

(2019) 05 DEL CK 0225

In the Delhi High Court

Case No : First Appeal From Order No. 557 Of 2018, Civil Miscellaneous
Application No. 52239 Of 2018

Viney Mohindroo

APPELLANT

Vs

Senior Divisional Commercial Manager Northern Railways

RESPONDENT

Date of Decision : 24-05-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 34, 37

Citation : (2019) 05 DEL CK 0225

Hon'ble Judges : Prateek Jalan, J

Bench : Single Bench

Advocate : Arvind Kr. Sharma, Deepika

Final Decision : Allowed

Judgement

1. This appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 ('the Act'), is directed against a judgment dated 19.09.2018 passed by the learned Additional District Judge-07 (Central District), whereby the respondent's petition under Section 34 of the Act has been allowed and the arbitral award dated 10.12.2012 in favour of the appellant has been set aside.

2. Pursuant to a tender notice issued by the respondent dated 15.01.2006, the appellant bid for a license to run a car parking site for a period of three years at Hazrat Nizamuddin Railway Station, New Delhi. The appellant's bid was accepted on 29.03.2006. The agreement between the parties stipulated that the area of the site was 3625 sq. mts.. The site was handed over to the appellant on 07.04.2006.

3. The appellant raised certain claims upon the respondent which were disputed by the respondent, and led to the institution of arbitration proceedings under the aforesaid agreement. Two of the appellant's claims were awarded by the Sole Arbitrator vide the award dated 10.12.2012. These pertained to (a) the appellant's contention that the site handed over to him measured 410 sq mts.

less than the contractually agreed 3625 sq. mts. (Claim No. 1), and (b) a claim for reduction of license fees on account of closure of the parking for four days each year, viz. 14th and 15th August and 25th and 26th January (Claim No. 5). The arbitrator awarded a total sum of Rs. 20,87,206/- in favour of the appellant of which Rs. 19,06,006/- was on account of Claim No. 1 and Rs. 1,81,200/- was on account of Claim No. 5. The respondent filed Arbn No. 103/2017 under Section 34 of the Act before the learned ADJ for setting aside of the aforesaid award. That petition has been allowed by the impugned judgment and the award has been set aside, leading to the institution of this appeal under Section 37 of the Act.

4. In support of the award on Claim No.1, the learned Arbitrator has recorded the following reasons:-

"5.1 Claims of Claimant

... Claimant has mentioned that total area of 3215 sq.mt. was handed over to them instead of 3625 sq.mt. as per the agreement. As an evidence claimant has attached the document No.56-C/SM/HNZM/CP/VM/07 dt. 24.10.2007 written by Station Manager HNZN to Sr. Divisional Commercial Manger, Northern Railway, New Delhi, informing that SSE/W, HNZN had given in writing that there was no feasibility for extending the area of car parking from 3215 sq.mt. This document also referred to sketch plan duly signed by SSE/W/HNZN dated 09.8.2006 showing the area of car parking in occupation of the contractor had 3215 sq.mt. A copy of this sketch plan was also enclosed with this letter.

In the counter affidavit respondent produced a document no. 79 Va0 Ni0/Parking Survey/Nija0/09 date 05.11.2008 written by CMI/NZN Divisional Commercial Manager (Services) Northern Railway, New Delhi informing that area of 3797.69 sq.mt. was being used by the parking contractor as per the fresh survey on 23.10.2008. Site plan enclosed with this document was signed by railway officials only. Claimant has mentioned in rejoinder affidavit that this measurement on 23.10.2008 as per the report of CMI was neither in the notice nor in the presence of the claimant. Claimant further mentioned that the same was done after more than 2 years and claimant was occupying only 3215 sq.mt. as per station Manager's report. In the rejoinder affidavit claimant also produced a reply under RTI dt. 21.8.2009 as per which one Mr. Bharat Walia was informed that the possession of parking site measuring 3125 sq.mt. in question was handed over to claimant on 7.4.2006 by Ex.Contractor Sh. Harvinder Singh. Going into the above documentary evidence I agree that 410 (3625-3215) sq.mt. less area was provided to the claimant for which this claim is justified. I therefore, grant the claimed of Rs.19,06,006.64 as per the following calculations:

(a) Less area

=

410 sq.mt.

(b) Monthly license fee

=

4,68,108 for 3625 sq.mt.

(c) A loss due to less area over contract

=

4,68,108 X 410 X 36

3625

period for 36 months

=

Rs.19,06,006

5. The communication dated 24.10.2007 referred to above, was produced before the Arbitrator wherein the Station Manager, Hazrat Nizamuddin, informed the Senior Divisional Commercial Manager as follows:-

"...SSE / Works / HNKM was asked to access the feasibility for handing over charge of a total area of 3625 Sq. Meter to the Car Parking contractor for which contract has been allotted. SSE / W, HNKM has given in writing that there is no feasibility for extending the area of Car Parking from 3215 Sq. Meters. The sketch plan duly signed by SSE / W, HNKM dated 09.08.2006 already submitted to your office vide this office letter No. 1-C/SM/ HNKM / Parking Area / 06 dated 18.08.2006 showing the area of Car Parking in occupation with the contractor as 3215 Sq. Meters. However a copy of the same is sent herewith again for further disposal."

