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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 160/2018 & IA 5222/2018 & IA 5223/2018**

VIRENDER KHANNA & ASSOCIATES Petitioner

Through: Mr Ramesh Singh, Mr Ranjay
N. and Mr Chiraya Jain,
Advocates.

versus

AIRPORT AUTHORITY OF INDIA Respondent

Through: Mr Sonal Kumar Singh and Ms
Swati, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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26.04.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 29.11.2017 (hereafter 'the impugned award') passed by an arbitral tribunal constituted by a sole arbitrator (hereafter 'the Arbitral Tribunal') to the limited extent that (i) the Arbitral Tribunal has not granted the petitioner's claim for recovering a sum of ₹26,00,000/- that was recovered by the Airport Authority of India (hereafter 'AAI') by encashment of the Bank Guarantee; and (ii) the Arbitral Tribunal has not awarded interest from

the date of cause of action but has computed the same from the date of reference.

2. The petitioner is a firm of Architects and Design Consultants. AAI was desirous of availing “Architectural/Engineering consultancy services for the proposed new Integrated Terminal Building at Birsa Munda Airport, Ranchi”. In this regard, the petitioner entered into discussions with AAI and offered to provide the aforesaid services at a fee of 5% of the estimated or awarded or completed cost of work whichever is lower.

3. Subsequently, AAI issued a Letter of Award (LoA) dated 16.01.2008 to the petitioner and thereafter, both the parties entered into an agreement dated 29.02.2008 (hereafter ‘the Agreement’). Clause 2.2 of the Agreement expressly provides that in consideration of the professional services, the respondent (referred to as the Consultant) would be paid *“a professional fee of 5% of the estimated cost of the work or the awarded cost or completed cost of work whichever is lower of the subhead of the works for which consultant has rendered professional services”*.

4. The construction was required to be completed in a period of 12 months; however, due to various delays, it took over five years and the Terminal building was finally inaugurated on 24.03.2013. Certain disputes arose between the parties in relation to the Agreement and, consequently, the petitioner invoked the Dispute Resolution Clause. Accordingly, all the disputes raised by the petitioner were referred to the Dispute Resolution Board (DRB). The petitioner raised several

claims – nine in number – before the DRB, which were all rejected by a letter dated 09.12.2015.

5. Aggrieved by the aforesaid decision of the DRB, the petitioner requested for the appointment of an arbitrator in terms of the Agreement. Consequently, the Arbitral Tribunal was constituted and all the claims raised by the petitioner before the DRB were referred to the Arbitral Tribunal. The said claims are summarized below:-

5.1 Claim No. 1 : For a sum of ₹1,78,46,163/- being the difference between the total amount of consultancy fee of ₹4,85,54,417.05/- less the amount of ₹3,52,85,230/- already received.

5.2 Claim No. 2 : Claim of ₹21,36,976/- on account of refund of security deposit.

5.3 Claim No. 3 : A sum of ₹8,78,985/- deducted by AAI on account of compensation for delay.

5.4 Claim No. 4 : A sum of ₹12,50,000/- which was deducted by AAI on account of non-deployment of architect/engineer at site.

5.5 Claim No. 5 : A sum of Rs.38,350/- towards interest on the amount of ₹12,50,000/- withheld by AAI on account of penalty for non-deployment of personnel.

5.6 Claim No. 6 : Sum of ₹87,726/- towards delay in submission of as-built drawings.

5.7 Claim No. 7 : An amount of ₹72,88,348/- deducted as penalty towards deviation in the Bill of Quantity (BOQ) items.

5.8 Claim No. 8 : Amount of ₹12,08,067/- recovered by AAI as

penalty towards the modifications in design based items.

5.9 Claim No. 9 : An amount of ₹26,00,000/- recovered by AAI by encashing the bank guarantee submitted by the petitioner.

5.10 In addition, the petitioner also prayed for award of interests on all the aforesaid claims and, further, award of costs.

6. The Arbitral Tribunal rejected petitioner's claim No.1, as it found that AAI's computation of the estimated cost of work at ₹108,60,98,186/- was correct and the petitioner's claim was unjustified. The Arbitral Tribunal made an award in favour of the petitioner (i) for a sum of ₹21,36,976/- against claim No.2 as refund of security; (ii) claim No. 3 to the extent of ₹8,78,985/-; (iii) claim No.4 to the extent of ₹12,50,000/- being the amount withheld by AAI less the amount of ₹1,50,000/- accepted by the petitioner; (iv) ₹38,350/- pertaining to interest on delayed recovery deducted by AAI; (v) ₹87,726/- against claim no. 6 for the amount deducted on account of alleged delay in submission of as built drawings; (vi) claim No. 7 – declaring that the deduction of ₹72,88,348/- made by AAI was unjustified; (vii) ₹12,08,067/- against claim No. 8 being the amount deducted by AAI for non-providing professional fee in relation to certain items, which the Arbitral Tribunal found to be unjustified; (viii) interest at the rate of 8% from 11.01.2016 till the date of payment; and (ix) ₹ 2,50,000/- as costs for arbitration.

