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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 25th May 2015
Date of Decision: 7th July 2015

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O.M.P. 1264/2013

AIR INDIA LTD

..... Petitioner

Through: Mr. R.S. Suri, Senior Advocate with
Mr. Manoj Arora, Mr. Siddharth Shanker and Ms.
Pallavi Tayal Chadda, Advocates.

versus

GATI LTD

..... Respondent

Through: Mr. P.V. Kapur, Senior Advocate with
Mr. Vijay Nair, Mr. Ravi Gandhi, Mr. Puneet
Damodar and Mr. Ritesh Sharma, Advocates.

And

O.M.P. 1082/2014

GATI LTD

..... Petitioner

Through: Mr. P.V. Kapur, Senior Advocate
with Mr. Vijay Nair, Mr. Ravi Gandhi, Mr.
Puneet Damodar and Mr. Ritesh Sharma,
Advocates

versus

AIR INDIA LTD.

..... Respondent

Through: Mr. R.S. Suri, Senior Advocate
with Mr. Manoj Arora, Mr. Siddharth
Shanker and Ms. Pallavi Tayal Chadda,
Advocates.

CORAM: JUSTICE S.MURALIDHAR

J U D G E M E N T

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07.07.2015

1. These are two petitions under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenging the unanimous Award dated 17th September 2013 of a three member Arbitral Tribunal ('AT') in the disputes between the parties.

2. A wet lease freighter agreement ('WLA') was entered into between GATI Ltd. ('GATI') and Indian Airlines Ltd. ('IAL') for lease of five freighter Boeing 737-200 aircrafts. As a result of the merger of IAL with Air India Ltd. ('Air India'), all the rights, interest, duties, liabilities and obligations of IAL and Air India have been vested in the National Aviation Company of India Ltd. ('NACIL').

3. Air India owned old Boeing 737-200 aircrafts which were operated by its passenger flight service called Alliance Air. Since the aircrafts were not in good shape from the point of view of safety and security, Air India decided to convert them into cargo freighters. Proposals were invited by Air India from interested parties to block space in the said cargo freighters which were to be operated under the 'hub and spoke' pattern. An offer was submitted by GATI on 9th April 2007, and its acceptance resulted in the WLA being entered into between the parties on 16th May 2007.

Relevant clauses of the WLA

4. In terms of the WLA, Air India agreed to lease five freighter Boeing 737-200 aircrafts to GATI for a period of five years commencing from 15th July 2007 till 14th July 2012 on the terms and conditions contained in the agreement. The aircrafts were to be provided with cockpit crew and with complete maintenance, operations and full insurance.

5. In terms of Clause 3.1 of the WLA, the leased aircrafts were to offer payload of approximately 15 tons on each of them “on committed basis for agreed freighter flights for the hours mentioned in Clause 5.1”. For the rest of the duration, Air India had discretion to use the leased aircrafts. Air India was to ensure that the leased aircraft was in compliance with the minimum ICAO requirements relating to their airworthiness standards. Air India was to comply with the specific requirements of the Directorate General of Civil Aviation (‘DGCA’) of India; it was to obtain all Government clearances including clearances of crew to operate the leased aircraft. In terms of Clause 3.4, the operations and the maintenance of the aircraft were to be in accordance with the rules and standards applicable in India and the approved maintenance and flight manuals of Air India as per the recommendations of the manufacturer of the aircraft. Under Clause 3.6, it was provided that Air India assumed no responsibility for loss of available payload due to any load restrictions or penalties imposed on the sectors of operations that may arise based on the performance of the aircraft.

6. Under Clause 4.1, it was stated that the aircrafts were scheduled to be inducted as per Clause 5.6 which set out a table of the dates of such schedule. The five aircrafts were numbered as A1 to A5. The scheduled date

of the operation of the aircraft with reference to the in-date and out-date for conversion at the vendor's location were as under:

Aircraft	Aircraft proposed in date at Vendors Location for Conversion	Aircraft out Date from Vendors Location after Conversion	Aircraft Schedule date for Operation
A1	25 th Mar'2007	30 Jun'2007	15 Jul'2007
A2	15 May'2007	15 Aug'2007	01Sep'2007
A3	01 Jul'2007	30 Sep'2007	15 Oct'2007
A4	15 Aug'2007	15 Nov'2007	30 Nov'2007
A5	01 Oct' 2007	30 Dec' 2007	15 Jan'2008

7. Clause 4.1 further provided that in case of any delay in the induction of the aircrafts, Air India “shall not be liable” for such delay. Beyond the initial term of the lease, the WLA was extendable for a further period “by mutual consent”. GATI was not to sub-lease the leased aircrafts to other parties. However, GATI was to have a preference in chartering the aircraft subject to the payment of actual charter rate before the same was offered to the third party.

