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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
F-453.

+ **O.M.P. 490/2011**

TDI INTERNATIONAL INDIA LTD. Petitioner
Through: Mr. Ashish Mohan and Mr. Mohit
Kumar, Advocates.

versus

AIRPORT AUTHORITY OF INDIA Respondent
Through: Shri Abhinav Vasisht, Senior Advocate
with Mr. Digvijay Rai, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER
15.02.2017

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1. The challenge in this petition by TDI International India Limited (TDI) is to an Award dated 19th April, 2011 passed by the sole Arbitrator in the disputes between TDI and the Respondent, Airport Authority of India ('AAI'), arising out of an 'Agreement for License of Advertisement Rights' dated 18th April, 2001 and a Supplementary Agreement dated 23rd March, 2007 whereunder for the period between 18th April, 2001 and 30th April, 2008, TDI was granted a licence for Advertisement Rights at the Hyderabad Airport.

2. A perusal of the impugned Award shows that by a letter dated 12th September, 2008 the claim petition of TDI through its Advocate Mr. Ajay Kapur was submitted before the learned Arbitrator. In response thereto, by a letter dated 5th January, 2009, AAI through its Advocate filed its statement

of defence as well as a counter-claim. Thereafter on 11th February, 2009, a rejoinder was filed by TDI. AAI filed its comments on the rejoinder by a letter dated 24th March, 2009.

3. There were two sittings held by the learned Arbitrator. The first was held at Hyderabad on 2nd May, 2009. What transpired at the said sitting and thereafter is set out in para 5 of the impugned Award which reads as under:

“(1) Sole Arbitrator had his first sitting at the conference room of Hyderabad/Begumpet Airport at 1100 Hrs on 2 May 2009.

(2) The claimant was represented by Sh. Prem Bajaj, MD, TDI and the Respondent was represented by officer Sh. K.S.Rao, DGM (Commercial).

(3) Claimant was given the opportunity to present an oral submission of the synopsis of the case.

(4) At appropriate times, the respondent was also given opportunity for his views.

(5) Thereafter, a site visit was undertaken to get more in depth view, of the case on hand.”

4. There was a second sitting held on 23rd June 2010. What transpired at the second sitting is set out in para 6 of the Award which reads as under:

“(1) The second sitting was also held at Hyderabad on 23 June 2010, to hear the oral evidence of both the parties.

(2) Sh. P.K. Bhan, Chief Strategist, represented the claimant duly authorized vide M/s. TDI Letter dated 21 June 2010 (signed by Sh. Prem Bajaj) and Sh. K.S. Rao, DGM (Commercial) represented the respondent.”

5. It appears that there were no further sittings after the above sitting on 23rd

June, 2010. The next thing the parties knew was that the sole Arbitrator had passed the impugned Award.

6. The entire arbitral record has been sent to this Court. There is no order passed by the learned Arbitrator closing the arguments on either side and reserving the Award. At the hearing of this case yesterday a query was posed to Mr Abhinav Vasisht, learned Senior counsel for AAI, whether there were any further proceedings of the arbitration. Mr Vashisht sought time till today for ascertaining the correct position. The Court is today informed by him that no other proceedings have been able to be located.

7. It is pointed out by Mr Ashish Mohan, learned counsel for TDI, that the stage of the Arbitrator reserving the Award could not have been reached because the parties were yet to lead evidence. In support of this submission, he drew the attention of the Court to a document in the arbitral record which is titled 'Appendix-6 Written Submission-Claimant'. A perusal of the said document reveals that it contains a covering letter dated 15th September, 2010 written by TDI to the sole Arbitrator enclosing therewith an "Application under Section 19 of the Arbitration and Conciliation Act, 1996 for your kind consideration". The prayer in the said application is to permit TDI to place on record three documents "in support of and as a proof of damage suffered by it due to the wrongful conduct of the Respondent" and to "convene the meeting of the Arbitral Tribunal at a future convenient date to record the specific oral evidence in respect of the above and also to provide an opportunity to the claimant to lead the critical and essential evidence."

8. Strangely, while the Award records the oral arguments of both parties which were advanced, not by their counsel, but by their authorised representatives before sole Arbitrator at the second sitting, there is no mention made of the above application filed by TDI. The reason for that perhaps is that the learned Arbitrator considered the said application to be a 'written submission of the Claimant'.

9. In *Oil and Natural Gas Corporation Limited v. Western Geco International Ltd. (2014) 9 SCC 263*, while explaining what constitutes the fundamental policy of Indian law under Section 34 of the Act, one of the aspects highlighted by the Supreme Court was the need for an Arbitrator to adopt a 'judicial approach'. Para 35 of the said judgment reads as under:

" What then would constitute the 'Fundamental policy of Indian Law' is the question. The decision in *Saw Pipes Ltd. (supra)* does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi judicial determination lies in the fact so long as the Court, Tribunal or the authority exercising powers that affect

the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge.

10. In the present case, it is indeed strange that after just two sittings the learned Arbitrator considered it appropriate to proceed to pronounce the Award without reserving the Award. At the same time, there was no intimation to the parties about the further sittings. When the application was filed before the learned Arbitrator by TDI on 15th September, 2010 i.e., at least seven months prior to the pronouncement of the Award, it was incumbent on the Arbitrator to have heard the submissions on the said application and pass an order thereon one way or the other. Strangely, the impugned Award does not even mention the said application although it is very much part of the arbitral record. It is even stranger that the said application was treated by the learned Arbitrator as 'written submission of the Claimant'. The Arbitrator failed to appreciate that an application under a statutory provision with a specific prayer could not simply be termed as a written submission. It had to be dealt with in accordance with law. The Court need not dwell on this aspect any further except to conclude that the learned Arbitrator failed to adopt a 'judicial approach'.

11. On the above short ground, the Court is of the view that the impugned Award cannot be sustained in law. The Court is conscious that the consideration of the Petitioner's claim on merits and AAI's counter-claim on

merits will have to take place in fresh arbitration proceedings. The Court permits both parties, therefore, to go in for fresh arbitration proceedings. The parties will take note of Section 43 of the Act for the above purposes. They are also at liberty to refer to and rely upon the pleadings in the arbitral record and this petition for that purpose.

12. The impugned Award is, accordingly, set aside. The petition is allowed in the above terms but in the circumstances, with no order as to costs.

FEBRUARY 15, 2017
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S. MURALIDHAR, J