THE HON'BLE SRI JUSTICE A.V.SESHA SAI

C.M.A.No.212 of 2017

JUDGMENT:

This is an Appeal filed under Section 37(2)(b) of Arbitration and Conciliation Act, 1996 read with Section 10 of Commercial Court, Commercial Division and Commercial Appellate Division of High Court Act, 2015, assailing an order dated 27.2.2017 passed by the Arbitral Tribunal in the matter of Arbitration between GMR Hyderabad International Airport Ltd., and Menzies Aviation PLC and others.

2. The appellant/claimant entered into a joint venture agreement with the Respondents 1 to 4, O & M Agreement with Respondents 1 and 4, Cargo Building Lease Deed with Respondent No.4 and Umbrella Agreement with Respondents 1 to 4. According to the said joint venture agreement, the appellant/claimant holds 51% share and the 2nd respondent holds 49% share in the 2nd respondent company. The said joint venture agreement confers a right on the appellant/claimant to buy back the shares held by 2nd respondent in the 4th respondent company after seven years of the Airport opening date i.e. 23.3.2008. The appellant/claimant expressed its intent to buy shares held by 2nd respondent in the 4th respondent company on 23.3.2015 on expiry of the said seven years as per the joint venture agreement. In furtherance of the same, in the month of August, 2015, the claimant and the 2nd respondent appointed a consulting firm Deloitte to determine the range of value of shares by 2nd respondent in 4th respondent company, so that the claimant can pay such value of shares to 4th respondent company and the said consulting firm submitted its final report and thereafter, a proposal was made by the claimant that it would be fair and reasonable for both the parties if the shares were transferred by the 2nd respondent to the claimant at the

simple averages of the value range provided by the consulting firm, but the said proposal was not accepted. Thereafter, the claimant, by invoking clause 9.1 of the joint venture agreement vide letter dated 23.8.2014 filed an application under Section 9 of the Arbitration and Conciliation Act before this Court with a prayer to restrain the 2nd respondent to exercise its right as a shareholder in the 4th respondent company. This Court, disposed of the said application by way of order dated 21.12.2016, keeping it open for the claimant to move an application under Section 17 of the Act before the Arbitral Tribunal.

3. The 45th meeting of the Board of Directors of the 4th respondent took place on 19.9.2016. Item 11 of agenda in the said meeting was to consider the declaration of dividend at the agreed rate of 11.97% on preference shares for the quarter April to 30th June 2016 and against agenda Item 12, the Board of Directors was to consider declaration of interim dividend on equity shares for the quarter April to 30th June 2016. In the said meeting, the nominee Directors of the claimant in the 4th respondent company did not agree for the declaration of dividends on the ground that the claimant had exercised buy back rights in respect of the shares held by 2nd respondent and had invoked arbitration and also sought interim relief from this Court and the matter was sub-judice and with the result, the Chairman of the Board of Directors meeting announced deferment of declaration of preference dividend and announced dropping of the agenda item for declaration of interim equity dividend for the quarter ending 30th June 2016. By way of letters dated 21.10.2016 and 14.11.2016, the claimant intimated the 1st respondent that technical fee under O & M Agreement is not payable to the 1st respondent for the period April 2016 to July 2016.

4. In the above background, the present application came to be filed by the 2nd respondent under Section 17 of the Arbitration and Conciliation Act, 1996 to;

(a) direct the claimant and its nominee Directors to pass resolutions in respect of Agenda Item 11 for preference dividend and Agenda Item No.12 for equity dividend which were placed before the Board of Directors in its 45th Board Meeting.

(b) direct the claimant and its nominee Directors not to oppose the resolutions that may be placed before the Board of Directors of 4th respondent company as regards the declaration and payment of preference and equity dividend.

(c) restrain the claimant and its Directors, nominees or agents from interfering in the business of the 4th respondent company or from issuing any advice, recommendation or direction to 4th respondent not to comply with the contractual obligations entered into with all or any of respondents 1 to 3.

