HON'BLE SRI JUSTICE S.V.BHATT

ARBITRATION APPLICATION No.92 OF 2016

ORDER:

The instant application is filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for consideration and grant of following interim measures:

a. By restraining the Respondent No.2, its directors, officials, agents, affiliates etc. from exercising their shareholder rights thereby interfering with the running of the Respondent No.4 in any manner carried out by the Applicant.

b. Restrain the Respondent Nos.1, 2 and 3, their directors, officials, agents, affiliates etc. from dealing in any manner with the Cargo Terminal at the Rajiv Gandhi International Airport at Hyderabad and carrying out any activity including operations of Bank Accounts and investment accounts under the Amended and Restated Joint Venture Agreement dated 16.11.2010 and other Cargo Agreements forming party of the same.

c. Restrain the Respondent No.2 including its directors, officials, agents, affiliates etc. from transferring and/or encumbering in any manner whatsoever the Shares held by the Respondent No.2 in the Respondent No.4

d. Restrain the Respondent No.4 from paying benefits such as dividend arising out of the shareholder rights of the Respondents No.2, till the disposal of the arbitration proceedings and execution of the arbitration award.

e. By passing any such other Order(s) as deemed fit and proper in the circumstances of the case."

The circumstances necessary for the disposal of application are as follows:

On 16.11.2010, GMR Hyderabad International Airport/Applicant herein on one hand, and Menzies Aviation

PLC/R1, Manzies Aviation Cargo (Hyderabad) Limited/R2, Menzies Aviation (India) Private Limited/R3, Hyderabad Menzies Air Cargo Private Limited/R4 have entered into Joint Venture Agreement for handling Cargo Terminal, Allied Functions at Green Field International Airport operated by GMR Hyderabad International Airport Limited (GHIAL) at Shamshabad. The 4th respondent was incorporated with the joint stake or share holding of Applicant and Respondent No.2. The Joint Venture Agreement provides for Buyback Rights. According to clause 1.1 of Joint Venture Agreement dated 16.11.2010, Buyback Rights shall mean the right of GHIAL to buyback the shares and Series A preference shares held by Menzies Mauritius or its affiliates in the company at the fair market value in the manner specified in this agreement, before the end of concession period. The rights may be exercisable by GHIAL at its option only after expiry of seven years from the airport opening date. The applicant and 1st respondent for the purpose of implementing the objective of Joint Venture Agreement brought into existence, Hyderabad Menzies Air Cargo Private Limited/respondent No.4. The applicant and the 1st respondent hold 51% and 49% stake respectively in 4th respondent company. On 23.03.2008, the operations at Green Field Airport, Shamshabad commenced and the learned counsel appearing for the parties agree that 23.03.2008 can be treated as the starting point for seven years period to exercise the option.

It is alleged that on 01.11.2014 the applicant sent communication in terms of Joint Venture Agreement indicating its intention to buyback rights and acquire the shareholding of respondent No.2 in respondent No.4. On 23.12.2014, the 1st respondent replied to the option exercised by the applicant to buyback the rights. The details are not very relevant hence not adverted to in this order. Thereafter, the parties on various dates exchanged correspondence on the subject. On 04.08.2015, the applicant and Respondent No.2 jointly appointed Deloitte for valuation of 100% equity and Series A CCC preference shares of Hyderabad Menzies Private Cargo Limited. On 05.08.2015, the applicant confirmed the engagement and on 26.08.2015, the 2nd respondent confirmed the engagement of Deloitte for the purpose referred to above.

On 09.05.2016, Deloitte sent final valuation report to applicant and the 2nd respondent. On 16.05.2016, the applicant informed respondent Nos. 1 and 2 expressing applicant's willingness to buy the shares in terms of Deloitte Report dated 09.05.2016. On 27.05.2016, the 1st respondent protested to the mode, manner etc. of valuation by Deloitte and communicated the following reply to applicant.

