

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

% Judgment delivered on: 06.03.2017

+ **O.M.P. (COMM) 398/2016**

**M/S OSS AIR MANAGEMENT PVT. LTD.**

..... Petitioner

Versus

**S.K. SINGH**

..... Respondent

**Advocates who appeared in this case:**

For the Petitioner : Mr Puneet Singh Bindra, Mr Aslam

Ahmed, Mr Rohan Kaushal, Mr Sharad

Kharra and Mr Sumanta Kumar Nayak.

For the Respondent :

Mr D. P. S. Dagar and Mr Lokendra Singh.

**CORAM**

**HON'BLE MR JUSTICE VIBHU BAKHRU**

**JUDGMENT**

**VIBHU BAKHRU, J**

1. OSS Air Management Pvt. Ltd. (hereafter 'OSS') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') for setting aside the arbitral award dated 03.06.2016 (hereafter 'the impugned award').

2. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with the Agreement dated 07.12.2010 (hereafter 'the Agreement') entered into between the parties whereby Raj Aviation acting through the respondent agreed to sell two MI-172 helicopters to OSS. Although, the Agreement reflects that it is executed by the respondent as a managing director of "Raj Aviation", it is admitted that Raj Aviation is a sole proprietorship concern of the respondent.

3. In terms of the Agreement, OSS paid 2% of the contract price

amounting to approximately ₹1,06,72,000/- as initial advance. It is OSS's case that the respondent failed to perform his obligations under the Agreement. Consequently, OSS terminated the Agreement on 03.06.2011 and called upon the respondent to refund the amount of ₹1,06,72,000/-. OSS further claimed a sum of ₹53,36,000/- as loss suffered on account of respondent's breach of his obligations. Thus, the respondent was called upon to pay an aggregate sum of ₹1,60,08,000/-. The respondent sent a letter dated 13.06.2011 disputing the allegation that he had failed to perform his contractual obligations and called upon OSS to perform the Agreement and to conclude the transaction within a period of sixty days.

4. OSS filed a criminal complaint dated 09.08.2011 against the respondent before the Joint Commissioner of Police, Anti Fraud and Cheating Wing. Thereafter, by letter dated 02.09.2011, the respondent invoked the arbitration clause. However, as the parties could not agree on the appointment of the arbitrator, OSS filed a petition in this Court under Section 11 of the Act. This Court, by an order dated 03.09.2012, appointed Justice K. Ramamoorthy (Retd.) as the Arbitrator for adjudication of the disputes between the parties.

5. Before the Arbitrator, OSS made a claim for a sum of ₹1,60,08,000/- along with interest at the rate of 18% p.a. in addition to costs. The Arbitrator passed the impugned award, *inter alia*, rejecting OSS's claims as not sustainable. The Arbitrator held that OSS had breached the terms of the Agreement. The Arbitrator disbelieved OSS's stand that it had entered into the Agreement for participating in the tender floated by the Ministry of Home Affairs, Government of India (hereafter 'MHA') and expressed

serious doubts as to OSS's purpose for entering into the Agreement. The Arbitrator proceeded to hold as under:-

“.....It is clear from the CAR, Air Craft Act, 1934, Air Craft Rules, 1937 that what is done by the claimant is absolutely illegal and the transaction comes within the mischief of Sec. 23 of the Contract Act, 1872. It is clearly an agreement which results in performance of an unlawful act. The claimant had also tried to contravene the provisions of the Foreign Exchange Management Act, 1999. In fine, the whole thing attempted by the claimant is wholly illegal and therefore assuming there has been a contract on 07.12.2010, it is wholly void.....”

***Rival contentions***

6. OSS assailed the impugned award essentially on two grounds. First, it is claimed that the impugned award is without jurisdiction as being beyond the terms of reference. Mr P.S. Bindra, learned counsel appearing on behalf of OSS stated that it was nobody's case that the Agreement was void as falling within the mischief of Section 23 of the Indian Contract Act, 1872 (hereafter 'the Contract Act'); the impugned award was beyond the disputes submitted to the Arbitrator and, therefore, liable to be set aside in terms of Section 34(2)(a)(iv) of the Act.

