

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 30.05.2017

+ **O.M.P.(COMM) 87/2016**

AIRPORTS AUTHORITY OF INDIA

..... Petitioner

Versus

ARTEFACT PROJECTS LTD.

..... Respondent

Advocates who appeared in this case:-

For the Petitioner : Mr Digvijay Rai and Ms Chetna Rai.
For the Respondent : Mr Arpit Bhargava and Ms Hina
Bhargava.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter 'AAI') has filed the present petition under section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 23.12.2015 (hereafter 'the impugned award') passed by the Sole Arbitrator, Shri O.P. Goel, Former Director General, CPWD.

2. The impugned award was rendered in the context of disputes that had arisen between AAI and the respondent (hereafter 'APL') in connection with agreements dated 02.03.2005 and 11.02.2007 (hereinafter 'the agreements') entered into between the parties. In terms of the said agreements, APL was appointed to render comprehensive architectural and

engineering services for construction of the proposed International Terminal Building at Trivandrum Airport.

3. Before the arbitral tribunal, APL made a claim of ₹94,38,997/- (Claim No.1) for shortfall in payment of consultancy fee as per the original scope of works; ₹1,35,181/- (Claim No.2) in respect of additional items considered by AAI; ₹35,00,057/- (Claim No.3) for additional services pertaining to ramp/bridge over Chackai Canal and Car Park; interest at the rate of 12% per annum on the amounts due (Claim No.4); and Costs (Claim No.5).

4. Claim No.1 (for a sum of ₹94,38,997/-) included (a) claim for a sum of ₹85,10,695/- on account of incorrect basis for calculation of fees; (b) claim for ₹6,25,500/- in respect of part works of Chiller/HVAC work of Phase-II; (c) claim for ₹3,02,802/- as fees for bought out items - purchase of L.T. Cables; and (d) claim for ₹8,27,199/- deducted towards delay in completion of the project and ₹18,28,577/- as deductions on account of variation beyond 5% of the estimate of quantities of BOQ.

5. The arbitral tribunal considered APL's claims and awarded an aggregate amount of ₹1,23,67,951/- which included a sum of ₹85,10,695/- on account of "*wrongful contractual basis of fees calculation*"; ₹6,25,500/- on account of Chiller/HVAC works of Phase-II; and ₹1,66,541/- on account of fees for bought out items - Purchase of LT Cables. In addition, the arbitral tribunal also held that AAI was not entitled to deduct any amount towards delay in project completion (₹8,27,199/-) or any deduction on account of variation beyond 5% of the estimate of quantities of BOQ (₹18,28,577/-).

6. Mr Rai, learned counsel appearing for AAI has pressed AAI's challenge to the impugned award in respect of five items.

7. First, Mr Rai submitted that the arbitral tribunal had grossly erred in directing that professional fees be paid at the rate of 5% of the tendered cost of the work or actual cost, whichever is lower. It is AAI's case that the fees payable to APL is to be calculated on the basis of 5% of the estimated cost or the actual cost, whichever is lower. It is claimed that this was the basis that was approved by the Board of AAI in its 79th meeting held on 28.07.2004. It is contended that inadvertently clause 2.01 of the agreements between the parties recorded that professional fees would be paid at the rate of 5% *of actual total cost of the work or the tendered cost whichever is lower*. Mr Rai submitted that this was pointed out to APL on 22.02.2012. He further submitted that the person who had signed the agreements on behalf of AAI was not authorised to execute any agreement which was in variance with the decision of the Board of AAI and, therefore, the decision of the Board of Directors of AAI in respect of fees payable would prevail over the terms recorded in the agreements.

8. Second, it was submitted that APL was not entitled to any fees for Chiller/HVAC work of Phase-II since the said work was never tendered or executed. Mr Rai drew the attention of this court to clause 8.01 of the agreements which expressly stipulated that the consultant would be paid only for those stages which were completed by it and approved by the authority. It was submitted that since Chiller/HVAC works provided in Phase-I were sufficient to cater to Phase-II area, the proposal for additional works submitted for Phase-II was not accepted.

9. Third, that the arbitral tribunal had grossly erred in holding that no deductions could be made on account of deviation. Mr Rai submitted that in terms of clause 8.04 of the agreements, the consultant had given an undertaking that there would not be any deviation of more than +/- 5% in quantities of various items worked out in the Bill of Quantities (BoQ). He submitted that contrary to this undertaking there was a deviation in the actual quantities executed on account of faulty designs and, therefore, AAI had suffered loss by way of overhead charges (such as manpower and material etc.). He stated that AAI had set out this case in its Statement of Defence, however, the arbitral tribunal had failed to consider the same.

