

\$~8

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment dated: 7th June, 2017

+

FAO(OS) (COMM) 128/2017

DELHI METRO RAIL CORPORATION LTD. Appellant

Through: Mr. P.S. Narsimha, ASG and Mr. Ajit Sinha, Senior Advocate with Mr. Tarun Johri, Mr. Srijan Sinha, Mr. Ankur Gupta and Mr. Ankit Saini, Advs.

versus

DELHI AIRPORT METRO EXPRESS PRIVATE LIMITED

..... Respondent

Through: Dr. Abhishek Manu Singhvi, Senior Advocate with Mr. Rishi Agrawala, Ms. Malavika Lal, Advs.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J. (ORAL)

C.M.Appl. No.22275/2017 (exemption)

1. Exemption allowed subject to all just exceptions.
2. Application is disposed of.

CAV.581/2017

3. Since learned counsel for the caveator/respondent is present, the caveat stands discharged.

FAO(OS) (COMM) 128/2017 & C.M. Appl.No.22276/2017 (Stay)

4. Challenge in this appeal is to the order dated 30.05.2017 passed by the learned Single Judge of this Court in O.M.P (I) (Comm.)

No.200/2017, a petition filed under Section 9 of the Arbitration & Conciliation Act.

5. We may note that the Arbitral Tribunal has rendered an Award in favour of the respondent in the sum of Rs.4670 crores including interest till the date of the Award.
6. We are informed that the objections to the Award are yet to be filed. Mr. Sinha submits that the appellant shall file the objections within the period of 90 days.
7. In the order dated 30.05.2017 (hereinafter referred to as '*the impugned order*') the learned Single Judge has directed the respondent/appellant herein to pay a sum of Rs.60 crores directly to Axis Bank who is stated to be the lead lending bank to the petitioner (before learned Single Judge and respondent herein) to protect the rights of the appellant herein, the respondent has been directed to furnish an unconditional bank guarantee to the extent of Rs. 65 crores which would cover the factor of interest at the rate of 12% per annum should the appellant herein succeed.
8. Learned Additional Solicitor General and Mr. Sinha learned Senior counsels appearing on behalf of the appellant submits that the impugned order is erroneous as the order does not provide reasons as to why the government company is liable to furnish the interest component on respondent's loan and stated that the respondent's financial condition is precarious. Counsel contends that the learned Single Judge has failed to appreciate the scope of Section 9 of the Arbitration & Conciliation Act (hereinafter referred to as '*Act*').

9. It is contended that the respondent had failed to establish that the appellant herein intends to defeat delay or obstruct the execution of the award. It is contended that the petition under Section 9 of the Act is premature and the order of deposit amounts to part enforcement of the award which is yet to attain finality as the appellants are yet to file the objections to the award.
10. Additionally, Mr. Sinha has contended that proceedings under Section 34 of the Act are yet to be initiated and passing of the order of partial deposit under Section 9 would amount to dismissal of the objections without hearing.
11. Learned counsel for the respondent, who appears on caveat, submits that out of awarded amount of Rs. 4670 crores, the learned Single Judge has only directed deposit of a paltry sum of Rs.60 crores keeping in view the financial sufferings of the respondent who has to pay Rs. 65 lakhs per day which translates into Rs.20 crores per month as interest to the Axis Bank which is the lead lending bank. He further submits that a petition under Section 9 would be maintainable and he relies on the Full Bench decision of Delhi High Court in the case of ***National Highway Authority of India v. Oriental Structure Engineers Ltd., AIR 2013 Del 67 (FB)*** more particularly paragraph no.16.2. He further draws the attention of the Court to the Office Memorandum dated 05.09.2016 issued by the Govt. of India, National Institution for Transforming India (NITI Aayog) wherein it has been provided that:

“in case of claims where PSU/Department has challenged the Arbitral Award already announced, 75%

of the award may be paid by the PSU/Department to the contractor/concessionaire against Bank Guarantee without prejudice to the final order of the Court in the matter under challenge”.

12. Dr. Singhvi, learned Senior counsel for the respondent, further submits that the order passed by the learned Single Judge makes it clear that this amount is only to be deposited with the Axis Bank.
13. The learned Additional Solicitor General submits that this circular is not applicable as it would apply post the Award being challenged.
14. We have heard the learned counsel for the parties.
15. We find no force in the submission of learned counsel for the appellant that the present petition under Section 9 of the Act is premature. The submission of the petitioners is premised in the language of Section 36 which stipulates that only after the expiry of time for making an application to set aside the arbitral award under Section 34 has expired, the award is deemed to be a decree of the Court. According to the learned counsel for the appellant, there is no decree as on date. This submission is not acceptable in view of the express language of Section 9 itself, which reads as under:

“9. Interim measures, etc. by Court.—A party may, before or during 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 a court—

(i) for the appointment of a guardian for a minor or a 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 court to be just and convenient,

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

(Emphasis Supplied)

16. From the foregoing, it is clear that the power vested in the Court may be exercised when the proceedings before the Arbitrator are either ‘contemplated’, ‘pending’ or even ‘completed’. The present case is one under the third category and the Court has the power to order interim measures after the passing of the award, but before its enforcement in accordance with Section 36 of the Act. Hence, the Court was clearly vested with the power to grant interim measures prior to the award becoming a deemed decree under Section 36 of the Act.
17. We may notice that the order dated 30.05.2017 is only an interim order and all the issues sought to be raised by the parties have been

kept open to be considered by the learned Single Judge on the next date of hearing as is evident upon reading of the order dated 30.05.2017.

18. We find no grounds to interfere in the impugned order passed by the learned Single Judge, firstly, for the reason that order dated 30.05.2017 is an interim order by which the appellant herein has been directed to deposit Rs.60 crores out of an award in favour of the respondent in the sum of Rs.4670 crores; secondly, for the amount to be deposited, the respondent has been directed to provide the bank guarantee of Rs.65 crores which would cover the interest on Rs.60 crores to be deposited by the appellant herein; and thirdly, this amount is to be paid directly to the Axis Bank keeping in view the large sums of interest to be paid by the respondent (Rs.65 lakh per day/Rs.20 crores per month) and also for the reason that all the grounds sought to be urged have been kept open to be decided by the learned Single Judge.
19. Accordingly, the present appeal as well as the application is dismissed.
20. *Dasti* under the signatures of the Court Master.

G.S.SISTANI, J.
(VACATION JUDGE)

VINOD GOEL, J.
(VACATION JUDGE)

JUNE 07, 2017// 'dsn'