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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 13th December, 2021

+ **FAO(OS) (COMM) 124/2020 & CM Nos.32948/2020, 22546/2021**

EZEN AVIATION PTY LIMITED & ANR. Appellants
Through Mr.Pai Amit, Mr.Prashant
Popat, Mr.Rahat Bansal,
Mr.Nikit Bala, Ms.Karishma
Naghnoor, Mr.Souvik Paul
Mazumdar, Advs.

versus

BIG CHARTER PRIVATE LIMITED Respondent
Through Mr.Saurabh Kirpal, Sr. Adv,
Mr.Pardeep Dhingra, Mr.Varun
Chandiok, Mr.Nishant Kumar,
Ms.Shagun Sharma, Advs.

+ **FAO(OS) (COMM) 154/2020 & CM Nos.30285-87/2020, 32908/2020, 9746-47/2021, 22548/2021, 44630-31/2021**

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CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE NAVIN CHAWLA
NAVIN CHAWLA, J. (Oral)

1. These two appeals filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenge the interim orders dated 08.06.2020 and 23.10.2020 passed by the learned Single Judge of this Court in the petition filed by the respondent under Section 9 of the Act being OMP (I) (COMM) 112/2020.
2. By the Impugned Order dated 08.06.2020, the learned Single Judge was pleased to allow the application being I.A. No. 4291/2020 filed by the respondent and restrained the appellant from taking any precipitate steps or alter the status of the aircraft/create any third party right or interest in the aircraft or its parts, till the pronouncement of the judgment in the main petition, that is, OMP (I) (COMM) 112/2020.
3. The appellant challenged the order dated 08.06.2020 by way of FAO (OS) (COMM) 124/2020 *inter alia* contending that the respondent had failed to initiate arbitral proceedings within the statutory period as stipulated in Section 9(2) of the Act. This Court vide its order dated 12.10.2020 passed the following interim order with the consent of the parties:

“ After some arguments, with the consent of the parties, the interim order dated 08th June, 2020 stands modified/varied as under:-

- (i) The appellant shall furnish a list of inventory as of date to the learned counsel for the respondent within a week.*
- (ii) The first appellant is permitted to dismantle and shift the landing gears and other accessories from the facility of M/s GMR Air Cargo and Aerospace Engineering Limited (GMR) at Hyderabad to the warehouse of GMR where other parts of the aircraft are already stocked and stored.*
- (iii) The first appellant shall be entitled to donate the bare shell of the aircraft without any accessories and landing gears to the National Institute of Technology, Warangal. Proof of such donation shall be placed on record before this Court within one week from the date of delivery to the National Institute of Technology, Warangal.*
- (iv) The first appellant is permitted to sell the landing gears and other spare parts and raise an amount of Rs.4,30,00,000/- (Rupees Four Crores Thirty Lakhs only). Immediately, on receipt of sale proceeds of landing gears and other spare parts, the appellant shall ensure that Rs.4,30,00,000/- (Rupees Four Crores Thirty Lakhs only) is deposited with the Registry of this Court.*

- (v) *Only upon deposit of Rs.4,30,00,000/- (Rupees Four Crores Thirty Lakhs only) with the Registry of this Court, the appellant shall be permitted to take away or sell other spare parts or appropriate the surplus sale proceeds for its use.*
- (vi) *The aforesaid arrangement shall be subject to OMP (I) (COMM) No.112/2020.*
- (vii) *CCP (O)No. 16/2020 shall stand dismissed as withdrawn in view of the consensual order passed today.*
- (viii) *In the event, the consensual arrangement is not abided by the appellant, it shall be open to the respondent to seek revival of the contempt proceedings.”*

4. The learned Single Judge thereafter passed the Impugned Order dated 23.10.2020 directing that the amount of Rs.4,30,00,000/- deposited by the appellant pursuant to the order dated 12.10.2020 of the Division Bench, should remain deposited with the Registry of this Court subject to the final award, if any, to be rendered in the arbitral proceedings between the parties. It is this order which is in challenge in FAO (OS) (COMM) 154/2020.

5. The appellant, by way of CM No. 44630/2021 has produced before this Court a copy of the Arbitral Award dated 03.11.2021 passed by the Singapore International Arbitration Centre (hereinafter

referred to as the ‘SIAC’) in SIAC Arbitration No. 730/2020. The learned counsel for the appellant submits that the said Award records that the respondent had raised its claim under the Lease Deed dated 09.12.2019 by way of a counter-claim which was registered by SIAC as Arb1030/20/LYY, however, as the respondent failed to make the payment of its share of arbitration fee, SIAC vide its letter dated 27.04.2021 deemed the said claim to be withdrawn. Though a right to re-introduce the same counter-claims in another arbitration proceedings was granted to the respondent, the respondent has not availed of the said right till date. He submits that in terms of Section 9(2) of the Act, the interim order passed by the learned Single Judge should, therefore, be vacated/set aside. He also places reliance on the judgment of the Supreme Court in ***Sundaram Finance Ltd. vs. NEPC India Ltd.***, (1999) 2 SCC 479 in support of his submission.

