

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

Reserved on: 04th May, 2022
Pronounced on: 1st August, 2022

+ **ARB. A. (COMM.) 17/2022 & I.As. 6774-75/2022**

AIRPORTS AUTHORITY OF INDIA (KOLKATA AIRPORT)

..... Appellant

Through: Ms. Padma Priya, Ms. Akanksha Das
and Mr. Shreyansh Rathi, Advocates.

versus

TDI INTERNATIONAL INDIA LTD.

..... Respondent

Through: Mr. Ashish Mohan, Ms. Gargi Sethee
and Ms. Sagrika Tanwar, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.:

1. The short questions for consideration in the present appeal are whether the impugned interim order of the Arbitral Tribunal amounts to a review or recall of its earlier order, and, whether the same suffers from any infirmity which would warrant interference at the stage of final arguments of the arbitration proceedings.

2. Airports Authority of India [*hereinafter*, 'AAI'] has impugned the consolidated interim order dated 14th March, 2022 [*hereinafter*, '**Impugned Order**'] passed by the Arbitral Tribunal under Section 17 of the Arbitration and Conciliation Act, 1996 (pre-amendment) [*hereinafter*, '**the Act**'] allowing an application filed by TDI International India Pvt. Ltd [*hereinafter*, '**TDI**'],

which, AAI claims, amounts to review of an earlier order of the Arbitral Tribunal dated 07th October, 2015.

BRIEF FACTS

3. Briefly stated, TDI was declared as the successful bidder pursuant to a Notice Inviting Tender floated by AAI in respect of advertising rights for certain sites at the Netaji Subhash Chandra Bose International Airport Estate, Kolkata [*hereinafter*, '**Kolkata Airport**']. A Letter of Award was issued in its favour on 05th October, 2007, followed by execution of a License Agreement on 31st August, 2010.

4. Disputes arose between the parties, concerning rights and obligations arising out of various such license agreements executed between them for various airports, which led to appointment of an Arbitral Tribunal at the instance of TDI (the Claimant) in April 2013, comprising of the Sole Arbitrator, Hon'ble Mr. Justice (Retd.) Deepak Verma. TDI's claims pertain to the amounts due under the agreements, withdrawal of interest, damages, etc. AAI is opposing the claims and is a Counter-Claimant for its alleged dues under the said agreements. The proceedings for each airport are being conducted separately, and are still underway. We are only concerned with the Kolkata airport in the present matter.

5. In 2014, TDI filed an application under Section 17 of the Act [*hereinafter*, '**the 2014 Application**'], praying for injunctive relief of restraining AAI from invoking certain Bank Guarantees furnished by TDI as per the terms of the License Agreement. Additionally, an interim prayer for

restraining AAI from disallowing TDI to participate in future tenders due to outstanding dues was also sought.

6. Interim relief was granted on 04th August 2014, restraining AAI from encashing the Bank Guarantees, subject to the condition that TDI shall deposit all arrears of license fee and shall continue depositing the same regularly, in the following terms:

“48. In the light of the aforesaid discussion, I am of the considered opinion that, if at this point of time partial injunction is not granted in favour of the Claimant only with regard to encashment of the Bank Guarantees, then in that case, it would suffer an irretrievable loss in many ways including in terms of money. Not only that if Bank Guarantees are allowed to be encashed, then the scope of this arbitration is also likely to be enlarged. However, this would continue only if Claimant continues to deposit regularly the amount of license fees as fixed between them, but presently shall not be liable to pay any interest or penalty on the same. Deposit of Licence Fees regularly and to clear all previous dues in this regard to encashment of Bank Guarantees. The same shall be renewed from time to time by the Claimant, till final adjudication of the matter.”

xx ... xx ... xx

50. The tribunal is also of the opinion that Claimant has not been able to make out a case for grant of injunction to restrain the Respondent not to treat non-payment by the Claimant as disqualification to participate in future Tenders. There is nothing on record to show that any tenders have been issued, for which Claimant has not been permitted to participate. Such a situation has not yet arisen.

