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IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.A. 24/2014

RAIL LAND DEVELOPMENT AUTHORITY Appellant

Through: Mr. Amit Kumar, Mr. Shaurya
Sahay and Mr. Arkin
Kharwanlang, Advocates.

versus

BHAGWATI RAIL INFRA PVT. LTD. Respondent

Through: Mr. Arunav Patnaik and Mr. D.B.
Ray and Ms. Bhabna
Das, Advocates.

WITH

3.

ARB.A. 28/2014

RAIL LAND DEVELOPMENT AUTHORITY Appellant

Through: Mr. Amit Kumar, Mr. Shaurya
Sahay and Mr. Arkin
Kharwanlang, Advocates.

versus

BHAGWATI RAIL INFRA PVT. LTD. Respondent

Through: Mr. Arunav Patnaik and Mr. D. B.
Ray and Ms. Bhabna
Das, Advocates.

AND

4.

ARB.A. 36/2014

BHAGWATI RAIL INFRA PVT. LTD. Appellant

Through: Mr. Arunav Patnaik and Mr. D. B.
Ray and Ms. Bhabna
Das, Advocates.

versus

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RAIL LAND DEVELOPMENT AUTHORITY Respondent
Through: Mr. Amit Kumar, Mr. Shaurya
Sahay and Mr. Arkin
Kharwanlang, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
% **04.02.2015**

1. These are three appeals under Section 37 (2) (b) of the Arbitration and Conciliation Act, 1996 ('Act') directed against the interim orders passed by the Arbitral Tribunal ('AT') i.e. at present adjudicating the disputes between the parties.

2. The Appellant in Arbitration Appeal ('AA') No. 24 of 2014 is Rail Land Development Authority ('RLDA'). The said appeal is against the order dated 5th May 2014 passed by the AT in the application filed by it under Section 17 of the Act. AA No. 28 of 2014 is also by RLDA and is directed against the order dated 19th June 2014 passed by the AT. AA No. 36 of 2014 is filed by Bhagwati Rail Infra Pvt. Ltd. ('BRIPL') and is directed against the impugned interim orders dated 19th June 2014 and 21st October 2014 of the AT on a limited aspect.

3. The background to these appeals is that a Request for Proposal (RFP) was invited by RLDA in October 2010, inviting bids for the development of a Multi-Functional Complex ('MFC') at Jhansi Railway Station. The land area of the site for the development of the MFC was to be leased for 45 years. *Inter alia*, it contained the schedule of payment of the lease premium. A Development Agreement ('DA') was to be signed only after the full payment of the lease premium was

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made by the selected bidder. Alternatively, payment of first instalment of lease premium could be accompanied by bank guarantees ('BGs') for the subsequent instalments. The DA was to be signed for the formation of a Special Purpose Vehicle ('SPV'), full payment of the lease premium or payment of the first instalment and submission of BGs for the second and third instalments, submission of performance bank guarantee (PBG) and the payment of success fees to the consultant etc.

4. BRIPL's bid was accepted and a letter of acceptance was issued by RLDA on 20th January 2011. The first instalment of Rs.2,34,90,000 was to be paid within 60 days thereafter. On 11th October 2011, RLDA wrote to BRIPL stating that the DA could be signed only after the approval by the Railway Ministry or approval of the Cabinet.

5. On 30th March 2012, BRIPL sought return of the BG for the payment of the second and third instalment and the BG towards the interest payable along with the said instalments. It was stated that the BGs would be re-submitted as and when the DA was agreed to be signed. Accordingly the BGs for the second and the third instalments were returned. After RLDA received the relaxation from the Cabinet it advised BRIPL by letter dated 24th August 2012 to re-submit the BGs and enter into the DA. On 22nd January 2013, BRIPL re-submitted the BGs towards the second and third instalment of lease premium along with interest and requested the RLDA to execute the DA and the lease deed. The DA was finally signed on 6th February 2013. The lease agreement was executed and the site was handed over on 25th February 2013.

6. BRIPL filed an OMP No. 277 of 2013 in this Court under Section 9 of the Act seeking a restraint on the encashment of the BGs by RLDA. On 18th March 2013 the Court granted status quo as against the encashment of the BGs.

