



2024:DHC:831-DB



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

% *Date of Decision: 24.01.2024*

+ **FAO(COMM) 17/2024 and CM Nos. 4448/2024, 4449/2024
4450/2024 and 4593/2024**

AIRPORTS AUTHORITY OF INDIA Appellant
Through: Mr Vaibhav Kalra, Ms Anisha
Upadhyay and Ms Neha Bhatnagar,
Advocates.

versus

M/S M.S. KHURANA ENGINEERING LTD. Respondents
Through: None.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE TARA VITASTA GANJU

VIBHU BAKHRU, J.

1. Airports Authority of India (hereafter 'AAI') has filed the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning an order dated 16.12.2023 (hereafter '**the impugned order**') in O.M.P.(COMM) 5/2021 captioned *Airports Authority of India v. M/s. M.S. Khurana Engineering Ltd.*

2. AAI had filed the said application – O.M.P.(COMM) 5/2021 – under Section 34 of the A&C Act impugning an Arbitral Award dated 31.01.2021 (hereafter '**the impugned award**') rendered by an Arbitral Tribunal comprising of a Sole Arbitrator (hereafter '**the Arbitral Tribunal**'). The impugned award was rendered in the context of the



disputes that had arisen between the parties in connection with an Agreement dated 19.10.2015 (hereafter '**the Agreement**'). The respondent (hereafter '**MKEL**') had raised certain claims with respect to escalation/variation in the price of bitumen, cement and labour. The said claims were partly allowed.

Factual Context

3. AAI had invited tenders for 'Strengthening of Runway 16-34 including up-gradation to CAT-III B system from CAT-II system including grading/levelling of basic strip at SGRDJ International Airport, Amritsar' (hereafter '**the Project**') by e-tender bid no. 1000008621. MKEL had participated in the tender process and submitted its bid on 22.05.2015.

4. MKEL's bid was found to be most economical and AAI decided to accept the same. AAI claims that, subsequently, on 18.09.2015, it sent a proposal to MKEL for modification of the General Clauses of the Contract (hereafter '**GCC**'), which are applicable to the Project in question. MKEL conveyed its acceptance to the modified terms and thereafter, AAI issued a Letter of Award dated 24.09.2015. Subsequently, on 19.10.2015, the parties entered into the Agreement. The contract value was ₹63,43,85,800/- and the Project was required to be completed within a period of twelve months from the date of start of the Project, which was stipulated as 04.10.2015. Thus, the works were to be completed on or before 03.10.2016. AAI had provided some land for mobilization to MKEL sometime in December, 2015. However,



there was a delay in handing over the main site (the basic strip which was required to be upgraded). The same was handed over sometime in March, 2016 and the work could commence on the basic strip after 26.03.2016.

5. Admittedly, the execution of the Project was delayed. By a letter dated 09.12.2017, MKEL submitted a proposal seeking extension of time of 568 (five hundred and sixty-eight) days for completion of the Project. However, AAI allowed extension of time of 338 (three hundred and thirty-eight) days, without prejudice to its rights to recover liquidated damages.

6. The Final Bill dated 28.05.2018 was raised by MKEL and the same was paid.

7. Immediately, thereafter, MKEL sent a letter dated 09.07.2018 and requested that the date of commencement of the Project be considered as 26.03.2016 instead of 04.10.2015 as the main site was not handed over and the execution of the works would commence only after 26.03.2016. MKEL claimed that extra bitumen required for the Project was purchased during October, 2016 to March, 2017 at a higher rate than specified. However, AAI rejected the said representation. AAI asserted that MKEL had undertaken not to claim any extra amount under Clause 10CC of the GCC or on account of delay in handing over the site. Thus, it was precluded from claiming any extra amount on account of delay in handing over the site. According to AAI, the date of handing over of site was 04.10.2015 as various activities for



mobilization were undertaken thereafter. AAI denied that the date for handing over of the site ought to be considered as 26.03.2016.

