Bharat Tewari Vs Union of India (UOI)

Court: Delhi High Court

Date of Decision: March 10, 2011

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 19, 24, 34(2)

Citation: (2011) 3 AD 393 : (2011) 179 DLT 108

Hon'ble Judges: Mool Chand Garg, J

Bench: Single Bench

Advocate: B.L. Chawla, for the Appellant; S.R. Narayan, for the Respondent

Final Decision: Dismissed

Judgement

Mool Chand Garg, J

1. This appeal arises out of an order dated 27.08.2007 passed by the learned ADJ whereby the Learned Additional District judge after hearing the

parties and finding no merit in the Objection Petition filed by the Appellant dismissed the objection petition and upheld the award passed by the

Arbitrator dated 02.08.2006. The Appellant, thus being aggrieved by the order of the Learned Additional District judge has impugned it before us.

Hence the present appeal.

2. Briefly stated the facts of the case are, Appellant was allotted a parking lot at (PRS) Sarojini Nagar Railway Station, New Delhi for a period of

two years w.e.f. 1.5.2003 on a payment of a lump sum amount of Rs. 14,80,005/-. An agreement to that effect was executed between the parties

on 6.5.2003. The parking lot allotted to the Appellant consisted of ground accommodation measuring 770 square meters at the existing site at the

station. The Appellant however alleged that he had deposited four months advance license fee besides a sum of Rs. 1,48,000/-towards security

with Northern Railway at the station as per terms and conditions of the agreement and therefore now no license fee was due from him.

3. The Appellants also alleged that after the allotment of parking site, he could not utilize the entire parking area, as a wall was constructed in the

parking lot (near new building of reservation) by Railway Administration. Further on the closure of the gate, the vehicles were restricted from

parking inside the parking lot, thus depriving Appellant of almost half of the parking lot which resulted in loss of collection of parking charges to

him. Appellant was also aggrieved by the fact that he was left with only an area of 330 sq. meters which he could use from 8.3.2004 till the end of

the contractual period and hence was deprived of the remaining area of 440 sq. meters.

4. The Appellant thus claimed proportionate refund of monthly license fee/contractual charges of the parking lot which was paid to the Railway

Administration. The Appellant further claimed that proportionate amount payable by the Respondent towards the parking lot came to Rs.

26,428.71 per month against the total monthly sum of Rs. 61,667/- and Appellant was entitled to refund of monthly sum of Rs. 35,239.29 and the

total amount refundable to him by Railway Administration came to Rs. 4,43,811.77 . The Appellant also claimed that he suffered a loss of Rs.

2000/- per day in collection of parking charges from 08.03.2004 onwards and till completion of contractual period in April, 2005 on account of

construction of wall and closure of gate by the Railway Administration, which came to Rs. 60,000/- per month and total amount for the entire

period came to Rs. 7,66,000/- hence Appellant claimed to be entitled to the said amount from the Railway Administration.

5. The Appellant thereafter brought these facts to the notice of the Railway Administration and requested for resolution of the controversy. The

Appellant, in this regard, also made a written request for removal of encroachment and obstruction caused and for making available the entire

parking lot to him during the period of the contract, but according to Appellant even the written request met with no success and Appellant

continued to suffer financial loss. Thereafter, on account of the failure on part of Railway Administration to resolve controversy or to have dispute

settled in accordance with terms of the agreement dated 06.05.2003, the matter was taken for adjudication in a court and subsequently Railway

Administration expressed its willingness to refer the dispute to the Arbitration of Chief Commercial Manager, Northern Railway and accordingly

petition was filed by the Appellant before the court for appointment of Arbitrator which was disposed of vide order dated 17.08.2005.