7. Second, OSS claimed that the receipt of the advance was not disputed and the Agreement between the parties expressly provided that if OSS refused to accept the helicopters or terminated the Agreement, the respondent would refund the initial advance and OSS would be liable to pay a penalty of 1% of the total contract value. Mr Bindra submitted that OSS had not breached the Agreement; however, even if it is accepted that OSS

had breached in terms of the Agreement, it was, nonetheless, entitled to refund of the advance in terms of the Agreement. He submitted that the impugned award, thus, was liable to be set aside under Section 34(2)(b)(ii) of the Act. He also added that even if the Agreement was held to be void, by virtue of section 65 of the Contract Act, the respondent was still liable to restore the funds received by him.

8. Third, OSS contended that the impugned award is liable to be set aside as being contrary to the principles of natural justice. Mr Bindra submitted that no issue as to whether the Agreement dated 07.12.2010 was void was framed during the proceedings or could be framed. He submitted that the issues articulated in the impugned award were not framed during the arbitral proceedings and, therefore, OSS had no opportunity to lead evidence and address the aforesaid issue. He referred to various orders passed by the Arbitrator in support of his contention. He also drew the contention of this Court to the order passed on 27.02.2016 by the Arbitrator whereby OSS was directed to produce a copy of the tender documents with all conditions along with rules and regulations governing the tender. He submitted that in compliance with the aforesaid direction, OSS had filed copy of the Certificate of Importer-Exporter Code (IEC), copy of the Air Operator Permit and a copy of the Revised Request for Proposal issued by MHA. Since, there was no controversy as to any violation of the Foreign Exchange Management Act, 1999 (hereafter 'FEMA'), Civil Aviation Requirements (hereafter 'CARs') or the Aircraft Act, 1934, there was no occasion for any of the parties to advance any contention regarding the same.

9. Lastly, Mr Bindra submitted that the Arbitrator's finding that the

Agreement was illegal as being violative of CARs, FEMA or the Aircraft Act, 1934 or any rules made thereunder is patently erroneous, unreasoned and, therefore, wholly unsustainable. He emphasised that there is no indication in the impugned award as to which statutory provision had been violated by OSS.

10. Mr D.P.S. Dagar, learned counsel appearing for respondent countered the submissions made on behalf of OSS. He submitted that the Arbitrator always has the jurisdiction to decide the validity of the contract and therefore the impugned award could not be faulted.

11. He drew the attention of the Court to the finding of the Arbitrator that OSS had breached the Agreement and on the strength of the said finding contended that OSS's claim for refund of the amount paid under the Agreement could not be sustained.

12. He relied on the decision of Kuju Collieries Ltd v. Jharkhand Mines Ltd. & Ors: AIR 1974 SC 1892 to counter the submission that even if the Agreement was held to be void, OSS would be entitled to refund of the amount paid as advance by virtue of Section 65 of the Contract Act. He contended that since the Agreement was void *ab initio*, Section 65 of the Contract Act was not applicable.

### ***Reasoning and Conclusion***

13. Before proceeding further, it is necessary to refer to certain relevant terms of the Agreement dated 07.12.2010. Clause 1 of the Agreement records the agreement between the parties for sale and purchase of two MI-

172 helicopters. In terms of clause 2.1, the price payable for the helicopters was agreed to be as set out in Appendix-I to the Agreement, which indicates the price for two helicopters as 11,600,000 USD. In terms of clause 3.1, the respondent undertook to deliver the helicopters on the delivery date to be agreed between the parties within 120 working days of the receipt of the advance payment. In terms of clause 4, 2% of the contract price was agreed to be paid at the time of signing of the contract; 48% of the price was payable on receipt of information regarding the helicopters; and the remaining balance 50% of the price was payable within 5 days from the delivery date. Clause 6 of the Agreement provided for penalties. Clause 6.3 is relevant and provides that if OSS refused to accept the property or terminated the Agreement, it would be entitled to refund of the initial advance but would be liable to pay 1% of the contract payment as penalty.

14. The relevant clauses of the Agreement are set out below:-

**"I. Subject of the contract**

- 1.1. Subject to the terms and conditions contained in this Contract, the Supplier has agreed to sell to the Buyer, and the Buyer has agreed to purchase from the Supplier 2 (two) M1-172 helicopters, (referred to hereinafter as the Goods or Helicopters).

**II. Contract price**

- 2.1. The price payable for the Goods has been agreed in US dollars and is set out in Appendix, 1. Includes packing, marks and transportation costs. 2. The price agreed for the Goods under this Contract may be revised only by mutual written agreement of the Parties.

