

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

**O.M.P. 400/2005**

Reserved on: March 1, 2012

Decision on: March 29, 2012

MESCO AIRLINES LTD

..... Petitioner

Through: Mr. Harish Malhotra, Senior Advocate  
with Mr. R.K. Modi, Advocate.

versus

M/S. AVIAEXPORT AND ORS

..... Respondents

Through: Mr. Vineet Malhotra with  
Mr. Rohan Sharma, Advocates.

**CORAM: JUSTICE S. MURALIDHAR**

**JUDGMENT**

**29.03.2012**

1. The challenge in this petition by Mesco Airlines Limited ('MAL') under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to the impugned Award dated 22<sup>nd</sup> August 2005 being the majority award of two of the learned Arbitrators constituting the three-member Arbitral Tribunal ('Tribunal') adjudicating the disputes between the Petitioner and Respondent No. 1 M/s. AviaExport.

2. It is stated that the Petitioner was to start a new venture of providing helicopter services to various organizations in India and in particular to the Oil and Natural Gas Commission ('ONGC'), a Government of India

undertaking, which required helicopters to transport its oil exploration specialists and stores for off-shore operations in the Mumbai High Sea.

3. The essential requirements stipulated by the Director General of Civil Aviation ('DGCA') for granting licence for flying an helicopter were as follows:

- (a) The helicopter should have emergency floatation gear; and
- (b) It should meet the requirement to operate under outside air temperature of 35-45 °C.

4. The Petitioner entered into a contract with Respondent No. 1 for wet lease of 1 MI-172 helicopter and for sale of 5 MI-172 helicopters. Contract No.76044/32299 dated 28<sup>th</sup> April 1994 between the parties provided "for delivery (by sale) of one MI-172 helicopter to Mesco Airlines Limited, New Delhi India and lease out of one MI-172 helicopter to Mesco Airlines Limited, New Delhi, India." Clause 1.1 stipulated that "the duration of helicopter lease shall be two years. The lease period shall commence from the day the said helicopter actually commences its operation for the company." Under Clause 5.14, the date of signing the said technical acceptance report was considered to be the date of putting the MI-172 helicopter into operation with the company. However, the leased helicopter was deemed to have been put into operation "only after the receipt of necessary approval from the Director General of Civil

Aviation (DGCA) to fly the same in India.” Clause 6.2 of the contract indicated the maintenance schedule of the leased helicopter, and the inspection time. For 25 hours, there was to be an inspection time of two hours; for 50 flying hours, the inspection time was one day; for 100 hours, two days and for 200 flying hours, the inspection time was 3 and half days. Clause 6.3.1 required that the MI-172 helicopter would fly six days per week, if weather conditions so permitted and according to the relevant Indian Flying Rules. The number of working hours for the flying crew was not to exceed 42 hours per week. Under Clause 6.1.1 for operation of the leased helicopter, Respondent No. 1 was to provide licenced and experienced pilots and a maintenance team. The said persons were to be and remain employees of Respondent No. 1. Under Clause 9.1, the lease operation and obligations of the parties under the contract “shall be deemed automatically terminated as soon at the leased helicopters and the Avia goods involved cross the Indian border”. The leased helicopter was to be operated “during two calendar years of putting it into operation and upon termination of operation the duration of the contract is to be extended for the period reasonably required for customer clearance and demobilization of the helicopter, Avia goods involved and the contractor’s flight and maintenance crews.” Clause 14 dealt with the terms of payment for the leased helicopters. Under Clause 14.1.3 a fixed amount of US \$ 45500 (i.e. for 50 hours at the rate of USD 650) would be

automatically paid by the Petitioner at the end of each 30 day period from the date of receipt of invoice for each 30 days period after the first three months of operation till the end of lease period regardless of the actual hours flown. Under Clause 17 the disputes were to be referred to an arbitration committee of three Arbitrators appointed by Indian Council of Arbitration ('ICA').

