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

#45, 46, 47 & 48

+ OMP 295 of 2008

AIRPORTS AUTHORITY OF INDIA Petitioner

Through: Mr. Abhinav Vashisht, Senior Advocate
with Mr. Digvijay Rai, Mr. B.K. Goel,
Ms. Amrita Jayan and Mr. Raman Kumar,
Advocates

versus

M/S. HANS ENTERPRISES & ANR Respondents

Through: Mr. Sandeep Sethi, Senior Advocate with
Mr. P.S. Bindra & Ms. Preeti Gupta,
Advocates

AND

OMP 370 of 2008

M/S. SHRI HANS ENTERPRISES Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate with
Mr. P.S. Bindra & Ms. Preeti Gupta,
Advocates

versus

AIRPORTS AUTHORITY OF INDIA Respondent

Through: Mr. Abhinav Vashisht, Senior Advocate
with Mr. Digvijay Rai, Mr. B.K. Goel,
Ms. Amrita Jayan & Mr. Raman Kumar,
Advocates

and

OMP 345 of 2009

SUNIL KUMAR Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate with

Mr. P.S. Bindra & Ms. Preeti Gupta,
Advocates

versus

AIRPORTS AUTHORITY OF INDIA

..... Respondent

Through: Mr. Abhinav Vashisht, Senior Advocate
with Mr. Digvijay Rai, Mr. B.K. Goel,
Ms. Amrita Jayan & Mr. Raman Kumar,
Advocates

and

OMP 364 of 2009

AIRPORTS AUTHORITY OF INDIA

..... Petitioner

Through: Mr. Abhinav Vashisht, Senior Advocate
with Mr. Digvijay Rai, Mr. B.K. Goel,
Ms. Amrita Jayan & Mr. Raman Kumar,
Advocates

versus

M/S. SHRI HANS ENTERPRISES & ANR

..... Respondents

Through: Mr. Sandeep Sethi, Senior Advocate with
Mr. P.S. Bindra & Ms. Preeti Gupta,
Advocates

CORAM: JUSTICE S. MURALIDHAR

ORDER

20.11.2012

1. These are four petitions under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') arising out of a common set of facts in the Award.

2. The background to these petitions is that the Airports Authority of India ('AAI') issued a Notice Inviting Tender ('NIT') on 15th November 1998 for removal and disposal of garbage from various designated points inside the

operational area and outside the terminal building of the Indira Gandhi International Airport ('IGI Airport'), New Delhi. The Minimum Reserve Price ('MRP') was indicated as Rs. 1,90,000 and the period of licence was five years.

3. M/s. Shri Hans Enterprises ('Hans'), the proprietary concern of Mr. Sunil Kumar Yadav, bid for the tender. It offered Rs. 3,13,000 per month as licence fee if the garbage was held over to it and Rs. 5,35,000 per month "if entire wet garbage is handed over to us by M/s Taj, Oberoi and Ambassador Flight Kitchens at their premises." A meeting was held between the parties, following which the AAI issued a letter dated 15th March 1999, awarding the contract to Hans, *inter alia*, stating that Hans would pay AAI a sum of Rs. 5,35,000 per month as licence fee during the first year of the contract, with a further condition that the licence fee for the subsequent years would be subject to 10% of the compound escalation. The licence fee, so worked out for the 5 years, was set out in the letter. Clause (ix) of the said letter stated that Hans "shall not claim any reduction in licence fee on any account of whatsoever including non availability of garbage from various agencies as well as due to decrease in the flight movement etc. or due to closure of operation of any airline(s) or closure of airport." Further, it was stated that "All the terms and conditions mentioned in the tender document will be part and parcel of the agreement."

4. Although the contract was awarded to Hans by letter dated 15th March 1999, a formal agreement was executed only on 8th July 1999, although the period of 5 years was to count from 25th June 1999. On 25th June 1999, AAI issued a letter to Hans where it set out the practice to be adopted by Hans for

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removal of garbage from IGI Airport. It was stated that a token system would be introduced, as was being adopted by the previous Contractor. Clauses 1(c), (d) and Clause 2 of the said letter read as under:-

“(c) You will be required to collect wet garbage comprising of left over food in the tray from the flight kitchen units on daily basis and you will collect and carry dray/galley garbage in polythene bags.

(d) Any cutlery items, i.e. knife, fork, spoons etc. if found in the dray garbage will be required to be deposited by you to the respective/airlines/flight kitchen operators once in a month. In case any flight kitchen operators wishes to sort out its garbage, same will be allowed to be done at the sorting point itself.

