

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

+ **OMP No.537/2009 (U/s.34 of the Arbitration Act, 1996)**

% **Date of decision: September, 15th, 2009**

M/S. HINDUSTAN TRADING COMPANY Petitioner

Through: Mr. . Parvinder Chauhan, Advocate

Versus

DELHI DEVELOPMENT AUTHORITY ... Respondent

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? No
2. To be referred to the reporter or not? No
3. Whether the judgment should be reported in the Digest? No

RAJIV SAHAI ENDLAW, J.

1 This petition under Section 34 of the Arbitration Act, 1996 is preferred with respect to the arbitral award dated 16th June, 2009 of Mr. Ashok Kumar, Vice Chairman of the DDA dismissing the claims of the petitioner against the respondent DDA.

2 The petitioner was the highest bidder in an auction held by the DDA for allotment of Idle Truck parking site at Timarpur. Pursuant to acceptance of the bid, the petitioner was put into possession of the said parking site and it is the admitted position that the petitioner remained in possession of the same for the term of the license i.e. for three years. It is also the admitted position that the petitioner has paid license fee to the respondent / DDA for the said period of three

years as per its bid. The license deed executed between the parties provided for arbitration.

3 It was the case of the petitioner that the aforesaid parking site had encroachment to the extent of 40% and thus the area available to the petitioner for parking was 40 % less and thus the petitioner became entitled to remission of the license fee. The petitioner from time to time made several representations to the respondent / DDA claiming the said remission or calling upon the DDA to remove the encroachment. Ultimately claim for approximately Rs.40 lacs on account of remission of license fee for a period of three years on the basis of 40% encroachment together with interest on the excess license fee paid, was made. It is the said claim of the petitioner which has been rejected by the arbitrator.

4 The arbitrator has in the award upheld the contention of petitioner that there was an encroachment leading to reduction in parking area available of 37% and which was subsequently on removal of some encroachment reduced to 26.52%. As far as the said finding (i.e. of encroachment of less than 40%) is concerned, the same being a matter of fact is not interfereable in proceedings under Section 34 of the Act. The petitioner also has not seriously challenged the same.

5 The arbitrator has notwithstanding the encroachment declined the claim of the petitioner for the reason, inter alia that the petitioner as per the notice inviting tenders was required to, before making the bid, inspect the site; it was held that the petitioner must have made the bid with knowledge of the encroachment and it was not the case of the petitioner that the encroachment was made after

he had made the bid; the arbitrator further held that even if the encroachment had been made between the date of inviting the bids and date of delivery of possession, the petitioner ought not to have taken possession if had found his bid unviable for the reason of such encroachment. The arbitrator has further held that the petitioner thus must have made the bid as per which the payments have been made, knowing the viability thereof and cannot seek remission of the same. The arbitrator has next held that the petitioner could not be allowed the remission inasmuch as that would amount to subverting the whole process of inviting the bids and the auction. It has been held that if the bid amount was allowed to be reduced as contended by the petitioner, it would tantamount to bestowing an unfair advantage to the petitioner over the other bidders. The arbitrator has lastly held that inspite of the encroachments continuing, after expiry of the term of three years of the petitioner, the license fee bid for subsequent period for the same parking site was nearly double of that being paid by the petitioner. The same was also held to be a ground not entitling the petitioner to any remission.

6 The grievance of the petitioner is as follows. Firstly, it is contended that the arbitrator has not followed the due procedure. It is contended that only one hearing was held and that the response of the respondent / DDA to the claims of the petitioner was not even placed before the arbitrator on the date of the said hearing or supplied to the petitioner; that the petitioner had no opportunity of meeting the said response of the respondent; that in fact the petitioner obtained copy of the same only after the award. It is also contended that the award is exactly the same as the response/comments of the respondent/DDA and which showed non-application of mind on the part of the arbitrator.

7 Secondly, it is contended that the practise of giving remission with respect to such parking sites owing to encroachment is a well established practise; the counsel for the petitioner contends that such remissions have been given in a large number of cases regularly and there are over a hundred orders of the courts granting such remission. Reference is also made in the OMP itself to at least two orders of this court made in writ petitions, though the copies of the said orders have not been supplied. The counsel thus contends that the award is contrary to substantive law.

