

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
F-104
+ **O.M.P. 443 of 2006**

S.G.S. AIRLINES LTD Petitioner
Through: Mr. P. Chowdhary with Mr. P.C.
Dhingra, Advocates.

Versus

FLEX ENGINEERING LTD. Respondent
Through: Mr. Arun Batta with Mr. Yudhir
B. Arya, Advocates.

CORAM: JUSTICE S. MURALIDHAR

% **ORDER**
03.10.2012

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an impugned Award dated 7th July 2006 passed by the learned sole Arbitrator in the dispute between the Petitioner, S.G.S. Airlines Limited [formerly known as U.P. Airways Limited ('UPAL')], and the Respondent, Flex Engineering Limited ('Flex').

2. The background to the petition is that on 25th April 1996 an agreement (hereafter the 'Charter Agreement') was entered into between the parties whereby the Petitioner was to provide air transport services on charter basis to the Respondent. Clause 1 of the Charter Agreement provided that the Respondent had to deposit a sum of Rs. 1 crore for a period of 15 months from the date of the Charter Agreement to avail aircraft services on charter basis. The said amount, unless otherwise refunded upon termination of the agreement was to be kept by the Petitioner as a security deposit, without interest. Clause 2 of the Charter Agreement stated that the repayment of the security amount of Rs. 1 crore has been secured by UPAL by way of pledge of shares of its promoters with Flex. A separate Pledge Deed was executed

by the parties. The Charter Agreement further provided that the Petitioner would make ready upon a notice of 12 hours by the Respondent, an airworthy unpressurized aircraft of approximately 10 seats configuration for providing air transport services to the Respondent anywhere in India for a period of 15 months. Such aircraft was to be made available within a period of three months from the date of signing of the Charter Agreement, subject to the approval of the concerned authorities for the import of the aircraft.

3. Clause 3 of the Charter Agreement provided as under:

“It is, however, agreed between the parties that in case the First party shall fail to make the aircraft available for providing the air transportation services, in terms of this agreement, for any reason whatsoever, within the said period of three months, the First Party, in that case, shall refund the security amount of Rs. 1 (one) crore along with interest @ 24% per annum from the date of deposit till the date of clearance, to the Second Party.”

4. Clause 4 of the Charter Agreement stated that the Petitioner was entitled to charge an amount of Rs. 10,000 for each flying hour from the Respondent. Clause 5 set out UPAL’s warranties and declarations. Clause 6 stated that in the event of any default of the terms and conditions of the Charter Agreement, either of the parties would be entitled to terminate it forthwith. Clause 7 provided that the Charter Agreement was valid for a period of 15 months. Clause 10 provided for reference of the disputes between the parties to arbitration by a three-member arbitral Tribunal.

5. On the same date, i.e., 25th April 1996, a Pledge Deed was entered into between Indira Associates Pvt. Ltd. [‘IAPL’] (referred to as the First Party), Flex (referred to as the Second Party) and UPAL (referred to as the Third Party). The Pledge Deed referred to the Charter Agreement in terms of which Rs. 1 crore was to be deposited by the Respondent with the Petitioner. The Pledge Deed stated that in consideration of the said deposit

of Rs. 1 crore, IAPL had deposited with Flex “the shares having face value of Rs. 2 (two) crores alongwith the blank transfer deeds, detailed in the schedule attached herewith, by way of pledge for securing the repayment of the said security amount of Rs 1 (one) crore.” Clause 2 of the Pledge Deed stated that IAPL agreed that in the event of default by UPAL in the repayment of the said security amount of Rs. 1 crore, Flex could call upon IAPL to repay the said amount within 15 days of the receipt of its notice in writing, failing which Flex would be authorized and empowered to sell the shares forming part of Annexure ‘A’ to the Pledge Deed or any of them at the sole discretion through any authorized broker. The sale proceeds of such shares were to be adjusted by Flex towards the security amount of Rs. 1 crore. The security by way of pledge was to be a continuing security for the ultimate balance that may be found due and payable by UPAL to Flex.

6. On the same date, i.e., 25th April 1996, a memorandum of understanding (‘MOU’) was entered into amongst the following persons:

(i) Mr. Subhash Gulati, the Chief Promoter and Shareholder of UPAL and representing other shareholders, consisting of family members, friends, associates and U.P. Air Services Society (referred to as ‘First Party’);

(ii) Mr. Ashok Chaturvedi s/o Mr. V.D. Chaturvedi (referred to as ‘Second Party’) which expression was to include “his legal heirs, successors, executors, assigns, administrators and nominees”; and

(iii) UPAL (referred to as ‘said company’ and/or ‘conforming party’).