> "As you are aware, Deloitte has issued its final valuation report on 09.05.2016 giving an indicative range of values of the equity shares as also the Series A preference shares (collectively, the "shares") held by MACHL in HMACPL.
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> Vide our letter dated 20th May,2016 copied to the GMR team, we had informed Deloitte that the valuation report was not acceptable to us giving detailed reasons.
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> We disagree that GHIAL had exercised its buy back rights vide its letter of 02 January,2015 in accordance with clause 8.7 of the J.V. Agreement, as stated in your letter. In any case, Deloitte's valuation report does not

conform to the mandate given to it in the letter of engagement dated 04.08.2015.

In this context, the offer made by the GHIAL for purchasing the shares at the simple average of the indicative range of values suggested by Deloitte is also not correct and therefore, not acceptable to MACHL.

For an early and effective resolution of the issue of buyout of shares we would expect a mutually acceptable solution."

From the above reply, for the present, it can be noted that a discordant note on the mode, manner etc. of exercising buyback option is communicated by respondents 1 and 2. Thereafter, letters have been exchanged between parties and finally through letter dated 23.08.2016, the applicant while setting out its view on the buyback right and after perceiving the discordant note of respondents 1 and 2 concluded as follows:

As Menzies Group chooses to insist on the valuation done by Deloitte is not binding and also as Menzies is disputing the buyback rights exercised by GHIAL, GHIAL is constrained to invoke arbitration under clause 9.1 of the Joint Venture Agreement for the purpose of referring the present dispute to arbitration. GHIAL hereby nominates Sri Justice B.Sudershan Reddy, retired Judge of Hon'ble Supreme Court of India as Arbitrator and request Manzies Group to nominate its Arbitrator within seven days of receipt of this notice to enable constitution of Arbitral Tribunal.

On 12.09.2016, the 1st respondent nominated Sri Justice S.B. Sinha former Judge of the Hon'ble Supreme Court of India as the nominee Arbitrator. On 30.09.2016, the Hon'ble Arbitrators nominated by the applicant and the respondents have agreed to request Sri Justice A.K. Patnaik, former Judge of Apex Court to act as presiding Arbitrator of the Arbitral Tribunal constituted by parties for resolving the disputes on right of buyback of shares under Joint Venture Agreement dated 16.11.2010. On 30.09.2016, the request was communicated to the Hon'ble Presiding Arbitrator and the first hearing of arbitration was agreed to be held on 04.12.2016 at Neetibagh, Delhi.

The applicant in support of its claim for interim measures alleges that respondents 1 to 3 are under obligation to honour the buyback right of applicant and the valuation report submitted by Deloitte is binding on both parties. A dispute on valuation raised by respondents is *perse* against the agreed right of applicant under Joint Venture Agreement dated 16.11.2010. One of the assertions of application for grant of interim measures is that respondents 1 to 3 have time and again demonstrated their unwillingness to fulfil their obligations under the Joint Venture Agreement, therefore their continuation on board of 4th respondent company, involvement in the operations of 4th respondent company etc. cause inconvenience in the operation of the cargo terminal at the airport thereby causing irreparable loss to applicant and other third party consumers apart from causing loss of reputation to applicant and Rajiv Gandhi International Airport, Shamshabad. The applicant expresses apprehension that respondents 1 to 3 may coerce the applicant into accepting respondents' illegal and highly inflated valuation for buying rights of respondent No.4. The applicant claims that the prima facie case, equities and balance of convenience in considering the interim measures are with the applicant and the application deserves to be allowed. Respondents 1 to 3 filed counter affidavit and in all fours oppose the prayer for grant of interim measures. This Court is of the view that succinct reference to the preliminary objections of respondents and the objections on the core issue of right of buyback option exercised by the applicant would be sufficient. The respondents objected to the maintainability of application before a Division Bench of this Court. The objection is sustained and the matter is sent to Commercial Division/Single Bench. Now the respondents object to the continuation and consideration of interim measures as opposed to Section 9(3) of the Act.

