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

+ FAO(OS) 115/2017 & CM No.14396/2017

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Date of decision : 9th February, 2018

AIRPORTS AUTHORITY OF INDIA

..... Appellant

Through : *Mr. K.K. Rai, Sr. Adv. with
Mr. Digvijay Rai, Mr.
Chandrashekhar Chakalabbi
and Mr. A. Rai, Advs.*

versus

M/S TDI INTERNATIONAL (INDIA) LTD

..... Respondent

Through : *Mr. Ashish Mohan and Mr.
Akshit Mago, Advs.*

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

1. This appeal filed under Section 37 of the Arbitration & Conciliation Act, 1996 (*hereafter the 'Arbitration Act'*) assails the order dated 15th February, 2017 passed by the learned Single Judge allowing OMP 490/2011 filed by M/S TDI International India Ltd. (*respondent herein – 'TDI' hereafter*) under Section 34 of the Arbitration Act.

2. By way of OMP 490/2011, TDI had laid objections to the Arbitral Award dated 19th April, 2011 passed by the sole Arbitrator in disputes between TDI and the Airport Authority of India (*appellant herein – ‘AAI’ hereafter*).

3. It is unfortunate that the present appeal relates to an invitation issued by the AAI inviting applications as back as in the year 1993 for advertisement rights at the Hyderabad Airport. Pursuant to this notice, inviting applications, a license for advertisement was awarded to TDI as the successful tenderer. TDI was the successful tenderer in subsequent tenders as well issued by the AAI between 18th April, 2001 to 17th April, 2006 as well as for the period 18th April, 2006 to 30th April, 2008 (*which was by way of a supplementary license agreement executed on 23rd March, 2007*).

4. It appears that TDI made a complaint with regard to parallel advertisement being permitted by the AAI, contending that this was in the nature of a breach of contract. On 4th July, 2008, TDI also invoked the arbitration clause in the agreement between the parties resulting in AAI appointing a sole Arbitrator to adjudicate upon the dispute.

5. These arbitration proceedings culminated in an Award dated 19th April, 2011 against the TDI.

6. Inasmuch as the challenge to the Arbitral Award before the learned Single Judge was primarily on account of the failure of the Arbitrator to follow a judicial approach, it becomes necessary to note the manner in which the Arbitrator proceeded in the arbitration. TDI

admittedly filed its claim on 15th September, 2008 which was responded to by the AAI on 5th January, 2009. Rejoinder thereto was filed on 11th February, 2009 by TDI. A sur-rejoinder thereto was filed on 24th March, 2009 by the AAI.

7. It is an admitted position that only two sittings took place before the sole Arbitrator. On 2nd May, 2009, a sitting was held before the Arbitrator. The proceedings in this sitting have been set out in para 5 of the impugned order which reads as follows :

“(1) Sole Arbitrator had his first sitting at the conference room of Hyderabad/Begumpet Airport at 1100 Hrs on 2 May 2009.

(2) The claimant was represented by Sh. Prem Bajaj, MD, TDI and the Respondent was represented by officer Sh. K.S.Rao, DGM (Commercial).

(3) Claimant was given the opportunity to present an oral submission of the synopsis of the case.

(4) At appropriate times, the respondent was also given opportunity for his views.

(5) Thereafter, a site visit was undertaken to get more in depth view, of the case on hand.”

8. A second sitting was held on 23rd June, 2010. The proceedings in this sitting have been set out in para 6 of the Award in the following terms :

“(1) The second sitting was also held at Hyderabad on 23 June 2010, to hear the oral evidence of both the parties.

(2) Sh. P.K. Bhan, Chief Strategist, represented the claimant duly authorized vide M/s. TDI Letter dated 21 June 2010 (signed by Sh. Prem Bajaj) and Sh. K.S. Rao, DGM (Commercial) represented the respondent.”

9. It is not disputed by Mr. K.K. Rai, learned Senior Counsel appearing for the appellant before us that there were no further sittings at all after the 23rd of June, 2010.

