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

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Date of decision: 18.08.2017

+ ARB. A. (COMM.) 2/2017

DELHI DEVELOPMENT AUTHORITY Petitioner
Through Mr. P.K.Saxena and Mr. Deepak
Dahiya, Advs.

versus

NAVEEN KUMAR Respondent
Through Mr. T.P.S.Kang, Adv.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. This petition is filed under section 37(2) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the Act'*) seeking to challenge the order dated 8.9.2016 of the learned Arbitrator whereby an interim protection granted to the petitioner vide an earlier order dated 29.4.2016 (termed as an interim award) was recalled.

2. Some of the relevant facts are that the parking site named as Group 1 in front of Plot No.16 at Rajendra Place, New Delhi was offered on auction. The bid of the respondent was accepted and the site was allotted to him on contract basis for a period of three years. An offer letter was issued on 15.10.2012 and possession letter was issued to the respondent on 4.12.2012. The site was given on a license basis on payment of Rs.1,23,000/- per month subject to 10% increase in license fee every year. It is the case of the petitioner that license fee was not regularly paid. A show cause notice was

issued on 24.1.2013. Disputes having arisen between the parties an Arbitrator was appointed. The proceedings are pending before the learned Arbitrator. On 29.4.2016 the learned Arbitrator passed an order though termed as interim award whereby he disposed of two applications filed by the petitioner and an application filed by the respondent. By the said order the application filed by the respondent under section 17 of the Act was dismissed with costs. On the application of the petitioner seeking directions under section 17 of the Act, the learned Arbitrator allowed the application and the respondent was directed to furnish security to secure the given claim of the petitioner. The learned Arbitrator noted that there are number of factors which compel him to direct the respondent to furnish adequate security including the conduct of the respondent regarding non compliance of order dated 15.4.2013, in OMP Nos.349/2013 and 350/2013, the factum of unpaid licence fee etc. are admitted facts etc. Accordingly, the learned Arbitrator directed the respondent to furnish a bank guarantee of a nationalised bank to fully secure the counter claim of Rs.42,26,860/- upto May, 2015 alongwith accrued interest @ 15% per annum.

3. The respondent thereafter moved an application on 11.5.2016 before the learned Arbitrator seeking various clarifications from the learned Arbitrator and also modification of the interim award/direction to the respondent dated 29.04.2016 to furnish the bank guarantee for Rs.42,26,860/-. The learned Arbitrator by the impugned order dated 8.9.2016 accepted the said application of the respondent and has modified/clarified the order dated 29.4.2016 and recalled the direction passed in favour of the petitioner to secure the counter-claim amount of the petitioner by means of a bank guarantee.

4. I have heard learned counsel for the parties. Learned counsel for the petitioner has vehemently argued that there are no powers to review the order by the learned Arbitrator and the impugned order dated 8.9.2016 is an exercise of review powers which do not exist.

5. A perusal of the first order passed by the learned Arbitrator on 29.4.2016 would show that though its nomenclature is of interim award it is admittedly an order passed under section 17 of the Act on an application under the said provision filed by the petitioner.

6. As far as the impugned order dated 8.9.2016 is concerned the grounds as stated in the said order to recall the earlier order dated 29.4.2016 are that the earlier order dated 29.4.2016 has ignored the legal position that in an order to pass an injunction the party who seeks injunction should make out a prima facie case. Reliance is placed on various judgments in support of this proposition. Thereafter the learned Arbitrator concludes that no case was made out for passing of an interim award. It notes that there are claims pending of the respondent which are on the same footing as of the petitioner except for the reason that public funds are involved vis-a-vis the petitioner. It also notes that the matter is at the evidence stage and concludes that it will be appropriate that the order is suitably modified. It relies upon judgment of the Supreme Court dated 26.11.2017 in ***Honda Siel Power Products Ltd. vs. Commissioner of Income Tax, Delhi in Civil Appeal 5412/2007*** to conclude that a Tribunal's mistake can be rectified.