### **III Delivery terms and conditions**

- 3.1 The Supplier undertakes to deliver the Goods as described in Article 3.3[on the terms of CPT] on a date (Delivery Date) to be agreed between the Parties for delivery of the Goods within 120 working days of receipt of advance payment (Long Stop Date) as set out in Article 4.1.1, under condition on performance of the other conditions specified in Article 4.

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### **IV Terms of payment**

- 4.1 The payment of the Price for the Goods under this Contract will be made on receipt of invoices from the Supplier for the relevant amounts in Indian Rupees by way of a bankers cheque / direct transfer to the Supplier's account (Beneficiary's Account No: 110102000008914, Beneficiary: Company "RAJ AVIATION", Bank: IDBI Bank Limited, E-29, PVR Road, Saket, New Delhi-110017) as per the following payment schedule:

- 4.1.1 The Buyer shall pay an advance amounting to 2% to the Supplier at the time of signing the Contract (Initial Advance).
- 4.1.2 A further 48% of the Price shall be payable after; (a) all the information about the serial number of the Helicopters as well as the serial number of the engines and major components of the Helicopters are made available to the Buyer, and (b) the Buyer is able to visually inspect the Helicopters after they have been delivered to (Kazan) or Kazan's approved plant for refurbishment (Second Advance)
- 4.1.3 The balance 50% of the Price would be paid to the Supplier's account within 5 (five) days from the Delivery Date.

- 4.2 Ownership rights of the Goods will vest in the Buyer simultaneously with the Buyer making payment of the full Price to the Supplier's account, without the need for any further action by either the Supplier or the Buyer."

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## **VI Penalties**

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- 6.3 If after signing the Contract, the Buyer refuses to accept and pay for the property and / or terminates the contract and such waiver and / or termination is not caused by an act of the Supplier or in accordance with the terms of this Agreement, the Supplier shall forthwith refund to the Buyer the Initial Advance and the Second Advance, If any and the Buyer shall pay a penalty of 1% of the total contract payment made in accordance with paragraph 4.1.1."

15. There is no dispute that 2% of the contract price equivalent to approximately ₹1,06,72,000/- was paid by OSS to the respondent. It is also not in dispute that by a letter dated 03.06.2011, OSS terminated the Agreement in question.

16. The contentions of the parties have to be considered in the aforesaid backdrop. OSS filed its statement of claim claiming that it had informed the respondent that it was in need of two MI-172 helicopters as OSS had to participate in a tender floated by the MHA for supply and maintenance of such helicopters. OSS alleged that respondent had represented that he was in a position to identity two such helicopters through his international network. OSS claimed that based on the aforesaid representation, it entered into the Agreement on 07.12.2010 and paid a sum of ₹1,06,72,000/- being 2% of the



total contract value, to the respondent. OSS claimed that despite receipt of the aforesaid sum, the respondent failed to carry out his obligations to deliver the helicopters within 120 days of the receipt of the advance payment; provide copies of the quality certificate and other documents issued by manufacturers; and procure invitation visas for OSS's representative to enable the representative to inspect the helicopters. It further claimed that the failure on the part of the respondent to identify the helicopters and submit documentary proof resulted in OSS's bid to be disqualified by MHA. Thus, OSS claimed refund of the amount of ₹1,06,72,000/- paid as advance. OSS also claimed a sum of ₹53,36,000/- as damages for breach of obligations and consequential financial loss.

17. The respondent filed its reply/objections to the statement of claims. First, he claimed that no binding Agreement came into force since the Agreement expressly recorded that the contract would come into force on the date set out in the beginning of the Agreement. The respondent also claimed that the Agreement was not signed by the authorised agent of OSS. Secondly, the respondent claimed that no dispute had arisen between the parties, which required to be adjudicated and the Agreement dated 07.12.2010 was merely a draft agreement.

18. The respondent also claimed that M/s Radha Udyog had acted as a facilitator between the respondent and the end supplier, Ukragent Avia in Odessa, Ukraine and the same was informed to OSS. Therefore, the respondent had performed his obligations but OSS did not come forward to execute the contract. The respondent also asked for the passport of the representative of OSS to arrange for the visa which was provided by OSS

initially but was subsequently demanded back. The respondent claimed that he had spent a large sum of money for arranging the invitations and getting the visas on priority basis. The respondent also claimed that he had paid a sum of ₹45,00,000/- to M/s Radha Udyog and approximately ₹8 to 10 lacs in getting the visas for the representative of the OSS, the respondent and the representative of M/s Radha Udyog for visiting Ukraine to inspect the helicopters. The respondent alleged that since OSS had failed to comply with its obligations, it had resulted in loss on account of non-finalisation of the contract as well as loss of reputation.