The said application was resisted by the claimant by filing counter. The Tribunal allowed the said application by way of order dated 27.2.2017 and the operative portion of the said order reads as under:

> "The Arbitral Tribunal, therefore, allows the application of the Respondent No.2 under Section 17 of the Act and as an interim measure of protection:
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> a) directs that during the present arbitration proceedings, the Claimant and its nominee directors in the Board of Directors of Respondent No.4 not to oppose the resolutions as regards the payment of dividend on preference and equity shares held by the Respondent No.2 in the Respondent

No.4 company on the ground that the Claimant has exercised Buy Back Rights in respect of the said shares as per the provisions of the JVA.

b) Restrain the Claimant and its nominee Directors in the Respondent No.4 Company from issuing any advice/ recommendations to the Respondent No.4 Company not to pay technical services fees to the Respondent No.1 under the O & M Agreement during the present arbitration proceedings so long as the Respondent No.1 continues to provide services under the O & M Agreement".

5. Heard Sri S.Niranjan Reddy, learned Senior Counsel for the Appellant and Sri R.Raghunandan, learned Senior Counsel for the Respondents and perused the material available before the Court.

6. <u>Submissions/contentions advanced on behalf of the Appellant/claimant</u>

6.1 The order under challenge is highly illegal, arbitrary, erroneous and opposed to the very spirit and object of the provisions of the Arbitration and Conciliation Act.

6.2 The learned counsel further contends that the impugned order is contrary to clause 5.5 of the Joint Venture Agreement read with Appendix-I, List-I and Item-1. It is further submitted that the Joint Venture Agreement confers right on the claimant to buy back the equity preference shares held by the 2nd respondent in the 4th respondent company after seven years of the Airport opening date i.e. 23.3.2008 and the claimant exercised its option for the same, and the 2nd respondent did not transfer the shares to the claimant, thereby committed default of the Joint Venture Agreement.

6.3 It is further submitted that the claimant exercised the buy back rights under clause 8.7 of the Joint Venture Agreement, which provides that in the event of exercise of buy back rights by the claimant after expiry of seven years, the provisions of sub-clause 8.6 of the Joint Venture Agreement apply mutatis-mutandis and sub-clause 8.6 of the Joint Venture Agreement provides that 2nd respondent will transfer the equity and preference shares held by it and sign and deliver documents and agreements to give effect to the transfer. It is further contended that breach of clause as regards claimant's right to buy back shares amounts to termination of agreement.

6.4 It is further contended that in the absence of necessary and indispensable ingredients, namely; strong prima facie case, irreparable injury and balance of convenience in favour of 2nd respondent, the Arbitral Tribunal ought not to have passed the questioned order.

6.5 It is further submitted that in the event of impugned order being allowed to continue, the claimant would have to face lot of difficulties at the time of passing final award.

6.6 The Tribunal did not properly consider the purport of clause 9.2 of the Joint Venture Agreement and the Tribunal ought to have seen that the payment of amounts pursuant to the impugned order would lead to unnecessary complications and drives the appellant to difficult situation where the clock cannot be put-back.

6.7 The impugned order passed by the Arbitral Tribunal is also not in consonance with Section 17 of the Arbitration and Conciliation Act, 1996.

To bolster his submissions and contentions, the learned counsel places reliance on the following judgments:

1) Dorab Cawasji Warden v. Coomi Sorab Warden[1].

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[1] (1990) 2 SCC 117

2) Dalpat Kumar and another v. Prahlad Singh and others[2]

3) Colgate Palmolive (India) Ltd. V. Hindustan Lever Ltd.[3]
4) Hindustan Petroleum Corpn.Ltd. v. Sriman Narayan and another[4].

5) Adhunik Steels Ltd. V. Orissa Manganese and Minerals (P) Ltd.[5].

7. Submissions/contentions advanced on behalf of the Respondent

7.1 According to clause 6.9(i) and 6.9(iii) of Joint Venture Agreement, the 4th respondent is under obligation to declare the dividend in respect of equity shares and to pay preference dividend @ 11.7% on the paid up value of preference shares quarterly.

7.2 The 2nd respondent is entitled to be paid technical service fee as per clause 7.1(d) read with 7.3 of O & M Agreement.

7.3 The impugned order is strictly in conformity with clause 9.2 of the Joint Venture Agreement and the claimant cannot advice the 4th respondent to stop paying the technical fee to the 1st respondent as per O & M Agreement, nor the claimant can be allowed to oppose through its nominee Directors in the 4th respondent company as regards payment of dividends on the equity and preference shares.

