

IN THE HIGH COURT OF DELHI AT NEW DELHI
(Reportable)

O.M.P. 202 of 2012

Reserved on: September 5, 2012

Decision on: October 10, 2012

JETLITE (INDIA) LTD.

..... Petitioner

Through: Mr. A.N. Haksar, Senior Advocate
with Mr. U.A. Rana, Mr. Sanjay Pal,
Ms. Mrinal Mazumdar and
Mr. Abhijit, Advocates.

Versus

M/S. T.V.C. SKY SHOP

..... Respondent

Through: Ms. Vandana Sehgal with
Mr. Rohan Thawani, Mr. Hardeep
Singh Anand, Ms. Kriti Singh
Gahlout and Ms. Ashima
Sehgal, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
10.10.2012

1. Jetlite (India) Limited ('JIL'), earlier known as Sahara Airlines Limited ('SAL'), has in this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenged an Award dated 16th November 2011 passed by the learned sole Arbitrator in the disputes between JIL and the Respondent M/s T.V.C. Sky Shop.

2. JIL (earlier SAL) is a well known airline company operating a large number of passenger flights in India and abroad. Sometime in April 2004,

the Respondent approached SAL and expressed its willingness to participate in a “Bid and Win” programme. On 21st April 2004, SAL wrote to the Respondent informing it that its product i.e. TVC gift voucher at the rate of Rs.10,000 each had been finalized for inclusion in the catalogue of the ongoing Bid and Win programme. The Respondent was to supply SAL 1,000 TVC gift products/vouchers at a maximum retail price (‘MRP’) of Rs.10,000 each. In exchange, SAL was required to issue air tickets to the Respondent at 60% of the total value of the vouchers utilized. It was specifically highlighted that “credit would be given on the number of utilized vouchers”. The said letter, countersigned by the Respondent, contained an arbitration clause.

3. According to the Petitioner, during the financial year 2004-05 and 2005-06 it issued tickets worth Rs.35,76,931 to the Respondent of which tickets worth Rs.2,75,550 were refunded/cancelled. It is stated that net issuance of the tickets was worth Rs.33,01,381 against 540 vouchers issued by the Respondent worth Rs.32.40 lakhs (Rs.10,000 each on which 40% discount was given on each voucher). The Petitioner’s case is that only 540 gift vouchers worth Rs.32.40 lakhs were received from the Respondent. The case of the Respondent, however, was that it had supplied 850 vouchers.

4. In its statement of claim before the learned Arbitrator, the Respondent contended that it had supplied SAL 750 vouchers on 28th April 2004, and 50 vouchers on 9th June 2004 and in all 850 vouchers. Enclosed with the statement of claim were copies of Invoice Nos. 214 and 215 dated 28th April 2004 for 750 quantities of gift vouchers. It, accordingly, was claimed that the Respondent was entitled to get air tickets worth Rs.51 lakhs, whereas

SAL had issued tickets worth only Rs.32,40,000. In spite of repeated requests, SAL had failed to provide the Respondent the balance coupon credit of Rs.18,60,000.

5. The Respondent filed in this Court Arbitration Petition No. 244 of 2007 under Section 11(6) of the Act. By an order dated 25th January 2010 the Court appointed a sole Arbitrator. It was stated before the learned Arbitrator by the Respondent that on 30th September 2008 there was a fire in the office/godown of the Respondent which completely destroyed the hard copies as well as soft copies of the documents of the Respondent. In the circumstances, the Respondent sought leave of the learned Arbitrator for exemption from filing the original documents and for filing true copies instead. The Respondent claimed Rs.18,60,000 plus interest at 18% per annum from 2005 till the date of payment.

6. SAL filed its statement of defence and counter-claim in the sum of Rs.61,381 against the Respondent. SAL denied receiving 850 gift vouchers. SAL maintained that it had received only 540 gift vouchers. In addition to the documents filed before the learned Arbitrator, the parties filed their evidence by way of affidavits.

7. The learned Arbitrator framed the following issues with respect to the claim of the Respondent:

- “1. Whether the claimant had supplied 850 Gift vouchers worth Rs.10,000/- each to the respondent?
2. Whether the claimant have received tickets worth only Rs.32,40,000/-?

3. Whether the claimant are entitled to Rs.18,60,000/-?
4. Whether the claimants are entitled to any interest, if so, on what amount, at what rate and for what period?"

8. With reference to the counter-claim of SAL, the following issues were framed:

- "1. Whether the respondents received only 540 Gift vouchers worth Rs.10,000/- each?
2. Whether the respondent had issued tickets worth Rs.35,76,931/- out of which tickets worth Rs.2,75,500/- were refunded/cancelled?
3. Whether the respondents are entitled to Rs.61,381/-?
4. Whether the respondents are entitled to any interest, if so, on what amount, at what rate and for what period?"

