

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 01.03.2017

+ **O.M.P. (COMM) 281/2016 & IA No.6564/2016**

M/S PAWAN HANS HELICOPTERS LTD

..... Petitioner

versus

**M/S MARITIME ENERGY HELI AIR SERVICES
PVT LTD**

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Puneet Taneja.

For the Respondent : Mr Jayant K. Sud, Ms Priya Puri, Mr Umang
Kumar Singh and Mr Swatantra Rai.

CORAM:

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. M/s Pawan Hans Helicopters Limited (hereafter 'PHHL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') challenging the arbitral award dated 24.02.2016 (hereafter 'the impugned award') made by the sole arbitrator in connection with the disputes between PHHL and M/s Maritime Energy Heli Air Services Pvt. Ltd. (hereafter 'Maritime').

2. The impugned award is rendered in the context of the disputes that had arisen between PHHL and Maritime in connection with an Agreement for Wet lease of amphibian aircraft which was to be deployed in Andaman & Nicobar Islands. There was a delay in delivery of the amphibian aircraft and consequently PHHL had levied liquidated damages. The Agreement between the parties was also prematurely terminated. The arbitrator accepted

Maritime's claim for refund of the liquidated damages collected by PHHL and also awarded damages for premature termination of the Agreement. The counter claims made by PHHL were rejected. The only challenge made by PHHL in these proceedings is in respect of refund of liquidated damages and the award of damages for premature termination of the Agreement.

3. Briefly stated, the factual context necessary to appreciate the controversy are as under:-

3.1 On 09.04.2010, PHHL entered into a Memorandum of Understanding (MOU) with the Andaman and Nicobar Administration for introduction of seaplane operations in Andaman & Nicobar Islands with a validity period of five years. The use of a seaplane was contemplated to connect popular tourist destinations in the Andaman & Nicobar Islands.

3.2 Subsequently, PHHL floated a global tender inviting bids for Wet lease of an amphibian seaplane (with passenger capacity of 5-10) for an initial period of six months with an option to extend for a further period of six months. The bidders were required to mobilize the seaplane at Port Blair within a period of 75 days from the issue of Letter of Intent (LOI).

3.3 Maritime submitted its bid pursuant to the aforesaid invitation, which was accepted and the LOI was issued by PHHL to Maritime on 13.09.2010.

3.4 In terms of the instructions issued by PHHL, the bids were to be split into fixed monthly charges (FMC) and flying hourly charges (FHC). In terms of the Agreement between the parties, Maritime was entitled to FMC of ₹49,07,270/- and FHC of ₹49,250/- per hour inclusive of service tax and

other taxes.

3.5 Admittedly, Maritime was obliged to mobilize the seaplane by 25.11.2010; that is, within a period of 75 days from the issuance of the LOI.

3.6 It is not disputed that Maritime had failed to mobilize the aircraft within the period of 75 days as agreed. The aircraft arrived in Mumbai on 30.11.2010 and was cleared by the Customs on 03.12.2010. Maritime applied for the necessary permissions from Directorate General of Civil Aviation (DGCA), however, that took some time; the aircraft was finally delivered to PHHL on 24.12.2010. The Non Scheduled Operators Permit (NSOP) was received from DGCA on 07.01.2011 and the No Objection Certificate (NOC) for operation of the seaplane to and fro from Port Blair to Havelock water aerodrome was received on 19.01.2011. The flight could only be operated from 20.01.2011.

3.7 In view of the delays, PHHL issued a letter dated 10.12.2010 permitting Maritime to mobilize the seaplane at Port Blair, albeit, with levy of liquidated damages.

3.8 The parties entered into a formal contract on 14.02.2011 (hereafter 'the Agreement').

3.9 On 27.04.2011, PHHL issued a notice for discontinuation of services under clause 14 (14.2) of the Agreement, effective 15 days from 28.04.2011.

3.10 Maritime claimed that it raised invoices which were paid in part. On 28.07.2011, after the Agreement was terminated, PHHL informed Maritime about the levy of ₹88,49,043/- as liquidated damages. At the material time, a

sum of ₹ 76,62,429/- was admittedly payable by PHHL to Maritime. PHHL sought to adjust the aforesaid sum and demanded the balance payment of ₹11,86,614/- which was paid by Maritime under protest.

