

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 388/2005

Reserved on: January 30, 2012

Decision on: February 16, 2012

AIRPORTS AUTHORITY OF INDIA Petitioner
Through: Mr. Ravi Gupta, Senior Advocate
with Ms. Meenakshi Sood and
Mr. Mukesh Verma, Advocates.

Versus

SHRI SHAKTI RESORTS & HOTELS LIMITED Respondent
Through: Dr. Aman Hingorani, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
16.02.2012

1. The challenge by the Petitioner Airports Authority of India ('AAI') in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 20th July 2005 passed by the learned sole Arbitrator adjudicating the disputes between the Petitioner and the Respondent, Shri Shakti Resorts & Hotels Limited ('SSRHL'), arising out of a lease deed dated 5th January 1990 executed by the AAI in favour of SSRHL for the development of land measuring 18,061.98 sq. yards situated at Hyderabad, belonging to the AAI, for the construction and commissioning of a 5-Star Hotel thereon by SSRHL.

2. The lease deed dated 5th January 1990 required SSRHL to pay annual lease rent @ Rs.16 per sq. ft. for a period of 30 years commencing from the date of delivery of possession, i.e., 21st June 1989. The rent was to

increase by 15% over the previous rent at the end of every five years from the date of commencement of commercial operation. However, first 30 months of the 'agreement period' was envisaged as 'Project Implementation Period' ('PIP') during which SSRHL was allowed to pay only 1/3rd of the annual lease rent.

3. The case of AAI is that SSRHL was unable to commence the implementation of the project and requested AAI to extend the PIP. Accordingly, AAI allowed the lease to commence from 15th November 1989 thereby extending the PIP by five months. The further request made by SSRHL was considered by AAI and by its letter dated 7th September 1992 it extended the PIP from 30 months to 42 months. In other words, the PIP was allowed to commence from 19th January 1990 so as to expire on 30th June 1993. The further request by SSRHL for extension of the PIP till 30th June 1995 was rejected by AAI by its letter dated 1st September 1994.

4. The disputes arising out of the lease deed dated 5th January 1990 read with rectification deed dated 20th June 1990 were referred to the sole Arbitrator. SSRHL filed a statement of claims for a total sum of Rs.12,29,90,197 under eight different heads. On 5th December 2003 AAI filed its reply to the statement of claims and also raised counter claims in the sum of Rs. 1,55,07,163. An amendment was filed by AAI on 15th December 2003 enhancing the counter claim to Rs. 1,65,21,565. SSRHL also amended its claims to reduce it by Rs. 26,80,084.

5. It On 7th October 2003 the learned Arbitrator decided an application by SSRHL seeking an interim direction to AAI to issue a no objection certificate ('NOC') to enable SSRHL to mortgage the leasehold rights in favour of the financial institutions and banks to secure loans with lower

interest. The learned Arbitrator allowed the request of SSRHL by an order dated 7th October 2003 on the basis of Clause 36 of the lease deed dated 5th January 1990 which required AAI not to “unreasonably withhold the issuance of necessary letters/permissions/ approvals/sanctions when applied by the lessees” as well as Clause 1 of the rectification deed dated 20th June 1990 in terms of which the lessor’s right, title and interest in the said property were conveyed in favour of the lessee by way of lease deed for a period of 30 years. The learned Arbitrator also referred to a letter dated 19th August 2003 sent by the Chairman, SSRHL to AAI requesting it to issue an NOC for mortgaging leasehold rights vested in the Respondent. Accordingly, by the said order dated 7th October 2003, the learned Arbitrator directed AAI to issue the NOC in favour of SSRHL for mortgaging the leasehold rights vested in the Respondent. Consequent thereto on 31st October 2003 AAI conveyed to SSRHL its NOC without prejudice to AAI’s rights and contentions.