9. Examining the invoices produced by the Respondent, the learned Arbitrator observed as under:

"39. A perusal of the copies of the Gift Vouchers filed by the respondent as Annexure R-1 (Colly) with the reply shows that the printed matter on Invoice Nos. 214 and 215 both dated 28.04.2004 is the same as appearing in the copies of the invoices filed by the claimant as annexure P-3 to the claim. On the invoice No. 214 filed by the respondent there are noting to the effect '240' 'Verified for Rs.14,40,000/-' – 'voucher consumption is 490 Pcs.'

40. On invoice No 215 filed by the respondent there are two noting 'Utilisation of TVC Voucher is 250 Pcs so please credit Amt Rs.15,00,000 (Fifteen Lac) Only'. It also shows a writing to the effect 'Verified for Rs.30,00,000/-' which has been struck out.

41. Thus according to the claimants 750 Gift Vouchers were

delivered to the respondents by these two invoices. The respondents claim that only 490 Gift Vouchers were actually received with these invoices. There is now no dispute about invoice TVC/1046/2004-05 as documents filed by both the parties show that 50 Gift Vouchers were delivered with this invoice.

42. A close scrutiny of the invoices shows that the noting made by the respondent are not with respect to the number of Gift Vouchers received but refer to the number of Gift Vouchers "Utilised." The noting on invoice No. 215 clearly shows that it was initially verified for Rs.30,00,000/-. That is 60% of the value of 500 Gift Vouchers. Later on this noting was struck off and it was noted that utilisation of TVC Vouchers was only to the extent of 250. The reason of this is quite clear once we refer to the alleged agreement Annexure P-2 filed with the claim. One of the terms and conditions of this agreement is that credit has to be given only for the number of utilised Vouchers. This clearly shows that the respondents had actually received the number of Gift Vouchers mentioned in the invoices but these invoices were verified for the amounts corresponding to the number of Vouchers utilised."

10. In para 43 of the Award, the learned Arbitrator noted "it is however, not the case of the respondents that the claimants were entitled to be paid back only for the utilised Vouchers." Again, in para 44 it was noted "the respondents never pleaded that they were liable to give tickets only in lieu of utilised Vouchers. The case of the respondents has been of a simple denial of receipt of more than 540 Gift Vouchers." Issue No. 1 was, therefore, decided against SAL thus:

"45. This Tribunal finds that the documents filed by the parties clearly establish that the claimants had delivered 800 Gift Vouchers to the respondents. The claimants have failed to prove delivery of any Gift Vouchers vide invoice No.

TVC/214/2004-05 dated 20.06.2004. These issues are decided accordingly.”

11. Issue No. 2 was answered by the learned Arbitrator by holding that the Respondent received tickets worth Rs.32,40,000. On Issue No. 3, it was held that the Respondent had supplied 800 gift vouchers and, therefore, was entitled to Rs.15,60,000 towards the balance price of 60% value of the gift vouchers. The counter-claim of SAL was rejected. The Respondent was granted Rs.2,57,400 as interest on the said sum of Rs.15,60,000 at 18% per annum from the date of filing of the claim petition till the date of the Award. Post-Award interest was to be in terms of Section 31(7) (b) of the Act.

12. One fact that requires to be noted is that the name of SAL was changed to JIL on 15th May 2007 pursuant to the approval granted by the central Government. JIL took over the management and control of SAL from 15th May 2007. The records of the contract that were till then held by SAL were handed over to JIL.

13. Mr. A.N. Haksar, learned Senior Advocate appearing for JIL, submitted that the express clause of the contract was that the credit would be given only for utilized vouchers. The contract was binding on the parties as well as the learned Arbitrator. Reliance was placed on the decisions of ***State of Rajasthan v. Nav Bharat Construction Company (2006)1 SCC 86*** and ***Hindustan Zinc Limited v. Friends Coal Carbonisation (2006) 4 SCC 445***. He submitted that there was no question of the Petitioner being liable to issue air tickets on payment of vouchers that were not utilized. It was submitted that the learned Arbitrator overlooked the evidence which showed that in fact only 540 vouchers were delivered. There was a misreading of the

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invoices produced by the Respondent to draw an inference that 840 vouchers had in fact been delivered. He pointed out that even the other contemporaneous records produced by the Respondent did not show that 850 'utilised' vouchers were in fact delivered. Even the learned Arbitrator found that there was no proof of delivery of at least 50 vouchers.

