

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 21.05.2018

+ **O.M.P. (COMM) 41/2016 & IA 2098/2016**

AIR INDIA LTD.

..... Petitioner

versus

M/S SPICE SMART SOLUTIONS LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Kailash Vasdev Senior Advocate with
Ms Suruchi Suri.

For the Respondent : Mr Sudhir Nandrajog, Senior Advocate
with Mr Anshuj Dhingra and Mr Kartik
Sethi.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 14.09.2015 (hereafter 'the impugned award') passed by the arbitral tribunal comprising of Justice Reva Khetrapal, Mr. Justice S K Mahajan and Mr. Sanjib Sen (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of disputes arising out of the "Agreement for Call Centre Services" dated 14.03.2007 (hereafter 'the Agreement') entered into between the parties.

2. The Arbitral Tribunal awarded a sum of ₹9,84,41,734/- in favour of the respondent along with *pendente lite* and future interest. At the

outset, it is necessary to observe that the petitioner has not assailed the award on merits; it challenges the impugned award only to the extent that the Arbitral Tribunal has rejected the petitioner's contention that the claims were barred by limitation. Thus, the only controversy that falls for consideration of this Court is whether the claims made by the petitioner were barred by limitation and, if so, whether the impugned order is liable to be set aside on the ground of the Arbitral Tribunal holding otherwise.

Factual Background

3. In 2004, National Aviation Company of India Ltd. (previously known as 'Air India Ltd.' and prior to that known as 'Indian Airlines Ltd.'), issued a Notice Inviting Tender (NIT) for availing of Call Centre Services for its airline operations. The respondent (known as 'M/s Starcon (India) Ltd.' at the relevant time) submitted its bid pursuant to the NIT. The said bid was accepted and the parties entered into an agreement on 03.03.2004 for the said services. Thereafter, on 14.03.2007, the parties entered into another agreement (the Agreement), whereby the earlier agreement dated 03.03.2004 was extended for a further period of three years.

4. On 05.09.2008, the petitioner issued a Request for Proposal (RFP) inviting bids for providing Call Centre services for both domestic as well as international sectors. The respondent also participated in the said bidding but its bid was rejected. Subsequently, by a communication dated 30.04.2009 (hereafter 'the termination notice'), the petitioner terminated the Agreement. The respondent contested the termination by

a letter dated 08.05.2009 challenging the termination of the contract. The petitioner replied to the aforesaid letter through a communication dated 05.06.2009 rejecting all contentions of the respondent regarding the termination of the contract. The effective date of the termination of the Agreement was 29.07.2009; however, the respondent continued to provide services till 25.09.2009 as, by that time, the process of relocation of all the services to the new vendor was completed.

5. In the meanwhile, on or about 27.07.2009, the respondent filed a Civil Suit before the Civil Judge (Jr. Division), Noida, Gautam Budh Nagar, Uttar Pradesh (O.S. No. 327/2009), *inter alia*, praying for a declaration that an injunction be granted against the termination notice issued by the petitioner. The Civil Court passed an ex-parte *ad interim* order dated 27.07.2009 granting a stay on the termination notice and further directing the petitioner to maintain status quo till 27.08.2009. Aggrieved by the same, the petitioner filed an appeal (Miscellaneous Appeal No. 14/2009) against the aforesaid order before the District Judge, Gautam Budh Nagar, Uttar Pradesh. The said appeal was allowed by an order dated 31.08.2009 and the order dated 27.07.2009 granting stay on the termination notice was set aside.

6. Thereafter, on 04.09.2009, the respondent filed a writ petition (Civil Miscellaneous Petition No. 48030/2009) before the Allahabad High Court, *inter alia*, assailing the aforesaid order dated 31.08.2009. The Allahabad High Court, by an order dated 09.07.2010, directed the petitioner to dispose of the respondent's representation seeking refund or settlement of account, expeditiously.

