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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB. A. (COMM.) 27/2016 & IA 10786/ 2016

DIVINE INFRACON PRIVATE LIMITED

..... Petitioner

Through: Mr. Anil Sapra, Senior Advocate with
Mr. Datar, Ms. Nivedita Sharma, Ms. Suruchi Mital
Mr. Tushar Roy, Advocates.

versus

DELHI DEVELOPMENT AUTHORITY

..... Respondent

Through: Mr. Ajay Verma, Senior Standing
counsel with Mr. Vaibhav Mishra, Advocate

CORAM: JUSTICE S.MURALIDHAR

ORDER

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05.10.2016

1. A preliminary objection has been raised by the Respondent Delhi Development Authority ('DDA') to the maintainability of this appeal against the impugned order dated 17th March 2016 passed by the learned Arbitrator.
2. Mr. Ajay Verma, learned Senior standing counsel for the DDA refers to Section 37(2) of the Arbitration and Conciliation Act, 1996 ('Act') and submits that the impugned order does not partake the character of appealable order "accepting the plea referred to in sub-section (2) of sub-section (3) of Section 16" or "granting or refusing to grant an interim measure under Section 17."
3. At this stage, it is necessary to advert to the few facts. An allotment-cum-demand letter was issued on 4th January 2008 by the DDA in favour of the

Appellant in respect of its bid for Plot No. 4, Sector 13, Dwarka, City Centre, Delhi admeasuring 15,367 sq. m with the Appellant having been the successful bidder for the said plot. As part of the terms and conditions of the said allotment, bank guarantees for a sum of Rs. 12.60 crores was furnished by the Appellant. The Appellant was to complete the construction of a hotel on the said plot within 24 months of the allotment. The fact of the matter is that the said condition could not be complied with. For the purposes of the present order, it is not necessary to examine the contention of the Appellant that its failure to comply with the condition was on account of the DDA failing to comply with its obligations. According to the Appellant, it ran up huge losses as a result.

4. There is an arbitration clause pursuant to which a petition was filed under Section 9 of the Arbitration & Conciliation Act, 1996 ('Act') before this Court by the Appellant being OMP No. 421 of 2010 seeking to restrain the DDA from encashing the performance bank guarantee ('PBG') which was issued in its favour. An interim order was passed on 31st July 2010, restraining the DDA from encashing the said PBG subject to the Appellant keeping it alive. The matter was then referred to the arbitration by a sole Arbitrator.

5. As is evident from the impugned order dated 17th March 2016, in the arbitral proceedings, an order was passed on 22nd October 2013 in an application filed by the Appellant under Section 17 of the Act, restraining the DDA from encashing the PBG. Subject to the final outcome of the arbitral proceedings the PBG was kept alive. It was directed that breach of

the aforementioned condition would result in automatic vacation of the order.

6. Admittedly, the PBG expired on 27th March 2015 and was not renewed by the Appellant. When this came to the notice of the Tribunal on 16th October 2015, it directed the Appellant to renew the BG within two weeks “failing which consequences shall follow”. Admittedly, the Appellant was unable to renew the BG. The Appellant then presented an application seeking recall of the aforementioned order dated 16th October 2015, explaining that it was unable to comply with the said order since the bank which issued the BG had declared the Appellant’s account as a non-performing asset and had issued notice under Section 13(2) of the SARFAESI Act, 2002 on 2nd March 2015.

7. In the course of the dealing with the said application, the learned Arbitrator passed the impugned order whereby he was “constrained to terminate the proceedings qua the claim”. The learned Arbitrator took a view that a Claimant who was in breach of the conditions of the order passed by the Arbitral Tribunal cannot be permitted to prosecute its claim and that the Act does not place any restrictions on the power of the Tribunal “to pass appropriate orders in the event of violation of its orders by a party, who enjoyed the protection and benefit thereunder”.

8. The Court is not proposing to deal with the merits of the impugned order or the correctness of the above determination. First the Court proposes to examine if the impugned order is one that could be appealed against under Section 37 of the Act.

9. Mr. Anil Sapra, learned Senior counsel appearing for the Appellant, does not dispute that the impugned order is not one which is appealable under Section 37(1) (a) (b) or (c) of the Act. He seeks to bring the impugned order within the ambit of Section 37(2) (a), which provides that an appeal shall lie from an order of the Tribunal “ accepting the plea referred to in sub-section (2) or sub section (3) of Section 16”.

10. Section 16(2) of the Act refers to “a plea that the arbitral tribunal does not have jurisdiction”. It envisages such a plea being raised “not later than the submission of the statement of defence”. Section 16(3) of the Act refers to a plea “the arbitral tribunal is exceeding the scope of its authority”. Again Section 16(3) envisages such a plea being raised “as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings”. Mr. Sapra submits that from the impugned order it is apparent that such a plea was in fact raised by the Appellant during the course of the arbitral proceedings and was rejected by the learned Arbitrator.

11. Even assuming that the Appellant has raised such a plea what the learned Arbitrator in fact did was to reject such a plea and not “accept it”. Section 37(2) (a) provides for an appeal only where the Tribunal accepts “the plea referred to in sub-section (2) or sub section (3) of Section 16”. Mr . Sapra then urged that the words “accepting the plea” should be read as subsuming the words “refusing the plea”. The legislative intent is unambiguous. The Court is precluded from the reading into the words “accepting the plea”, words that convey the exact opposite meaning and still preserve the legislative intent.

12. In that view of the matter, the Court is unable to agree with Mr. Sapra that the impugned order is one which answers the description of an order as envisaged by Section 37(2) (a) of the Act. The net result is that the present appeal is not maintainable under Section 37 of the Act.

13. Mr. Sapra then urges that the Appellant cannot be without a remedy. According to him, the impugned order terminating the entire claim of the Appellant, should be treated as a final Award in which case the Appellant can challenge it under Section 34 of the Act. Mr. Ajay Verma, learned counsel for the DDA, however, refutes the above submission. As according to him, the Appellant would have to wait till a final award is passed on the counter claim of the DDA, which is still pending before the learned Arbitrator.

14. The Court does not propose to express any opinion on the above submissions other than observing that as and when such a plea is raised by the Appellant before the appropriate Court, it will be considered in accordance with law. The appeal is disposed of in the above terms.

S.MURALIDHAR, J

OCTOBER 05, 2016

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