

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Delivered on February 20, 2015

+ **ARB.A. 7/2015**

DEPARTMENT OF TRANSPORT GOVERNMENT OF NCT OF
DELHI

..... Appellant

Through: Mr. Amiet Andlay, Advocate

versus

M/S STAR BUS SERVICES PVT. LTD. & ANR.

..... Respondents

Through: Mr. Sandeep Sethi, Sr. Advocate with
Mr. Somiran Sharma & Mr. Vishnu
Sharma, Advocates

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

This petition has been filed by the Government of NCT of Delhi challenging order dated January 23, 2015 passed in IA No.2/2015 by the Arbitral Tribunal of Mr. M.K.S Menon, Advocate.

2. The operative part of order dated January 23, 2015 reads as under:-

"In the said peculiar circumstances, without expressing any opinion on the merits of contentions raised, I direct that the respondent shall not levy/impose any further "performance deductions" nor shall impose any penalty pursuant to notice dated 12.01.2015, till the next date of hearing. The application for interim relief shall be considered in detail on the next date of hearing. The

respondent may file their response to the applications in the meanwhile.”

3. The facts are that a Concession Agreement dated March 10, 2010 was entered into between the appellant and respondent No.1 for operation of Stage Carriage Services for a period of 10 years. Disputes arose between the parties as is seen from legal notice issued by the respondent No.1 raising a claim for the refund of Rs.87 lacs imposed as penalty and recovered by the appellant and for payment of performance incentives in terms of Schedule 3 of the Concession Agreement amounting to Rs.61,09,767/- for the period between November, 2011 to March, 2013.

4. The respondent No.1 invoked the arbitration clause vide its notice dated May 02, 2014, whereby it had intimated the appellant that it has appointed the Sole Arbitrator- respondent No.2 as the Arbitrator. It is noted that the respondent No.2 entered the reference. The appellant challenged his appointment on the ground of qualification; appointment to be made by ICADR; his nomination is not as per the mandate of arbitration clause in the Concession Agreement.

5. The appellant filed OMP No.1259/2014 inter-alia praying for termination of the mandate of the Sole Arbitrator. Suffice to state, OMP No.1259/2014 was dismissed. On January 12, 2015 the appellant issued show cause notice to respondent No.1 calling upon it why recovery of

damages at Rs.1 lac per day upto 90 days and Rs.2 lac for delay beyond 90 days and upto 120 days in terms of Article 10.5 of the Concession Agreement be not imposed.

6. The Sole Arbitrator (respondent No.2) intimated the appellant about the next date of hearing as January 23, 2015. Two applications were filed by the respondent No.1 before the Sole Arbitrator: (i) under Section 23 of the Arbitration & Conciliation Act, 1996 ('Act' in short) for amendment of the claim petition to allow amendments/supplementary claim; (ii) application under Section 17 of the Act to restrain the appellant herein from imposing any penalty.

7. It is the case of the appellant that in view of the announcement of the Delhi Elections, Senior Officers of the appellant were on election duty and this fact was informed to the learned Arbitrator and requested that the proceedings be deferred to any convenient date after February 15, 2015. On January 23, 2015, the two applications were taken up by the respondent No.2, which culminated in the impugned order.

8. When this matter was listed before this Court on February 13, 2015, this Court on a request made by the learned counsel for the petitioner adjourned the matter for February 19, 2015 as the date of hearing fixed by the learned Arbitrator was February 16, 2015.

9. It is the submission of the learned counsel for the appellant that

while in one application under Section 23 of the Act, the respondent No.2 had issued notice whereas in the second application under Section 17 of the Act, the learned Arbitrator had granted interim relief, which had the effect of restraining the appellant herein from imposing any penalty pursuant to notice dated January 12, 2015. He would submit, without a decision on Section 23 application, the order dated January 23, 2015 is not justified. He would further submit that the said order would amount to varying the terms and conditions of the Concession Agreement. According to him, Section 17 of the Act being a provision for interim measures the learned Arbitrator could not have passed orders in piecemeal. He would further state that the subject matter of the application under Section 17 of the Act was only a show cause notice dated January 12, 2015. In fact, till January 23, 2015 the respondent No.1 had not even filed a reply to the show cause notice and no final order has been passed. According to him, the respondent No.1 had sought an amendment to the claim petition without there being a final order.

