IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 10.01.2017

+ **O.M.P. (COMM.) 469/2016**

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

versus

M/s RAUNAQ CONSTRUCTION ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Moni Cinmoy, Advocate.
For the Respondent : Mr Raman Kapur, Senior Advocate with Mr Dhiraj Sachdeva, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Delhi State Industrial and Infrastructure Development Corporation Ltd. (hereafter 'DSIIDC') has filed the present petition under Section 34 of the of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') assailing the Arbitral Award dated 21.07.2016 (hereafter 'the impugned award') made and published by the Sole Arbitrator, Shri S. R. Pandey, Additional Director General, CPWD (Retired).

2. The disputes between the parties - in the context of which the impugned award was rendered - related to construction of boundary wall at New Industrial Area at Kanjhawala (hereafter 'the works').

3. DSIIDC invited tenders for the works on 04.02.2011. The respondent (hereafter 'Raunaq') bid for the said works. Raunaq's bid was

accepted and DSIIDC issued a letter of acceptance on 04.05.2011. The estimated costs of works was ₹ 3,50,90,995/- and Raunaq had tendered to execute the same at a value of ₹ 4,17,58,284/-. The execution of the works was to commence on 24.05.2011 and was to be completed within a period of 12 months, that is, on or before 24.05.2012. In terms of the tender conditions, Raunaq deposited earnest money of ₹7,02,000/- and also furnished a performance guarantee dated 09.05.2011 in the sum of ₹20,88,000/-.

4. The execution of the works was inordinately delayed and it is Raunaq's case that the same was for the reasons attributable to DSIIDC. The works entailed construction of approximately 9400 metres long boundary wall out of which Raunaq completed the construction of 7200 metres. Raunaq claimed that the balance site of 2200 metres was not handed over to it. According to Raunaq since DSIIDC had failed to hand over the entire unobstructed site to Raunaq, therefore, Raunaq was constrained to give a notice for foreclosure of the agreement in question on 31.03.2014. DSIIDC does not dispute that the execution of the works was significantly delayed on account of delays in handing over drawings and site to Raunaq. However, DSIIDC disputes the allegation that the entire site was not handed over to Raunaq.

5. After foreclosure of the agreement in question by Raunaq, DSIIDC called upon Raunaq to complete the works. Since Raunaq did not do so, DSIIDC levied compensation under Clause 2 of the agreement in question on 28.07.2014 and, thereafter, terminated the agreement on 04.08.2014.

6. In view of the disputes, Raunaq - by its letter dated 12.05.2014 addressed to the Managing Director of the DSIIDC - invoked the arbitration clause and requested for appointment of an Arbitrator.

7. Thereafter, the Chief Engineer of DSIIDC by its letter dated 20.05.2014, instructed Raunaq to initiate action in terms of Clause 25 of the agreement in question.

8. DSIIDC, thereafter, issued a Show Cause Notice dated 17.07.2014 calling upon Raunaq to show cause as to why compensation not be imposed in terms of Clause 2 of the agreement in question. Thereafter, by a letter dated 28.07.2014, DSIIDC levied compensation of the sum of ₹41,75,828/- and directed Raunaq to pay the sum within a period of 15 days failing which the same would be adjusted against any sum payable by DSIIDC to Raunaq. DSIIDC followed this with a letter dated 04.08.2014 informing Raunaq of the action under Clause 3 of the agreement in question.

9. DSIIDC appointed the Sole Arbitrator by letter dated 04.08.2014 to adjudicate the disputes between the parties. Raunaq filed its Statement of Claims before the Arbitrator; it claimed a sum of ₹26,36,000/- on account of balance payment of works as per final bill dated 14.03.2014 (claim no.1); sum of ₹14,59,778/- on account of refund of security deposit recovered upto 5th running bill (claim no.2); ₹20,88,000/- on account of refund of performance guarantee (claim no.3); ₹55,00,000/- on account of damages/compensation on account of idling of establishment, tolls, plant and machinery etc., due to prolongation of the contract period on account of breach committed by DSIIDC (claim no.4); pre suit, *pendente lite* and future interest at the rate of 18% p.a.; and ₹10 lacs towards cost of litigation.

