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* IN THE HIGH COURT OF DELHI AT NEW DELHI\

+ ARB.A.(COMM) 46/2017

Date of decision: 9th November, 2017

NAVEEN KUMAR Appellant
Through: Mr.Pratap Chandra Rana,
Ms.Upasana Kang, Advs.

versus

DDA Respondent
Through: Mr.Pawan Mathur, Standing
counsel for DDA

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. By way of the present appeal under Section 37(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act), the Appellant is challenging the order dated 11th October, 2017 passed by the Sole Arbitrator.

2. The dispute between the parties arises out of a parking contract at parking site named as 'Group-I, in front of Plot no.16, Rajendra Place, New Delhi'.

3. The Sole Arbitrator vide his interim order dated 29th April, 2016 had directed the Appellant to furnish a bank

guarantee for an amount of Rs.42,26,860/- of Nationalized Bank to secure the respondent. On an application filed by the Appellant, the Arbitral Tribunal recalled the above directions vide his order dated 8th September, 2016. This was challenged by the respondent before this Court by way of Arbitration Appeal (Comm) no.2/2017. This Court by way of a detailed order passed on 18th August, 2017 allowed the said appeal quashing the order dated 8th September, 2016 passed by the Arbitrator. Paragraphs-9 to 11 of the said order record that no cogent reasons were discernible as to why the order dated 29th April, 2016 needed review /modification/recall. The same are quoted herein below:-

“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 counter claimed 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 OMP 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."

4. The effect of the above order resulted in the revival of the interim order dated 29th April, 2016 passed by the Arbitrator. However, this was made an issue before the Arbitrator with the Appellant contending that in the order dated 18th August, 2017 passed by this Court, the order dated 29th April, 2016 has not been confirmed or revived.

5. The Arbitrator vide his impugned order dated 11th October, 2017, has rejected such contention and directed that the petitioner/appellant shall comply with the order dated 29th April, 2016 giving liberty to the respondent to take appropriate proceedings in case there is non-compliance.

6. Counsel for the Appellant, drawing reference to the judgment of this Court in ***BPL Ltd. Vs. Morgan Securities and Credits Pvt. Ltd.*** 2008 Vol. II RAJ 660 (Del), has contended that the order passed by the Arbitrator was beyond his jurisdiction under section 17 of the Arbitration and Conciliation Act, 1996, so far as it directs furnishing of a bank guarantee. I am unable to appreciate the said contention.

7. Firstly, the order dated 29th April, 2016 is not challenged before me. In any case, Section 17 even prior to its amendment empowered the Arbitral Tribunal to pass such orders of ‘interim measure of protection as the Arbitral Tribunal may consider necessary in respect of the subject matter of the dispute’. In the present case, the respondent has raised a counter claim with respect to the licence fee. The interim order dated 29th April, 2016 has been passed for protection and securing such licence fee in case an award is ultimately passed in favour of the respondent. I find nothing wrong with the said direction.

8. Accordingly, the appeal is dismissed with no order as to costs.

9. My above observations would not have any effect on the final outcome of the Award or the arbitral proceedings before the Arbitrator.

NAVIN CHAWLA, J

NOVEMBER 09, 2017
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