

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 520/2013

B.R. ARORA & ASSOCIATES (P) LTD. Petitioner
Through: Ms. Anusuya Salwan with
Mr. Vikas Sood, Advocates.

versus

AIRPORT AUTHORITY OF INDIA Respondent
Through: Mr. S.K. Chandwani and Mr. Sameer
Chandwani, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
10.03.2014

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') by M/s B.R. Arora & Associates (P) Ltd. is to the Award dated 25th March 2013 passed by the sole Arbitrator in respect of the disputes between it and the Respondent, Airport Authority of India ('AAI') arising of a contract for construction of "Extension and strengthening runway and allied work" at the Maharana Pratap Airport, Udaipur.

2. The estimated cost of the tender was Rs.3721.50 lakhs. The stipulated date of start was 26th March 2007 and the stipulated date of completion was 25th June 2008, i.e., 15 months after the date of start. It is not in dispute that extension of time ('EOT') was granted by the AAI to the Petitioner from time to time. The last such extension was granted from 22nd April 2009 up to 15th May 2009. For the EOT up to 21st April 2009, there was no levy of

compensation. However, for the last extension from 22nd April 2009 to 15th May 2009, EOT was granted by AAI with a levy of compensation of Rs.29,000.

3. It is also not in dispute that the contract was foreclosed on 15th May 2009. According to the Petitioner there were various hindrances (detailed in the document labelled as C-142) including rainy season and VVIP movement, profile correction finalization, suspension of bituminous works due to low temperature, delay in handing over of site for the runway at the 08 end and the runway at the 26 end, delay in finalization of job mix formula (overlapping hindrance), delay in shifting of runway lights at 08 end, delay in handing over site for perimeter road including changes in design of road cross section and breaches in Airport boundary wall, extra work beyond the scope of agreement like 02 nos. taxi links etc. There were 1030 hindrance days of which the extension was approved by the AAI for 365 days.

4. The disputes between the parties were referred by the AAI to the arbitration of Mr. D.N. Bhargava, a retired Chief Engineer of CPWD. The Petitioner preferred 14 claims and the Respondent preferred 4 counter claims.

5. By the impugned Award dated 25th March 2013, the learned Arbitrator allowed Claim No. 1 and directed the AAI to release Rs.29,000 recovered from the bills of the Petitioner towards the compensation for the EOT granted between 22nd April 2009 and 15th May 2009. After analysing the evidence in respect of Claim No.1, the learned Arbitrator came to the following conclusions:

“Above facts clearly show that respondents were responsible for initial delay on account of profile correction, on finalization of 3 Non-Schedule items and also for restriction on 08 end due to restoration of ILS, it is also a facts that respondents could not give site for perimeter road even up to 20th April 2009 when the work had to be foreclosed.

I would therefore consider it fit to release the compensation of Rs.29000 so recovered.”

6. The learned Arbitrator proceeded to allow some of the claims under Claim No.1.1. Claim No.2 was for a sum of Rs.34,56,295 being the compensation on account of delay in making payment of running bills and final bill and unjustified recoveries. The learned Arbitrator awarded simple interest @ 6% pa for the delay in payment of escalation bills in respect of Claim No.2(A), the learned Arbitrator awarded a total sum of Rs.30686. Claim No.2(B) was for delay in payment of RA bills. The learned Arbitrator calculated the interest @ 9% pa and awarded Rs.17,466 for the said claim. Claim No. 2(C) was for ‘unjustified recoveries’. He awarded 6% pa and calculated the total sum payable as Rs.7249.

7. In respect of the aforementioned three claims i.e. 2(A), 2(B) and 2(C), it is pointed out by Ms. Anusuya Salwan, learned counsel for the Petitioner that the learned Arbitrator committed an arithmetical error in calculating the amount of interest under each of these claims. The correct calculation in respect of each of these claims has been set out by the Petitioner at pages 7 and 10 of the petition. In terms of all these calculations the amount payable under Claim No.2(A) was Rs.2,97,080 and under Claim No.2(B) Rs.2,09,588 and under Claim No.2(C) Rs.87,156.

8. The Petitioner filed an application before the learned Arbitrator under Section 33 of the Act for correction of the Award in respect of the interest amounts under Claim Nos. 2(A) to 2(C). It is stated that the learned Arbitrator refused to entertain the application much less take it on Board and consider it. A copy of the said application was given in advance to the Respondent.

9. Learned counsel for the Respondent submits that this is a matter for which the Petitioner ought to have approached the learned Arbitrator under Section 33 of the Act. He states that a plea for correction of the Award cannot lie under Section 34 of the Act. However, it is seen that the Respondent has not disputed the correctness of the calculation of the interest amounts by the Petitioner in respect of Claims 2 (A), 2 (B) and 2 (C) as set out in pages 7 and 10 of the petition. It is pointed out by the learned counsel for the Respondent that the amounts in respect of the Claim Nos. 2(A) to 2(C) as awarded by the learned Arbitrator have already been paid to the Petitioner.

While it is true that the Arbitrator does have the power under Section 33 of the Act to correct arithmetical errors in the Award, the fact remains that the application filed by the Petitioner under Section 33 of the Act was not entertained by the learned Arbitrator. The Respondent does not dispute that the learned Arbitrator has in the impugned Award dated 25th March 2013 erroneously calculated the interest amounts under Claim Nos. 2(A), 2(B) and 2(C). The Court is of the view that these are arithmetical errors which ought to have been corrected by the learned Arbitrator in exercise of its power under Section 33 of the Act, but which he failed to do. The Court can therefore set right the aforementioned error and directed that the interest amounts awarded under Claim Nos. 2(A), 2(B) and 2(C) should be in terms

of the calculations as set out by the Petitioner in the present petition at pages 7 [for Claim No.2(A)] and page 10 [for Claim Nos. 2(B) and 2(C)]. The objections in respect of Claim Nos. 2(A), 2(B) and 2(C) are decided accordingly.