10. DSIIDC disputed the aforesaid claims and also raised counter claims. DSIIDC claimed a sum of ₹49,30,080/- on account of compensation under Clause 2 and 3 of the agreement in question (counter

claim no.1); sum of ₹97,11,891/- on account of extra expenditure estimated to be incurred by DSIIDC on account of breaches alleged to have been committed by Raunaq (counter claim no.2); interest at the rate of 18% p.a. (counter claim no.3); and ₹10 lacs towards cost of arbitration (counter claim no.4).

11. The Arbitrator considered the claims and counter claims in the light of the material placed on record and concluded that DSIIDC was in breach of the agreement in question since it had failed to handover the complete site to Raunaq. First of all, the Arbitrator found that only a part of the site had been handed over to Raunaq and a site pertaining to 2200 metres of boundary wall had not been handed over to Raunaq. The Arbitrator further held that the termination of the agreement in question by DSIIDC was wrongful as it was in breach of the agreement in question.

12. The Arbitrator awarded a sum of ₹14,48,679/-in favour of Raunaq against its claim no.1 which included ₹14,98,609/- being the gross amount of work done after the last Running Bill as admitted by DSIIDC plus ₹25,000/- being the amount released in the final bill less statutory deductions on account of VAT (₹59,944/-) and cess (₹14,986/-). The Arbitrator also awarded a sum of ₹14,59,778/- on account of refund of security deposit and ₹20,88,000/- on account of release of performance guarantee. In addition, the Arbitrator also awarded a sum of ₹6,05,194/- as compensation on account of loss of overheads. The counter claims made by DSIIDC were rejected. The Arbitrator also awarded interest at the rate of 10% p.a. on the claims awarded from the date of invocation of the arbitration (04.07.2014) upto the date of the award (21.07.2016) and further future interest at the rate of 12% p.a. with effect from 22.07.2016 till the date of payment.

Submissions

13. The learned counsel for DSIIDC sought to assail the impugned award broadly on four fronts. First of all, Mr Cinmoy submitted that the Arbitrator had charged a fee higher than as stated in the appointment letter. He submitted that although DSIIDC had declined to enhance the Arbitrator's fee, the Arbitrator had nonetheless charged the same. The enhanced fee was paid by Raunaq and this rendered the award vulnerable under Section 34 of the Act.

14. Secondly, he submitted that the arbitration proceedings were *non est* and the appointment of the Arbitrator was premature. He submitted that in terms of Clause 25 of the agreement in question, Raunaq was required to approach the Superintending Engineer for a decision in regard to the disputes. If the Superintending Engineer's decision was not acceptable or he failed to render the same, Raunaq was required to appeal to the Chief Engineer who in turn was required to give a decision within 30 days of the receipt of the appeal. Raunaq could invoke the arbitration and request for appointment of an Arbitrator only if the decision of the Chief Engineer was not acceptable. He submitted that the aforesaid procedure was not followed and, therefore, the impugned award is without jurisdiction.

15. Thirdly that the Arbitrator had grossly erred in directing refund of securities and allowing release of the performance guarantee even though the said amounts were to be adjusted against levy of compensation. The Arbitrator had held that he was not going into the question of compensation (that being an excepted matter); he, nonetheless, awarded refund of security and release of performance guarantees and thus, in effect decided the issue of levy of compensation.

16. Lastly, he submitted that the Arbitrator's finding that 2200 metres of site was not made available to Raunaq was perverse as Raunaq by its letter dated 05.12.2013 had acknowledged that only 1200 metres of length of works had not been made available by DSIIDC. He submitted that in the aforesaid circumstances, the impugned award was contrary to the record and was liable to be set aside.

17. Mr Raman Kapur, the learned senior counsel appearing for Raunaq countered the submissions made on behalf of DSIIDC. He submitted that DSIIDC's grievance that the Arbitrator had accepted his appointment but had not adhered to the terms of his appointment by charging a higher fee, is unmerited. He referred to the record of the arbitral proceedings and pointed out that the Arbitrator had in the third hearing recorded that the fee as laid down by NHAI in its circular dated 13.01.2010 would be payable. At the material time, DSIIDC did not object to the same and in fact, had sought time to deposit the necessary fees. Subsequently, DSIIDC declined to pay the fee and, therefore, the same was paid by Raunaq. He submitted that therefore, no grievance could be made by DSIIDC with regard to fees which had already been specified by the Arbitrator at the initial stage.

