis to be supplied by the respondent. The chasis was to be supplied to the appellant against the security of a bank guarantee to cover the cost of the chasis. The appellant furnished a bank guarantee in respect of the price of one chasis against which the appellant received the chasis. The appellant fabricated the coach and the same was submitted to the respondent for approval on 04.08.1984, and finally accepted by the respondent on 21.09.1984. The remaining 30 coaches were to be developed in batches of six each, and for receiving each batch, the appellant was required to furnish the security of a bank

guarantee.

3. According to the respondent, the appellant failed to furnish the requisite bank guarantee for six coaches and consequently despite the approval of the prototype the contract remained unperformed by the appellant. The respondent sought to cancel the contract and claims to have proceeded to get the work done at the risk and cost of the appellant. The respondent, in these circumstances, preferred a claim before the arbitrator for Rs. 14,87,720/-.

4. The defence of the respondent before the arbitrator was, inter alia, that the respondent raised frivolous objections to the format and content of the bank guarantee and insurance cover for the six chasis, inasmuch as, the claimant/respondent refused to accept a clause of the bank guarantee relating to the period of its validity, which was a standard clause in the bank guarantees according to banking norms, and the claimant/respondent insisted for deletion or amendment of the same. The appellant further pleaded that its banker refused to alter the terms of the bank guarantee as required by the claimant/respondent, as the banker argued that the appellants had already furnished a bank guarantee for the prototype chasis, which has been accepted by the DGS&D/respondent along with a performance guarantee which contained the disputed clause. Therefore, there was no reason for the DGS&D to raise any objection at a later stage, as far as the format of the bank guarantee was concerned. It was further pleaded that the appellant had contacted the officers of the respondent and informed it of the difficulties that the appellant was facing in getting the bank guarantee amended as regards the said clause. A letter to this effect, dated 26.07.1984, was addressed by the appellant to their banker to which the banker had responded vide letter dated 29.10.1984. These communications were also placed before the learned arbitrator by the appellant. The appellant further pleaded that in spite of its requests to withdraw the condition as to alteration of the aforesaid term in the bank guarantee, the respondent claimant kept sending reminders for submission of the amended bank guarantee, and eventually the respondent cancelled the contract on 16.02.1985.

5. It appears that the appellant also placed on record of the arbitrator the guarantee bond bearing No. 191 dated 28.04.1984 which, inter alia, stated that the bank's liability under the bond will remain till 20.04.1985, unless the action to enforce suit under the guarantee is filed against the bank before that date. The aforesaid guarantee was furnished in respect of the chasis provided to the appellant for developing the prototype. The format provided by the respondent for furnishing of the guarantee bond on the other hand provided:

6. We, _____ Bank, lastly undertake not to revoke this guarantee during the its currency except with the previous consent of the Government in writing.

Dated _____ day _____.

6. The communication issued by the appellant's bank, namely, Bank of India,

dated 29.10.1984, addressed to the respondent reads as follows:

Dear Sir,

Ref.: Our Bank Guarantee No. 19/23 of 27-8-84 for Rs. 5,51,790/- drawn in your favour expiring on 30-11-1984.

Beneficiary:- M/s Avi Coach Builders.

We refer to our captioned Guarantee Bond.

We understand from the beneficiary M/s Avi Coach Builders that you have asked for the deletion of clause 7 (Limitation Clause) from the captioned guarantee.

In this context we are to inform you that the limitation clause is a part of Bank's standard guarantee proforma. Also it may be noted that the bank guarantee Nos. 19/6, 19/14, 19/18 issued by us on 4-2-84, 23-3-84 and 28-4-84 for Rs. 1,83,938/-, Rs. 1,90,000/- & Rs. 58,345/- respectively drawn in your favour have been duly accepted at your office.

You are requested to intimate the reasons for non-acceptance of bank guarantee with the limitation clause. In the meantime you are requested to return the captioned guarantee bond to us if it is required to be changed.

7. The pleadings of the appellant in respect of the aforesaid aspect before the learned arbitrator were as follows:

(ii) As per the claimants own admission in para 3 of the claim statement, the prototype was offered for inspection on 4.8.84 and also accepted by the claimants on 21.9.84. Without prejudice it is submitted that if there was any discrepancy, or any delay on the part of the respondent, the same was, rendered ineffective by the acceptance of the prototype, which proves that the respondent was at no time required to furnish Bank Guarantee and Insurance Cover for six chassis but only for one chassis required for building for prototype.