7. In the meantime, on 16.09.2009, the petitioner sent a letter, *inter alia*, stating that in view of the order dated 31.08.2009 passed by learned District Judge, Gautam Budh Nagar, Uttar Pradesh vacating the injunction order granted by the Civil Judge, the termination notice was reinstated and the effective date of termination of the Agreement would be 29.07.2009. The petitioner further stated that pursuant to the provisions of Clause 6.1 and subject to the compliance of Clause 11 of the Agreement, the petitioner would be required to (a) Pay service fee to SPICE BPO per services rendered till the date of end of notice period i.e., 29.7.09, (b) Return to Spice BPO the Performance Bank Guarantee, and (c) Pay Spice BPO the amount equivalent to two months billing based on average monthly bill for the preceding 12 months. The petitioner further stated that the Performance Bank Guarantee would be released after settlement of all other dues and claims of the petitioner and in accordance with the terms of the Guarantee. It also called upon the respondent to comply with the provisions of the Agreement.

8. The petitioner deposited a sum of ₹67,66,599/- on account of tax deducted at source (TDS) against the amount paid to the petitioner or credited to its account on 31.05.2010.

9. On 15.12.2010, the Allahabad High Court dismissed the respondent's writ petition as infructuous. In the meanwhile, the parties exchanged communications regarding the payment of dues to the respondent. The respondent sent a letter dated 03.08.2010 calling upon the petitioner to release the dues. The petitioner responded on 12.08.2010, *inter alia*, stating that no further consideration of issue of

payments was required as the matter was *sub judice* before the Allahabad High Court.

10. Thereafter, on 03.01.2012, the respondent invoked the dispute resolution clause under the Agreement – Clause 12.2 – *inter alia*, stating that although the termination of the Agreement was made effective from 29.07.2009, the services sought by the petitioner continued up to 25.09.2009 and, therefore, the respondent was entitled to service charges. The respondent also listed out several of its claims – describing them as ‘illustrative’ – and called upon the petitioner to amicably resolve the same at the earliest.

11. The petitioner responded to the aforesaid letter dated 19.01.2012, *inter alia*, stating that the validity of the termination of the Agreement was *sub judice* in the Court of Civil Judge, Gautam Budh Nagar, Uttar Pradesh and, thus, the demands raised by the petitioner did not warrant any reply or action from the petitioner at that stage. The petitioner reiterated that full and final settlement of accounts between the parties and/or the respective claims of obligations would not be disposed of or decided until the matter was *sub judice*.

12. The petitioner withdrew the suit filed before the Civil Judge, Gautam Budh Nagar, Uttar Pradesh (O.S. No. 327/2009) on 28.04.2012 and thereafter, by a letter dated 21.05.2012, called upon the petitioner to amicably resolve the claims as set out in its notice dated 03.01.2012. The petitioner responded to the letter dated 21.05.2012 by its letter dated

15.06.2012, whereby it unequivocally denied the claims raised by the respondent.

13. The respondent sought reference to the disputes to Indian Council of Arbitration by its letter dated 06.06.2013. The arbitral proceedings so commenced culminated in the impugned award.

14. Before the Arbitral Tribunal, the respondent claimed (i) ₹6,23,05,247/- as payment of service charges towards inbound and outbound services rendered at all locations for the months of June to September 2009; (ii) ₹87,052/- as payments towards SMS charges from June, 2009 to September, 2009; (iii) ₹4,88,225/- as payments towards STD charges for the period June, 2009 to September, 2009; (iv) ₹3,56,56,160/- as termination fee; (v) ₹10 lakhs as Earnest Money Deposit paid by the respondent; (vi) ₹50 lakhs as Retention money; and (vii) Interest at the rate of 10% per annum against service charges. The petitioner, in its statement of defense, contended that the aforesaid claims filed by the respondent were barred by limitation.