5. As regards the main contract, the Petitioner herein (Respondent before the Arbitral Tribunal) was to deposit USD 70,000 with Respondent No. 1 (Claimant before the Arbitral Tribunal) one month prior to the delivery of the leased helicopter. The said amount was to be deducted from the first three monthly payment of USD 97500 and thereafter, till the end of the leased period USD 45,500 was to be charged per month regardless of the actual hours flown, however, an additional amount of USD 650 per hour had to be paid if the helicopter flew hours in excess of the period stated in paras 14.1.2 and 14.1.3 of the contract. All the spares and consumables were to be supplied by Respondent No. 1 at its own expense. The lease period was for two years. It was agreed that all fuel consumed during flight and during any ground running was to be paid by the Petitioner. The Petitioner was also required to provide a first class bank guarantee of 1 lakh USD in favour of Respondent No. 1 confirming the payments to Respondent No. 1 of flying charges as agreed between the parties.

6. According to Respondent No. 1, the operation of the leased helicopter commenced on 11<sup>th</sup> December 1994. Respondent No. 1 raised several bills in regard to its balance dues. However, the Petitioner did not pay the balance lease money and Respondent No. 1 raised a claim of USD 201,529.95 on account of lease money due from July to November 1996. This formed subject matter of Claim No. 1 before the Arbitral Tribunal.

7. Claim No. 2 was for a sum of USD 1,29,750 in respect of the helicopter that was sold. The price of the said helicopters was fixed at USD 25,95,000. In terms of the agreement between the parties, 95% of the total cost was to be paid by the Petitioner against presentation of the shipping documents and the balance 5% against presentation of invoice and technical acceptance report. According to Respondent No. 1, it received only 95% of the price and the balance 5%, i.e., USD 1,29,750 has still not been paid to Respondent No. 1.

8. Claim No. 3 was for a sum of USD 3,96,017.56 arising out of the Contract No. 76045/35699 dated 10<sup>th</sup> February 1995 whereby Respondent No. 1 agreed to sell the Petitioner five helicopters at a price of USD 1,57,45,709.20. The price of each helicopter was USD 2,980,000 and the total value of the contract therefore, was reduced to USD 1,57,45,709.20. According to Respondent No. 1, the goods shipped were more than USD

2,15,385.87. Since the goods shipped were more than the value of the actual invoices, Respondent No. 1 sent further invoices for payment.

9. According to Respondent No. 1, the Petitioner had to pay for the spare parts which were supplied under the above contract to the extent of USD 6,62,755.63. Claim No. 4 related to the balance payment towards the price for spare parts supplied to Respondent No. 1.

10. It was the case of Respondent No. 1 that Petitioner neither paid the above amounts nor returned the leased helicopter. It is stated that the leased helicopter was returned only in terms of the orders passed by this Court. Further, as noted in the order dated 12<sup>th</sup> September 2000 of this Court, Respondent No. 1 paid the entire dues of Rs. 13,06,820 to the Airport Authority of India ('AAI') at the time of release of the helicopter.

11. Before the learned Tribunal, the Petitioner herein filed its counter claims. The case of the Petitioner was that leased helicopter could be made operational only on 24<sup>th</sup> May 1995. According to the Petitioner, due to lack of maintenance, operations of the leased helicopter had come to a grinding halt and the liquidated damages ('LD') had to be paid to Pawan Hans. It is contended that the date of commencement of lease was 24<sup>th</sup> May 1995 and not 11<sup>th</sup> December 1994. Respondent No. 1 had not

adjusted the amount for the period during which the helicopter was not flying. It was claimed that what was due to Respondent No. 1 was USD 2,01,529.95 minus USD 40,932.00 = USD 1,60,660.95. Even this payment was to be made by the Petitioner only after adjustment of the losses incurred by Petitioner on account of breaches of the contract by Respondent No. 1.

