(2014) 03 DEL CK 0042

Delhi High Court

Case No: FAO 43 of 2013 and CM No. 1616 of 2013

India Tourism Development Corporation Ltd.		APPELLANT
	Vs	
Integrated Digital Solution (P) Ltd.		RESPONDENT

Date of Decision: March 11, 2014

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 28(3) 31(7)(a) 34 37
- Contract Act, 1872 - Section 7 8

Citation: (2014) 2 ARBLR 129

Hon'ble Judges: Valmiki J Mehta, J

Bench: Single Bench

Advocate: Karunesh Tandon, for the Appellant; Atul Tandon and Mr. Amit Tewari, for the Respondent

Final Decision: Partly Allowed

Judgement

Valmiki J Mehta, J.

This first appeal is filed u/s 37 of the Arbitration and Conciliation Act, 1996 (the Act) impugning the judgment of the court below dated 16.10.2012 by which the objections filed by the appellant/objector (respondent in the arbitration proceedings) u/s 34 of the Act have been dismissed. Impugned Award dated 27.1.2009 awards an amount of Rs. 16,41,054/- alongwith interest against the appellant. The facts of the case are that respondent herein accepted a tender with respect to a sound and light show at Chittorgarh, Rajasthan in the year 2003. As per the contract the respondent was to supply the material required for execution of the sound and light show. Originally the proposal was a comprehensive one for the supply of mannequins and other material for a sum of Rs. 1,60,40,240/-, but subsequently the quantity was reduced, including the quantity of the mannequins, and therefore, the second proposal was made by the respondent for a sum of Rs.

1,43,64,530/-. In this second proposal there was no motorized mannequins included, and therefore, seven motorized mannequins were included in a final contract with the total amount of contract agreed at Rs. 1,49,00,000/-. For this purpose a letter of intent dated 12.6.2003 was issued by the appellant in favour of the respondent and subsequently a formal agreement was executed on 20.6.2003 between the parties. After entering into of the contract six additional mannequins were ordered by the appellant making the mannequins to a total number of 13. This order was placed upon the respondent by the appellant by its letter dated 23.3.2005 and which reads as under:

AC/SEL/CHITTOR/03

23.3.05

M/s. Integrated Digital Solutions Pvt. Ltd.

B-21/3, Okhla Industrial Area-Phase-2

New Delhi-110020.

Dear Sirs,

Sub: Motorized Mannequins for Day Show, Chittorgarh Fort.

This is with reference to the motorized mannequins for the Day Show at Chittorgarh Fort. We hereby confirm the number of mannequins has been increased from seven(7) to thirteen (13).

As discussed and explained in the meeting with Sr. Vice President, ITDC recently, the amount payable for thirteen mannequins reached at site will be Rs. 9,95,429/- only @ Rs. 76,571.43.

Thanking you,

Yours faithfully

For India Tourism Development Corpn. Ltd.,

Sd/-

(R. Sridharan)

Sr. Manager (Culture)

2. The respondent initially objected to the price as stated in the aforesaid letter dated 23.3.2005, by its reply-letter dated 24.3.2005 which reads as under:

Our reference: IDS/SEL-CG/2103-01

March 24, 2005

Deputy General Manager-Ashok Creatives

India Tourism Development Corporation Limited

Scope Complex-Core 8

Lodi Road

New Delhi 110 003.

Kind attention: Ms. Madhu Dubey

Dear Madam

Re: Chittorgarh Mannequins

Kindly recall our discussions of the last week where we expressed our displeasure in the delays on part of ITDC on the matter related with the issue of amendment for the additional mannequins, release of related with-held payments and the decision on the locations where these mannequins are required to be mounted.

During this meeting, we were assured that all the matter will be resolved within a week.

On the contrary, we are shocked to receive a letter from your office, bearing # AC/SEL/CHITTOR/03 dated 23rd instant, which has no bearing either with previous discussions or with the provisions of the contract agreement and has no rationale too, as it suggests that we supply the additional 6 mannequins at a meager total amount of Rs. 45 thousand approximately.