19. It is apparent from the pleadings filed by the parties that the question whether the Agreement dated 07.12.2010 was contrary to the provisions of FEMA, CARs or the Aircraft Act, 1934 was never in issue. It was not the respondent's case that the Agreement violated any provisions of Indian law and, therefore, was void by virtue of Section 23 of the Contract Act. Although the respondent supported the impugned award but a bare perusal of the reply filed by the respondent indicates that it is not his case that the Agreement contravened any provisions of FEMA or any other Indian law and was consequently void.

20. The impugned award indicates that the question whether the Agreement was void was an issue and was considered by the Arbitrator. However it is not disputed that no such issue was framed by the Arbitrator during the arbitral proceedings. OSS had produced the record of the arbitral proceedings and indisputably, no issue as to whether the Agreement contravened the provisions of CARs or FEMA was framed or put to the parties. There is, thus, much merit in the contention that the impugned award

was passed in violation of the principles of natural justice and therefore the impugned award offends the fundamental policy of Indian law.

21. Admittedly, no dispute regarding the validity of the Agreement was raised by the respondent. The Arbitrator was called upon to adjudicate the disputes that had arisen between the parties and, thus, the reference to the arbitral tribunal was limited to the disputes articulated by the parties in their respective pleadings. In this view, the impugned award is also liable to be set aside in terms of Section 34(2)(a)(iv) of the Act inasmuch it deals with a dispute not contemplated by or not falling within the terms of submission for arbitration. The impugned award inasmuch as it holds the Agreement to be illegal and violative of the provisions of CARs, FEMA and the Aircraft Act, 1934, travels beyond the scope of the dispute submitted to arbitration.

22. Indisputably, the arbitrator has jurisdiction to decide on the validity of the agreement between the parties. However, the arbitrator can do so provided the same is a subject matter of dispute. The Bombay High Court had considered a similar question in Union of India v. M/s Sarathi Enterprises: (2015) SCC Online Bom 1511 wherein the Court had held that the arbitrator had exceeded its jurisdiction in declaring a condition of the contract as a violation of Section 23 of the Contract Act and Section 3 of the Competition Act, 2002 since it was not the respondent's prayer that any part of the contract be declared as void by the arbitrator.

23. In the case of MSK Projects India (JV) Limited v. State of Rajasthan and Another.: (2011) 10 SCC 573, the Supreme Court had referred to its earlier decisions and observed as under:-

“15. The issue regarding the jurisdiction of the Arbitral Tribunal to decide an issue not referred to is no more *res integra*. It is a settled legal proposition that special Tribunals like Arbitral Tribunals and Labour Courts get jurisdiction to proceed with the case only from the reference made to them. Thus, it is not permissible for such Tribunals/authorities to travel beyond the terms of reference. Powers cannot be exercised by the Tribunal so as to enlarge materially the scope of reference itself. If the dispute is within the scope of the arbitration clause, it is no part of the province of the court to enter into the merits of the dispute on the issue not referred to it. If the award goes beyond the reference or there is an error apparent on the face of the award it would certainly be open to the court to interfere with such an award. (Vide: *Grid Corpn. of Orissa Ltd. & Anr. v. Balasore Technical School* and *DDA v. R.S. Sharma and Co.*)

16. In *Associated Engg. Co. v. Govt. Of A.P* this Court held that an umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside. Thus, an arbitrator cannot be allowed to assume jurisdiction over a question which has not been referred to him, and similarly, he cannot widen his Jurisdiction by holding contrary to the fact that the matter which he wants to decide is within the submission of the parties."

24. The Arbitrator had also disbelieved OSS's claim that it had submitted a tender to MHA as OSS did not produce any material to show that it had paid the earnest money as required under the terms of the tender. OSS has now produced material to indicate that it had submitted a bank guarantee for the requisite sum and claims the Arbitrator's finding to be erroneous.