(iii) The claimant raised frivolous objections as to the format and contents of the Bank Guarantee and Insurance Cover for six Chassis; in as much as the claimants refused to accept Clause 7 of the Bank Guarantee which was a standard Clause in the Bank Guarantee according to banking norms and asked for deletion or amendment of the same.

(iv) The true position was that the respondent bankers refused to alter the terms of the Bank Guarantee as required by the claimant as the bankers argued that the respondents had already furnished a Bank Guarantee for the prototype chassis which had been accepted by the DGS&D alongwith a performance guarantee which contained the disputed Clause 7 (Time period clause). Therefore, there was no reason for the DGS & D to raise an objection at this late stage, as far as the format of the Bank Guarantee is concerned.

8. The respondent while filing its rejoinder dealt with the aforesaid pleadings in the following manner:

(ii) Para (ii) is totally wrong and denied and wholly misconceived. It is wrong to assume that the respondents were not to furnish Bank Guarantee and insurance cover for 6 chassis but were to give only for one chassis. Para 19(d) of the A/T is very clear on the subject. The respondents were to furnish BG for 6 chassis so that the continuity of construction by release of chassis could be maintained. It is denied that the respondents were to furnish B.G. and insurance cover for 1 No. chassis and not 6 Nos.

(iii) Contents of this para are not admitted. The respondents did not submit BG for 6 Nos. chassis. The objections raised were genuine. BG proforma was given alongwith contract. This did not have para 7. The respondents never objected to the contents of BG proforma sent to them with the contract.

(iv) Para (iv) is wholly misconceived and evasive. The true position is that the claimants were to furnish BG for 6 Nos. chassis which was not furnished by them. Any matter between the claimant and bankers is their internal matter. Besides there is an attempt on the part of the claimants to confuse the issues. In the present case there is a total failure on the part of the respondents to abide by and comply with an important conditions of the contract to furnish the BG for 6 Nos. chassis which the respondents have failed to furnish.

9. The arbitrator made his award dated 30.09.1991 allowing the claim of the respondent and disallowing the counter claim of the appellant. The arbitrator in his award, inter alia, held as follows:

WHEREAS I, Shiv Prakash, Additional Legal Adviser to the Govt. of India, Ministry of Law & Justice, Department of Legal Affairs, New Delhi was appointed as Sole Arbitrator by the Director General of Supplies & Disposals, New Delhi vide letter No. LIT. II/A(75)/90 dated 6.11.90 under the terms and conditions agreed to by the parties with reference to the contract mentioned above and the differences between them relating to the said contract were referred to my arbitration.

AND WHEREAS I took upon myself the burden of the said reference and issued notices to the parties. Shri O.N. Moolri, Senior Govt. Counsel alongwith Shri Om Parkash, Dy. Director, DGS&D appeared on behalf of the claimants U.O.I. Shri J.S. Sinha, Advocate and Miss Maryada Bhatt, Advocates alongwith Major A.P. Lawale, Representative of the firm appeared on behalf of the respondents M/s A.V.I. Coach Builders.

AND WHEREAS I have considered the pleadings filed by both the parties, the documentary evidence adduced by them and the detailed arguments put forth on behalf of both the parties in support of their respective cases. I have also seen certain relevant original documents from the purchase file brought before me by Shri Om Parkash, Dy. Director.

I do hereby make my award and publish it as follows:

CLAIMANTS OF THE CLAIMANTS UNION OF INDIA:

Claim No. 1)

The Claimants U.O.I claim a sum of Rs. 12,90,104/- on account of loss, the details of which are given in Para 17) at page 5 of their statement of claim alleged to have been suffered by them because of breach of the subject contract alleged to have been committed by the respondents contractor.

Award No. 1)

The claim is allowed to the extent of Rs. 12,90,104/- for the reason that the work got done at the risk and cost of the respondents contractor is legally and contractually valid. Besides, the claimant U.O.I. had no other alternative but to cancel the subject contract as the respondents contractor had failed to furnish the Bank Guarantee towards the cost of the Chassis and the insurance cover there for which were to be supplied by the claimants U.O.I. for construction of the passenger coach, furnishing of Bank Guarantee and the comprehensive insurance policy, being the condition precedent for the supply of the Chassis to the respondents contractor as per terms of Clause 19 of the subject contract which was to be first fulfilled by the respondent contractor.