10. Fourth, he submitted that the quantity of LT Cables in the BoQ as prepared by APL was 2900 meters but the actual quantity executed at site was 9700 meters and thus, there was a deviation beyond the tolerance limit of 5%. It was earnestly contended that APL was not entitled to any fees on account of increase in the quantities of LT Cables as they were procured without any role played by APL.

11. Lastly, it was submitted that the arbitral tribunal had grossly erred in not considering that AAI had paid a sum of ₹5,01,133/-, which was in addition to the figures as claimed by APL and, therefore, the awarded amount was required to be reduced by the aforesaid amount.

12. Mr Bhargava, learned counsel appearing for APL countered the submissions made on behalf of AAI. He submitted that the jurisdiction of the courts to set aside an award was limited and the impugned award could be set aside only on the grounds as set out in section 34 of the Act. He referred to the decision of the Supreme Court in *P.R. Shah, Shares and*

Stock Brokers Private Limited v. B.H.H. Securities Private Limited and Others: (2012) 1 SCC 594 in support of his contention.

13. Mr Bhargava further submitted that the arbitral tribunal had rightly held that the fees payable to APL was to be calculated in terms of the agreements and not in terms of the decision of the Board of Directors of AAI. He further countered the submissions that the APL was not entitled to any fees on account of Chiller/HVAC works for Phase-II or for increase in the quantities of LT Cables. He submitted that APL was to be paid for works executed stage-wise and there was no dispute that APL had completed the works up to Stage-IV in relation to Chiller/HVAC works. Insofar as LT Cables is concerned, he submitted that the scope of works was increased not on account of faulty designs but because of AAI and therefore, APL was also entitled to receive additional fee for LT Cables (which was a bought out item).

14. It is well settled that this court does not sit as an appellate court to examine the findings of the arbitral tribunal. The scope of juridical review is limited to the grounds as set out in section 34 of the Act. The arbitral tribunal is a final authority on questions of fact and unless it is found that the findings returned by the arbitral tribunal are perverse or patently illegal, no interference with the arbitral award would be warranted. (See: ***Associate Builders v. Delhi Development Authority: (2015) 2 SCC 49***).

15. It is also well settled that the question of interpretation of a contract is within the scope of the jurisdiction of the arbitral tribunal and even if the view of the arbitral tribunal is found to be erroneous, the same cannot be interfered with unless it is found that the arbitral tribunal's view is perverse

and wholly unreasonable on the touchstone of the *wednesbury* principle; that is, no reasonable person could support such view. (See: ***Oil and Natural Gas Corporation Limited v. Western Geco International Limited: (2014) 9 SCC 263***, ***Mcdermott International Inc. v. Burn Standard Co. Ltd and Others.: (2006) 11 SCC 181*** and ***Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.: (2009) 10 SCC 63***)

16. The challenge laid by AAI to the impugned award must be considered having regard to the aforesaid principles. The contention that fee payable to APL ought to have been computed, not in terms of the agreements between the parties but on the decision of the Board of Directors of AAI taken in the 79th Meeting held on 28.07.2004, is wholly without merit. The terms of the agreements could not be unilaterally changed by AAI merely because they were in variance with the decision of its Board of Directors. The arbitral tribunal had considered the aforesaid contention and found that the terms of the agreements between the parties were clear and APL was entitled to fees at the rate of 5% of the actual cost of work or the tendered cost of work whichever is lower. There is also no dispute that the fees as claimed by APL was in terms of the agreements entered into between the parties.

17. The arbitral tribunal held that "*the claimant have entered into the contract with the clear understanding that payment shall be made on the basis of the lower of the two i.e. tendered cost or the actual cost of work. The same cannot be unilaterally changed subsequently by the respondent.*" This court finds no infirmity with the aforesaid view and no interference with the arbitral award on this ground is called for.