15. The Arbitral Tribunal rejected the contention that the claims of the respondent were barred by limitation. Accordingly, the Arbitral Tribunal awarded ₹4,84,51,335/- against Claim no.1; ₹87,052/- against Claim no.2; ₹4,88,225/- against Claim no.3; ₹3,56,56,160/- against Claim no.4; ₹10 lakhs against Claim no.5; ₹50 lakhs against Claim no.6; and ₹80,23,126/- against Claim no.7. The Arbitral Tribunal further awarded *pendente lite* interest at the rate of 9% per annum and future interest at the rate of 18% per annum.

Submissions

16. Mr Kailash Vasdev, learned Senior Counsel appearing for the petitioner contended that in terms of the Regulations of International Council of Arbitration, the arbitration would commence on the respondent making a request to the Indian Council of Arbitration. He stated that such request was made on 06.06.2013, and that would be the date for the purpose of computing the limitation. He referred to Section 21 of the Act and contended that an arbitral proceeding commences on a party making such request, and the provisions of Section 43(2) of the Act makes it explicitly clear that for the purposes of limitation, the arbitration would be deemed to have commenced on the date as referred to in Section 21 of the Act. He submitted that since the request for arbitration was made beyond the period of three years from 30.04.2009, the claims made by the respondent were barred by the Limitation Act, 1963. He submitted that, admittedly, the petitioner had discontinued availing services from the respondent with effect from 25.09.2009 and even if the said date was considered as for the purposes of commencement of the period of limitation, the claims made by the respondent were time barred.

17. Next, he referred to the impugned award and submitted that the decision of the Arbitral Tribunal that the letter dated 15.06.2012 was the trigger point and the right to sue had accrued in favour of the respondent from the said date, is patently illegal and, therefore, the impugned order is liable to be set aside under Section 34(2)(b)(ii) as well as under Section 34(2A) of the Act.

Reasons and Conclusions

18. At the outset, it is relevant to note that during the course of the arbitral proceedings, the petitioner had filed an application to place on record additional documents pursuant to the orders passed by the Arbitral Tribunal. This was in the context of the tax deducted at source (TDS), which was deposited by the petitioner with the Income Tax Authorities. Undisputedly, the said amount was deposited to the credit of the respondent and was in discharge of the petitioner's liability to that extent.

19. In its application, the petitioner had unequivocally stated as under:-

“8. Accordingly, on 31.05.2010 the Respondent deposited the TDS amount with the authorities as per law (as applicable in 2009-10). It is pertinent to mention herein that the TDS was deposited only after calculating the amounts payable to the Claimant for (a) service fees and expense for the months of June & July, 2009 (b) payment of termination fee equivalent to two (2) months billing based on average monthly bill for the preceding twelve (12) months and (c) the refund of the earnest money deposits by Respondent. It is pertinent to mention herein that the respondent in fact had also provided for claims that were recoverable from the Claimant in respect to payments for dial-a-ticket and dial-a-package services which were unpaid by the Claimant to the Respondent.

9. It is further submitted that the Respondent had acted in good faith in 2009-10 in respect of the amounts payable to the Claimant and accordingly booked the

amounts on 31st March, 2010 (against which TDS was deposited on 31st May, 2010) concerned department are given along with the necessary approvals.

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11. While the documents attached herewith indicate that the Claimant continues to be a named creditor in the books of accounts of the Respondent as of present date, the Hon'ble tribunal must appreciate the fact that (being a Public Sector Undertaking) the Respondent as a matter of process does not automatically write-off any ledger account unless specific orders or instructions from the concerned department are given along with the necessary approvals."

20. Thus, admittedly, the amounts due to the respondent were reflected and acknowledged in the books of accounts maintained by the petitioner. The said amounts also formed a part of the published balance sheet of the petitioner.

21. The Arbitral Tribunal had considered the same on 17.07.2015 and had observed as under:-

"In view of the fact that in the application filed today, it is stated by the Respondent that the Claimant continues to be a creditor in the books of accounts of the Respondent till date, the question of the claim being time barred does not arise.