51. In the light of the aforesaid discussion, I am of the considered opinion that Claimants' Application deserves to be allowed partially and is allowed only to the extent that Respondent is restrained from encashing Bank Guarantees only subject to strictly depositing all arrears of Licence Fee and to continue deposit it regularly, but for other reliefs as claimed in the Application and reproduced herein above, no case is made out for grant of such reliefs. For other reliefs Claimants' prayer stand hereby rejected. [emphasis supplied]

7. Subsequently, in 2015, TDI filed another application under Section 17 of the Act [*hereinafter*, ‘**the 2015 Application**’] seeking the following reliefs:

“ C. Direct its Amritsar Airport Unit to issue the requisite “No Dues Certificates” to enable the Claimant to participate in the upcoming call of technical/financial bidding for Exclusive Advertisement Rights Concessions at various Airports;

D. Allow participation in the fresh tenders of Exclusive Advertisement Rights Concessions at all the AAI Airports without getting prejudiced by the ongoing Arbitration Proceedings or by imposing any extraneous/ discriminatory conditions which are intended to debar the Claimant Company from participation in the call of future tenders.”

8. The said application was allowed *vide* interim order dated 07th October, 2015 whereby the Sole Arbitrator directed AAI to furnish a No Dues Certificate [hereinafter, ‘NOC’] and allow TDI to participate in any future tenders floated for any of AAI’s airport units, subject to TDI furnishing a Bank Guarantee for 50% of the outstanding dues for that particular airport.

Extract of relevant directions is reproduced below:

“17. Perusal thereof shows that, it is very widely worded and gives competence, jurisdiction and power to the Tribunal to grant any Interim Measure of protection, which it may consider necessary to allow. The only embargo is that there should not be any agreement between the parties to do or to act otherwise. There is no such agreement existing between them, nor the Respondent has raised any such Preliminary objection in this regard.

Subsection (2) of Section 17 of the Act, only requires that the Tribunal may provide for adequate security in connection with the measure ordered U/S 17 (1) of the Act. After having critically examining the legal position, it is crystal clear that Tribunal has power, competence & jurisdiction to grant reliefs as claimed by the Claimant- but to safeguard the other side, certain conditions, could be imposed by way of appropriate security.

xx ... xx ... xx

22. Now the question, that arises for consideration is, whether in the given facts and circumstances, Respondent could be directed to issue a “No Objection Certificate”, to the Claimant, with a view to allow the Claimant to participate in further Tender processes, as and when it commences. In the considered opinion of the Tribunal, interest of justice would be met, if the Respondent is directed to allow the Claimant to participate in further Tender process, to be initiated by the Respondent. If it is allowed to be done, then the question may arise as to how to safeguard Respondent’s interest. In the considered opinion of the Tribunal, if Claimant is directed to furnish Bank Guarantees for 50% of the amount said or alleged to be due against it, with the Respondent then, it would be deemed that there are no dues against the Claimant and in that case, Claimant would be permitted to participate in Tender Process to be initiated by it in future.

xx ... xx ... xx

24. In the light of the foregoing discussions, Claimant’s IAs are partly allowed and it is directed as and when Tenders are floated by the Respondent for different Airports, Claimant would be allowed to participate in the same, subject to its furnishing Bank Guarantee for 50% of the said or alleged dues of the Respondent for that particular Airport. Meaning thereby that whatever amount for any particular Airport is found to be due against the Claimant, only towards licence

fees by the Claimant, Bank Guarantees to the extent of 50% of the same would be furnished by the Claimant. On such furnishing of the Bank Guarantee to the extent of 50% of the alleged dues towards licence fees, Claimant would be permitted to participate in the Tender process. In other words, it would mean that Claimant has furnished “No Objection Certificate” in favour of the Respondent by compliance hereinabove. Thus, Claimant’s Bid shall not be rejected on the ground of not filing of “No Objection Certificate”, by the Claimant. [emphasis supplied]

9. In terms of the above directions, on furnishing of such Bank Guarantees for a particular airport, AAI was to issue an NOC to TDI, which would make it eligible to participate in future tenders for that particular airport. This order is of particular significance, as we shall soon see.

