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

+ **FAO(OS) (COMM) 116/2017 and CM Nos.19882-83/2017**

**DELHI STATE INDUSTRIAL & INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD** Appellant
Through : Ms. Anusuya Salwan with
Ms. Nikita Salwan, Advocates.

versus

A K BUILDERS Respondent
Through : None.

**CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE DEEPA SHARMA**

ORDER
% **01.08.2017**

1. The appellant/DSIIDC is aggrieved by the judgment dated 11.4.2017, passed by the learned Single Judge in OMP (COMM) 180/2017, whereunder its petition filed under Section 34 of The Arbitration & Conciliation Act, 1996 (hereafter referred to as “A&C Act”), assailing an arbitral award dated 30.11.2016, passed by the Sole Arbitrator, has been dismissed.
2. A glance, at the relevant facts of the case are considered necessary before dealing with the submissions made by learned counsel for the appellant/DSIIDC.
3. The appellant awarded the work of development in unauthorized colonies at Mustafabad Extension to the respondent/contractor and the site was handed over on 6.2.2012. It is the appellant's version that the

respondent had failed to commence the work at the expected pace and due to the delay in the execution of the work, the appellant was constrained to grant provisional extensions from time to time. On account of the alleged breach of the agreement on the part of the respondent, the appellant issued a notice to show cause dated 12.3.2014, calling upon it to state as to why should action not be taken against it due to the said breach. The respondent duly submitted a reply vide letter dated 20.3.2014. Not satisfied with the said reply, the appellant issued a letter dated 3.4.2014, calling upon the respondent to pay compensation, quantified at Rs.48,47,584/-. Aggrieved by the said action of the appellant, the respondent invoked the arbitration clause governing the parties and vide letter dated 02.12.2013, the appellant informed the respondent that a Sole Arbitrator was appointed to adjudicate the disputes between the parties.

4. The Sole Arbitrator passed an award on 30.11.2016, whereunder a sum of Rs.1,04,48,327/- was awarded in favour of the respondent/contractor along with *pendente lite* interest @ 9% p.a. on a sum of Rs.85,26,145/- (against claim no. 1 & 2), with effect from 04.10.2013, till the date of the award. Future interest was also awarded @10% p.a. However, the counter claim preferred by the appellant/DSI IDC before the learned Sole Arbitrator was rejected in entirety.

5. The arbitral award dated 30.11.2016 was challenged by the appellant/DSI IDC in a petition under Section 34 of the A&C Act, registered as OMP (COMM) 180/2017. By the impugned judgment dated 11.4.2017, the said challenge was turned down and the learned Single Judge upheld the award. Aggrieved by the said decision, the appellant/DSI IDC has filed the present appeal.

6. Though, several pleas have been taken in the appeal to assail the impugned judgment, Ms. Anusuya Salwan, learned counsel for the appellant has confined the challenge to the impugned judgment on two counts. Firstly, on the ground that the learned Single Judge has failed to appreciate that the Sole Arbitrator had erred in allowing certain claims of the respondent/contractor for which, no test certificates were available and secondly, on the ground that the plea of the appellant that awarding of profits in favour of the respondent for the unexecuted portion of the work, ought to have been upheld for the reasons that the respondent was at fault having abandoned the work midway.

7. Coming to the first plea raised by the counsel for the appellant that the impugned judgment has erroneously upheld the impugned award, directing release of payment in favour of the respondent despite the absence of test certificates from the named Agency, Sri Ram Institute of Industrial Research (in short “**SIIR**”), as stipulated in clause No.11 of the General Specification and Special Conditions of the contract and once there was no dispute that the test certificates were a prerequisite for making payments, in their absence, no amount could have been awarded in favour of the respondent/contractor in terms of the claims referred by it for arbitration.

8. For considering the aforesaid argument, we can do no better than reproduce the observation made by the learned Single Judge on this aspect:-

“25. AKB had made a claim of Rs.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 Rs.2,44,54,665/- and after adjusting the amount of Rs.61,08,000/- received from DSIIDC, a sum of Rs.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 Rs.1,24,53,222/- had been done. The gross value of

work done as per measurements certified by SIIR was only Rs.96,51,208/-. The Arbitral Tribunal found that the final bill as claimed by AKB of Rs.2,44,54,665/- was split into the following components:

"[A] Value of work done as per the Test Certificates - Rs.1,18,91,413 issued by SIIR. [Col. A of statement dated 26.06.2015]

[B] Value of work disallowed by DSIIDC. -Rs.16,58,471/- [Col. B of statement dated 26.06.2015]

[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 - Rs.51,31,550 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]

[E] Value of work for which Test Certificates -Rs.34,76,874 of SIIR are not on record [Col. E of statement dated 26.06.2015]

[F] Value of work of extra item Nos. 3 to 9 for -Rs.39,54,713 which Test Certificates of SIIR are not on record. [Col. F of statement dated 26.06.2015]"

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

27. As against the sum of Rs.1,18,91,413/- [Component A] as claimed by AKB, the Arbitral Tribunal awarded a sum of Rs.1,17,79,281/- as it was found that the said claim included two extra items of a value of Rs.3,52,826/- against which the Arbitral Tribunal held that AKB was entitled only to Rs.2,40,694/- (Rs.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 Rs.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 Rs.77,39,199/- against Claim No.1 after adjusting a sum of Rs.61,08,000/- admittedly received by AKB as the first and only adhoc payment.” (emphasis added)

9. It is apparent from the above that the Arbitral Tribunal had upheld the claims preferred by the respondent for the work done primarily on the basis of the measurement of the said work that was signed jointly by the representatives of the appellant, the respondent and SIIR.

