
(2006) 01 DEL CK 0043

In the Delhi High Court

Case No : CS (OS) No. 1450 of 1994 and is No's. 9835 and 10400 of 1994

I.C.M. Airport Technics

APPELLANT

Vs

International Airport Authority of India

RESPONDENT

Date of Decision : 03-01-2006

Acts Referred:

Arbitration Act, 1940 — Section 15, 30, 33

Contract Act, 1872 — Section 51, 52, 53, 54, 55

Citation : (2006) 1 ARBLR 146

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Pankaj Kapoor and Vikram Kapoor, for the Appellant; Nemo, for the Respondent

Judgement

Sanjay Kishan Kaul, J.

IA No. 9835/1994 (Under Sections 30 and 33 of The Arbitration Act, 1940)

IA No. 10400/1994 (Under Section 15 of The Arbitration Act, 1940)

1. The respondent International Airport Authority of India, entered into an agreement with the petitioner on 12.01.1984 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. Disputes arose between the parties in respect of the work to be carried out and the payments to be made and as a result of the same, the Chairman of the respondent appointed Justice P.N. Khanna (Retd.) as the Sole Arbitrator as per the arbitration clause between the parties. The Sole Arbitrator has made and published his Award on 15.03.1994. In terms of the Award, some of the claims of the petitioner had been accepted, while others had been rejected.

2. The respondent herein has filed objections under Sections 30 and 33 of the Arbitration Act, 1940 (hereinafter to be referred to as, "the Arbitration Act"). The petitioner has also filed an application u/s 15 of the Arbitration Act only to the

extent that the petitioner claims conversion of the award in Deutsche Mark @ Rs. 20/- as against the exchange rate of Rs. 4.50 allowed by the Arbitrator.

3. On 29.11.2005, when the matter was listed for final hearing, a request for adjournment was made on behalf of learned counsel for the respondent. It was noticed that a perusal of the order-sheet showed that the matter had been adjourned from time to time either on account of non-presence of the counsel for the respondent or because of a request made for adjournment. Last opportunity was granted to the respondent to make submissions on the next date of hearing and the adjournment was granted subject to payment of Rs. 5,000/- as costs to be paid within a week. Learned counsel for the petitioner states that the costs have not been paid.

4. Today, the matter is listed in the category of "FINALS" at Item No. 7, but is effective Item No. 1 as the earlier matters have been deleted or notified as "Not For Today" in the Cause List. None has put in appearance for the respondent. It cannot be expected that in such an old matter, this Court will continue to wait till such time as the counsel deems it appropriate to come to the Court to make his submissions.

5. The objections could have been dismissed for non-prosecution, especially since on 29.11.2005, it was clearly stated in the order that in case the respondent fails to prosecute the objections on the next date of hearing or the costs are not paid, the objections shall stand dismissed for non-prosecution without any further directions. However, in order to do substantial justice between the parties, I have considered it appropriate to peruse the Award, the objections filed as well as the written synopsis.

6. It cannot be lost sight of while considering the objections that this Court does not sit as a court of appeal over the Award. It is not for this Court to interfere with an Award merely on the ground that this Court would come to a different conclusion on the material available before the Arbitrator. It is not for this Court to re-appreciate the evidence and in the absence of the award being absurd, reasonableness is not a matter to be considered. The Court would not interfere with an award merely because it would come to a different conclusion on the material available before the Arbitrator. It is only in the eventuality of an award being perverse, that an interference would be called for. In this behalf, reference may be made to judgment of the Apex Court in Food Corporation of India Vs. Joginderpal Mohinderpal, and judgment of the Division Bench of this Court in DDA v. Bhagat Construction Co. Pvt. Ltd., 2004 (3) Arb.LR 481 . It may be relevant to add that in Sudarsan Trading Co. Vs. Government of Kerala and Another, , the Apex Court had observed that so long as the view taken by the Arbitrator is plausible, though perhaps not the only correct view, the Award cannot be examined by the Court. In the case of State of U.P. Vs. Allied Constructions, , it has been once again reiterated that Section 30 of the said Act providing for setting aside an award is restrictive in its operation and unless one of the conditions specified therein is satisfied, an award cannot be set aside. The

Arbitrator is a Judge chosen by the parties and his decision is final. Thus, an error apparent on the face of the record would not imply closer scrutiny on the merits of the documents and the material on record.

