$~35

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

\+ O.M.P. (COMM) 180/2017 and IA No. 4242/2017

DELHI STATE INDUSTRIAL & INFRASTRUCTURE DEVELOPMENT CORPORATION LTD. ..... Petitioner

Through: Mr Moni Cinmoy, Advocate.

versus

A.K. BUILDERS ..... Respondent

Through

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **11.04.2017**

<u>VIBHU BAKHRU, J</u>

<u>IA No. 4243/2017</u>

1. Exemption is allowed, subject to all just exceptions.

2. The application stands disposed of.

<u>O.M.P. (COMM) 180/2017 and IA No. 4242/2017</u>

3. Delhi State Industrial & Infrastructure Development Corporation Ltd. (DSIIDC) has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') assailing an arbitral award dated 30.11.2016 (hereafter 'the impugned award') passed by the sole arbitrator, Sh. K.K. Varma. By the impugned award, the Arbitral Tribunal has awarded an aggregate sum of ₹1,04,48,327/- plus *pendente lite* interest at the rate of 9% per annum on a sum of ₹85,26,145/- (amount awarded against claim Nos. 1 and 2) from 04.10.2013 up to the date of award in

favour of the respondent (hereafter 'AKB'). The Arbitral Tribunal has also awarded post award interest at the rate of 10% per annum till the date of payment, if the awarded sum was not paid within a period of three months from the date of the award. The counter claims made by DSIIDC were rejected.

4. The impugned award was rendered in the context of the disputes that had arisen between the parties in relation to a contract for execution of certain development works awarded to AKB. AKB suspended the works as DSIIDC had failed to make the payment against bills raised by it. AKB claimed that DSIIDC had breached the agreement and had failed to perform its obligations. DSIIDC disputed the above and claimed that the performance of the contract was delayed solely for the reasons attributable to AKB. According to DSIIDC, it was also entitled to damages as provided under the contract.

5. Briefly stated, the relevant facts necessary to address the controversy are as under:-

6. DSIIDC invited tenders for the work of "*development works in Unauthorized Colonies S.H: Construction of Roads & SW Drains at Mustafabad Extn. (Balance Work)*" (hereafter 'the works'). AKB bid for the same and its bid was accepted. AKB also submitted a performance bank guarantee for an amount of ₹24,24,000/- under the cover of its letter dated 30.01.2012 and was awarded the contract for execution of the works on the same date by issuance of the Letter of Commencement dated 31.01.2012.

7. The consideration for the works to be executed was fixed at

₹4,84,75,842/- and the same were to be completed within a period of 12 months, that is, on or before 30.01.2013.

8. Admittedly, there were delays in execution of the works and the same could not be completed. AKB suspended the work on 27.06.2013. DSIIDC issued a show cause notice on 12.03.2014 and thereafter, rescinded the contract by its letter dated 25.03.2014. According to DSIIDC, AKB had failed to perform its contractual obligations and the execution of the works was delayed due to negligence on AKB's part. AKB disputed the above and claimed that the works could not be completed due to several breaches on the part of DSIIDC, including due to withholding of the payments and non-release of funds.

9. In reply to the show cause notice, AKB claimed that a sum of ₹1,85,96,665/- was payable for the work done and due but not paid by DSIIDC. Since DSIIDC was not satisfied with the reply to the show cause notice, it terminated the contract by its letter dated 25.03.2014.

10. In view of the above disputes, AKB invoked the arbitration clause and the Chief Engineer of DSIIDC referred the disputes to the sole arbitrator. AKB alleged that DSIIDC had breached the terms of the contract and the works were delayed for the following reasons: "*i) Clear site on which work was to be executed. There was no terms stipulated in the contract to give piece meal site (ii) Timely decisions by the respondent. (iii) Removal of all hindrances (iv) To make the payments of work as executed and of extra items within time and regularly.*"