8. Clause 5 dealt with the rental. Under Clause 5.1, GATI was to pay Air India the rental payment - per block hour flown (‘lease rental’). GATI gave Air India ‘a minimum guarantee utilization of aircraft’s to operate 25 days in a month with minimum seventeen hours per day on five aircrafts operation i.e. 425 per month subject to the reasons of *force majeure* and 'availability of the freighter aircrafts'. Initially, GATI was to pay Air India on actual flown hours till the induction of 5th aircraft in operation. The block

hours would be as per the actual block time recorded in the aircraft technical logbook. Air India was to raise an invoice, duly supported by copies of the certified logbook for actual number of block hours by the 5th day of the consecutive next month and if that was a holiday, the next working day. The payment of lease rental was to be free of any deductions, other than the applicable taxes and disputed amounts or set offs as agreed between the parties. Clause 5.8 stated that notwithstanding the Clauses 5.1 to 5.7, Air India “does not in any manner warrant or commit to the dates of induction/operation of the Aircraft as set forth in this Agreement. Any delay in the induction/operation of the Aircraft shall not be held against the Lessor and the Lessor shall not be liable in any manner whatsoever towards the Lessee”.

9. Clause 6 dealt with space utilization. GATI was to produce and offer, at its will, the cargo as per space made available for each sector. If for any reason the space on any sector remained unutilized, GATI at its sole discretion was to share the unutilized space with Air India to fill up unutilized payload. Air India was to offer such cargo to be carried as per the market rates for each sector. As per Clause 6.1A, if GATI was unable to utilize the entire space allocated aboard the aircraft due to inability to provide space/equipment by Air India, GATI was not to pay Air India such charges calculated on pro-rata basis towards ‘remunerable space allocated’. However, if GATI was unable to utilize the entire space due to deficiencies/lack of booking etc. on the part of the GATI, then the entire lease charges were payable to Air India.

10. GATI was to provide an irrecoverable bank guarantee ('BG') in favour of Air India's bank equivalent to three months estimated billing (Clause 8.1). Upon GATI's failure to make payment of the undisputed amounts within the stipulated period, Air India had the right to invoke the BG after giving due notice. The BG which was valid for a period of three years was to remain valid for six months after expiry of the lease.

11. Clause 12.1 provided that either party could terminate the WLA giving 120 days' reasoned notice in writing to the other, and upon expiry of the notice period, the WLA "shall stand terminated". The other circumstances under which the parties could terminate the WLA forthwith were set out in Clause 12.2.

12. Annexure 1-A of the WLA provided for the freighter operation schedule giving the dates of induction for operation of the aircrafts and total flying hours for number of aircrafts. By 15th January 2008, five aircrafts were expected to fly altogether 16.50 hours per day. In terms of Clause 8.1 of the WLA, GATI furnished two BGs of 15 crores each. This amount was arrived at after estimation of lease rent to be billed for four freighters for a period of three months since, after entering into the WLA, Air India informed GATI that it would be in a position to provide GATI with only four freighters.

Events triggering the arbitration

13. Both the BGs were invoked by Air India on 24th March 2009 against part satisfaction of the demand of Rs.53.35 crores which it claimed was due and payable to it by GATI. By a letter dated 17th March 2009, GATI

terminated the WLA. Air India by its letter dated 23rd March 2009 protested and termed the termination as illegal.

14. GATI invoked the arbitration clause by its letter dated 19th March 2009 and thereby the AT came to be constituted. Apart from cost of the arbitral proceedings, GATI preferred eight distinct claims and Air India preferred eight counter claims. On the basis of the pleadings, there were as many as twenty issues framed by AT. There were 13 witnesses examined on behalf of the GATI (CW-1 to CW-13) and 12 witnesses on behalf of Air India (RW-1 to RW-12). GATI filed forty one volumes of documents and Air India filed three volumes of documents. Then there were affidavits and interrogatories also filed.

Issue No.1

15. Issue No.1 was whether there was a diversion of an aircraft by the Air India as claimed by GATI in para 18 of the statement of claim ('SOC'). The case of GATI was that Air India delivered the first two of the five proposed aircrafts beyond the stipulated date. While the first two aircrafts, were as per Clause 5.6 of the WLA, to be delivered on 15th July and 1st September 2007 respectively, they were in fact delivered only on 17th October and 27th October 2007 respectively.

