

Devender Kumar Sharma Vs. Airport Authority of India

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Court : Delhi

Decided On : May-21-2008

Reported in : 2008(3)ARBLR87(Delhi)

Judge : Pradeep Nandrajog, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 34

Appeal No. : FAO 289/2006

Appellant : Devender Kumar Sharma

Respondent : Airport Authority of India

Advocate for Def. : S.K. Chandwani, Adv.

Advocate for Pet/Ap. : Anusuya Salwan, Adv

Disposition : Appeal allowed

Judgement :

ORDER

Pradeep Nandrajog, J.

1. Heard learned Counsel for the parties.

2. Appellant had responded to a notice inviting tender floated by the respondent for execution of works at I.G.I. Airport. On 6.9.2000, first respondent communicated acceptance of appellant's offer requiring appellant to execute an agreement on a non-judicial stamp paper of Rs. 20/-. The work was to commence on 18.11.2000 and was to be completed in 3 months i.e. by 17.3.2001. There was a dispute between the parties with respect to the site and execution of a formal agreement. First respondent issued a show cause notice and proceeded to forfeit the earnest money deposited by the appellant.

3. The appellant disputed the entitlement of the respondent to forfeit the earnest money and determine the contract. The appellant not only sought refund of the earnest money but demanded compensation for loss of profit alleging that had he been permitted to complete the works he would have earned, if not more, at least 15% profit on the quoted price.

4. There being an arbitration clause in the tender documents matter was referred for arbitration.

5. Needless to state learned arbitrator had to decide the jurisdictional question whether first respondent was justified in terminating the contract which of necessity required a decision to be taken on facts: who was liable for not commencing the work?

6. Claim No. 1 of the appellant was refund of earnest money. Claim No. 2 was on account of loss of profits.

7. Dealing with the jurisdictional facts whether the first respondent was justified in its action, learned arbitrator returned a finding as under:

In view of the Hon'ble Supreme Court Judgment in the case of 'Hind Construction' case as reported in : [1979]2SCR1147 , and in view of the facts as explained above, the Respondents committed breach of the Contract and therefore, the Earnest Money could not be forfeited.

In view of the illegal and wrongful action, the Respondent is not entitled to forfeit the Earnest Money. The forfeiture of the Earnest Money by the Respondents is,

therefore, wrongful and illegal.

8. As a consequence thereof learned arbitrator held that the appellant was entitled to a refund of earnest money in sum of Rs. 71,285/-.

9. Pertaining to loss of profits learned arbitrator held that 15% loss on the contract value was justified compensation in view of the decision of the Hon'ble Supreme Court reported as : AIR 1984 SC1703 Brijpaul Singh & Bros. v. State of Gujarat. Thus, as against a claim of Rs. 5,51,560/- as loss of profits only Rs. 3,63,700/- was awarded.

10. First respondent challenged the award by filing objections under Section 34 of the Arbitration and Conciliation Act 1996. It sought to urge that it was justified in terminating the contract.

11. Needless to state if first respondent had succeeded in said objection award pertaining to both claims would have been set aside.

12. Vide impugned order dated 18.8.2006 learned Trial Judge repelled the challenge pertaining to the finding recorded by the learned arbitrator that the respondent was not entitled to forfeit the earnest money and that the respondent was in breach of the contract. As a consequence thereof award pertaining to claim No. 1 i.e. refund of earnest money was upheld.

13. Pertaining to the second claim i.e. loss of profits the award has been set aside on the following process of reasoning:

26. It was contended on behalf of the petitioner that Ld. Arbitrator had awarded the loss of profit on the total value of the work that was not executed by the respondent despite it itself communicated to the petitioner that the contract be treated as closed. The petitioner at no point of time prevented the respondent to not to proceed with the work. However, the respondent admittedly failed to visit site and commence the work. The Ld. Arbitrator has not decided this claim of the respondent in accordance with the terms of the contract neither he has assigned any reasons for granting the said relief.

27. The Hon'ble Supreme Court in the judgment *Bharat Cooking Coal Ltd. v. L.K.Ahuja* (Supra) has held that, 'Loss of the profit due to prolongation of work - Plea to be establish such claim - held in respect of such a claim contractor has to establish that he had received amount due under contract on time, he could help utilise the same elsewhere and earned profit thereon - In absence of such plea or materials substantiating the same on facts, award in this respect set aside.' It has been further held that, 'Had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established claim for loss of profit, could not have been granted.

28. On perusal of the proceedings initiated before the Ld. Arbitrator the respondent has not established in case he had received the amount due under the contract he would have utilised the same in some manner to the other in his business out of which he could have earned profit. Thus the respondent has failed to establish the claim of loss of profit. Accordingly, the sum of Rs. 3,63,700/- awarded by the Ld. Arbitrator in favor of the respondent with respect to claim No. 2 is deleted from the award.

14. The appellant i.e. the contractor has challenged the impugned order dated 18.8.2006 pertaining to the findings returned in para 26 to 28 thereof. The respondent has not filed a cross appeal or cross objections. Thus findings in the impugned order against the respondent have attained finality.

15. The appellant has to succeed for a simple reason decision in *Bharat Cooking Coal Ltd. v. L.K. Ahuja* : (2004)5SCC109 referred to by the learned Trial Judge is wholly inapplicable on the issue at hand.

16. Their Lordships of the Hon'ble Supreme Court were dealing with an objection to an award where recompense had been effected on compensation for loss arising out of prolongation of the work, contention of the contractor being that the capital spent by the contractor on the works during prolonged period thereof could have earned return to him if invested elsewhere.

17. In said context Hon'ble Supreme Court held that where a contractor is recompensed on account of increase in price of raw material and overhead expenses during contract prolonged period no loss of profit on block capital could be awarded unless there was evidence to establish that said capital could have been meaningfully invested elsewhere.

18. Loss of profit due to a work being curtailed or totally abrogated is an entirely issue viz.-a-viz loss of profit on blocked capital.

19. In para 27 of the impugned order, learned Trial Judge has extracted head note 'H' of the decision in Bharat Cooking Coal Ltd.'s reported in Supreme Court Cases. Even the head note as extracted makes it clear that their Lordships of the Hon'ble Supreme Court were dealing with a claim of loss of profit due to prolongation of the work. Had the learned Judge taken care to carefully analyze the decision in Bharat Cooking Coal's case, it would have dawned on her that their Lordships of the Supreme Court were not dealing with a case of recompense for loss of profit due to curtailing or abrogating the awarded work.

20. Indeed, in M/s. Brijpaul Singh's case Hon'ble Supreme Court opined that 15% loss of profit is a reasonable recompense to a contractor whose work is either abrogated or terminated.

21. The appeal is allowed.

22. Impugned order dated 18.8.2006, in so far it has allowed respondent's objection to the award pertaining to claim No. 2 is set aside.

23. The result is that respondent's objections to the award stand dismissed in totality.

24. No costs.