14. Ms. Vandana Sehgal, learned counsel appearing for the Respondent submitted that the case set out by the Petitioner before the learned Arbitrator was only regarding non-delivery of 850 vouchers and not of non-utilization. Referring to the pleadings she submitted that no such plea was taken by SAL before the learned Arbitrator. Relying on the decision in ***B. Leelavathi v. Honnamma (2005) 11 SCC 115*** she submitted that in the absence of a specific plea by the Petitioner regarding non-utilization of gift vouchers, the Petitioner ought not to be permitted to raise such a plea for the first time in the present proceedings. She also placed reliance upon the decisions in ***Guru Mehar Constructions v. Delhi Development Authority 2002 (2) Arb LR 254 (Delhi) (DB)***, ***National Thermal Power Corporation Limited v. WIG Brothers (Builders & Engineers) Limited 2009 (2) Arb LR 238 (Delhi)***, ***Ram Sarup Gupta v. Bishun Narain Inter College (1987) 2 SCC 555***, ***Bhagwati Prasad v. Chandramaul AIR 1966 SC 735*** and ***M/s Trojan & Company v. RM. N.N. Nagappa Chettiar AIR 1953 SC 235***.

15. Ms. Sehgal submitted that the view taken by the learned Arbitrator on the evidence produced before him by the parties was a plausible one and did not call for interference by the Court. She urged that on account of fire in the office/godown of the Respondent, the originals of the vouchers could not be produced. However, copies of the said documents were later submitted to the

learned Arbitrator.

16. The above submissions have been considered. The learned Arbitrator was bound by the specific clause in the contract which stated that credit could be given only for utilised vouchers. The learned Arbitrator erred in observing in paras 43 and 44 that the Petitioner had to plead that it was liable to give credit to the Respondent only for utilised vouchers. Once the contract specifically stated that only utilised vouchers had to be given credit for, it was incumbent on the learned Arbitrator to have examined if the Respondent's claim was substantiated by the production of 'utilised' vouchers. In **Hindustan Zinc** (supra) it was emphasised that the learned Arbitrator cannot travel beyond the contract. It was observed in the said decision that the Supreme Court had in **Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. [2003] 3 SCR 691** "made it clear that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

17. Likewise, in **Nav Bharat Construction** (supra) it was observed by the Supreme Court as under (SCC, p.103):

"27. There can be no dispute to the well established principle set out in these cases. An arbitrator cannot go beyond the terms of the contract between the parties. In the guise of doing justice he cannot award contrary to the terms of the contract. If he does so, he will have misconducted himself. Of course if an interpretation of a term of the contract is involved then the interpretation of the arbitrator must be accepted unless it is one which could not be reasonably possible. However where the term of the contract is clear and unambiguous the arbitrator cannot ignore it."

18. The question in the instant case was not so much about what was pleaded by the Petitioner but whether in terms of the contract the Respondent had proved that it had delivered 850 utilised gift vouchers as claimed by it. In any event, in para 5 of its defence statement, the Petitioner had pleaded as under:

“5. In reply to Para 3 (G) of the Statement of the claim, without prejudice to other contentions, it is submitted (on a demurer) that the Claimant alleges to have supplied 850 vouchers to the Respondent Company and has also filed a purported Consumption report (Annexure P-6). Even these documents show a consumption of 742 vouchers by the Respondent Company, which clearly show that the assertions of the Claimant are unreliable, concocted and fabricated and also show a fallacy in the claim of the Claimant and/or a fraudulent manipulation for the purpose of the claim. In fact, the said consumption report also does not substantiate the case of the Claimant that it has provided 850 vouchers to the Respondent Company. It is also reiterated that the Respondent Company had received only 540 vouchers from the Claimant against which it has issued tickets to the Claimant Company. It is reiterated that tickets were issued to the Claimant which were more than what the Claimant was entitled for. As per the books of accounts of the Respondent which have been reconciled after receipt of the claim petition, it is the Respondent company which is entitled to recover an amount of Rs.61,381/- from the Claimant for which a counter claim is being preferred herewith.”

19. Therefore, it cannot be said that the point about non-utilization of vouchers was not pleaded by the Petitioner. The finding of the learned Arbitrator on Issue No. 1 was, therefore, clearly contrary to the express clause in the contract. Under Section 28(3) of the Act, the learned Arbitrator was bound to decide the claim in terms of the contract between the parties. That being a settled legal position as explained by the Supreme Court in the

decisions noted hereinabove, there is no merit in the plea of the Respondent that this had to be pleaded by the Petitioner. The decisions cited by the Respondent in support of such plea are clearly distinguishable on facts and do not support the case of the Respondent.