3.11 In view of the above, Maritime raised an invoice of ₹1,29,83,285/- for 263.62 flying hours. It claimed that PHHL had assured at least 100 hours of flying per month, and the actual flying hours during the term of the Agreement were only 117.38 hours which were short by 263.62 hours (computed on the basis of 100 flying hours per month). Maritime also raised another bill for a sum of ₹1,07,64,334/- towards FMC from 13.05.2011 to 18.07.2011, being the unexpired period of the Agreement. In addition, Maritime also raised a bill of ₹1,09,62,097/- for FHC for the period 13.05.2011 to 18.07.2011, the unexpired period of the Agreement.

4. The invoices raised were not accepted by PHHL and the parties were unable to resolve their disputes. Consequently, Maritime invoked the arbitration clause by its letter dated 08.08.2011. Since the disputes were not amicably resolved, Maritime nominated its arbitrator and PHHL nominated its arbitrator. However, the two arbitrators could not concur on appointment of the third arbitrator. This led Maritime to file a petition under Section 11 of the Act before this court. This court by an order dated 10.07.2012 appointed Justice Manju Goel (Retired), a former Judge of this court, as the sole arbitrator to adjudicate the disputes between the parties.

5. Before the arbitrator, Maritime made the following claims aggregating to ₹5,00,92,573/- :-

(i) ₹88,49,043/- as the amount wrongly collected by PHHL as liquidated

damages;

- (ii) ₹1,29,83,285/- for shortfall in flying hours.
- (iii) ₹1,07,64,334/- towards FMC from 13.05.2011 to 18.07.2011.
- (iv) ₹1,09,62,097/- towards FHC from 13.05.2011 to 18.07.2011.
- (v) ₹65,33,814/- as interest at the rate of 15% on the above amounts.

6. PHHL also made the following counter claims:-

- (i) Revenue loss due to delay in mobilization of seaplane at Port Blair within 75 days from the date of issue of LOI - ₹15,00,000/-.
- (ii) Revenue lost in peak season – October to Jan. – ₹35,00,000/-.
- (iii) Loss of brand and reputation due to non-mobilization of and non-commencement of seaplane operation - ₹50,00,000/-.
- (iv) Loss in terms of financial resources, manpower, etc., in floating of tender, evaluations, meetings, appointment of external members and their fees, taking permission/clearances from various agencies such as DGCA, MOD, BCAS, Ministry of External Affairs, etc. – ₹40,00,000/-.
- (v) Losses incurred due to loss of MOU signed with Andaman and Nicobar Administration for 05 years and consequent loss of future profits – ₹1,00,00,000/-.

7. The arbitrator accepted Maritime's claim for refund of liquidated damages for several reasons. The arbitrator held that the seaplane operation could not be mobilized without sufficient infrastructure approved by DGCA and the necessary infrastructure was not ready. The arbitrator further concluded that the Jetty at Havelock Island was ready only on 23.12.2010 and the Jetty at Diglipur Island was not ready for a long period thereafter. The arbitrator further noted that although DGCA had issued the NSOP on

07.01.2011, the same was not sufficient to commence operations as the permission from Directorate of Aerodrome Standard was required to put the seaplane in service and this required clearance of the area from where seaplane would be operating. The arbitrator held that there was delay in clearance regarding waterways, etc. The arbitrator held that Maritime could not alone be held responsible for the time taken by DGCA. The last sanction regarding waterways was granted on 19.01.2011 and the operations could be started thereafter. The arbitrator also held that the requisite notice for imposing liquidated damages had not been issued by PHHL. Accordingly, the arbitrator held that PHHL was not entitled to levy liquidated damages as per clause 5 and Section 3 of the Tender documents.

8. The arbitrator further held that the termination of the Agreement was wrongful and accordingly also allowed Maritime's claim for FMC for the unexpired period of the Agreement. However, Maritime's claim for shortfall in FHC during the period of the Agreement and for the unexpired period of Agreement was rejected.

9. The arbitrator also allowed interest at the rate of 9% per annum with effect from 21.12.2011 till the filing of the claim which was quantified at ₹13,97,453/-. The arbitrator also awarded *pendente lite* interest and future interest at the rate of 9% per annum. In addition, Maritime was also awarded proportionate costs on the amount awarded.