6. Before the Trial Court, the Appellant had submitted that he had filed his claim statement dated 3.3.2006 before the Arbitrator which was replied

by the Respondent/Northern Railway and then rejoinder dated 13.4.2006 was filed by the Appellant before the Arbitrator and thereafter no date

of hearing was fixed. According to Appellant, in the case, neither any issue was framed in the arbitral proceedings nor was the Appellant given an

opportunity to adduce evidence in support of his claim. Further the Appellant was also not given an opportunity to address arguments in the case

and as a result of which the Appellant filed an application dated 31.7.2006 thereby requesting Ld. Arbitral Tribunal for grant of opportunity to

adduce evidence in support of his claim and address oral argument to substantiate the same but the Ld. Arbitrator did not consider the application

dated 31.07.2006 and thereafter passed the impugned Award dated 2.8.2006 and as such it was contended by the Appellant that the impugned

Award was liable to be set aside on the ground that the Appellant was not given adequate and fair opportunity of being heard in the matter and

further that Ld. Arbitral Tribunal acted in haste as after receiving application dated 31.7.2006, request of the Appellant was ignored and Award

was passed on 2.8.2006.

7. It was further contended by the Appellant that Section 19 of the Arbitration and Conciliation Act provide for determination of rules/procedure

and liberty is given to the parties to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings and also entitle the

tribunal to conduct the proceedings in the manner it considers appropriate, if the parties fail to agree to the same but in the present case no such

opportunity was given to the parties by the learned Arbitral Tribunal and the tribunal proceeded to make the award of his own after filing of

rejoinder dated 13.4.2006 .

8. It was further contended by the Appellant that Section 24 of the act further provides that unless otherwise agreed by the parties the arbitral

tribunal shall decide whether to hold oral hearings for presentation of evidence or oral arguments or whether the proceedings shall be conducted on

the basis of documents and other materials, provided that arbitral tribunal shall hold oral hearings on a request by any party but in this case the

Arbitrator had not given any opportunity to the Appellant and had overlooked his application dated 31.07.2006 and had passed the impugned

order.

9. On the other hand Respondent, opposing the maintainability of the objection petition submitted that the objection petition was not maintainable

and was beyond the scope of provisions of Section 34 of the Arbitration and Conciliation Act 1996 and further that the Section 34(2) of the Act

stipulates the grounds on which an Arbitral Award can be set aside by the court. It was further submitted that the objections were not maintainable

as the objector was seeking reappraisal of the evidence and the material which the parties had produced before Ld. Arbitrator and further that

such reappraisal of the evidence and the material by the court was not permissible in law. It was also contended by the Respondent that Arbitrator

was the judge of facts and the law and further that the court was not competent to sit as a court of appeal to scrutinize the evidence produced

before learned Arbitrator and to come to its own conclusion on facts and the law.

10. Respondent further submitted that during inspection of area on 31.1.2005, it was found that the Appellant had encroached upon additional

area and the actual area available with the Appellant was in two parts i.e. part A comprising of 312.09 sq. meters and part B of 540 sq. meters,

however, the total area occupied by the Appellant was 852.09 sq. meters and the same was measured in presence of the Appellant and the site

plan was duly signed by the him. Thus it was accordingly submitted by the Respondent that total area of 852.09 Sq. meters which was being used

by the Appellant was against allotted area of 770 Sq. meters. Respondent also submitted that the Appellant was given adequate and fair

opportunity of being heard and also that due opportunity was given due opportunity to adduce evidence and address arguments.

11. After hearing the parties, the Ld. ADJ had observed here as under:

24. Learned Arbitrator at page 2 of the Award has categorically mentioned as under:''AND WHEREAS both the parties have given their

undertaking in writing that they have been given/afforded full opportunity to represent their case and have nothing more to produce/say in the

matter and have further requested to make and publish the Award''''

25. Ld. Arbitrator has further observed as follows:

AFTER having heard and fully considered all arguments and evidence of the parties concerning the said disputes and differences and having gone

through all the materials, papers and documents, and having considered all the matter submitted to me in connection with the aforesaid disputes and

differences''''

26. After considering the material on record and relying upon the authorities as relied upon by Ld counsel for Respondent No. 1 I am of opinion

that this Court cannot act as a court of appeal and to reappraise the facts and evidence adduced during the arbitral proceedings and it is to be seen

whether adequate and fair opportunity of being heard has been given to both the parties by Arbitrator.