6. Learned ADJ, while setting aside the award on this claim, referred to Clause 2 of the agreement and to the survey report dated 23.10.2008, referred to in the award, wherein it appeared that an area 3797.69 sq. mts. was being used by the appellant. Learned counsel for the respondent has also drawn my attention to Clause 2 of the agreement, which provides as follows:-

"2. For the purpose of this agreement unless a contrary intention appears from the subject or content the terms scooter/cycle/motor/car/cycle stand will consist of ground accommodation measuring 3625 sq. mtrs the existing site for car cycle stand at the station. The Railway Administration, however, reserve the right to alter the location and measurement of the said land if necessary without assigning any reason and no compensation will be granted to the licensee on this account."

7. Mr. A.K. Sharma, learned counsel for the appellant has, with regard to this claim, relied upon Clause 21 of the agreement which is reproduced below:-

"21. (i) Railway Administration reserves the right to revise the area and change

in site of parking stand within the station premises during the currency of the contract.

(ii) In case of revision of size parking area during the currency of the contract the license fee will be stand revised in same proportion for the remaining period of the contract."

8. The finding of the learned ADJ in the impugned judgment is as follows:-

"Moreover, as per the Survey Report dated 23.10.2008, the area of the site used by the Respondent/Claimant was 3797.69 sq.mt. It is also apposite to mention here that as per clause 1, the Petitioner has claimed the lump-sum amount and was not based upon the measurement of the area i.e. per sq. mt. The result of combined reading of clause 1 and 2 of the Agreement, no compensation would be payable to the respondent/claimant even if the area is reduced by the Petitioner/Applicant.

Considered from any view point, the Ld. Arbitrator has failed to look into the settled terms between the parties and which has resulted into passing of the Award which is contrary to the agreed terms and conditions between the parties and the said claim ought to have been rejected by the Arbitral Tribunal."

9. As far as Claim No. 5 is concerned, the learned Arbitrator supported the award with the following reasons:-

"e. Claim No. 5 - As proportionate license fees on account of parking closed for 3 years on 15th & 16th August and 25th & 26th January due to security purposes.

f. Claim No. 6 - Interest @ 15% per annum on amount of claim No.5.

Respondent has agreed that parking was closed on 14th & 15th August and 25th & 26th January as a security measure on the advise of Civil Authority in public interest. Though respondent has not agreed for the admissibility of this claim but the fact that parking site was not permitted to run during these 12 days over 3 years period due to security reasons is definite business loss to the claimant.

I therefore, agree with the claimant and grant Rs. 1,81,200/- (4,68,108/31= Rs. 15,100 per day X 12 days) I do not agree to grant interest on this amount as claimant has not quoted any rule/clause under which the same is admissible."

10. The learned ADJ, on the other hand, considered the contract to be one for a lump sum and not on a daily basis and held that the appellant, being a government contractor, had specific knowledge of the fact that the parking site would remain closed for four days a year (14th and 15th August and 25th and 26th January) for security reasons. In the absence of any express clause providing for compensation in such circumstances, the learned ADJ held that the arbitrator had failed to look into the settled terms between the parties and the record.

11. Mr. A.K. Sharma, learned counsel for the appellant submitted that the award

was a reasoned one and showed due consideration of the contractual clauses as well as the evidence led by the parties. His contention was that the learned ADJ had exceeded the limited jurisdiction of the Court under Section 34 of the Act.

12. Ms. Deepika, learned Counsel for the respondent, on the other hand, submitted that the arbitrator had gone beyond the contractual stipulations between the parties, and awarded sums for which no provision had been made in the contract. It was also argued by the learned Counsel that the learned ADJ had rightly set aside the award of claims which were based upon objections raised by the appellant belatedly, after five months of using the area.

13. Having heard learned counsel for the parties, I am of the view that the impugned judgment is based upon an impermissible re-appreciation of the evidence led by the parties and re-interpretation of the contractual provisions, beyond the remit of Section 34 of the Act.

14. The settled law relating to Section 34 is that interpretation of contractual terms and appreciation of evidence are both tasks within the realm of the arbitrator. Absent manifest arbitrariness or patent irrationality in the award, the intervention of the courts is unjustified. The Supreme Court in *Rashtriya Ispat Nigam Limited vs. Dewan Chand Ram Saran* (2012) 5 SCC 306, held that where the arbitrator's interpretation of a contractual provision was a possible one, interference under Section 34 would not be justified. While referring to *SAIL v. Gupta Brother Steel Tubes Ltd.* (2009) 10 SCC 63 and *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.* (2010) 11 SCC 296, the Court in *Rashtriya Ispat* (supra) held as follows: -

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

15. The judgment in *Sumitomo* (supra) holds as follows:-

"43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.* [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so,

the decision of the umpire has to be accepted as final and binding."