18. He further submitted that Clause 25 of the agreement in question was followed since there was ample communication on record from both the parties which clearly evidenced that the claims made by Raunaq were not considered by the various authorities and, consequently, Raunaq was constrained to invoke the arbitration clause. The same was accepted and DSIIDC had appointed the Arbitrator. In the circumstances, DSIIDC could not be heard to complain that the procedure in Clause 25 of the agreement in question had not been followed.

19. Insofar as the levy of compensation is concerned, Mr Kapur pointed out that DSIIDC had itself raised a counter claim for ₹49,30,080/- under clause 2 and 3 of the agreement in question. Lastly, Mr Kapur submitted that DSIIDC only handed over part of the site comprising of two sides of the land on 28.11.2011. Further, another part of the site was handed over on 31.05.2012. He referred to various letters which indicated that DSIIDC had not handed over the complete site even till the termination of the agreement in question. Without prejudice to the above, he contended that the question whether 1200 metres of the site or 2200 metres of the site was not handed over, was not material since there was ample material on record to indicate that complete site had not been handed over. He also referred to the letter dated 09.08.2014 and submitted that the same clearly indicated that, in fact, 2200 metres of length had not been handed over even till the termination of the agreement in question. He also referred to a letter dated 15.03.2013 sent by the Deputy Commissioner, North West to the Deputy Commissioner of Police requesting for adequate police force to assist DSIIDC for fencing the land acquired. He submitted that there were hindrances in acquiring the site and DSIIDC's contention that the site was handed over, was erroneous.

Reasoning and Conclusion

20. The contention that the Arbitrator had charged excess fee and, therefore, the impugned award is liable to be set aside cannot be accepted. In terms of the appointment letter, the Arbitrator's fee was fixed as per the CPWD norms; no specific amount had been specified in the letter appointing the Arbitrator. At the third arbitral hearing, the Arbitrator had made a specific note that in two other matters, namely, "NPCC v. DSIIDC" and "M/s Roshan Real Estates Pvt. Ltd. v. DSIIDC", DSIIDC had agreed

that the arbitral fee be paid as per the prevailing fee structure of NHAI. On the aforesaid basis, he had noted that the fee and other charges in the arbitration matter at hand would also be as per fee structure as laid down by NHAI in its circular dated 13.01.2010. Admittedly, the same was not objected to at the material time. At the fourth arbitral hearing held on 08.10.2015, the Arbitrator directed both the parties to pay a sum of ₹54,000/- as the second tranche of advance against fees. The computation of the aforesaid amount payable, as recorded in the order sheet, indicated that the Arbitrator was charging ₹15,000/- per hearing to be shared equally between both the parties. No protest of any kind appears to have been made by DSIIDC even at that stage. The Arbitrator proceeded to hold further hearings without any indication by DSIIDC of its unwillingness to pay the arbitral fee as specified. At the seventh hearing held on 21.01.2016, the Arbitrator one again directed DSIIDC to pay its share of the advance fee without further delay. Since, DSIIDC had not paid its share of fee, the Arbitrator at the eighth hearing indicated that on failure of DSIIDC to pay the fees, the same would be directed to be paid by Raunaq and would be reflected in the award. This was again reiterated in the ninth arbitral hearing held on 12.03.2016.

21. DSIIDC communicated its unwillingness to pay the fee indicated by the Arbitrator for the first time by its letter dated 08.04.2016 stating that the fee fixed by the Arbitrator was not acceptable to it. The same was considered by the Arbitrator on 12.04.2016 (10tharbitral hearing) and he pointed out that in other cases DSIIDC was making payments as per the NHAI fee structure and called upon the DSIIDC to review its decision and remit the fee failing which Raunaq would be called upon to pay DSIIDC's share which would be reflected in the Arbitral Award.