18. The contention that AAI was entitled to deduct the sum of ₹8,27,199/- in terms of clause 9.01 of the agreements was also rejected by the arbitral tribunal. It is contended on behalf of AAI that the arbitral tribunal had not considered the stand of AAI in its Statement of Defence. The said contention is also unmerited as it is apparent from a plain reading of the impugned award that the arbitral tribunal had considered the contentions advanced by AAI. It is AAI's case that in terms of clause 9.01 of the agreements, AAI was entitled to recover compensation at the rate of 1% of the stage value of the consultancy fee for every month's delay, subject to maximum of 5% of the total consultancy fee for the project. It was AAI's stand that APL had delayed performance of its obligations under the agreements. The arbitral tribunal had examined the aforesaid contention and had concluded that *"by and large the Claimant were not responsible for the delays. The delays were caused by other agencies like the project consultant, Employer i.e. Respondent themselves, the Contractor engaged for construction work and the delays were not on account of the Claimant."*

19. In view of the unambiguous finding that APL was not responsible for the delays, the question of levy of compensation did not arise.

20. AAI had also imposed a sum of ₹18,28,577/- as liquidated damages as, according to AAI, the deviation in estimate of quantities of BOQ was beyond the tolerance limit of +/- 5%. AAI had stated that its management had decided to impose a penalty which was maximum of two options:

"Option A: @ 0.5% of total deviation amount for more than
+ 5% of deviation quantity. (Rs.18,28,577.55).

Option B: @ 10% of stage 'V' total consultancy fees
(Rs.8,24,741.36)."

21. The arbitral tribunal found that there was no basis for imposition of liquidated damages. Clause 8.04 of the agreements provided that if there was a deviation of more than 5%, the consultant would not be paid anything extra on this account. The arbitral tribunal, therefore, held that APL would not be entitled for any amount on deviation but could also not be subjected to any penalty.

22. Nothing has been brought to the notice of this court which would indicate that the said finding was erroneous or contrary to the terms of the agreements. It was not open for AAI to unilaterally levy penalty on APL. Thus, no interference with the impugned award is called for on this ground either.

23. The contention that APL was not entitled for any payment for Chiller / HVAC works of Phase-II, was rejected by the arbitral tribunal. The arbitral tribunal had noted that there was no dispute that APL had performed the works up to Stage-IV. Thus, in terms of clause 8.01 of the agreements, APL was entitled to consultancy fee for the work performed till the stages completed by them. The arbitral tribunal rejected the contention that no fees was payable since the works were not tendered for. This court is not persuaded to accept that the said view is patently illegal or perverse. The arbitral tribunal's interpretation of the agreement is clearly a plausible interpretation and, therefore, is not amenable to judicial review in these proceedings.

24. The arbitral tribunal had also held that APL would be entitled to fees on the additional LT Cables bought by AAI. Whilst it was contended on behalf of AAI that there is a deviation beyond the tolerance limit of 5%, it was APL's case that the quantity had been increased at the behest of AAI. Indisputably, if the quantity of any item was increased by AAI, APL would be entitled to fees on the same. There is no material brought to the notice of this court which would establish that increase in quantity was due to any faulty design as claimed by AAI. Thus, this court is not persuaded to accept that the decision of the arbitral tribunal in this regard was patently illegal or perverse.

25. The contention that the arbitral tribunal has failed to consider that APL had received a sum of ₹5,01,133/- which was not accounted for by the APL, also cannot be accepted. In the Statement of Claims filed by APL, it had admitted receipt of a sum of ₹5,01,133/- [Sub-paragraph (ii) under claim I (A)] against claim No. I. The said sum had been deducted from the total amount of ₹1,30,74,235/- claimed by APL thus reducing the total amount of the claims to ₹1,25,73,102/-. This is clear from the tabular statement captioned "SUMMARY OF CLAIMS" annexed at the end of the Statement of Claims. However, the Statement of Defence filed by AAI indicates that the aforesaid sum had been paid in respect of ramp/bridge over Chackai Canal and Car Park. APL's case in respect of the said item was resisted by AAI on the ground that the said item was dealt with separately and it was not a part of the subject contract between the parties and thus, this dispute was not arbitrable. The arbitral tribunal had accepted the aforesaid contention and held that "*the contention of the Respondent that this item was dealt separately and not under this contract appears to*

be correct." Consequently, APL's claim in respect of *ramp/bridge over Chackai Canal and Car Park* was not considered.

26. Since the dispute relating to the aforesaid claim was held to be outside the scope of arbitration, the question of adjusting any payment made against the said item also would not arise.

27. In view of the above, the present petition is dismissed.

28. The parties are left to bear their own costs.

MAY 30, 2017
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VIBHU BAKHRU, J