Respondents further contend that there is no factual or legal basis for the relief claimed by the applicant. According to respondents, in the fact situation of the case, the grant of interim relief would amount to granting final relief without adjudicating the core issues dealt with by Arbitral Tribunal. According to respondents, there is no cause of action for filing the application for interim measures particularly at this stage of the matter. Further the very foundation for interim measures claimed in the instant applicant is substantially a fact in issue before the Arbitral Tribunal. It is alleged that the circumstances leading to the execution of Joint Venture Agreement till the constitution of Arbitral Tribunal are not stated from correct perspective and the applicant has also distorted and presented circumstances in a misleading manner. Respondents 1 to 3 reiterate that the valuation report dated 09.05.2016 of Deloitte is not acceptable to answering respondents. The interim measures if considered at this stage, substantially infringe the statutory and contractual right of respondent No.2 as a shareholder in respondent No.4. The counter affidavit refers to a series of circumstances opposing the prayer for grant of interim measures. This Court is not adverting to these circumstances both for brevity and that they deal with merits of the case.

The learned counsel have also stated that these averments are substantially facts in issue before the Hon'ble Tribunal. Therefore while considering the prayer for interim measures, this Court need not to advert to them in detail. To say briefly this Court notes that respondents 1 to 3 vehemently oppose grant of interim measures under Section 9 of the Act.

Mr.S.Niranjan Reddy for applicant has drawn the attention of this Court to Clauses 1.1, 8.4, 8.7 and 9 of Joint Venture Agreement dated 16.11.2010 and contended that having regard to the nature of arrangement between the applicant on one hand and respondent Nos. 1 to 3 on the other, resulted in R4/Company. The investors at the time of entry into Joint Venture business consider the exist options as well and accordingly the same is incorporated in the Agreement dated 16.11.2010. The parties after negotiations have agreed on the right of buyback of the shares held by respondents 1 to 3 in respondent No.4 together with Series A CCC preference shares is an explicit terms of agreement. According to him, the applicant on 01.11.2014, has set in motion the steps required for exercising the right of buyback shares of respondents 1 to 3 in respondent No.4/company, for the seven year period comes to end by 31.03.2015. Respondents 1 to 3 after acknowledging the right of applicant, have consented to engaging the services of Deloitte for determining the value of buyback stake. On 09.05.2016, the report of Deloitte was made available. The applicant in May, 2016, in good faith and in furtherance of its option under the Joint Venture called upon respondents 1 to 3 to cooperate in discharging their obligation under Joint Venture Agreement dated 16.11.2010. On 10.06.2016, the respondents without reasons and grounds particularly contrary to the conduct borne out by communications oppose the Deloitte report dated 09.10.2016 and the very exercise of right of buyback by the applicant. From these circumstances, he contends that the assertions of respondents by way of reply in counter affidavit are contrary to binding obligations under Joint Venture Agreement, the existence of buyback clause, steps so far taken in engaging Deloitte, receiving final valuation report etc. and further these circumstances establish prima facie case and having regard to the manner in which respondents 1 to 3 are objecting for grant of interim measures, he tries to persuade this Court that the continued presence of respondents 1 to 3 on the board of respondent No.4 will be adverse to the business interest of applicant as well as respondent No.4. To prove bona fides of applicant, he submits that the applicant is prepared to deposit the amount determined by Deloitte towards consideration for buying-back the rights of respondents or such other sum, the Court directs and prays for grant of all the reliefs. In other words, he contends that respondents 1 to 3 are entitled to receive consideration as mutually considered and agreed by the parties or alternatively as determined by the Arbitral Tribunal. Therefore, if the sale consideration amount if deposited in an account, the interest of respondents is secured and respondents 1 to 3 may be refrained as prayed in the instant application from participating in the affairs of

4th respondent company. Therefore, he prays for allowing the application as prayed for.

