$~29

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

\+ O.M.P. (COMM) 249/2019

Date of Decision : 26th July, 2019

AEZ INFRATECH PVT LTD.(NOW KNOWN AS ADTV COMMUNICATIONS PVT. LTD.) & ANR. ..... Petitioners

Through: Mr.Krishnendu Datta, Mr.Praveen Kumar & Mr.Shikhar Kumar, Advs.

versus

SNOWTEMP ENGINEERING COMPANY LTD & ORS. ..... Respondents

Through: Mr.J.P. Sengh, Sr. Adv. with Ms.Surekha Raman, Mr.Rajeev K. Sharma, Mr.Ankit Singhal, Ms.Manisha Mehta, Mr.Shashi Pratap Singh, Mr.R.L. Sinha, Mr.Archit Gupta & Ms.Arushi Bhardwaj, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

I.A. No.8844/2019 (Delay)

This is an application seeking condonation of 22 days delay in re-filing of the petition.

For the reason stated in the application, the delay is condoned and application stands allowed.

I.A. No.8843/2019 (Exemption)

Allowed, subject to all just exceptions.

O.M.P. (COMM) 249/2019 & I.A.No.8842/2019 (Stay)

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 11.12.2018, passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Memorandum of Understanding (MoU) dated 28.12.2006, Supplementary MoU dated 27.03.2007 and Development Agreement dated 27.03.2007, executed between the parties.

2. The respondent no. 1 is the owner of a parcel of land measuring 14.41 acres (58631 Sq. mtrs.) situated at 14th Milestone, Mathura Road, Faridabad, Haryana. As it was interested in developing the said parcel of land as an I.T./Commercial project, the abovementioned MoU's and Agreement were executed between the parties.

3. By way of the MoU dated 28.12.2006, the petitioners were to acquire 50% paid up capital in respondent no. 1, held by the Mahajan Group (respondent nos. 2 to 6) at a price of Rs. 62.50 crores by way of transfer of equity shares. By the Supplementary Agreement dated 27.03.2007, the proposed shareholding of the two groups was changed with the introduction of one Mr. Subhash Chandra Lakhotia. On the same day, the petitioner no. 1 and respondent no. 1 entered into a Development Agreement whereby the petitioner was to undertake the construction activity on the said parcel of land by an initial investment

of Rs. 62.50 crores. A sum of Rs. 1 crore, which was initially paid by the petitioners as a part consideration for the MoU, was shown as having been paid as a "part consideration" in the Development Agreement. Admittedly the development on the said parcel of land did not take place and the petitioners claimed that the project was kept on hold at the instance of the respondents due to a sudden drop in the real estate market. On the other hand, the respondent no. l terminated the Development Agreement and forfeited the amount of Rs. 1 crore by its notice dated 23.09.2013. The petitioners invoked the Arbitration Agreement and filed their Statement of Claim before the Sole Arbitrator, *inter alia,* making the following prayers:-

> *"39. That the claimant seeks the following claims:*
>
> *1 (a) The shares of 43% of the Non-Claimant No. 1 Company be transferred in favour of the Claimants in terms of the Supplementary Memorandum of Understanding dated 27.03.2007;*
>
> *b) Direct the Non-Claimants to re-apply for the License and obtain the License at their cost and thereafter Claimants be allowed to carry out the Development of the said Project on the Said Lands and be entitle to the Revenue/ Profit in the ratio 75:25 effectively to be divided between Claimants and the Non Claimants No. 2 and 3 in terms of the Development Agreement dated 27.03.2007;*
>
> *c) Declare that Claimant No. 2 continues to be Director of Non Claimant No. 1 Company;*
>
> *d) Declare Legal Notice dated 23.09.2013 issued by the Non Claimants as illegal and void;*

In the alternative:

Non-Claimants be directed to pay the Claimants an amount to the tune of Rs.125,00,00,000/- (Rupees One Hundred Twenty Five Crore Only) towards the compensation/damages including re-conveying of shares given as consideration of the two companies which were transferred in favour of the Non-Claimant No. 1 and towards the expense incurred for the Development of the Subject Lands before the Project was kept on hold on the Subject Lands by the Non Claimants. The said amount is liable to be paid with interest @ 24% w.e.f. dates of payment till the date of actual recovery of the said amount.