7. Subsequently by an order dated 27th November 2013, after noting that the AT had already fixed a hearing, the Court requested the AT to hear and dispose of O.M.P. No. 277 of 2013 by treating it an application under Section 17 of the Act. It was ordered that pending the disposal of the application, the interim order would continue to operate. The AT was given the liberty to vacate or modify or affirm or even extend the scope of the interim order in accordance with law.

8. Meanwhile by letter dated 30th December 2013, upon exercise of the right under Clause 25.3.2 of the DA, RLDA terminated the DA on the ground that BRIPL had not paid the second instalment of the lease premium and interest thereon and failed to rectify the payment default within 180 days. BRIPL was directed to hand over the possession of the site to the officials of the RLDA on 3rd January 2014.

9. Following the above termination, BRIPL filed OMP No. 23 of 2014 in this Court. On 6th January 2014, this Court passed an order to the effect that RLDA would not dispossess BRIPL till such orders that may be passed by the AT in that regard subject to BRIPL depositing the second instalment of Rs.3,13,20,000 within a period of 90 days in three monthly instalments, the first instalment of Rs.1 crore being deposited by 31st January 2014, the second instalment of Rs.1 crore to be deposited by 28th February 2014 and the balance amount by 31st March

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2014. The AT was asked to consider OMP No. 23 of 2014 also as an application under Section 17 of the Act and passed necessary orders.

10. Aggrieved by the above order RLDA filed FAO (OS) 82 of 2014. The Division Bench passed an order on 16th April 2014 noting that the AT had already heard the application under Section 17 of the Act. It was observed that any party aggrieved by the order of the AT could file an appeal under Section 37(2) (b) of the Act.

11. As regards OMP No. 277 of 2013 concerning the stay of encashment of the BGs, the AT passed an order on 5th May 2014 observing that BRIPL had made out a *prima facie* case in its favour. There was a serious doubt about the commencement of the timelines. The question whether the demand for payment conformed to the DA was yet to be determined. In any event, the BGs furnished were valid till 31st July and 31st October 2014. Accordingly, the AT confirmed the interim order passed by the High Court and stayed the encashment of the BG for Rs.2,34,90,000 for the third instalment together with interest on the second and third instalment till the disposal of the arbitral proceedings subject to the BRIPL keeping the BGs alive during the pendency of the arbitral proceedings. Aggrieved by the stay order dated 5th May 2014, RLDA has filed Arb. A. No. 24 of 2014.

12. BRIPL had also filed OMP No. 277 of 2013 in this Court for a direction to RLDA to suspend the running of the timelines under the DA till such time the competent authority approved the development plans and permit BRIPL to continue the construction of the MPC pending resolution of the issues in order to prevent the inordinate delay

in executing the contract. By an order dated 27th November 2013, in OMP No. 772 of 2013, the Court permitted the stay application also to be placed before the AT and requested the AT to treat it as an application under Section 17 of the Act and dispose it of. The interim order passed by the Court in the said OMP No. 277 of 2013 on 18th March 2014 was directed to continue to operate till then.

13. The AT took up the said application OMP No. 277 of 2013 at its hearings held on 11th, 17th and 19th June 2014. Before the AT, BRIPL proposed a workable solution for early functioning of the MFC. BRIPL had submitted plans on 8th March 2013 within the admissible period of 90 days as per the DA. After protracted correspondence between the parties, two issues remained unresolved. These issues related to set backs as per the local bye laws and difference of opinion on 'built up' and 'other area' within the meaning of Clause 6.2 of the DA. Both parties requested the AT to decide the said issues.

14. OMP No. 772 of 2013 was disposed of by the AT by 2:1 majority by the impugned order dated 19th June 2014 which has been challenged by the RLDA in Arb. A. No. 28 of 2014. A majority of the AT comprising of Mr. S.P. Mehta, learned Presiding Arbitrator and Mr. Chander Prakash, Co-Arbitrator held as under:

“(a) From the total constructed area (Section 1.1.10) the areas of atrium and lifts are to be deducted to arrive at the built up area within the meaning of permissible built up area u/s 6.2 of DA. If the claimant wishes to construct two levels of basements for the purpose of exclusive parking and service buildings, he can do so.

(b) The claimant should submit the architectural plans with

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all the requisite i.e. the GA plans, elevations, sections, etc. as per DA. The submission by claimant and approval by respondent should be done as per the time table set out in Order Sheet No. 22 dt. 24.5.14.