Mr.C.V.Mohan Reddy for respondents 1 to 3 raises preliminary objection on the jurisdiction of this Court to continue to entertain the prayer for interim measures in view of the sub section (3) of Section 9 of the Act. According to him, once the Arbitral Tribunal has been constituted, this Court shall not entertain application under sub section (1) of Section 9 unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious. He elaborates his submission by contending that on 24.08.2016, Arbitration Application No.92 of 2016 filed by the applicant. On 30.08.2016, the Hon'ble Division Bench issued notice before admission. On 08.09.2016, respondents 1 to 3 sought time for filing counter. On 14.09.2016, with the appointment of the Presiding Arbitrator, the constitution of Arbitral Tribunal is complete and all issues in this behalf are seized by Arbitral Tribunal. Therefore, the prohibition contained in the first limb of sub section (3) of Section 9 of the Act is attracted and this Court shall not entertain the application under sub section (1) for grant of interim measures. He further contends that the affidavit filed along with the application does not contain details or minimum averments to consider the case of applicant that circumstances exist which may not render remedy provided under Section 17 of efficacious. By commenting extensively on the affidavit of the applicant, he concludes that the application does not satisfy the tests, namely prima facie, irreparable loss and injury and balance of convenience for grant of interim measures. He further contends that prayers covered by Paras 9.I, II and IV if considered by way of interim measures virtually amount to restricting the rights and privileges enjoyed by a shareholder in a company and the relief if granted is beyond the scope of Section 9 of the Act. He further contends that respondents 1 to 3 are objecting to the exercise of right of buyback, therefore, the very assertion of buyback is an issue before Arbitral Tribunal and he places reliance upon clause 9 - resolution of disputes, reads as follows:

> "9.1 Any dispute, controversy or claim arising out of or in relation to this Agreement or the breach, termination or invalidity thereof, if the same cannot be settled amicably among the Parties concerned, shall be settled by final and binding arbitration in accordance with the Indian Arbitration and Conciliation Act,1996 by three arbitrators. Menzies Group shall appoint one arbitrator and the Company and GHIAL shall appoint one arbitrator and the two arbitrators shall jointly appoint the third arbitrator. The arbitration proceedings shall take place at Hyderabad in India and the proceedings shall be exclusively in English.
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> 9.2 Pending the resolution of a dispute by arbitration, the Parties shall except in the event of termination, continue to perform all their obligations under this Agreement without prejudice to a final adjustment in accordance with the arbitral award."

He contends that the submissions of applicant proceed on the assumption that respondents 1 to 3 have confined the defences only to the valuation part of buyback right and therefore the respondents can be kept away from the day –to-day administration by depositing sale consideration is illegal and untenable. He draws the attention of the Court to series of letters exchanged between the parties and contends that this Court cannot and could not under any circumstances consider granting reliefs covered by Paras 9.I, II and IV of the application. As regards prayer covered by Para 9.III, he relies upon clause 4 of Joint Venture Agreement viz., Share Transfer restrictions and Pre-emptive rights to contend that this prayer is superfluous. The learned senior counsel has interpreted each one of the sentences covered by clause 4 to bring home his point that the prayer covered by 9.III is unnecessary. According to him, there is no averment in the affidavit that respondents 1 to 3 are taking steps to transfer their share to third party/ entity and alternatively, on instructions, submits that respondents 1 to 3 are bound by the rigor or obligation under clause 4 of Joint Venture Agreement dated 16.11.2010. On the pointed query of the Court, whether this statement can be placed on record, senior counsel reiterates that respondents 1 to 3 are bound by the mechanism provided by clause 4 of Joint Venture Agreement and as the buyback issue is the principal dispute for resolution before the Arbitral Tribunal, restriction through a Court order is unnecessary, for clause 4 of Joint Venture Agreement is a sufficient safeguard.