7. The MOU recorded that Mr. Ashok Chaturvedi had approached the promoters group for investing an aggregate sum of Rs. 7 crores by purchase of 40,00,000 equity shares of Rs. 10 each of UPAL from the promoters

group aggregating to Rs. 4 crores and 30,00,000 fresh equity shares of Rs. 10 each of UPAL in cash at par aggregating to Rs. 3 crores. The MOU was valid for 15 months with time being the essence of the contract. The scheme of arrangement was set out in Clause 2 of the MOU. The MOU contained an arbitration clause whereby the disputes or difference of any kind whatsoever between the parties were to be referred to a three-member arbitral Tribunal.

8. Admittedly Flex deposited Rs. 1 crore with the Petitioner. Also, admittedly, Flex did not opt for renewal of the Charter Agreement under Clause 7 thereof. With the efflux of time the Charter Agreement came to an end after a period of 15 months on 24th July 1997.

9. Flex's case was that the value of IAPL's shares was such that they could not be sold to recover even a portion of the sum of Rs. 1 crore deposited with the Petitioner. On 6th February 1998 Flex sent a notice through its advocate calling upon the Petitioner to refund the security amount of Rs. 1 crore with interest @ 24% per annum with effect from 25th July 1997 till the date of its realization. Thereafter, Flex filed a winding-up petition, Company Petition No. 296 of 1998, in this Court. In the said winding-up petition, the Petitioner filed a reply stating that pursuant to the MOU dated 25th April 1996 a sum of Rs. 7 crores was to be invested and that the deposit of Rs. 1 crore was pursuant to the said MOU. The Petitioner sought to link the Charter Agreement, the Pledge Deed and the MOU.

10. It appears that in the winding-up petition filed by Flex, the parties informed the Court that they were unable to arrive at a common agreed name of the Arbitrator. On 27th March 2003 the Court passed the following order:

“CP 296 of 1998 & CAs 966-67 of 1998

The parties have not been able to arrive at a common agreed name of the Arbitrator.

Accordingly, with the consent of the parties, Mr. Justice K. Ramamoorthy, a retired Judge of this Court is appointed as the Arbitrator in this matter.

Parties to appear before the Arbitrator on 12th April 2003 for directions. Arbitrator will pronounce his award within four months from 12th April 2003. Both the counsel agree that the fees may be fixed by Arbitrator himself. The fees and other expenses to be shared equally by the parties subject to the final adjustments.

List on 3rd November 2003.

Dasti to the parties.”

11. Pursuant to the aforementioned order which was with the consent of the parties, Flex filed a statement of claim before the learned sole Arbitrator on 12th May 2003 in which there were five items of claims. Claim No. 1 was for refund of the security deposit of Rs. 1 crore. Claim No. 2 was for interest on the security deposit @ 24% per annum from 25th July 1997. Claim No. 3 was for Rs. 10 lakhs towards damages. Claim No. 4 was for *pendente lite* and future interest @ 24% per annum and Claim No. 5 was for a sum of Rs. 2 lakhs towards cost of arbitration.

12. The Petitioner filed its reply and counter-claims before the learned Arbitrator on 12th January 2004. It was reiterated by the Petitioner that there were three agreements between the parties by which it was agreed that Rs. 7 crores would be invested by the “associate companies” of Mr. Ashok Chaturvedi of which Flex was one. It was contended that it was understood by the parties that Rs. 1 crore was being deposited as part of the MOU and the Pledge Deed was therefore executed between the parties whereby the Petitioner pledged 20 lakh shares of the aggregate face value of Rs. 2 crores in favour of Flex. It was maintained that it was Flex which had committed a

default in not complying with the terms of the MOU and failing to invest Rs. 7 crores. The Petitioner alleged that Flex's legal notice dated 6th February 1998 was issued to cover up Flex's failure to make investment in terms of the MOU. No effort had been made by Flex to sell the pledged equity shares of IAPL to recover the amount allegedly due to it. Accordingly, it was alleged by the Petitioner that the entire claim of Flex was *ex-facie* "bogus, absurd, *malafide* and deprived of any merit."

13. In its counter-claims, the Petitioner claimed Rs. 12,35,44,655 towards projected loss of actual business, Rs. 59,78,54,800 towards "disastrous consequences, locking the value of shares at its face value of Rs. 10", Rs. 3 crores towards loss suffered by the Petitioner, Rs. 1 crores towards expenses incurred towards building base, Rs. 2 crores for loss of professionals and opportunities, Rs. 6 crores being loss in the market capitalization of its share value. Accordingly, a sum of Rs. 26,35,44,655 was claimed by the Petitioner.