16. According to GATI, it learnt much later that in breach of the WLA, Air India had in fact delivered the first aircraft, after it was converted for use, to a competitor of GATI, viz., INDIAPOST. Further, the third aircraft which was to be delivered on 15th October 2007 was in fact delivered only on 7th

May 2008. Moreover, within twenty four days of delivery, Air India informed GATI that the said aircraft would have to undergo engineering checks and would have to be withdrawn. Despite the protest of GATI, the third aircraft was withdrawn on 31st May 2008. GATI claimed that the withdrawal of the third aircraft was made on a false pretext, that it was withdrawn for being provided as a standby aircraft to INDIAPOST and that it came to its knowledge when by inadvertence a bill raised by Air India for operation of the third aircraft which was meant for INDIAPOST was delivered to GATI. The third aircraft was again offered by email dated 11th July 2008 and fourth by email dated 22nd July 2008. GATI's case was that on account of the non-adherence to the delivery schedule, it could not plan its business in advance, nor it could enter into contracts with customers, thereby incurring heavy business losses. The case of GATI was that Air India's non-adherence to the delivery schedule and the diversion of the freighter aircrafts to other parties in violation of the WLA amounted to a 'repudiatory' breach by Air India.

17. The AT found that as far as the statement of defence ('SOD') of Air India was concerned, it did not deal with para 18 of the SOC where GATI had pleaded about the diversion of the aircraft. The case of Air India emerged in para 17 of the affidavit of Mr. S.K. Sharma (RW-8) where it was stated that the operations under the WLA were 'charter operations' and no aircrafts was to be delivered to GATI. In para 18 of its affidavit, RW-8 stated that no freighter was deployed in the services of INDIAPOST in contravention of the WLA.

18. From the answers to the interrogatories furnished to the witnesses of Air India, the AT noted that according to Mr. Anil Shakhder (RW-2), aircraft bearing registration VT-EHH was operated under charter to INDIAPOST with effect from 24th August 2007. He stated that there was no delivery to be made of aircraft and no specific registration number was promised in the WLA. He confirmed that the aircraft VT-EHH was sent to Miami for conversion on 18th March 2007 and received back on 6th July 2007.

19. The AT referred to the 93rd meeting of the Board of Directors ('BOD') of IAL held on 11th July 2007, which recorded that the first converted aircraft would be given to INDIAPOST for operation in the north-eastern sector and that GATI's operation would commence from 1st September 2007 in place of 15th July 2007, which had been agreed to in the WLA. The first freighter was resolved to be painted with logos of Air India cargo and Department of Post ('DOP'). A sum of Rs.12 crores had been deposited by DOP as advance which was resolved to be adjusted in the billing amount for operation of the freighter aircrafts in the north-east sector.

20. The Board also noted that the first converted aircraft was to be operated in the north-east sector and therefore "the operations of Nagpur Hub pattern would be delayed". The agreement between Air India and INDIAPOST was dated 23rd August 2007, which was more than three months after the date of the WLA entered into between GATI and Air India. The registration number of the aircraft was also mentioned in the agreement with the INDIAPOST as VT-EHH.

21. The argument advanced by Mr. R.S. Suri, learned senior counsel for Air India before this Court was the same as advanced before the AT which was to the effect that no specific aircraft was agreed to be given to GATI. It was urged by Mr. Suri that the agreement was in fact in the nature of a charter agreement and was not to be considered as a WLA. According to Mr. Suri, GATI was in the know of the fact that the first freighter aircraft was given on lease to INDIAPOST and had never raised any objection during the entire operation or even in its termination notice dated 17th March 2009. The agreement itself did not indicate any aircraft registration number which was in fact the identification mark assigned to it by the DGCA. There was no exclusivity provided in the WLA to the effect that Air India was bound to use only the converted freighters for operations under the WLA.

22. Mr. Suri also referred to the minutes of meeting ('MOM') dated 5th September 2007, which stated that GATI was expecting the second freighter to arrive after conversion. The entire case of GATI in this regard was an afterthought. He further pointed out that the contentions of Air India as stated in Note 4 of its final submissions before the AT were not even discussed by the AT. In it, it was stressed that the usage of the term 'wet lease' was a misnomer as the operations were in the nature of 'charter flight'. The invoices raised on GATI and accepted by it and paid for were only for such charter flights. The BG also stated that it was a charter flight.

