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

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Date of decision: July 19, 2017

+ **ARB. A. (COMM.) 17/2017**

DELHI STATE INDUSTRIAL & INFRASTRUCTURE..... Petitioner

Through **Ms. Anusuya Salwan and
Ms. Renuka Chaudhary, Advs.**

Versus

**PNC DELHI INDUSTRIAL INFRA PRIVATE
LIMITED.**

...Respondent

Through **Mr. Sandeep Sethi, Sr. Adv. with
Mr. Vikas Goel, Mr. Abhishek
Kumar and Ms. Arushi Gupta,
Advs.**

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

IA No.7924/2017 (exemption)

Allowed subject to all just exceptions.

Application stands disposed of.

ARB. A. (COMM.) 17/2017 & IA No.7925/2017

1. This petition is filed under section 37(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "The Act") seeking to impugn the order dated 27.4.2017 passed by the learned Arbitrator directing to release a sum of Rs.43 crores in favour of the claimant/respondent within six weeks on the respondent furnishing a Corporate Guarantee for the said amount by the respondent's parent company M/s. PNC Delhi Infratech

Limited. The guarantee was also to accompany an appropriate affidavit of a Director of the company acknowledging that in case the respondent does not succeed finally, the corporate guarantee would be honored.

2. Some of the relevant facts are that on 10.3.2011 the petitioner i.e. Delhi State Industrial & Infrastructure Development Corporation Ltd. (hereinafter referred to as "DSIIDC") invited "Request for Proposal" (RFP) from private entities for the work of Upgrade, Redevelop, Augment, Operate, Maintain and Manage the common infrastructure and utilities and on Upgrade-Operate-Maintain-Transfer basis for separate industrial estates. As per the RFP the estimated cost/indicative project costs for the industrial estate at Narela was Rs.130 crores. M/s. PNC Infratech Limited was selected as the successful bidder being the lowest bidder, quoting annuity of Rs.21.5 crores per annum. In July 2011 the respondent company was incorporated. The Concession Agreement was executed on 19.7.2011 between the parties with a stipulated date of completion of the work as 14.12.2013. Shriram Institute for Industrial Research was inducted as a Third Party Engineer.

3. Disputes having arisen between the parties the respondent is said to have filed a Writ Petition before this court being W.P.(C) No.856/2015 titled PNC Delhi Industrial Infra Ltd. vs. Delhi State Industrial & Infrastructure Development Corporation. A preliminary objection was taken by the petitioner regarding availability of alternative remedy. Thereafter respondent invoked the Arbitration clause and moved a petition under section 11 of the Act, whereby this court by its order dated 3.2.2017 appointed the Sole Arbitrator to adjudicate the dispute between the parties.

4. Before the learned Arbitrator the respondent moved an application under section 17 of the Act seeking a direction to the petitioner to pay an

amount of Rs.86 crores to the respondent. It was pointed out in the application that the respondent has redeveloped the industrial estate of Narela at a huge cost of Rs.175 crores having taken a loan of Rs.140 crores from Oriental Bank of Commerce. As per the Concession Agreement the concession period is 15 years. In addition, an annuity of Rs.21.5 crores was to be paid as annuity for 13 years by the petitioner which was payable as per clause 12.3 (e) of the Concession Agreement irrespective of any dispute. It was further urged that the work was substantially completed w.e.f. 31.10.2013 and a provisional completion certificate was issued by the Third Party Engineer appointed by the petitioner. Accordingly, in view of the said certificate having been issued the annuity commencement date of the project/started and the respondent became entitled to receive the annuity. It is urged that more than four annuities are due.

5. The learned Arbitrator by the impugned order has noted that there is no serious dispute over the fact that the project has been completed by investing money of over Rs.100 crores. Further, the order notes that the documents on record show that the (bank) account of the respondent is being declared a non-performing asset which would seriously affect the health of the respondent company. Accordingly, the impugned order directs payment of 50% of the four annuity amounts said to have already accrued in favour of the respondent company being Rs.43 crores. Appropriate directions as noted above were passed.

6. I have heard learned counsel for the parties. Learned counsel for the petitioner has vehemently submitted as follows:-

- (i) In terms of section 17 of the Act mandatory directions like payment of money which are more in the form of an award cannot be passed.

There are no such powers of the Arbitrator to pass such sweeping orders.

- (ii) It was further submitted that various clauses of the agreement have not been complied with by the respondent. Some of the examples given were that an audit of the above accounts has to be done and an audit report submitted which has not been done, an escrow account had to be opened which had to be run in a manner as stipulated in the agreement which has not been done.

7. Learned senior counsel appearing for the respondent has pointed out that even as per the present petition filed before this court, it is stated by the petitioner that the provisional certificate was issued to the respondent. Therefore, it is urged that in terms of Clause 9.10 the annuity commenced with effect from the date of the completion certificate on 14.3.2014. Hence, it is urged that even as per the own admissions in the present petition the liability to pay the annuity has commenced from March 2014. Reliance was also placed on clause 9.5 and 9.10 of the agreement to submit that payments have fallen due which are not being paid without any rhyme or reason. It was also pointed out that all money received from the respondent will go to the ESCROW Account to be spent as per stipulated conditions. It is stated that even the present money to be released as per direction of the impugned order will go in the ESCROW Account. It is also pointed out that before the learned Arbitrator no dispute was raised about the liability of the petitioner to pay this amount. The only argument raised by the petitioner was about powers of the learned Arbitrator to pass such orders under section 17 of the Act. Learned counsel has relied upon the latest judgment of the Division Bench of this court in ***FAO(OS)(Comm.)61/2016*** titled ***Ajay Singh vs. Kal***

Airways Private Limited and Ors pronounced on 3.7.2017 to submit that such powers are available under section 17 of the Act with an Arbitrator.