8. On 24.01.2019, MKEL requested for appointment of a Dispute Resolution Committee (**DRC**) under Clause 25 of the GCC. The DRC recommended that MKEL's claims be rejected 'in toto'. In the aforesaid backdrop, MKEL invoked arbitration and sought reference of the disputes to arbitration. Accordingly, the disputes were referred to arbitration.

The Impugned Award

9. Before the Arbitral Tribunal, MKEL filed a Statement of Claim aggregating to ₹1,48,54,936/- plus interest. A tabular statement setting out the claims raised by MKEL is reproduced below:

Sr. No.	Description	Amount Payable	Less Recovered / paid	Balance amount payable
1	Escalation of Bitumen (VG-10), for (Period Oct-15/ March-16 to April-17)	-4013158.00	-4378096.00	364938.00
2	Escalation of Bitumen (VG-30), for (Period Oct-15/ March-16 to April-17)	-52638117.00	-58601410.00	5963293.00
3	Escalation of Cement, for (Period Oct-15/March-16 to April-17)	1773822.00	1557386.00	216436.00



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4	Escalation of Labour,, for (Period Oct- 15/March-16 to April- 17)	12913024.00	4602755.00	8310269.00
Total		-41964429.00	-56819365.00	14854936.00 Plus Interest

10. MKEL founded its claim on the assertion that the site was handed over on 26.03.2016 and therefore, escalation/variation under Clause 10CA of the GCC was required to be computed based on the indices as on that date and not 04.10.2015.

11. MKEL claimed that the escalation was under Clauses 10CA and 10C of the GCC and was required to be computed on the basis of indices taking into account the start of work on 26.03.2016. In addition, MKEL claimed that it was also entitled to escalation for the extended period as granted by AAI, that is, up to 06.09.2017.

12. AAI contested the said claims raised by MKEL. According to AAI, the same were not justified. AAI contended that MKEL had agreed not to claim any extra amount under Clause 10CC of the GCC and therefore, could not claim any extra amount on account of delay in handing over of site. AAI contended that since MKEL had not raised any objections regarding delay in handing over the site at the material time, it was estopped from raising any claim on the said account.

13. The Arbitral Tribunal considered the rival contentions and accepted MKEL's claim that indices of material was required to be



computed taking into account the date of handing over of site as 26.03.2016. The Arbitral Tribunal accepted the said contention that the amounts under Clause 10CA and 10C of the GCC were incorrectly computed.

14. The Arbitral Tribunal took note of the minutes of the meeting of Works Advisory Board of the Department of Engineering of AAI (**WAB**) held on 15.09.2015, wherein it was clearly stated that the site could not be handed over to the contractor before February/March 2016 as per the Directorate General of Civil Aviation (**DGCA**) Circular. The Arbitral Tribunal also noted that in terms of Clause 5 of the GCC, the date for commencement of work would be as mentioned in Schedule F or from the date of handing over of site, whichever is later.

15. The Arbitral Tribunal noted that some land was granted to MKEL for mobilization and enabling works in December, 2015 instead of handing over the same in the last week of September, 2015 for commencement of execution of works on 04.10.2015. The Arbitral Tribunal found that the preliminary work of site survey and cleaning of basic strip could be taken up only in March, 2016 for commencing actual execution from 26.03.2016.

16. The Arbitral Tribunal also found that the Project-in-charge had recommended extension of time and had mentioned that the site was made available to MKEL on 26.03.2016.

17. The Arbitral Tribunal rejected the contention that Clauses 10CA and 10C of the GCC were not applicable. Since there was no dispute



as to the calculation of the claims raised by MKEL, the Arbitral Tribunal allowed the same. The Arbitral Tribunal awarded an amount of ₹1,48,54,936/- and simple interest at the rate of 8% per annum from the date of payment of the Final Bill (that is, 04.07.2018) till the date of publication of the impugned award (that is, 31.01.2021). The Arbitral Tribunal computed the pre-award interest at ₹30,64,726/-. In addition, the Arbitral Tribunal also awarded proportionate costs as well as future interest at the rate of 6% per annum from the date of publication of the impugned award. It was further provided that in the event the award was not paid within a period of three months from the date of the publication of the impugned award, future interest would be payable at the rate of 8% per annum. The operative part of the Award is set out below:

“AWARD

I. The Arbitrator awards Rs. 1,48,54,936/- (One Crore Forty Eight Lakh Fifty Four Thousand & Nine Hundred Thirty Six Only) as per its claim calculation at para 4 at page 9 of Statement of Claims.

