

\$~

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

% *Date of Judgment : 21st February, 2018*

+ **FAO(OS) (COMM) 191/2017 & CM No.39821/2017**

RAMKALA

..... Appellant

Through: Mr.Inder Bir Singh Alag, Senior
Advocate with Mr.M.Aggarwal,
Mr.S.K.Sharma and Mr.R.S.Bisht,
Advocates.

versus

DELHI DEVELOPMENT AUTHORITY

..... Respondent

Through: Mr.Pawan Mathur, Standing
Counsel with Mr. C. Tete, Dy.
Director LPC.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J. (ORAL)

1. This is an appeal under Section 37 of the Arbitration and Conciliation Act 1996 read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter referred to as '**the Act**'). The appellant has impugned the order dated 01.09.2017 passed by a Single Judge of this Court by which the objections to the Award dated 16.02.2017 have been dismissed.
2. The necessary facts to be noted for disposal of this appeal are that the respondent invited participants for various parking sites including the present parking site in question at Bhikaji Cama Place

(hereinafter referred to as 'the Site') in the month of July-August 2012 in various newspapers. The sale of tenders commenced on 14.08.2013. Upon opening of tenders, the appellant was declared as the highest bidder with respect to the subject site on 24.08.2013. The appellant was accordingly issued an allotment letter on 15.10.2012. Pursuant to the allotment, the appellant having completed the basic formalities, the respondent executed a licence deed in favour of the appellant on 29.10.2012. The appellant was unhappy with the condition of the parking site and this led to various letters addressed by the appellant to the respondent and since the grievances of the appellants were not addressed, the appellant issued a legal notice dated 02.04.2013 to the respondent. Meanwhile, the appellant also filed a petition under Section 9 of the Arbitration and Conciliation Act seeking interim reliefs being OMP No.896/2013. A local Commissioner was appointed vide order dated 09.09.2013 to inspect the parking site and to report the condition of the site along with the photographs. The section 9 petition was finally disposed of by an order dated 16.12.2013. The appellant also invoked the arbitration clause being clause no.24 of the agreement on 27.01.2013, the said clause read as under:-

“That in case of any dispute arising between the licensor and the licensee in respect of interpretation or performance of any terms or conditions of this license, the same shall be referred to the sole arbitrator of the choice of Vice chairman DDA whose decision thereon shall be final and binding on both the parties. The licensee shall not object to the Vice Chairman's of the

Delhi Development Authority's action as sole arbitration on the ground that he had dealt with case or has at some stage expressed opinion in any matter connecting herewith. ”

A petition under Section 11(5) & (6) of the Arbitration and Conciliation Act was filed being Arbitration Petition No.332/2013, which was allowed in the absence of counsel for the appellant by an order dated 06.01.2015. The respondent/DDA was directed to appoint an Arbitrator within four weeks. A Sole Arbitrator was appointed who rendered his Award dated 16.02.2017 by which all the claims of the appellant herein were rejected and the counter claims were allowed.

3. Aggrieved by the award, objections were filed under Section 34 of the Arbitration and Conciliation Act, which were dismissed by the learned single judge by an order dated 01.09.2017 which has led to the filing of the present appeal.
4. Mr. Alag, learned Senior Counsel for the appellant submits that the learned Single Judge did not consider the patent illegalities in the award passed by the learned Arbitrator. Learned Senior Counsel contends that the Arbitrator did not consider the facts material and evidence on record, and thus, deprived the appellant of its valuable rights. Being an employee/official of the respondent/DDA, the Arbitrator acted with clear bias and did not act within the framework of law as well as the agreement between the parties. Mr. Alag submits that the appellant was handed over a parking site, which comprised of three levels of the basement described as B-1

being the top area, B-2 middle area and B-3 lower area. Learned Senior Counsel contends that even prior to taking possession, the appellant complained to the Vice Chairman, DDA that although the appellant had deposited three months licence fee but vacant physical possession of the site was not handed over to him. It was also brought to the notice of the Vice Chairman that on inspection of the site, it was found that the condition at the Site was unhygienic due to the filthy water, waste material, storage of garbage, which resulted in foul smell spreading all over the parking site. The area was being used as a dump to store defused material. Additionally, the entry and exit gates of the Site were not working properly and thus, only 30% of the area was in working condition and useable and the remaining 70% of the Site could not be used for parking.