6. After completion of pleadings, the learned Arbitrator framed the following issues for consideration:

- (i) What is the duration of the Project Implementation Period?
Who is responsible for delay in implementation of the project;
and from which date the Claimant is liable to pay 100% lease rent?
- (ii) Whether Claim Nos. 2 and 5 are arbitrable in terms of the reference made by the parties?
- (iii) Whether the claimant is entitled to 7% interest on the total security amount deposited by it?
- (iv) Whether the counter claim by AAI is sustainable and/or whether the claimant is liable to pay the same?
- (v) Whether withholding of NOC by SSRHL is justified in the

given circumstances; if not, what is the loss suffered by the claimant in terms of money and whether he is entitled to any compensation?

(vi) Whether the claimant is liable to pay any additional royalty on account of flight catering services?

7. In its evidence by way of affidavit, SSRHL reduced its claim to Rs. 1 crore.

8. In the impugned Award dated 20th July 2005 the learned Arbitrator decided Issue Nos. 1, 2, 3 and 5 in favour of SSRHL. As regards Issue No. 4 relating to the counter claim of AAI it was held that no specific award was required. Issue No. 6 was held to be premature.

9. This Court has heard the submissions of Mr. Ravi Gupta, learned Senior counsel with Ms. Meenakshi Sood, learned counsel for the AAI. Dr. Aman Hingorani, learned counsel advanced submissions on behalf of the Respondent.

10. The first issue concerns the duration of the PIP and who was responsible for delay in implementation of the project and from which date SSRHL was liable to pay 100% lease rent. The learned Arbitrator, after noticing the repeated extensions given by AAI of the PIP till 30th June 1993 applied the test of 'pragmatic consideration' and concluded that the delay in AAI responding to the last request of SSRHL for extension was unreasonable and that such delay "has obviously created a legitimate expectation of possible extension of PIP". This in turn persuaded the learned Arbitrator to hold that it was AAI which had contributed to the delay in actual implementation of the project for which SSRHL should be

‘proportionately compensated’. However, after holding that the AAI was entitled to receive 100% lease rent from 1st July 1993, it was further held that the AAI should compensate SSRHL for its inaction during the period from 1st July 1993 to 30th August 1994 (14 months) to respond to the letters of SSRHL seeking further extension of PIP. Therefore, the differential payment made in excess during these 14 months by SSRHL was awarded to it as compensation. This worked out to a sum of Rs. 23,75,996. Learned counsel for SSRHL relied on the decision in ***Union of India v. Kaushalendu Mishra AIR 2007 (NOC) 1966*** to contend that the arbitrator was justified in awarding compensation to SSRHL on account of the delay on the part of AAI in granting extension of the PIP.

11. The doctrine of legitimate expectation has no place in contractual matters. Recently in ***GNCT of Delhi v. Naresh Kumar 175 (2010) DLT 143 (DB)*** this Court summarized the legal position with regard to legitimate expectation in para 21, as under:

“I. Mere reasonable or legitimate expectation of a citizen may not by itself be a distinct enforceable right, but failure to consider and give due weightage to it may render the decision arbitrary.

II. Legitimate expectation may arise (a) if there is an express promise given by a public authority; or (b) because of acceptance of a regular practice, a claimant can reasonably expect it to continue; and (c) such expectation may be reasonable.

III. For a legitimate expectation to arise, the decision of administrative authority must affect the person by depriving him of some benefit or advantage which he had in the past been permitted, by the decision maker, to enjoy and which he

can legitimately expect to be permitted to continue, until some rational grounds for withdrawing it have been communicated to him.

IV. If the authority proposes to defeat a person's legitimate expectation, it should afford him an opportunity to make a representation in the matter.