27. The impugned Award shows that only two hearings were held by Ld. Arbitrator before passing impugned Award. First hearing was held on

24.3.2006 and on the said date the representative of Northern Railway filed reply and copy of same was supplied to the claimant and the claimant

asked for 15 days to go through the reply of the Northern Railway and accordingly second hearing was held on 13.4.2006 and on which date

counter was filed by the claimant and copy of same was supplied to the representative of the railway and on that day a copy of joint survey report

was also supplied to claimant on his demand.

28. Furthermore the proceedings dated 24.3.2006 and 13.4.2006 were also signed by claimant Sh Bharat Tewari and the proceedings dated

13.4.2006 clearly shows that claimant has raised no other point to add to what has already been given by him and whereas on the said date

counsel for railways had also indicated that he has no other fact to be placed before Arbitrator.

29. In the proceedings dated 13.4.2006 it is also mentioned by Arbitrator that a copy of joint survey report dated 31.1.2005 as well as plan was

prepared in the presence of the Petitioner showing that the Petitioner is using parking site at two places i.e. site A and Site B having measurement

mentioned earlier.

30. When the Petitioner has himself appeared before the Arbitrator and has indicated that no other point is to be added and no other document is

to be submitted and as such I find no force in the arguments raised by Ld. counsel for Petitioner that adequate and fair opportunity of being heard

was not given by Arbitrator and I am of opinion that the Petitioner is only interested in delaying the matter and is raising a futile controversy.

31. Moreover, I also find no weight in the contention of counsel for Petitioner that no hearing was given by the Arbitrator on the application dated

31.7.2006 sent to the Arbitrator by the counsel for objector by regd. AD post. In this regard a perusal of the arbitration proceedings held by

Arbitrator clearly shows that Arbitrator has been vigilant in protecting the envelope and the same shows that said application was received by the

Arbitrator on 2.8.2006 and that the Award is also passed on the same date. Firstly the said application is not signed by the Petitioner and

furthermore on none of the date fixed by the Arbitrator for hearing, Sh. B. L. Chawla Adv. had appeared before the Arbitrator. I am accordingly

of the opinion that Arbitrator has rightly decided not to give any weight to the representation dated 31.7.2006.

12. Thus aggrieved by the impugned order passed by the Learned Additional District Judge, Appellant has now appealed before us.

13. In his written submission, the learned Counsel for the Appellant has primarily raised the plea that the application dated 31.07.2006 sent by

them seeking an opportunity to adduce evidence and address arguments in the matter upon receipt of which the learned Arbitrator passed the

award dated 02.08.2006 was not correct. It has been submitted that the provisions contained u/s 19 and 24 of the Arbitration and Conciliation

Act, 1996 were ignored by the Arbitrator inasmuch as fair and reasonable opportunity to contest the arbitral proceedings were denied to the

Appellant.

14. It is also the case of the Appellant that the Arbitrator has also gone beyond the scope of submissions to arbitration and has failed to appreciate

the controversy raised by the Appellant who was only for refund of the license fee for the area which was reduced out of the area allotted to him to

the extent of 440 sq. mts. for the period 08.03.2004 to 30.04.2005. According to the Appellant, the Arbitrator went wrong in observing that no

loss was caused to the contractor in terms of the recovery of parking fees from the customer whereas the claim was for the refund of proportionate

refund of the license fee. The Appellant also submits that even the learned ADJ was wrong in holding that the application dated 31.07.2006 was

not signed by the Appellant despite the said application having been signed by the counsel for the Appellant.

15. On the other hand it has been argued on behalf of the Respondent that in this matter, the Arbitrator gave full opportunity to the parties. It is

only after the Appellant took a stand that he is not to address any other point, the award was passed. No doubt, an application was filed on

31.07.2006 but the said application was basically an afterthought and it was not even signed by the Appellant. It is, thus, submitted that there is no

error in the decision given by the Arbitrator. There is no infirmity in the approach adopted by the Arbitrator or the decision given by the learned

ADJ. It is, therefore, submitted that the appeal filed by the Appellant is liable to be dismissed.