20. The Court now proceeds to examine whether the impugned Award was consistent with the evidence on record and it is for this limited purpose that the evidence is being discussed. With its statement of claim, the Respondent filed two invoices. The first one was TVC/214/2004-05 dated 28th April 2004 for 250 gift vouchers. The second invoice was TVC/215/2004-05 dated 28th April 2004 for 500 gift vouchers. The Respondent also enclosed a copy of the letter dated 11th February 2005 addressed to SAL stating that “we have submitted our consumed voucher copies to the ‘Win’ department”. In the said letter the Respondent stated that it had supplied 850 gift vouchers. Also enclosed with the claim as Annexure P-9 was a true copy of the ledger account for sales promotion (coupons) for the period 1st April 2004 to 31st March 2005.

21. The parties appear to have exchanged correspondence in regard to the gift vouchers. On 16th June 2005, SAL wrote to the Respondent providing clarifications in response to a letter dated 11th June 2005. On 28th February 2006 the Respondent wrote to SAL claiming that it had supplied to SAL 250 gift vouchers under Invoice No. TVC/214/2004-05 dated 28th April 2004, 500 gift vouchers under Invoice No. TVC/215/2004-05 dated 28th April 2004, 50 gift vouchers under Invoice No. TVC/1046/2004-05 dated 9th June 2004 and another 50 gift vouchers under Invoice No. TVC/214/2004-05 dated 20th June 2004. It claimed that further sum of Rs.18,60,000 was

required to be credited by SAL to its account. Along with its reply to SAL's objection, a copy of Invoice No. 1046 for 50 vouchers was produced. In its letter dated 26th April 2005 to SAL the Respondent stated that its supply of vouchers was as follows:

“1st Supply – On 27.04.2004 total 750 vouchers

2nd Supply – On 09.06.2004 total 50 vouchers

3rd Supply – On 26.06.2004 total 50 vouchers.”

22. However, the documents produced by the Respondent did not show that it had delivered 850 utilised vouchers. In fact the learned Arbitrator noted that “unfortunately there was a fire in the office of the claimants and much of their record was destroyed. They are unable to produce any further record to support the delivery of 850 Gift Vouchers”. Annexure P-3 to the reply filed by the Respondent before the learned Arbitrator was a statement titled: “franchisee wise utilisation of Sahara coupons”. The total of such coupons worked out to 686. This statement contained repetitions of the numbers of the utilised TVC voucher coupons. There was another statement in continuation of Annexure– P3 titled: “utilized TVC vouchers”. The total number of vouchers in terms of this statement was 742. Therefore, even according to the documents placed before the learned Arbitrator by the Respondent, there was a discrepancy in the number of vouchers claimed to have been utilised.

23. The learned Arbitrator has in the impugned Award discussed the copies of the two Invoices i.e. Nos. 214 and 215. In Invoice No. 214, the number ‘250’ has been circled and beneath it is written ‘240’ and “verified for Rs.14,40,000”. In Invoice No. 215, it was written “verified for

Rs.30,00,000”. However, this was struck off and beneath it was written: “utilization of TVC vouchers is 250 pcs so please credit amount is Rs.15,00,000”. This is dated 25th May 2004. The third Invoice No. 1046 was verified for Rs.3,00,000. Therefore, the total number of vouchers verified worked out to 540 (240 + 250 + 50 vouchers). These writings on the said documents were by SAL personnel. JIL took over the said documents much later.

24. The above evidence showed that SAL had substantiated its case that it had received only 540 vouchers. The evidence produced by the Respondent on the other hand did not substantiate its case that it had delivered to SAL 850 utilised vouchers. The burden was on the Respondent to show that it had actually delivered 850 vouchers to SAL. The Respondent’s letter dated 26th April 2005 claimed that it had delivered only 850 vouchers. But that was not the end of the matter. In terms of the contract the Respondent had to demonstrate that those 850 vouchers had both been delivered and in fact utilised. The Respondent was conscious of this requirement and therefore produced the statement in Annexure P-3 and the ledger account as Annexure P-9. As already noted, these documents did not substantiate the Respondent’s plea of delivery of 850 utilised vouchers. Apart from this, these documents contained repetitions in the numbers of the coupons. The learned Arbitrator failed to notice or reconcile these different statements.

25. Therefore apart from the fact that the impugned Award in respect of Issue No. 1 is contrary to the express clause in the contract and violates the mandate of Section 28(3) of the Act, it is also contrary to the evidence placed on record and therefore is patently illegal and opposed to the public

policy of India. The consequent decision in respect of Issues 3 and 4 also cannot be sustained in law. At the same time, this Court finds no error having been committed by the learned Arbitrator as regards rejection of the Petitioner's counter-claim.

26. Consequently, the impugned Award dated 16th November 2011 is set aside to the extent that it allows the claim of the Respondent and directs payment by the Petitioner to the Respondent. The impugned Award to the extent that it rejects the counter-claim of the Petitioner is upheld.

27. The petition is disposed of in the above terms, but in the circumstances, with no order as to costs.

S. MURALIDHAR, J.

OCTOBER 10, 2012

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