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

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Judgment delivered on: 01.09.2017

+ O.M.P. (COMM) 320/2017

SH. RAM KALA

..... Petitioner

versus

DELHI DEVELOPMENT AUTHORITY

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Anil Gera and Vimish Mittal, Advs.

For the Respondents : Mr. Pawan Mathur, Standing Counsel for DDA

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

I.A.No.9701/2017

In view of the judgment of the Division Bench in **DDA vs. DURGA CONSTRUCTION** 2013(139) DRJ 133 (Del) (DB) and the averments made in the application, the delay in refiling is condoned.

The application is disposed of

O.M.P. (COMM) 320/2017

1. The petitioner by way of the present petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as

‘the Act’) impugns the award dated 16th February, 2017.

2. By award dated 16th February, 2017 the Arbitrator has awarded as under:-

6.0 Summary of award

S.No.	Description of claim/counter claims	Amount of claim	Award
1.	Refund/Remission @ 70% of the licence fee for the license period of 36 months in respect of non-operational/ not- handed over area of the parking site.	Rs.94,52,520.00	NIL
2.	Loss of income due to inaction on part of respondent to hand over the entire parking site & not removing the obstructions @ Rs.25,000/- per day for the contract period.	Rs.2, 73,75,000.00	NIL
3.	Refund of 3 months advance as the earnest money.	Rs.11,25,300.00	NIL
4.	Expenses incurred on creating repair works and infrastructure necessary for running the parking site.	Rs.3,00,000.00	NIL
5.	Compensation for mental agony/ torture/ harassment/ hardship suffered by the claimant due to inaction and non-redressal of bonafide requests of the claimant.	Rs.5,00,000.00	NIL
6.	Estimated litigation expenses excluding the arbitrators fee (incurred and expected)	Rs.1 ,30,000.00	NIL
7.	Pre-Reference, pendent-elite & future interest @ 18% per annum on the total claimed amount till the realization of the claim.	---	NIL
	Total	Rs.3,88,82,820.00	

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	COUNTER CLAIM		
1.	<i>The respondent claims that the acts of the claimant Shri Ram Kala is not depositing the license fees as per the License Agreement was wrong, malafide, illegal, unjustified and against the terms of the said license agreement.</i>	---	<i>Awarded</i>
2.	<i>The respondent claims that the claimant Shri Ram Kala is liable to pay the complete and proper monthly license fees as per the aforesaid license agreement till he uses the parking site and does not hand over the vacant physical possession thereof to the Respondent.</i>		<i>Awarded</i>
3.	<i>The Respondent claims a sum of Rs.79,51,133/- (Rupees seventy nine lacs fifty one thousand one hundred thirty three only) as arrears of license fees accumulated till 30th April, 2015.</i>	<i>Rs.79,51,133.00</i>	<i>Rs.79,51,133.00</i>
4.	<i>The Respondent claims a sum of Rs.14,12,486/- (Rupees fourteen lacs twelve thousand four hundred eight six only) as interest @ 15% per annum calculated separately on each delayed payment of the license fees, till 31st March, 2015.</i>	<i>Rs.14,12,486.00</i>	<i>Rs.14,12,486.00</i>
5.	<i>The Respondent states that Claimant Shri Ram Kala is liable to pay and shall pay to Respondent DDA service charge@ 2% on the entire license fees calculated from the very inception of the license</i>	<i>Service charge @ 2% on licence fee payable.</i>	<i>Allowed on the actual amount of licence fee.</i>

	<i>deed.</i>		
6.	<i>The Respondent submits that Claimant Shri Ram Kala is liable to pay to the Respondent DDA and shall pay a sum of Rs.5,200/- (Rupees five thousand two hundred only) towards the bill of the expenses incurred by the Respondent in getting the parking site clean and providing the lights etc.</i>	<i>Rs.5,200/-</i>	<i>Rs.5,200/-</i>
7.	<i>Award that Claimant Shri Ram Kala is liable to pay to the Respondent DDA pendent-lite interest @ 15% per annum on the aforesaid sum of Rs.93,63,619/- (Rupees Ninety Three lacs sixty three thousand six hundred nineteen only) from the date of the filing of the claim till the award is passed.</i>		<i>Pendent-lite interest @15% PA awarded on the outstanding licence fee of Rs.79,51,133/-</i>
8.	<i>Award that Claimant Shri Ram Kala is liable to pay and shall pay to the Respondent DDA future interest @ 15% per annum from the date of award till the same is actually paid.</i>		<i>The future interest @ 15% is awarded with effect from the date of sixty days after the publishing of this award.</i>
9.	<i>Cost of present proceedings be awarded in favour of the Respondent and against the Petitioner/Claimant</i>		<i>No cost.</i>

3. The respondent/DDA had invited tenders for grant of licence for collecting parking charges and for running parking sites for DDA on a monthly licence basis.

4. The petitioner submitted his bid for the parking situated in the premises of Bhikaji Cama Bhawan/Bhikaji Cama Place. Petitioner was declared successful being the highest bidder for the same.

5. Allotment letter was issued to the petitioner on 15th October, 2012. Consequent on the allotment of the parking site, the petitioner deposited the security deposit and the advance licence fee. Licence Deed was executed in favour of the petitioner of the parking site on 29th October, 2012.