7. It is in view of the aforesaid parameters that the award of the Sole Arbitrator has to be examined.

8. A perusal of the Award shows that there is no dispute about the fact that contract could not be implemented within the time stipulated. It was the case of the petitioner that there was a delay on the part of the respondent of 13 months in handing over the site for which the scheduled date was 31.03.1984. The main sophisticated items of equipment and allied items were to be fabricated in West Germany, but rest of the items consisting mainly of steel structures were to be fabricated and procured in India. Since the site was not ready fully and part of the site could not be handed over before April, 1985 (In fact, it is alleged that no workable site could be handed over till even middle of November, 1985) there was inordinate delay on account of failure of the respondent to hand over the site in time resulting in increase in cost to the petitioner. The petitioner made seven claims on different accounts. Such claims were made in Deutsche Mark and Indian Rupees with claim of interest @ 20% p.a.

9. The plea of the respondent before the Arbitrator was that in view of certain conditions contained in the contract between the parties, no amount was payable to the petitioner on account of hindrance in the execution of work for any reason whatsoever. The contract also provided that if for reasons beyond the control of the respondent including for preparation of site, there was any requirement, the delivery date could be suitably amended.

10. The Arbitrator has analysed the terms and conditions of the contract and has come to the conclusion that a distinction must be made between a hindrance in the execution of the work and the handing over of site to the petitioner for execution of the work at the very inception of the contract. The petitioner could not be expected to complete the work in time if there was delay on the part of the respondent and, thus, the respondent must compensate the petitioner for any losses suffered on account of such delay. In this behalf, the Arbitrator, in my considered view rightly so, has considered the effect of the provisions of Section 52 of the Indian Contract Act, 1872 (hereinafter to be referred to as, "the Contract Act") to come to the conclusion that the nature of transaction has to be determined by the order in which promises had to be performed as there were reciprocal promises. The respondent had to give the site to the petitioner to install the equipment and in the alternative had to provide for storage space as per clause 3.1.3(b)(i). The Arbitrator found although 15 months' time for completion started from 31.03.1984, the storage space as an alternate to the completed cargo building was provided on 27.08.1984 and further space could be made available on 20.11.1984. The supply of steel structure was completed by December, 1984. The site where the installation had to take place was handed over partly in February, 1985 and the remaining incomplete site in April, 1985. It

is in view thereof that the Arbitrator rightly came to the conclusion that the petitioner could not be expected to perform its promises until and unless the respondent was willing to perform its reciprocal promises. In view of the provisions of Sections 54 and 55 of the Contract Act, the petitioner was entitled to claim compensation for any loss which it may have sustained, especially when the petitioner had given written notices in the form of numerous letters to the respondents informing the respondent that the petitioner will be claiming all losses sustained by it due to delay in handing over of the site. These letters have been produced on record and have been considered by the Arbitrator.

11. At this stage, it may be noticed that Section 51 of the Contract Act provides that a promisor is not bound to perform, unless reciprocal promises ready and willing to perform his promises. Section 52 provides that where the order in which reciprocal promises are to be performed is expressly fixed by the contract, then they shall be performed in that order which the nature of transaction requires. Section 53 provides for liability of a party in case of a contract containing reciprocal promises and one party to the contract prevents the other to perform its promises. Section 54 provides for compensation to the affected party in case of such reciprocal promises.

12. The contention of the respondent based on the oral testimony of witnesses was rejected by the Arbitrator in view of the contemporaneous correspondence between the parties. This course of action by the Arbitrator is both legal and valid as the Arbitrator has rightly come to the conclusion that oral testimony after long interval can be tailored to suit the party, but contemporaneous documents including communications would clearly bring forth the situation existing as on the relevant date.