23. In reply, Mr. P.V. Kapur, learned senior counsel appearing for GATI, pointed out that there was correspondence between the parties on the proposal to change the title of the WLA to a charter agreement. However,

no such was carried out. The WLA itself envisages that the aircrafts to be given to GATI were to be painted with the logo of GATI. Therefore whether the agreement was incorporated as a charter or wet lease, the fact was that specific identified aircrafts were to be provided to GATI. He reiterated that the minutes of the BOD meeting dated 11th July 2007 itself recorded that the first aircraft was meant to be given to INDIAPOST. There was no denial of this fact in the SOD filed by Air India before the AT.

24. The Court has been shown the minutes of the meeting held between the parties on 5th September 2007. Part-1 of the said meeting states "The 2nd Aircraft to GATI is arriving on 16.09.2007 duly converted and it would take 15 days for completing the formalities and painting". Admittedly, there was no aircraft delivered to GATI prior to September 2007. It is not possible to read the minutes of the meeting dated 5th September 2007 as an admission by GATI that it acknowledged that the first aircraft has already been given to INDIAPOST by Air India. On the other hand, as rightly noted by AT, the minutes of the 93rd meeting of the BOD held on 11th July 2007 notes that five aircrafts were already at Miami for conversion and it had been decided to convert a sixth aircraft on the same basis as well. The minutes clearly recorded "The first converted aircraft to be given to DOP for operations in NE stations as per the schedule and GATI operation to commence from 01.09.2007." The above minutes therefore acknowledge that despite the agreement with GATI, the BOD had unilaterally decided to postpone the commencement of the operations to 1st September 2007 without the knowledge of GATI. When read with these minutes the reference to the 'second freighter' in the minutes dated 5th September 2007 could only refer

to the second freighter aircraft which was then given to GATI as the first aircraft under the WLA.

25. The Court is unable to agree with the submissions of Mr. Suri that the AT has misread and misinterpreted the WLA. The correspondence between the parties shows that there was no agreement between the parties to rephrase the WLA as a charter agreement. The conclusion of the AT that the aircraft VT-EHH was definitely the subject matter of WLA and that its allotment to INDIAPOST was in breach of the WLA appear to be a perfectly possible conclusion on the reading of the entire evidence. Clearly the minutes of the BOD meeting of 11th July 2007 reveals that IAL was fully aware of the consequences of the breach it was committing of the WLA in diverting the first freighter aircraft to INDIAPOST. The Court therefore finds no error having been committed by the AT in deciding the Issue No.1 in favour of GATI.

Issue No.2

26. Two questions were addressed under Issue No.2. The first was whether there was a delayed and deficient delivery of aircrafts [2(a)] and whether the dates mentioned in Clause 5.8 of the agreement were promised dates or tentative dates [2(b)]. As far as the first freighter aircraft was concerned since it was delivered only on 17th October 2007, instead of 15th July 2007, clearly there was a delay of more than three months. Likewise, the second aircraft was offered on 27th December 2007 after a delay of more than four months. The third, which was initially offered on 7th May 2008, and then withdrawn, reoffered on 11th July 2008, was with a delay of seven months

and the fourth aircraft was offered on 27th July 2008 with a delay of more than eight months. As regards the fifth freighter, the finding of the AT was that there was no documentary evidence to support the plea that it was at all offered to GATI but not taken delivery of. The AT accordingly concluded that the fifth freighter was in fact never offered. Both the issues were accordingly answered in favour of GATI by the AT.

27. Mr. Suri submitted that the AT erroneously interpreted Clause 5.8 of the WLA which only provided for tentative dates. The delay attributable to the agencies in Miami, USA in converting the aircrafts could not be fastened on Air India. This aspect had been dealt with in a supplement to Note-3 which was submitted to the AT by Air India. The air operator licence which had been filed during the arbitral proceedings proved that Air India converted six aircrafts and not five. Both the Clauses 4.1 and 5.8, according to Mr. Suri, clearly provided that any delay on the part of the agencies entrusted with the conversion of the aircrafts, would not make Air India liable. Apart from not proving that it suffered any loss of business, GATI did not lead any evidence to show that it had any problems with the postponement of the commencement of the operations w.e.f. 18th October 2007. This only showed that GATI had prior knowledge that it was to start operations from October 2007 and not from 15th July 2007 as proposed in the WLA.

