
(2013) 07 DEL CK 0221

In the Delhi High Court

Case No : FAO (OS) 155 of 2013 and C.M. Application 4746 of 2013

Shri Sunil Kumar

APPELLANT

Vs

Airports Authority of India

RESPONDENT

Date of Decision : 19-07-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 34

Citation : (2013) 3 ARBLR 99

Hon'ble Judges : S. Ravindra Bhat, J;Najmi Waziri, J

Bench : Division Bench

Advocate : Pawanjit Singh Bindra, for the Appellant; Abhinav Vashisht and Sh. Digvijay Rai, for the Respondent

Judgement

S. Ravindra Bhat, J.—In this arbitration appeal, the order of a learned Single Judge in OMP 345/2009, to the extent it rejected the Appellant's claim for enhancement of the quantum of compensation contained in an arbitration award, is challenged. The impugned order was made on a petition u/s 34 of the Arbitration and Conciliation Act, 1996 (hereafter "the 1996 Act"). The Airports Authority of India ("AAI") issued a Notice Inviting Tender (NIT) on 15th November 1998 for removal and disposal of garbage from various designated points inside the operational area and outside the terminal building of the Indira Gandhi International Airport ("IGI Airport"), New Delhi. The Minimum Reserve Price (MRP) indicated was Rs. 1,90,000/-; the period of license was five years. One M/s. Shri Hans Enterprises ("Hans"), proprietary concern of the appellant, bid for the tender offering Rs. 3,13,000/- per month as license fee if the garbage was handed over to it and Rs. 5,35,000/- per month, if entire wet garbage was handed over to it by M/s. Taj, Oberoi and Ambassador Flight Kitchens at their premises. A meeting was held between the parties, following which the AAI issued a letter dated 15th March 1999, awarding the contract to Hans, stating, inter alia, that Hans would pay AAI a sum of Rs. 5,35,000/- per month as license fee during the first year of the contract, with a further condition that the license fee for the subsequent years would be subject to 10% of the compound

escalation. The license fee, so worked out for the 5 years, was set out in the letter. Clause (ix) of the said letter stated that Hans

shall not claim any reduction in licence fee on any account of whatsoever including non availability of garbage from various agencies as well as due to decrease in the flight movement etc. or due to closure of operation of any airline(s) or closure of airport.

2. Although the contract was awarded to Hans by letter dated 15th March 1999, a formal agreement was executed only on 8th July 1999. The period of 5 years was to be effective, nevertheless, from 25th June 1999. On 25th June 1999, AAI issued a letter to Hans where it set out the practice to be adopted by Hans for removal of garbage from IGI Airport. It was stated that a token system would be introduced, as was being adopted by the previous Contractor. On 28th June 1999 itself, Hans wrote a letter to the Flight Kitchen Units (FKUs), i.e., M/s. Taj Air Caterers ("Taj"), M/s. Oberoi Flight Services ("OFS") and M/s. Ambassador Flight Kitchen Operator requesting them to issue instructions to their employees to handover the garbage to Hans on a daily basis. On 29th June 1999, Hans wrote to AAI complaining that the Flight Kitchen Operators (FKOs) were not allowing Hans to remove garbage. AAI then wrote a letter on 2nd July 1999 to the FKOs, asking them to allow Hans to collect wet garbage which had arrived from the aircraft and deposited at flight kitchen. The issue did not get resolved, despite correspondence of the parties. Hans, therefore, filed a petition u/s 11 of the Act in this Court for the appointment of an Arbitrator. By an order dated 14th October 1999, while directing AAI to appoint an Arbitrator, the Court referred the six disputes to arbitration. Hans filed its Statement of Claims on 12th November 1999. AAI filed its reply to the statement of claims, denying that it had committed any breach of the agreement. No evidence was led by the parties. An Award dated 5th December 2001 was made, which rejected the claims of Hans, holding that Clause 16 of the OTCs did not oblige AAI to ensure the availability of garbage from the flight kitchens. The flight kitchens were not mentioned in the designated points in the schedule to the agreement and, therefore, the plea of Hans that AAI failed to ensure the supply of wet garbage from the flight kitchens was not tenable. Aggrieved by the Award, Hans filed OMP No. 1 of 2002 u/s 34 of the Act. That petition was allowed by a judgment dated 6th May 2003 by the learned Single Judge. The arbitrator was directed to go into the matter afresh. The second round of arbitration resulted in an award dated 5th July 2005 ("the second Award"), which rejected Hans's claims. The second Award of the Arbitrator was challenged by Hans in this Court by filing OMP No. 285 of 2005 u/s 34 of the Act. By an order dated 16th July 2007, the second Award was set aside by a learned Single Judge of this Court.

3. The Arbitrator, appointed subsequently, made his award on 18th March 2008 in which AAI has been directed to pay Hans a sum of Rs. 1,62,63,984 along with interest at 7% per annum on Rs. 26,64,000/- from the expiry of first year of the license till payment. Interest @ 7% per annum on Rs. 29,30,400/- from the

expiry of the second year till payment. Interest @ 7% per annum on Rs. 32,13,440/- from the expiry of the third year till payment. Interest @ 7% per annum on Rs. 35,45,784/- from the expiry of fourth year till payment and interest @ 7% per annum on Rs. 39,00,360/- per annum from the expiry of five years of the licence till payment. Further, AAI was asked to pay the Respondent Rs. 1,00,000/- as costs. AAI filed OMP No. 295 of 2008 u/s 34, challenging the award. Aggrieved to the extent that interest has been awarded only @ 7% per annum and not 18% per annum, Hans filed OMP No. 370 of 2008. Both these were also disposed by a common order, of which the impugned order is a part.