22. The Arbitrator concluded the arbitral hearings at the thirteenth hearing. The order sheet indicates that the Arbitrator had computed the fee payable by each party and had further recorded that the Raunaq had paid its share but DSIIDC had only paid ₹48,000/- and had declined to pay any further. Accordingly, the Arbitrator directed Raunaq to pay DSIIDC's share of ₹1,04,250/- which would be reflected in the award.

23. Although, the Arbitrator had accepted his appointment and, therefore, was bound by the terms of his appointment which included charging fee as per CPWD norms, it cannot be overlooked that the Arbitrator had clearly indicated at the initial stage itself that the fee payable by the parties would be as per NHAI's fee structure which had been accepted by DSIIDC in the case of other arbitrations. DSIIDC was well within its right to immediately object to the same but it did not do so. It communicated its decision not to pay the amount on 08.04.2016 and by the said time, the arbitral proceedings had progressed and were in its final stages; the Arbitrator had held nine hearings (out of the total thirteen hearings). In the circumstances, I am unable to accept that DSIIDC can make any grievance against the impugned award on that basis.

24. It is also relevant to observe that the fee charged by the Arbitrator cannot by any stretch of imagination be termed as excessive or unreasonable. This Court is therefore, unable to accept the contention that the impugned award is liable to be set aside under Section 34(2)(b)(ii) of the Act as being opposed to the Public Policy of India.

25. The next issue to be considered is whether the arbitration proceedings are *non est* as contended on behalf of DSIIDC. At this stage, it is necessary to refer to Clause 25 of the agreement in question, which is set out below:-

"25. Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawing and instructions here-in-before mentioned and as to the quality of workmanship or materials as used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawing, specifications, estimates, instructions orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the engineer-in Charge on any matter in connection with or arising out of the contract of carrying out of the work, to be unacceptable, he shall promptly within 15 days request the superintending Engineer in writing for written instruction or decision. Thereupon, the superintending Engineer shall give his written instruction or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instruction or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of contractors appeal. The chief Engineer shall give his decision within 30 days of receipt of contractors appeal. If the contractors is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

(ii) Except where the decision has become final, binding and conclusive in terms of sub Para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, DSIDC, in charge of the work or if there be no Chief Engineer, the Administrative Head of the said DSIDC. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole Arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the part invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of Arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by such Chief Engineer, DSIDC or the Administrative Head of DSIDC, as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the DSIDC shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act 1940 or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause.

The arbitrator may from time to time with the consent of the parties enlarge the time for making and publishing the award.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/- the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

26. A plain reading of the said clause indicates that Raunaq was required to raise its disputes before the Superintending Engineer and, thereafter, before the Chief Engineer of DSIIDC, before an Arbitrator could be appointed. Although it is contended on behalf of Raunaq that the said procedure was followed, DSIIDC disputes the same. Without going into the question whether Raunaq had, in fact, referred the disputes to the Superintending Engineer and, thereafter, to the Chief Engineer as required under Clause 25 of the agreement in question, it is plain that the impugned

award cannot be set aside on account of the non compliance with the said procedure. This is so because it is not disputed that the Chief Engineer of DSIIDC had appointed the Arbitrator in terms of Clause 25 of the agreement in question by the letter dated 04.08.2014. Thus, DSIIDC cannot be heard to say that his appointment was flawed or premature.

27. The learned counsel for DSIIDC had placed a reliance on the aforesaid letter dated 04.08.2014 to contend that the same was subject to DSIIDC's objection under Clause 25 of the agreement in question. In order to consider the said contention, it is necessary to refer to the language of the letter dated 04.08.2014 issued by the Chief Engineer, DSIIDC appointing the Arbitrator. The said letter reads as under:-

> "Where Sh. Amarjeet Singh Arora (Proprietor of M/s Raunaq Construction) has written to me vide his letter no. Nil dated: 04/07/2014 that certain disputes have arisen between the abovenoted parties in respect of the above noted work I, Shashi Kant Chief Engineer (II), DSIIDC by powers conffered on me under clause 25 of the said Agreement hereby appoint Sh. S. R. Pandey (Retd. ADG CPWD) Arbitrator, DSIIDC, New Delhi as sole Arbitrator to decide and make his award regarding the claims/disputes by the contractor. If any, as shown in the statements enclosed subject always, however, to their admissibility under clause 25 of the aforesaid agreement. The amount of the claim(s) in dispute being above Rs 1,00,000/- the Arbitrator shall give reasons for the award."

