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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO (OS) (COMM) No. 137/2018**

Date of decision: 6th July, 2018

AIRPORT AUTHORITY OF INDIA Appellant
Through Mr. Sonal Kr. Singh, Ms. Swati Sehgal
and Mr. Rajat Dasgupta, Advocates.

versus

M/S. VIRENDER KHANNA & ASSOCIATES Respondents
Through Mr. Ramesh Singh, Mr. Ranjay N. and
Mr. Chirayu Jain, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

Having heard counsel for the Airport Authority of India, we are not inclined to interfere with the impugned order dated 26th April, 2018, passed by the learned single Judge on question of refund of Rs.26,00,000/- and direction that interest on the awarded amount would be payable with effect from 4th August, 2015.

2. We feel that the learned single Judge was justified and correct in interfering with the arbitration award dated 29th November, 2017, to the extent indicated above on objection filed by the respondent and in exercise of power under Section 34 of the Arbitration and Conciliation Act, 1996 (Act, for short).

3. The respondent is a firm of architects and design consultants, who vide agreement dated 29th February, 2008 were to provide architectural/engineering consultancy services in the new integrated terminal building at Birsa Munda Airport, Ranchi, on payment of professional fee of 5% of the estimated cost of the work or the awarded cost or completed cost of work, whichever was lower of the subhead of the works.

4. As disputes had arisen, which could not be resolved under the dispute resolution clause, the respondent had invoked arbitration clause. Mr. A.K. Singhal was appointed as the Arbitrator.

5. Award dated 29th November, 2017, partly accepts plea and claims of the respondent and directs payment of Rs.1,30,88,452/- along with simple interest @ 8% per annum with effect from 11th January, 2016.

6. We are only concerned with the two claims/issues in the present appeal i.e. claim No.9 directing refund of Rs.26,00,000/-, which amount was collected by the appellant by invoking performance bank guarantee and claim No 10 directing payment of interest from 4th August, 2015.

Recovery of bank guarantee

7. Respondent had furnished a performance bank guarantee of Rs.26,00,000/- in favour of the appellant. Performance guarantee was invoked for purported dues/claims of the appellant against the respondent in another contract relating to Kolkata Airport Project. Arbitration proceedings in respect of the Kolkata Airport Project are pending between the appellant and the respondent. On the question of refund of Rs. 26,00,000/-, the awards holds:-

“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

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 the Bank Guarantee (BG) amounting to Rs.26 lakhs was the “Contract Performance Guarantee”

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.”

(emphasis supplied)

8. In our opinion, the learned single Judge has rightly observed that the findings and reasoning given by the Arbitrator is contradictory and incongruous. Arbitrator had clearly held that the appellant could not have invoked performance bank guarantee of Rs.26,00,000/- for alleged claim and dues in respect of a third project i.e. Kolkata Airport project. As per the present contract, performance guarantee was to be released to the respondent after expiry of 90 days from the end of stage 7 as defined in the contract. Award holds that the action of the appellant in encashing the performance bank guarantee of Rs.26,00,000/- pertaining to the project in question was incorrect, unjustified and illegal. This was the firm and affirmative finding by the Arbitrator against the appellant. In spite of the said finding, it was held that the appellant need not refund Rs. 26,00,000/- as the claims or disputes regarding Kolkata Airport Project were pending before another Arbitrator. It was left to the said Arbitrator to decide the fate of Rs.26,00,000/- upon encashment of performance bank guarantee. Award had directed that status quo be made till the decision.

9. Learned single Judge had to interfere to correct the anomaly and discrepancy, which had arisen in view of the converse final direction in the award. The interference, in our opinion, was justified and within the four corners of powers exercisable by the Courts under Section 34 of the Act.

Interest

10. On the claim of interest and the date from which interest was payable, awards holds:-

“Claim No.10: Interest on the amount claimed under claim no.1 to 9”

84.0 The Claimant submitted that he is entitled to interest on the aforesaid amount of Rs.1,72,42,739.95/- to be calculated @ 18% from 04.08.2015 till the date of award.

The Respondent refuted the contention of the Claimant and submitted that as the Claimant is not entitled for any award in his favour in respect of his alleged claims 1 to 9, therefore, the issue of payment of interest under section 31 (7) (a) and (b) of the Arbitration and Conciliation Act, 1996 on the claim amount does not arise.

85.0 After perusal of the 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 submission and the written submission made by the parties, I find that interest is payable to the Claimant by the Respondent under section 31 (7) (a) & (b) of the Arbitration and Conciliation Act, 1996 on the amount awarded by me against Claims No.2,3,4,5,6,7 & 8 from the date the cause of action arose to the date of payment of award.

86.0 In this case the cause of action arose when the Claimant vide his letter no. VKA/BMAR/16/1297 dated 11.01.2016 approached the Competent Authority of AAI for appointment of Arbitrator to adjudicate his claims. I therefore consider & award 8% simple interest on the amount awarded by me against Claim No.2,3,4,5,6,7 & 8 from 11.01.2016 to the date of payment of award by the Respondent as pendente lite (sic) and future interest.”

11. The respondent had claimed interest @ 18% from 4th August, 2015 till the date of Award. The Arbitrator in paragraph 85 after referring to the

pleadings, oral arguments and written submissions has held that the appellant was liable to pay interest to the respondent under Section 31 (7) (a) & (b) of the Act on the amount awarded against claims Nos.2, 3, 4, 5, 6, 7 and 8 from the date cause of action arose till the date of payment. This is a categorical and clear finding of the Arbitrator. Arbitrator took the date of cause of action as the date on which the respondent had invoked arbitration clause i.e. 11th January, 2016. Accordingly, the appellant was directed to pay simple interest @ 8% from 11th January, 2016. This was wrong and incorrect.

12. In our opinion, the learned single Judge was justified in interfering with the aforesaid direction of the Arbitrator, recording the following reasons:-

“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.”

13. As noticed above, the parties had entered into an agreement dated 29th February, 2008 in respect of architectural/engineering consultancy services in the new integrated terminal building at Birsa Munda Airport, Ranchi. Construction was to be completed within 12 month but for various reasons, it took over 05 year and the terminal building was finally inaugurated on 24th March, 2013. As disputes had arisen, the matter was first referred to the Dispute Resolution Board by invoking dispute resolution clause. All claims, 9 in number, were rejected by the Dispute Resolution Board vide letter dated 9th December, 2015. Thereupon, the respondent had invoked the arbitration clause and matter was referred to the Arbitrator.

14. In the light of the aforesaid facts, learned single Judge was justified in not ignoring the apparent and glaring error made by the Arbitrator, who after a clear finding that interest would be payable from the date cause of action arose, had erroneously directed payment of interest from 11th January, 2016, i.e. the date when request for appointment of arbitrator was made. Cause of action had arisen earlier, when the respondent had submitted his bill and demanded the amount due. Learned single judge was therefore justified in correcting the “flaw” and in directing that interest was payable from 4th August, 2015.

15. In view of the aforesaid, the appeal is dismissed without any order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

JULY 06, 2018
MR/NA