V. The doctrine of legitimate expectation permits the Court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made.”

12. In the present case, there was no promise or assurance given by AAI at any time to the effect that as and when SSRHL made a request for extension of PIP, it would be granted. The fact that AAI delayed its response to the last request for such extension made by SSRHL could not lead to the inference that AAI had impliedly agreed to such extension. On the contrary, even in its letter dated 7th September 1992 the AAI had made it clear that the commercial operations should begin by 1st July 1993. There is no indication at all in the said letter that any further request for PIP would be entertained. SSRHL surprisingly did not write to AAI on any date immediately prior to 1st July 1993 seeking further extension. It waited till 15th May 1994 to write such a letter and sought extension till 30th June 1995. There was, therefore, no reasonable basis for SSRHL to presume that AAI would grant any further extension of the PIP. Learned counsel for SSRHL referred to the correspondence between the parties leading to extension up to the last PIP and submitted that the view taken by the learned Arbitrator was a plausible one which did not call for interference under Section 34 of the Act. This Court is unable to agree with the above submission. The learned Arbitrator failed to give any plausible reason why

these circumstances could have given rise to a 'legitimate expectation' by SSRHL of a 'possible extension of PIP'. This conclusion of the learned Arbitrator can only be explained by his 'pragmatic' approach based on 'equitable considerations' and not on the basis of the evidence or law. This in turn led the learned Arbitrator to erroneously hold that SSRHL should be compensated by AAI for the sum equivalent to 100% lease rent fee collected for the period from 1st July 1993 to 30th August 1994. This part of the Award as regards Claim No.1 is plainly unsustainable in law.

13. SSRHL's Claim No.2 for a sum of Rs. 7,19,009 on account of outstanding dues from 'Family World' towards airport catering services was under a separate contract dated 6th November 1992. SSRHL also sought refund of an amount of Rs. 1,36,41,151/- as well as compensation of Rs. 72 lakhs on the ground that the AAI withdrew allotment of space for parking earlier provided to it under a different arrangement. The learned Arbitrator referred to Clause 37 of the lease agreement dated 5th January 1990 which reads as under:

“37. All disputes and differences arising out of or in any way touching or concerning this agreement (except these the) decision whereof is otherwise hereinbefore expressly provided for or to which Public Premises (Eviction of unauthorized Occupants) Act, 1971 and the Rules framed thereunder which are in force or which may hereafter come into force are applicable) shall be referred to the sole arbitration of a person to be appointed by the Chairman of NAA.....”

14. The learned Arbitrator correctly concluded that “the issues raised by the claimant under these heads admittedly pertain to different agreements, which envisage different arbitration proceedings together”. However, inexplicably, the learned Arbitrator proceeded to observe that “Issue No. 2 has a little bearing/ overlapping on the present dispute”. If indeed Claims 2 and 5 pertained to different agreements there was no occasion for the

learned Arbitrator to decide the said claims at all.

15. It was contended by learned counsel for SSRHL that in his written arguments before the learned Arbitrator, AAI had stated that “operations of Family World are not different from operations of Hotel and the same supplements and aids in functioning of the Hotel itself, adding to its revenue by utilizing the leased premises and various facilities of the lessee hotel”. However, the above submission was made in a different context as to what should be taken to be the date of commencement of operation of the hotel. AAI was contending that it should be taken to be 21st August 1997 and not 9th September 1990 when one of the units of the hotel commenced its operations. The statement was not in the context of whether the disputes with reference to the separate lease agreement should be adjudicated by the learned Arbitrator. In the same written submissions AAI has in fact maintained the claims which were filed earlier outside the scope of the arbitration clause, i.e. Clause 37 of the lease agreement dated 5th January 1990. Consequently, this Court holds that the learned Arbitrator travelled outside the scope of the lease agreement and decided a claim that was not arising from the lease deed in question. This was impermissible for the learned Arbitrator to do. The Award in respect of Claims 2 and 5 is unsustainable in law.

16. Issue No. 3 pertained to entitlement of 7% interest on the total security amount deposited by the Respondent. This involved interpretation of Clause 9 of the lease agreement dated 5th January 1990 and Clause 10 of the Advertisement dated 10th March 1989. The learned Arbitrator held that “in the interest of justice” Clause 9 of the Agreement “should have been read with Clause 10 of the advertisement” thereby vesting in SSRHL -“an unqualified right” to get interest over the total security deposit.