16. I have heard the parties and have also perused the impugned order as well as the award passed by the Arbitrator.

17. Though it is correct that the Arbitrator had given only two hearings to the party"s i.e 24.03.2006 and 13.04.2006 but the proceedings of in

these two hearings goes to show that the Arbitrator had given sufficient opportunity to both the parties to present their case. In this regard, I would

like to quote the order sheet dated 13.04.2006 passed by the Arbitrator wherein the Appellant had appeared before the Arbitrator and had

accepted that no other point or document was to be submitted. Hence the objection taken by the Appellant that fair opportunity was not given to

him to present his case is not correct.

18. The order dated 13.04.2006 is quoted here under:

Arbitration meeting held on 13.4.2006 at 15.00 hrs., was attended by:

1. Shri Bharat Tiwari - Contractor

2. Shri K.D.Sharma - Railway Advocate

3. Shri Arun Shankar - Assistant Commercial

Manager, Delhi Division,

New Delhi

4. Shri R.C.Dhiman- Chief Office

Superintendent/Commercial, Delhi

Division, New Delhi

Rejoinder was filed by Shri Bharat Tiwari, and a copy of the same was handed over to the representative of Commercial Department of Delhi

Division. In the above-mentioned rejoinder given by Shri Bharat Tiwari, it has been indicated that the Joint Survey Report was not handed over

along with the rejoinder filed earlier by Railways which was given along with the additional points on 22.04.2006. A copy of the same was handed

over to Shri Bharat Tiwari. Photocopy of the same was also placed before the Arbitrator Proceedings:

Counsel for the Railways pointed out that in the Plaint filed by Shri Bharat Tiwari there was no mention that out of the area allotted as part of the

contract, some portion was raised and was like a footpath, which could not be used. Shri Bharat Tiwari agreed that the issue regarding availability

of footpath was not mentioned in the plaint, but it was mentioned verbally before the Court of Addl. District Judge, Delhi Tis Hazari. Shri Bharat

Tiwari indicated that he has no further points to add to what has already been given by him. Counsel for the Railways indicated that he has no other

facts to be placed before the Arbitrator

19. Further the objection taken regarding the application dated 31.07.2006 that the Arbitrator had not heard the application, it is observed that the

Arbitrator was aware of the application as he had been vigilant in protecting the same, however the perusal of the application shows that the

Appellant had not put his signatures on the application which raises doubt on the veracity of it, further in none of the hearing before the Arbitrator

the Advocate B.L Chawla appeared, which shows that the Appellant and his advocate himself were not serious with the application. Hence the

Arbitrator was right in not giving weightage to the application.

20. It may be also observed that the Arbitrator while delivering the award has considered the impact of reduction of the area as well as user of

excess area by the Appellant which goes to show that the total area which the Appellant had been using was more than the area for which he was

allowed to do parking business. In this regard, the observation made by the Arbitrator on the first issue are relevant. The same are reproduced

hereunder for the sake of reference:

a) 1st Issue: ""Whether applicant has been deprived of an area of 440 sq. Mts. Since 8.3.2004 as claimed by him, & Whether railway''s contention

is to be accepted that the applicant has occupied an area of 852.09 Sq. Mts., i.e. 82.09 Sq. Mts., extra as against 770 Sq. mts., given as per the

contract""? It is not disputed that 770 sq. mts., of area was to be given to the plaintiff as per the contract. This is also mentioned in the agreement

executed between the plaintiff and the Railways. The applicant has, however claimed that the area was reduced on 8.3.2004 to only 330 sq. mts.,

i.e. reduced by 440 sq. mts. In support of this contention, the claimant has given no proof of measurement or joint signatures with the railway

authorities or any letter from the railways to substantiate the claim that the area of 440 sq. mts., was taken away by the railways on 8.3.2004. They

have, however, represented again and again on this issue.