8 Lastly, it is contended that the award ought to shock the judicial conscience of this court inasmuch as the petitioner has been treated unfairly qua others who have been granted a remission. Reliance in this regard is placed on Paragraph 12 of ***DDA Vs. R.S. Sharma & Co.*** 2008 X AD (SC) 393.

9 As far as the plea of the arbitrator not following the procedure is concerned, Section 19 of the Act permits the arbitrator to determine his own procedure. It is not the case that the parties in the present case had agreed to any procedure which has not been followed by the parties. Though on the basis of the averments made, principles of natural justice appear to have been violated but in the OMP nothing has been stated as to what prejudice has been suffered by the petitioner owing to being not furnished copy of the response of the DDA or no hearing thereon being given to the petitioner. The counsel for the petitioner has during the hearing also not disclosed as what would have been the rejoinder or contention of the petitioner to the reply/response of the DDA or as to how it could have altered the reasoning given in the award without it being pleaded

and established that had opportunity been given, the arbitrator could not have arrived at the findings reached, no ground of deprivation of opportunity or irregularity in procedure can be agitated.

10. The petitioner has not even controverted the finding of the arbitrator of the site remaining encroached and fetching nearly double the license fee after the expiry of the term of the petitioner. Without any prejudice having been shown to have been caused to the petitioner owing to the irregularity in procedure alleged, no case on that ground under Section 34 of the Act is made out. The reasoning given in the award is based on the admitted documents and cannot be faulted with.

11 I have also inquired from the counsel for the petitioner as to whether the area in sq. yds./sq. mts. of the parking site was disclosed in the notice inviting tender. The counsel for the petitioner has fairly stated that though the area was not disclosed but the DDA maintains a register in which the area in square yards/square metres of each parking site is mentioned and since it is the same set of people who usually participate in the bids for the parking sites, they are in the know of the said area and make their bids accordingly. It is also admitted that the encroachment was existing on the date of the making of the bid by the petitioner. The counsel however contends that the respondent being a state, the petitioner expected that the encroachment would be removed at the time of possession else the remission as per practise shall be given. It is further contended that the arbitrator being the Vice Chairman of the DDA itself was aware of the practise and ought not to have made the award in contravention thereof.

12 The arbitrator has made the award in accordance with the contract between the parties and as per which contract the petitioner had agreed to make the payments at the rates made and I find nothing contrary to substantive law of the land, in the award holding the petitioner not entitled to wriggle out of the said contract. The reasoning given by the arbitrator that if the petitioner is permitted to do so it would subvert the auction is also found to be cogent. Even if the petitioner had any expectation that the encroachment shall be removed before the delivery of possession, there is nothing to show that the bid of the petitioner was subject to any such condition or the petitioner prior to taking possession made any such demand on the respondent. The petitioner after entering into possession of the parking site on the basis of the bid, cannot be permitted to wriggle out of the same. Had the petitioner made the said intention known, the respondent could have re-auctioned the site and given equal opportunity to the other bidders also to make a bid with the existing encroachment. Similarly the logic adopted by the arbitrator that as per the terms of the notice inviting tender the petitioner was required to inspect the site is found to be sound.

13 There is yet another aspect of the matter. The petitioner, upon the respondent/DDA not agreeing to reduce the license fee had the option to terminate the contract and walk out of the parking site. The petitioner did not do so. It appears that the bid made by the petitioner was viable and that is why the petitioner allowed the contract to run for its entire length and subsequently wanted refund of nearly half of the license fee paid also.

14 The counsel for the petitioner has lastly urged that the petitioner has been very fair to the respondent in the matter of

paying the license fee as per contract. It is urged that most of the contractors stop paying the license fee on such grounds. However this court in the exercise of jurisdiction under Section 34 cannot enter into such aspects. There is nothing to shock the judicial conscience of this court also. The petitioner with its eyes open had made the bid and carried on business on the terms agreed. It is the petitioner which was by making claims for remission seeking to put the respondent in a disadvantageous position.

14 No ground under Section 34 of the Act for issuance of the notice is made out. Petition is dismissed. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**September 15, 2009
J**