(c) On the approval of the architectural plans, the claimant should submit expeditiously the structural plans duly certified about the adequacy of the design from a qualified Structural Engineer.”

15. An application for clarification was filed before the AT by BRIPL on 23rd September 2014 seeking review of para 25.8 (a) of the order dated 19th June 2014 since the calculation of 'built-up area' as held by the majority of the AT had major financial ramifications of crores of rupees. By an order dated 21st October 2014, the AT dismissed the said application after noting the preliminary objection of RLDA that the AT's order dated 19th June 2014 had already been challenged by RLDA before this Court in Arb. A. No. 28 of 2014. The AT in the same order observed that it was unable to appreciate RLDA's submission that the plans should be in conformity with the local bye laws “when the same need not be applicable to Railway operational buildings as confirmed by the Development Authority, Jhansi itself.”

16. The third Arbitrator Mr. M.R. Garg gave a dissenting note holding as under:

“From the total constructed area (section 1.1.10) the areas mentioned in Other Areas, section 1.1.65 as specified in Para 11.1.e (i to viii) are to be deducted to arrive at the Built Up Area within the meaning of permissible Built Up Area under section 6.2 of the agreement.”

17. Aggrieved by the orders dated 19th June 2014 and 21st October 2014

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of the AT to the extent that it decided the issue of “built up area and other areas” and in so far as it held that local bye laws would be followed, BRIPL has filed Arb. A. No. 36 of 2014.

18. This Court has heard the submissions of Mr. Amit Kumar, learned counsel for the RLDA and Mr. Arunav Patnaik, learned counsel for the BRIPL.

19. Taking up first for consideration Arb.A. No. 24 of 2014 against the impugned order dated 5th May 2014 passed by the AT in OMP No. 277 of 2013, the Court finds that the AT has for detailed reasons given in the said order confirmed the stay order passed by the High Court and stayed the encashment of the BG for the third instalment and BG for the interest on the second and third instalments. RLDA has been unable to make out grounds to challenge the said order. With many of the contentious issues yet to be finally adjudicated by the AT, permitting RLDA to encash the BGs at this stage would indeed cause irretrievable injustice to the BRIPL. The impugned order staying the encashment of the BGs subject to BRIPL keeping them alive during the pendency of the arbitral proceedings is also consistent with the principle of balance of convenience which at this stage is in favour of BRIPL. Consequently, there is no merit in Arb. A. No. 24 of 2013 and it is dismissed as such.

20. As far as Arb. A. No. 28 of 2014 is concerned, the grievance of the RLDA is that the AT failed to appreciate that the BRIPL had not submitted the development plans as per the DA. Consequently according to RLDA, the AT erred in holding that the set backs
Arb. A. Nos. 24 of 2014, 28 of 2014 & 36 of 2014

proposed by the BRIPL were in order. As per the plan submitted by BRIPL, the set back at the rear of the building was 1.95 m and 2.45 m in the front whereas the local bye laws mandated 6 m set back both in the front and 3 m set back on the remaining sides of the building of a height up to 10.5 meters. It is further submitted that the AT also erred in holding that the area of atrium which had to be deducted to arrive at the built up area within the meaning of permissible built up area. This was contrary to the local bye laws which did not permit provision of atrium in buildings having less than 4,000 sq.m. area. It has been pointed out that BRIPL was permitted to construct only 2400 sq.m. built up area.

21. BRIPL is also aggrieved by the interim order dated 19th June 2014 of the AT and its reiteration by the subsequent order dated 21st October 2014 to the extent that it holds that in addition to the undisputed items of the carpet area, balconies and passage, the items of staircases, corridors all in the main building (excluding the basement) are to be considered part of the built up area. The contention of the BRIPL is that in terms of the DA the "other areas" can also be let out to third parties on licence basis to generate short term revenues. Going by the impugned order of the AT, there would be no "other areas" at all and this would take away from BRIPL the option of revenue generation. BRIPL relied on the dissenting note of third Member, Mr. M.R. Garg who has held that the other area 'section 1.1.65' is to be deducted from the total construction area to arrive at the build up area.

22. One issue that has arisen in both appeals is whether the local bye laws apply and to what extent. As noted by the AT in its order dated
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21st October 2014, the Jhansi Development Authority had itself confirmed that the local bye laws need not apply to Railway operational buildings. Section 1.1.10 of the DA defines 'Built up area' as under:

"Built up area is the total constructed area under roof on a given piece of land which shall include carpet area, thickness of walls, balconies, staircases, corridors, passages, but shall not include area under basement if the basement is solely intended for parking use and areas for provision of electrical and mechanical building services such as lifts, generator, air conditioning plant, power sub-station."