5. Attention of the Court has also been drawn to the communication vide letter dated 07.01.2013 addressed to the Director (LD), DDA complaining that despite the deposit of three months licence fee, possession of the Site had not been handed over. Mr. Alag, Senior Counsel contends that post handing over of possession, the appellant again addressed a communication dated 21.01.2013 to the Vice Chairman, DDA bringing to his notice the condition of the Site, which was full of waste materials and discarded articles were lying all over the site, besides dirty water was flowing at the Site leading to unhygienic conditions resulting in various health issues of the workers. It was again brought to his notice that the Site was

unusable including the fact that flooring was broken and the area lacked basic facilities. The Vice Chairman was requested to look into the matter and hand over complete possession of the area. Mr. Alag has also relied upon a communication dated 27.01.2013, the sum and substance of this communication is almost the same as the contents of the earlier communication, in support of his submissions that since the area handed over to the appellant was practically unusable, the appellant could not have been saddled with an exorbitant licence fee. He submits that almost 70% of the area was blocked on account of illegal parking by a travel house, a company which was functioning from the building itself, old furniture kept by DDA, area covered with garbage, old vehicles parked, seepage, water flowing and the non-functional entrance and exit deprived the appellant, the complete use of the parking space and in the absence the complete area being made available, the DDA was not entitled to the monthly licence fee. Mr. Alag, Senior Counsel also contends that since communications were neither replied to nor any action taken to remove the obstructions or to clear the area, the appellant was forced to file a petition under Section 9 of the Arbitration and Conciliation Act on 16.08.2013 being OMP No.896/2013.

6. It is contended that the learned Single Judge noticed the submissions made by the counsel for the appellant that most of the parking site in issue was either occupied by another contractor or due to seepage and scrap make it unusable, accordingly, the local

commissioner was appointed vide order dated 09.09.13. Mr. Alag, Senior Counsel has relied upon the report of the local commissioner in extenso to buttress his arguments that the area was unusable. He has laboured hard to contend that the arbitrator did not consider the report of the local commissioner reading of which would leave no room for doubt that the area was unusable. He submits that since the evidence was available relied upon but not considered by the arbitrator, this Court can consider the same in the present proceedings and it would show that the award would fall within the larger definition for being set aside as against being public policy. It is also the case of the appellant that the local commissioner in her report has observed that upon the entrance in basement B-1, on the left, many bikes were parked and cars were parked on the right side. Local Commissioner affirmed that the petitioner is entitled to hold exclusive possession of B-1. However, the condition of the basement in B-1 is very poor due to severe seepage from the upper floors. She further noted the complaint of the appellant that the area is used for disposal of garbage, there is no cleanliness of the basement. The basement had unclaimed vehicles occupying the space and irrespective of complaining about the same to the local police and DDA, no cognizance had been taken. Apart from the automobiles, the area of approximately 1000 square feet was blocked due to old furniture kept by DDA because of which cars could not go inside due to disposed (sic), tube lights and motorcycle. Light was found to be dim, additional two damaged

cars, one rickshaw, iron pipes and one big board besides structural damages in the basement. Similar observations were made with regard to the upper floor.

7. Mr. Alag, Senior counsel has also drawn the attention of the Court to show that the additional 27 cars were parked in the B-3 and 175 cars were parked at B-2 and taxi number with the stickers of Travel house. Approximately 65 % area of the B-2 was in the possession of Travel House, where all the working, servicing and maintenance of all the cars were being carried out . According to Mr. Alag, Senior counsel, the said vehicles were blocking the area, which had been originally auctioned for the benefit of running a parking site by the appellant on being a successful bidder. Mr. Alag, Senior counsel contends that in case, the arbitrator had considered the report of the local commissioner, which had been filed and not disputed by the DDA before the Arbitrator, he would have allowed the claims of the appellant. He submits that the award is completely silent despite the appellant making all efforts to seek leave to produce the relevant witnesses to exhibit the report. Counsel submits that bias is writ large on the face of the record. A bare reading of the award would show that on one hand, the appellant was not allowed to lead the evidence to prove the report on the ground that it had been admitted by the DDA and on the other hand the report was not exhibited. It is also the case of the appellant that much emphasis has been given on the terms of the notice inviting the tender and the terms of the agreement, as per which the Site was

auctioned on “As is where is Basis”. He submits that the Clause 17 of the tender condition is to be read as a whole. The relevant clause reads as under:-

“ 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 familiarized himself/herself with the prevailing conditions in all respect before submitting the tender. No claim/ dispute above condition/ capacity of the parking site shall be entertained by DDA. The tenderer cannot put any condition with his/ her tender.”