10. Much emphasis has been laid by learned counsel for the appellant on the observations made by the Arbitral Tribunal in para 33 of the award to the effect that *“the claimant (respondent herein) is entitled to the payment for the quantified work done for which test certificates were issued by SIIR are on record”*. We may note that after establishing the value of work done for which the measurements were signed by the appellant, the respondent as also by the representative of SIIR, the learned Sole Arbitrator held that the quantities of work done in respect of the Agreement item Nos.1,2,3 and 4 and extra item No.1 were payable on the ground that the respondent cannot be blamed for the non-availability of the test certificates on the record, since it was the appellant/DSI IDC who had appointed SIIR as a certifying agency, and it was equally required to explain the reason for the absence of the test certificates.

11. Therefore, based on the measurements signed by the representatives of all the three parties, the Sole Arbitrator had proceeded to award a sum of Rs.77,39,199/- in favour of the respondent against claim No.1, after adjusting the amount already received by it. We find no infirmity in the aforesaid findings returned in the arbitral award that have been upheld by

the learned Single Judge. Once it stood established that the respondent had executed the work, non-availability of the test certificates could not be a valid ground to decline the payment due to it, particularly when it is an undisputed position that the measurements had been endorsed by all the three parties namely, the appellant, the respondent and the SIIR. The aforesaid yardstick adopted by the Sole Arbitrator for awarding amounts in favour of the respondent for work done by it in respect of claim No.1, has been rightly upheld by the learned Single Judge. Therefore the challenge laid by the appellant on this aspect is turned down.

12. Coming to the second argument advanced by learned counsel for the appellant to assail the impugned judgement which is that the learned Single Judge has failed to take note of the inherent flaw in the reasoning of the Sole Arbitrator while awarding an amount of Rs.17,31,432/- in favour of the respondent under claim No.4, it is pertinent to note that the aforesaid amount has been awarded to compensate the respondent/contractor for the loss of profits suffered by it for the unexecuted portion of the contract. We are not persuaded by the submissions made by learned counsel for the appellant that it was the respondent who chose not to complete the work for which action had to be initiated against it and therefore a party guilty of breach of action, cannot claim a premium for its non-performance.

13. On the contrary, we are inclined to concur with the findings returned in the impugned judgment to the effect that once the learned Sole Arbitrator had arrived at the conclusion that the appellant/DSI IDC was in breach of the contract and responsible for non-completion of the work, a natural corollary thereto would be the respondent's right to claim loss of profits. This was a finding based on the facts of the case which does not warrant any

interference in appeal. For assessing the loss of profits suffered by the respondent, reliance has been placed by the Sole Arbitrator on a Circular dated 08.6.2009 issued by the Directorate General of Works, CPWD that has fixed the profit component at 7.5 % of the contract value and thereafter, he has reduced the same on taking note of the submissions made by the respondent.

14. We may emphasize that in its wisdom, the legislature has conceived the A&C Act in such a manner that the higher a party goes up the jurisdictional pyramid, the more scope of the appeal gets constricted. It is beyond any cavil that the Arbitral Tribunal is the master of facts and the grounds for setting aside of an arbitral award are fairly narrow. Interference in an award is called for on very limited grounds as for example, when the decision is so perverse and irrational that no reasonable person would have arrived at the same or the findings returned are based on no evidence or in circumstances that are irrelevant to the decision. If the vital evidence has been completely overlooked, then also the said decision could be termed as perverse. But a plausible view taken by the Arbitral Tribunal on facts, as in the present case, would not be open to interference in an appeal. As long as the award is based on some evidence and the approach adopted by the Arbitral Tribunal is not found to be arbitrary or capricious, the court will forbear from intervening.

15. As expounded by the Supreme Court in the case of Associate Builders vs. Delhi Development Authority reported as **(2015) 3 SCC 49**, once it can be concluded that the Arbitral Tribunal has adopted a judicial approach and adhered to the principles of justice and morality, and the said decision cannot be termed as perverse or contrary to the interest of the country, the

courts should refrain from meddling with the arbitral award.

16. In the instant case, mindful of the aforesaid parameters while examining the impugned award, the learned Single Judge has rightly observed that the Sole Arbitrator had found on facts that the appellant/DSI IDC was in breach of the contract and was responsible for the delay and non-completion of work. The aforesaid findings of the Arbitral Tribunal are premised on the material placed before it and backed by reasoning. Despite the same, for our satisfaction, we have perused the findings returned by the Sole Arbitrator in respect of claim No. 4 preferred by the respondent, for seeking loss of profit in business and we find that same has been discussed at some length at paras 49.1-49.4 of the impugned award. The reasons given for holding that a quantified sum was payable by the appellant to the respondent towards loss of profit, are based on the fact position placed before the Sole Arbitrator and in our opinion, do not warrant any interference.

17. As a result, the impugned judgment dated 11.4.2017 is upheld and the present appeal is dismissed in *limine*, as being meritless, along with the pending application.

HIMA KOHLI, J

DEEPA SHARMA, J

AUGUST 01, 2017
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