10. Subsequently, in the arbitral hearing which took place on 12th December, 2021, it was decided that final arguments would begin on 5th February, 2022. At that stage, TDI filed yet another application on 18th January, 2022 [*hereinafter*, ‘**the 2022 Application**’] praying for the following interim reliefs for the airport units located at Jammu, Amritsar, Pune, Vadodara and Kolkata:

- A. xx ... xx ... xx
- B. Direct the Respondent to return and release the Bank Guarantee as specified in Para 8 of the present Application;
- C. Alternatively, the Claimant may be relieved of its obligation to renew any such bank guarantee as is mentioned in Para 8 of the present Application;
- D. xx ... xx ... xx”

11. Thus, by way of the 2022 Application, TDI sought to be relieved of its obligation to renew the Bank Guarantees furnished by it in terms of order dated 7th October, 2015. The aforementioned application was strongly opposed by AAI, however, the Arbitral Tribunal, *vide* a consolidated interim order dated 14th March, 2022 (i.e., the Impugned Order) partly allowed the application and directed the return and release of Bank Guarantees furnished by TDI in respect of the aforementioned airport units. Relevant portion of the Impugned

Order is as follows:

“52. In light of the foregoing discussion, the Tribunal deems it fit to allow the Applications of the Claimant for the return and release of the Bank guarantees as specified in Para 13 of this order. This injunction/liberty is granted to the Claimant subject to Claimant providing a combination of Corporate and Personal Guarantee in lieu of the Bank Guarantees, to the extent of the entire amount of the said Bank Guarantees. The Corporate Guarantee is to be in the name of the Claimant and the Personal Guarantee is to be given by the Managing Director of the Claimant. Both the Corporate and Personal Guarantee will cover the entire sum of the said Bank Guarantees. The needful be done within two weeks from the date of this Order. The Order dated 07.10.2015 thus stands modified to this extent.”

12. Though this was a consolidated order, AAI’s grievance in the instant appeal, as noted before, is limited to the Kolkata Airport, as the same falls within the territorial and pecuniary jurisdiction of this Court.

13. For the sake of completeness, it must also be noted that, in compliance of the stipulations made in the Impugned Order, TDI has furnished the requisite Personal and Corporate Bank Guarantees for the Kolkata Airport, both dated 17th March, 2022. The Court is also informed that the arbitral proceedings, as on the date of pronouncement of this judgment, are still at the stage of final adjudication.

APPELLANT’S CONTENTIONS

14. Ms. Padampriya, counsel for AAI, argued as follows:

- a) Irrespective of the nomenclature, the 2022 Application was in the nature of review of the interim order dated 07th October, 2015, and the direction given in the Impugned Order obtained under Section 17 of the Act, amounts to modification/review of the said interim order.
- b) The Arbitral Tribunal itself, having observed in the Impugned Order that the relief as sought for was *‘somewhat peculiar, unusual, strange,*

uncommon, and odd relief’, ought not to have granted it.

- c) In the absence of any enabling provisions under the Arbitration and Conciliation Act, 1996, the Arbitral Tribunal had no power to allow the 2022 Application. On this aspect, she placed reliance on the judgment of this Court in *Delhi Development Authority v. Naveen Kumar*.¹
- d) The Arbitral Tribunal could not have exercised power under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908 for modifying the interim order dated 07th October, 2015.
- e) The Impugned Order is inequitable, incorrect and unfair insofar as the interim order dated 07th October, 2015 had remained in force for nearly six and a half years, and had been complied with by AAI, and therefore, having once reaped the benefit of the said order, TDI could not have been permitted to seek modification of the same as per its own convenience, at the final stage of the arbitral proceedings.
- f) TDI had, on the strength of the interim order dated 07th October, 2015, participated in fresh tenders floated at several airports. But for the said interim order, TDI would not have been permitted to do so, because, as per the policy of AAI, no entity is entitled to be considered for participation in its tenders unless an NOC is submitted by the prospective bidder. Such NOC is to be obtained not only from the concerned airport but from all other airports where a bidder may be executing contracts. In such circumstances, TDI’s submission that it did not bid for any of the five concerned airports in the past or has no

¹ 2017 SCC Online Del 10240.

intent to bid for the same in the future is dishonest, misleading and clearly an afterthought.