II. The Arbitrator further awards a simple interest @ 8% from the date of payment of final bill i.e. 04.07.2018 as confirmed by the Respondent up to 31.01.2021 (Date of publication of Award) as pre reference and pendente lite interest which works out to Rs.30,64,726/- (Rs. Thirty Lakh Sixty four Thousand Seven Hundred and Twenty Six Only).

III. Share of Additional fee of Rs. 69250/- only under section 29A(2) of A&C Act, 1996 amended up to date as refused by the Respondent has now been paid by the Claimant is also awarded in favour of the Claimant.

IV. The Arbitrator also Awards a simple interest @ 6% from the date of publication of Award i.e. 31.01.2020 up to the date



of payment of Award. In case the Award is not paid to the Claimant within 3 months from the date of publication of Award, the interest payable shall be @ 8% from the date of publication of Award.

V. The cost of arbitration shall be borne by the Parties themselves.”

Proceedings under Section 34 of the A&C Act.

18. AAI assailed the impugned award on several grounds. First, it contended that MKEL had, during the course of the Agreement, never disputed that 04.10.2015 was the date of commencement of the Project and 03.10.2016 was the stipulated date for completion of the Agreement. Thus, during the course of executing the work, MKEL had made no claims on the said basis. Second, it claimed that MKEL had applied for extension of time for completion of the Agreement and the same was also reckoned from 03.10.2016. Therefore, MKEL could not contend to the contrary. Third, it was submitted that in terms of Clause 9 of the GCC, it was agreed that a contractor would not be entitled to raise any claim after the submission of the Final Bill and therefore, the claims raised after the Final Bill was paid, were not maintainable. Fourth, it was contended that the Arbitral Tribunal’s reference to Clause 5 of the GCC was *ex facie* erroneous. Fifth, it was contended that the Arbitral Tribunal had erroneously construed Paragraph 2(ii) of the Conditions of Contract to mean handing over of the actual site strip (basic strip) would be considered as handing over of the site. Sixth, that the site was in fact handed over much prior to March, 2016 as admittedly, some land was provided for mobilization. The documents



on record, including mobilization bill also reflects that MKEL had acted on the aforesaid basis.

19. AAI claimed that the impugned award was rendered in disregard of evidence and therefore, was amenable to challenge under Section 34 of the A&C Act on the ground of patent illegality.

20. AAI also submitted that the calculation furnished by MKEL was also erroneous and the correct amount ought to be ₹1,39,68,197/- instead of ₹1,48,54,936/- as claimed.

21. AAI contended that MKEL had agreed for deletion of Clause 10CC of the GCC and therefore, was precluded from raising any claim on account of delay in handing over the site.

22. MKEL had countered the aforesaid submissions. It claimed that it was not precluded from raising any claim regarding computation of escalation / variation under Clauses 10CA and 10C of the GCC. It was submitted that MKEL had undertaken not to claim price variation / escalation under Clause 10CC of the GCC but not escalation under Clauses 10CA and 10C of the GCC. Clause 10 CC of the GCC was applicable in respect of escalation other than that was covered under Clause 10CA of the GCC. MKEL contended that Clauses 10C, 10CA and 5 of the GCC were required to be read in conjunction and therefore, the index applicable for calculating the price variation was required to be considered from 26.03.2016. MKEL claimed that the calculation of value of core material (bitumen) was payable in terms of Clause 10CA of the GCC. The said material was procured after the site was handed over on 26.03.2016 and therefore, the index for calculating the said



amount from the retrospective date of 04.10.2015 had resulted in excessive deductions.