It is submitted that the appellant did not perceive that the statutory body, would hand over the site to the appellant, which is not free from obstructions.

8. Counsel further contends that there is no quarrel to the proposition that the arbitrator is the master in the factual arena and may even have a right to go wrong while dealing with factual issues but in case on the face of the award there is something so grave, which would move the conscious of the Court or the error would result in the miscarriage of justice, this Court would be well within its right to interfere. It is contended that the conjoint reading of all the communications addressed by the appellant to the respondent from 13.12.2012 onwards and further upon reading of the Local Commissioner's report would leave no room for doubt that the appellant was handed over only 30 % of the entire area and in this backdrop to dismiss the claims of the appellant, would lead to gross miscarriage of justice. Reliance is placed on *Associate Builders vs. Delhi Development Authority* reported in 2014 (4) Arb. Law

Reporter 307 (SC), the Supreme Court while relying on “*Oil & Natural Gas Corporation Ltd. vs Western Geco International Ltd.*”, (2014) 9 SCC 263 has held in para 39 as under:

“No less important is the principle now recognized as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [Associated Provincial Picture House Ltd. vs. Wednesbury Corpn., (1948) 1 KB 223=(1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.”

9. Mr. Mathur, learned counsel appearing for the DDA submits that there is no infirmity in the order passed by the learned Single Judge which would require interference in these proceedings. He submits that the arbitrator has considered the entire material on record and assessed the evidence in detail. Mr. Mathur submits that while deciding the objections, the Court would not sit as a Court of Appeal and the Court is not expected to re-assess the entire evidence or re-assess the case of the parties. He submits that the scope of interference in an appeal under Section 37 is narrow. There is no perversity in the findings of the learned Arbitrator who has considered the terms of the tender documents and the agreement dated 23.10.2012 executed between the parties.

10. Mr. Mathur also submits that the Court cannot lose track of the fact that despite complaining even prior to taking possession of the site and filing a petition under Section 9 of the Arbitration and Conciliation Act seeking appointment of a Local Commissioner, the appellant only handed back the possession of the site after the term of the agreement came to an end on 11.01.2016. This factor alone would show that in case the site was not viable, in case the appellant was handed over only 30% of the area, in case the site contained obstructions, the appellant would not have use the site, which would show that from day one, the attempt of the appellant was to get into the site and not pay the license fee. Counsel contends that the appellant has paid a security deposit at the rate of Rs.11,25,000/- and thereafter paid license fee at the rate of Rs.3,75,000/- on 12.02.2013, at the rate of Rs.7,90,000/- on 13.05.2013, at the rate of Rs.3,73,000/- on 15.05.2013, at the rate of Rs.6,00,000/- on 13.05.2014, Rs.2,00,000/- and Rs.1,25,000/- on the same date and thereafter Rs.4,00,000/- on 05.12.2014 total amounting to Rs.47,40,000/-, leaving a balance of Rs.1,48,98,972/-.
11. Mr. Mathur further submits that reading of the communications relied by counsel for the appellant would show that in every communication, a somewhat different stand was taken. He also submits that with every letter there was marked improvement with regard to nature of obstructions and the appellant has failed to bring to the notice of the Court that the area was auctioned on 'as is where is basis'. Admittedly, the appellant has inspected the site and