12. The Petitioner claimed Rs. 5,99,03,400 towards LD (Counter Claim No.1), Rs. 13,06,820/- towards housing and parking charges of the leased helicopter (Counter Claim No.2) and Rs. 5,00,71,600 towards losses due to idling of helicopter during warranty period due to failed component and their delayed/non-replacements (Counter Claim No.3). The Petitioner also claimed interest @ 24% on the above amounts with past and *pendente lite* interest (Counter Claim No.4) and Rs. 5 lakhs as cost of arbitration (Counter Claim No.5). It was also prayed that the claim made in Rupees may be converted into USD. Consequently, before the learned Tribunal Respondent No. 1 filed four claims and the Petitioner filed five counter claims. Affidavits by way of evidence were filed by both the witnesses.

13. As regards Claim No. 1 by Respondent No. 1 for USD 2,01,529.95 towards balance lease rentals of the leased helicopter, the principal question that arose for determination was the date from which the lease

rentals for the leased helicopter became payable. The Tribunal referred to two letters dated 1<sup>st</sup> July 1995 and 7<sup>th</sup> August 1995 written by the Petitioner to Respondent No. 1 admitting that the helicopter had started its operation on 12<sup>th</sup> December 1994. By its letter dated 21<sup>st</sup> January 1996 written by the Petitioner to the Reserve Bank of India ('RBI'), the Petitioner stated that the certificate of airworthiness was issued to the helicopter on 11<sup>th</sup> December 1994 and that the period of lease commenced on that date itself. The Tribunal also noted that during the month of May 1996 the Respondent No. 1 had raised a bill for 69.81 hours where the actual flying hours were 72.03 hours. In March 1996 the helicopter had flown for 81.40 hours whereas Respondent No. 1 raised the bill only for 77.52 hours. For August and September 1996 again the actual flying hours were for more than the bills raised by Respondent No. 1. Even the admitted liability for of USD 16,060.95 had not been paid by the Petitioner to Respondent No. 1. It was held that since the Petitioner had flown the helicopter for more than 70 hours per month which was the minimum guarantee flying hours under Clause 14.1.3 of the contract, there was no question of any deduction of USD 10,06,000.

14. Assailing the above finding, it was submitted by Mr. Harish Malhotra, learned Senior counsel for the Petitioner, that Clause 6.3.1 of the contract which related to the working hours for the flying crew was

mandatory and the helicopter could not fly beyond those hours per week. He submitted that the DGCA granted final clearance for the helicopter only from 24<sup>th</sup> May 1995. According to him, Clause 14.1.3 of the contract dated 28<sup>th</sup> April 1994 talked of the liability of the Petitioner for a fixed amount in respect of the actual number of flying hours. He referred to the letter dated 19<sup>th</sup> April 1996 written by the Petitioner to Respondent No. 1 and pointed out that Petitioner had stated clearly therein that the helicopter had flown in the month of March 1996 for 77 hours 52 minutes. The helicopter was grounded for five days from 6<sup>th</sup> to 10<sup>th</sup> March 1996 and therefore, an amount of USD 2274 had to be deducted. Likewise the Petitioner by its letter dated 10<sup>th</sup> October 1996 pointed out that the helicopter had been grounded for seven days from 4<sup>th</sup> to 9<sup>th</sup> September 1996 and on 15<sup>th</sup> September 1996 and accordingly claimed USD 10,612 as deduction. By a letter dated 5<sup>th</sup> November 1996 the Petitioner pointed out that during October 1996 the helicopter had been grounded for six days and USD 9096 was claimed as deduction.

15. Mr. Vineet Malhotra, learned counsel for the Respondents on the other hand relied upon two letters of the Petitioner which clearly showed that commercial operations of the leased helicopter had commenced on 12<sup>th</sup> December 1994. He referred to each of the flying logs of the helicopter, which had been referred to in the majority Award, to show that

actual bills were raised by Respondent No.1 for less than the actual flying hours. The Award of the dissenting member had accepted the contention of the Petitioner herein that under Clause 6.3.1 there was a restriction on the Petitioner flying more than 42 hours and therefore, the Petitioner was justified in claiming reduction for the period of grounding of the helicopter for more than what was authorized under the contract and which deductions were never refuted by the Respondent No.1.