28. Mr. Kapur, in reply, pointed out that once the WLA itself had settled the schedule for induction of the aircraft, it was obvious that any delay would adversely affect the business of GATI. He submitted that the interpretation placed by the AT on Clauses 4.1 and 5.8 that they cannot offer protection

against unreasonable delay was a plausible interpretation. He pointed out that detailed reasons have been given by the AT in the impugned Award for its conclusions. He further submitted that what Air India was inviting the Court to do was to re-appreciate the evidence. At no point of time the Air India proved before the AT that it had a fifth aircraft ready to be offered to GATI. It was submitted that if the findings of the AT were plausible, this Court should not interfere with the findings.

29. The Court finds that the AT has discussed Clause 5.8 of the agreement threadbare. It has also made note of Clause 4.1 when setting out the various clauses in the agreement. It must be noticed here that Clause 4.1 makes a reference to Clause 5.6 and states that “in case of any delays in the induction of the Aircrafts, Lessor shall not be liable for such delay”. This is virtually repeated in Clause 5.8, which says that the delay in induction/operation of the aircraft shall not be held against the lessor and that the lessor “shall not be liable in any manner whatsoever towards the lessee.”

30. The AT has in detail explained how it came to the conclusion that “the protection against delay provided by Clause 5.6 of the agreement can at best be extended to ‘reasonable delay’ and not to an unreasonable one.” It is not possible to find any error having been committed by the AT, much less any patent illegality, when it says that the delay of “14 months for the delivery of fourth freighter from the date of commencement of the Agreement as against the originally scheduled period of six months cannot in any circumstances be held to be reasonable”.

31. The AT also took note of the fact of the withdrawal of the third aircraft on the false pretext of engineering check and making the same aircraft available to INDIAPOST in the North-Eastern sector by keeping GATI entirely in the dark about this. Clearly, as a result of the uncertainty over the delay for delivery of the aircraft to it, GATI could not plan its business. The AT accepted the plea that the sudden withdrawal of the third aircraft disrupted its commercial engagements and that these breaches were serious and caused damage to the business of GATI.

32. The Court also finds plausible the view taken by AT that “ commercial propriety also required disclosure from time to time and contemporaneously, by the Respondent to the Claimant, of the delay and reasons there for, as and when the delay was taking place”. The interpretation placed on Clause 5.8 read with Clauses 5.6 and 4.1 of the agreement cannot be said to be unreasonable. Consequently, as regards Issue No. 2(a) and 2(b), the Court holds that these were rightly answered by the AT in favour of GATI.

33. The AT then took up together Issue Nos. 3, 8 and 9. The questions addressed by the AT were whether there was no obligation of Air India to offer payload capacity of 15 MT since what the contract required was that it should provide ‘approximately 15 MT’, and whether as pleaded by Air India, GATI was unable to generate the cargo of 15 MT in most cases and therefore Air India in any event was absolved of any such obligation.

34. Mr. Suri submitted that the AT wholly misinterpreted and misread the relevant clauses in the agreement and in particular Clauses 3.1 and 3.6 as regards what was meant by 'payload'. The AT, according to Mr. Suri, also overlooked the basic premise of 'space utilization' as set out in Clauses 6.1 and 6.1(A), which clearly indicated that it was the 'space' on the freighters which was the subject matter of the agreement and this ought not to be equated with 'weight'. He further submitted that the entire burden of showing the failure by Air India to offer the promised payload to GATI, was on GATI and barring three documents which again were wrongly interpreted by the AT, GATI produced no evidence to show that it utilized the space offered at any point of time or that it suffered any loss as a result of non-availability of any such space.

35. Mr. Suri submitted that AT ignored completely the written notes of arguments apart from the numerous voluminous documents placed by Air India in the form of challans, airway bills ('AWB'), cargo manifests and trim sheets. He submitted that the AT erroneously held the letter dated 3rd March 2008 as an evidence against Air India, whereas what was being spoken to in the letter was 'available payload' and not 'payload of the freighter'.

36. Mr. Suri submitted that the AT also wrongly interpreted the deposition of Mr. Anil Shakhder (RW-2) as against Fuel on Board Requirement ('FOBR') which was a varying figure which depended on several factors such as weather, length of sector, refueling facilities. He submitted that the decision as regards the availability of payload was a technical one which

was to be taken by the pilot prior to every take off with weight of ATF in aircraft reducing available cargo weight.

37. Mr. Suri also discussed at length the three instances referred to in the impugned Award, which were referred to by GATI to substantiate its plea that the payload capacity actually offered by Air India was deficient. According to him, in the first instance on 31st December 2007, the total cargo offered by GATI was 8.741 tonnes and the no-show consignments were 2.513 tonnes. Therefore, GATI had not booked 14 tonnes on that particular flight as claimed by it. The trim sheet shows that there was under load of 4.201 tonnes. This meant that the freighter could have carried more cargo had it been offered. As regards the second instance of 9th January 2008 the actual cargo tendered was only 12.866 tons instead of 15 tonnes as alleged by GATI. The third instance was of 27th February 2008 where the tendered load was 11.058 tonnes and accepted in entirety. Any cargo that had been offloaded, if at all, could have been offered to be carried on the next available flight.