7. The Arbitral Tribunal rejected claim No.9 with regard to recovery of ₹26 lakhs (amount collected by invoking of the bank guarantee). Interestingly, this claim was rejected even though the

Arbitral Tribunal held that the invocation of the bank guarantee by AAI was incorrect, unjustified and illegal. With regard to claim of interest, the Arbitral Tribunal proceeded on the basis that cause of action arose by the letter dated 11.01.2016 and awarded simple interest at the rate of 8% on claim nos. 2 to 8, from that date till the date of payment.

Submissions

8. Mr Ramesh Singh, learned counsel appearing for the petitioner contended that the Arbitral Tribunal had grossly erred in not directing refund of the amount recovered by AAI by encashment of the Bank Guarantee. He submitted that the Arbitral Tribunal had accepted the petitioner's contention that the invocation of the Bank Guarantee was unjustified and AAI could not have recovered the said amount against alleged dues pertaining to another contract (Kolkatta Airport Contract). However, the Arbitral Tribunal has failed to direct refund of the same on the ground that the matter was *sub judice* and would be subject to the decision of the Arbitral Tribunal constituted to adjudicate the disputes in relation to the Kolkatta Airport Contract. Next, Mr Singh contended that the Arbitral Tribunal had grossly erred in proceeding on the basis that the cause of action had arisen on 11.01.2016 and computing interest from that date. He submitted that the cause of action arose on the date when the amounts were withheld, that is, 04.08.2015. He also urged that since the petitioner had prevailed, it was entitled to the costs of arbitration.

Reasons and Conclusions

9. It is apparent from the above that the controversy involved in the present petition is limited to not awarding a sum of ₹26 lakhs collected by AAI by invoking the bank guarantees furnished by the petitioner; interest to the extent that it has not been awarded from the date it was withheld (04.08.2015) till the date of reference; and arbitration cost to the extent the same has not been awarded.

10. Insofar as AAI had recovered a sum of ₹26 lakhs by invoking the bank guarantee furnished by the petitioner, the Arbitral Tribunal accepted the petitioner's contention that the invocation of Bank Guarantee was unjustified. The said Bank Guarantee was invoked against the alleged dues pertaining to another contract. The Arbitral Tribunal found that the claims made by AAI with regard to the other contract (Kolkata Airport Project) were not admitted by the claimant (petitioner herein) and, therefore, the Performance Bank Guarantee could not be encashed against the dues of the other contract. The relevant extract of the impugned award is set out below:-

“81.0 After perusal of Statement of Claim (SoC).
Reply to the Statement of Claim (RoC),
submitted by the Respondent, the
Rejoinder & Additional documents
submitted by the Claimant, hearing both
the parties at length during oral
submissions and the written submissions
made by the parties, I find that the Bank
Guarantee (BG) amounting to Rs.26 lakhs
was the “Contract Performance Guarantee”

which was given by the Claimant at the time of award of the work to the Respondent i.e. AAI. This “Performance Guarantee” amounting to Rs.26 lakhs as per clause 12.0 of the agreement was to be released to the Claimant after the expiry of 90 days after the end of stage-7 (as defined in the contract agreement). It is observed from Annex R-8 (colly) pages 249-254 of RoC that while finalising the accounts of Kolkata Airport Project awarded to the Claimant itself, it was found that Rs.66,72,838/- were recoverable from the Claimant. This recovery was informed by the Respondent to the Claimant vide letter dated 26.01.2015 (pages 250 of SoC) and he was asked to deposit Rs.66,72,838/- with the Respondent. When the Claimant did not deposit the said amount the Bank Guarantee amounting to Rs.26 lakhs submitted by the Claimant in respect of Ranchi Airport Project as “Performance Guarantee” was encashed against the dues of the Kolkata Airport Project. This encashment of the Bank Guarantee of Rs.26 lakhs was done by the Respondent before finalization of the accounts of the Claimant in respected Ranchi Airport Project.