16. The above submissions as regards Claim No.1 have been considered. The claim turns on the interpretation of two clauses of the contract, i.e., Clause 6.3.1 under which the number of flying hours for the crew was not to exceed 42 hours and Clause 14.1.3 which talks of the minimum guarantee to be paid by the Petitioner.

17. As regards the first plea of the Petitioner that lease had commenced only from 24<sup>th</sup> May 1995, the majority Award correctly deduced from the Petitioner's own letter dated 7<sup>th</sup> August 1995 to Respondent No. 1 and the letter dated 10<sup>th</sup> December 1996 to the RBI that even according to the Petitioner, commercial operation of the leased helicopter commenced on 12<sup>th</sup> December 1994. The relevant portion of letter dated 7<sup>th</sup> August 1995 reads as under:

“Following has been the schedule of the helicopter's operations in chronological order:

1. Operations commenced on 12<sup>th</sup> December 1994.
2. Helicopter in operation from 12<sup>th</sup> December 1994 till 23<sup>rd</sup> of February.
3. Helicopter grounded due to non-availability of the air (Capt. Said hospitalized) from 23<sup>rd</sup> February to 5<sup>th</sup> March 1995.
4. Helicopter grounded due to fitment of floatation system, ELT and Two ULBs from 5<sup>th</sup> March to 28<sup>th</sup> April 1995.”

18. The cross-examination of the witness, Mr. D.V.S. Trehan, for the Petitioner also indicates that the first flight of the leased helicopter did take place on 11<sup>th</sup> December 1994. The relevant question and answers to this regard as under:

“Q. Is it correct the first flight took place on 11<sup>th</sup> December 1994 in regard to the lease helicopter?

A. Yes. The first air test flight took place on 11<sup>th</sup> December 1994 as recorded in page 82 in Volume-I.”

19. The view taken by the majority Award cannot therefore be said to be contrary to the evidence placed on record.

20. As regards deduction claimed by the Petitioner, one has to go by the actual flying log (Ex.30). The learned Tribunal has rightly pointed out that examination of invoices does show that as compared to the actual flying time, the total flying hours that were billed for each month from May 1995 onwards till November 1996 were less. As rightly held by the

majority Award, the claim for any further reduction was, therefore, misconceived.

21. As regards the actual date of return of the leased helicopter, the letter dated 10<sup>th</sup> December 1996 written by the Petitioner to the RBI indicates that even as on that date, it was not yet returned. Para (b) of the said letter reads as under:

“b. With regard to the period of lease, it is reiterated that the helicopter was received on 7<sup>th</sup> September 1994 and the certificate of airworthiness was issued to the helicopter on 11<sup>th</sup> December 1994. As per clause 1.1 of the agreement No. 76-044/32299 dated 28<sup>th</sup> April 1994 the period of lease commenced from the date of C of A which is 11<sup>th</sup> December 1994. As such the lease agreement expires on 10<sup>th</sup> December 1996. Therefore, we request that GR waiver for re-export of this helicopter may please be issued urgently.”

22. The fact remains that the leased helicopter was not returned till much later. This is evident from the letter dated 11<sup>th</sup> September 1998 written by the Petitioner to the RBI requesting for GR waiver for re-export of leased helicopter. It is not disputed that it was only after an application filed by the Respondent No.1 under Section 9 of the Act in this Court that the leased helicopter was returned. Further, there was no clause in the contract that actually provided for reduction of lease rentals for non-flying hours, or even for damages for days of the non-flying. The majority Award in regard to Claim No. 1 was based on the correct interpretation of the clauses of the contract as well as the evidence on record and,

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therefore, calls for no interference.