7. The legal position regarding review requires no clarification. The Supreme Court in ***State of Arunachal Pradesh vs. Damani Construction Co. (2007) 10 SCC 742*** held as follows:-

8. Firstly, the letter had been designed not strictly under

Section 33 of the Act because under Section 33 of the Act a party can seek certain correction in computation of errors, or clerical or typographical errors or any other errors of a similar nature occurring in the award with notice to the other party or if agreed between the parties, a party may request the arbitral tribunal to give an interpretation of a specific point or part of the award. This application which was moved by the appellant does not come within any of the criteria falling under Section 33(1) of the Act. It was designed as if the appellant was seeking review of the award. Since the Tribunal had no power of review on merit, therefore, the application moved by the appellant was wholly misconceived. Secondly, it was prayed whether the payment was to be made directly to the respondent or through the Court or that the respondent might be asked to furnish Bank guarantee from a nationalized Bank as it was an interim award, till final verdict was awaited. Both these prayers in this case were not within the scope of Section 33. Neither review was maintainable nor the prayer which had been made in the application had anything to do with Section 33 of the Act. The prayer was with regard to the mode of payment. When this application does not come within the purview of Section 33 of the Act, the application was totally misconceived and accordingly the arbitrator by communication dated 10.4.2004 replied to the following effect.

However, for your benefit I may mention here that as per the scheme of the Act of 1996, the issues/ claims that have been adjudicated by the interim award dated 12.10.2003 are final and the same issues cannot be gone into once again at the time of passing the final award.”

8. Similarly, the Division Bench of this court in ***ATV Projects India Ltd. v. Indian Oil Corporation Ltd.***, LPA 862/2004 in para 16 held as follows:-

“16. Though the remedy of review has in *State of Arunachal Pradesh v. Damani Construction Co.* (2007) 10 SCC 742 been

held to be not available to an arbitral tribunal and it is otherwise a settled principle that the power of review is not an inherent power and must be conferred by law either expressly or by implication (and of which there is no indication in the Arbitration Act) but the Supreme Court in *Grindlays Bank Ltd. v. CGIT* 1980 Supp SCC 420 followed in *Kapra Mazdoor Ekta Union v. Birla Cotton Spg. And Wvg. Mills Ltd.* (2005) 13 SCC 777 though in the context of Industrial Adjudicator, carved out a difference between a procedural review and a review on merits. It was held that procedural review is inherent or implied in a Court or a Tribunal, to set aside a palpably erroneous order passed by it under a misapprehension. On the contrary, a review on merits is for correction of error of law apparent on the face of the record. The law that there is no power to review unless the statute specifically provides for it, was held to be applicable to review on merits and not to a review sought due to a procedural defect. It was held that such procedural defect or inadvertent error must be corrected *ex debito justitiae* to prevent the abuse of process and such power inheres in every Court or Tribunal. Cases where a decision is rendered by the Court or a quasi judicial authority without notice to the opposite party or under a mistaken impression that notice had been served upon the opposite party were held to be falling in the category where the power of procedural review may be invoked. It was held that the party seeking such review has to establish that the procedure followed by the Court or the quasi-judicial authority suffered from such illegality that it vitiated the proceedings and invalidated the order made therein inasmuch as the opportunity of hearing was denied without the fault of that party. The Supreme Court held that in such cases the matter has to be re-heard in accordance with the law without going into the merits of the order passed and the order is liable to be recalled and reviewed not because it is erroneous but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake. It was yet further held that once it is established that the party was prevented from appearing at the hearing due to sufficient cause, the matter must be re-heard and decided again. It is

important to at this stage highlight that the Supreme Court in Damani Construction Co. (supra) was concerned with review of an award and which power of “review on merit” was held to be not vested in the arbitral tribunal.”