7.4 In view of existence of express clause i.e. clause 9.2 of the Joint Venture Agreement, which binds all the parties to the agreement, it cannot be said that the Tribunal ought not to have granted the relief in the absence of three ingredients of Order 39 Rules 1 and 2 of CPC namely; prima facie case, balance of convenience and irreparable loss.

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[2] (1992) 1 SCC 719
[3] (1999) 7 SCC 1
[4] (2002) 5 SCC 760
[5] (2007) 7 SCC 125

7.5 The Arbitral Tribunal also thoroughly considered the above aspects and answered meticulously all the issues.

In support of his contentions/submissions, the learned counsel for the Respondent places reliance on the following judgments:

1) Wander Ltd. and another v. Antox India P.Ltd.,[6]
2) V.B.Rangaraj v. V.B.Gopalakrishnan and others[7]
3) Metro Buildtech Pvt. Ltd. v. Standard Chartered Bank[8]
4) EMAAR MGF Land Limited v. Kakade British Realities Private Limited and another[9]

8. There is absolutely no dispute as regards the issue that a person approaching a Court of Law, praying for temporary injunction is required to show the existence of three necessary ingredients, namely; prima facie case, balance of convenience and irreparable loss and injury in his favour to have the benefit of such injunction. Clause 9.1 of the Joint Venture Agreement provides for resolution of disputes by arbitration. Clause 9.2 of the Joint Venture Agreement stipulates and mandates that the parties to the agreement shall except in the event of termination, continue to perform all the obligations under the agreement until the final award is passed.

9. In the instant case, by way of letter dated 16.5.2016, the claimant agreed to buy the preference and equity shares held by 2nd respondent in the 4th respondent company and requested the 2nd respondent to complete the transaction, but the same was declined. It is an admitted fact that in the claim statement made before the Arbitral Tribunal, the claimant prayed for a direction to the Respondents 1 to 3 to transfer the shares to the claimant.

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[6] 1990 (Supp) SCC 727
[7] AIR 1992 SC 453
[8] 2012 SCC Online Del 2262
[9] 2013(138) DRJ 507

The Tribunal, by referring to clause 8.6 and 8.7 of the Joint Venture Agreement, recorded a finding that when the claimant exercises the buy back right, 2nd respondent will have to sign, execute and deliver any further documents and agreements to give effect to the transfer of shares to the claimant. The Tribunal also found that until the Arbitral Tribunal issues directions as prayed for by the claimant and pursuant to such directions, the shares are transferred by 2nd respondent in favour of claimant, the Board of Directors of 4th respondent company will have to declare payment of dividends on the preferential shares held by 2nd respondent in the 4th respondent company as per the agreed rate. The aspect of termination in view of exercise of right of buy back was considered by the Tribunal in an elaborate manner and eventually found that as per clause 9.2, the 4th respondent will have to perform its obligations under the Joint Venture Agreement and O & M Agreements towards Respondents 1 to 3. The Tribunal also directed that the nominee Directors in the Board of Directors of 4th respondent cannot prevent the 4th respondent from performing the said obligations during the pendency of the arbitral proceedings and passing of final award.

10. In the teeth of Clause 9.2 of the Joint Venture Agreement, this Court is of the considered opinion that the 2nd respondent herein has established existence of three necessary ingredients of Order 39 Rules 1 and 2 of CPC namely; prima facie case, balance of convenience and irreparable loss and injury in his favour.

11. Coming to the judgments cited by the learned counsel for the Appellant. In *Dorab Cawasji Warden v. Coomi Sorab Warden* (1 supra), the

Hon'ble Apex Court while dealing with the power to grant interlocutory application mandatory injunction, at paragraph 16 held as under:

> "The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which [127] was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:
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> (1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
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> (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
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> (3) The balance of convenience is in favour of the one seeking such relief.