17. The above approach of the learned Arbitrator was legally flawed. A perusal of Clause 10 of the proforma lease agreement enclosed with the advertisement shows that the amount column was left blank. In the circumstances, it is Clause 9 of the agreement which obliged SSRHL to pay simple interest @ 7% on the total amount in the sum of Rs. 8,66,975.20. When the security deposit was enhanced, there was no specific agreement that the AAI would pay interest on the enhanced amount as well. Again, equitable considerations appear to have weighed with the learned Arbitrator and not the actual terms of the contract.

18. Learned counsel for SSRHL sought to refer to the minutes of the hearing before the learned Arbitrator on 30th January 2004 and in particular Point No. 3. A perusal of the said minutes shows that the learned Arbitrator only recorded the contentions of the parties and gave no decision as such on the point. In any event, that cannot be taken to be final determination of the issue by the learned Arbitrator. The Award in relation to Issue No. 3 is also therefore unsustainable in law and is, accordingly, set aside.

19. As regards Issue No. 5, the learned Arbitrator held that in view of the language of the relevant clauses of the lease deed dated 5th January 1990 and the rectification deed dated 20th June 1990 and “in view of commercial practice language”, SSRHL was entitled to an NOC from AAI. The learned Arbitrator appears to have treated the earlier order dated 7th October 2003 as having attained finality. He simply reiterated the said order in coming to the above conclusion.

20. The opinion expressed by the learned Arbitrator in his order dated 7th October 2003 was not a final one. It was limited to examining whether the request made by SSRHL for a direction to AAI to issue an NOC, pending

the adjudication of the disputes finally by the learned Arbitrator, was tenable. In any event, as rightly pointed out by Mr. Ravi Gupta, learned Senior counsel for the AAI the said order dated 7th October 2003 was for a limited purpose of issuance of an interim direction to AAI to grant NOC and would not decide the claim of SSRHL for damages for which different parameters would apply.

21. The learned Arbitrator has referred to the correspondence between the parties and concluded that SSRHL was entitled to the NOC “from day one”. The letters dated 11th January 1991 and 22nd February 1991 were letters from the Tourism Finance Corporation of India Limited (‘TFCIL’) and Industrial Finance Corporation of India (‘IFCI’), respectively, to SSRHL regarding the grant of loan. These did not involve the AAI at all. This Court fails to explain how these letters can cast an obligation on the AAI regarding grant of NOC to SSRHL for availing financial assistance from TFCIL and IFCI.

22. For all practical purposes, it is the letter dated 7th March 1992 written by SSRHL to AAI that has to be taken as the starting point. That letter simply states that “we have been sanctioned term loans for our hotel project by TFCIL and IFCI. They require us to furnish NOC as above from you and the same is being insisted upon by them as a pre-disbursement condition”. This was explained by SSRHL as being ‘a routine requirement’ in respect of the leased premises. At the time of entering into the lease agreement dated 5th January 1990 or even the rectification deed dated 20th June 1990 SSRHL had not approached TFCIL or IFCI for loans. In his evidence in the arbitration proceedings on 8th October 2004, the Chairman-cum-Managing Director (‘CMD’) of SSRHL stated that it was only in June 1991 for the first time that loans were sanctioned by the TFCIL and IFCI

in which it was stipulated that NOC from AAI should be submitted. Yet till 7th March 1992 no request in that behalf was made by SSRHL to AAI. The CMD further stated that in March 1994 “we could persuade IFCI and TFCIL to disburse the loans without waiting for the above NOC and thus saved our project from total collapse.” In response to a specific question, whether SSRHL had produced any document/letter whereby the TFCIL and IFCI laid such conditions for grant of loans without NOC, the CMD answered as under:

“DVM (Ans.): We may not have filed them formally, but certainly now I am producing the loan agreement dated 18th March 1994 between TFCIL (the leading institution) and SSRHL (1st para on page 4) of the agreement is relevant, which reads as below: (Exhibit C1).

‘Disbursements made pending creation of final security as stipulated in Article III shall carry further interest at the rate of 1.05% per annum till creation of such security.’

I am also producing Exhibit C2 – a loan agreement dated 21st February 1995 between TFCI (the leading institution) and SSRHL [page 3 of Article II 2.2 (ii)], which reads as below:

‘Additional interest disbursement made pending creation of final security as stipulated in Article III shall carry further interest at the rate of 1.05% per annum till creation of such security’.