28. A plain reading of the aforesaid letter indicates that the contention that the appointment of the Arbitrator was subject to DSIIDC's objection regarding non adherence to procedure under Clause 25 of the contract in question, is unmerited. The only reservation expressed in the said letter was that the Statement of Claims enclosed was subject to "*their admissibility under Clause 25*"of the contract in question. This only meant

that the disputes referred were subject to the disputes falling within the scope of Clause 25. In other words, the reference was subject to the disputes being arbitrable under the said clause. The appointment of the Arbitrator was not subject to any reservation.

29. The Arbitrator had also considered the same and held that the objections regarding not following the procedure under Clause 25 could be raised only prior to appointment of the Arbitrator. Once DSIIDC had proceeded to appoint the Arbitrator, it could no longer object to the disputes being considered by the Arbitrator on the ground that the disputes had not been considered by the Superintending Engineer earlier.

30. This Court does not to find the said view to be perverse or patently illegal so as to warrant any interference by this Court.

31. The next controversy to be examined is whether the Arbitrator had exceeded his jurisdiction by directing the refund of security and the release of performance guarantee without considering that DSIIDC's claim as to the levy of compensation, was subject matter of a suit. The contention that the Arbitrator could not have directed the same because DSIIDC had adjusted the compensation against the security deposit, is unpersuasive. Admittedly, it was within the jurisdiction of the Arbitrator to decide the issue whether the DSIIDC was in breach of the contract in question. Indisputably, it was necessary for the Arbitrator to decide the said issue to adjudicate the claims made by the parties.

32. The learned counsel for the parties concurred that Clause 2 and 3 considered by the Supreme Court in ***M/s J. G. Engineers Pvt. Ltd. v. Union of India and Anr.*****: AIR 2011 SCC 2477**, were similar to the concerned clauses in this case. In that case, the Supreme Court held that the question whether such damages could be levied would be within the

jurisdiction of the arbitrator. The learned counsel for DSIIDC did not counter the submission that the aforesaid decision would cover the issue in question.

33. The next issue to be addressed is whether the Arbitrator's finding that 2,200 metres of the site had not been handed over to Raunaq is perverse and whether the conclusion drawn that DSIIDC was in breach of the terms of the contract in question, is perverse and patently illegal.

34. The Arbitrator had noted that the notice inviting tender had mentioned that the site for work was available and it found that the said representation was incorrect. The learned counsel appearing for DSIIDC did not dispute the correctness of the aforesaid findings. Admittedly, DSIIDC was not in a position to hand over the site when the contract in question for the works was awarded to Raunaq. Admittedly, a part of the site was made available in November, 2011. According to Raunaq, only two sides of the boundary wall were demarcated in November, 2011.The Arbitrator, accordingly, held that 4,700 metres of the total length was handed over in November, 2011. The Arbitrator drew the aforesaid inference from the letters exchanged between the parties. The Arbitrator noted that the Raunaq in its letter dated 31.05.2012 had stated that the balance site, which was not in litigation, was handed over on 18.05.2012 after removal of crops and the same had not been disputed by DSIIDC in its reply dated 07.06.2012. The Arbitrator, thus, concluded that only a part of the site was handed over on 18.05.2012. The aforesaid findings are not amenable to judicial review in these proceedings as the same cannot be considered to be perverse or without any material. The only question that remains is whether the balance site, which was stated to be in litigation, was handed over by DSIIDC to Raunaq subsequently. According to

DSIIDC, only 1200 metres of site was under litigation and the stay orders with regard to the same were also vacated on 12.11.2013 and therefore, the said site was also handed over to Raunaq. Raunaq had disputed the same and had contended that 2,200 metres of site was not handed over on account of litigation.