2. You will also collect and remove the garbage from the designated points as well as flight kitchen units and dispose the same in the prescribed manner and there will be no separate contract for removal of the garbage by any other agency.”

5. This was followed by the execution of the agreement on 8th July 1999.

Clause 19 of the agreement reads as under:-

“19. The licensee shall not claim any reductions in licence fee on any account whatsoever including non-availability of garbage from various agencies as well as due to decrease in the flight movement etc. or due to closure of operations of airlines at the Airport.”

6. Under Clause 21, the licensee, i.e., Hans could not terminate the licence before the expiry period of licence, except by giving 90 days' notice in writing. Under Clause 22, AAI also reserved to itself the right to terminate the agreement by giving the 90 days' notice in writing without assigning any reasons. Under Clause 23, in the event of any default, failure, negligence and breach etc. by the licensee in complying with the licence agreement, AAI was at liberty to determine the licence and resume possession of the premises without payment of any compensation or damages and also invoke, in full or

part, the Bank Guarantee ('BG') furnished by Hans. Under Clause 26, the Award letter dated 15th March 1999 was also to be read as forming part of the agreement.

7. There was also a schedule of garbage bins locations appended to the agreement from where Hans was required to lift the garbage. There were 13 locations within the domestic apron, 15 locations in the International apron. There were 4 garbage collection points within the airport premises and 3 outside the airport and 6 other new points.

8. There were General Terms and Conditions ('GTC') appended to the licence agreement. There were also Operating Terms and Conditions ('OTC') appended to the licence agreement. Clauses 16 and 19 of the OTC read as under:

"16. The licensee will be required to collect wet garbage comprising of leftover food in the tray from the Flight Kitchen units on daily basis. To ensure that tarmac is not spoiled when dry garbage is collected at tarmac, the licensee will collect/carry the same in covered trolleys instead of open passenger baggage trolleys.

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19. The licensee is expected to remove and dispose approximately 06 to 10 tonnes of Garbage, which are generated from different sources at IGI Airport as per the above procedure. However, the quantum of Garbage is not guaranteed by AAI and the licensee is expected to remove and dispose all the Garbage from the designated points. No claim on any accounts for reduction in license fee payable due to non-availability of saleable garbage shall be entertained by AAI."

9. On 28th June 1999 itself, Hans wrote a letter to the Flight Kitchen Units (FKUs), i.e., M/s. Taj Air Caterers ('Taj'), M/s. Oberoi Flight Services ('OFS') and M/s. Ambassador Flight Kitchen Operator ('Ambassador'),

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requesting them to issue instructions to their employees to handover the garbage to Hans on a daily basis. On 29th June 1999, Hans wrote to AAI complaining that the Flight Kitchen Operators (FKOs) were not allowing Hans to remove garbage. AAI then wrote a letter on 2nd July 1999 to the FKOs, asking them to allow Hans to collect wet garbage which had arrived from the aircraft and deposited at flight kitchen. After Hans again complained by letters dated 7th July 1999 and 15th July 1999, AAI summoned a meeting of Hans and the representatives of FKOs and directed them to handover the wet garbage to Hans. On 15th July 1999, Hans requested AAI to introduce the token system at Steel Gate No.1 and on 9th August 1999, it wrote a letter to AAI requesting that till such time the matter is resolved, it should be permitted to pay the Reserved Price of Rs.1,90,000, instead of Rs.5,35,000. The problem did not end with Hans repeatedly protesting to AAI by letters dated 27th July 1999 and 29th July 1999.

10. Hans then filed a petition under Section 11 of the Act in this Court for the appointment of an Arbitrator. By an order dated 14th October 1999, while directing AAI to appoint an Arbitrator, the Court referred the following disputes to arbitration:

“(a) Airports Authority of India has failed to ensure supply of wet garbage from the flight kitchen units of Taj Air Caterer, Oberoi Flight Services, Ambassador Flight Kitchen and Chef-Air Flight Kitchen – Effect thereof.

(b) Effect of no introducing token system at Steel Gate, Terminal-I.

(c) Heavy losses suffered by the petitioner because of the breach of the terms and conditions committed by the respondents.

(d) In the circumstances of the case, are the respondents entitled to claim a sum of Rs. 5,35,000 per month from the claimants?