12. In fact, the Tribunal referred to the above judgment and taking into consideration the language of clause 9.2 of Joint Venture Agreement, which imposes obligation on the parties to perform their obligations under agreement during the pendency of arbitration proceedings, came to a conclusion against the appellant herein. The case in *Dalpat Kumar and another v. Prahlad Singh* (2 supra) is also to the above effect. The judgments in the case of *Colgate Palmolive (India) Ltd. V. Hindustan Lever Ltd.* (3 supra), *Hindustan Petroleum Corpn.Ltd. v. Sriman Narayan* (4 supra) and *Adhunik Steels Ltd. V. Orissa Manganese and Minerals (P) Ltd.* (5 supra) would not render any assistance to the petitioner herein having regard to the express clause i.e. clause 9.2 of the Joint Venture Agreement.

13. Coming to the judgments cited by the learned counsel for the Respondents.

14. In *Wander Ltd. and another v. Antox India P.Ltd.,* (6 supra), the Hon'ble Apex Court at paragraph 14 held as under:

> "The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd.* v. *Pothan Joseph*[1]: (SCR 721)
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> "... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co.* v. *Jhanaton*[2] '...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'."
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> The appellate judgment does not seem to defer to this principle."

15. In *Metro Buildtech Pvt. Ltd. v. Standard Chartered Bank* (8 supra), the Hon'ble Apex Court at paragraph 12 held as under:

> "The terms of MOU as noted above are very clear. Perusal of record shows that earlier appellant had requested for rescheduling the

payment of balance consideration and thereafter vide its letter dated 16.4.2012, it had recalled the offer. Even extension of time for making balance payment was sought after the time limit for payment under the MOU had already expired. After considering the relevant material on record, the learned Arbitrator had modified the status quo order and has observed that default has undeniably occurred on the part of the appellant and for the said reason, continuing of the status order cannot be granted. The learned Arbitrator had exercised his discretion in modifying the interim order. Nothing has been placed to show that discretion has been exercised in arbitrary, capricious or in perverse manner. Further the same has been exercised after considering the material on record. In these circumstances, it will not be appropriate to reassess the material on record and reach a conclusion other than the one arrived at by the learned Arbitrator especially when the conclusion arrived at is reasonably possible on the basis of material on record. Reference is made to Wander Ltd. and Another vs. Antox India P. Ltd.; 1990 (Supp) Supreme Court Cases 727.".

16. The Delhi High Court in *EMAAR MGF Land Limited v. Kakade British Realities Private Limited* (9 supra), at paragraphs 7 and 9 held as under:

"7. Having heard the learned counsel for the parties, according to me, what requires to be examined is not how this court would have ruled had the matter been placed before it, in the first instance but, whether the conclusion reached by the learned arbitrator was reasonably possible based on the material placed before him. The scope of an appeal qua discretion employed by an authority of the first instance is restricted to an appeal on principle. Therefore, the appellate court is not to interdict the exercise of discretion employed by the original authority and substitute the same with its own view in the matter, except when, it is shown that the discretion exercised in the matter is imbued with arbitrariness, is capricious, or has resulted in perversity, or the impugned order is passed in ignorance of the settled principles of law for grant or refusal of interlocutory injunctions [see Wander Ltd. and Anr. (supra)].

9. I find that there is nothing in the interim order which calls for interference. None of the factor for grant of interim order are ignored. The discretion, in the grant of interlocutory orders, is that of the authority, which passed the order in the first instance, in this case, the

> learned arbitrator - Which I do not propose to interdict even if I were to hold a view different from that of the learned arbitrator except in situations articulated hereinabove".

17. In the instant case, the Arbitral Tribunal, after elaborately and meticulously considering various clauses in the agreement, which are mutually agreed, arrived at the impugned conclusions. It is also clear from the impugned order that the Arbitral Tribunal took note of the provisions of Section 17 of the Arbitration and Conciliation Act while recording a finding that the parties will have to perform their obligations under the Joint Venture Agreement during the pendency of the arbitration proceedings in terms of clause 9.2 of the Joint Venture Agreement.

18. Having regard to the reasons assigned by the Tribunal, this Court does not find any valid reason to meddle with the well articulated order passed by the Arbitral Tribunal.

20. For the aforesaid reasons, the Civil Miscellaneous Appeal is dismissed. As a sequel, the Miscellaneous Petitions, if any, shall stand closed. There shall be no order as to costs.

A.V.SESHA SAI, J

Date: 30.3.2017

Note:
Despatch the order today.
B/o
DA

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

C.M.A.No.212 of 2017

30.3.2017

DA