- g) Substantial amount of money is involved in the arbitration proceedings and approximately Rs. 21,25,00,000/- is outstanding in respect of the Kolkata Airport, apart from dues claimed for other airports.
- h) The condition of furnishing Bank Guarantee for 50% of the outstanding dues for that particular airport was to safeguard the interest of AAI as well as towards securing AAI's counter-claims.
- i) The financial condition of TDI makes it all the more crucial to secure the amount due towards AAI, and the Personal Guarantees and Corporate Guarantees are not adequate security.
- j) The reasons given by the Sole Arbitrator are erroneous and he could not have relied upon any another award passed inter-se the parties to find *prima facie* case in favour of TDI. Nevertheless, the award relied upon by the Tribunal is also under challenge under Section 34 of the Act.

RESPONDENT'S CONTENTIONS

15. Mr. Ashish Mohan, Counsel for TDI, argued that the Arbitrator did not exercise any power of review at all, and instead merely modified the interim order under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908. The vacation of the interim order dated 07th October, 2015 was sought by TDI in light of a change in circumstances, as the order was causing undue hardship to TDI, and therefore it was well within the powers of the Arbitrator to do so. The Impugned Order was well reasoned and passed upon a careful

consideration of the previous orders, the change in circumstances, and the balance of equities.

ANALYSIS

16. The Court has carefully considered the contentions advanced by the counsel.

17. First, the court will deal with the preliminary objection raised by AAI regarding the validity of the power exercised by the Arbitral Tribunal in passing the Impugned Order. In the opinion of the Court, the Impugned Order is not a review or recall of the earlier interim order. The Court finds merit in the contention of TDI that there is a qualitative difference between the jurisdiction envisaged in a review or recall, as opposed to a vacation/modification as envisaged under Order XXXIX Rule 4 of CPC.

18. The order dated 7th October, 2015, passed in favour of TDI, imposed upon it a condition precedent to participating in future tenders, upon furnishing of Bank Guarantee(s). It cannot be doubted that this reciprocal stipulation was imposed in order to balance the equities and safeguard the interests of AAI.

19. As it transpires in the case of Kolkata Airport, though TDI duly furnished the Bank Guarantee, it never took benefit of the said order as it did not participate in the tender process. Thus, the condition precedent lost its meaning and was no longer applicable. In fact, TDI argues that it has not participated in tenders for the last five years. In such circumstances, it was

entitled to seek vacation of the order dated 07th October, 2015, in view of the change in circumstances as: (i) it was no longer interested in participating in the tenders, and (ii) the order was causing undue hardship to it as it was being constrained to bear bank charges for the Bank Guarantees.

20. There cannot be any dispute on the proposition that change in circumstances and undue hardship are grounds for discharge/modification of an interim order in terms of Order XXXIX Rule 4 of the CPC. Though there is no quarrel on the proposition that the power of substantive review does not vest in an Arbitral Tribunal, however, in the instant case, TDI was not seeking a review, but rather, a discharge/modification of the conditions prescribed in the said interim order, under Section 17 of the Act, in view of the change in circumstances. Thus, in the opinion of the Court, the Arbitral Tribunal was entitled to exercise the said option, having regard to the principles enshrined under Order XXXIX Rule 4 of the CPC. In fact, the Supreme Court has consistently held that while exercising powers under Section 9 of the Act, the Court is guided by the principles set out in Order XXXIX Rule 1 & 2 of the CPC.² Similar views have also been expressed by the High Court of Bombay, holding that the Court or the Arbitral Tribunal, as the case may be, would be guided by principles contained in Order XXXVIII Rule 5 of the CPC.³ Therefore, if, for considering the issue of vacation/ modification of an interim order, the Court or Arbitral Tribunal would be guided by the principles set out in Order XXXIX Rule 1 & 2 or Order XXXVIII Rule 5 of the CPC, for grant of relief, as the situation may require, the Court/ Tribunal can also be guided

² *Adhunik Steels Ltd. v. Orissa Manganese & Minerals Pvt. Ltd.*, AIR (2007) SC 2563.

³ *Nimbus Communication Ltd. v. Board of Control for Cricket in India*, 2012 (4) ARB L.R. 113 (Bom).

by the principles enshrined under Order XXXIX Rule 4 of the CPC.

21. Hence, the Court does not find merit in the contention of AAI that the Impugned Order amounts to review of the earlier order dated 7th October, 2015.