10. The next challenge is to the Award in respect of the Claim No.5. It was for compensation for loss of profit due to reduction in turnover as a result of the default committed by AAI. The entire reasoning of the learned Arbitrator in respect of the aforementioned claims reads as under:

“It is established that delay in finalization of work had been due to various reasons and therefore claimant is not entitled any further compensation for loss of profit due to reduction in turnover. No award for this item”.

11. As rightly pointed out by Ms. Salwan, apart from the fact that virtually no reasons have been given for rejection of the claim, the observation that the delay in completion of the work was “due to various reasons” contradicts the finding of the learned Arbitrator in respect of Claim No.1 which notes that it was the Respondent which was responsible for “initial delay on account of profile correction, on finalization of 3 Non Schedule items and also for restriction on 08 end due to restoration of ILS”. The Arbitrator further found the fact that the AAI could not give site for perimeter road even up to 20th April 2009 when the work had to be foreclosed. The Award of the learned Arbitrator in respect of the Claim No.5 is unsustainable in law as it is inconsistent with the findings rendered elsewhere in the impugned Award. In ***UOI v. V Pundarikakshudu & Sons, 2003 (7) SCALE 323***, the Supreme Court in similar circumstances held that the Award would be vulnerable to being set aside. Consequently, this Court sets aside the

impugned Award as regards Claim No.5.

12. Claim No.6 was for compensation for the loss due to payment made to the idle labour. Claim No.7 was for compensation for expenditure on idle machinery. Claim No.8 was for compensation due to escalation during the extended period of contract agreement due to abnormal increase in prices of input material. The learned Arbitrator rejected the said claims for the reason that the Petitioner was unable to substantiate the claim. There is no discussion under Claim Nos. 6,7 and 8 of the evidence produced by the Petitioner. Although there is a reference by the learned Arbitrator to such evidence, it was simply stated that the claim “could not be substantiated”.

13. It was pointed out by the learned counsel for the Respondent in respect of Claim No.8 that the claim for compensation could be at best for the extended period in terms of the formula already set out in the contract and not on the basis of any other formula. He placed reliance on the decision of this Court in *DDA v. U. Kashyap, 1998 VII AD (DELHI) 300*. In other words, he submitted that the Petitioner would not be entitled to escalation for the extended period on a formula other than what was agreed between the parties.

14. The Court finds that the learned Arbitrator has not given any reasons whatsoever, much less the reason now sought to be provided by the Respondent, for rejecting Claims 6 to 8. If there was evidence placed before the learned Arbitrator the least that could be expected is that there was application of mind to the evidence, a discussion of the contentions of the parties and the reasons given for deciding the claims. It has been emphasised

by the Supreme Court in *ONGC Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263 that one of the parameters for testing whether an Award is contrary to the 'public policy of India' is to examine if the Arbitrator has adopted a 'judicial approach'. One facet of such judicial approach is for the Arbitrator to give reasons for his decision. The Court finds that in the impugned Award there is neither any discussion of the evidence nor is there any reason given for rejecting Claims 6 to 8. Therefore the Award in respect of Claims 6 to 8 is unsustainable in law and it is hereby set aside.

15. Claim No. 9 was for compensation due to expenditure incurred on extension of bank guarantees from time to time. This was connected with the issue of grant of EOT. Here again there is inconsistency in the Award when compared to the award in respect of Claim No. 1. In rejecting Claim No. 9 the learned Arbitrator held that the work was delayed 'due to various reasons' whereas in deciding Claim No.1 he held that the initial delay was due to the Respondent.

16. Claim No.10 was for refund of interest recovered on mobilization advance. The case of the Claimant was that on account of the default of the Respondent it could not utilize the mobilization advance for timely execution of the work and therefore recovery of interest on the mobilization advance was not justified. This claim was therefore linked to the question as to the EOT granted and the inability to complete the work within the stipulated period as a result thereof. The finding given under Claim No.10 is again extremely cryptic and inconsistent with the findings given under Claim No.1. Consequently, this Court is unable to sustain the impugned Award even in respect Claim Nos. 9 and 10.

17. The Award in respect of the other claims, and the Award rejecting the counter claims of the Respondent have not been challenged.

18. To summarize the findings of this Court:

(i) the impugned Award insofar as the calculation of the interest amounts in respect of Claim Nos. 2(A), 2(B) and 2(C) will be corrected to read as the interest amounts in respect of each of the said claims as set out in the petition at pages 7 [for Claim No.2(A)] and page10 [for Claim Nos. 2(B) & 2(C)]. The differential amounts will now be payable by the Respondent to the Petitioner.

(ii) The impugned Award in respect of Claim Nos. 6,7,8,9 and 10 is set aside. It will be open to the Petitioner to seek afresh arbitration in respect of the aforementioned claims. In that event the objections of the Respondent to the claims are also left open to be urged before the learned Arbitrator. A fresh Award will be rendered given on those claims without reference to the impugned Award dated 25th March 2013.

19. The petition is disposed in the above terms.

S. MURALIDHAR, J

MARCH 10, 2015

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