

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 511/2016**

Reserved on: 01.02.2019
Date of decision : 06.03.2019

AAIC BUILDING SOLUTIONS LTD. Petitioner
Through: Mr.Akhil Sibal, Sr. Adv. with
Mr.Pradeep Chhindra, Ms.Shriambhra, Advs.
versus

ARCHAEOLOGICAL SURVEY OF INDIA Respondent
Through: Mr.Jayant Tripathi, Mr.Dinesh
Dahiya, Ms.Nayantara Roy, Advs.

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 challenging the Arbitral Award dated 15.03.2015 passed by the Sole Arbitrator directing the petitioner to pay to the respondent a sum of Rs.1,26,63,692/- (Rupees One Crore Twenty Six Lac Sixty Three Thousand Six Hundred and Ninety Two only) along with interest @12% per annum from the date the application was filed before this Court for appointment of an Arbitrator till the final payment.

2. In the year 2010, the respondent issued a tender notice inviting bids for operating the premium parking facility on the south side of Red Fort. The tender was for a period of two years and had the following important terms:

“1. The contract shall be for two years from the date of award of contract.

2. The charges for parking of different category of vehicle shall be as under:-

a. Car Rs.40/- per vehicle for two hours.

b. Mini Coach Rs.75/- per vehicle for two hours.

c. Bus Rs.100/- per vehicle for two hours.

d. Large Buses Rs.125/- per vehicle for two hours.

e. Three wheeler /Auto Rs.30/- per vehicle for two hours.

f. Motor-Cycle & Scooter parking Rs.10/- per vehicle for two hours.

g. For Clock Room Rs.5/- per luggage for two hours.

Note: The above rates of parking of vehicle is only for 2 hrs. The above said rates shall double up one time after two hours in a day.

3. The reserved price for one year contract by the govt. is 65.00 lacs.

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20. No fee would be charged from Hop On and Hop Off Buses or vehicles that are taking tourists from Delhi Gate to Lahori Gate and Vice-versa.”

3. Along with the above tender conditions, the respondent provided an assessment of revenue collection which was the basis of setting the reserve price. The said revenue assessment was based on the parking rate fixed by UP Tourism Department for Taj Mahal / Fatehpur Sikri parking at Agra for tourist parking. The said assessment is relevant as the Award is based thereon and is therefore, reproduced hereinbelow:

“Parking area at South (T-5) Red Fort

An assessment of revenue collections

<i>Parking capacity for bus</i>	<i>30 nos.</i>	<i>@ Rs.100/-</i>	<i>3000</i>
<i>Parking capacity for car</i>	<i>300 nos.</i>	<i>@ Rs.40/-</i>	<i>12000</i>
<i>Parking capacity for scooter motorcycle</i>	<i>100 nos.</i>	<i>@ Rs.10/-</i>	<i>1000</i>
<i>Parking capacity for auto/three wheeler</i>	<i>20 nos.</i>	<i>@ Rs.30/-</i>	<i>60</i>
<i>Car on monthly basis</i>	<i>20 nos.</i>	<i>@ Rs.20/-</i>	<i>400</i>
<i>Total Rs.</i>			<i>17000</i>

This capacity may be used 1.5 times
a day 1.5 x 17000 = *26250/-*
Clock Room 500 pkts @ Rs.5/- = *2500/-*
Total for one day = *28750*

Calculated working days
Non working days
ID celebration 07 days

Other emergency occasion 06 days
Weekly off 52 days
Total 65 days

365-65 = 300 days @ Rs.28750/- *Rs.8625000/-*
Deduction for collection charge
Infrastructures by contractor, contractor's
Profit and taxes etc. Taken as 25% *(-) 2156250/-*

Net Rs.6468750/-
Say 6500000/-

= The rates based on the parking rate fixed by UP Tourism Department for Taj Mahal/Fatehpur Sikri parking at Agra for tourist-Parking.”

4. The petitioner submitted a bid of Rs.1,03,00,000/- (One Crore Three Lacs only), which being the highest bid, was accepted by the respondent.

5. The learned senior counsel for the petitioner submits that the petitioner started providing the parking services with effect from 19.10.2010.