8. I may first deal with the submissions of the petitioner that the learned Arbitrator did not have powers to pass such mandatory directions to release such sums of money.

9. Section 17 of the Act reads as follows:-

“17. Interim measures ordered by arbitral tribunal

(1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal—

- (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
- (ii) for an interim measure of protection in respect of any of the following matters, namely:—
 - (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
 - (b) securing the amount in dispute in the arbitration;
 - (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
 - (d) interim injunction or the appointment of a receiver;
 - (e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral

tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.”

10. The Division Bench in *Ajay Singh vs. Kal Airways Private Limited and Ors* (*supra*) held as follows:-

“26. Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines - therefore, the analogy of Orders 38 and 39. Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles. In this regard, the observations of Lord Hoffman in *Films Rover International Ltd. v. Cannon Film Sales Ltd.*(1986) 3 All ER 772 are fitting:

“But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', i.e. useful generalizations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an

injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.”

27. It was observed later, in the same judgment that:

“The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction.”

11. Hence, in view of the above judgment, the court would have wide powers to fashion appropriate interim order including mandatory interlocutory injunction. Such powers could also be exercised under Section 17(1)(e) of the Act by the arbitrator. As noted above, exercise of power for grant of interim orders is a fact dependent exercise.

12. A perusal of the impugned order shows that on merits no real submissions were made before the learned Arbitrator. However, before this

court it was sought to be pleaded that on merits the annuity is not yet payable on account of the facts stated above, namely, non-availability of audit reports and non-compliance of directions regarding the ESCROW Accounts.

13. As rightly pointed out by learned senior counsel for the respondent I may have a look at the averments made in the present petition which are relevant.

14. Paragraph 17 of the petition reads as follows:-

“17. That the Provisional Certificate was issued by the petitioner vide letter dated 09.01.2014, however, since the work under the project had not been completed and there was no hindrance from the side of the petitioner causing delay in completion of the works and also because there is no provision in the CA for issuing Provisional Completion Certificate before the scheduled date of completion of work, therefore, the said Provisional Completion Certificate was withdrawn vide letter dated 14.3.2014. Therefore, in terms of Clause-9.10 of the Agreement, the project shall be deemed to be completed when the Completion Certificate dated 14.3.2014 has been issued by the Petitioner and accordingly the annuity commencement date of the project shall be the date of the Completion Certificate i.e. 14.03.2014.”

15. Clearly, as per the above averment the annuity commencement date is accepted to be 14.3.2014.

16. Para 12.1 and 12.2 of the Agreement between the parties read as follows:-

“12.1 Annuity

In consideration of the Concessionaire accepting the Concession and undertaking to perform and discharge its obligations in accordance with the terms, conditions and covenants set forth in this Agreement, and subject to: (i) the provisions of this Agreement, and (ii) the

Concessionaire achieving Annuity Commencement Date, DSIIDC agrees and undertakes to pay to the Concessionaire, on the Annuity Commencement Date and on each subsequent Annuity Payment Date as set forth in Schedule 13 ("**Annuity Payment Schedule**"), the sum of Rs.21.5 Cr (Rupees Twenty One Crore Fifty Lakhs only) (the "**Annuity**") as set forth in its Bid.

12.2 Payment of Annuity

(a) Subject to the provisions of this Article 12.1 and Article 12.5 and any other provisions of this Agreement, DSIIDC shall make payment

of Annuity to the Concessionaire on each Annuity Payment Date. For avoidance of doubt the number of such Annuities shall not exceed 1 (one) per year over the Concession Period and will commence from Annuity Commencement Date.

(b) The first Annuity Payment Date shall be the Annuity Commencement Date. Each Annuity payment period shall be deemed to be a period of 12 (twelve) calendar months from the preceding Annuity Payment Date ("**Annuity Payment Period**"),

(c) Notwithstanding anything contrary contained anywhere in this Agreement, DSIIDC's Obligation to pay Annuity shall arise subject to and only upon occurrence of Annuity Commencement Date."

17. In terms of the above Agreement the obligation to pay annuity arises on occurrence of the annuity commencement date. The petitioner admits that the occurrence of annuity commencement has taken place. In the light of the above, prima facie the annuity amount becomes payable.

18. The learned Arbitrator has also noted about the fact that there is a danger of the loans of the respondent becoming non-performing assets on account of default and delay on the part of the petitioners in releasing

payments. In addition, it is a matter of fact that huge resources above Rs.100 crores have been spent by the respondent on the project.

19. In these facts and circumstances, in my opinion, the learned Arbitrator has exercised powers under section 17 of the Act in a fair and reasonable manner. There were sufficient facts on record to warrant exercise of powers and for giving mandatory directions for release of partial funds to the respondents. There is no merit in the pleas of the petitioner.

20. Petition is dismissed. All pending applications also stand disposed of.

(JAYANT NATH)
JUDGE

JULY 19, 2017

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