22. This Court also does not find infirmity with the aforesaid decision since the petitioner had acknowledged the amounts due in its balance

sheet. [See: *Food Corporation of India v. Assam State Cooperative Marketing & Consumer Federation Ltd. & Ors.*(2004) 12 SCC 360; also see *The State of Manipur & Ors. v. Th. Haridas Singh & Ors.*: 2017 (4) ArbLR 307]

23. Mr Nandrajog, learned Senior Counsel appearing for the respondent had also pointed out that the said decision was final insofar as the issue of limitation is concerned and, therefore, was an arbitral award in terms of Section 2(1)(c) of the Act, which expressly defines an arbitral award to include an interim award. He had submitted that since the said decision was not challenged within the time as specified under Section 34(3) of the Act, the petitioner was precluded from doing so. Although, the said contention appears to be attractive on the first blush, it is unmerited. The Arbitral Tribunal has finally decided the issue of limitation in the impugned award and, therefore, the petitioner cannot be denied its right to assail the same.

24. In view of the admitted position that the petitioner continued to acknowledge the amount due to the respondent in its books, it is not necessary to examine the matter any further. However, for the sake of completeness, this Court considers it apposite to also examine the contention that whether the Arbitral Tribunal's conclusion that the right to sue arose in favour of the petitioner on 15.06.2012, is patently illegal or falls foul of the fundamental policy of Indian law.

25. At this stage, it would be necessary to refer to the Dispute Resolution Clause which reads as under:-

“20. **Dispute Resolution:** Any dispute, violation, controversy, contest or claim arising out of or relating to this agreement or the breach, termination or validity thereof shall be resolved amicably in the first instance. All unresolved disputes or differences after the aforesaid dates shall be settled by arbitration in accordance with the rules of arbitration of the Indian Council of arbitration, New Delhi India and the award made in pursuance thereof shall be binding upon the parties.

Arbitration shall be referred to a bench of three arbitrators. Parties to the Agreement shall select one arbitrator each and the Panel of Arbitration Committee of the Indian Council shall select the third arbitrator who acts as Chairman of the Bench of Arbitrators.”

26. It is apparent from the plain reading of the aforesaid clause that the first step required for invoking the Dispute Resolution Clause was to attempt to resolve the same amicably. It is only those disputes which remained unresolved, that could be referred to arbitration.

27. The respondent invoked Clause 12.20 of the Agreement, by its letter dated 03.01.2012; it set out its claims and unequivocally called upon the petitioner to amicably resolve the claims as stated in the said letter. The said letter was within the period of three years of the termination of the Agreement. Thus, the petitioner had commenced the dispute resolution procedure, in terms of Dispute Resolution Clause under the Agreement, within the period of limitation.

28. Although Mr Vasdev had submitted that the respondent had denied the claims by its letter dated 19.01.2012, a plain reading of the

letter dated 19.01.2012 sent by the petitioner in response to the aforesaid letter dated 03.01.2012, does not indicate so. The petitioner did not unequivocally deny the claims raised by the petitioner. On the contrary, the petitioner had stated that a full and final settlement of the accounts between the parties and/or their respective claims and obligations could not be decided and disposed of until the matter was *sub judice*. The relevant extract of the said letter reads as under:-

“In response to your captioned letter, it is submitted that since the legality and validity of termination of the Agreement has been voluntarily challenged by your company and the matter in respect thereof is sub-judice in the Court of Hon’ble District Judge, Gautam Budh Nagar, Uttar Pradesh, the demands raised by you vide your captioned letter with regards payment of service fee, margin money, interests and/or any kind of severance fee do not warrant any reply/action from AIL.

That it is reiterated that full and final settlement of accounts between the Parties and/or the respective claims and obligations of either Party cannot be disposed and decided upon until the matter is sub-judice.