6. The petitioner, however, stopped making the payment of the agreed licence fee with effect from July, 2011 claiming that the respondent was in breach of the Agreement as it had failed to provide to and fro shuttle service between the parking lot and Lahori Gate entrance of the Red Fort as also a Cloak Room, leading to loss of revenue to the petitioner.

7. In this manner, disputes arose between the parties with the petitioner claiming an amount of Rs.1,92,43,175/- (Rupees One Crore Ninty two Lacs Forty Three Thousand one Hundred and Seventy Five only) on account of under occupancy of the parking due to respondent's failure to provide shuttle service, loss of revenue due to closure of the parking, loss of revenue due to failure of the respondent to construct a Cloak Room and loss of reasonable profits, salaries and other expenses.

8. On the other hand, the respondent claimed the unpaid licence fee for the period of July, 2011 to October, 2012 amounting to

Rs.1,34,18,604/- (Rupees One Crore Thirty Four Lacs Eighteen Thousand Six Hundred and Four only) along with penalty of Rs.1,000/- per day in terms of Clause 26 of the Terms and Conditions amounting to Rs.39,56,000/- (Rupees Thirty Nine Lacs Fifty Six Thousand only) and Rs.1,01,588/- (Rupees One Lac One Thousand and Five Hundred and Eighty Eight only) on account of electricity charges.

9. The Sole Arbitrator by his Impugned Award has held that while the respondent was in breach of the Agreement by not providing to and fro shuttle service from the parking space to the Red Fort and the Cloak Room, the petitioner was also in breach by not paying the licence fee as it could not have withheld the entire licence fee on this account. There is no challenge to this finding by either party. The challenge of the petitioner is to the assessment of damages to which the petitioner has been held entitled due to the breach of obligations by the respondent. I would therefore, first quote the relevant findings of the Sole Arbitrator on the issue of quantification of such damages:

“The next dispute is as to what amount if any can be awarded to the respondent for not providing to and fro service from the parking space to the Lahori Gate of the Red Fort. The witness of the respondent RW1 has produced a detailed statement of the staff and RW2 Chartered Accountant has proved the audit report. In the opinion of this Tribunal this is no ground or to show that damage has been caused as is the defence of the respondent. The visitors that come to the Red Fort and park their vehicles would depend on so many factors. There is precious little to state as to how much was the drop because of the absence of to and fro facility from the parking space to the entry to the Red Fort. It cannot be believed that there was no visitor at all. Visitors would still come and may be and they would park their vehicles.

Reference with advantage can be made to Exhibit R3 the documents filed by the respondent himself. The same is being reproduced below for the sake of facility.

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An assessment of revenue collections

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Parking capacity for car	300 nos.	@ Rs.40/-	12000
Parking capacity for scooter motorcycle	100 nos.	@ Rs.10/-	1000
Parking capacity for auto/three wheeler	20 nos.	@ Rs.30/-	600
Car on monthly basis	20 nos.	@ Rs.20/-	400
Total Rs.			17000

This capacity may be used 1.5 times
a day 1.5×17000 = 26250/-
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365-65 = 300 days @ Rs.28750/-	Rs.8625000/-
Deduction for collection charge	
Infrastructures by contractor, contractor's	
Profit and taxes etc. Taken as 25%	(-) 2156250/-

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= The rates based on the parking rate fixed by UP Tourism Department for Taj Mahal/Fatehpur Sikri parking at Agra for tourist-Parking.

It clearly shows that at the time of the bid the calculations have been given and it specified clearly that the contractors profit is Rs. 21,56,250/-. This is almost 25% of the total amount though it cannot be taken to be a very precise figure but these terms and conditions were accepted by the respondent. Taking the case of the respondent at its best this is the maximum that the respondent can claim because this was the profit of the contractor for two years i.e. Rs. 43,12,500/- which he lost.

For the loss in the absence of cloak room again there is no material or there was material that can be available of visitors will not avail the facility of a cloak room. A reasonable amount can be awarded on the touchstone of fairness. Thus only Rs.5 lakhs is awarded as is the loss in the absence of a cloak room for two years."

10. The learned senior counsel for the petitioner submits that the Arbitrator has erred in not relying upon the evidence led by the petitioner in support of its claim. He submits that the petitioner had produced two witnesses before the Arbitrator being the CMD of the petitioner and its Chartered Accountant, while the respondent produced no witness to rebut such evidence. Placing reliance on paragraphs 47 to 50 of the affidavit filed by Mr.Anirudh Singha, CMD of the petitioner, he submits that all

relevant data for proper determination of damages had been duly provided and proved before the Arbitrator and therefore, the Arbitrator has erred in not placing reliance on such evidence.