10. The learned Single Judge has rejected the plea of the appellant that the primary issue was with regard to the unreasonable stand of the respondent in insisting on a bank guarantee/guarantee bond without any limitation as to time within which the same could be invoked or the same had to remain valid for invocation, on the ground that the issue involved was not with regard to the duration of the bank guarantee, but the non-furnishing of the bank guarantee for six coaches.

11. The learned Counsel for the appellant submits that initially the bank guarantee in respect of the chasis supplied to develop the prototype coach was valid for a period of 8 months and had indeed been accepted by the respondents. It is upon the insistence of the Union of India that the guarantee for six chasis be open ended, that the dispute arose and the question of furnishing the bank guarantee for six coaches never arose as the respondent kept insisting that the guarantee be open ended. He submits that the learned Single judge has neither noticed the real dispute between the parties, nor the failure of the arbitrator to even deal with the defence of the appellant, and the learned Single Judge has not dealt with the dispute about the nature of the bank guarantee which was required to be furnished. He submits that if the defence of the appellant had been considered and accepted, it is likely that the learned Arbitrator would not have made the impugned award, holding the appellant to be in breach of its contractual obligations. However, the arbitrator, as aforesaid, had failed to even consider the defence of the appellant and the learned Single Judge also did not appreciate the said failure on the part of the arbitrator.

12. Having considered the aforesaid aspects and heard learned Counsel for the parties, we are of the view that the judgment of the learned Single Judge is unsustainable and the same is liable to be set aside.

13. It is not disputed that the arbitrator was obliged to give reasons for his award. Even though the award recites that the pleadings filed by both the parties, documentary evidence produced by them and the detailed arguments were put forth by each of the parties, we find the Award to be wholly lacking any reasons.

14. From the above extracted pleadings, it appears that the fundamental dispute between the parties was whether, the appellant was justified in demanding that the clause with regard to the limited validity of the bank guarantee be accepted by the respondent, or, whether the respondent was justified in insisting that the bank guarantee to be furnished by the appellant's bank, be open ended. Indeed this is evident from the pleadings/documents before the Arbitrator, which included a letter dated 29th January, 1984 issued by the Bank of India to the respondent from which it is clear that the bank guarantee was not being accepted by the respondent due to time limitation clause. In our view, the Arbitrator has not at all referred to any of these pleadings and documents. There is nothing to show that the Arbitrator has even addressed himself the said issue, before rendering the award.

15. An arbitrator, particularly one well instructed in law, such as the Additional Legal Adviser to the Government of India, Ministry of Law and Justice, Department of Legal Affairs, is expected to give at least a brief summary of his reasons in the Award, which, in our view, he has failed to do. The preamble of the Arbitrator's award is much longer than the so called reasoning. In spite of the pleadings of the appellant urging the ground specifically that the demand by the Union of India to have an open ended bank guarantee was arbitrary, the Arbitrator and, indeed, the learned Single Judge have not dealt with the issue. In our view, the learned arbitrator has failed to consider not only the defence of the appellant, but even material documents produced by the appellant while making the impugned award. The aforesaid failures of the arbitrator clearly constitute legal misconduct and deals a death blow to the impugned award. (See *College of Vocational Studies v. S.S. Jaitley* AIR 1987 Delhi 134.)

16. Accordingly, the appeal is allowed and the judgment of the learned Single Judge dated 11th September, 2006 and the Award dated 30th September, 1991 are set aside. We direct a fresh consideration of the disputes in arbitration on the existing pleadings and evidence by another Arbitrator, to be appointed by the respondents, on or before 20th February, 2009.

17. The parties will appear before the said Arbitrator within two weeks thereafter, or on a date and place found suitable by the said Arbitrator to be appointed, and the Arbitrator shall render a reasoned award, as that is an undisputable term of reference, by 30th April, 2009.

However, we make it clear that nothing stated in our judgment should influence, or be construed as an expression of our view on the merits of the cases of the respective parties, and the Arbitrator should decide the disputes in accordance

with law.

The appeal stands disposed of accordingly.