38. Mr. Suri emphasized that the agreement was a 'block space arrangement' between the parties and it would be erroneous to go only by the simplistic concept of 'payload capacity' whereas what had to be appreciated was 'available pay load' on the freighter which was arrived at after taking into account several factors including the dry operating weight, the operating empty weight, the maximum take-off weight, maximum landing weight and maximum zero fuel weight.

39. According to Mr. Suri the evidence of Mr. Suresh Newatia (CW-1) reveals that in the entire operations, GATI only carried 7882 tonnes of cargo on the freighters which on an average works out to about 6.5 tonnes on two freighters. All these shows that the GATI was unable to generate business to utilize the entire space offered in the aircraft and miserably failed to prove any loss suffered by it. Mr. Suri submitted that the entire evidence was misread by the AT.

40. Mr. Kapur, learned senior Counsel appearing for GATI, submitted that Mr. Suri was again inviting the Court to re-appreciate the evidence. The three instances pointed out by GATI before the AT clearly showed that there was a shortfall in the payload capacity offered on the aircraft. The evidence led by the parties was appreciated by the AT and the view was taken thereon. The records produced by Air India which included Air India's own internal notes, more than adequately established that none of the aircrafts could offer the promised capacity. The fact that none of the aircrafts had a capacity of even approximately 15 MT could not be denied even by Air India. It was charging a fixed amount on that basis and therefore was obliged to make available aircrafts with that approximate capacity. If it failed to provide that capacity it could not recover the full amount fixed under the contract.

41. Mr. Kapur submitted that how much cargo GATI carried was irrelevant for that purpose. In any event, once it became plain to GATI that it was never going to get an aircraft with a capacity of even approximately 15MT, it could not obviously take on bookings to that level. Its scale of operations

therefore had to be changed. The corresponding losses suffered by GATI were obvious. The fact that Air India offered 15 MT capacity with the start of hub and spoke patterns showed that Air India could in fact estimate the fuel requirement and therefore offered the MT capacity. The interpretation of the relevant clauses of the WLA by the AT was, according to Mr. Kapur, perfectly plausible and did not call for any interference.

42. The Court finds that the AT has in fact extensively discussed the Clauses 3.1, 3.6 and 6.1 in dealing with the above issues. It has discussed the evidence in sufficient detail. The internal note dated 3rd March 2008 written by Mr. Avadesh Kumar, Dy. General Manager which states that IAL was offering payload of 12.5 tonnes per flight to GATI “which is in contradiction with the Agreement signed between India Airlines and GATI. The matter was referred to Director Engineering for enhancing the payload. However, it has been confirmed by him that the same cannot be increased”. The note concluded “Therefore, the available payload could be 12.5 tonnes only”.

43. The minutes of the meeting dated 15th July 2008 also recorded that the DGM(Finance) has suggested that the agreement itself to be amended to ensure 'correct billing and settlement' on the issue of 'payload capacity' The correspondence between the parties which has been discussed by the AT showed that the case of Air India was that the full load would become available only when the 'hub and spoke operations' with the fourth freighter would commence.

44. The AT also discussed the evidence of six of the witnesses of Air India who were posted at various airports. They deposed instances “directly within their knowledge where 15 MT payload or payload more than 12.5 MT was tendered on behalf of the Claimant, but it was refused to be accepted for carriage by the freighter operating with the Claimant by the Respondent”.

45. Nothing has been shown to the Court to persuade it to hold that the above conclusion of the AT on the reading of the depositions of the aforementioned witnesses i.e. CWs 3 to 8 was erroneous. The AT also appears to have been persuaded by the fact that cargo in excess of 12 to 12.5 MT was carried by Air India by next available commercial flight without charging GATI for it, thereby admitting to its failure. The AT has also discussed the evidence of Mr. Anil Shakhder (RW-2) as regards the availability of payload after accounting for the fuel requirement. In particular it has even set out the entire evidence in this regard. In para 7.3.33 it has dwelled on the expression ‘approximate’ and concluded that the expression ‘approximately 15MT’ may at the most permit a variation between the range of 14 to 16 and not a reduction to 12.5 MT which would be really a variation of 37.5% over 15 MT.

