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

% *Judgment reserved on : 26th July, 2019*
Judgment pronounced on : 15 October, 2019

+ **FAO(OS) (COMM) 37/2017 & C.M.6300/2017**
RAIL LAND DEVELOPMENT AUTHORITY Appellant

Through: Mr.Shaurya Sahay, Mr.A.M.Tripathi
and Mr.Kumar Abhishek, Advocates

versus

BHAGWATI RAIL INFRA PVT LTD. Respondent

Through: Mr.Arunav Patnaik and Mr.Karun
Pahwa, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

1. The appellant has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996(hereinafter referred to as the 'Act') read with Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015(hereinafter referred to as the 'Commercial Courts Act') against the judgment of the learned Single Judge dated 24.10.2016, by which the objections to the Award dated 30.04.2016 stand dismissed.
2. Some necessary facts which are required to be noticed for disposal of this appeal are that the disputes between the parties arise out of The Development Agreement (the Agreement) dated 06.02.2013 for development of a Multi-Functional Complex over Railway land at Jhansi Railway Station. In the month of October, 2010, the

appellant/RLDA invited bids by way of a Request for Proposal (RFP) document issued for development of the complex over Railway land at Jhansi Railway Station. The land for the construction of the complex was to be leased to the successful bidder for 45 years as per Clause 18 of the RFP. Further, as per the RFP the successful bidder was required to sign the Agreement and Lease Deed before the site was to be handed over to the bidder. The RFP also contained a schedule for payment of lease premium including a clause that the Agreement shall be signed only after the selected bidder had paid the entire lease premium or paid the first installment of lease premium along with Bank Guarantees (BGs) for the subsequent installments.

3. The bid of the respondent was accepted for Rs.7,83,00,000/- as the upfront premium and for Rs.50,00,000/- as annual lease rent, and accordingly the appellant issued a Letter of Acceptance (LOA) on 20.01.2011. Consequent to receiving the LOA, the respondent deposited a sum of Rs.2,34,90,000/- on 02.04.2011 as the first installment towards the lease premium. According to the payment terms, the second and third installments were to be paid on 02.04.2013 and 02.04.2014 respectively.
4. In addition to the above undisputed facts, it is also not in dispute that on 27.05.2011, the respondent submitted a Performance Bank Guarantee and five BGs, issued by Bank of India for securing the payment of second and third installments. However, the respondent did not furnish any Bank Guarantee for securing payment of interest as the respondent had planned to mark the site and generate funds during the interest free period of one year commencing from

02.04.2011 to 02.04.2012. It was also the endeavor of the respondent to pay the second and third installments within the said period to avoid paying interest.

5. It is also not in dispute that despite the payment of the installment for premium of Rs.2,34,90,000/- and submission of five BGs in addition to one Performance Bank Guarantee, the appellant failed to execute the Agreement and hand over the site to the respondent. Series of letters were issued by the respondent to the appellant, including letters dated 07.09.2011, 14.09.2011, 19.09.2011 and 10.10.2011. In terms of the aforesaid communication, it was brought to the notice of the appellant that the respondent was losing out on the interest free period available and a request was made to execute the Agreement and Lease Deed and for handing over of the site to the respondent. The appellant fairly, by a communication dated 11.10.2011, informed the respondent about the receipt of an advisory from the Ministry on 30.03.2011, as the reason for its inability to execute the Agreement, Lease Deed and handing over the site to the respondent. The relevant portion of the advisory *inter alia* reads as under:

“..handing over the possession of land in all cases (including cases where developers have been fixed, but the possession of land has not been made and the signing of the Lease Agreement has not been made over) the signing of the The Agreement thereof is to be undertaken by the RLDA only after the approval of the Cabinet for leasing of the land for the same has been received and communicated to the RLDA”.

6. Despite the aforementioned embargo, the appellant called upon the respondent vide letter dated 28.03.2012 to pay second and third

installments of lease premium by 01.04.2012 to avoid the invocation of the BGs. The respondent objected to the demand and in turn sought refund of the BGs assuring the appellant of re-submission of the same after the clearance is granted from the Ministry. At that stage, the appellant did not press its request for payment of second and third installment and released the BGs to the respondent.