11. On the other hand, the learned counsel for the respondent submits that the Arbitrator has awarded much more to the petitioner than was reasonable. He submits that the Arbitrator has awarded the damages in favour of the petitioner based on the projections given by the respondent at the time of the tender. The Arbitrator has awarded full portion of the anticipated profit in favour of the petitioner without making any deductions for the amount that the petitioner had earned from the operation of the parking facility. He further submits that the petitioner had infact, used the parking facility even on the weekly off days thereby making unjustified profit. The petitioner had also charged a fee of Rs.5/- per passenger for the shuttle service which was otherwise supposed to be free. He submits that therefore, the Arbitrator has balanced such claims and counter claims and, thereafter awarded an amount in favour of the petitioner, which cannot be challenged under Section 34 of the Act.

12. I have considered the submissions made by the counsels for the parties.

13. The petitioner along with the affidavit of Mr.Anirudh Singha had filed a copy of the audited account certificate issued by the Chartered Accountant as Ex.R-46, the same reflected the total receipts, expenses and therefore, the loss on account of the running of the parking facility. The Arbitrator, therefore, was correct in holding that the said certificate

cannot and does not show the loss that was occasioned to the petitioner only because of non-provision of shuttle service and the Cloak Room.

14. The petitioner had also filed month wise statement of expenditure, daily collection log and a purported loss statement. These again could not have shown the loss suffered by the petitioner on account of non-provision of the shuttle service and the Cloak room. The petitioner also made projections on the basis of the tender for the Taj Mahal parking, which again was not relevant. Finally, the petitioner relied upon the parking data of the respondent, which again was not of much relevance to determine the loss suffered by the petitioner due to the breach of the Agreement by the respondent.

15. On the other hand, the Arbitrator placed reliance on the projections given by the respondent at the time of tender. The Arbitrator has awarded the full amount of profit that were shown in such projections. In my view, therefore, the Arbitrator has infact been more than reasonable in awarding damages to the petitioner for the default / breach of the respondent. It may be correct that these were mere projections of the respondent and not a term of the Agreement, however, the Arbitrator having adopted a particular method for assessment of damages and such assessment having been found to be more than reasonable, does not deserve any interference from this Court.

16. In *Associate Builders vs. Delhi Development Authority & Ors.* (2015) 3 SCC 49, the Supreme Court has held as under:

“33. 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 [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

“General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”.

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“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.

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56. Here again, the Division Bench has interfered wrongly with the arbitral award on several counts. It had no business to enter into a pure question of fact to set aside the arbitrator for having applied a formula of 20 months instead of 25 months. Though this would inure in favour of the appellant, it is clear that the appellant did not file any cross-objection on this score. Also, it is extremely curious that the Division Bench found that an adjustment would have to be made with claims awarded under Claims 2, 3 and 4 which are entirely separate and independent claims and have nothing to do with Claims 12 and 13. The formula then applied by the Division Bench was that it would itself do "rough and ready justice". We are at a complete loss to understand how this can be done by any court under the jurisdiction exercised under Section 34 of the Arbitration Act. As has been held above, the expression "justice" when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the arbitrator's view and does what it considers to be "justice". With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact."

17. The learned senior counsel for the petitioner further submits that the Arbitrator has erred in awarding only a sum of Rs.5,00,000/- (Rupees

Five Lacs) as damages for non-provision of Cloak Room. He submits that the Arbitrator had placed reliance on the projected estimate given by the respondent at the time of the tender. The same showed a revenue collection of Rs.2,500/- (Rupees Two Thousand Five Hundred only) per day from the Cloak Room. Therefore, at least this amount should have been awarded in favour of the petitioner.

18. I am unable to agree with the submission made by the learned senior counsel for the petitioner. For earning the above revenue, the petitioner would necessarily have to incur expenditure. In any case, the assessment of damages by the Arbitrator cannot be termed as unreasonable or perverse so as to warrant any interference of this Court in exercise of its powers under Section 34 of the Act.