in case he found the site to be unusable or unviable, he should have not bid for the site, in question. He further submits that the obstructions sought to be relied upon by the appellant was self-created. Once all the possession was handed over to the appellant, it was for him to clear the area of any garbage, if any, and prevent anyone throwing garbage in future. He further submits that to say that 175 cars were parked by travel house without his leave, consent or concurrence is not believable as the entry and exit were in his control and it is not expected or believable that a travel agency would simply park 175 cars and not put them to use. There is also no explanation as to why the appellant allowed 175 cars to remain parked in a parking site of which he was in absolute possession and control. Similar argument is raised by Mr. Mathur with regard to any other car/rickshaw/old scooter. Even otherwise, Mr. Mathur submits that the parking site comprised of three floors in a basement over an area of 7518 square meters i.e. 80,000 sq. ft. Mr. Mathur also submits that the complaint with regard to the entry and exit gates not being in working condition can be of no benefit to the appellant, firstly, as the site was auctioned on 'as is where is basis', the appellant should have satisfied himself with regard to the working condition of the shutters and in the worst case, he should have had the shutters repaired on his own cost, if he was interested in running the parking site. While relying on clause 6(b) of the tender, Mr. Mathur submits that repairs including lighting was the responsibility of the appellant and the burden cannot be shifted on

the DDA as the terms and conditions of the tender clearly states that the cost of maintenance of the parking site including repairing and lighting is to be borne by the licensee. Mr. Mathur also contends that post filing of petition under Section 9 of the Arbitration and Conciliation Act without prejudice to the rights and contentions of the DDA, these vehicles were removed by the traffic police. Even at that point of time no objection was raised with regard to the vehicles pertaining to travel house or any other vehicle which was blocking the area.

12. Mr. Mathur further submits that in case the conditions of the parking lot were as bad as are being projected in the Court, the intend of the appellant would have been to abandon the tender or seek cancellation whereas to the contrary, prayer was made in the petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 seeking stay of cancellation of the contract. He further submits that the entire arguments of counsel for the appellant is belied by the fact that the appellant has completed the entire terms of the contract and possession was handed over only on 11.01.2016.
13. Counsel for DDA contents that on the one hand the appellant continued to complaint about the area being full of obstructions, unhygienic conditions, jammed shutters, cars being parked outside the travel house and area full of garbage but on the other hand the appellant continued to function and derived benefits of parking area but with a view to pocket the money licence fee an imaginary dispute has been raised and thus, no relief can be granted to the appellant.

14. Mr. Mathur also submits that the scope of interference in a petition under Sections 34 and 37 of the Arbitration Act is narrow. He further submits that in the present petition filed under Section 37 of Arbitration Act, the court cannot sit as a court of appeal or re-appreciate the evidence on record. Reliance is placed on ***Sudhakar Tiwari Vs. Delhi Development Authority*** reported in ***2016 SCC Online Del 667***, a judgment passed by a coordinate Bench of this Court.
15. The facts which have given rise to the dispute between the parties in case of ***Sudhakar Tiwari (Supra)*** were that a parking site had been tendered also on “As is Where is Basis,” the appellant being the highest bidder was awarded the tender, the license deed was executed but licence fee was not paid. An Arbitrator passed an award directing the payment of licence fee with interest. The plea raised by the appellant was similar to the plea as raised in the present case that the area utilizable was only 40% and thus, he was not entitled to pay the entire licence fee. In para 4 of the ***Sudhakar Tiwari (supra)***, the facts have been noticed. It is also useful to reproduce paras 21 to 24 and 28, which reads under:

21. Assuming that there was a mismatch between the utilizable area in the site vis-à-vis what was represented as the utilizable area, it would at best be a case of a misrepresentation of a fact. Assuming that the misrepresentation was of the kind, truth whereof was not capable of being discovered with ordinary diligence, and thus the exception to Section 19 of the Indian Contract Act, 1872 was not attracted, the appellant would have

known the same, and as per his pleadings in the statement of claim became aware of the same the day he took charge of the car parking. As per the appellant he did not pay the license fee because the utilizable area was only 40%. If this be so, the contract became voidable at the option of the appellant and it was his duty to elect to either abide by the contract or avoid the same. If the appellant chose to elect for avoiding the contract he was obliged to restore the benefit which he had received under the contract i.e. vacate the licensed site. He did not do so. On the contrary he filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 to restrain DDA from taking over possession of the site.

