

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

% Judgment delivered on: 05.03.2018

+ **O.M.P. (COMM) 395/2017 & IA No.12980/2017**

**AIRPORTS AUTHORITY OF INDIA** ..... Petitioner

Versus

**UNITY PRATIBHA CONSORTIUM** ..... Respondent

**Advocates who appeared in this case:**

For the Petitioner : Mr K. K. Rai, Senior Advocate with Mr  
Dig Vijay Rai, Ms Chetana Rai and  
Mr Pulkit Tyagi.

For the Respondent : None.

**CORAM**  
**HON'BLE MR JUSTICE VIBHU BAKHRU**

**JUDGMENT**

**VIBHU BAKHRU, J**

1. The petitioner (hereafter 'the AAI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 29.07.2017 (hereafter 'the impugned award') rendered by an Arbitral Tribunal comprising of a sole arbitrator.

2. By the impugned award, the Arbitral Tribunal has awarded a sum of ₹47,92,321/- in favour of the respondent and further directed that the bank guarantees amounting to ₹2,35,92,000/- be released. The

counter claim preferred by the AAI has been rejected.

3. The principal controversy involved in the present case relates to rejection of the counter claim preferred by the AAI. Mr K. K. Rai, learned Senior Counsel appearing for the AAI contended that the impugned award was intrinsically inconsistent inasmuch as the Arbitral Tribunal had accepted the report of Chief Technical Examiner's Organisation (hereafter 'CTEO') of the Central Vigilance Commission and had permitted AAI to adjust the amount of ₹30 lakhs retained by the AAI from the amounts due to the respondent but, on the other hand, the Arbitral Tribunal had rejected the AAI's counter claim, which was also based on the report of the CTEO.

4. Briefly stated, the controversy involved in the present case arises in the following context:-

4.1 AAI had invited bids for the work "Modular Expansion of Terminal Building at Amritsar Airport, Amritsar (Phase II), SH Main Building Work". The respondent submitted its bid pursuant to the aforesaid invitation which was accepted. The AAI issued a Letter of Intent (LOI) dated 24.11.2006 which was subsequently followed by a Letter of Award (LOA) dated 30.11.2006.

4.2 Thereafter, the parties entered into a 'Contract Agreement' on 02.12.2006, whereby the respondent agreed to execute the works at a contract value of ₹65,58,82,344.96.

4.3 The works were to be completed within a period of 10 months from the 25th day of the LOI; the Scheduled date for commencement of the works was 19.12.2006 and the works were to be completed by 18.10.2007.

4.4 The execution of the works was delayed for various reasons including increase in the scope of work and the contract was finally completed on 30.06.2009. The AAI paid the final bill in August, 2010.

4.5 In terms of the Contract Agreement, the respondent also submitted three Bank Guarantees. Details of which are as under:-

| S.No. | BG No.           | Bank & Date of issue                                                       | BG amount (in Rs. Lacs) | Amended BG Amount (in Rs. Lacs) | Validity   | BG submitted for                                    | Reference of Contract Condition                            |
|-------|------------------|----------------------------------------------------------------------------|-------------------------|---------------------------------|------------|-----------------------------------------------------|------------------------------------------------------------|
| 1.    | 3731LG002309     | PNB, Mid Corporate Branch, Brady House, V.N. Road, Mumbai-23<br>16/03/2009 | 330                     | 100                             | 30.06.2010 | Security Deposit                                    | Clause No. 01 on page -02                                  |
| 2.    | 0505009BG0002485 | SBI, Commercial Branch, Fort, Mumbai - 01.<br>04.08.2009                   | 44                      | 47.77                           | 30.06.2014 | Guarantee against the work of Standing seam roofing | Guarantee for performance of specialized work page No. 333 |
| 3.    | 0505009BG0002486 | SBI, Commercial, Fort,                                                     | 67                      | 88.15                           | 30.06.2014 | Guarantee against the work of curtain/stru          | Guarantee for performance of                               |

|  |  |                           |  |  |  |                                |                                     |
|--|--|---------------------------|--|--|--|--------------------------------|-------------------------------------|
|  |  | Mumbai -01.<br>04.08.2009 |  |  |  | ctural<br>aluminium<br>glazing | specialized<br>work page<br>No. 333 |
|--|--|---------------------------|--|--|--|--------------------------------|-------------------------------------|

4.6 According to the respondent, the total value of the work was ₹1,16,43,95,546/- (₹1,09,38,33,426/- + Escalation Bill of ₹7,05,62,020/-).