35. The Arbitrator had considered the above dispute and had come to the conclusion that 2,200 metres of length was not handed over as DSIIDC had even after determination of the contract in question, not taken any steps to award the work to any other party. The Arbitrator also noted that Raunaq had asked for closure of the contract in question on the ground that 2,200 metres of the site was not made available to Raunaq. Although, learned counsel for DSIIDC stoutly disputed the findings arrived at by the Arbitrator, he could not show any document which would unequivocally indicate that the entire site had been handed over by DSIIDC and its receipt was acknowledged. In the circumstances, the dispute as to whether the site had been physically handed over to Raunaq would have to be decided on the basis of attendant circumstances. It is not disputed that there was extensive litigation regarding acquisition of the site and the owners of land were protesting against the acquisition. This is also clear from the letter dated 15.03.2013 addressed by the Deputy Commissioner (North West) to Deputy Commissioner of Police, which indicates that DSIIDC officials had complained that certain land owners were creating hurdles in the work of the boundary wall on the acquired land.

36. A perusal of the letter dated 31.03.2014 addressed by Raunaq to DSIDC also indicates that 2,200 metres of work site was not available to Raunaq. Admittedly, there is also no dispute that there was a stay order passed by this Court which was operating in respect of 1200 metres of site

which is stated to have been vacated on 12.11.2013. The Arbitrator had considered the rival contentions as well as attendant circumstances and had concluded that approximately 4,700 metres of total length was handed over in November, 2011; the balance 2,500 metres (other than 2,200 metres) was handed over on 18.05.2012; and the remaining 2,200 metres had not been handed over by DSIIDC at all. The Arbitrator had further held that even if DSIIDC's contention that it had handed over the balance site in November, 2013 is accepted, the undeniable position would still remain that DSIIDC had failed to hand over the site as required under the contract in question.

37. DSIIDC had sought to support its case that there was no litigation with regard to the balance site by producing certain writ petitions which are indicated in the impugned award. The Arbitrator had examined the same and had observed that it would not be possible to ascertain whether the subject matter of those writ petitions related to pockets of land pertaining to the balance of the boundary wall or other parts of land. However, the Arbitrator had concluded that there was more to the dispute. A plain reading of the impugned award indicates that the Arbitrator had come to the aforesaid conclusion on the basis that (a) Raunaq was disputing that the site had been made available to it and (b) that even after determining the contract in question, DSIDC had not engaged anyone to complete the balance works.

38. Whilst, there may be serious dispute as to the question whether the balance site (2,200 metres according to Raunaq and 1200 metres according to DSIIDC) was handed over by DSIIDC or not, it cannot be disputed that the finding of the Arbitrator that the site was not handed over by DSIIDC in accordance with the contract in question, is not erroneous. Thus,

notwithstanding the dispute whether the site had been handed over by DSIIDC to Raunaq, the finding that DSIIDC was in breach of the contract in question as it had failed to fulfil its fundamental obligation of providing the site on the commencement of the works, is indisputable.

39. In view of the above, this Court is unable to accept that the impugned award is liable to be set aside on account of the controversy between the parties relating to the handing over of parcel of balance site which according to DSIIDC is 1200 metres and was handed over in November, 2013 and which according to Raunaq was measuring 2200 metres and never handed over till determination of the contract in question.

40. The claims awarded by the Arbitrator are based on his finding that DSIIDC had been in breach of the contract in question and the said finding, as stated earlier, is not amenable to judicial review.

41. A plain reading of the impugned award indicates that the Arbitrator has not only awarded amounts for the work done by Raunaq but has also awarded a sum of ₹6,05,194 on account of damages for idling labour and overheads. Admittedly, no evidence to establish such loss had been led by Raunaq. Further, the Arbitrator had also noted that part of the delays in execution of the work were also caused due to failure of Raunaq to mobilize the requisite resources and to ensure compliance with the provision of Clause 36 of the contract in question relating to employment of technical staff. Nonetheless, the Arbitrator has assessed the loss by determining the delay attributable to DSIIDC and by applying a CPWD Circular as to the quantum of overheads. Mr Kapur fairly conceded that in the absence of any evidence of any damages, the same could not be awarded to Raunaq and the impugned award to that extent may be set aside.

42. In view of the above, the impugned order to the extent that it awards an amount of ₹ 6,05,194/- as damages, is set aside.

43. The petition is, accordingly, disposed of. The pending application also stands disposed of. No order as to costs.

VIBHU BAKHRU, J

JANUARY 10, 2017
MK