22. In the pleadings before the Arbitrator there is no reference to the appellant intimating DDA that the utilizable area in the parking site was only 40% and that there was misrepresentation by DDA to the appellant. No letter was filed before the Arbitrator. Even before the Arbitrator it was not the case of the appellant that he avoided the contract. For the first time in the appeal, annexing the same as Annexure D, the appellant claims of having informed DDA that the utilizable area was 40%. We have not hesitation in trashing the said letter dated April 15, 2013 for the reason there is no proof that said letter was never pleaded in the statement of claim nor was filed before the learned Arbitrator. Lastly for the reason merely writing that the utilizable area is less is neither here nor there because case of the appellant is that there was a misrepresentation of a fact by DDA and induced by the same he entered into the contract. The appellant had thus to elect, whether he wanted to avoid the contract or affirm the same. He did not avoid the contract and on the contrary affirmed the same by retaining possession and resisting resumption thereof.

23. In the decision reported as (1871-72) L.R. 7 Ex. 26 Clough Vs. the London and North Western Railway Company it was held that lapse of time without rescinding a voidable contract will furnish evidence that the party had determined to affirm (not rescind) the contract; and when the lapse of the time is great, it probably would in practice be treated as conclusive evidence to show that the party has so affirmed.

24. The ratio of law declared therein would squarely apply in the instant case. Having taken physical possession of the site on May 25, 2011 and having executed the license-deed on or before May 09, 2011, the appellant never determined the contract on the ground that there was a misrepresentation of a fact made to him. Assuming that the utilizable site was only 40% of the licensed space, the appellant was aware of the same because this is his justification not to pay the license money. The parties were referred to arbitration, pursuant to the order dated September 02, 2013. The appellant never determined the contract evidenced by the fact that he clung on to the site, it was his obligation to restore the benefit if he determined the contract, which he did not do.

28. But for the simple legal principle applicable, that assuming there was a misrepresentation of a fact concerning the utilizable area at the site, since the appellant learnt of the same as per his own case pleaded in May, 2011 itself, when encroachers and other persons did not let him use the full site, it became obligatory upon the appellant to elect to affirm or determine the contract. The appellant had to return the site if he determined the contract. The appellant did not do so. He retained the benefit. When DDA attempted to resume possession of the site alleging default in non-payment of the license fee, the appellant clung on to the site. He never determined the contract and therefore the principle of law declared in the decision in Clough's case (supra) would make it a

case of conclusive evidence being reached against the appellant.

16. In response to the submissions made by the counsel for the DDA, learned Senior Counsel appearing for the appellant submits that from day one, the appellant has been pointing out the deficiency in detail. He has drawn the attention of the Court to the communication dated 21.01.2013, and also submits that the petition filed under Section 9 Arbitration and Conciliation Act, 1996 and more particularly paras 12 and 14 of the petition wherein the appellant highlighted the unhygienic conditions at the leased parking site, illegal and unauthorized encroachment and thus, merely because the agreement was not determined by the appellant, cannot be a sole ground to reject the present appeal.
17. We have considered the submissions made by the learned counsel. We have also perused the arbitral award and the order of the learned Single Judge of this Court.]
18. It is no longer *res integra* that The Arbitrator/ Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. The Hon'ble Supreme Court in the case of ***McDermott International Inc. v. Burn Standard Co. Ltd. and Ors***, (2006)11SCC181 held as under:

"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few

circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

19. In **Associate Builders** (*supra*), the Supreme Court while further explaining the scope of judicial intervention under the appeal in the Act held as under:-

"It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares and Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.* MANU/SC/1248/2011 : (2012) 1 SCC 594, this Court held:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second Respondent and the Appellant are liable. The case as put forward by the first Respondent has been accepted. Even the minority view was that the second Respondent was

liable as claimed by the first Respondent, but the Appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the Appellant did the transaction in the name of the second Respondent and is therefore, liable along with the second Respondent. Therefore, in the absence of any ground Under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

20. Applying the law to the facts of the present case would show that the communications between DDA and the appellant placed on record by the appellant, make it clear that the appellant was well aware about the condition of the parking site before taking possession of the site. As per the records, the appellant was also given a fair chance to inspect the site prior to the submission of his bid and satisfy himself with respect to the location, area and business on the site. It is not wrong to say that the appellant was well versed with the terms and conditions of the tender for the grant of licence for collecting parking charges and running the parking site prior to the bid. Clause 1 (vii) of the general conditions clearly states that ***“before giving tender, the intending tenderer may inspect the site and satisfy himself about the location, area and its business prospects.”*** Additionally, Clause 17 of the terms and conditions clearly states that the site, which is being offered by the DDA, is being tendered on “As is where is basis”, the onus was on the appellant to inspect the site and satisfy himself about the site conditions.