22. As regards the merits of the case, the Court does not find any substance in the contention of AAI that the Impugned Order is inequitable, incorrect or unfair, on the ground that TDI has taken the benefit of the interim order dated 7th October, 2015, and cannot be allowed to press for modification of the order as per its own convenience.

23. Firstly, the circumstances which led to the filing of the 2015 Application need to be examined. TDI, hopeful of getting further business from AAI, was aware of AAI's policy regarding no dues.⁴ It filed an application in order to remove the inability put upon it, which came at the cost of furnishing Bank Guarantees for each airport, which too, TDI readily supplied. Next, it is an admitted position that from the date of passing of the interim order on 07th October, 2015, and till the filing of the 2022 Application, TDI did not participate in any tender floated with respect to the Kolkata Airport and has even made a statement that it has no intention to bid for the same in future. Nonetheless, the Bank Guarantees continued to be retained.

⁴ As per the policy of AAI as mentioned in Clause 4 and 5 of the NIT issued in 2007, no firm or individual having outstanding dues in respect of the any of the airports is eligible to participate in any future tenders; Also as per Clause 2.2.1 (d) of the Request For Proposal issued by the AAI, a prospective bidder is required to confirm that it does not have any outstanding dues in respect any Airport Units of AAI; and also as per the current Commercial Manual, all participating Concessionaires should have nil outstanding dues in respect of all units of AAI.

Since TDI did not participate in the tendering process at the Kolkata Airport even once in the six years since the order dated 07th October, 2015, in the opinion of the Court, the benefit accrued therefrom has indeed outlived its cause and instead become a liability upon TDI. Therefore, the Arbitral Tribunal rightly noted in para 46 of the Impugned Order, that the interim order dated 7th October, 2015 only required TDI to furnish Bank Guarantees qua the airports it wished to participate in; and since it did not eventually participate at all, the Bank Guarantee for the said airport was liable to be returned. The change in circumstances was a germane ground for TDI to seek modification/withdrawal of the said Bank Guarantee. The parties have continued their proceedings for a long period of time and the Tribunal therefore could not have turned a blind eye towards the material change in circumstances, other significant developments, and the current situation faced by TDI. For the foregoing reasons, the direction for replacement of the Bank Guarantee in the Impugned Order warrants no interference.

24. At this juncture, it must also be noted that the entire chronicles in relation to TDI's participation in future tenders is not even the subject matter of adjudication in arbitration. The main dispute between the parties pertains to certain monetary claims arising from the various license agreements executed between the parties. TDI only made such applications before the Arbitral Tribunal which was seized of the matter. These applications, thus, were incidental and ancillary to the arbitration proceedings, though the relief sought, in the opinion of the Court, was beyond the subject matter of arbitration. Nevertheless, at this juncture, when the proceedings have advanced to the stage of final disposal, the Court need not engage on this

aspect any further, except for observing that, since the furnishing of Bank Guarantees by TDI was a condition precedent for issuance of NOC in order to participate in tender process for future contracts, it cannot be held that the bank guarantees have a bearing on the outcome of the arbitration, or are required to be kept alive as security for monies under dispute in the arbitration. In fact, it cannot be ignored that the order dated 7th October, 2015 was passed on an application by TDI, and AAI never filed any application seeking furnishing of a security or any similar protection under Section 17 of the Act. Nonetheless, the Impugned Order adequately balances equities as it directs TDI to furnish Personal and Corporate Guarantees, which sufficiently protects the interest of AAI *qua* the amounts in dispute in arbitration.

25. Though it needs no reiteration, it must also be observed that against an interim order, in an appeal under Section 37(2) of the Act, the Court's jurisdiction is limited, and the Court would not like to substitute its opinion for that of the Arbitral Tribunal, in light of the principles laid down by the Supreme Court in the landmark case of *Wander v. Antox*.⁵

26. In view of the above, the Court finds no ground to interfere with the Impugned Order of the Arbitral Tribunal.

27. Dismissed.

SANJEEV NARULA, J

AUGUST 01, 2022

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⁵ *Wander Ltd. & Ors. v. Antox India P. Ltd.*, 1990 Supp (1) SCC 727.