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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **O.M.P. 1137/2014**

DELHI STATE INDUSTRIAL DEVELOPMENT CORPORATION LTD. ..... Petitioner
Through: Ms. Biji Rajesh, Mr. Yashwardhan Pratap Singh and Mr. Gaurang Kanth, Advocates.

versus

INTEGRATED TECHNO SYSTEM (P) LTD. ..... Respondent
Through: Mr. S.N. Singh and Mr. Vijay Kumar, Advocates.

CORAM: JUSTICE S. MURALIDHAR

O R D E R
% **13.02.2017**

1. The Delhi State Industrial Development Corporation Ltd. ('DSIDC') has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') against Integrated Techno System (P) Ltd. challenging an Award dated 10th May 2014 passed by the sole Arbitrator in the disputes that arose between the parties.

2. By the impugned Award, Claim Nos. 1 to 7 and 10 of the Respondent were allowed in the sum of Rs.35,70,872. The counter-claims of DSIDC were rejected. Aggrieved by the Award in respect of the above Claim Nos. 1 to 7 and 10, the present petition has been filed by DSIDC. In other words, it has chosen not to question the impugned Award insofar as it rejected

DSIDC's counter claims.

3. The background facts are that an agreement was entered into between the parties on 14th February 2001 whereby the Respondent was awarded by the DSIDC the work of setting out layout plan and handing over physical possession of the plots for relocation of industries project at Udyog Vihar, Bawana, Delhi. The stipulated date of start and work was 18th February 2001 and the date of completion was 17th December 2002. The work could not be completed within the stipulated time. The Respondent, therefore, requested DSIDC for foreclosing the contract by invoking Clause 13 thereof. The Respondent also issued a 'No Claim Certificate' by a letter dated 29th April 2004.

4. According to DSIDC, the Respondent raised its final bill on 7th June 2004 and this was paid in full on 10th June 2004. On 6th October 2004, the Respondent sent to DSIDC a legal demand notice for a sum of Rs.20,87,570. DSIDC rejected the said demand on the ground that it was filed beyond 120 days of payment of the final bill. An appeal was filed by the Respondent against the above rejection to the Chief Engineer of DSIDC by a letter dated 2nd December 2004. The Respondent also wrote to the Chief Engineer by letter dated 12th January 2005 requesting him to refer the disputes to arbitration.

5. By a letter dated 10th May 2005, the Managing Director of DSIDC referred the disputes to arbitration in terms of Clause 25 of the agreement. As already noted while Claim Nos. 1 to 7 and 10 of the Respondent were allowed in part by the sole Arbitrator, DSIDC's counter claims were

rejected.

6. Claim No. 1 was regarding short payment in the physical area against agreement Item No.1 and Claim No.2 was for extra amount for carrying out land survey work of the entire area on larger scale; the detailed survey work of western Yamuna Canal, pumping stations and gas pipe line points of GAIL in the area on different scales for the purposes of finalisation of the layout plan. The sum claimed under Claim No.1 was Rs.5,57,847. According to the Respondent, the measurement was to be taken in terms of Clause 6 of the agreement, jointly by the parties. Instead DSIDC made the revenue record as the basis of the measurement and payment was also made on that basis. According to DSIDC, the total area handed over by the concerned revenue department was 1903.29 acres and after deducting an area of 160.43 which was under Master Plan ('MP') roads, the net area of 1742.86 acres was handed over to the Respondent. On the other hand, the Respondent contended that the contract was an item rate contract under Standard Form-8. The revenue record was an extraneous document which could not be made the basis of the measurement. The only method that could form the basis of the payment was Clause 6 i.e. joint measurement. The Respondent also submitted a road layout plan, topographical survey plan, and the superimposed survey plan.

7. It was noted by the learned Arbitrator that while answering Question No. 126, the sole witness of the DSIDC (RW-1) undertook to produce a copy of the completed plan but did not do so on the ground that it was not traceable. In his cross-examination, RW-1 while answering Question No. 158

volunteered that lay out plan submitted by the DSIDC indicated the outer boundaries of the whole complex, sectors and their clusters whereas the completion plan submitted by the Respondent "was showing in addition to aforesaid the demarcation of the plots." The sole Arbitrator also noted that there were two well established and recognised methods for calculating the area based on the completion drawings. One was by using the computer and the other by calculating the area by arithmetical calculations. The learned Arbitrator also noted that the Respondent had submitted manual arithmetical calculations of the entire area of sectors 1 to 5 on the basis of the completion plan. The sole Arbitrator then noted that "the quantities of area has been worked out by both these methods are the same."

8. The Respondent gave details about the areas under the MP roads to the extent of 160.43 acres and further areas i.e. 314.28 minus 160.43= 153.85 acres. It was admitted before the sole Arbitrator that DSIDC had not paid for the areas under the MP roads and for further areas under the Bawana Escape Western Yamuna Canal area. It was sought to be explained that the letter dated 4th February 2001 given by the Respondent was on the understanding that the demarcation of the MP roads was completed and presumed to be correct. However, this turned out to be a misrepresentation by DSIDC.