25. Without examining the question whether OSS had submitted a bid to

MHA, it is apparent that even if the Arbitrator disbelieved OSS's statement that it had participated in the tender, he could have, at best, disallowed OSS's claim raised on the aforesaid basis. It is relevant to mention that OSS had claimed that it had suffered a loss of ₹53,36,000/- on account of failure on the part of the respondent to perform his obligations. This claim could have certainly been rejected if OSS had failed to establish that it had bid for the contract and suffered a loss. However, considering that it was not the respondent's case that the Agreement dated 07.12.2010 was void, the question whether OSS had entered into the said Agreement in order to supply the helicopters to MHA would be irrelevant for considering whether OSS was entitled for refund of the amount paid as advance to the respondent. In terms of the Agreement, OSS would be entitled to refund of the initial amount, even if it was in breach of the terms of the Agreement and had failed to accept the delivery of the helicopters in question. The only consequence of OSS's failure to accept delivery would be levy of penalty to the extent of 1% of the contract value.

26. At this stage, it is relevant to mention that the respondent had not raised any counter claims on account of any loss suffered by it. And, therefore, plainly, the respondent could not resist OSS's claim for refund of the initial advance.

27. Even, if it is assumed that respondent could establish that he had paid a sum of ₹45,00,000/- for performing his obligations under the Agreement and had further incurred expenditure of ₹8 to 10 lacs in arranging visas; at best, the respondent could claim the expenses incurred by him. However, there was no ground to reject OSS's claim for refund of the balance amount.

28. Even if it is assumed that the Arbitrator did have the jurisdiction to decide whether the Agreement was void by virtue of Section 23 of the Contract Act and it is accepted that the Agreement in question was void; nonetheless, OSS would be entitled to refund of the amount paid under a void agreement by virtue of Section 65 of the Contract Act. In terms of Section 65 of the Contract Act, any party to an agreement which is discovered to be void, is bound to restore any benefit that he has received to compensate the person from whom he has received such advantage. The decision of the Supreme Court in Kuju Collieries Ltd. v. Jharkhand Mines Ltd. (*supra*), does not further the respondent's case. In that case, the Supreme Court had clearly explained that whether the contract is discovered as void subsequently or become void after it has entered into, the party who has received any benefit would be bound to restore such advantage or compensation. It is only in cases where both the parties knew at the time when the agreement was entered into that it was not lawful and, therefore, void that Section 65 of the Contract Act would not apply. The said decision would have no application in the facts of the present case. It is nobody's case that both the parties were fully aware at the time of entering into the Agreement that the same was void; no such claim has been made and no such finding has been returned by the Arbitrator.

29. Mr Dagar, learned counsel for the respondent has earnestly contended that respondent was not in breach of any of his obligations and, therefore, the respondent would not be liable to refund the amount received by him. In my view, this contention is also unmerited for two reasons. First, the Agreement expressly provided for consequence of failure on the part of OSS

to take delivery or perform its obligations. In such case, OSS would be liable to pay 1% of the contract value, however, it would be entitled to refund of the advance paid. Second, it is well settled that in case a buyer fails to perform its obligations to take delivery, the seller would be entitled to forfeit the earnest money but would have no right to appropriate any consideration paid by the buyer. However, this is subject to the seller's right to claim damages in accordance with law. Thus, the respondent could have claimed damages if he had suffered any loss on account of breach of the obligations by OSS but no such counter claims were preferred by the respondent. In the circumstances, the respondent cannot resist OSS's claim for refund of part consideration paid by OSS for purchase of the helicopters.

30. In *M/s Baldev Steel Ltd. v. M/s The Empire Dyeing and Manufacturing Co. Ltd. and Anr.*: (2001) 92 DLT 471, a Coordinate Bench of this Court had stated the above principles in the following words:-

"....It is well settled that in case the buyer defaults to carry out his part of the contract, he would lose the earnest money, but may recover the part payment given by way of advance, leaving untouched the seller's right to recover damages. The buyer is not disentitled to recover advance even if he is the party in breach because breach of contract on the part of the buyer would only entitle the seller to sue for damages, but not forfeit the advance...."

31. As discussed above, the impugned award contains decisions which are beyond the scope of submission to arbitration. The impugned award also falls foul of the public policy of India and is, therefore, unsustainable.

32. Accordingly, the impugned award is set aside. OSS is at liberty to

agitate its claims in view of the observations made herein.

33. The petition is disposed of.

34. The parties are left to bear their own costs.

**VIBHU BAKHRU, J**

**MARCH 06, 2017**  
**RK**