82.0 I find that the Claimant is justified in alleging that the action of the Respondent AAI in encashing the Bank Guarantee amounting to Rs.26 lakhs relating to

Ranchi Airport Project for the dues amounting to Rs.66,72,838/- relating to Kolkata Airport Project and conveyed to the Claimant vide letter dated 28.01.2015 (page 250 of SoC) was incorrect, unjustified and illegal. As pointed out by the Claimant the Supreme Court judgment in respect of case (1974) 2SCC 231 Union of India V/s Raman Iron Foundry and Union of India V/s Airfoam Industries (P) Ltd. is quite clear. According to this judgment Respondent was entitled to exercise the right conferred under clause 9.3 of the agreement only where the claim for payment of a sum of money is either admitted by the Claimant or in case of dispute adjudicated upon by a Court or other adjudicatory authority like arbitration. Therefore, it is evident that the Respondent should not have encashed the Bank Guarantee of Rs.26 lakhs till such time the demand raised by the Respondent vide his letter dated 28.01.2015 (page 250 of SoC) in respect of some other work i.e. Kolkata Airport Project would have been adjudicated upon by a Court or other adjudicatory authority such as Arbitration.

- 83.0 However, the Respondent have encashed the Bank Guarantee of Rs.26 lakhs more than 2 ½ years back. The various claims of both the parties i.e. Claimant as well as Respondent regarding Kolkata Airport Project are already under adjudication by

an Arbitral Tribunal. The Arbitral Tribunal will also decide the fate of Rs.26 lakhs, which were recovered by the Respondent by encashing Bank Guarantee. As on date the arbitration case relating to Kolkata Airport Project is still pending & the case is therefore, subjudice.

I accordingly consider & decide to maintain the status quo on this claim. The Claimant will get the necessary relief according the judgment of the Arbitral Tribunal in respect of the work of Kolkata Airport Project.”

11. It is apparent from the above that the Arbitral Tribunal had, in fact, declined to make any award in respect of claim No.9. This Court is of the view that the decision of the Arbitral Tribunal is *ex facie*. This Court finds it difficult to understand the conclusion of the Arbitral Tribunal. After having concluded that AAI ought not to have encashed the bank guarantee, the Arbitral Tribunal was required to decide the claim made by the petitioner. Instead, the Arbitral Tribunal decided to “maintain the status quo on this claim”. This clearly amounts to not adjudicating the claim made by the petitioner. It is also relevant to note that the bank guarantee invoked by AAI was a performance bank guarantee and was furnished to secure the performance of the Agreement. In the circumstances, it was not necessary for the Arbitral Tribunal to defer the decision on the petitioner’s claim to await the results of the other arbitral proceedings.

In this view, this Court is unable to sustain the award in relation to claim No.9 preferred by the petitioner.

12. The next question to be examined is with regard to award of interest. The Arbitral Tribunal had accepted several claims raised by the petitioner which mainly pertained to amounts, which had been withheld by AAI. The Arbitral Tribunal concluded that interest was payable to the petitioner under Section 31(7)(a) and (b) of the Act from the date of cause of action to the date of payment of the award.

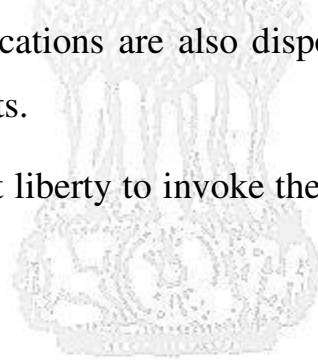
13. Section 31(7)(a) of the Act enables the Arbitral Tribunal to award interest for the period on which the cause of action has arisen and the date on which the award is made. Indisputably, the Arbitral Tribunal had decided to award such interest. However, the Arbitral Tribunal has fallen in error in proceeding on the basis that the cause of action has arisen on 11.01.2016. That was a date on which the petitioner had approached the competent authority for appointment of an arbitrator. The cause of action had arisen much earlier. It is seen that bulk of the claims related to the amounts withheld by AAI and, therefore, there is merit in the contention that cause of action had arisen when the petitioner had submitted its final bid and demanded the amounts due to it. Admittedly, the last of such bills were submitted on 04.08.2015 and, therefore, the cause of action had arisen on that date. The Arbitral Tribunal had clearly fallen in error in awarding interest under Section 31(7)(a) from 11.01.2016 instead of 04.08.2015.

14. Insofar as the award of cost is concerned, this Court is not persuaded to accept that there is any infirmity in the said decision which warrants interference under Section 34 of the Act. An award of cost is at the discretion of the Arbitral Tribunal, and the Arbitral Tribunal thought it fit to award partial cost quantified at ₹2.5 lakhs and the said decision cannot be faulted.

15. For the reasons stated above, the impugned award to the extent of relating to claim No.9, i.e., claim of ₹26 lakhs for the amount recovered by AAI through encashment of the bank guarantee as well as claim of interest to the extent it has not been awarded from 04.08.2015 till the date of reference, is set aside.

16. The pending applications are also disposed of. The parties are left to bear their own costs.

17. The petitioner is at liberty to invoke the arbitration with respect to the said claims.


नित्यमेव जयते **VIBHU BAKHRU, J**

APRIL 26, 2018
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