As per the contract agreement:

- the entire project is on a fixed upper-limit value (Rs. 149.00 lacs), except for the mannequins.

- unit rate of the mannequins has been fixed (Rs. 1,35,700.00)

- tentative requirement of the mannequins (seven nos.) included in the originally agreed upper-limit value of the contract and

- where, for any additional requirement (six now) of the mannequins, an enhancement in the upper-limit value (by Rs. 8,14,200.00 now) was warranted, irrespective of whether the upper-limit of the agreed contract amount is crossed or not.

Therefore, in view of the above, we wish to clarify that your letter, referred above, is not acceptable to us, as we find it arbitrary and not conforming to the true spirit of the contract agreement.

You are kindly aware that the mannequins are already at site since long and it is relevant to take decision, in terms of the contract agreement, without any further delay.

Kind regards

Sincerely yours,

For integrated Digital Solutions Private Limited

Mukesh Bhargava

Director

3. The respondent however in spite of objections to the price as stated in its letter dated 23.3.2005 without further ado as to the price stated in the appellant''s letter dated 23.3.2005 supplied the six additional mannequins. After completion of the contract respondent sought the price of the mannequins at around Rs. 1,35,700/- per mannequin instead of Rs. 76,571.43 as stated in the order-letter dated 23.3.2005. There were also two other disputes between the parties pertaining to the cost incurred by the respondent towards security inasmuch as the appellant took charge of the project with delay and also the claim of interest on the amount which was due and payable on the respondent, but not paid. Matters were hence referred to arbitration.

4. The arbitrator allowed all the three claims of the respondent by rejecting the defence of the appellant that the price of additional mannequins should not be Rs. 1,35,700/- per mannequin but only Rs. 76,571.43 as stated in the letter dated 23.3.2005. The arbitrator further held that since the appellant was guilty of delay the respondent would have incurred cost towards security, and therefore, cost of security and related expenses were awarded in favour of the respondent. Interest was also allowed on the awarded amount by the arbitrator.

5. The court below has dismissed the objections by refusing to accept that only Rs. 76,571.43 per mannequin was payable as per the stand of the appellant vide its letter dated 23.3.2005. Other objections to the awarded claims have also been rejected on account of the fact that once there is delay, the respondent would have incurred cost on security and that the interest was liable to be paid as per Section 31(7)(a) of the Act.

6. Before me, learned counsel for the appellant has very vehemently argued that once the appellant specified a specific price for the additional mannequins at Rs. 76,571.43 per mannequin as per its letter dated 23.3.2005, it was perfectly open to the respondent not to supply the mannequins because there was no compulsion upon the respondent to enter into a fresh contract for supply of additional mannequins @ Rs. 76,571.43 per mannequin. Learned counsel for the appellant argues that the objection raised by the respondent in terms of letter dated 24.3.2005 is of no effect because one of the ways in which contract is accepted is by giving performance of the offer as contained in the letter of the appellant dated 23.3.2005 and the respondent very much performed the contract by supplying additional mannequins. Reliance is also placed on behalf of appellant upon Sections

7 and 8 of the Indian Contract Act, 1872 to argue that contract is implied when performance takes place of an offer or obligation/promise under a contract. Counsel for the appellant has also argued that the respondent ought not to have been allowed costs towards security expenses and interest as has been awarded by the arbitrator.

7. Learned counsel for the respondent has very vehemently disputed the arguments urged on behalf of the appellant. So far as the first issue of the cost of the mannequins is concerned it is argued that in hindsight it is convenient for the appellant to claim the cost of mannequins only to Rs. 76,571.43 per mannequin in terms of its letter dated 23.3.2005, however, the same ignores the factual position that the respondent had to complete the contract. It is also argued that the case of the appellant that no costs were incurred towards security is not correct because bills have been filed showing incurring of expenditure and that evidence has been considered by the arbitrator and consequently re-appreciation of the evidence cannot be done u/s 34 of the Act. It is also argued that the court below has rightly relied upon Section 31(7)(a) of the Act to confirm the Award of the arbitrator awarding interest to the respondent.