Submissions

10. Mr Puneet Taneja, the learned counsel appearing for PHHL assailed the award in respect of recovery of liquidated damages principally on four

fronts. First, he contended that liquidated damages were based on failure of Maritime to mobilize the aircraft and the delay was admitted. He submitted that the delay in mobilization resulted in a loss to PHHL since valuable period of almost two months of the tourist season was lost. Secondly, he submitted that the finding of the arbitrator that the Jetty at Havelock Island was not ready was erroneous. He referred to minutes of the meeting held on 09.09.2010, which indicated that the Jetty at Havelock Island existed and was required to be re-constructed, if necessary. Thirdly, he contended that the finding of the arbitrator that time was not the essence of the Agreement was contrary to the terms of the Agreement which expressly provided that mobilization of the aircraft within time was of essence. He submitted that the tender conditions had expressly provided that only those persons who owned an amphibian aircraft or had a confirmed arrangement were qualified for making the bid. He submitted that this was necessary since PHHL could not accept any delay in mobilization of the aircraft. Lastly, he contended that the finding of the arbitrator that PHHL had not given notice for levying liquidated damages was unsustainable as admittedly PHHL had issued a letter dated 10.12.2010 permitting Maritime to mobilize seaplane but it also expressly stated that liquidated damages would be levied in terms of the tender conditions.

11. Mr Taneja, also assailed the award of FMC after the termination of the Agreement. He referred to the terms of the Agreement and contended that PHHL was entitled to terminate the Agreement without any further obligations and the impugned award was, therefore, contrary to the express terms of the Agreement.

12. Mr Jayant K. Sud, learned counsel appearing for Maritime countered the submissions made by Mr Puneet Taneja. He referred to various letters sent by Maritime explaining the delay in mobilization of the aircraft. He earnestly contended that this was the first occasion where seaplane operations were contemplated in India and therefore, DGCA took a considerable time to grant the requisite permissions, which was beyond the control of Maritime. He also submitted that PHHL/Andaman & Nicobar Administration had contributed to the delay since the necessary infrastructure was not in place even after the aircraft had landed in India.

Reasoning and Conclusion

13. At the outset, it is necessary to observe that the scope of judicial review under Section 34 of the Act is restricted and this court does not sit in appeal over the decisions of the arbitrator. In **Associate Builders v. Delhi Development Authority**: (2015) 3 SCC 49, the Supreme Court has explained the above principle in the following manner:-

“It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

14. It is not permissible for this court to re-appreciate the evidence led before the arbitrator and supplant its view over the decision of the arbitrator. If the decision of the arbitrator is based on some material and is a plausible view, no interference with the arbitral award would be warranted. The Supreme Court in **P.R. Shah, Shares and Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd and Others: (2012) 1 SCC 594**, observed as under:

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

15. In the present case, the arbitrator had examined the evidence on record and had concluded that Maritime was not responsible for the delay in commencement of operations. The arbitrator had appreciated the evidence on record including pre-bid meeting. The arbitrator noticed that Maritime had as early as on 08.09.2010 raised concerns regarding non-availability of infrastructure. The arbitrator concluded that authorities were fully aware that

seaplane operations could not be mobilized without sufficient infrastructure approved by DGCA and duly approved waterways. The arbitrator concluded that there was no evidence that the Jetty at Havelock Island was ready at any time before 23.12.2010. Although, Mr Taneja has referred to the pre-bid meetings, which indicates that Jetty existed at the Havelock Island, it is also clear that the said Jetty was not in the condition for commencement of operations and required to be renovated and modified. Thus, the finding of the arbitrator that the Jetty was not ready before 23.12.2010 cannot be interfered with as it is based on appreciation of material brought on record and cannot be held to be perverse. The arbitrator also held that the clearance for waterways was not available till much later and therefore the seaplane operations could not be commenced. In this view, it is apparent that even if the aircraft had been brought in India within the period as agreed and Maritime had performed its obligations, the aircraft could still not be operated until DGCA and the concerned authorities approved the necessary infrastructure and waterways. Admittedly, the seaplane flights were to be operated from Port Blair to Diglipur Island and Havelock Island. There is no dispute that Jetty at Diglipur Island was not constructed even till the termination of the Agreement. Thus, even though liquidated damages were provided in the Agreement, there was sufficient reason to hold that PHHL did not suffer any damages on account of the aircraft not being mobilized in time. Therefore, the decision of the arbitrator to award refund of liquidated damages recovered by PHHL cannot be interfered with. In the circumstances, it is not necessary to examine the arbitrator's finding regarding non-issue of notice of liquidated damages or time being the essence of the Agreement. Nonetheless, it must be observed that the