23. The learned Commercial Court found no flaw in the finding that the actual work commenced only after 26.03.2016 as the basic strip could not be handed over to MKEL on account of instructions by DGCA. Thus, no Running Account (RA) bill could be raised prior to 26.03.2016. The learned Commercial Court also accepted that the labour force was engaged after 26.03.2016 and substantial material was also procured thereafter. Thus, the payments made by MKEL for labour and core material were paid by MKEL after March, 2016. The learned Commercial Court also noted that MKEL had raised its claim for variation as per Clauses 10CA and 10C of the GCC on 01.06.2018, which was prior to payments made against the Final Bill, which were received on 05.06.2018.

24. In view of the above, the learned Commercial Court did not accept that the impugned award suffers from patent illegality or was otherwise against the public policy of India. Accordingly, the learned Commercial Court dismissed AAI's application under Section 34 of the A&C Act.

Reasons & Conclusion

25. The learned counsel appearing for AAI has confined the challenge to the impugned order on three grounds. First, he submitted that there was ample evidence on record, including bills and communications issued by MKEL, acknowledging the date of commencement of the project as 04.10.2015 and the impugned award



was contrary to the evidence brought on record. Second, that MKEL had undertaken not to raise any claims under Clause 10CC of the GCC or any other claim due to delay in handing over of the site. The conclusion that post-tender negotiations were illegal and void, is *ex facie* erroneous. Third, he submitted that the impugned award was contrary to Clause 9 of the GCC which proscribed MKEL from raising any claim that was not covered under the final bill and the same were deemed to have been waived.

26. The only question to be considered by this Court is whether the impugned award is vitiated on the ground of patent illegality on the face of the record.

27. At the outset, it is material to note that MKEL's claims were mainly on account of excess recovery of bitumen during the period of the Agreement. Clause 10CA of the GCC provided that in the event there was increase or decrease in the price of material, the amount of the contract would accordingly be varied. The variation was to be worked out on the basis of base price of material, which was required to be taken as the basic price plus excise as issued at the nearest delivery point of a government refinery valid at the time of the last stipulated date for receipt of tender including the extension, if any. Admittedly, the indices for bitumen were higher at the time of submission of tender. Thus, there was negative variation in the contract price, which was recovered by AAI. MKEL had disputed the extent of recovery as bulk of bitumen was procured after March, 2016 when the basic strip was handed over to MKEL. According to MKEL, the negative variation



was required to be calculated on the basis of price as applicable when bitumen was procured, which was after handing over of site on 26.03.2016. AAI had calculated the recovery reckoning the commencement of the Project work from 04.10.2015 and the applicable indices. Further, AAI had also frozen the index, on the basis of which variation was to be computed, as on 03.10.2016 (twelve months after commencement of the Agreement), even though bulk of the work was executed thereafter.

28. The controversy in calculation of variation in the contract value on account of cement was similar although the variation was positive variation (there was increase in the price of cement).

29. MKEL had also claimed escalation on account of labour in terms of Clause 10C of the GCC.

30. The principal issues to be addressed by the Arbitral Tribunal was whether the calculation of variation under Clauses 10CA and 10C of the GCC was done on the wrong index. According to MKEL, the calculation of price variation was required to be done from the actual date of handing over of site – 26.03.2016 – as per Clause 5 of the GCC and not from 04.10.2015. Clause 5 of the GCC expressly provided that *“the execution of the works shall commence from such time period as mentioned in Schedule ‘F’ or from the date of handing over of the site whichever is later”*.

31. There was no dispute that the basic strip on which the work was to be performed was not handed over before March, 2016. The Arbitral



Tribunal also noted that WAB in its meeting held on 15.09.2015 had also observed that the site could not be handed over to the contractor before February/March, 2016 in view of the circular issued by DGCA. Thus, AAI was fully aware that there would be a delay in handing over the site. In the aforesaid context, the AAI had also sought an undertaking from MKEL that it would not claim any escalation under Clause 10CC of the GCC.

32. The Arbitral Tribunal had also examined the files relating to extension of time and found that the Project-in-charge had recorded that the site was made available to MKEL only on 26.03.2016.