2. As per para 37 of the Claim Statement, the Claimants are entitled to Rs. 286,27,50,000/- (Rupees Two Hundred Eighty Six Crore Twenty Seven Lakhs Fifty Thousand Only);

3. Claimants are also entitled to the loss of profit which as calculated in para 38 comes to Rs.522,52,50,000/- (Rupees Five Hundred Twenty Two Crores Fifty Two Lakhs and Fifty Thousand Only).

4. The cost of the present proceeding including the fee of the counsel and all other cost and expenses incurred by the claimant;

5. Interest @ 24% p.a. pendente lite on the amounts claimed till the date of actual recovery."

4. The Sole Arbitrator by the Impugned Award has rejected the prayers of the petitioners leading to the present challenge.

5. The learned counsel for the petitioners submits that even assuming that the petitioners had failed to comply with their

obligations under the Development Agreement, the respondent no. 1 could not have been allowed to forfeit the advance consideration of Rs. 1 crore and the development cost that has been incurred by the petitioners for the said project, without the respondent no. 1 having pleaded and thereafter proved any loss suffered by it due to such default on behalf of the petitioners. He submits that Clause 6(b) of the Development Agreement though authorizes the respondent no. 1 to forfeit the part consideration of Rs. 1 crore and any development cost incurred by the petitioners for the said project, however, for such forfeiture to take effect, the respondents have to plead and prove any loss suffered by them due to such defaults by the petitioners. In the present case, the respondent no. 1 did not even plead, leave alone adduce any evidence of any loss suffered by it. Infact, the respondent no. 1 did not make a counter claim towards this amount. He submits that in view of such lack of pleadings and proof of loss, the Arbitrator has erred in allowing the respondent no. 1 to forfeit the amount of Rs. 1 crore and refusing the claim of the petitioners towards the refund of the amount spent by the petitioners towards development of the project.

6. I have considered the submissions made by the learned counsel for the petitioners, however, find no merit in the same. Clause 6(b) of the Development Agreement is reproduced hereinunder:-

> *"It is agreed upon between the parties that in the event of the project being abandoned by the Developer at any stage the whole amount that has been invested by him in the project including the amount paid to the First Party will be*

forfeited. This is subject to the provisions contained in Clause 6a, relating to Force Majeure".

7. The respondent no. 1 in its termination notice dated 23.09.2013, while terminating the Development Agreement also forfeited the amount of Rs. 1 crore that was paid at the time of the execution of the Development Agreement. The petitioners in their Statement of Claim made no averment or prayer challenging such forfeiture on the ground that the respondents had not suffered any loss on account of the breach of the Contract by the petitioners. The Statement of Claim was premised only on the fact that the respondents were in breach of the Development Agreement. Infact, in the written submission filed before the Arbitrator, the petitioners highlighted the issues to be determined by the Arbitrator in the following words:-

*"**ISSUES FOR CONSIDERATION BY THIS HON'BLE TRIBUNAL:***

The issues that fall for consideration by this Hon'ble Tribunal is as follows:

A. Whether the MOU, SMOU and DA are valid, existing and enforceable agreements?

B. Whether the Claimant Company had abandoned the project as alleged by the Respondent vide notice dated 23.09.2013?

C. Whether the termination of Development Agreement dated 27.03.2007 is invalid and illegal?

D. Whether the removal of Mr. Sanjeev J Aeren from the board of directors without any notice is illegal and liable to be set aside;

E. Whether Claimant No. 2 is not competent to seek relief in the present arbitration proceedings?

F. Whether the Claimants are entitled to the damages claimed?"

8. The learned senior counsel for the respondents is correct in his submission that once the issue, whether the respondents have suffered any loss on account of breach of the Contract by the petitioners, is not put to trial, the petitioners cannot challenge the Award by urging the same before this Court.

9. As far as the amount spent by the petitioners on the development of the project is concerned, apart from the fact that this amount was claimed by the petitioners as damages/compensation in the statement of claim, rather than a separate substantive claim on account of the respondent no. 1 having not suffered any loss due to breach of the Development Agreement by the petitioners, the Arbitrator, on appreciation of evidence, found that the petitioners have miserably failed to prove any such investment/expenses incurred by them on the project.