16. To similar effect is the Court's judgment in *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49:-

"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

xxxx xxxx xxxx

42.3. ...

An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."

17. In view of the provisions of Clause 21, which does not appear to have been cited before the learned ADJ, I do not accept the respondent's contention that the award on Claim No. 1 was contrary to the agreement between the parties. The appreciation of the documentary evidence and the weight attached thereto by the arbitrator also does not display any such irrationality. The learned ADJ has not returned any finding to the contrary but has proceeded to lay weight upon the survey report dated 23.10.2008, relied upon by the respondent herein, which was considered in the Award. In any event, the learned ADJ in the impugned judgment has not given any reason for considering the said survey report in preference to the documents upon which the learned Arbitrator has based his award.

18. With regard to Claim No. 5, the arbitrator considered the evidence and drew a conclusion that the respondent was liable for the loss suffered by the appellant. Implicit in that decision is the finding that the appellant was contractually entitled to assume that he would be entitled to operate the parking site even on the four days in question. While noticing that the contract does not contain any provision for compensation in such a case, the impugned judgment does not take into account the fact that the contract also did not contain any provision for closure of the parking lot on those four days. The arbitrator's construction of the agreement, in these circumstances, could not have been faulted as arbitrary or perverse.

19. Learned counsel for the appellant has also drawn my attention to a recent judgment of a coordinate bench in *Adrin Pal Dheer v. Northern Railway* (OMP No. 740/2012, decided on 03.12.2018), where this Court considered contentions similar to those raised in these proceedings. The contract in that case was also in respect of a parking site at a Railway Station and the contractor had made claims arising out of a shortage in area and closure of the parking facilities on 14th and 15th August and 25th and 26th January. The arbitrator had rejected both the

claims, but the award was set aside by this Court.

The Court held as follows:

"5. The Arbitrator in the Impugned Award has observed that the inspection report dated 02.05.2003 has not been brought on record, however, at the same time, the onus of substantiating allegation of lesser area being handed over to the petitioner was on the petitioner and though some letters have been written by the petitioner complaining about the shortage of the area, in absence of any joint measurement at the time of taking over or other measurements having been done from an independent authority, the claim of the petitioner cannot be sustained.

6. Counsel for the petitioner submits that the Arbitrator has erred in law and on facts in not appreciating that the letters written by the petitioner had remained uncontested by the respondent. He places reliance on a document dated 17.10.2005 issued by the respondent clearly acknowledging that the area of the parking was 3532 sq. mtr. He further submits that the document was an admission of fact that only 3532 sq. mtr. had been handed over to the petitioner as against 3985 sq. mtr. as mentioned in the licence Agreement.

7. I have considered the submission of the petitioner and find merit in the same. In the Impugned Award, there is no discussion by the Arbitrator on this document. The document prima facie contains an admission on part of the respondent that the area of the plot handed over to the petitioner was only 3532 sq. mtr. This was a vital piece of evidence to be considered by the Arbitrator. Having not considered the same, the Award cannot be sustained and is liable to be set aside as far as rejection of Claim no.1 of the petitioner is concerned. However, this ipso facto does not lead to Claim no.1 being allowed in favour of the petitioner at this stage. The fact of this document as also the effect of the same on the claim of the petitioner would have to be considered by the Arbitrator. In this view, while setting aside the Award of the Arbitrator on Claim no.1, it is left open to the petitioner to agitate the said claim in form of an appropriate proceeding against the respondent.

xxxx xxxx xxxx

11. Counsel for the petitioner has further challenged the rejection of Claim no.9 by the Arbitrator. In Claim no.9, the petitioner had claimed proportionate deduction of the licence fee for the closure of the parking facility on 14th and 15th August and 25th and 26th January. The Arbitrator has rejected the claim on the ground that these days were well within the notice of the claimant/petitioner at the time of taking over of the tender and that the sites were closed as per orders of the State Government for security reasons.

12. Counsel for the petitioner submits that in the licence Agreement, there was no stipulation warning the petitioner regarding closure of the parking facility on these dates. Further, the communication asking the petitioner to close the

parking facility on these dates, did not make any mention of any order being passed by the State Government in this regard. In fact, these letters did not state any reason for asking the petitioner to close the parking facility on these dates.

13. I have considered the submissions made by the counsel for the petitioner. The licence Agreement does not provide for any stipulation directing the petitioner not to use the parking facility on the above dates. The orders by which the respondent had directed the petitioner to close the parking facility on the above dates also do not mention about any order being passed by the State Government in that regard. In view of the same, the reasons given by the Arbitrator are patently incorrect."

In view of the aforesaid judgment of this Court also, it cannot be said that the arbitrator's approach was unreasonable or irrational.

20. For the reasons aforesaid, the appeal is allowed and the impugned judgment dated 19.09.2018 of the Learned ADJ is set aside. The arbitral award dated 10.12.2012 is restored.

21. No order as to costs.