7. Meanwhile, the appellant, on receipt of a Press Release lifting the embargo, sent a communication which was received by the respondent on 03.09.2012. In view of the aforesaid communication, the respondent requested the appellant to realign the timeframe for payment of the first, second and third installments and also grant one-year interest free period based on the original terms of the RFP. The request of the respondent did not find favor with the appellant.
8. The appellant called upon the respondent to submit the BGs for the second and third installments and also a Bank Guarantee for interest. The respondent vide letter dated 11.09.2012 agreed to resubmit the Bank Guarantee for only the principal amount and requested for change of timeline and sought one-year interest free period for paying the second and third installments. The offer of the respondent was declined by the respondent vide a communication dated 13.10.2012. Thereafter the respondent sought conciliation of the dispute vide notice dated 21.12.2012 under Article 27(3) of the RPF document. The respondent was called upon to furnish the BGs within two weeks, that is, by 22.01.2013, failing which the LOA would be terminated and the security would stand forfeited. The respondent resubmitted the BGs for second and third installments along with BGs for interest, but

under objection. Upon receipt whereof, the Agreement was executed on 06.02.2013 without changing the timeline as requested by the respondent, and a Lease Deed was also executed on 25.02.2013. Possession of the site was also handed over on the same date. Meanwhile, while the conciliation proceedings which had been initiated failed, the appellant threatened invocation of the BGs for the second and third installments, which led the respondent to file OMP 277/2013 under Section 9 of the Act seeking a restraint order against encashment of the BGs. This petition under Section 9 of the Act was allowed vide order dated 18.03.2013.

9. Another issue which crept up between the parties related to submission of the plans which were to be submitted by the respondent to the Nodal Officer of the appellant. The plans were to be submitted within a period of two months of the execution of the Agreement and the same were to be approved within a period of one month from the date of submission which in this case was 08.04.2013. The deficiencies in the plans were pointed out to the respondent and since the issues which arose on submission of the plans could not be sorted out, this led to the filing of a second OMP.772/2013 seeking resolution of the disputes related to the timeline and approval of plans. In the meantime, the respondent invoked the arbitration clause on 08.01.2013. The Arbitral Tribunal (Tribunal) was constituted on 19.11.2013, and both the OMPs. 277/2013 and 772/2013 were transferred to the Tribunal directing the same to be treated as applications under Section 17 of the Act. Also, the stay of invocation of the BGs was ordered to continue till the disposal of the said

applications. Even before the Tribunal could proceed, the appellant terminated the Agreement on 30.12.2013, which led to the filing of a third OMP bearing no.23/2014. In the aforesaid OMP, a Single Judge of this Court directed the respondent to deposit the amount of the second installment in three further installments by 31.03.2014. The respondent was also granted stay of dispossession of the site and consequently, the third OMP no.23/2014 was also directed to be treated as application under Section 17 of the Act.

10. The Tribunal vide order dated 04.03.2014 stayed the termination of the Agreement pending disposal of the main issues of which it was ceased. An appeal filed by RLDA against the order of stay before a Division Bench of this Court was dismissed on 16.04.2014. The interim order of stay of the invocation of the Bank Guarantee was confirmed by the Tribunal on 05.05.2014 subject to the conditions that the Bank Guarantee would be kept alive by the respondent. The Tribunal also granted protection to the respondent on 19.06.2014 for suspension of timelines till the final disposal of the case. The Tribunal also directed that the plans should be approved immediately as per the timelines as already set as per which the respondent was to submit the plan within 15 days as directed by the Arbitral Tribunal and the same were to be approved within 15 days thereafter. Accordingly, the plans were submitted and after a number of sittings with RLDA, the final plans were submitted on 21.08.2014. RLDA challenged this decision of the Tribunal before the High Court and thereafter, before the Supreme Court, but was unsuccessful. The matter was not laid to rest even after the Special Leave Petition filed by the appellant herein was

dismissed on 03.07.2015. The respondent submitted fresh plans for approval, which were approved after a gap of 7 months but the construction at the site could not progress on account of certain riders, which were imposed by the appellant herein, and which riders were also set aside by the Tribunal by an order dated 17.08.2015 in this backdrop. The Arbitral Tribunal (Tribunal) allowed the claims of the respondents herein as under:

“16.0 The Arbitral Tribunal’s award is, therefore; summarized as follows: -

- i) The Termination Order issued by the Respondent on 30.12.2013 is set aside. Details are given in para 10.1 above.
- ii) The Claimant is awarded the timelines i.e. the date of payment of each installment and interest free period, annual lease rent and the date of start of construction period of 2 years as per para 12.9 above.
- iii) Article XXII-22.1 of the DA provides that in no event shall RLDA have any liability or be subject to any claim for the damages arising out of the design, development, financing, construction, operation, maintenance or management of the project and the assets and project utilities located upon the site. AT has accordingly not awarded any damages or indirect loss due to opportunity etc. AT has only reimbursed the actual expenses incurred by the Claimant due to delay attributed to the Respondent. The financial claims to the tune of Rs.1,23,37,799/- are awarded to the Claimant as per para 15 above.
- iv) This amount of Rs.1,23,37,799/- as per para 16(iii) above, awarded to the claimant should be paid by the respondent within two months of the date of award, failing which after two months, it shall carry a simple interest of 15% p.a., till the date of payment of the amount. The respondent shall have liberty to adjust

this amount against any dues of the Developer/Claimant.

17.0 The Award dated 23.2.2016 regarding vacation of the stay on two interest related BGs with a restriction for not encasing the same till 30.4.2016 stands superseded from the date of publication of this Award.

18.0 The BGs for third installment, interest on third installment and performance guarantee, should be re-submitted / continued without break.

19.0 The AT has issued various interim awards dated 4.3.2014, 5.5.2014, 19.6.2014, 21.10.2014, 28.5.2015 and 17.8.2015 which are hereby confirmed. These awards fully bring into account the arguments submitted by the parties orally as well as through written submission in Court cases by both the parties. The arguments submitted by both the parties, listed in the interim Awards, are not being reproduced in this final Award. Therefore, interim Awards, now confirmed as above, should be read as part of this final Award. Copies of the interim Awards, mentioned above, are available with both the parties.

20.0 This Award is made and published by us on this 30th day of April 2016 on a stamp paper of Rs.100/- with a direction that the Claimant should make good the stamp duty as per the prevailing law and Stamp Duty Act as applicable. The payment of the awarded amount should not be released until the stamp duty is made good.”

11. Learned counsel for the appellant has laboured hard to contend that the Tribunal as also the learned Single Judge of this Court have exceeded their jurisdiction. The Tribunal directed the specific performance of an agreement, which was not only specifically determinable, but had detailed provisions pertaining to payments of damages in case of breach of any obligations. It is also contended that the learned Single Judge has erroneously endorsed the view taken by the Tribunal that the specific performance of the Agreement could be directed in view of Section 14(3) and Explanation to Section 10 of the

Specific Relief Act, 1963, to be a plausible view. It is contended that a complete reading of the agreement between the parties leaves no room for doubt that in the event of default, damages could have been awarded. It is also contended before us that the learned Single Judge failed to consider that the Tribunal was not competent to modify the terms of the agreement, as per which, the timelines were fixed for payment of the first, second and third installments. The timelines were fixed for an interest free period and such timelines as envisaged in the agreement were binding on the parties and could not have been modified by the Tribunal. It is further contended that neither the Tribunal nor the Single Judge took into account that the respondent was not ready to carry out construction. However, the burden has been shifted on the appellant for all the delays. It is also the contention of the counsel for the appellant that specific performance is a special, extraordinary and discretionary remedy and such discretion could have been exercised in favour of the respondents in extraordinary circumstances. The learned Single Judge had ignored that the Tribunal had passed an interim order from time to time without giving reasons for the same. It is contended that the award is against public policy; and contrary to the contract and statutory provisions of law; perverse and patently illegal and thus, liable to be set aside.

12. The learned counsel for the respondent submits that the respondent is ready and willing to perform his part of the contract being the successful bidder in regard thereof the respondent took every step possible to ensure that the contract was workable. It is contended that the first installment was to be paid at the time of acceptance of the bid.