19. The leaned senior counsel for the petitioner further challenged the Award of Rs.39,56,000/- (Rupees Thirty Nine Lacs Fifty Six Thousand) as penalty in favour of the respondent. He submits that Clause 26 of the Terms and Conditions itself prescribes the payment of Rs.1,000/- (Rupees One Thousand) per day as a 'penalty' and therefore, in terms of Section 74 of the Indian Contract Act, 1872 the abovementioned amount is not payable. He further submits that the said amount being in form of damages, it was for the respondent to prove the same and only a reasonable amount could have been awarded in favour of the respondent. He places reliance on the judgment of the Supreme Court in ***Kailash Nath Associates vs. Delhi Development Authority & Anr.*** (2015) 4 SCC 136.

20. On the other hand, the learned counsel for the respondent submits that the petitioner never challenged its liability to pay the above amount as penalty before the Arbitrator. He submits that a plea based on Section 74 of the Contract Act was never raised by the petitioner before the Arbitrator. He further submits that even otherwise this amount cannot be said to be unreasonable as the petitioner had voluntarily been paying the said amount prior to the disputes having arisen between the parties.

21. As far as the petitioner not raising such plea before the Arbitrator is concerned, the learned senior counsel for the petitioner does not dispute the same. However, he submits that in view of Section 34(2)(b) of the Act, where the Court finds that the Award is in conflict with the Public Policy of India, it would on its own set aside the same irrespective of whether such issue was raised before the Arbitrator or in the objection petition filed before the Court. He places reliance on the judgment of this Court in *Delhi Jal Board vs. Esskay Kohli*, MANU/DE/8198/2007 and of the Supreme Court in *Lion Engineering Consultants vs. State of M.P.* 2018 SCC OnLine SC 327.

22. I have considered the submissions made by the counsels for the parties.

23. Admittedly, the petitioner was in default of payment of the monthly licence fee and, therefore, in terms of Clause 26 of the Terms and Conditions, was liable to pay an amount of Rs.1,000/- (Rupees One Thousand) per day albeit as penalty. The petitioner had voluntarily paid such amounts for the defaults prior to the disputes having arisen between the parties. This is not denied by the learned senior counsel for the

petitioner. Therefore, the petitioner itself found the said charge to be reasonable.

24. Section 74 of the Contract Act states that where a sum has been named in the contract as the amount to be paid in case of breach, as a penalty, the party complaining of the breach is entitled to receive from the party who has breached the contract reasonable compensation not exceeding the amount so named. Reasonableness of an amount would be a question of fact. Not only was this question of fact not put in issue before the Arbitrator but even otherwise it has to be held against the petitioner on account of its previous conduct of having voluntarily paid such amount to the respondent for its defaults. I therefore, find no reason to interfere with the award of such amount in favour of the respondent.

25. Learned senior counsel for the petitioner further challenges the award of Rs.1,01,588/- (Rupees One Lac Fifteen Hundred and Eighty Eight) in favour of the respondent towards alleged electricity consumption. Learned senior counsel for the petitioner submits that the respondent had filed no proof in support of such claim. The learned counsel for the respondent has not been able to contradict the said submission. Even from the Impugned Award no basis for awarding such claim can be found.

26. I therefore, have no hesitation in setting aside the award of Rs.1,01,588/- (Rupees One Lac Fifteen Hundred and Eighty Eight) in favour of the respondent.

27. The last challenge of the petitioner is to the award of interest at the rate of 12% per annum in favour of the respondent. Learned senior counsel for the petitioner submits that the Arbitrator has awarded interest even on the damages. He further submits that the rate of interest is highly exorbitant.

28. I find no merit in such submissions. The Arbitrator has awarded interest from the date the application was filed before the High Court for appointment of an Arbitrator. By this time, the licence fee and the damages had already become payable. Under Section 31(7) of the Act, the Arbitrator was therefore, within his rights and jurisdiction to award such interest. Even otherwise, the rate of interest awarded by the Arbitrator cannot be said to be unreasonable.

29. In view of the above, the Impugned Award, only in so far as it directs payment of Rs.1,01,588/- (Rupees One Lac Fifteen Hundred and Eighty Eight) as electricity charges by the petitioner to the respondent and interest thereon, is set aside.

30. The petition is partly allowed in the above terms with no order as to costs.

NAVIN CHAWLA, J

MARCH 06, 2019
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