11. AKB made the following claims:-

SR. NO.	PARTICULARS	AMOUNTS RS.
(i)	Towards non-payment of running bills which became final bill after repudiation of contract	1,83,46,665/-
(ii)	Towards refund of earnest money	7,86,946/-
(iii)	Towards in fructuous expenses relating to idle labour, staff, equipments and machinery.	50,90,000/-
(iv)	Loss of profit/business loss 15% of Rs.2,40,21,177/-	36,03,177/-
(v)	Interest on Sr. No. 1 and 2 from the date, the amount became due till actual payment but calculated up to 31.12.2013 at 18% per annum	38,39,577/-
(vi)	Interest on Bank Guarantee paid to Bank	1,45,400/-
(vii)	Payment of IOC at IOCA-	15,50,000/-
	Total amount	3,33,61,765/-

12. AKB also claimed refund of the performance bank guarantee alongwith further interest at the rate of 18% per annum. DSIIDC also made counter claims for a sum of ₹45,43,882/-which included liquidated damages under clauses 2 & 3 of the agreement and other recoveries alongwith interest at the rate of 18% per annum.

13. DSIIDC contested the claims on several grounds including that the

Arbitral Tribunal had no jurisdiction to adjudicate the claims as the process for escalating the claims/disputes to arbitration, in terms clause 25 of the agreement, had not been followed. The Arbitral Tribunal noted that although admittedly the works were being performed for a period of 17 months - that is, from the date of commencement of 31.01.2012 up to the date of suspension of work on 27.06.2012 - only one *adhoc* payment of ₹61,08,000/- was made on 03.08.2012. While accepting the aforesaid payment, AKB had also pointed out that another bill for a sum of ₹84,83,076/- had been submitted and was pending clearance. The Arbitral Tribunal called for certain records of DSIIDC relating to its proposal to release the second *adhoc* payment and found that as per the record maintained by DSIIDC, work of the value of ₹1,24,53,222/- had been completed up to 17.09.2013 and thus, concluded that at the time of suspension of works on 27.06.2013, payment for more than 50% of the work physically done, had not been made. The Arbitral Tribunal also noted that DSIIDC was not making payment on the basis running account bills. After examining the material available on record, the Arbitral Tribunal concluded that DSIIDC had failed to perform its contractual obligations by not making payments from time to time for the works done by AKB and was solely responsible for the delay in execution of the works. It was also observed that DSIIDC had rescinded the contract in order to mask its own failure for not making the running account payments for the work done.

14. The Arbitral Tribunal awarded a sum of ₹77,39,199/- against Claim No.1 after adjusting a sum of ₹61,08,000/-, admittedly received by AKB as the first and only *adhoc* payment.

15. Since the Arbitral Tribunal had concluded that DSIIDC was solely responsible for the delay in the execution of the works, it had also directed refund of earnest money of ₹7,86,946/- appropriated by DSIIDC.

16. The Arbitral Tribunal rejected AKB's claim for expenses relating to idle labour, staff, equipment and machinery for the sum of ₹50,90,000/-. It accepted the claim for loss of profits on account of unexecuted portion of the work at the rate of 5%, which was computed at ₹17,31,432/-.

Submissions

17. Mr Moni Cinmoy, the learned counsel appearing on behalf of DSIIDC advanced arguments to assail the impugned award essentially on four fronts. First, he contended that the Arbitral Tribunal had enhanced the rate of fees after 11 hearings and this amounted to change of rules in the midst of the proceedings without DSIIDC's consent, which was not permissible.

18. Second, he contended that the Arbitral Tribunal had no jurisdiction to proceed as in terms of clause 25 of the agreement, AKB had to first approach the specified officers of DSIIDC for resolution of the disputes failing which the same would be escalated for adjudication by the sole arbitrator. He further submitted that although an arbitrator was appointed, however, the disputes were subject to arbitrability and since, there had been no attempt to resolve the disputes with the concerned officers, such disputes were not arbitrable.

19. Third, he submitted that the Arbitral Tribunal had accepted that DSIIDC could make payments only on the basis of the test certificates

issued by Sri Ram Institute for Industrial Research (hereafter 'SIIR') and yet had proceeded to award claims for which such certificates were not available.