Accordingly, the respondent tendered a sum of Rs.2,34,90,000/- on 02.04.2011 with the assurance that the subsequent terms of the agreement would be complied with by the appellant. As per the agreement, second and third installments were to be paid upon signing of the agreement and as per the time schedule mentioned in Clause 43 of RFP. Counsel for the respondent also submits that the parties were *ad idem* to the extent that at the time of signing of the agreement, possession was to be handed over and at that stage, the respondent was to raise finances by the developing the site in question and in the absence of possession, the respondent could not raise finances and thus, the timelines had to be extended to make the agreement workable. Counsel further contends that the Tribunal and the learned Single Judge have categorically held that all the delays were attributable to the appellant on account of restrictions imposed by the Ministry. Therefore, the arguments that the terms of the contract have been varied by the Tribunal, are without any force. The counsel further submits that the delay in signing of the developing agreement, handing over possession and also the lease deed was attributable to the appellants, and therefore the respondent could not market the area in question and thus, could not raise funds. Furthermore, there was a delay in approval of the plans, which were submitted by the respondent.

13. We have heard the learned counsel for the parties and have carefully examined the Arbitral Award, the order dated 24.10.2016 passed by the learned Single Judge, the terms of the agreement and the rival contentions of the learned counsel appearing in the matter.

14. The short question which arises for our consideration is as to whether the award is vitiated by the patent illegality, or is the award perverse; or can the award be set aside in case the Court comes to a conclusion, which is at variance to the conclusion drawn by the Tribunal or the learned Single Judge.
15. Before the rival submissions of learned counsels for the parties can be considered, we deem it appropriate to set out the prayer made by the respondent before the Arbitral Tribunal. The respondent had inter-alia prayed as under :

“(a) grant the benefit of the 1 year interest free period under the RFP and Development Agreement to the Claimant from the date on which the Claimant is permitted to commence development activities on the site, and accordingly extend timelines for payments under the contract;

(b) exclude the delay on the part of the Respondent in handing over an encumbrance free site and the time taken by the Respondent to approve the development plan of the Claimant, from the timelines for construction under the contract;

(c) exclude the delay by the Respondent in executing the lease Deed and handing over an encumbrance free site as well as the time taken by the Respondent in approving the development plan, from the lease period of 45 years and extend the same accordingly;

(d) direct the Respondent to approve the development plan of the Claimant and to allow the Claimant to commence the Construction of the MFC in accordance with the said plan, and subsequently, permit the Claimant to develop Phase-II of the MFC;

e) quash the notice of termination dated 30.12.2013 issued by the Respondent;”

16. Learned counsel for the appellant has strongly urged before us that the respondent had signed the agreement with open eyes and was thus bound to follow the terms and conditions contained in the agreement. It is contended that the respondent failed to discharge his obligation under the development agreement and hence the Tribunal and the learned Single Judge exceeded their jurisdiction by holding that the termination was bad. Closely connected to this argument is that in case the Tribunal reached a conclusion that the termination is bad, the Tribunal could have awarded the damages and could not have granted relief in the nature of specific performance of the contract.
17. We find no infirmity in either the award for the reasoning adopted by the learned Single Judge while dealing with this issue. Paras 37 & 38 of the order dated 24.10.2016 passed in OMP (COMM) 372/2016 by the learned Single Judge read as under :

“37. It is the case of RLDA that the impugned award suffers from patent illegality as the relief granted according to RLDA by the Tribunal is in the nature of directing specific performance of a contract, which by its nature is determinable. It was earnestly contended that even if the Tribunal found that the termination of the Development Agreement was illegal, it could have awarded damages but it was not within its jurisdiction to set aside the letter of termination and direct the performance of the Development Agreement.