(e) That since the respondents are not able to enforce the terms and conditions of the licence agreement particularly to arrange providing wet garbage from the flight kitchen units of the four caterers and also failure to introduce token system at Steel Gate, Terminal-I, is the petitioner entitled to pay only a sum of Rs. 1,90,000/- per month during the period of contract?

(f) Other disputes related to the matter connected with the licence.”

11. Hans filed its Statement of Claims on 12th November 1999, *inter alia*, claiming the following reliefs:

(i) Hans should be permitted to pay AAI Rs.1,90,000 per month till such time AAI ensures supply of wet garbage from the FKUs of Taj, OFS, Ambassador and Chefair Flight Kitchen ('Chefair').

(ii) AAI should be held to have failed to introduce the token system at Steel Gate No.1 resulting in loss to Hans of Rs.1,50,000 per month from 25th June 1999 till the filing of the claim “and further till such time the token system is introduced at Steel Gate No.1.”

(iii) Hans also prayed for awarding of damages calculated on the above amount.

(iv) That because of the breaches committed by AAI, Hans was liable only to pay Rs. 1,90,000 per month and AAI had no right to invoke the BG which had been wrongly encashed by it and it should be asked to reimburse the said amount to Hans with interest @ 24% per annum.

12. It appears that on the failure of OFS to hand over the wet garbage to Hans, it filed a complaint against OFS at the Mahipalpur Police Station (P.S.).

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The vehicle of OFS, which was removing the wet garbage, was detained by the police. On 11th October 2000, AAI wrote to the Station House Officer ('SHO'), Mahipalpur P.S. that the matter had been discussed with the Manager of OFS to ensure the delivery of wet garbage to Hans.

13. AAI filed its reply to the statement of claims, denying that it had committed any breach of the agreement. No evidence was led by the parties. By an Award dated 5th December 2001 (hereinafter 'the first Award'), the learned Arbitrator rejected the claims of Hans, holding that Clause 16 of the OTCs did not make it obligatory on AAI to ensure the availability of garbage from the flight kitchens. The flight kitchens were not mentioned in the designated points in the schedule to the agreement and, therefore, the plea of Hans that AAI failed to ensure the supply of weight garbage from the flight kitchens was not tenable and there was no occasion for Hans being granted any concession in the licence fee on account of non-availability of garbage in general and from any specific source in particular. Likewise, any claim on the basis of failure to pay AAI to introduce the token system was also not tenable. Hans had failed to substantiate any losses suffered by it and at no time had it invoked Clause 21. At no point of time, AAI bound itself to supply certain quality and quantity of garbage to be provided to Hans. There were, therefore, no breach of the terms and conditions of the agreement by AAI.

14. Aggrieved by the above Award, Hans filed OMP No.1 of 2002 under Section 34 of the Act. The said petition was allowed by a judgment dated 6th May 2003 by the learned Single Judge. It was held that the learned Arbitrator had totally misconstrued the clauses of the contract in holding that AAI was not required to ensure that wet garbage from the flight kitchens was also

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handed over to Hans. It was held that the various clauses of the contract, read with the correspondence between the parties, "clearly envisage the removal of wet garbage from flight kitchens." The operative part of the said judgment in para 15 read as under:

"15. In view of the foregoing, this Court is of the opinion that the Award of the sole arbitrator, to the above effect was not based on true construction of the terms and conditions of the contract between the parties and correct appreciation of the material inasmuch as he has ignored the certain important clauses of the agreement while arriving at the said findings. In turn it would mean that the award rendered by the arbitrator is clearly in conflict with the public policy of India and therefore, is liable to be set aside. As the claim of the petitioner for damages has been declined and a nil award given on the basis of incorrect construction of the contract between the parties, this Court is of the opinion that it is necessary in ends of justice if the Award is remitted back to the Arbitrator with the direction that the Arbitrator will read the contract between the parties as inclusive of a contract for removal of wet garbage from the four flight kitchens namely Air Taj Air Caterer, Oberoi Flight Service, Ambassador Flight Kitchen and Shefair Flight Kitchen, besides from the designated points as appearing in Annexure "A" of the Licence Agreement dated 8.7.99. In the light of this, the Arbitrator will proceed further to enter the reference as directed by this Court vide order dated 14.10.99."