6. On 30th December, 2012, the petitioner issued a letter to the respondent contending that there was flowing water, waste material and garbage in the allotted parking site on account of which only 30% of the parking area was available for carrying out parking operation. Petitioner requested the respondent to clear the parking site.

7. As per the petitioner, respondent failed to clear the parking site on account of which the petitioner was constrained to file a petition under Section 9 of the Act. It is contended that in the said petition under Section 9 the respondent/DDA agreed to have the parking site cleared. Despite the same, it is contended, the respondent/DDA failed to have the parking site cleared and the petitioner accordingly could not utilize more than 30% of the allotted area for parking operation.

8. The petitioner invoked arbitration and filed its claim, inter alia, for refund of the 70% of the licence fee, loss of income etc.

9. The respondent/DDA filed its counter claim inter alia for the recovery of arrears of the licence fee which the petitioner withheld on the ground of not being able to use entire area for parking operation.

10. The contention of respondent/DDA before the Arbitral Tribunal was that the notice inviting tender clearly stipulated that before submitting the bid the tenderor may inspect the site and satisfy himself about the location, area and its business prospects. Further, it was stipulated that parking site is being tendered on “as is where is” basis and the tenderor was presumed to have inspected the parking site and familiarized herself/himself with the prevailing conditions prior to submitting the bid.

11. It was also specifically stated that no claim/dispute about the condition/capacity of the parking site shall be entertained by DDA.

12. It was further contention of the DDA that the tender conditions specifically stipulated that the arrangement for maintaining the parking site in a state of repair and lighting of the parking site etc. are to be made by the licensee at his own costs.

13. The Arbitrator after noticing the contentions of the parties has specifically examined the tender conditions.

14. The Arbitrator in his award has noticed and relied upon the general conditions as contained in the Notice Inviting Tender more particularly condition 1(vii) which reads as under :

“1.(vii) Before giving tender, the intending tenderer may inspect the site and satisfy himself about the location, area and its business prospects.”

15. The Arbitrator has referred to clause 17 of the Tender conditions which reads as under:

17. The parking site is being tendered on “As is where is basis”. It is presumed that the intending tenderer has inspected the parking site and familiarised himself/herself with. The prevailing conditions in all respect before submitting the tender. No claim/dispute about conditions/capacity of parking site shall be entertained by DDA”.

16. The Arbitrator also noticed clause 6(b) which also reads as under:

“6(b) Arrangement for maintaining the parking site in a state of repair and lighting of the parking site are to be made by the licensee at his own costs.”

17. Relying on the said clause and more particularly the stipulation “as is where is basis” the Arbitrator has held that the petitioner/claimant was bound by terms and conditions of the allotment. It was the duty of the petitioner to have inspected the site prior to submission of his bid and satisfy himself with regard to the location, area and business prospects.

18. The petitioner after having submitted a bid and after being

presumed to have inspected the site and satisfied himself with regard to business prospects cannot be permitted to contend that the area that was handed over was not usable or was not financially viable for the petitioner to be used as parking area.

19. The tender conditions specifically stipulate that the petitioner is to satisfy himself about the business prospects and the site conditions. They also stipulate that no claim/dispute about the condition/capacity of the parking site would be entertained by DDA. The petitioner is presumed to have inspected the site and familiarized himself with the prevailing conditions prior to submitting a bid.

20. Noticing the specific conditions of the contract the Arbitrator has found no justification in the petitioner refusing to pay the amount that was specifically agreed to by the petitioner in its bid.

21. The petitioner has submitted a bid after becoming aware of the site conditions. Once the bid of the petitioner was accepted, the petitioner would not be permitted, and rightly so, to resile from the bid on the alleged ground that the site was not suitable or usable.

22. DDA has offered the site on “as is where is” basis after giving the petitioner an opportunity of inspecting the site and satisfying himself about the site conditions.

23. There is no gainsaying that the arbitral tribunal is the master of the factual arena and has the right to even go wrong while deciding

the factual issues, unless there is something manifest from the face of the award that is so grave as to move the conscience of the court that the error would result in a monumental miscarriage of justice.¹

24. Where the Arbitral Tribunal has assessed the material and evidence placed before it in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible.²

25. The arbitrator's decision is generally considered binding

¹ *Food Corporation of India v. Shanti Cereals Pvt. Ltd.*, 2010 (3) ARB. LR 296 (Del.) (DB)

² *Jhang Cooperative Group Housing Society v. P.T Munshi Ram & Associates Private limited*: 202(2013) DLT 218.

between the parties and therefore, the power of the court to set aside the award would be exercised only in cases where the court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well-settled proposition that the court shall not ordinarily substitute its interpretation for that of the arbitrator. The arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.³

26. In my view, there is no infirmity with the finding returned by the Arbitrator. This Court as noticed above does not sit as a Court of Appeal to re-appreciate the entire evidence. The Arbitrator has assessed the material and evidence placed before it and has analyzed the relevant clauses of the contract and taken a view which is plausible. I find no infirmity in the view taken by the Arbitrator of the calling for interference in exercise of power under Section 34 of the Act.

27. The petition is accordingly dismissed. There shall be no orders as to cost.

SANJEEV SACHDEVA, J

SEPTEMBER 01, 2017

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³ *Swan Gold Mining Ltd. v. Hindustan Copper Ltd.*, (2015) 5 SCC 739