13. The petitioner had made the first claim in respect of expenses in engaging personnel over a longer period and remaining idle and extra provisions to be made on account of delay and the same have been found in favor of the petitioner. Similarly price escalation claim No. 3 has been found in favor of the petitioner on the basis of working of the amounts, the details of which were given to the Arbitrator and filed in the proceedings. The objection of the respondent that there was no price escalation clause was rightly brushed aside by the Arbitrator on account of the fact that even in the offer letter of the petitioner dated 07.07.1982, it was clearly stipulated as per the paradise comments attached to the same that the price quoted would be subject to escalation and the formula for the same was given. Clause 4.1(c) of the contract stipulates that the offer and all correspondences and clarifications submitted prior to the contract shall form a part of the Contract. It was, thus, rightly held that the offer of 07.07.1982 formed part of the contract.

14. The other claim awarded to the petitioner was on account of reimbursement of tax, etc. The claim towards excise duty was rejected in view of the clear stipulation in clause 6(b) of the contract that the excise duty was included in the price. The Arbitrator found on a reading of the contract that in terms of clause

3(a), the taxes were to be borne by the respondent against the demand on the presentation of supply of bills and the bills had to be paid as per actuals. The claim was, thus, allowed to that extent.

15. The last claim allowed is in respect of interest. Interest has been allowed @ 18% p.a. on the total amount awarded from 01.09.1991, the date when the statement of claim was filed till the date of payment. This was with the condition that in case the payment was made within 4 months from the date of the award, the interest rate would be only 15%. The payment has not been made. Learned counsel for the petitioner very fairly confines his claim of interest to 12% p.a. from 01.09.1991 till the date of decree, which is also the prevailing market rate of interest at the relevant period of time and the interest rate, which has been so awarded by this Court in numerous matters.

16. The material aspect, which is noticed from the objections filed by the respondent and the written synopsis is that the substratum of the submission of the respondent is that the Arbitrator fell into an error in not appreciating the documents correctly and coming to the conclusion that the delay was attributable to the respondent. It has further been stated that the specific clauses and covenants of the contract have not been considered in their true perspective.

17. It has already been noticed above that the aforesaid can hardly be said to be grounds for interference u/s 30 of the Arbitration Act in view of various authoritative pronouncements discussed herein-above. A perusal of the record and of the reasoning of the Arbitrator shows that the present Award is not one which falls within the category of a perverse award or where the Arbitrator has totally misconstrued the provisions of the Contract Act. The conclusions arrived at by the Arbitrator are certainly plausible conclusions even insofar as reading of the terms of the contract are concerned.

18. Insofar as the application of the petitioner is concerned, it is not disputed that the claim was made by the petitioner both in Deutsche Mark and Indian Rupees and at the conversion rate of Rs. 4.50. The same has been allowed by the Arbitrator as prayed by the petitioner. It is not a decree which has been passed in Deutsche Mark and that is why it is not the LIBOR rate of interest which has been granted to the petitioner, but the commercial rate of interest prevalent in our country.

19. Learned counsel for the petitioner states that as of now, the amount would have to be converted into EURO for being transmitted since Deutsche Mark currency is no more in existence. Once the decree is calculated in Indian Rupees, it will be for the petitioner to take appropriate steps for seeking transmission of the amount, which can be in EURO as per the rate prevalent.

20. The objection applications are accordingly disposed of.

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21. The objections having been disposed of, the Award dated 15.03.1994 of

Justice P.N. Khanna (Retd.), Sole Arbitrator is made Rule of the Court with the modification that the petitioner shall be entitled to interest @ 12% p.a. instead of 18% p.a. from 01.09.1991 till the date of decree. The petitioner shall also be entitled to future interest from the date of decree till the date of realisation @ 9% p.a. simple interest. The petitioner shall also be entitled to costs quantified at Rs. 7,500/-. The suit stands disposed of. Decree-sheet be drawn up accordingly.