The railways, on the other hand, have claimed that the applicant occupied an area of 852.09 sq. mts., w.e.f. 1.5.2003 against 770 sq. mts., of area

allotted for the parking contract. It has been mentioned by the railways that during measurement of the area on 31.1.2005 on the request of party,

it was found that prior to 8.3.2004, the actual area available with the applicant was in two separate parts, which totaled to 852.09 sq. mts. The

contention that this area was measured in presence of the applicant and Site Plan duly signed by him on 31.1.2005 cannot be made relevant for the

period prior to 8.3.2004. It may be true that the area was made available in two parts where the parking contractor was operating from. What is

relevant is whether the contractor was initially using a total area of 852.09 sq. mts., but this has to be proved by records. As per the joint survey

done on 31.1.2005, it is brought out that the area initially used by the parking Contractor (Claimant) was 852.09 sq. mts. It is difficult to accept

and believe that the parties could know with certainty as to what was the status of actual occupation of the area during the period 8 months earlier.

If the Parking Contractor (Claimant) ahs encroached on an additional area, the Railways (Respondents) should have given notices for vacation of

the unauthorized land. None of this had been brought out on record in the Arbitration proceedings by the Railways. The Railway had also not

raised this issue before the learned ADJ. I find it difficult to accept this contention of railways, which in any case, has been disputed by the

applicant in his counter to the rejoinder.

21. Regarding the actual loss suffered by the Appellant on account of reduction of parking area, the Arbitrator has further observed as under:

In the claim made by the Petitioner, the only reason mentioned for reduction in the contractual amount is by linking the value of contract with the

land area allotted. The claimant has accordingly claimed that once a specific area has been reduced, the contractual amount should be

proportionately revised downwards.

The railways have countered this argument by having a survey conducted of the cycles, scooters, cars parked during 3-day timings i.e. 10:00

hours, 14:00 hours and 18:00 hours (These are especially peak timings for parking) for a period of 7 days i.e. from 4.2.2006 to 10.2.2006. The

period of survey is beyond the contractual period and, therefore, the initial reaction is to teat as irrelevant. A close look of the survey report shows

that the representative of contractor has also signed the survey report and hence it is proved that initial contract was valid only up to 30.04.05; this

was, however, extended much beyond this period as a new contact could not be finalized. The existing contractor, therefore, participated in the

survey. The survey report brings out that the space available caters to parking of 125 scooters. That is, if one car is equated to 3 scooters for the

purpose of working out the requirement of total area, the total area available after the reduction in space was for 125 scooter parking.

As per the number of cycles, scooters and cars parked, (taking one car requiring an area equivalent to parking of three scooters), the space

available is much more as compared to the number of cycles. Scooters & cars parked at any given time at any given date of the survey. As per the

survey report, the parking area had a substantial vacant space during the peak timings on all the 7 days of the survey - the remaining vacant space

available was equal to the parking of 50-100 more scooters.

The land area given is to be used only for parking of cycles, scooters or cars. After reducing the area, if the space for parking is adequate for the

requirement, there would obviously be no loss to the contractor in terms of recovery of parking fees or the customers. This issue is decided against

the applicant.

22. It is a matter of record that before filing the application dated 31.07.2006, at no stage prior thereto any request was made by the Appellant or

his counsel that the Appellant wanted to lead any evidence. The application was received by the Arbitrator on the same day when he made the

award and, therefore, the Arbitrator has not taken any cognizance of such an application which, of course, was a device to somehow delay the

proceedings and bring the material on record which was never sought to be brought by the Appellant.

23. An Arbitral forum is selected by the parties as per their choice. In this case, the Arbitrator has been appointed after the Appellant agreed for

appointment of the Arbitrator in accordance with the terms of the contract between the parties. Before the Arbitrator both the parties have filed

their claims and counter-claims. Both the parties have stated that whatever has been stated by them in their pleadings is the only thing that they wish

to state. None of the parties have led any evidence. The application dated 31.07.2006 was received by the Arbitrator on the date when he passed

the award.

