

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

+ **OMP 117/2015**

Reserved on: 1st February, 2018
Date of decision: 19th February, 2018

AIRPORTS AUTHORITY OF INDIA Petitioner
Through: Mr.Sunil Ahuja, Adv.
versus

M/S PARNIKA COMMERCIAL & ESTATE (P) LTD. & ANR.
..... Respondents
Through: Mr.Bhupesh Narula, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner Airports Authority of India challenging the Arbitral Award dated 05.09.2014 passed by the Sole Arbitrator. The challenge to the Award is confined to grant of claim no. 1,4,7.1 and the Additional Claim no. 2 as also the interest on the awarded amounts.
2. Claim no. 1 raised by the respondent before the Sole Arbitrator was for a sum of Rs. 4,58,000/- towards the recovery of liquidated damages imposed by the petitioner.
3. The respondent had been granted the work of "extension of Rajiv Gandhi Bhavan, (Operational Complex) at Safdarjung Airport, New Delhi" vide Agreement dated 12.02.2007 by the petitioner. The stipulated dates of start and completion of work were 15.02.2007 and 14.02.2008 respectively. The work was completed on 23.07.2010 i.e. after a delay of 851 days. The petitioner granted the extension of time without levy of

compensation / liquidated damages up to 08.05.2010 and granted extension of time from 09.05.2010 to 23.07.2010 on levy of liquidated damages of Rs. 4,58,000/-, which was recovered from the final bill paid to the respondent. The Arbitrator, after considering the Hindrance Register; the fact that earlier there was a recommendation to grant extension of time without levy of compensation; as also the specific hindrances after 09.05.2010, allowed the claim of respondent. Paragraph 5.21 of the Impugned Award is reproduced herein under:-

“5.21 The compensation has been levied for the period 9.5.2010 to 23.7.2010 which implies that the work should have been completed latest by 8.5.2010. It is recorded in the Hindrance Register that certain hindrances were removed only after 9.5.2010 such as:

- i. Underground fuel tank location finalized on 4.6.2010;*
- ii. Restriction in working on week days in connecting corridor lifted on 17.6.2010;*
- iii. Barracks allowed to be dismantled for development works on 21.6.2010;*

It is obvious that the items of works which were held up on account of the above hindrances could not have been completed by 8.5.2010. The Claimant has to be given adequate time for completing these items after the respective hindrances were removed. Therefore, EOT up to 23.7.2010 without levy of compensation appears to be justified.”

4. Learned counsel for the petitioner submits that the hindrances as noted in the paragraph quoted above were minor in nature and would not have affected the work of the respondent. He submits that the said

hindrances, therefore, could not have resulted in the grant of extension of time without compensation.

5. I am unable to agree with the submissions made by the counsel for the petitioner. The hindrances, as recorded by the Arbitrator, are not denied by the petitioner. The same cannot be said to be minor in nature. In any case, whether these hindrances would result in the grant of the extension of time without compensation, is an issue to be determined by the Arbitrator, which he has done in the Impugned Award after taking into account the Hindrance Register. The view of the Arbitrator, in my opinion, cannot be said to be perverse or so unreasonable so as to warrant interference by this Court in the exercise of its power under Section 34 of the Act.

6. In claim no.4, the respondent has claimed an amount of Rs. 9,97,76,315/- towards reimbursement of losses on account of non-payment of enhanced contract rates by 30%. The Arbitrator, in the Impugned Award, has granted a sum of Rs. 55,73,217/- in favour of the respondent against this claim.

7. The Arbitrator, while awarding the above amount in favour of the respondent, has relied upon Clause 53.1(A) and 53.1(B) of the Contract which provides the formula for calculating cost of escalation on price of cement, steel, bitumen and other materials and wages of labour respectively. The Arbitrator has held that, in view of these clauses in the agreement, the petitioner was not justified to consider only 85% of the value of the work for working out the payments under these clauses or to contend that the Wholesale Price Indices adopted for these clauses do not reflect the real escalation in construction cost. The Arbitrator held that

the respondent would be entitled to an increase in the cost of the materials and labour only in accordance with clause 53.1(A) and 53.1(B) of the Contract and as these have been paid only up to 08.05.2010, which was the date up to which the petitioner had granted extension of time without levy of compensation, and as in terms of the Impugned Award it had been held that the respondent was entitled to the extension of time up to 23.07.2010 i.e. the date of actual completion of the work without levy of compensation, the respondent was also entitled to escalation for the work done from 09.05.2010 to 23.07.2010. The Arbitrator, relying upon the calculations submitted by the respondent in this regard, granted a sum of Rs. 53,73,217/- in favour of the respondent. The Arbitrator recorded that such calculations had not been objected to by the petitioner.

8. The learned counsel for the petitioner submits that the said claim should not have been granted for the reason that the extension of time beyond 08.05.2010 was due to the fault of the respondent. I have already rejected the said contention of the petitioner. As far as calculation of the amount is concerned, it is not shown how the same is incorrect. Therefore, I find no merit in the objections raised by the petitioner on the grant of claim no. 4 in favour of the respondent.

