

Airports Authority of India v. Delhi International Airport Ltd.

(O.M.P. (Comm) 17/2023)

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Introduction

Recent judicial pronouncements have positioned India as an emerging hub for arbitration, marked by increasing stakeholder engagement and growing calls for predictability in the enforcement of arbitral awards. As is conventional wisdom, one primary factor to ensure certainty of execution is nominal judicial intervention in tribunal findings and ultimately, the award. Despite frequent assertions of minimal judicial interference and the routine invocation of judicial restraint, recent developments suggest a different reality. Courts have shown a growing willingness to expand the limited scope of Section 34 of the Arbitration and Conciliation Act, 1996, and have increasingly intervened to overturn arbitral tribunal findings, even at the advanced curative stage, which is typically reserved for the correction of fundamental legal errors.

Amidst most courts favoring judicial interference, the recent decision of the single-judge bench of the Delhi High Court dated 18.10.2024 in *Airports Authority of India versus Delhi International Airport Ltd/Mumbai International Airport Ltd* (O.M.P. (COMM) 17/2023), while upholding the majority opinion of the arbitral tribunal, reposes much required confidence in the adjudication process of the tribunal¹. The judgment is a landmark not only for its meticulous

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¹ Harshit Anand, *Delhi High Court Verdict in Airports Authority of India Case is a Renewed Call to Uphold the Spirit of the Arbitration Act*, (Nov. 12, 2024), <https://www.livelaw.in/articles/delhi-high-court-verdict-airports-authority-india-case-renewed-call-uphold-spirit-arbitration-act-274974>.

tracing of the actual import of Section 34 but also for not taking an alternative view, especially given that the award translates to substantial losses to the coffers of the Airports Authority of India (AAI) – a state instrumentality – in a high-stakes dispute.

Brief Overview of the Dispute

The dispute in the present case revolves, inter alia, around the definition of the terms 'revenue' and 'projected revenue' under the operation, management and development agreement (OMDA) executed between AAI and the Delhi International Airport Ltd/Mumbai International Airport Ltd (hereinafter, collectively referred to as the JVCS), and the calculation of the 'annual fee' payable to AAI and the heads of income which were liable to be excluded therefrom.

The JVCS asserted that 'annual fee' ought to be payable on 'revenue' as defined in the OMDA and not on the basis of the gross receipts credited to the 'profit & loss account'. For this purpose, the JVCS pleaded certain deductions from the 'annual fee' on account of,

- (i) Capital costs,
- (ii) Income derived from sources other than 'aeronautical services' as well as 'non-aeronautical services' (hereinafter, other income), and,
- (iii) 'Exclusions' in the form of payments received by the JVCS from the provision of electricity, water, sewerage, etc.

AAI argued that the definition of 'revenue' under the OMDA was exhaustive and must include all income recorded in the profit and loss account, without any deductions, except for the five specifically enumerated exclusions.

Facts

Mumbai International Airport Ltd (MIAL) is a company incorporated under the Companies Act, 1956, as a joint venture between GVK Airport Holdings Pvt. Ltd and other private entities, with GVK as the lead partner.

It is a collaborative effort between GVK Airport Holdings Private Limited (hereafter 'GVK') and a group of private developers, with the respondent as the main partner. Whereas the respondent ('AAI') is a statutory authority constituted under Section 3 of the Airports Authority

of India Act, 1994 ²(hereafter “the AAI Act”) and is responsible for creating, upgrading, maintaining, and managing civil aviation infrastructure in India.

Mumbai International Airport Limited (hereinafter 'MIAL') had filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the A & C Act') impugning an arbitral award dated 13.03.2021. The award was given in consideration of conflicts that emerged during the Operation Management and Development Agreement (OMDA) signed on 04.04.2006, between the two parties involved. This award was delivered by the arbitral tribunal comprising three members - Justice (retd.) C.K. Thakker, Justice (retd.) Mohit Shah and Justice (retd.) R.C Lahoti as the presiding arbitrator.

Background of the Contentions

Pursuant to the policy of the Government of India regarding privatization of certain airports, bids were invited for operating, maintaining, developing, designing, constructing, upgrading, modernizing, financing and managing the Mumbai airport. On 02.03.2006, the consortium led by GVK was declared successful in the bid and MIAL was incorporated as a special purpose vehicle (SPV) for developing, operating and financing the Mumbai Airport.

On 04.02.2006, MIAL and AAI executed the OMDA, under which MIAL was granted comprehensive rights for operating, developing, and managing the Mumbai Airport, subject to the terms and conditions laid down therein. Subsequently, on 26.04.2006, a lease deed was executed between the parties, granting MIAL possession of the Mumbai Airport premises, except for certain excluded areas, for purposes aligned with OMDA.

AAI, by a communication dated 02.05.2006, informed MIAL that it "shall perform under all existing contracts and agreements between AAI and other parties as relatable to the Airport from the Effective Date, as if MIAPL was an original party to such contracts and agreements instead of AAI and towards this end shall perform all responsibilities, liabilities and obligations of AAI at MIAPL's risk and cost (including payment obligations to counter parties)".³

² (Sept. 9, 2021), Section 3 https://www.indiacode.nic.in/bitstream/123456789/1979/1/AAairpoert1994_55.pdf.