I also produce Exhibit C3- loan agreement dated 2nd May 1997 [page 2 of Article II 2.2. (ii)]”

23. There is merit in the contention of Mr. Gupta, learned Senior counsel for the Petitioner that the above correspondence shows that SSRHL approached financial institutions for loans subsequent to entering into the lease agreement with AAI. Clearly, the clauses of the lease agreement could not be interpreted to cast a liability on AAI to grant NOC for the financial arrangements which were going to be entered into by SSRHL much after the lease agreement. It was only during the cross-examination

that for the first time SSRHL disclosed about their having to pay interest in terms of the loan agreements dated 21st February 1995 and 2nd May 1997. In the circumstances, there was no question of SSRHL being entitled to any NOC from AAI from day one. The context in which Clause 36 of the lease agreement dated 5th January 1990 requires AAI to issue necessary “letters/permissions/approvals/sanctions” is a very different one. It could never have been intended by the parties at that stage that the above approvals/sanctions also included NOC for loans to be borrowed by SSRHL.

24. Learned counsel for SSRHL placed reliance on the decisions in ***Union of India v. Peekay Industries 67 (1997) DLT 652*** and ***Ircon International Limited v. Arvind Construction Co. 81 (1999) DLT 268*** to contend that the arbitrator is the “sole judge of the quality of the evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator.” He also referred to ***McDermott International Inc. v. Burn Standard Co. Limited (2006) 11 SCC 181***, ***I.C.M. Airports Technics v. International Airports Authority of India 2008 (1) Arb LR 146 (Delhi)*** and ***R.K. Bhandari v. Satish Jassal 2008 (2) Arb LR 513 (Del)*** to urge that the court under Section 34 will not sit as a court of appeal.

25. While the legal position explained in the above decisions is well settled, on the facts and circumstances of the present case, they are distinguishable. In the present case, as noticed hereinbefore, the learned Arbitrator has not only travelled beyond the contract and decided claims not arising therefrom but has overlooked the evidence on record and come to an erroneous conclusion based on a misreading of the clauses of the contract. There was no occasion for the learned Arbitrator to award any compensation to SSRHL on the ground of the delay in AAI issuing an

NOC to it for the purposes of availing loans. The causal proximity of the failure by AAI to issue an NOC and the resultant loss suffered by SSRHL was not at all established in the present case. As explained by the Supreme Court in *Karsandas H. Thacker v. M/s. The Saran Engineering Co. Limited* AIR 1965 SC 1981 (at AIR, p.1984):

“13.....The appellant, on breach of contract by the respondent, was entitled, under S.73 of the Contract Act, to receive compensation for any loss by the damage caused to him which naturally arose in the usual course of business from such breach or which the parties knew when they made the contract to be likely to result from the breach of it. Under S.73 of the Contract Act, **such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach....**

14. Illustration (k) to Section 73 of the Contract Act is apt for the purpose of this case. According to that illustration, the person committing breach of contract has to pay to the other party the difference between the contract price of the articles agreed to be sold and the sum paid by the other party for purchasing another article on account of the default of the first party, but the first party has not paid the compensation which the second party had to pay to third parties as he had not been told at the time of the contract that the second party was making the purchase of the article for delivery to such third parties.”
(emphasis supplied)

26. The award of the compensation to SSRHL for the purported failure by AAI to issue an NOC to SSRHL in reasonable time was contrary to the clauses of the contract as well as the law governing the award of compensation under Section 73 of the Contract Act.

27. In the considered view of this Court, the Award of the learned Arbitrator to the extent it allowed Issues 1, 2, 3 and 5 in favour of SSRHL is unsustainable in law. The remaining part of the impugned Award is upheld.

28. The petition is disposed of in the above terms with costs of Rs. 20,000/- which will be paid by SSRHL to AAI within a period of four weeks.

S. MURALIDHAR, J

FEBRUARY 16, 2012
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