15. The above judgment led to the second round of arbitration. The same learned Arbitrator, on remand, passed an Award dated 5th July 2005 (hereinafter 'the second Award'), again rejecting the claims of Hans. It was held in the second Award that Hans had not filed any document regarding the non-supply of garbage after 1999-2000. From the documents on record as well as the conduct of the Claimant, it was clear that Hans was receiving wet garbage and paying the monthly licence fee. Accordingly, it was held that Hans had failed to prove that the wet garbage was not handed over to it and, therefore, was not entitled to the sums claimed. Hans had also not led

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evidence to prove that it was entitled to damages for the specific period of the contract. It failed to quantify the garbage or the damage or loss suffered. Hans had the option of not paying the licence fee or terminating the agreement if the wet garbage was not being handed over to it. It was strange that far from raising any such dispute, Hans continued to pay the monthly licence fee of Rs. 5,35,000 along with 10% escalation for the later years. It was, therefore, held that Hans was not entitled to the sums claimed.

16. The second Award of the learned Arbitrator was challenged by Hans in this Court by filing OMP No.285 of 2005 under Section 34 of the Act. By an order dated 16th July 2007, the second Award was set aside by a learned Single Judge of this Court. It was held that despite the learned Single Judge having found in the order dated 6th May 2003 that the learned Arbitrator had overlooked the aspect of removal of wet garbage and remanded the matter to the learned Arbitrator with the direction that the learned Arbitrator would "read the contract between the parties as inclusive of the contract for removal of wet garbage from the four flight kitchens", the second Award ignored the said aspect. The matter was again remanded but this time to a sole Arbitrator appointed by the Court by its order dated 20th July 2007.

17. The learned Arbitrator, who was so appointed by the order dated 20th July 2007, has passed the impugned Award dated 18th March 2008 (hereinafter 'the third Award'), in which AAI has been asked to pay Hans a sum of Rs. 1,62,63,984 along with interest at 7% per annum "on Rs. 26,64,000/- from the expiry of first year of the licence till payment. Interest @ 7% per annum on Rs. 29,30,400/- from the expiry of the second year till payment. Interest @ 7% per annum on Rs. 32,13,440/- from the expiry of the third year till

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payment. Interest @ 7% per annum on Rs. 35,45,784/- from the expiry of fourth year till payment and interest @ 7% per annum on Rs. 39,00,360/- per annum from the expiry of five years of the licence till payment.” Further, AAI has been asked to pay the Respondent Rs. 1,00,000 as costs.

18. Aggrieved by the third Award, AAI has filed OMP No.295 of 2008. Aggrieved to the extent that interest has been awarded only @ 7% per annum and not 18% per annum, Hans has filed OMP No.370 of 2008.

19. During the pendency of the third Award, the issue arose as regards the entitlement of Hans to further benefits for the period of nine months beyond 25th June 2004. The issue went before the yet another learned Arbitrator who gave the fourth Award on 2nd April 2009. By the fourth Award, it was directed that Hans would be entitled to damages at the same rate granted to it in the third Award for the further period of nine months. Both the parties were aggrieved by the said fourth Award. Mr. Sunil Kumar Yadav, the sole proprietor of Hans, has filed OMP No.345 of 2009 on the ground that the 10% increase in the licence fee should have been accounted for a further period of nine months and the interest should have been @ 18% per annum. AAI has filed OMP No.364 of 2009 against the fourth Award to the extent that no amount, at all, should have been awarded to Hans.

20. This Court has heard the submissions of Mr. Abhinav Vashisht, learned Senior counsel for AAI and of Mr. Sandeep Sethi, learned Senior counsel for Hans.

21. The first issue relates to the scope of the proceedings before the learned Arbitrator who passed the impugned third Award. It was sought to be urged by Mr. Vashisht that the issue decided in the first and the second Award filed pertained to entitlement of Hans to collect the wet garbage, andt what was remitted to the learned Arbitrator to decide was whether at all Hans was entitled to any loss or damages and to what extent. In other words, it was sought to be urged that the learned Arbitrator erred in holding that Hans was to be compensated by AAI for the loss suffered by it on account of it being denied wet garbage from the FKU and that this was in the teeth of Clause 19 of the licence agreement as well as Clause 19 of the OTC. Secondly, it was submitted that the annual licence fee agreed was Rs. 5,35,000 and there was no scope for the reduction of the licence fee at all on any account whatsoever. Thirdly, it was sought to be urged that the evidence on record showed that, in fact, Hans was actually offered wet garbage by the FKUs but did not collect it.