³ *Delhi High Court refuses to interfere with Award passed by Arbitral Tribunal in petition by the Airports Authority of India*, SCC Times (Oct. 21, 2024), <https://www.sconline.com/blog/post/2024/10/21/delhi-hc-refuses-interfere-with-award-passed-arbitral-tribunal-petition-by-airports-authority-india/>.

The matter escalated when MIAL, by a letter dated 09.06.2006, was informed of AAI's intent to novate the HCI Lease Agreement. MIAL agreed in principle, proposing minor modifications and requesting AAI's approval. Thereafter, by a letter, the Ministry of Civil Aviation, Government of India (hereafter 'MoCA') informed MIAL that since the land leased to HCI was excluded from the Lease Deed executed in favour of MIAL, the same could not form a part of the 'Demised Premises'.

MIAL, by a communication, responded to the aforesaid letter disputing the same and requested reconsideration of the matter. It also sought a direction to be given to AAI to novate all the current and subsisting leave and license agreements in its favour. Due to unresolved disputes concerning the HCI lease, MIAL invoked arbitration under Article 15(2) of the OMDA through a notice dated 16.02.2019. It nominated a former Judge of the Supreme Court as its nominee arbitrator and requested AAI to appoint its nominee arbitrator within a period of thirty days from issuance of the notice. AAI responded and requested MIAL to withdraw the Notice of Dispute as the matter had been referred to the MoCA for review.

Consequently, on 29.04.2019, AAI informed MIAL that it had appointed Justice (Retd.) C.K. Thakker as its nominee Arbitrator. AAI also requested MIAL to withdraw its nomination of Justice (Retd.) Deepak Verma as its nominee arbitrator, as he had been engaged as an arbitrator in several proceedings concerning both parties. MIAL accepted the said request and by a letter dated 07.05.2019, informed AAI that it had substituted its nominee arbitrator and appointed Justice (Retd.) Mohit Shah as its nominee Arbitrator. Thereafter, Justice (Retd.) R.C. Lahoti was appointed as the Presiding Arbitrator.

Arguments

On 03.05.2006, MIAL took over the control and operations of the Mumbai Airport, as stipulated in the OMDA. MIAL, a company involved in airport operations, sought to acquire land leased to HCI for airport expansion. They argued that AAI, the airport authority, was obligated to transfer the lease to them under a specific agreement. Mr. P. Chidambaram, Senior Counsel for MIAL, contended that the arbitral award ignored essential contractual terms,

particularly Article 5.2(b)(i) of the OMDA, which mandated the transfer of all existing contracts to MIAL. He argued that the dispute fell squarely within the scope of the OMDA and was therefore arbitrable.

In response, Mr. Shankar, Counsel for AAI, emphasized that the HCI Lease Agreement predated the OMDA and fell within the category of 'Existing Leases' as defined under Article 2(6)(i). Hence, it was excluded from the 'Demised Premises' and outside the jurisdiction of the arbitral tribunal constituted under the OMDA. Consequently, the Arbitral Tribunal found that any dispute relating to the HCI Lease Agreement, which fell outside the purview of the OMDA, could not be adjudicated in arbitral proceedings under Article 15.2 of the OMDA.

“The tribunal found that the OMDA did not extend rights equivalent to those under the HCI Lease and declined to assess whether other statutory or contractual provisions might mandate such transfer, citing lack of jurisdiction.” MIAL subsequently appealed, arguing that the tribunal erred by not adjudicating whether AAI was legally obligated to novate the HCI lease. The Supreme Court agreed, finding that the tribunal had prematurely declined jurisdiction. The matter was remanded for reconsideration on the substantive dispute.

Decision of Arbitral Tribunal

The award consisted of two parts- one made by the Presiding Arbitrator, which was the minority view; and the other made by the other two Co-Arbitrators, which comprised the majority view, and therefore, the decision of the Tribunal.

The majority held that the JVCS's obligation under the OMDA was to share 'Projected Revenue', not 'Revenue' as defined elsewhere in the agreement. They interpreted this term contextually, concluding that costs related to aeronautical assets were to be excluded from the 'Projected Revenue' when computing the Annual Fee. In contrast, the minority opinion asserted that 'Annual Fee' was to be calculated based on 'Revenue' as expressly defined in the OMDA, without allowing deductions for capital costs or 'Other Income'.

On the aspect of deduction of Other Income, while the minority opinion rejected the plea of deduction observing that the JVCS would have been in no position to earn Other Income but

for the grant embodied under the OMDA, the majority held that amounts falling under Other Income are liable to be excluded for computing the 'Annual Fee' payable by the JVCS⁴.

Proceedings before the High Court

Pursuant to the government's policy on airport privatization⁵ bids were sought for operating, maintaining, developing, designing, constructing, upgrading, modernizing, financing, and managing the Mumbai airport. On February 3, 2006, the consortium led by GVK was declared successful in the bid, and MIAL was established as a special purpose vehicle (SPV) for the development, operation, and financing of the Mumbai airport.

