

Sikka Associates Vs Airports Authority of India

Court: Delhi High Court

Date of Decision: Nov. 25, 2008

Acts Referred: Arbitration and Conciliation Act, 1996 & Section 34

Citation: (2008) 4 ARBLR 593

Hon'ble Judges: Mukul Mudgal, J; Manmohan, J

Bench: Division Bench

Advocate: V.K. Makhija and S.K. Chandwani, for the Appellant; Advs., for the Respondent

Final Decision: Dismissed

Judgement

Mukul Mudgal, J.

The present appeal has been filed by the appellant above-named being aggrieved from the judgment of the learned judge of this Court passed in OMP No. 179 of 2000 whereby the arbitral award dated 12th June, 2000 awarding an additional sum of Rs.

12,25,575/- in favour of the appellant as fees @ 4.5% on the cost of the project against the tender cost and also upon the amount of escalation

charges payable to the architects and a further sum of Rs. 40,000/- as interest on the delayed payment of bill has been set aside.

2. Briefly, the facts of the present case are:

i) That the appellant had submitted its offer vide letter dated 5th January, 1989 relating to the work of "providing consultancy services for the work

of construction of New International Block, Domestic Departure/Arrival Block and associated work at Goa Airport". It was accepted by the

respondent vide letter dated 22nd February, 1989 at the remuneration payable to the appellant for such work at "4.5% of the executed cost of the

project".

ii) That while accepting the said offer given by the appellant vide its letter dated 5th January, 1989, the respondent vide its letter dated 22nd

February, 1989 categorically stated that for the services to be rendered by the appellant, the appellant would be paid 4.5% of the executed cost of

the project and other terms and conditions were also attached to the said letter accepting the said offer. The relevant term is Clause 3 of the terms

& conditions of Agreement which relates with the "Mode of Payment" and reads as follows:

3. MODE OF PAYMENT

For each of the services in the scope of the work the consultant shall be paid in the following stages consistent with the work done plus

reimbursable expenses as agreed upon. Payments made to the Consultants are on account and shall be adjusted against the final amount payable:

PRELIMINARY STAGE

Stage 1

On submitting conceptual designs and preliminary estimates of costs

10% of the total fees payable based on cost estimates as per Clause 2.03

Stage 2

On submitting the final preliminary drawings/designs and model along with the modified estimates.

20% of the total fees payable less payment already made cost.

Stage 3

On submitting preliminary drawings for obtaining approval from statutory bodies.

25% of the total fees payable less payments already made.

WORKING DRAWING STAGE

Stage 4

On preparation of basic working drawings and details sufficient for preparing item-wise estimates of costs.

35% of the total fees payable less payments already made.

Stage 5

On submitting detailed specifications, bill of quantities detailed architectural working drawings structural and services designs together with

estimates of costs and to invite tenders.

55% of the total fees less payments already made based on the cost estimate as given in this stage.

Stage 6

On submission of complete set of working drawings and details.

65% of the total fees payable less payments already made.

CONSTRUCTION STAGE

Stage 7

During the course of construction of work at site.

Further 25% to be paid in instalments consistent with the value of work done.

Stage 8

On completion of

(to be paid within six months of completion of the work)

Balance payment

10% making the total equivalent to 100% of the fees payable based on the actual cost of the work.

3. That it is not disputed before us that the tender cost for the civil work was Rs. 5,31,09,985/-, while the actual cost when the work was

completed came to Rs. 6,58,35,000/-. The appellant was paid 4.5% on Rs. 5, 31, 09,985/-, but was not paid this amount on the actual cost upon

completion of the work which became a root cause of the disputes between the parties.

4. That accordingly, as provided under the agreement, the appellant invoked the arbitration and Shri C.B. Rai, Engineer-in-Chief (Retd.) was

appointed as an arbitrator by the Chairman, Airports Authority of India, to act as a sole arbitrator.

5. That the main controversy between the parties before the arbitrator was whether the appellant was entitled to his remuneration @ 4.5% on the

tender cost or on the actual cost worked out at the time of completion of the said project. The appellant has been claiming his remuneration on the

actual cost incurred for completion of the said project, while the respondent has been saying that the appellant is entitled to remuneration only on

the tender cost. Thus, the arbitrator was to decide as to on what amount the remuneration was to be paid to the appellant.

6. That the arbitrator while giving reasons in his award made reference to the letter of acceptance dated 22nd February, 1988 which stipulated the

remuneration payable at ""4.5% of the executed cost of the project"" and reference was also made to Clause 3 of the Agreement and more

particularly Stage 8 of the Mode of Payment wherein balance payment 10% making the total equivalent to 100% of the fees payable based on the

actual cost of the work. The arbitrator thus returned the finding that the appellant was entitled to its fee @ 4.5% on the actual cost of the work

which is the executed cost inclusive of escalation and not on the tender cost and accordingly awarded an amount of Rs. 12,25,575/- to the

appellant under Claim No. 1 and Rs. 40,000/- was awarded to the appellant under Claim No. 4 and the interest was granted @ 18% on the

amount of award from the date of its publication till the date of its payment.