10. The entire Arbitral record was produced and carefully scrutinized by the learned Single Judge while hearing OMP 490/2011. The learned Single Judge has noted in para 6 of the impugned order dated 15th February, 2017 that there was no order at all passed by the learned Arbitrator noting that any evidence has been recorded; that he has heard arguments of either side; that arguments on either sides were closed. The learned Single Judge has specifically noted that no order reserving the Award has been recorded. This position has been confirmed by learned Senior Counsel who was appearing for the AAI before the learned Single Judge.

11. It is also admitted by Mr. K.K. Rai, learned Senior Counsel for the AAI that no intimation of any hearing was given to the parties by the learned Arbitrator after 23rd June, 2010.

12. It is also admitted before us that on 15th September, 2010, an application under Section 9 of the Arbitrator & Conciliation Act, 1996

came to be filed by TDI. Copy of the application has been placed before us. We may usefully extract the prayers contained in this application which are to the following effect :

“a) Permit the Claimant to place on record Annexure(s) A-1,A-2,A-3 as mentioned herein above in support of and as proof of damage suffered by it due to the wrongful conduct of the Respondent.

b) Convene the meeting of the Arbitral Tribunal at a future convenient date to record the specific oral evidence in respect of the above and also to provide an opportunity to the claimant to lead the critical and essential evidence;

c) Pass any further order(s) as may be deemed fit and proper.”

13. It is undisputed before us that the learned Arbitrator did not even issue notice in this application despite receipt thereof let alone hear any arguments on the same. The next thing that happened was that the parties received the Arbitral Award dated 19th April, 2011 purporting to be on the claims made by TDI.

14. Mr. Ashish Mohan, learned counsel for the TDI draws our attention to a document aforementioned by the learned Single Judge in the impugned order. It appears that the Arbitral record placed before the learned Single Judge contained a document which was placed as “Appendix-6 Written Submission-Claimant”. This document was in fact the covering letter dated 15th September, 2010 written by the TDI to the sole Arbitrator enclosing the aforesaid application under Section

19 of the Arbitration & Conciliation Act, 1996. The learned Single Judge has rightly concluded that this application was erroneously treated by the Arbitral Tribunal as if it were written submissions filed by TDI. Clearly, this fact by itself discloses complete non-application of mind. It indicates that the learned Arbitrator has gravely erred and has not even noticed the prayers made in this application.

15. We also find that the Arbitral Award has recorded that oral arguments of both parties were advanced, not by their counsel but by their authorized representatives at the second sitting. No mention at all of the application dated 15th September, 2010 is contained in the Award.

16. While considering the interpretation which has to be led to the expression '*fundamental policy of Indian law*' contained in Section 34 of the Act, in the judicial pronouncement reported at **(2014) 9 SCC 263 Oil & Natural Gas Corporation Ltd. vs. Western Geco Ltd.**, the Supreme Court has highlighted the need of an Arbitrator to adopt a '*judicial approach*' while conducting Arbitral proceedings. In this regard, the principles laid down by the Supreme Court in para 35 of the judgment deserves to be considered *in extenso* and read as follows:

“35. What then would constitute the “fundamental policy of Indian law” is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression

“fundamental policy of Indian law”, we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a “judicial approach” in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.”

(Emphasis supplied)

17. After considering the above factual narration and the legal position laid down by the Supreme Court, the learned Single Judge has concluded that the learned Arbitrator failed to adopt a judicial approach. It has been observed that in merely two sittings, without even considering as to the necessity of further evidence; without hearing the parties on the claims and the reply thereto or consideration of the documents; without taking a view on the application dated 15th September, 2010 and passing an order on the prayers made therein;

without giving any intimation to the parties of reserving the Award 10 months after the second sitting on 23rd June, 2010 and 7 months after receipt of the application dated 24th September, 2010, the Arbitrator has proceeded to pass the Award.

18. The learned Single Judge has noted the grave error committed by the learned Arbitrator in treating the application under Section 19 of the Enactment as “*written submissions of the claimant*”.

19. We see no reason to disagree with the view taken by the learned Single Judge that the impugned Award cannot be sustained in law.

20. For all these reasons, we find no merit in this appeal which is hereby dismissed with costs which are quantified at Rs.1,00,000/-, which shall be paid within four weeks from today.

21. In view of the dismissal of the appeal, CM No. 14396/2017 (*for stay*), does not survive for adjudication and is dismissed.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

FEBRUARY 09, 2018/kr