4.7 The respondent claimed that a sum of ₹93,99,226/- had been withheld by the AAI. This was disputed by the AAI; however, AAI accepted that it had withheld a sum of ₹75,00,000/-.

4.8 The CTEO, a wing of the Central Vigilance Commission, sent a letter dated 07.07.2011 to the Chief Vigilance Officer of the AAI calling for comments from the concerned officials with regard to certain observations. The petitioner states that it was alleged in the report submitted by the CTEO that financial favours were given to the respondent and payments were made at higher rates for extra items, which were inadmissible. In particular, it was claimed that a sum of ₹1.97 crores was paid to the respondent for using 250 MT capacity of crane in lieu of 80 MT crane to erect the portal frame truss segments etc.

5. AAI claimed that a sum of ₹2,49,85,642/- was recoverable from the respondent on the basis of the report of the CTEO. The said amount was the aggregate of the sums specified in two statements – Recovery Statement No.1 indicating sums aggregating ₹2,13,63,457/- and Recovery Statement No.2 indicating recovery of a sum of

₹36,22,185/-. Recovery Statement No.1 consisted of recoveries on account of payments for extra items which were now claimed to be inadmissible and payments made for extra items, which AAI now claimed were made at higher rates. Recovery Statement No.2 was for recovery of amounts on account of deficiency in execution of certain works as specified under the Contract Agreement.

6. AAI claimed that the said amount was due in terms of Clause 29(2) of the Contract Agreement. This was disputed by the respondent.

7. The Arbitral Tribunal accepted that AAI was entitled to recover the amounts as specified in Recovery Statement No.2, that is, a sum of ₹36,22,185/-. Since the sum of ₹30 lacs was admittedly withheld by the AAI on that account, the Arbitral Tribunal awarded balance sum of ₹6,22,185/- and adjusted the same from the amount awarded in favour of the respondent. The Arbitral Tribunal also awarded interest at the rate of 9% per annum on the said sum from 25.10.2015 to 29.07.2017, which it quantified at ₹97,994/-.

8. With regard to the recovery of the amounts specified in the Recovery Statement No.1, the Arbitral Tribunal came to the conclusion that the same was not recoverable in terms of the proviso to Clause 29(2) of the Contract Agreement as the said amounts were specifically sanctioned by the Executive Director, Engineering of the AAI and the General Manager, Engineering of the AAI.

9. The respondent had claimed that a sum of ₹93,99,227/- was

withheld; however, AAI clarified that only a sum of ₹75 lacs had been withheld by the AAI. Out of the aforesaid amount of ₹75 lacs, a sum of ₹15 lacs was withheld against the pressure testing of glasses and ₹30 lacs was withheld against the replacement of glass fins. Since the defective glasses had been replaced and tested, the Arbitral Tribunal held that there was no justification for AAI to withhold the aforesaid sum of ₹45 lacs (₹30 lacs plus ₹15 lacs). The Arbitral Tribunal also awarded interest at the rate of 9% per annum on the aforesaid amount from 21.01.2005 and, accordingly, awarded a sum of ₹10,12,500/- in favour of the respondent.

### ***Submissions***

10. Mr Rai, learned Senior Counsel appearing for the AAI contended that the impugned award was palpably erroneous and was *ex facie* inconsistent inasmuch as the Arbitral Tribunal had accepted that the AAI was entitled to recover a sum of ₹36,22,185/- on the basis of the report of the CTEO. However, the Arbitral Tribunal rejected the AAI's claim for recovering any amount under Recovery Statement No.1, which was also based on the report of the CTEO. He submitted that the Arbitral Tribunal having accepted that the AAI was entitled to make recoveries on the basis of the report of the CTEO could not have rejected its right to recover the sum of ₹2,13,63,457/- (as per Recovery Statement No.1). He submitted that the Arbitral Tribunal had grossly erred in proceeding on the basis that the proviso to Clause 29(2) of the Contract Agreement was applicable. He contended that the said proviso, *inter alia*, provided that the AAI would not be

entitled to recover any sum overpaid provided the same had been agreed upon by the officers of specified designations as indicated in the said proviso. He contended that the expression “agreed upon” as used in the said proviso obviously, referred to an agreement arrived at after the differences and disputes had arisen and the overpaid sum had been identified. Any approval of rates or prices by the concerned officer prior to the receipt of the report from CTEO would be of little relevance. Lastly, he submitted that the Arbitral Tribunal could not have sat in appeal over the report of the CTEO and, therefore the AAI’s claim based on the said report could not have been rejected.