21. In ***Punjab Urban Planning and Dev. Authority and Ors. vs. Raghu Nath Gupta and Ors.***, reported at AIR 2012 SC 3194, the Supreme Court held that the phrase “as is where is ” is a clear indication that the person entering into the agreement is well aware about the condition and the surrounding of the property and if the party entering into the agreement has any sort of the problem with the property, then the person is free to reject the same , but if once, the person has accepted the allotment then the same are estopped from contending the same. The relevant part of the judgement is reproduced as under:-

“The commercial plots were allotted on "as is where is" basis. The allottees would have ascertained the facilities available at the time of auction and after having accepted the commercial plots on "as is where is" basis, they cannot be heard to contend that PUDA had not provided the basic amenities like parking, lights, roads, water, sewerage etc. If the allottees were not interested in taking the commercial plots on "as is where is" basis, they should not have accepted the allotment and after having accepted the allotment on "as is where is" basis, they are estopped from contending that the basic amenities like parking, lights, roads, water, sewerage etc. were not provided by PUDA when the plots were allotted.”

22. In ***AI Champdany Industries Limited vs. The Official Liquidator and Anr.***, reported at (2009) 4SCC 486, the Supreme Court broadly explained the phrase “as is where is” and held as under :-

“The terms "as is where is basis and whatever there is basis" signifies, the condition, quality and the quantity in which the assets sold, exists. It does not take into account the liabilities attached to the assets sold. The terms and

conditions of sale, however, called upon the bidders to satisfy themselves regarding title and encumbrance attached to the said asset.”

The Supreme Court further held that “as is where is” and whatever there is basis shows a duty that was cast upon the offerer to satisfy themselves in regard to the physical inspection of the assets/properties as to the title, encumbrance, area, boundary, measurement, description etc. of the assets of the company in liquidation and the purchaser would be deemed to be offering his prices therefore with full knowledge as to the defects containing the descriptions, quality or quantity of the assets sold, the appellant was bound to make an investigation in regard to the liabilities of the company in liquidation.”

23. It is clear from the submissions made by both the parties that there is no denial of an existence of an agreement between the parties and thus, the terms and conditions of the agreement and therefore were bound by it. Though neither the arbitrator, nor the learned single judge took the local commissioner report into consideration while computing the counter claims of the respondent. Nevertheless, post filing of the petition under Section 9 of the Arbitration and Conciliation Act, the vehicles were removed from the site by the traffic police on the direction of DDA. The Local Commissioner report indicated the fact that the appellant was not given 70 % of the vacant physical possession, which was altered by the DDA post the filing of Section 9 petition. The Section 9 petition was finally disposed on 16.12.2013 and the license agreement came to an end on

11.01.2016, during which period the appellant had exclusive possession over the parking site.

24. Although Mr. Inder Bir Singh Alag has laboured hard while relying on the report of the Local Commissioner to show that the area was not free from obstructions but we are of the view that no benefit can accrue in favour of the appellant for the reason that firstly the site was to be handed over on 'As is where is basis' and secondly the appellant could have got the site cleared, blocked the entrance so that the illegal cars could not enter and have the gates repaired. We may also notice that no argument regarding the report of the Local Commissioner was noticed by the learned Single Judge. Thus, we presume that no such submission was made. This Court cannot act as a court of appeal or to correct errors of fact. It cannot be said that the approach of the Arbitrator is either arbitrary or capricious. In fact, the Arbitrator has rightly relied upon the terms of the tender documents.
25. We find no merit in the appeal. The appeal and C.M.39821/2017 are, accordingly, dismissed.

G. S. SISTANI, J

SANGITA DHINGRA SEHGAL, J

FEBRUARY 21, 2018

ck-- /