In light of the above, it is submitted that AIL reserves its rights to answer to your letter dated 3rd January, 2012 would not entertain any claim or demand from your company since the matter between the parties is sub-judice.”

29. A plain reading of the aforesaid letter indicates that the petitioner had not shut down the possibility of an amicable settlement but had only stressed that the settlement of accounts and respective claims could not

be disposed of till the matter was *sub judice*. Thus, the petitioner's stand was that while the matters are pending in Court, it would not entertain any claim or demand from the respondent. In view of the position adopted by the petitioner at the said stage, the process of amicable resolution of disputes remained inconclusive.

30. Thereafter, the petitioner withdrew the suit on 28.04.2012 and once again approached the petitioner for an amicable resolution of the disputes by a letter dated 21.05.2012. This was in conformity with the petitioner's stand that a full and final settlement of accounts could not take place till the matters were *sub judice*.

31. The petitioner responded to the aforesaid letter, on 15.06.2012, denying the claims made by the respondent as untenable.

32. The said letter dated 15.06.2012 is significant for two reasons: first, that this was the first communication sent by the petitioner, whereby the respondent's claims were unequivocally denied; and second, that the said letter also ended the prospect of an amicable settlement with regard to the claims made by the petitioner; thus, paving the way for the respondent to refer the disputes to arbitration.

33. The Arbitral Tribunal had considered the sequence of events and had observed as under:-

“51. The entire sequence of events delineated above, in our opinion, bears out the contention of the Claimant that it was on 15.06.2012 that for the first time the Respondent unequivocally refused to entertain the claims of the Claimant. The said date

must therefore be regarded as the trigger point or the starting point of limitation running against the Claimant.”

34. The Arbitral Tribunal also observed that the petitioner was cognizant of the fact that the respondent’s dues were required to be paid and this was evident from the following facts:-

- “A. The fact that the Respondent deducted TDS vide Form no.16A dated 08.06.2010 to the account of the Claimant in the sum of Rs 6,76,66,985/- (Rupees Six Crores Seventy Six Lakhs Sixty Six Thousand Nine Hundred and Eighty Five Only) [TDS deducted-Rs 67,66,699/-{ Rupees Sixty Seven Lakhs Sixty Six Thousand Six Hundred and Ninety Nine Only}].”
- B. The fact that the Respondent has till date never disputed a single invoice submitted to it by the Claimant, all of which are placed on record.
- C. The fact that the Respondent acknowledged the bill of the Claimant for the month of August and did not return the same.
- D. The fact that the Respondent called upon the Claimant to submit its bill for the month of September till 29.09.2009 and on the Claimant's doing so, returned the bill on the ground that it was not in the proper format, specifying that the format was as laid down in Appendix ‘E’ to the Agreement dated 14.03.2007.
- E. The fact that on the Claimant’s re-submitting the bill in proper format i.e. as per Appendix ‘E’ to the Agreement the Respondent did not return the same but took the plea that the bills could not be settled as the matter was pending before the Hon’ble High Court of Allahabad and thereafter the plea that the

suit was still pending in the Court of the Ld. Civil Judge, Gautam Budh Nagar (U.P).

- F. The fact that the Respondent at no point of time denied its liability to clear the accounts of the Claimant, but repeatedly called upon the Claimant to withdraw the proceedings filed by it as a pre-condition to the settlement of accounts.
- G. The fact that even in the application filed before this Tribunal the Respondent admits that the Claimant “continues to be a named creditor in the books of account of the Respondent.”

35. In view of the above, the present petition is unmerited. It is also clear that the petitioner was fully aware that it was obliged to pay the amounts due to the respondent, and the present petition has been pursued mainly to delay paying the respondent its legitimate dues. In the given facts and circumstances, this Court is of the view that the petitioner ought to be mulcted with costs.

36. In view of the above, the present petition is dismissed with costs quantified at ₹50,000/-. All pending applications are also disposed of.

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VIBHU BAKHRU, J

MAY 21, 2018
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