23. Section 1.1.65 of the DA defines 'other area' as under:

"Other area" shall mean and include the basement, terrace, common space (both covered and open), atrium, corridors (both covered and open), drive way, outer facade, inner walls, elevator doors, stair cases, green areas, car parking spaces, tatum poles, signage area, etc. and also any other open or covered spaces within the site which is not covered in the definition of Built up area."

24. It was contended by BRIPL that "staircases, corridors and walls" were appearing in both the definitions. The AT noted Section 1.2.13 of the DA which states that the rule of interpretation which requires that an agreement be interpreted against the person or party drafting it shall have no application in the case of the DA. The AT has analysed the two questions and come to the conclusion that it is possible to have staircases, corridors and walls even in the 'other area'. The definition of 'built up' area in Section 1.1.10 was unambiguous and consistent with the trade practice whereby staircases, corridors and thickness of walls were also considered as part of built up/super area. The AT went by Section 28 (3) of the Act which stipulates that the AT should decided in terms of the contract and "take into account the usage of the trade

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applicable to the transaction.” It was accordingly concluded that the built up area for the purposes of Section 6.2 of the DA was to be calculated on the basis of the Section 1.1.10 of the DA. Lifts and atrium were to be excluded from the built up area as they were not specifically included in the definition of the ‘built up area’. However undisputed items like the carpet area, balconies, passage, items of staircases, corridors and thickness of walls in the main building (excluding the basement) were to be considered as part of the ‘built up’ area.

25. The Court is unable to find any error in the above analysis of the clauses of the contract by the AT or its reasoning and conclusion on the issues of built up area and other area.

26. On the issue of set-backs, the Court finds that these were based on practical considerations. The AT invited the Architect of BRIPL to give its expert opinion in the matter. It was on that basis that the running of timelines under Clause 7 of the agreement was directed to remain suspended. The AT concluded that the set outs proposed by BRIPL were in order.

27. The Court finds that again the AT has adopted a reasonable approach after inviting the views of the experts on the issue of set-backs. The AT has also found that the local bye laws were not applicable to Railways operational buildings. If the set-backs were to be in terms of local bye laws, it would reduce the width of the building considerably. Moreover, the Development Authority in Jhansi by a letter dated 31st May 2013 addressed to BRIPL confirmed that the local bye laws did not apply to Railways operational buildings. Therefore,

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the AT found it desirable to have a minimum practicable set back in the front and rear of the building. However for the sides of the building, the set-backs could be more than the minimum shown in the local bye laws. The AT passed the impugned order to the above effect on 19th June 2014 since that approach was accepted by both parties.

28. On the issue of set-backs again this Court does not find any grounds made out for interference. The Court also does not find any error in the impugned order to the extent that the timelines in Clause 7 have been suspended. Considering that the entire project has been delayed and the technical issues are being worked out by the AT in hearings, the AT was in the best position to take a call on this aspect as well.

29. The only part that now remains to be considered is whether the decision of the AT that local bye laws for construction of buildings would be followed "as applicable to commercial complex." It is seen that the AT has consistently held in the order dated 19th June 2014 and the subsequent order dated 21st October 2014 that the local bye laws need not apply to Railway operational buildings. It is observed in the order dated 19th June 2014 that local bye laws for construction of buildings as applicable to commercial complex would be followed, has to be understood in the context of ensuring that the best practice in this regard is followed. Wherever the local bye laws provide a higher and better standard in terms of safety requirements, then such standards would be followed.

30. The Court would like to emphasise that the AT is again in the best position to determine whether for a particular aspect of the

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construction, the trade practice as indicated in the National Building Code or any other such document would ensure a better quality and a higher safety standard than the local bye laws. Where the local bye laws offer a better standard, then that should be followed. Since the members of the AT are also technically qualified, they would be in a best position to determine the issue.

31. Subject to the above observations, the Court finds no grounds having been made out for interfering with the orders dated 19th June 2014 and 21st October 2014 of the AT. The appeals are disposed of.



S. MURALIDHAR, J.

FEBRUARY 04, 2015

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