20. Fourth, that the award for profits for the unexecuted portion of the works, was palpably erroneous and unsustainable as AKB had abandoned the works.

Reasoning and conclusion

21. The contention that the Arbitral Tribunal had changed the rules of procedure during the course of the arbitral proceedings and, consequently, the amount awarded is liable to be set aside, is plainly unsustainable. The Arbitral Tribunal had found that DSIIDC had accepted the fee structure as laid down by NHAI in the Circular dated 13.01.2010 and, accordingly, enhanced the fees based on the aforesaid circular. Plainly, such enhancement has no material bearing on the subject disputes referred to arbitration. In certain cases, the courts found that change of rules of procedure had worked to the disadvantage of a particular party and, consequently, had set aside the award on such ground. The principle that an arbitrator cannot change the rules of procedure during the course of the proceedings is only to ensure that each party is given an equal and fair opportunity to present its case and no party is put at disadvantage. In the present case, enhancement of fees did not, in any manner, preclude DSIIDC from advancing its case. It is correct that in terms of Section 34(2)(a)(v) of the Act, an arbitral award is also liable to be set aside if the arbitral procedure is not in accordance with the agreement between the parties.

However, the reference to arbitral procedure relates to the procedure adopted for adjudication of the disputes; a relatively insignificant change in the quantum of fees cannot, obviously, be considered as a part of arbitral procedure for adjudication of the disputes, non-adherence of which would render the arbitral award susceptible to challenge under Section 34(2)(a)(v) of the Act.

22. The contention that the Arbitral Tribunal had no jurisdiction to adjudicate the disputes is also not persuasive. AKB had sent a letter indicating its disputes and invoking the arbitration clause. By a letter dated 02.12.2013, the Chief Engineer, DSIIDC had appointed the sole arbitrator to decide and make an award regarding the claims/disputes raised by AKB subject to "*their admissibility under clause 25 of the above said agreement*". The reference to admissibility of claims is clearly in reference to whether the disputes are arbitrable. It is obvious that the reference to admissibility of disputes was only to clarify that the matters, which fell outside the scope of reference were not referred and the appointment of arbitrator ought not to be construed to mean that DSIIDC had agreed to refer such disputes to arbitration. In the event DSIIDC was of the view that an attempt to resolve the disputes by the concerned authorities ought to be made before referring the same to arbitration, it was always open for DSIIDC to indicate the same and decline referring the disputes to arbitration. In the aforesaid circumstances, the Arbitral Tribunal had considered the above and had held as under:-

> "21. Keeping in view the facts and circumstances, it is held that the appointing authority consciously waived the drill laid down in clause 25 before appointing arbitrator.

> Accordingly, the objection raised by the respondent on the jurisdiction of the arbitrator is rejected and as per sub-section (5) of section 16 of the Act, the AT proceeds to adjudicate the claims and make the award."

23. This Court finds no infirmity with the above view that would warrant any interference in these proceedings.

24. The contention that there is an intrinsic contradiction in the amount awarded inasmuch as the Arbitral Tribunal has awarded the claim for the work done which was not supported by SIIR certificates, is also unmerited.

25. AKB had made a claim of ₹1,83,46,665/- (Claim No.1) for work done but not paid. AKB claimed that it had done the work for the value of ₹2,44,54,665/- and after adjusting the amount of ₹61,08,000/- received from DSIIDC, a sum of ₹1,83,46,665/- was due. The said amount was at variance with the DSIIDC's proposal for second *adhoc* payment, which indicated that the work to the value of ₹1,24,53,222/- had been done. The gross value of work done as per measurements certified by SIIR was only ₹96,51,208/-. The Arbitral Tribunal found that the final bill as claimed by AKB of ₹2,44,54,665/- was split into the following components:

"[A]	Value of work done as per the Test Certificates - issued by SIIR. [Col. A of statement dated 26.06.2015]	Rs.1,18,91,413
[B]	Value of work disallowed by DSIIDC. [Col. B of statement dated 26.06.2015]	-Rs.16,58,471/-
[C]	Value of the work considered substandard by DSIIDC. (Col. C of statement dated 26.06.2015]	-Rs.30,62,806

[D]	Value of work for which measurements have been signed by the claimant and the respondent and also by the representative of SIIR but corresponding Test Certificates of SIIR are not on record. [Col. D of statement dated 26.06.2015]	- Rs.51,31,550
[E]	Value of work for which Test Certificates of SIIR are not on record [Col. E of statement dated 26.06.2015]	-Rs.34,76,874
[F]	Value of work of extra item Nos. 3 to 9 for which Test Certificates of SIIR are not on record. [Col. F of statement dated 26.06.2015]"	-Rs.39,54,713

26. Components [B] and [C] was included in Component [A].

27. As against the sum of ₹1,18,91,413/- [Component A] as claimed by AKB, the Arbitral Tribunal awarded a sum of ₹1,17,79,281/- as it was found that the said claim included two extra items of a value of ₹3,52,826/- against which the Arbitral Tribunal held that AKB was entitled only to ₹2,40,694/- (₹2,07,706/- plus 32,988/-).

28. The Arbitral Tribunal sustained the aforesaid claim for the work done principally on the basis that the measurement of work done was certified by SIIR and found that the reduction by DSIIDC was arbitrary and unexplained.

29. The Arbitral Tribunal also awarded a sum of ₹20,67,918/- for work done but for which SIIR certificates were not on record. The said amounts were computed on the basis of the measurements that were jointly signed by AKB, representatives of SIIR and DSIIDC; but the test certificates for the

same were not on record. The claim for work done, the measurements of which were not jointly signed, were rejected. Accordingly, the Arbitral Tribunal awarded a sum of ₹77,39,199/- against Claim No.1 after adjusting a sum of ₹61,08,000/- admittedly received by AKB as the first and only *adhoc* payment.

30. Although, it is not disputed that test certificates from SIIR were necessary for making payments, the onus to procure the said certificates did not rest with AKB alone. The Arbitral Tribunal had found that since the measurements had been singed jointly by representatives of AKB, representatives of SIIR as well as DSIIDC, it was established that, in fact, AKB had performed the work. In such circumstances, payments for the work done by AKB could not be denied only on the ground that test certificates were not available on record. This court does not find any infirmity with this approach; surely, AKB is entitled to be paid for the work done.

31. Lastly, this Court is also not persuaded to interfere with the amount awarded on the ground that the Arbitral Tribunal has awarded loss of profit on the unexecuted portion of the contract. The Arbitral Tribunal had concluded that DSIIDC was in breach of the contract and was responsible for non-completion of the works. In view of this finding, AKB would be entitled to loss of profits. The Arbitral Tribunal had taken note of a circular, which had fixed the profit component at 7.5% of the contract value and had further reduced the same in view of the averments made by AKB.

32. It is also relevant to note that Mr Moni Cinmoy did not challenge the

quantum of profits ascertained by the Arbitral Tribunal (5% of unexecuted component of the work of ₹3,46,28,643/- worked out at ₹17,31,432/-). The award of loss of profits was contested on the ground that no such award could be made as AKB had abandoned the work. The said contention is unmerited since the Arbitral Tribunal had found that DSIIDC was in breach of the contract and was responsible for the delay and non-completion of the works. The aforesaid findings are based on material on record and are also informed by reason. It is well settled that an arbitral tribunal is the final adjudicator of facts and unless such finding is found to be perverse, no interference would be warranted (See: ***Associate Builders v. Delhi Development Authority***: **(2015) 3 SCC 49**). Thus, this Court finds no reason to interfere with the aforesaid findings. Plainly, in view of the finding that DSIIDC had breached the contract and was responsible for the same not being completed, AKB would be entitled to loss of profits on the un-executed component of the work.

33. In view of the above, the petition and the pending application are dismissed.

VIBHU BAKHRU, J

APRIL 11, 2017
RK