46. The Court is not persuaded to hold that the above detailed discussion of the evidence by the AT and its analysis suffers from any material irregularity much less any patent illegality. On the evidence before it, it was for the AT to take a call on what was the inference to be drawn as any reasonable person would in the facts and circumstances of the case. None of

the findings of the AT is improbable or contrary to the evidence on record. The award in respect of the aforementioned three issues cannot said to be erroneous warranting any interference by this Court.

Issue No.4

47. Issue No.4 was whether the Nagpur airport was not ready for operations as a hub and spoke center and whether the Claimants were not ready to implement the hub and spoke operations from Nagpur [4(a) and 4(b)]. The AT concluded after extensively dealing with the evidence that there were at least three letters namely letters dated 8th August, 19th August and 8th October 2008, whereby GATI indicated its readiness and willingness to commence hub and spoke operations but Air India did not respond, much less give any fixed date for such commencement.

48. Further, the internal reports dated 19th May, 11th August, 2nd September and 8th September 2008 of Air India clearly showed the acceptance of readiness on the part of Air India to commence hub and spoke operations at Nagpur. In para 7.4.29, the AT recorded the contention of Mr. Suri that hub and spoke operations were to start only after four freighters were to be inducted. In the petition under Section 34 of the Act, there is no averment that the above contention recorded in para 7.4.29 was not made by Mr. Suri. He, however, urged that the AT failed to look at the matter from the operational and technical aspects of the industry's norms and practices. According to him, the internal reports and discussions between the officers of Air India have been misunderstood by the AT as revealing an absence of readiness to commence the hub and spoke operations at Nagpur.

49. On the other hand, Mr. Suri again took the Court through the entire correspondence to show that the Respondent was never prepared to avail of the fourth freighter even after it was offered by Air India. He submitted that at no point of time, did GATI inform the Air India that it was unable to start operations at Nagpur because the hub and spoke operations had not commenced. Even on 6th August 2008, GATI informed Air India that they would operate only three freighters from Nagpur as a hub and spoke pattern from 9th September 2008 and the fourth would be a standby. Mr. Suri accordingly submitted that no evidence had been produced by GATI to show that the Nagpur airport was not ready for the hub and spoke operations.

50. The Court does not propose to re-appreciate the entire evidence on this aspect. This has been exhaustively discussed by the AT in paras 7.4.1 to 7.4.30. The inferences drawn by the AT from three letters whereby GATI had expressed its readiness to commence the hub and spoke operations has not been countered by Air India. The inferences drawn by the AT from the internal reports and communications have not been shown to be erroneous.

51. The contents of the said internal notes do reveal that the infrastructure at Nagpur was not ready for the hub and spoke operations during the dates of these notes i.e. between May and September 2008. The Court is not expected to re-appreciate the evidence and to interfere with the impugned Award only because a different view is possible. In any event, this Court is not persuaded to come to any different view in the matter.

Issues 5 (a) and (b)

52. On the issue of repudiation i.e. Issues 5(a) and 5(b), the AT concluded that Air India had repudiated the contract and the repudiation was accepted by GATI. It was also held that there was no waiver by GATI of the repudiation by the Air India nor did the GATI acquiesce in the breach by the Air India. It was held that “in view of the repudiatory breach of contract by the Respondent, the Claimant was justified in terminating the contract by Notice dated 17.03.2009” since it was not under Clause 12.1 of the agreement, it was not vitiated for want of 120 days’ notice.

53. According to Mr. Suri, the AT failed to discuss the essence of repudiation under the Indian Law. According to him, the AT based its findings only on English Law and therefore came to an erroneous conclusion. It was submitted that right from the induction of the first freighter, GATI was in the knowhow that the operations were delayed and that the freighter from the very first flight was not able to carry a payload of more than 12.5 tons, yet the operations carried on for the next 18 months. It was only when the minimum guarantee clause was to be implemented with the 5th freighter, that GATI, as an afterthought, came up with the idea of repudiatory breach and without giving the 120 days’ mandatory notice illegality terminated the agreement. The fact that GATI did not protest against the postponement of the dates of induction led to a situation where both the parties accepted the realities and acquiesced in the changed situation. There was no justification to excuse GATI from complying with

the requirement of Clause 12.1 which is reinforced in Clause 20 of the agreement.