8. In my opinion, the appeal is liable to be accepted so far as the first issue which is urged being the cost of the mannequins is concerned and is liable to be rejected so far as the two other claims which have been awarded by the arbitrator.

(i) In my opinion, appellant is justified in relying upon Sections 7 & 8 of the Indian Contract Act, 1872 because one of the ways in which a contract is entered into is by giving performance under the offer. The specific and categorical offer of the appellant was of supplying of mannequins at Rs. 76,571.43 per mannequin in terms of letter dated 23.3.2005 and there was never any compulsion to the respondent to supply additional mannequins if according to the respondent the price stated in the letter dated 23.3.2005 was inadequate. The letter of the respondent dated 24.3.2005 amounted to a counter-offer qua the price but there is no confirmation/acceptance to the same by the appellant. Thus when the supply of additional mannequins was made by the respondent it can only be taken as supply in terms of the appellant''s letter dated 23.3.2005. I cannot agree with the argument urged on behalf of the respondent that in hindsight appellant is now failing to appreciate conditions inasmuch as the respondent was under no contractual obligation to supply six additional mannequins, and therefore, contract would always have been completed and performed without any breach by the respondent which was entered into for the supply of original seven mannequins and the respondent was not in any manner bound to supply the six additional mannequins if according to it the rate of Rs. 76,571.43 was not adequate. In my opinion, once the respondent supplied the additional mannequins, merely objecting to the rate after supply was made is not enough to claim a higher price because if the respondent was not agreeable to the rate as offered by the appellant it should have never supplied the six additional

mannequins and for which it was not legally bound to do so. Therefore, in my opinion, the arbitrator has clearly committed an illegality inasmuch as Section 28(3) of the Act clearly states that the arbitral tribunal shall decide only in accordance with the terms of the contract and the contract in my opinion is complete in terms of amount stated in the letter of the appellant dated 23.3.2005 inasmuch as respondent has acted upon this letter dated 23.3.2005 and the same consequently resulted in a binding contract as per the provisions of the Indian Contract Act, 1872 including Sections 7 and 8 related to implied contract and contract by performance. I therefore accept the appeal and the objections to the extent that the cost of six additional mannequins will only be at Rs. 76,571.43 per mannequin and not at the amount of about Rs. 1,35,700/- per additional mannequin as awarded by the arbitrator.

9. So far as the case for security charges are concerned, I am unable to accede to the argument urged on behalf of the appellant because respondent no doubt would have incurred charges on account of delay of appellant in taking over the project inasmuch as a valuable project after completion of the same with its expensive equipment could not have been left without any security. Once there was security, and bills were filed by the respondent to show incurring of charges then at best in my opinion two views will be possible and the arbitrator was hence entitled to take one of the two views to hold that the respondent had incurred charges towards security for awarding the claim in this regard. Taking of one possible view is not a perversity which can be interfered with u/s 34. This contention on behalf of the appellant is accordingly rejected.

10. So far as the third aspect of claim of interest is concerned, the court below has rightly relied upon the provision of Section 31(7)(a) which allows the arbitrator to award interest for the period prior to the arbitration proceedings. Once interest is not paid for a sufficiently long period, in my opinion, the same itself becomes a principal amount and there is nothing grossly illegal if on the said amount which was due on the date of the commencement of the arbitration proceedings, further interest is awarded. The appellant cannot take benefit of its own wrong in failing to pay the amount due and yet claim that in spite of passing of a long period of time interest should not become part of the principal. Even nationalized banks when they lend money charge interest at quarterly rates i.e. after every three months interest becomes part of the principal. I thus do not find any illegality or perversity in the Award in granting interest because at best two views are possible and arbitrator is entitled to take one possible and plausible view. In view of the above discussion, the appeal is partly allowed so far as the cost of six additional mannequins whose price is held to be @ Rs. 76,571.43 per mannequin are concerned and the appeal is dismissed so far as the other objections are concerned. Parties are left to bear their own costs.