24. No doubt, there was a wall constructed at a place where, the parking lot was allotted to the Appellant and which reduced the place available

for using as a parking lot by the Appellant but it is also a fact that the Appellant had also been using another portion of the parking lot unauthorized

and, therefore, total area used by him was about 852.09 sq. meters instead of 770 sq. meters. Moreover, there was no loss to the Appellant on

account of reduction of area as apparent from a reading of survey report. The relevant part of the survey report is re-produced hereunder :

3 to 5. The party had submitted that some railway employee came to PRS Parking near new PRS building and constructed a concrete wall at the

covered parking side near new PRS building and due to the closer of gate, vehicles cannot be parked inside the parking. He further stated that this

situation is effecting collection of parking charges and loss of revenue to him and approximate half of the area has become unutilized due to closing

of gate. On the receipt of the representation of the party, efforts were made to conduct a joint inspection immediately but the party could have

made available himself on 31.01.2005. As such the inspection was conducted on the same day. During inspection, it was noticed that prior to

08.03.2004, 852.09 sq. mtrs. area was used by the contractor against the allotted area of 770 sq. mtrs i.e. 82.09 sq. mtrs extra area was used by

the contractor upto 08.03.04 and after 08.03.2004 the area in use was 540 sq. mtrs. Area was measured in the presence of the contractor and

site plan was signed by him also on 31.01.2005. As per para 2 of the agreement, the railway administration reserve the right to alter location and

measurement of the said land if necessary without assigning any reason and no compensation will be granted to the licensee on this account.

Since, the applicant has encroached extra land upto 08.03.2004, as para 3(a) of the agreement, the licensee is liable to pay the damage to railway

administration @12% of the marketing value of the land.

There is no loss in collection of the parking charge caused to the parking contractor due to closer of gate and construction of wall. In this

connection, a survey was conducted from 04.02.2006 to 10.02.2006. During the survey it was found that the area available with the contractor

was not fully occupied with vehicles even during peak hours. More space was available for parking more vehicles. Details of survey enclosed.

There was no congestion and adequate area was available to accommodate more vehicles thus there was no loss on account of less area.

The reserve price for parking to allot contract was fixed on the basis of number of car/scooter/cycle expected for parking and revenue earned. The

contract was not given on the basis of recovery of land license fee per sq. mtrs.

6,7 After receipt of representation from party, several attempts were made to conduct joint inspection in presence of contractor. On 31.01.05

when the contractor was available, a joint inspection was conducted and a site plan was signed by the contractor also. In view of the reason

explained in above para, it is observed that contractor has not suffered any financial loss. Contractor did not suffer any financial loss due to the

construction of wall, closer of gate and taken over area from the contractor has encroached extra area and sufficient area was available with him to

accommodate the volume of vehicular traffic even after 08.03.2004.

8. The claim for refund of license fee of 40 sq mtrs. area is not admissible as the party has already encroached extra area measuring 82.09 sq. mtrs

from the date of allotment of contract upto 08.03.04 and there is no loss on account of less area however, as per para 2 of the agreement, the

railway administration reserve the right to alter location and measurement of the said land if necessary without assigning any reason and no

compensation will be granted to the license on this account.

As per para 21(a) of the agreement, right is given only to the Railway Administration to revise the area and change in site of parking within the

station premises during the currency of contract. As per para 15(c) of the agreement, in the event of breach of agreement or non-observations of

any terms and condition, the licensee would be liable to pay a fine upto maximum of Rs. 1,000/- for single irregularity.

25. I have also gone through Section 19 and 24 of the Arbitration and Conciliation Act, 1996. However, in view of the proceedings conducted by

the Arbitrator, none of the parties were considering to lead any evidence and have concluded their points in the form of reply/rejoinder. Thus, there

being no other procedure agreed to between the parties, no benefit can be taken by the Appellant. More so, as per paragraph 2 of the agreement,

the Railway Administration reserved its right to alter location and measurement of the said land if necessary without assigning any reason and no

compensation will be granted to the licensee on this account.

26. In these circumstances, the Arbitrator having considered all the aspects of the matter and having given an award against the Appellant which

has been upheld by the learned ADJ calls for no interference by this Court inasmuch as nothing has been brought to my notice which may entitle

this Court to cause any interference in the order passed by the learned ADJ who has considered all the aspects of the matter including the

pleadings of the parties and the records as available before the Arbitrator.

27. Thus, I find no infirmity with the order passed by the learned ADJ and consequently, the appeal is dismissed with no order as to costs.

28. TCR be sent back forthwith along with a copy of this judgment.