14. In the arbitral proceedings, the power of attorney holder of Flex Ms. Banmala Jha was examined as a witness on behalf of Flex. Mr. Subhash Gulati, the Managing Director of the Petitioner was examined as its witness. The following issues were framed by the learned Arbitrator:

- "1. Whether the Respondent committed any breach with reference to the terms of the Agreement dated 24th May 1996, as contended by the Claimant?
2. If so, whether the Claimant is entitled to return of the security deposit of Rs. 1 crore?
3. Whether the Claimant is entitled to damages of Rs. 10 lakhs as claimed in Claim No. 2?
4. Whether the Claimant is entitled to interest thereon and if so, at what rate?

5. Whether the Respondent is entitled to the amount claimed in the counter-claim on the basis of breach of agreement between the Respondent and the Chairman of the Claimant Co.?

6. If so, what is the quantum that the Respondent is entitled to?

7. If the Respondent is entitled to the amount, what is the rate of interest on which the Respondent could claim on the principal amount?

8. Whether the counter claim is barred by time?

9. What are the reliefs the parties are entitled to?”

15. The findings on the above issues were as under:

(a) The Petitioner had committed breach of the Charter Agreement and did not provide the services as mentioned therein.

(b) Flex was entitled to the return of security amount of Rs. 1 crore.

(c) In view of the claim for interest being granted, Flex was not entitled to damages.

(d) Flex was entitled to the contractual rate of interest @ 24% per annum from 25th July 1997.

(e) Flex was entitled to interest @ 16% per annum from 13th May 2003 till the date of payment.

(f) The Petitioner had not substantiated its counter-claims and therefore, it was not entitled to any amount. Consequently, no amount was payable by Flex to the Petitioner. Therefore, the question of interest also did not arise. Further, the Petitioner had

not been able to show as to how the counter-claims were within time.

16. In the result, the learned Arbitrator directed the Petitioner to pay Flex a sum of Rs. 1 crore together with interest @ 24% per annum from 25th July 1997 till the date of claim, i.e., 12th May 2003 and further interest @ 16% per annum from 13th May 2003 till the date of payment. The Petitioner was also asked to pay Rs. 2 lakhs towards cost of arbitration.

17. This Court has heard the submissions of Mr. P. Chowdhary, learned counsel for the Petitioner and Mr. Arun Batta, learned counsel for the Respondent.

18. One of the grounds urged by learned counsel for the Petitioner is that the doctrine of lifting the corporate veil should be employed in the present case and it should be held that three documents executed on the same date viz., the Charter Agreement, the Pledge Deed and the MOU had to be read together. Reliance is placed on the decisions of the Supreme Court in ***Subhra Mukherjee v. Bharat Coking Coal Ltd. (2000) 3 SCC 312***, and ***Commissioner of Central Excise, New Delhi v. Modi Alkalies & Chemicals Ltd. (2004) 7 SCC 569***. It is submitted that the Charter Agreement was never acted upon and no chartered aircraft was availed of by Flex at any time. The main agreement was in fact for investment of Rs. 7 crores by Flex in the Petitioner. It is further submitted that the learned Arbitrator did not advert to the Pledge Deed at all. Since the sum of Rs. 1 crore was secured by the pledge of shares of IAPL worth Rs. 2 crores with Flex, the only logical course of action was for Flex to bring the said shares of IAPL to sale. It is further pointed out that there was no agreement that the amount of Rs. 1 crore would be refunded together with interest. It is submitted that even now the Petitioner is willing to arrange for sale of the

shares to help the Respondent to recover at least a part of the sum of Rs. 1 crore.

19. Learned counsel for the Respondent on the other hand supported the impugned Award. Referring to the decisions in ***Union of India v. Bakshi Steel Limited 2005 (3) Arb.LR 74 (Del)*** and ***Madhok Construction Co. Ltd. v. Union of India 71 (1998) DLT 599*** it is submitted that the wording of the MOU was such that while the Pledge Deed was an integral part thereof, the Charter Agreement was a stand-alone agreement. Mr. Ashok Chaturvedi was in his personal capacity party to the MOU dated 25th April 1996. The said MOU and Pledge Deed did not affect the Charter Agreement and the obligations thereunder of Flex and the Petitioner. The shares of IAPL were not listed and the question of the Respondent bringing the pledged shares to sale to recover the sum of Rs. 1 crore did not arise. If Mr. Gulati was aggrieved by any breach committed by Mr. Chaturvedi in terms of the MOU, Mr. Gulati ought to have initiated appropriate legal proceedings. It was submitted by Flex that the Petitioner was deliberately confusing the issue by linking the MOU with the Charter Agreement.