23. Claim No. 2 concerned the helicopter which was to be sold under the contract dated 24<sup>th</sup> April 1994. While the Petitioner paid 95% of the price, it had not paid the balance amount. The admission of the Petitioner in the written submission was that balance amount, i.e., 5% was payable only after adjustment of its claims, i.e., losses and LD suffered by it. Since this was virtually an admission by the Petitioner, the decision to allow Claim No.2, in the majority Award was justified. No interference is called for with the Award in regard to Claim No. 2.

24. Claim No. 3 related to the second contract dated 10<sup>th</sup> February 1995 in relation to the four invoices under which the Respondent No.1 claimed USD 3,96,017.56. The Tribunal referred to the letter of agreement dated 18<sup>th</sup> February 1997 as well as the evidence of Mr. Nikolai V. Dulin on behalf of Respondent No. 1. The contention of Mr. Harish Malhotra, learned Senior counsel for the Petitioner was that no details were furnished by Respondent No. 1 nor any evidence led by it in support of the claim. Whatever was the value of the goods, as shown in the invoices, was duly paid by the Petitioner. The addendums to the agreement were of no consequence as they were consequently treated to be cancelled.

25. Mr. Vineet Malhotra, learned counsel for Respondent No.1, on the

other hand pointed out that liability to pay the amount under Claim No.3 was based on invoices and was admitted by the Petitioner in the letter of agreement dated 18<sup>th</sup> February 1997.

26. A perusal of the letter of agreement dated 18<sup>th</sup> February 1997 shows that the Petitioner admitted its liability in respect of the four invoices under the contract dated 10<sup>th</sup> February 1995 for USD 3,96,017.56. This document has been signed by both the parties. Mr. Dulin, a witness of Respondent No. 1, in his evidence spoke about this letter. Mr. Dulin, specifically referred to the addendum and in para 25 of the affidavit by way of evidence referred to the amount due under the contract dated 10<sup>th</sup> February 1995. In para 26 it was specifically stated that the said amount was also admitted by the Petitioner in the letter of agreement dated 18<sup>th</sup> February 1997. The cross-examination of Mr. Dulin does not indicate that any question was asked in relation to the LOA. In the circumstances, this Court finds no error having been committed by the majority Award in allowing Claim No. 3 of Respondent No. 1.

27. Claim No. 4 related to the balance amount towards the price for spare parts. A reference was made in this regard again to the LOA dated 18<sup>th</sup> February 1997. Therefore, this claim had also to be allowed to the extent of USD 6,39,911.47.

28. Counter claim No. 1 of the Petitioner was premised on the contention that the lease of the helicopter commenced only on 24<sup>th</sup> May 1995 and was valid up to 23<sup>rd</sup> May 1997. The evidence on record, as has already been discussed, showed that even according to the Petitioner, the operation of the helicopter commenced on 12<sup>th</sup> December 1994 and ended in November 1996. Therefore, the very basis of this claim stood refuted by the evidence of the Petitioner itself. Rejection of Counter Claim No. 1 by majority award cannot therefore be faulted.

29. Counter claim No. 2 was for parking charges of the helicopter. Despite the lease having expired in November 1996, the helicopter was not returned by the Petitioner. Ultimately, the helicopter was released to Respondent No. 1 by this Court's order. At the time of release, the parking charges had been paid by Respondent No. 1 to the AAI. Consequently, there is no merit and Counter claim No. 2 was rightly rejected by the majority Award.

30. As regards Counter claim No. 3 for losses due to idling of helicopter, the majority Award pointed out that no evidence was placed on record by the Petitioner to establish any part of this counter claim. In the absence of any evidence in support of such counter claim, it was rightly rejected by the majority Award. Counter Claim Nos. 4 and 5 are also rejected.

31. As regards claims of Respondent No. 1, the Tribunal has awarded only 6% interest per annum which is reasonable. The cost of arbitration awarded can also not be unreasonable.

32. No ground has been made out for interference with the impugned Award of the Tribunal. The petition is dismissed with costs of Rs. 20,000/- which will be paid by the Petitioner to Respondent No. 1 within a period of four weeks.

**S. MURALIDHAR, J.**

**MARCH 29, 2012**

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