9. Hence, the arbitral tribunal has no powers of review unless there is some procedural lacunae. A perusal of the impugned order would show that in effect the learned Arbitrator has re-written the order dated 29.4.2016 and has changed its conclusions. In the said order dated 29.04.2016 conclusions are recorded about various factors that compel the Arbitrator to pass appropriate directions to furnish security including non-compliance of orders by the respondent and existence of admitted facts. It also records that the petitioner has been successful in establishing the ingredients for grant an interim order and that a *prima facie* case is made out that the petitioner would suffer irreparable loss and injury if the amount claimed is not secured. The said order records a finding as follows:

“....The respondent/applicant has been successful in establishing all the ingredients for the grant of interim order to secure the counterclaimed amount. The respondent/applicant has a *prima facie* case in its favour. The respondent/applicant shall suffer an irreparable loss and injury if the counter-claimed amount is not secured at the earliest. Balance of convenience also lies in favour of the respondent/applicant and in favour of securing the counter-claimed amount....”

10. However, in the impugned order the learned arbitrator takes a completely different stand. He goes through various judgments on the issue as to when an interim relief under Section 17 of the Act is required to be passed, and concludes that passing of an interim measure is based on a *prima facie* facts. It notes that the respondent has sought exemption from

paying licence fee. It also notes that the petitioner has filed the application after delay. In fact, no cogent reasons are discernible as to why the order dated 29.04.2016 needs review/modification/recall. Relevant para giving reasons reads as follows:

“7. The Order dated 29.4.2016 requires modification/rectification as it was supposed to be an order for Interim Measures and not Interim Award. For deciding the above said Applications, I had to consider the principles governed under sections 9, 17 read with section 33 of the Arbitration and Conciliation Act, 1996 rather than going into the merits of the case at this interim stage. This, cannot be a case for passing an Interim Award but Interim Measures are to be made based on *prima facie* facts. Admittedly, evidence by way of affidavit has been filed by the Claimant in the present case to proceed with trial. I need not dwell upon past history but should look into the aspect of undue hardship and *prima facie* case. The Claimant had sought for exemption from paying the license fee till the disposal of the present arbitration petition and had referred to the Order dated 20.11.2013 passed by the Hon'ble Delhi High Court in O.M.P.No. 349/2013 wherein there is a direction to move to Arbitrator regarding the relief. In the present case, the Counter Claimant had filed the application on 27.6.2015 and Claimant had moved application on 22.9.2015. I have observed that the Claimant did not move for almost 2 years regarding the exemption for the interim measures, even the Counter Claimant has moved almost simultaneously. The reason given for modification/clarification is legally well founded as from pleadings nothing comes on record for granting any interim measures to secure the Counter Claimant. There are claims of the Claimant also, which are standing on the same footing except for the reason that public funds are involved vis-a-vis the Counter-Claimant. The matter is at the evidence stage and it would be appropriate if the order is suitably modified and clarified

that the parties will proceed with the trial in the arbitration proceedings and conclude the same at the earliest.”

11. Essentially, the learned Arbitrator has re-written the order and has exercised powers which are more akin to powers of an appellate court.

12. Reliance of the learned Arbitrator on the judgment of the Supreme Court in *Honda Siel Power Products Ltd. vs. Commissioner of Income Tax, (supra)* dated 26.11.2007 was misplaced. In that case the Tribunal was exercising powers under section 254(2) of the Income Tax Act where the Supreme Court held that where prejudice results from an order attributable to a Tribunal's mistake then it is the duty of the Tribunal to set it right. In the present case it is not discernable from the impugned order as to what error if any is sought to be corrected in the earlier order dated 29.4.2016. The order is completely illegal and is passed *de hors* any powers of the Arbitrator. Accordingly the impugned order dated 8.9.2016 is quashed.

13. I am informed that the evidence is going on before the learned Arbitrator. The learned Arbitrator is requested to expeditiously complete the proceedings and pass an Award.

14. Petition is accordingly disposed of. All pending applications, if any, also stand disposed of.

JAYANT NATH, J

AUGUST 18, 2017

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