22. Mr. Sethi referred to the first and the second Award which were comprehensively set aside by the learned Single Judges of this Court. According to him, there was no scope left for AAI to argue that Hans was not entitled to be compensated for being deprived of the wet garbage from the FKUs. In other words, only the quantum of damages to which Hans was entitled had to be decided. It is pointed out that the third Award, in fact, only determines the reasonable sum of compensation. Two alternative figures were suggested by Hans before the learned Arbitrator. The higher sum was based on the licence fee charged by the FKUs from the Contractors who collected the wet garbage. The learned Arbitrator awarded the lesser figure. It is further submitted that inasmuch as the licence agreement required Hans to pay AAI

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penal interest at 18% per annum on delayed payment of licence fee, the same yardstick would apply as regards interest payable by AAI to Hans on the quantified amount of damages. He submitted that as regards the fourth Award, there was no justification for the learned Arbitrator to overlook the clause of the licence deed which required the licence fee to be enhanced by 10% every year. In other words, there damages for the nine months should have been at a rate 10% higher than what was granted by the third Award.

23. The judgment dated 6th May 2003 of the learned Single Judge set aside the first Award in its entirety. In other words, the finding of the learned Arbitrator in the first Award that Hans was not entitled to any claim, based on deprivation of wet garbage from the FKUs was set aside by this Court. Para 15 of the judgment dated 6th May 2003 makes is clear that on the question of damages to which Hans would be entitled, the matter had to be remitted to the learned Arbitrator. In fact, in the second Award, the learned Arbitrator again went into the question whether Hans was entitled at all to collect wet garbage from the FKUs. This Court, while setting aside the second Award, took umbrage and held that the learned Arbitrator while passing the second Award ignored the specific directions in the judgment dated 6th May 2003.

24. Consequently, at the present stage of challenge to the third Award, AAI ought not to be permitted to again urge that on the basis of Clause 19 of the licence agreement and the OTCs, Hans is not entitled to be compensated for being deprived of the wet garbage. The only issue that remained to be decided in the third round of arbitration was the quantum of damages to which Hans was entitled.

25. AAI is not right in its submission that Hans was claiming reduction in the licence fee. What Hans was asking for was to be compensated for the loss it incurred on account of being deprived of the wet garbage for the five years and then again for a period of nine months when the licence was renewed. Therefore the question of applicability of Cause 19 of the agreement or the OTC did not arise. Two different bases were put forward by Hans for the claim for compensation – one was the differential between the rates offered by it for the dry garbage, i.e., Rs.1,13,000 per annum and Rs.5,35,000 along with an enhancement of 10% every year if it was given the entire wet garbage. The alternative that Hans proposed for quantifying its loss was to go by the licence fee offered by the parties to the FKUs for lifting their wet garbage. No doubt, this would give a reasonable estimate of the value of the wet garbage, which Hans was otherwise entitled to.

26. This Court is unable to agree with the submissions on behalf of AAI that Hans had failed to quantify the loss suffered by it. The fact that Hans suffered loss was not in doubt. To that extent the third Award is right. As far as the yardstick for determining the loss is concerned, the differential between the two rates offered by Hans, even at the stage of execution of the licence agreement, was a reasonable basis. In the third Award, the learned Arbitrator had adopted that as the basis for determining the loss. This was a plausible view for the learned Arbitrator to take and cannot be said to be suffering from any patent illegality.

27. As regards the awarding of interest at 7%, again this Court is not impressed with the submissions made on behalf of Hans that the interest charged by AAI for the late payment of licence fee should form the basis for

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awarding interest on the compensation payable to Hans by AAI for the loss suffered by Hans. The reasons for charging of penal interest for late payment obviously cannot be the basis for awarding interest on money dues by AAI to Hans. The award of interest was within the discretion of the learned Arbitrator and it cannot be said that he has exercised it erroneously.

28. Therefore, as far as the third Award is concerned, this Court finds no ground having been made out for interference under Section 34 of the Act.

29. As far as the fourth Award is concerned, the differential licence fee offered by Hans was only a yardstick for determining the loss suffered by it. Once it is clear that what was being awarded to Hans was not the refund of any excess licence fee but only the compensation for the loss suffered by it, then the quantification of the loss for the nine months' period on the same basis as determined in the third Award could not be said to be erroneous or suffering from any patent illegality. This Court therefore does not find any reason to interfere with the fourth Award of the learned Arbitrator.

30. Resultantly, all the four petitions are dismissed, but in the circumstances, with no order as to costs.



S. MURALIDHAR, J.

November 20, 2012

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