Mr.S.Niranjan Reddy by way of reply and to the pointed query of this Court submits that the statement of respondents 1 to 3 as regards the prayer covered by para 9.III may be placed on record. He further submits that, if this Court is of the view that the consideration of other prayers at this stage is not ripe, liberty may be given to applicant to move application before the Tribunal for reliefs as the circumstances warrant for proper functioning of respondent No.4 may be reserved. He reiterates his submission that the Court considers restraining respondent No.4 from paying benefits such as dividend arising out of the shareholders' rights of respondent No.2 till the disposal of the arbitration proceedings and execution of the Award. Mr.S.Niranjan Reddy on the preliminary objection of respondents that the affidavit is bereft of details required for establishing the principles of prima facie case, irreparable loss and injury, and balance of convenience fairly submits that the affidavit refers to a few details on these aspects but does not contain all the details that may persuade a Court to examine the request for grant of interim measures at this stage.

I have taken note of submissions of learned counsel appearing for the parties and perused the material available on record. Having considered the rival contentions of the parties and after taking into consideration the circumstances narrated herein before taking into consideration the fact that the disputes/ differences between the parties under the Joint Venture Agreement are required to be resolved before the Arbitral Tribunal, and further keeping in view the commencement of Arbitral Proceedings, I am of the view that at this stage of Arbitral Proceedings considering the prayers will not be in the interest of both the parties and also for timely completion of arbitral proceedings.

The application under Section 9 of the Act is in the nature of an interlocutory application. The term interlocutory application is a term of well known legal significance. The interlocutory application has been used in various statutes and in the Act words used are a party may apply to a Court for grant of interim measure. This Court while considering prayer under Section 9 of the Act ought not to examine the merits of issues pending before the Arbitral Tribunal. The applicant claims to have exercised the right of buyback option of shares of respondents. According to applicant, the option is compliant with the procedures and formalities required in this behalf. Per contra, the case of respondents 1 to 3 is that the exercise of option is stoutly opposed by respondents 1 to 3. Therefore, the mechanism under Joint Venture will take this aspect of the dispute. Clause 9 encompasses all the disputes including the dispute referred to above. This Court is of the view that in a case like this, preservation of subject matter of dispute pending before Arbitral Tribunal is required to be noted and not other prayers. Had respondents 1 to 3 opposed preservation of subject matter of dispute before the Arbitral Tribunal or alternatively applicant places material to show that third party interest is likely to be created by respondents 1 to 3, this Court would have considered subject to other objections raised by respondents 1 to 3 and passed orders on the prayer covered by Para 9 III. This Court is relieved of examining the issue in view of the stand of respondents 1 to 3 on the scope and functioning of clause 4 of Joint Venture Agreement. This Court is of the view that Clause 4 of Joint Venture Agreement has provided enough safeguards from share transfer. Hence, the subject matter of dispute is protected by the restrictions contained in clause 4 of Joint Venture Agreement. Further the statement of learned senior counsel as noted above is placed on record and no further direction is required in this behalf while dealing with the prayer in Para 9 III. As regards the other prayers of applicant, this Court is of the view that circumstances are not ripe enough and in anticipation of difficulty expressed by applicant in the running of 4th respondent company or non-cooperation by respondents 1 to 3, grant the reliefs. On the ground that Arbitral Tribunal is constituted and schedule for hearing is fixed, by leaving it open to applicant to move application under Section 17 of the Act as advised and circumstances warrant, the Arbitration application is disposed of as indicated above. No order as to costs. The question whether the maintainability of instant application having regard to the restriction imposed by sub section (3) of Section 9 of the Act is not considered and is left open for consideration and decision in some appropriate proceedings. It is made clear that firstly the merits of issues are not considered while disposing of the Arbitration Application and secondly any observation made in this order shall not be construed as an expression of opinion on the merits of the case which are to be decided by Arbitral Tribunal in accordance with law.

S.V.BHATT,J

Date: 21.12.2016
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