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

\+ FAO(OS) (COMM) 141/2016

M/S SI3D SYSTEMS PVT LTD & ANR

..... Appellants

Represented by: Mr.Gaurav Ghosh and Mr.P.Sinha, Advs.

versus

TECHNOLOGY DEVELOPMENT BOARD

..... Respondent

Represented by: None

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE YOGESH KHANNA

ORDER

% **16.12.2016**

CM No.46348/2016

Allowed subject to just exceptions.

CM No.46349/2016

For the reasons stated in the application 28 days' delay in filing the appeal is condoned.

FAO(OS) (COMM) 141/2016

1. Two points have been urged in the objections filed under Section 34 of the Arbitration and Conciliation Act, 1996 to the award dated May 20, 2016 passed by Justice M.A.Khan (Retired), the Sole Arbitrator.

2. The first point urged was regarding arbitability of the dispute.

3. This issue has been succinctly noted and dealt with by the learned

Single Judge in paragraphs 16 to 18 of the impugned order. The paragraphs read as under :

> *"16. In order to address the controversy as to whether the disputes raised by TDB were arbitrable – it is necessary to refer to the arbitration clause, the relevant extract of which reads as under:-*
>
> > *"11.1 If any dispute or difference arises between the Parties hereto as to the rights or liabilities or any claim or demand of any Party against other or to the construction, interpretation, effect and implication of any provision of this Agreement or in regard to any matter under these presents but excluding any matters, decisions or determination of which is expressly provided for in this Agreement, such disputes or differences shall be referred to the sole arbitration of the Chairperson, Technology Development Board or that of his nominee and the decision of such arbitrator shall be conclusive and binding on the Parties hereto. ....."*
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> *17. It is apparent from the above that any matter, the determination of which is expressly provided for under the Loan Agreement would be outside the scope of arbitration. Thus, the issue to be addressed is whether the Loan Agreement provides for determination of the matters relating to the disbursement of the loan and/or recalling of the loan; and whether in terms of the Loan Agreement, such determination is final and binding on the parties. According to SSPL, the said disputes are within the scope of the determination by the monitoring committee - in this case PEMC - in terms of clause 4.5 of the Loan Agreement. The said clause reads as under:-*
>
> > *"4.5 The decision of the Monitoring Committee/Board regarding successful completion or failure of the project shall be final and binding on the Borrower.*

18. In my view, the contention that the disputes raised by TDB were covered under the aforesaid clause (clause No.4.5 of the Loan Agreement) is devoid of any merits. First of all, the report dated 14.04.2014 submitted by PEMC is a report as to the evaluation of the project and the same cannot be read as a decision regarding successful completion or failure of the project as contemplated under clause 4.5 of the Loan Agreement. Secondly, PEMC had merely made a recommendation as to the further disbursal of loan and it was for TDB to take a decision on it; the said report is in the nature of a recommendation and not a decision. More importantly, it is not within the scope of powers of the monitoring committee to disburse or recall loans."

4. In view of the arbitration clause noted by the learned Single Judge in paragraph 16 of the impugned order, the view taken in paragraphs 17 and 18 cannot be faulted with. We concur with the reasoning.

5. The second issue dealt with by the learned Single Judge concerns diversion of part of loan amount given by the respondent to the appellant to mobilise itself to complete the tendered works. The loan agreement was executed between the parties on October 29, 2013 requiring the respondent to, in four instalments, disburse ₹4 crore to the appellant. A supplementary agreement was thereafter executed on January 02, 2014 reducing the loan to ₹3 crores as also the repayment schedule. Concededly loan in sum of ₹1.2 crores was disbursed. It transpired that the appellant had some financial issues with its banker : Indian Overseas Bank and had made payment in sum of ₹37.5 lakhs to the bank. The respondent alleged breach of contract on the plea that the loan amount was strictly for execution of the tendered works and

could not be diverted to Indian Overseas Bank; even in part. The learned Arbitrator has returned a finding that said sum had been diverted to the bank and not utilised for the purposes of the work.

6. Learned Single judge has held that this is a finding of fact returned by the learned Arbitrator and therefore would be immune from challenge under Section 34 of the Arbitration and Conciliation Act, 1996.

7. The case of the appellant is that the said finding of fact stands in sans any evidence.

8. We have perused the statement of the defence and counter claim filed by the appellant and we find, albeit with a sugar coating, that there are admissions that ₹37.5 lakhs was paid over to the Indian Overseas Bank. Thus, sugar coated admissions are to be found in paragraph 10.1.1 (page 146 of the appeal paper book) and paragraph 11 (page 149 of the appeal paper book). We concur with the view taken by the learned Single Judge that within the scope of Section 34 of the Arbitration and Conciliation Act, 1996, the award which was sought to be impugned does not warrant any interference by the Court.

9. The appeal is dismissed in limine.

<u>CM No.46347/2016</u>

Dismissed as infructuous.

PRADEEP NANDRAJOG, J

YOGESH KHANNA, J

DECEMBER 16, 2016
VLD