arbitrator has provided reasons for holding that PHHL had not issued the necessary notice for levy of liquidated damages and had also indicated the reasons for holding that time was not of essence. Even if the said conclusions are accepted as erroneous, the same would be errors within the jurisdiction of the arbitrator and therefore would not warrant any interference in these proceedings. It is well settled that even if the arbitral award is erroneous, the same would not warrant any interference unless the award falls foul of section 34(2) of the Act. (See: *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 next issue to be examined is with regard to finding of the arbitrator that the termination of the Agreement was illegal and consequent award of FMC for the unexpired period of the Agreement. The arbitrator had held that there was no reason given in the notice of termination and the delay in mobilization in November and January, 2010 could not be a ground for termination of the Agreement in April and May, 2011. The arbitrator interpreted clauses 14.2 and 14.3 of the Agreement to hold that the termination under the said clauses required PHHL to pay at least FMC for the remaining period of the Agreement. The arbitrator reasoned that Maritime had incurred substantial expenditure and had brought the seaplane in India on enormous costs in the anticipation that the Agreement would run its course and therefore PHHL could not terminate the Agreement merely because the tourist season had ended and it was uneconomical to continue the services. The arbitrator held that the parties did not intend that PHHL

could terminate the Agreement without PHHL at least paying FMC for the remaining period of the term of the Agreement.

17. In order to examine the controversy in regard to termination of the Agreement, it is necessary to refer to the relevant clauses of the Agreement which read as under:-

“14. **TERMINATION**

14.1 **TERMINATION ON EXPIRY OF THE TERMS**

This agreement shall be deemed to have been automatically terminated on the expiry of the contract period of six months.

The Contractor shall remove the seaplane from PHHL's operating base within 7 days from the date of expiry of this Agreement. Pawan Hans will not pay any charges (other than demobilization charges) after the date of termination of agreement.

14.2 **TERMINATION AT THE SOLE DISCRETION OF PAWAN HANS**

Notwithstanding anything contained herein Pawan Hans may at its sole discretion terminate this Agreement by giving to the Contractor fifteen (15) days written notice without assigning any reason whatsoever including specific direction of the Regulatory Authority (DGCA).

14.3 **CONSEQUENCES OF TERMINATION**

In all cases of termination herein setforth the obligation of PHHL to pay the rates or any other charges shall be limited upto the period of the date of termination.

Notwithstanding the termination of this Agreement the parties shall continue to be bound by the provisions of this Agreement that reasonably require some action of forbearance after such termination.”

18. It is plainly clear from the above that PHHL was entitled to terminate the Agreement without assigning any reason. The arbitrator had also accepted the same as is clear from para 73 of the impugned award which reads as under:-

“It is important to see that the claimant/contract or has not been given any option to terminate the contract. The clause granting termination is entirely unilateral giving the entire authority to the respondent. Further respondent is not required to give any reason for termination.”

19. The only question that remains to be considered is whether PHHL would be liable to pay any charges for the unexpired period of the Agreement on premature termination of the Agreement. The answer to this must be in the negative as clause 14.3 of the Agreement expressly provides that the obligation of PHHL to pay the rates or any other charges shall be limited upto the period of the date of termination. In view of clause 14.3 of the Agreement (which is similar to clause 18 of the tender documents), the arbitrator’s conclusion that the parties intended that PHHL shall at least pay FMC for the unexpired period of the Agreement is plainly unsustainable and contrary to the express terms of the Agreement. It is well settled that an arbitral award that runs contrary to the express terms of the Agreement would fall foul of the public policy test under Section 34 (2) (b) (ii) of the Act. Accordingly, the impugned award to the extent that it awards ₹1,07,64,344/- as FMC charges is set aside. Consequently, the interest

quantified at ₹13,97,453/- would have to be re-computed on ₹88,49,043/- for the period 21.12.2011 till the filing of the claim. The costs awarded would also have to be proportionately reduced.

20. The petition and the pending application are disposed of with the aforesaid observations.

MARCH 01, 2017
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VIBHU BAKHRU, J