4. During pendency of the proceedings leading to the third Award, the issue arose as regards the entitlement of Hans to further benefits for the period of nine months beyond 25th June 2004. The issue went before yet another learned Arbitrator who gave the fourth Award on 2nd April 2009. By the fourth Award, it was directed that Hans would be entitled to damages at the same rate granted to it in the third Award for the further period of nine months. Both the parties were aggrieved by the said fourth Award. The appellant filed OMP No. 345 of 2009 on the ground that the 10% increase in the licence fee should have been accounted for a further period of nine months and the interest should have been @ 18% per annum. AAI filed OMP No. 364 of 2009 against the fourth Award stating that no amount, at all, should have been awarded to Hans. The present appeal is directed only in respect of the findings as to the quantum of damages or compensation; the appellant questions the common judgment, to the extent it pertains to OMP 345/2009.

5. The learned Single Judge rejected the appellant's claim for an enhanced quantum of damages, and held as follows:

29. As far as the fourth Award is concerned, the differential licence fee offered by Hans was only a yardstick for determining the loss suffered by it. Once it is clear that what was being awarded to Hans was not the refund of any excess licence fee but only the compensation for the loss suffered by it, then the quantification of the loss for the nine months' period on the same basis as determined in the third Award could not be said to be erroneous or suffering from any patent illegality. This Court therefore does not find any reason to interfere with the fourth Award of the learned Arbitrator.

6. It is argued by the appellant's counsel, Shri Bindra, that the learned Single Judge clearly erred in not enhancing the amount of damages. It was submitted that the arbitrator ignored vital material in the form of the offer for extension of the contract, for spells of three months, totaling nine months. AAI had clearly indicated that such extensions were on the basis of the original terms. Clearly, therefore, the arbitrator ought to have taken into account that the appellant was paying the amount enhanced in terms of the contract, which had worked out to Rs. 7,83,293/- per month. Therefore, the amount which had to be the basis for calculation of difference was Rs. 7,83,293/- per month and not Rs. 5,35,000/-. The total damages payable to the appellant thus was Rs. 29,25,270/- and not Rs.

19,98,000/- awarded by the arbitrator. This approach of the arbitrator amounted to applying different yardsticks in respect of the same subject matter. For the period of five years, the damages calculated was on the basis of the escalated amount paid actually paid, after giving effect to the 10% increase, from which the sum payable was subtracted. However, for the period of nine months, which clearly incorporated the same terms and conditions of the contract, an entirely different principle was adopted; the award was in fundamental breach of law and disclosed a patent error, which ought to have been corrected.

7. The AAI pleaded, and its senior counsel, Shri Abhinav Vashisht urged, that the approach and award of the arbitrator did not disclose any error of law. Counsel reiterated that the findings of the Single Judge should not be interfered with except when they are unreasonable. Furthermore, the principle applied by the arbitrator was not unreasonable, since the period involved was beyond the scope of the contract. The appellant willingly accepted the terms given for the three spells of three months' extension, despite the parties facing litigation at the time of such extension. If the intention was to claim any differential on the basis of the last monthly amount paid to the AAI, nothing prevented the appellant from stating that at the time of accepting the offer for the extensions, and further clarifying that such acceptance was subject to the final outcome of the pending arbitrations. Not having done so, the appellant could not complain.

8. This Court is conscious that it is sitting in appellate review of what is essentially an extremely narrow supervisory jurisdiction conferred upon the Courts in India u/s 34 of the 1996 Act. Sans manifest error, or patently unprincipled orders, the appellate Court would loath interfering with findings in an award which have received the stamp of approval of the Court of first instance, which exercises supervisory jurisdiction. The limits of interference were spelt out by the Supreme Court in *Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.*, in the following terms:-

(i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a Court.

(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award.

(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

(iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.

(v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the

sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not interfere with the award.

(vii) It is not permissible to a Court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings.

9. This Court is of the opinion that the arguments of the appellant are unpersuasive. The original period of the contract had ended when the three extended spells of three months each were granted to the appellant contractor. The latter heavily relies on the terms of contract, which states that the terms of contract as originally granted in July, 1999 would govern the parties. Whilst the Court cannot quarrel with the appellant's submission that allusion to such terms would include the yearly increase in the amount payable to AAI, it cannot be argued that such an interpretation is the only possible way to look at the terms of the extended contract. This is because the original contract also made a reference to the sum of 5,35,000/-. The appellant's argument that for calculation of damages the escalated amount ought to have been made the basis, as that was the only possible basis is unfounded. This is because if such was the intention, nothing prevented the parties from clarifying so at the stage of contract formation when each of the extended spells was agreed upon. That the appellant was aware of potential conflict is evidenced by the circumstance that the third arbitration proceedings were pending when the extensions were given. It did not insist that the extensions were acceptable in terms of the final determination of the reference to arbitration. Not having done so, it cannot now question the quantification resorted to by the arbitrator, which by no means can be characterized as unreasonable. This Court is, for the above reasons, of the opinion that the impugned order does not disclose any error; the appeal and pending application are accordingly dismissed without any order as to costs.