10. Learned counsel for the petitioner also relied upon the proceedings which were held before the learned Arbitrator on February 16 and 17, 2015, to impress upon this Court the manner in which the learned Arbitrator has conducted the proceedings.

11. On the other hand, Mr.Sandeep Sethi, learned Senior Counsel for the

petitioner has drawn my attention to the order dated January 23, 2015 to contend and justify the interim order inasmuch as the application under Section 23 and Section 17 were necessitated in view of the developments which have taken place in the interregnum whereby the respondent No.1 was in receipt of notice dated January 12, 2015, whereby the appellant issued a notice for imposing penalty for non-induction of buses as per the Schedule fixed. He would state that the appellant instead of sending a representative to seek time, preferred to remain absent and an application for time was served in the office of learned Arbitrator. This approach was not found satisfactory by the learned Arbitrator and to ensure that the appellant does not precipitate the issue by imposing charges and penalty on one hand and on the other not appearing before the learned Arbitrator since the year 2014, had passed the interim order. He would submit various reasons which even though not attributable to the respondent No.1, have resulted in the issuance of show cause notice and the same was unjustified. He states that till such time an order is passed under Section 17 of the Act, the appellant could not have approached this Court. A petition challenging an interim measure pending hearing of the application need to be discouraged otherwise this Court would be flooded with such petitions. He states that the reply to show cause notice has been given by the respondent on January 28, 2015. He would justify the amendments sought for by the

respondent No.1, as according to him the respondent No.1 had reserved its right to amend the claim petition. He would also state that if a party approaches the authority expeditiously on the occurrence of certain events and the amendments sought are not alien to the main issue the application seeking such amendments is justified so also interim order pending consideration of the application for amendments. He would state that performance guarantee has been submitted by the respondent to the appellant and till date there is no order invoking the performance guarantee. He would also state that the show cause notice dated January 12, 2015 is an offshoot of the dismissal of the petition filed by the appellant challenging the appointment of respondent No.2 as the Sole Arbitrator. In the last he states that the appellant would be at liberty to make all submissions and such right would not be foreclosed by the respondent No.1.

12. In rejoinder, learned counsel for the appellant would submit that the appellant did invoke the performance guarantee in the month of December, 2014. That apart according to him, the appellant has every right to invoke the remedy of Section 37 by filing a petition in this Court as Section 37 contemplates filing of an appeal against an interim measure. The order dated January 13, 2015 is an interim measure directing against the appellant in favour of the respondent No.1. It is his submission that the

interim order must be confined between the period January 23, 2015 to February 16, 2015 and the same should not be read to mean a restraint order against the appellant in future as well. He would state that the respondent No.1 be directed to secure the amount as sought to be claimed in terms of show cause notice dated January 12, 2015.

13. Having considered the submissions of learned counsel for the parties, I note, the learned counsel for the parties agree that the learned Arbitrator has fixed the next date of hearing on February 21, 2015 i.e. tomorrow, on which date he has fixed both the applications for hearing.

14. The submissions made by the learned counsel for the parties can be summed up broadly into two categories: (i) on the maintainability of the appeal pending hearing; (ii) on the merit of the order passed by the learned Arbitrator.

15. On the aspect of maintainability of the appeal, I agree with the submission of Mr. Andlay that the order dated January 23, 2015 amounts to granting an interim measure and the same is maintainable on reading of Section 37(2)(b), which is reproduced below:-

“granting or refusing to grant an interim measure under section 17.”

16. Even though there is no legal bar for the appellant to approach this Court against order dated January 23, 2015, the question would be whether

at this stage when the learned Arbitrator has fixed the hearing tomorrow i.e. February 21, 2015, would it be proper for the Court to consider this appeal. The answer is 'No' for the reason any finding by this Court at this stage would have a bearing on the application to be decided by the learned Arbitrator.

17. In the conspectus of the facts, the only direction that can be given is learned Arbitrator shall hear and dispose of the applications filed under Section 23 and 17 of the Act on the date of hearing fixed by him i.e. February 21, 2015 by considering all the pleas to be urged by the parties before him.

18. Petition is disposed of in above terms. No costs.

IA 3231/2015

Dismissed as infructuous.

(V.KAMESWAR RAO)
JUDGE

FEBRUARY 20, 2015
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