### ***Reasoning and Conclusion***

11. At the outset, it is necessary to observe that no contentions were advanced on behalf of the AAI in respect of the award of claims in relation to the amount withheld by the AAI. Further, Mr Rai also did not contest the interest awarded in favour of the respondent. Thus, there is no controversy with respect to the award of a claim of ₹45 lacs along with interest thereon, quantified at ₹10,12,500/-.

12. The only issue that falls for consideration of this Court is whether the decision of the Arbitral Tribunal to reject the AAI’s claim for recovery of a sum of ₹2,13,63,457/- on account of (a) payments made for allegedly inadmissible extra items; and (b) payments made for extra items at alleged higher rates, is patently illegal or falls foul of the fundamental policy of Indian law.

13. Before proceeding further, it would also be relevant to mention

that it was the AAI's case that a sum of ₹2,13,63,457/- was recoverable in terms of Clause 29(2) of the Contract Agreement, there was no endeavour whatsoever on the part of the AAI to establish that the said amounts were recoverable *dehors* the provisions of Clause 29 of the Contract Agreement. Even before this Court neither any submission has been made nor any material has been produced to establish that the AAI would be entitled to recover the amounts without reference to Clause 29 of the Contract Agreement and the Arbitral Tribunal had erred in not awarding the same. As clarified by Mr Rai, the AAI's case rests solely on the basis of Clause 29 of the Contract Agreement. In other words, it is the AAI's case that CTEO's report is binding on the respondent in terms of Clause 29 of the Contract Agreement and, therefore, the AAI is entitled to recover the amount claimed on the basis of the said report.

14. Bearing the aforesaid case in mind, it would now be relevant to refer to Clause 29 of the Contract Agreement, which is set out below:-

“29(1) Whenever any claim, against the contractor for the payment of a sum or money arises out of or under the contract, Airports Authority of India (International Airport Division) shall be entitled to recover such sum by appropriating, in part or whole, the security deposit of the contractor, and sell any Government promissory notes, etc., forming the whole or part of such security. In the event of the security being insufficient or if no security has been taken from the contractor then the balance or the total sum recoverable as the case may be shall be deducted from any sum then due or which at any

time thereafter may become due to the contractor under this or any other contract with Authority. Should this sum be not sufficient to cover the full amount recoverable, the contractor shall pay to Airports Authority of India (International Airports Division) on demand the balance remaining due.

29(2) Airports Authority of India (International Airports Division) shall have the right to cause an audit and technical examination of the works and the final bills of the contractor including all supporting vouchers, abstract etc. to be made after payment of final bill and if as a result of such audit and technical examination any sum is found to have been overpaid in respect of any work done by the contractor under the contract or any work claimed by him to have been done by him under the contract and found not have been executed the contractor shall be liable to refund the amount of overpayment and it shall be lawful for Airport Authority of India (International Airports Division) to recover the same from him in the manner prescribed in sub clause (i) of this clause or in any other manner legally permissible and if it is found that contractor was paid less than what was due to him under the contract in respect of any work executed by him under it, the amount of such under payment shall be duly paid by Airports Authority of India (International Airports Division) to the contractor.

Provided that Airports Authority of India (International Airports Division) shall not be entitled to recover any sum overpaid, nor the contractor shall be entitled to payment of any sum paid short where such payment has been agreed upon between the Executive Director Engineering/Gen. Manager Engg/Dy. or Addl. Gen.

Manager Engg/Asstt. Gen. Manager Engg or the Sr. Manager Engg on the one hand and the contractor on the other under any terms of the contract permitting payment for work after assessment by the Executive Director Engineering/Gen. Manager Engg./Dy. or Addl. Gen. Manager Engg/Asstt. Gen. Manager Engg or the Senior Manager Engineering.”

15. In terms of Clause 29(2) of the Contract Agreement, the AAI had the right to call for an audit and technical examination of works as well as all supporting vouchers, abstract etc., after the final bill was approved. If such examination reflected that the contractor had been overpaid in respect of any work claimed to have been done under the contract, he would be liable to refund the same. In other words, it is clear that Clause 29(2) of the Contract Agreement enabled the AAI to recover: (i) any amount, which was found to have been overpaid in respect of any work done by the contractor under the contract; and (ii) amount paid for any work claimed to be done by him, which is found not to have been executed by the contractor.