10. The Statement of Accounts filed by the petitioners in support of their claim was not believed to be true and fair by the Arbitrator for various reasons recorded in the Award. Though the learned counsel for the petitioners made an effort to show that these findings of the Arbitrator are incorrect, I find no merit in such submissions. Apart from the fact that the Statement of Accounts was not supported by an affidavit as required under Section 65B of the Indian Evidence Act, 1872, the Arbitrator has found various discrepancies in the Statement of Accounts which led her to conclude that the Statement of Accounts

produced by the petitioners cannot be relied upon. Reference in this regard can be made to pargraphs 130, 139 and 140 of the Impugned Award.

11. In exercise of power under Section 34, this Court cannot sit as a Court of appeal against the said findings of the Arbitrator. The Arbitrator being the final judge of the quality and quantity of the evidence led by the parties, this Court cannot substitute the opinion of the Arbitrator on such evidence unless, such opinion is found to be completely perverse or unreasonable. In the present case no such exception is made out by the petitioners warranting any interference from this Court.

12. The learned counsel for the petitioners further submits that the Arbitrator had erred in her finding that the MoU and the Supplementary Agreement stood novated by the Development Agreement. He submits that the MoU and the Supplementary Agreement, apart from containing terms for the development of the project, also provided for the investment of the petitioners in the respondent no. 1 as a shareholder. The Development Agreement was an independent Contract between the parties which was only intended for the development work on the parcel of land owned by respondent no. l. The two Agreements therefore, operated on a different field and did not substitute the other. He submits that infact there were different parties in the MoU, the Supplementary Agreement and the Development Agreement, with the Development Agreement being executed only between petitioner no. 1 and the respondent no. 1.

Further, the Supplementary Agreement and the Development Agreement were executed on the same day and if the parties would have intended the Development Agreement to substitute the MoU and the Supplementary Agreement, they would have specifically recorded the same in the Development Agreement. He submits that therefore, the finding of the Arbitrator that the Development Agreement has substituted the MoU and the Supplementary Agreement is perverse and cannot be sustained.

13. As far as the implementation of the MoU and the Supplementary Agreement is concerned, he submits that in terms of the MoU and the Supplementary Agreement, the petitioners had infact made an investment of Rs. 62.50 crores for acquiring share in respondent no. 1 Company. He submits that this investment was made in the form of transfer of their shareholding in two Companies, namely, M/s Ish Realcon Pvt. Ltd. and M/s Aloha Township Pvt. Ltd., which again the Arbitrator had wrongly rejected as being an independent transaction and having no connection with the MoU and the Supplementary Agreement.

14. As far as the first submission of the learned counsel for the petitioners is concerned, though, I find *prima facie* merit in the same, the Arbitrator has given various reasons for her conclusion that the Development Agreement novated the MoU and the Supplementary Agreement. These reasons can be found in paragraphs 38 to 56 of the Impugned Award.

15. Most importantly, the Arbitrator in the Impugned Award has observed that the MoU and the Supplementary Agreement were not acted upon by the parties; not a single share was transferred by the Mahajan Group to the petitioners; and the petitioners took no steps for transfer of shares in their favour. Though MoU provided for appointment of two Directors from each of the two groups in the Board of Directors of respondent no. 1 Company, however, only one Director from the petitioners group was appointed from 15.03.2007 till 30.09.2013 and the second Director of the petitioners group was never appointed. In terms of the Supplementary Agreement, Shri Subhash Chandra Lakhotia was to be appointed as a fifth Director, who was also never appointed and who never even staked a claim for his appointment. Further, it was the obligation of the petitioners to obtain the necessary clearance from SEBI for the proposed share transfer. This was never done. Witness of the petitioners sought to explain this lapse, however, the explanation was disbelieved by the Arbitrator.

16. As far as the transfer of the shareholding of the two companies that is M/s Ish Realcon Pvt. Ltd. and M/s Aloha Township Pvt. Ltd., the Arbitrator gave cogent reasons for disbelieving that the said transfer was in connection with the MoU and Supplementary Agreement. The reasons are contained in paragraphs 63 to 78 of the Impugned Award and are not reproduced herein for the sake of brevity.

17. The above being a finding of fact arrived at upon appreciation of evidence by the Arbitrator, this Court in exercise of its jurisdiction under Section 34, cannot interfere with the same.

18. In view of the above, the present petition is dismissed, with no order as to costs.

NAVIN CHAWLA, J

JULY 26, 2019/*rv*

HIGH COURT OF DELHI
सत्यमेव जयते