9. Importantly, when specifically asked whether the aforementioned letter dated 4th February 2001 was obtained from the Respondent through coercion, no direct answer was given by the witness appearing for DSIDC. The learned Arbitrator has specifically adverted to the answer given in response to the Question No. 105 on this aspect. There was sufficient

evidence to show that the lay out plan given at the beginning by the DSIDC was wrong and was revised later on the basis of the survey plan prepared by the Respondent.

10. As regards other areas, Exhibit C-126 to C-131 which were copies of the measurement books along with the running account bills as paid to the Respondent for various sectors proved that "demarcation of all the above areas have been actually done by the claimant and running account payments were made to the claimants." The actual quantity of work executed under Item No.1, measured in terms of Clause 6 of the contract from the proved/accepted completion plan worked out to be 2057.14 acres. What was paid for by DSIDC in view of the final bill was for 1742.86 acres. Thus the shortfall worked out as 314.28 acres. After deducting the area under the MP roads, the balance area worked out to 153.85 acres.

11. The learned Arbitrator has rejected the contention of DSIDC that the revenue record should form the basis of the payment. The letter dated 4th February 2001 obtained from the Respondent lost its sanctity once it was established that Respondent had carried out the work under Item No.1 for the area under the MP roads. There was no basis for denying payment to the Respondent.

12. The above is a factual finding by the learned Arbitrator based on the evidence placed on record. Although Ms. Biji Rajesh, learned counsel appearing for the DSIDC sought to find fault with the impugned Award in respect of Claim Nos. 1 and 2, the Court finds that she is unable to show any finding which could be said to be contrary to the record or the evidence led

by the parties or in any manner perverse or shocking to the judicial conscience. The Court finds the analysis of Claim No.1 by the learned Arbitrator is a thoroughgoing one and cannot be said to be opposed to the public policy of India, which is one of the grounds of invalidation under Section 34 (2)(b)(ii) of the Act.

13. Likewise, even in respect of Claim No.2, the learned Arbitrator examined in detail the Item No.1 of the Schedule of Quantities ('SOQ'). The fact that there were inaccuracies and mismatch in the lay out plan given out by DSIDC was also noted by the sole Arbitrator. Further the Respondent placed on record superimposed plan of the layout plan over the survey plan so as to highlight the material discrepancies/factual errors in the lay out. The cross-examination of the Respondent's witness CW-1 brought out a fact that no written orders were given by DSIDC to carry out the entire survey work. The consequent finding of the learned Arbitrator was that "the claimant has carried out the survey works and submitted its plans non-gratuitously and the respondent has taken its advantage and thus the respondent is liable to make payments to the claimant." The learned Arbitrator has given a detailed explanation for why he came to the conclusion that the rate of Rs.571.30 per acre for an area of 2052.45 acres and Rs.1775 per acre for the area of 4.69 acres was reasonable and legitimate. Consequently, the learned Arbitrator determined the amount payable under Claim No.2 to be Rs.11,80,875.

14. Here again the finding has been purely factual and there is nothing in the impugned Award which has been shown to be perverse or shocking to the judicial conscience.

15. Claim No.3 was for short payment against handing over of the plots. Reference is made by the learned Arbitrator to Item No.2 of the SOQ along with conditions 9, 10 and 12. It was found that the Respondent in fact had completed its three obligations of (i) demarcation of plots (ii) handing over of physical possession of plots to owner and (iii) fixing of demarcation stones at sites in case they are not available while handing over the plots. The fulfilment of the above obligations by the Respondent was found to be evident from the certificates recorded by the DSIDC itself. Further Exhibits C-65 showed that the record of handing over and taking over of the plots was to remain in the custody of the DSIDC. The records already showed that on an average 140 plots were handed over in a single day. The learned Arbitrator also noted the contents of the completion certificate recorded in the measurement book, the certificate given on the body of the final bill and another certificate which showed that the Respondent had carried out the terms of the contract even after the lapse of defect liability period of one year. All measurements, dimensions, locations of the plot should be taken to be corrected since nothing was brought to the notice of the sole Arbitrator to the contrary. Significantly the learned Arbitrator also found that DSIDC has "failed to contest the claim of the claimant and prove its case that at any stage after the Claimant has handed over the plots to the respondent and/or even after actual completion of the work and/or before the expiry of defect liability period and/or while handing over physical possession of the plots to its allottees, either the allottees or the respondent itself has found that the fixing of the demarcation stone was not proper." On the contrary the evidence showed that the handing over of the plots to the individual allottees

went off very smoothly and in an expeditious manner.

16. As regards the letter dated 29th April 2004 whereby the Respondent sought foreclosure and gave an undertaking of not raising any claim, the learned Arbitrator noted that the work was actually completed on 10th November 2003. The completion certificate recorded in the Measurement Book, and the final bill along with the certificate of satisfactory completion issued by DSIDC on 17th June 2004 did not show that the Respondent had abandoned the work or that it was foreclosed. The said plea of the DSIDC was, therefore, rejected.

17. With the Respondent having performed all its obligations, it was held entitled for payment of 13702 plots at Rs.75 per plot under Item No.2 of the Clause which worked out to Rs.10,27,650.