54. Mr. Kapur, learned senior counsel for GATI, referred to an extract from Pollock and Mulla's The Indian Contract and Specific Relief Acts, (14th Edition, 2012) as regards repudiatory breach and submitted that since GATI had accepted the repudiation by Air India, GATI's failure to perform would not amount to a breach at all and that Air India's breach gave GATI the right to terminate the contract. Once it was found on fact that Air India had wrongly diverted the aircrafts and had failed to deliver the aircrafts on time, or the aircrafts with the promised payload capacity, its unilateral increase in ATF prices and encashment of the BG added to the repudiatory breaches committed by Air India.

55. Indeed the Court finds that the conclusions by the AT on the issue of repudiation are a natural corollary of its findings of fact that there were repudiatory breaches by Air India. The AT rightly accepted the submissions of GATI that there could not be any implied waiver or acquiescence. It had to be pleaded as a fact. Such a plea has been raised for the first time by Air India during oral submissions.

56. The Court has already upheld the findings of the AT on the failures of the Air India to fulfill its obligations under the WLA. The AT has discussed Section 39 of the Indian Contract Act, 1872. It gives the right to the promisee to put an end to the contract if the promisor, in this case Air India, "has refused to perform, or disabled itself from performing, its promise in

its entirety." In these circumstances the conclusion of the AT that Section 39 permits GATI to terminate the contract without having to comply with the requirement of Clause 12.1, which was not attracted to a case of repudiatory breach of contract is a perfectly plausible conclusion and cannot be faulted with.

57. The Court notes that as regards the actual claim for damages what has been awarded by the AT is not the entire amount claimed. As regards the amount wrongly charged on account of deficient payload capacity, as against the claim of Rs 1741.97 lakhs, the AT has awarded only 50% as a corollary to the conclusion that the promised payload capacity was not made available.

Other issues

58. The other amount awarded is Rs. 429.58 lakhs being overcharged on account of unilateral increase in the ATF prices. This has been discussed threadbare under Issue No.12 in the Award with reference to the correspondence between the parties and the minutes of the meetings. If there was any change which was contemplated, it had to be incorporated in the agreement. The minutes of the meeting shows that there was no such amendment to the agreement to permit any unilateral increase in the ATF rates. On the question of excess amount recovered by encashing the BG, the AT has allowed the claim of Rs.59,64,535. This also is based on the evidence produced before the AT.

Damages

59. However, the Court finds that in para 7.14.8 the AT found substance in the criticism of Air India and concluded “The least which the Claimant could have done was to file before the Tribunal its annual accounts indicating the trends of profits wherefrom some reasonable inference as to the likely loss suffered by the Claimant could have been drawn”. Nevertheless, the Tribunal appears to have gone by the principle that “the Claimant cannot be left high and dry”. While observing in para 7.14.10 that “we would not like to speculate”, the AT has proceeded to make an assessment of “just and reasonable profits” and awarded a sum of Rs. 497 lakhs by way of damages.

60. This was not a case where Air India had wrongfully terminated the contract. This was a case where GATI had terminated the contract on account of repudiatory breaches by Air India. Therefore, the decision relied upon by the AT viz., *A.T. Brij Paul Singh v. State of Gujarat (1984) 4 SCC 59* was not strictly applicable. On the other hand, Air India was justified in its plea that it was incumbent upon GATI to provide at least some basis as to the likely loss it may have suffered by producing its annual accounts or any other evidence. This clearly GATI failed to do. Consequently, the Court finds no basis for the AT to award GATI Rs.497 lakhs by way of damages. The award to that extent is hereby set aside.

Costs

61. However, as regards awarding the cost of arbitration the Court is unable to find any error having been committed by the AT and therefore, it is not considered necessary to interfere with the Award in that regard.

62. As regards counter claims of Air India, which was essentially by way of damages and would have resulted only if GATI was found to be in breach of the agreement, since the Court has upheld the findings of the AT that it was Air India who committed breach of several obligations and thereby repudiated the contract its rejection of the counter claims of Air India is accordingly upheld.

63. O.M.P. No. 1082 of 2014 by GATI is a petition under Section 9 of the Act, seeking directions to Air India to deposit the awarded amount or create a charge on an immoveable property or provide a bank guarantee. The Court is not at this stage inclined to grant such relief. The remedy under Section 36 of the Act would, in any event, be available to GATI at the appropriate stage.

Conclusion

64. O.M.P. No. 1264 of 2013 by Air India is disposed of by setting aside the award of Rs. 497 lakhs in favour of GATI and upholding the impugned Award dated 17th September 2013 in all other respects. O.M.P. No. 1082 of 2014 is dismissed. There shall be no order as to costs.

S.MURALIDHAR, J

July 7, 2015/mg