20. The scope of interference by the Court with the Award of the learned Arbitrator is limited to the grounds set out in Section 34 of the Act. As explained by the Supreme Court in ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705***, the Award has to be shown to be suffering from a patent illegality and therefore opposed to the public policy of India. The Court is not expected to re-appreciate the evidence only to come to a different conclusion. In other words the Court is not acting as an appellate authority reviewing the Award of the learned Arbitrator.

21. The learned Arbitrator has, in the impugned Award, examined the Charter Agreement, the Pledge Deed and the MOU. The depositions of the

witnesses were also analysed in detail. Flex's witness was clear in her statement that the MOU was between UPAL, Mr. Ashok Chaturvedi and Mr. Subhash Gulati in their personal capacities. When Mr. Gulati was cross-examined, he stated unambiguously as under:

“Q. 24 I put it you that this Memorandum of Understanding was signed by you in your personal capacity as well as by Mr. Ashok Chaturvedi in his personal capacity.

Ans. I signed as a shareholder of U.P. Airways. Mr. Chaturvedi signed in his personal capacity.

.....

Q. 27. Have you ever written any letter, sent any notice, filed any case against Mr. Chaturvedi for his not performing your alleged contract terms?

Ans. By verbally as being on mutual business trust.”

22. The learned Arbitrator has also adverted to the answers given by Mr. Gulati confirming that the MOU dated 25th April 1996 was executed between him, Mr. Chaturvedi and UPAL. On the aspect of lifting of the corporate veil, the learned Arbitrator came to the following conclusion:

“20. The proposition propounded by the learned counsel is strange and it cannot at all be accepted. The concept of the lifting of the corporate veil is well known and that cannot be called in aid by the Respondent Co. in this case. The Memorandum of Understanding is a separate agreement and nothing to do with the Claimant Co. and the general principles emanating out of Sections 91 and 92 of the Evidence Act, 1872 would apply and the Respondent cannot be heard to contend that Memorandum of Understanding is the evidence of any comprehensible understanding between the parties. The Memorandum of Understanding cannot at all be accepted as in evidence in support of the Respondent's case. The Memorandum of Understanding dated 24th May 1996 (*sic* 25th April 1996) is completely be eschewed out of consideration. Consequently, I am clearly of the opinion that the Respondent is bound to return the security deposit of Rs. 1 crore.”

23. This Court is unable to find any patent illegality committed by the learned Arbitrator in analysing the evidence and coming to the above conclusion. There is no ambiguity or confusion that although three agreements were executed on the same date, there was no link as such between the Charter Agreement and the MOU. Indeed, the MOU was a separate agreement. In terms of the Charter Agreement Flex was entitled to refund a sum of Rs. 1 crore upon termination of the said agreement by efflux of time. Clause 3 in fact categorically stated that UPAL would refund the security amount along with interest @ 24% per annum from the date of deposit till the date of clearance. Consequently, the finding of the learned Arbitrator in favour of Flex in the above extent is consistent not only with the clauses of the contract but also with the evidence placed on record. The MOU was signed by Mr. Chaturvedi in his personal capacity and confirmed by Mr. Gulati himself in the answers given by him in his cross-examination. Also, the shares of IAPL that were pledged with flex would have not fetched any sum to enable adjustment against the sum of Rs. 1 crore. Flex's right to recover Rs. 1 crore with interest in terms of the Charter Agreement was independent of its right to bring the pledged shares of IAPL to sale. Consequently, the findings of the learned Arbitrator on Issues 1 and 2 do not call for interference.

24. As regards the award of interest, considering the number of years over which the disputes have been pending, and in light of the decision of the Supreme Court in ***Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy (2007) 2 SCC 720***, this Court considers it appropriate to direct that the Respondent is entitled to simple interest @ 12% per annum on the sum of Rs. 1 crore for the period, 25th July 1997 till the date of payment. This Court finds no error having been committed by the learned Arbitrator as far as the rejection of the Petitioner's counter-claims are concerned.

25. Consequently, the impugned Award is upheld with the only change that the Petitioner will pay Flex simple interest @ 12% per annum on the sum of Rs. 1 crore from 25th July 1997 till the date of payment. The petition is disposed of in the above terms, but in the circumstances, with no order as to costs.

S. MURALIDHAR, J

OCTOBER 03, 2012

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