7. That after the said award was published, the respondent has filed objections u/s 34 of the Arbitration & Conciliation Act, 1996 which became

the subject matter of OMP No. 179 of 2000 wherein the respondent raised a contention that the arbitrator has mis-interpreted the provisions of

the contract and has wrongly awarded remuneration @ 4.5% on the executed cost/actual cost, whereas he ought to have held that the appellant

was entitled to 4.5% of the tender cost only.

8. On the other hand, the appellant resisted the said objections and stated that the arbitrator is the final arbiter in law and the provisions of the

contract were within the domain of the arbitrator to interpret. The arbitrator being the Engineer-in-Chief (Retd.) was well conversant with the said

services and has interpreted the provisions of the contract rightly and, thus, the award of the arbitrator in this regard is final and cannot be assailed

in law. However, such a contention of the appellant did not find favour with the learned judge of this Court and by order dated 26th May, 2004

allowed the petition u/s 34 of the Arbitration & Conciliation Act, 1996 and set aside the arbitral award dated 12th June, 2000.

9. That aggrieved by the said judgment, the appellant has filed the present appeal.

10. We have heard both the counsels in detail. The learned Senior Counsel for the appellant had contended that the only controversy between the

parties before the arbitrator was whether the appellant had to be paid remuneration @ 4.5% on the tender cost or had to be paid upon

executed/actual cost. The learned Senior Counsel also referred to the definition of the word "executed" given in Black's Law Dictionary. The

word "executed" means "'completed, carried into full effect'" and thus stated that the executed cost as mentioned in the letter of award means the

cost of the work upon completion. The learned Senior Counsel for the appellant also contended that Clause 3 of the Agreement deals with the

stage by stage payment also refer to the actual cost of the work would be the cost which has been incurred by the department for completing the

said work which also includes in it the escalation paid to the contractor. It was also contended that the arbitrator was well within its rights to

interpret the terms and conditions of the contract and the arbitrator had interpreted the said provisions and had held that the appellant has to be

paid remuneration on the actual cost of the work which is the executed cost which also includes in it the escalation as well.

11. That according to the learned Senior Counsel for the appellant, the said interpretation by the arbitrator is final and cannot be assailed in law

and the reference was made by the counsel to following judgments of Hon"ble Supreme Court:

i) Sudarsan Trading Co. Vs. Government of Kerala and Another,

ii) Food Corporation of India Vs. M/s. Veshno Rice Millers,

iii) M/s. Hind Builders Vs. Union of India,

12. That it was also contended by the learned Senior Counsel for the appellant that even if any term and condition of the contract is capable of

having two plausible interpretation, then if the arbitrator has accepted one out of two, the court cannot set aside the said interpretations by

substituting its view that the arbitrator should have accepted the other plausible view. Thus, it was contended that the award could not have been

assailed in law and the objections in this were beyond the scope of Section 34 of the Arbitration & Conciliation Act, 1996.

13. On the other hand the learned Senior Counsel for the respondent reiterated the stand taken before the learned Single Judge that the arbitrator

misconducted the proceedings by mis-interpreting the provisions by granting remuneration on the actual cost, whereas it ought to have been

granted on the tender cost. The learned Senior Counsel for the respondent without prejudice to their arguments further contended that the rate of

interest awarded by the arbitrator is on the higher side and it ought not have been granted @ 18% p.a.

14. We have gone through the provisions of the contract and we feel that the interpretation given by the arbitrator is absolutely reasonable and

justified. The word used in the letter of acceptance is the "executed" cost while in the other terms and conditions of the Agreement, it has used

actual cost of the work. The same cannot be the tendered cost. It is a matter of common practice that some times during the execution of the work

there are deviations in the work and certain additional work as well which enhances the cost of the work, therefore, it is the executed cost or the

actual cost which assumes importance. Furthermore, it is nowhere provided either in the letter of acceptance or in the terms and conditions of the

contract that remuneration has to be paid on the tender cost. Thus, the plea of the respondent that the remuneration has to be paid on the tender

cost/amount put to tender cannot be accepted. Escalation is also the part of the executed cost, thus, if the arbitrator has taken a view that the

appellant is entitled to remuneration on the executed cost of Rs. 6,58,35,000/- nothing wrong can be found in the same so as to warrant

interference in appeal.

15. That from the impugned judgment, we find that the learned Judge has adopted its own interpretation by differing from the interpretation

adopted by the arbitrator which according to us could not have been taken in view of the law laid down by the Hon'ble Supreme Court of India in

the aforementioned judgments of Sudershan Trading Co., Food Corporation of India and Hind Builders. (supra) Accordingly, we do not agree

with the said view expressed by the learned Judge. So far as the contention of the respondent is concerned that interest awarded is at the higher

side, we feel the interest of justice would be met if the interest @ 18% p.a. is reduced to 12% p.a.

16. We, therefore, set aside the impugned judgment and dismiss the petition u/s 34 of the Arbitration & Conciliation Act, 1996 for setting aside the

arbitral award dated 12th June, 2000. However, we modify the said award, so far as it awards interest @ 18% p.a. to 12% p.a. No orders as to

costs.