18. This again is a purely factual finding and on going through the documents already placed on record before the learned Arbitrator in light of the submissions made by learned counsel for DSIDC, the Court is unable to hold that the reasoning and analysis of the learned Arbitrator leading to the above factual finding suffers from any legal infirmity.

19. Claim No.4 was for compensation for undue prolongation in execution of agreement Item No.1 and Claim No.5 was for compensation against agreement item No.2 for prolongation. Under Claim No.4 a sum of Rs.6,36,000 and under Claim No.5 a sum of Rs.3,96,000 was sought. The question was whether the prolongation was for the reasons that were attributable to the Respondent as claimed by the DSIDC.

20. The learned Arbitrator examined the completion certificate as recorded in the measurement book which showed that extension of time was granted without levy of compensation which implied that the reasons for the prolongation were attributable to DSIDC and that there was no lapse on the part of the Respondent herein. This was particularly significant since the contract provided for liquidated damages leviable in the event of undue prolongation by the Contractor. After considering the entire factual matrix, the learned Arbitrator came to the conclusion that the period of delay worked out to 10.76 months and the reasons were attributable to the DSIDC. As regards the quantum, the learned Arbitrator has awarded only Rs.2,25,580 against both Claims 4 and 5 as against Rs.10,32,000 claimed by the Respondent. The learned Arbitrator has followed the Hudson Formula in arriving at the above figure.

21. The Court is unable to discern any error committed by the learned Arbitrator in either the analysis or the reasoning or with the conclusion arrived at. Nothing has been shown to the Court which persuades it to hold that this part of the Award is opposed to the fundamental policy of Indian law.

22. Claim No.6 was for non-payment under the escalation clause. A sum of Rs.4,48,600 was claimed by providing the details for the calculation under Clause 10CC of the contract. According to DSIDC, the tender did not contain Clause 10CC as it stood deleted under Schedule C and this clause was never renewed between the parties. Further it was contended that except black Japan paint, wooden pegs were required to be arranged by the

Respondent for which no bill has been raised as required. It was pointed out that final bill was accepted by the Respondent without resolution. The learned Arbitrator found that there was a correction slip neatly typed and inserted as an additional sheet between pages 28 and 29 which provided for Clause 10CC. The details submitted by the Respondent were very carefully analysed by the learned Arbitrator. Although the amount to which the Respondent was entitled worked out to be a higher figure, since what was claimed was much less the learned Arbitrator awarded the said amount i.e. Rs.4,48,600.

23. In the present petition nothing is stated about the above factual finding. The other finding of the Arbitrator was that there was an insertion between the two pages of the contract making Clause 10CC applicable. Nothing is also said about the documents submitted by the Respondent which have been analysed in detail by the learned Arbitrator. In short no ground is made out for any interference with the Award in respect of Claim No.6.

24. Claim No.7 was for payment towards revision of drawings for Sector 5 in the sum of Rs.1,30,320. The case of the Respondent was that although the entire work of Item No.1 as per the approved lay out plan was completed, DSIDC revised the lay out plan for Sector 5 on 3rd September 2003 requiring the claimant to redo the work under Item No.1 for an area of 73.42 acres. The sum for the said expenditure as per the agreed rate worked out to Rs.1,30,320. The case of the DSIDC was that there was no area under Sector 5 which was redone by the Respondent. The internal noting in the file dated 2nd February 2005 is relied upon. Further while accepting the payments

against the running bills no objection was raised by the Respondent.

25. The said noting was examined by the learned Arbitrator. This was, however, much after the work had been completed. It was noted that DSIDC did not produce any cogent evidence to rebut the documents produced by the Respondent which showed that the area re-executed under Sector 5 was 73.42 acres. The learned Arbitrator examined the certificates recorded in the final bill, the completion certificate recorded in the measurement book and the fact of release of the security deposit to the Respondent at the expiry of the plan which went to show that the Respondent had carried out the work in true letter and spirit. Consequently, the claim was allowed.

26. The only argument sought to be advanced is that the Respondent did not raise any objection while accepting payments on the running bills. This has been discussed by the learned Arbitrator and it been concluded that the Respondent in fact owed the sum for the extra work. The Court is not persuaded to hold that the learned Arbitrator erred in allowing the above claim.

27. Claim No.10 was for the interest pre-claim, *pendente lite* and future. The learned Arbitrator awarded simple interest @ 15% per annum on Claims 1, 2, 3 and 7 from 26th May 2004 which was the date on which the cause of action arose according to the learned Arbitrator. As regards Claim Nos. 4 and 5 simple interest was awarded @ 15% per annum from 8th July 2005 till the date of the Award. Future interest was awarded at 18% simple interest from the date of the Award till the date of payment and too only if the award amount was not paid within three months.

28. The above award of interest is consistent with the claims and the accepted practice. There is nothing in the impugned Award that can attract any of the grounds under Section 34 of the Act.

29. No grounds have been made out for interference with the impugned Award. The petition is dismissed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

FEBRUARY 13, 2017
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