38. The Tribunal had considered the aforesaid contention and by an order dated 04.03.2014 (pursuant to hearing held on 27.02.2014 and 04.03.2014) came to a conclusion that the Development Agreement involved transfer of rights in the immovable property for a period of 45 years and thus the said contract fell within the scope of the Explanation to Section 10 as well as Section 14(3) of the Specific Relief Act, 1963. The aforesaid conclusion of the Tribunal that the

contract in question entails transfer of rights in immovable property cannot be disputed. The contract in question entails construction of building on a plot of land and further entails BRIPL acquiring interest in the said property. In the aforesaid context, the conclusion of the Tribunal that damages do not provide an adequate remedy and the case is covered within the Explanation to Section 10 of the Specific Relief Act, 1963 is certainly a plausible view and would not be amenable to judicial review. In the circumstances, it is difficult to accept that the impugned award suffers from patent illegality inasmuch as the Tribunal has directed the performance of the Development Agreement. Thus no interference in the impugned award is warranted even if the statutory amendments as introduced by Arbitration and Conciliation (Amendment) Act 2015 are ignored.”

18. Another submission made before us is that the respondent had failed to make the installments as per the dates specified in the development agreement and hence the appellant was well within its right to terminate the development agreement and any order made to the contrary would be bad in law. The Arbitrator as also the learned Single Judge has found no force in the said submission and rightly so for the reason that the appellant had failed to discharge its obligation under the contract and delay was attributable to the appellant in execution of the development agreement and the lease deed. Possession of the MFC site as also delay in approval was attributable to the appellant. Once this factual finding was returned by the Arbitrator, the same could not have been interfered with by the learned Single Judge. The court cannot loose track of the fact that the attempt on the part of the appellant to encash the bank guarantee was stayed by a learned Single Judge of this court in OMP 272/2013. We find no force in the submission made by counsel for the appellant that

the award is liable to be set aside as it has in fact re-written the development agreement for the reasons that the Tribunal has simply extended the timelines, as also provided in Clause 15.2.7 of the Agreement, on account of the delay caused by the appellant herein as and by extending the timelines the contract in question can be implemented.

19. As far as the interference of the Court in the Arbitral Award is concerned, the learned Single Judge has rightly held that an award under Section 34(2A) of the Act though provides for a provision to set aside the Arbitral Award in case of patent illegality, but the proviso to the same restricts scope of Section 34(2A) as it provides that an award shall not be set aside merely on the ground of erroneous application of law or re-appreciation of evidence. In the present case
20. In regard to the scope of interference of the Court under Section 37 with an award made under Section 34 of the Act, this Court in the case of *M/s. L.G. Electronics India (P) Ltd. v. Dinesh Kalra*, FAO(OS)(COMM).86/2016, held that the scope of interference under Section 34 and Section 37 is restricted to cases where the Tribunal has given an award which is either contrary to the terms of the contract between the parties, or ex facie, a perverse finding. The Arbiter/Tribunal is the final arbiter on facts as well as law, and even errors, factual and legal, which stop short of perversity, do not merit interference under Section 37 and Section 34 of the Act.

21. In a recent decision of the Division Bench of this Court in the case of *NHAI v. BSC-RBM-PATI Joint Venture* in FAO(OS) (Comm.) 107/2017 decided on 24th January 2018, while deprecating the practice of filing cases challenging the Arbitral Awards under Section 34 and Section 37 of the Act, on the basis of factual errors, the Court held in paragraph 19 as under:

“19.1 We have already highlighted, hereinabove, the limited arena of the jurisdiction of this Court, in the matter of interference with arbitral awards, under Sections 34 and 37 of the Act. The position that emerges from the law, as it stands crystallized today, is, clearly, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. It is only where the finding is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is necessary. The arbitrator/Arbitral 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. Insofar as the ultimate view of the learned arbitrator/Arbitral Tribunal, on any issue is concerned, so long as the view is plausible, and not merely possible, this Court would be loath to interfere therewith. We may usefully make reference, in this regard, to the following postscript, entered by this Court in its judgment in P.C.L Suncon (JV) v N.H.A.I., MANU/DE/3364/2015:

"As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petition before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness

that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost"

22. In view of the law laid down by this Court as well as the Apex Court in catena of decisions and applying the same to the facts of the present case, we do not find merit in the appeal since the Arbitral Award is devoid of any patent illegality or perversity, and it is also not against public policy. Accordingly, the present appeal stands dismissed.

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23. In view of the order passed in the writ petition, the application stands dismissed.

G.S.SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

OCTOBER 15, 2019

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