16. The proviso to the said clause makes it clear that Clause 29(2) of the Contract Agreement would not entitle recovery of the amounts that had been agreed between the contractor and the specified officers of the AAI. In the present case, there is no dispute that the concerned officers had agreed to the rates for execution of the extra items included in the Recovery Statement No. 1. The Arbitral Tribunal concluded that there was no dispute that the rates were agreed between the respondent and the concerned officers of the AAI; thus, in terms of

proviso to Clause 29(2) of the Contract Agreement, no recovery under Clause 29(2) of the Contract Agreement could be made.

17. This Court finds no ground for interference with the aforesaid view. First of all, there is a good ground to accept the Arbitral Tribunal's interpretation of proviso to clause 29(2) of the Contract Agreement. The object of Clause 29(2) appears to permit an audit post approval of the final bill to verify whether the payments made to the contractor are in terms of the contract; however, this audit would afford no ground to alter or modify the terms of the contract which has been performed. Plainly, the agreement between the parties would also include the rates agreed to between the contractor and the specified officers of the AAI. Clause 29(2) of the Contract Agreement cannot be read in a manner so as to enable AAI to review the rates as agreed with the contractor after he has completed the works. Thus, there is no infirmity with the said interpretation.

18. Secondly, and more importantly, even if the interpretation of the proviso to Clause 29(2) of the Contract Agreement as canvassed by Mr Rai is accepted (which this Court does not), the same is not sufficient to warrant any interference with the impugned award under Section 34 of the Act. Plainly, the interpretation of the proviso to Clause 29(2) of the Contract Agreement as accepted by the Arbitral Tribunal is a plausible interpretation and cannot be stated to be perverse and patently illegal.

19. The question as to the interpretation of the contract falls

squarely within the jurisdiction of the Arbitral Tribunal and it is trite law that even if the interpretation of the contract is found to be erroneous, the same would be an error within the jurisdiction of the Arbitral Tribunal and would warrant no interference under Section 34 of the Act. In ***Mcdermott International Inc. v. Burn Standard Co. Ltd and Others.***: (2006) 11 SCC 181, the Supreme Court of India held as under:-

“112. It is trite that the terms of the contract can be express or implied. The contract of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission*: AIR 2003 SC 4519 and *D.D. Sharma v. Union of India*: (2004) 5 SCC 325].

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

20. In ***Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.***: (2009) 10 SCC 63, the Supreme Court had expressly stated as under:-

“...an error relating to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award.”

21. The contention that there is an intrinsic inconsistency in the impugned award is unmerited. There is a qualitative difference in the items included in Recovery Statement No.1 and those included in Recovery Statement No.2. In case of Recovery Statement No.1, the AAI claims recovery of certain amounts, which have been paid for works executed, at agreed rates. There is no dispute that the said items were executed and the only controversy is whether the items could have been admitted as extra items and whether the rates for such items were higher than what ought to have been accepted. Recovery of any amount under Recovery Statement No.1 would indisputably run contrary to an agreement arrived at between the respondent and the concerned officer of the AAI. As noticed above, by virtue of proviso to Clause 29(2) of the Contract Agreement, the said Clause is inapplicable for reviewing agreed rates for items of work. As distinguished from the above, the recoveries as sought to be effected in respect of Recovery Statement No.2 pertain to defective work; this is clearly a matter of a technical audit and does not fall within the exception carved out under proviso to Clause 29(2) of the Contract Agreement.

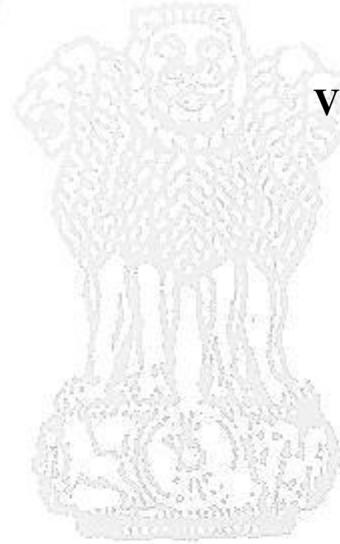
22. The controversy addressed by the Arbitral Tribunal is not whether the recoveries were sought to be made on the basis of the report of the CTEO or whether the said report is acceptable; the

controversy decided is whether such recoveries could be made under Clause 29(2) of the Contract Agreement as contended by the AAI.

23. In view of the above, this Court finds no infirmity with the impugned award. The petition is, accordingly dismissed. The pending application stands disposed of. The parties are left to bear their own costs.

**MARCH 05, 2018**  
pkv/RK

**VIBHU BAKHRU, J**



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