6. On the other hand, the learned counsel for the respondent submits that the respondent has already written to SIAC of its intent to revive the counter-claims by payment of requisite fee and is expecting a response from SIAC in this regard. The learned counsel for the respondent further submits that the appellant has no other assets in India barring the aircraft and the parts and, therefore, further opportunity be granted to the respondent to initiate the arbitration proceedings and the interim order passed by the learned Single Judge be maintained.

7. We have considered the submissions made by the learned counsels for the parties. As is evident from the pleadings of the

parties, the petition filed by the respondent being OMP (I) (COMM) 112/2020 was heard by the learned Single Judge on 26th and 27th May, 2020. The first Impugned Order was passed by the learned Single Judge on 08.06.2020 and the second Impugned Order was passed on 23.10.2020. During this period the respondent did not invoke the arbitration agreement. Even after the arbitration agreement was invoked by the appellant, *albeit* under the Lease Deed dated 12.11.2019, the respondent did not invoke the arbitration agreement under the Lease Deed dated 09.12.2019 on which reliance was being placed by it. The Arbitral Award dated 03.11.2021 records that it was only on 01.12.2020 that the respondent filed a notice of arbitration. Even this notice, for failure of the respondent to deposit the requisite fee, has been determined to be withdrawn vide SIAC letter dated 27.04.2021. The relevant observations of the learned Arbitrator in the Award dated 03.11.2021 are reproduced hereinbelow:

“76. On May 20, 2021, the SIAC wrote to the Parties noting that BCPL had yet to make payment of its share of the deposits by May 19, 2021 despite repeated reminders. As foreshadowed in the SIAC’s letter dated April 27, 2021, the Registrar determined that BCPL’s counterclaims in this reference (i.e. BCPL’s claims under the December Lease Deed in ARB1039) shall be withdrawn, without prejudice to BCPL’s right to reintroduce the same

counterclaims in another arbitration proceeding.

77. *Following the Registrar's determination, BCPL no longer had any counterclaims in this Arbitration. Accordingly, from May 20, 2021, this Arbitration proceeded only with Ezen's claims in ARB730 and this Decision only addresses Ezen's claims in ARB730. As explained above, Ezen did not bring claims under ARB1039 and did not bring claims under the December Lease Deed.*

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95. *For reasons already set out above, I shall make no determinations in this Decision on BCPL's "counterclaims" in the consolidated arbitration (or, more precisely, BCPL's claims in ARB1039 arising under the December Lease Deed). I do not have to consider BCPL's claims under the December Lease Deed because the SIAC Registrar has determined that BCPL's claims are withdrawn in accordance with Rule 34.6(b) of the SIAC Rules as a result of BCPL's persistent failure to pay arbitration deposits relating to those claims."*

8. Therefore, for a period of almost nineteen months from the first hearing of the petition under Section 9 of the Act filed by the respondent; eighteen months from the first interim order dated 08.06.2020; and fourteen months from the second interim order dated 23.10.2020 passed by the learned Single Judge, the respondent is yet to take steps to have its claims adjudicated through arbitration.

9. Section 9(2) of the Act requires that where a Court passes an order for any interim measure or protection, the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such time as the Court may determine. This sub-Section was introduced by the Arbitration and Conciliation (Amendment Act), 2015. In *Sundaram Finance Ltd.* (Supra), the Supreme Court, while holding that an application under Section 9 of the Act may be filed before the commencement of the arbitral proceedings, observed that the party invoking such jurisdiction must satisfy the Court that it intends to take the disputes to arbitration. While passing such an order and in order to ensure that effective steps are taken for commencement of arbitral proceedings, the Court can pass a conditional order to put the applicant to such terms, as it may deem fit with a view to see that effective steps have been taken by the applicant for commencing the arbitral proceedings.

10. In the present case, we find that not only the statutory period as provided in Section 9(2) of the Act, but a period much beyond it has expired. The claim filed by the respondent has been deemed to be withdrawn for its failure to deposit the fee before the SIAC way back

in April 2021. The mere fact that the respondent has now written some request to the SIAC for re-agitating its claim, in our view, is not sufficient, at least at this stage, to allow the Impugned order dated 23.10.2020 passed by this Court to continue.

11. Accordingly, the present appeals are allowed. The Impugned Orders dated 08.06.2020 and 23.10.2020 passed by the learned Single Judge of this Court in OMP (I) (COMM) 112/2020 are set aside. However, this order shall not debar the respondent from making an application seeking appropriate interim order in case it revives or files fresh arbitration proceedings before the SIAC.

12. The appeals are allowed in the above terms. There shall be no order as to costs.

NAVIN CHAWLA, J

MANMOHAN, J

DECEMBER 13, 2021/rv/U.