9. The next challenge of the petitioner is to the award of Rs.72,27,039/- in favour of the respondent under claim no. 7.1. In claim no. 7.1, the respondent had claimed an amount of Rs. 12,18,13,492/- towards the loss of profit/profitability and overheads due to prolongation of the Contract.

10. The Arbitrator having held that the prolongation of the work was due to reasons attributable to the petitioner, relying upon the Schedule

‘E’ of the Contract, has held that, as the Contract Value was Rs.33,25,87,883/-, the expected profit thereon would workout to be Rs. 2,49,44,091/-. The Arbitrator thereafter, worked out the average delay in earning the profit to be 560 days and awarded interest for this period of delay at the rate of 10% per annum equivalent to Rs. 38,27,039/-. The Arbitrator rejected the claim of the respondent for loss of profit at the rate of 15%.

11. The learned counsel for the petitioner submits that once the escalation of the cost has been granted in favour of the respondent, the claim for loss on account of prolongation of work could not have been granted. I am unable to agree with the said submission.

12. In *Associate Builders vs. DDA (2015) 3 SCC 49*, the Supreme Court had held that if the employer is at fault and the Contract is prolonged for an inordinate period of time, it cannot be said that the contractor cannot be compensated for the same. It was further held that the Clause pertaining to increase in price of material incorporated in work or wages or labour increase will not be applicable to a claim for damages.

13. In *Assam State Electricity Board and Others v. Buildworth Private Limited* (2017) 8 SCC 146, the Supreme Court while dealing with the claim of escalation and idling charges, held that once there was a delay in execution of Contract due to employer, the employer was liable for consequences of the delay, namely, an increase in price and the other party would be entitled to a Claim for damages.

14. In view of the above, merely because the respondent had been granted escalation in cost due to prolongation of work, it could not have

been denied the loss of profit and in this case, actually the loss of interest on such profit for the period for which the work was prolonged.

15. The second component of claim no. 7.1 was towards overheads. The Arbitrator has considered the minimum staff and other miscellaneous expenses and worked out the extra site-overhead expenses as Rs. 2 Lakhs per month and for the prolongation period of seventeen months, awarded Rs. 34 Lakhs on this account in favour of the respondent.

16. The learned counsel for the petitioner submits that once the claim of escalation had been granted under claim no. 4, a separate amount could not have been granted by the Arbitrator for the alleged overhead expenses. I am unable to accept the said argument of the counsel for the petitioner. While granting claim no. 4 the Arbitrator had specifically excluded the claim with respect to overhead expenses. Therefore, there was no overlap between claim no. 4 and this sub-head of claim no. 7.1. As noted above, the Arbitrator worked out the minimum staff required to be engaged at the site and the expenses for engaging them as also other miscellaneous expenses required to be expended as site overheads. It could not be shown how the same is in any manner incorrect. This Court, in exercise of its power under Section 34 of the Act does not act as a Court of appeal against such finding of the Arbitral Tribunal. The claim, having been duly examined by the Arbitrator, the Award made by the Arbitral Tribunal cannot be stated to be perverse or patently illegal. The challenge to the award of claim for overhead expenses, therefore, cannot be sustained.

17. The other challenge to the Impugned Award is to the grant of Rs. 1,89,774/- against Additional Claim no. 2 of the respondent. The said

Additional Claim was with respect to escalation on the amount of Award under clause 53 of the agreement and further interest at the rate of 18% per annum from the date it became due till realization.

18. The Arbitrator in the Impugned Award has under claim no. 2 and various sub-heads thereof, awarded certain amounts in favour of the respondent towards the deductions made by the petitioner. While granting the claim under Additional Claim no. 2, the Arbitrator has awarded the claim of escalation on these amounts.

19. The counsel for the petitioner submits that the escalation having been granted in claim no. 4, it could not have been again granted in Additional Claim no. 2. This submission of the counsel for the petitioner is clearly fallacious as what was granted under claim no. 4 was without taking into account the amount awarded under claim no. 2, which resulted in the increase in the quantity of work. While granting Additional Claim no. 2, the Arbitrator has therefore, granted escalation only on the amounts that were awarded in favour of the respondent under claim no. 2 and were not a part of Claim No.4. There being no challenge to the Award on claim no. 2, I do not see any merit in the objections raised against the Award of escalation under Additional Claim no. 2 or the amount so awarded. These are clearly different from what was granted in favour of the respondent under claim no. 4.

20. The last challenge of the petitioner is to the award of interest at the rate of 10% per annum on the awarded amounts. The only ground of challenge raised in the petition is reproduced herein under:-

“Claim 9:- AWARDING THE INTEREST @ 10% P.A. FOR DIFFERENT DAYS.

The Ld. Tribunal has wrongly awarded the interest @ 10% on various claims which is on very high side and being against banking practices is liable to be set aside.”

21. I do not see any reason being made out in the objection for setting aside the award of interest as granted in the Impugned Award.

22. Though in the petition challenge was also made to claim no. 6, no submission in this regard was made in the oral hearing by the counsel for the petitioner.

23. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with cost quantified at Rs. 25,000/-.

NAVIN CHAWLA, J

FEBRUARY 19, 2018/rv

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