33. On the basis of the aforesaid, the Arbitral Tribunal concluded that there was admitted delay in handing over the site. The site was required to be construed as the basic strip and not some land provided for mobilization.

34. We are unable to accept that the aforesaid conclusion of the Arbitral Tribunal is not a plausible one. There is no dispute that the strip on which work was to be executed was delayed and handed over only in March, 2016. The Arbitral Tribunal had construed Clause 5 of the GCC and read the same in conjunction with Schedule F.

35. It is well settled that the consideration of a contract falls within the jurisdiction of an Arbitral Tribunal¹.

¹ See McDermott International Inc. v. Burn Standard Co. Ltd.: (2006) 11 SCC 181; M.S.K. Projects IJV Ltd. v. State of Rajasthan: (2011) 10 SCC 573; Steel Authority of India v. Gupta Brothers Steel Tubes Limited: (2009) 10 SCC 63



36. It is also settled law that the Court is not required to re-adjudicate the disputes under Section 34 of the A&C Act. It is merely to examine whether any of the grounds for setting aside of the arbitral award are established.

37. The contention that the impugned award suffers from patent illegality on the face of the record as the Arbitral Tribunal has allowed price variation under Clauses 10C and 10CA of the GCC, is also unmerited. According to AAI, MKEL was precluded from raising any such claim in view of its undertaking dated 19.09.2015. AAI also contends that the Arbitral Tribunal's conclusion that post-tender negotiations were void is patently illegal. Therefore, the conclusion that the amendment to the tender conditions (deletion of Clause 10CC of the GCC) was void, is patently erroneous.

38. MKEL had furnished an undertaking dated 19.09.2015, *inter alia*, stating that it would not claim any escalation under Clause 10CC of the GCC or compensation for delay in handing over of site. Undisputedly, MKEL has not claimed any escalation under Clause 10CC of the GCC. Its claim for variation of the contract price on account of labour is premised on Clause 10C of the GCC and its claim for variation in the price of material (bitumen and cement) is founded on Clause 10CA of the GCC.

39. It is relevant to note that Clause 10CC of the GCC is applicable for computing escalation other than the escalation, which is covered under Clause 10CA of the GCC. Clause 10CC of the GCC provides for



variation in price due to increase and decrease in prices excluding the material covered under Clause 10CA of the GCC.

40. It is also material to note that AAI has not disputed the applicability of the said clauses. The controversy is only regarding the calculation of the amount recoverable by AAI on account of variation on price of bitumen and the amount payable on account of increase in the price of cement and labour. We find no patent illegality in the conclusion of the Arbitral Tribunal that MKEL had not given up its right to claim price variation under Clauses 10CA and 10C of the GCC. It is also material to note that MKEL has not raised any claims, which typically arise on account of delay in handing over of site such as idle plant and machinery, idle labour, loss of opportunity, costs and loss of profits on account of loss of opportunity, amongst others. MKEL's claims were confined to calculation of price based on applicable indices. The same were not for compensation for delay in handing over the site. Although the Arbitral Tribunal had also found that post-tender negotiations were not permissible and post-tender modifications were void, the impugned award does not rest solely on the said finding.

41. We are also unable to accept that the impugned award is liable to be set aside as being contrary to Clause 9 of the GCC. It is relevant to note that MKEL had not raised any claim, which is not founded in the Final Bill. It has merely sought correction in the calculation of the variation under Clauses 10CA and 10C of the GCC. Admittedly, AAI had also computed recovery on account of the variation in the price of bitumen, which MKEL claimed was excessive. Additionally, MKEL



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had also sought correction in the values of variation on account of labour and cement. The learned Commercial Court had noted that the issues as to calculation were raised by MKEL on 01.06.2018, which was prior to the receipt of the Final Bill.

42. It is also relevant to note that in the Statement of Defence filed by AAI, it had not raised any ground that MKEL's claims were contrary to Clause 9 of the GCC.

43. In view of the above, the appeal is unmerited and accordingly dismissed. The pending applications are also disposed of.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

JANUARY 24, 2024
RK/gsr