On April 4th, 2006, MIAL and AAI signed the OMDA. In terms of the said agreement, MIAL was awarded the rights for operating, maintaining, developing, designing, constructing, upgrading, modernizing, financing, and managing the Mumbai airport, on the terms and conditions stipulated therein. Simultaneously on 26.04.2006, MIAL and AAI entered into a lease deed, whereby the site of the Mumbai airport, subject to certain exceptions, was demised to MIAL for the purpose of, inter alia, the operation, management, and development of the Mumbai airport (hereafter the 'lease deed').

Appearing for AAI, the solicitor general submitted, inter alia, that the majority opinion went on a roving inquiry, one which had not been pleaded or argued by either party. According to the Solicitor, the premise that the obligation to pay the 'annual fee' is determined not by actual "revenue" but by 'projected revenue' appears for the first time in the majority opinion and was never advanced by either party before the tribunal. AAI thus contended that the decision of the majority amounted to a rewriting of the contract between the parties and fell within the ambit of Section 34 of the Act, insofar as it contained decisions on matters beyond the scope of the submission to arbitration. AAI further submitted that this was a fit case for the High Court to invoke its powers conferred under Section 34 and set aside the award.

⁴ Jus Mundi, *DIAL and MIAL v. AAI, Judgment of the Delhi High Court 2024/DHC/8028, 18 Oct 2024*, <https://jusmundi.com/en/document/decision/en-delhi-international-airport-ltd-and-mumbai-international-airport-ltd-v-airport-authority-of-india-judgment-of-the-delhi-high-court-2024-dhc-8028-friday-18th-october-2024>.

⁵ *Microsoft Word - Doc.9980.1st Edition.alltext.en.docx*, (May 14, 2012), <https://aera.gov.in/uploads/order/icao9980.pdf>.

The JVCS responded by pleading that the interpretation of the term 'revenue' for calculating 'annual fee' constituted the core of the dispute between the parties, and it was therefore imperative for the tribunal to identify the constituents of 'shareable revenue'. The JVCS pointed out that it had been their consistent case that computation of 'annual fee' revolves around the contractual obligation of providing 'shareable revenue' and in order to identify the streams of income which would form part of 'shareable revenue', the tribunal was required to examine the concepts of 'projected revenue' and 'business plan' which stood incorporated in the OMDA. In addition to their arguments on merits, the JVCS pleaded that AAI's challenge required the high court to evaluate the validity of the award as if the high court proceedings were akin to a regular appeal. In doing so, the JVCS placed reliance on judicial pronouncements that expound upon the contours of the Section 34 power.

Reasoning of the High Court

After noting the submissions of the parties and terms of the contract in detail, the Bench comprising Justice Yashwant Varma undertook the arduous task of delineating leading judgments of the apex court as well as comparative jurisdictions which trace the limits of Section 34 of the Act. Thereafter, Justice Varma's description of Section 34 powers provides a faithful representation of the real purport of the provision:

“Thus, the fundamental and default rule which informs Section 34 is of minimal curial intervention. This rule is, in turn, based upon the principle of party autonomy and resting upon parties having entrusted the dispute resolution function to a body of their own choosing. The validity of an award would be liable to be tested on the principles of patent illegality and which in turn would require a curative court to come to the firm conclusion that the decision rendered is so perverse and irrational that no reasonable person would have arrived at that conclusion. An award would be equally susceptible if it ignores the evidence on record or where its conclusion is *ex facie* contrary to the uncontested terms of the contract.”⁶

⁶ *Delhi High Court refuses to interfere with Award passed by Arbitral Tribunal in petition by the Airports Authority of India*, SCC Times (Oct. 21, 2024), <https://www.sconline.com/blog/post/2024/10/21/delhi-hc-refuses-interfere-with-award-passed-arbitral-tribunal-petition-by-airports-authority-india/>.

Having done so, Justice Varma proceeded to hold that the view taken by the majority was based on a cumulative consideration of the legislative objective of the Act, the envisaged commercial enterprise agreed between the parties, and the rule of business efficacy. The minority opinion, on the other hand, took a diametrically opposite view in holding that the project agreements could not guide the OMDA. As per Justice Varma, a narrow construction of a definition clause, as undertaken by the presiding arbitrator, would lead to an interpretation which would strike at the very root and foundation of the commercial principles underlying the contract.

Analysis & Conclusion

Justice Varma's crucial judgment on the contours of Section 34 comes at a time when arbitration and its viability for business interests face an existential test in India. Of late, bureaucracy and risk-averse behavior implicit in the functioning of Indian Public Sector Undertakings have ensured that arbitration, despite being an expensive and time-consuming process, is unable to reduce the burden on the courts. This has invariably delayed the final resolution of disputes, which threatens to render the very purpose of the Act otiose. Courts would, therefore, do well to take a leaf out of Justice Varma's verdict in cases where tribunal awards reflect party autonomy and are well-reasoned.