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

+ **FAO(OS)(C) 264/2018 & CM APPL. No. 47776/2018**

**DELHI STATE INDUSTRIAL & INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD. Appellant**

Through: Mr. Vinod Diwakar, Sr. Standing
Counsel with Ms. Radhik Roy,
Mr.Sayandeep Pahari & Mr. Moni
Cinmoy, Advs. along with
Mr.Bhawesh Gupta (CE), Mr. Sehgal
(SE) and Mr. Jajinder Kumar (EE)

versus

BLS SUMMER JOINT VENTURE Respondent

Through: Mr. Ashish Dholakia & Mr. Gautam
Bajaj, Advs.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

Anup Jairam Bhambhani, J. (Oral)

By this appeal filed under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter the “Act”) read with Section 13 of the Commercials Courts Act 2015, the appellant/Delhi State Industrial and Infrastructure Development Corporation Limited (hereinafter “DSIIDC”) impugns order dated 16.08.2018 made by the learned single Judge of this court in O.M.P. (COMM) No. 259/2017, whereby the single Judge has

upheld Arbitral Award dated 03.03.2017 passed by a Sole Arbitrator. The award was a culmination of disputes that arose from a project for construction of Integrated Infrastructure of 28 Government Schools in East Delhi awarded by DSIIDC to the respondent/BLS Summer Joint Venture (hereinafter the “Contractor”) *vidé* Contract dated 01.10.2009 (hereinafter, the ‘Agreement’).

2. Briefly, the disputes arose by reason of delay on the part of the Contractor to complete the construction of schools within the stipulated period of 12 months from the date of commencement of the contract, which was 25.10.2009. By reason of such delay, DSIIDC terminated the contract on 13.09.2013, whereupon the Contractor invoked arbitration. The Contractor made 11 claims; whereas DSIIDC made 5 counter-claims before the Arbitrator. Upon such claims and counter-claims, the Arbitrator framed 4 issues, the main issue being whether there had been any breach of contract; and if so, which party was responsible for the breach.

3. The arbitrator allowed 10 of the 11 claims made, in varying amounts and rejected the claim for loss of profit. The total amount awarded was Rs. 12,38,25,162/-plus interest as also release of the bank guarantee furnished by the Contractor.

4. In essence and substance, the Arbitrator held that the delay in execution of work was occasioned *mainly* on account of DSIIDC failing to hand- over the sites for construction of schools in time to the Contractor; DSIIDC failing to make available drawings/decisions for execution of work in time ; and DSIIDC failing to release running account payments in time. The Arbitrator also held though, that there was contributory delay on the part of the Contractor inasmuch as the progress of work was slow. But the

Arbitrator opined that delay on the part of the Contractor was attributable to the delay in receiving payment from DSIIDC, which delay put financial pressure on the Contractor and thus slowed down the pace of work. The Arbitrator held, *as a decision on point of fact*, that DSIIDC was responsible for 60% of the delay; whereas the Contractor was responsible for 40% of the delay. The Arbitrator also observed that while exact apportionment of delay as between the parties may not be possible; but the Arbitrator, in his *subjective factual assessment*, apportioned blame on a 60:40 basis as between DSIIDC and the Contractor.

5. One of the principal grievances raised by DSIIDC before the single Judge was that the Arbitrator was biased against DSIIDC and such bias vitiates the arbitral proceedings. The alleged bias, DSIIDC argued before the single Judge, was a result of DSIIDC omitting to pay its share of what it considered was exorbitant arbitration fee fixed by the Arbitrator. DSIIDC complained that such fee was fixed by the Arbitrator contrary to the terms of his appointment and in spite of protests by DSIIDC. DSIIDC therefore did not pay its share of the fee; whereupon the Contractor paid the entire fee, including DSIIDC's share. DSIIDC contended before the single Judge that since the Contractor paid the entire arbitration fee, the arbitrator rendered an award favourable to the Contractor.

6. Apart from the issue of bias, DSIIDC alleged before the single Judge that the Arbitrator had failed to take into account relevant documents and materials including 90 letters stated to have been written by DSIIDC to the Contractor complaining about delay and slow progress of work. DSIIDC also alleged that the Arbitrator did not consider a Drawing Register which, the Contractor says, was not provided by DSIIDC itself. But DSIIDC

refutes this to say that the Drawing Register was placed on record during the course of cross-examination of witnesses. Grievance was also made by DSIIDC that the Arbitrator ignored documents on record and therefore came to a *wrong conclusion on facts*. DSIIDC further argued that the Arbitrator ignored Clause 20 of the Agreement in concluding that the termination of contract by DSIIDC was illegal on the ground that the contract was terminated by an officer not entitled to do so. DSIIDC further contended that while the 60:40 formula for apportionment of blame for the delay was applied by the Arbitrator to certain claims, this formula was not applied in relation to claim No. 1 which was towards the final bill raised by the Contractor.

7. DSIIDC further argued that the Arbitrator applied incorrect rates in awarding the claim towards the final bill inasmuch as, for deviated items, the award is based on rates payable on sanctioned cost indices of the Central Public Works Department, without any evidence having been led on such rates. DSIIDC further argued that there was an overlap between claim No. 1 (on account of final bill) and claim No. 5 (on account of cost escalation) and thereby excess amount has been awarded.

8. We may now briefly allude to the view taken by the single Judge on the relevant matters decided by the Arbitrator:

8.1 On the issue of rescission of contract by the wrong Executive Engineer, the single Judge upholds the interpretation given by the Arbitrator to Clause 20 read with Clauses 2(i) and 2(ii) of the Agreement, which pertain to the 'Engineer' who would be 'Engineer-in-Charge', whereby the

Arbitrator has held that the rescission of contract was illegal since it was done by a wrong authority;

8.2 The single Judge also agrees with the Arbitrator, who held that time was never made of essence of the contract; which the single Judge says is a plausible interpretation of contractual terms;

8.3. The single Judge has also approved the view taken by the Arbitrator in relation to the claim for cost of additional items, observing that since there is no dispute about the quantum of such items, the Arbitrator having used the indices of the Central Public Works Department to determine market rates cannot be faulted;

8.4. As regards the plea of overlapping of claims Nos. 1 and 5, the single Judge holds that such plea was never raised before the Arbitrator nor in the petition before the single Judge, additionally observing that while claim No. 1 pertains to actual final bill, claim No. 5 was towards the cost of escalation; and therefore, there was no overlap between the claims;

8.5. On the issue of apportionment of blame for delay in a 60:40 ratio as between the DSIIDC and the Contractor, the single Judge proceeds on the basis that the Arbitrator has, in deciding this issue, proceeded on a perusal of the Hindrance Register and the Site Order Book maintained by the parties. Based upon the said documents, the Arbitrator had held, on point of fact, that in case of a number of schools that were to

be constructed there was long delay by the DSIIDC in handing-over the sites for construction to the Contractor; as also delay in furnishing Lay-Out Plans/Foundation Drawings etc., which would be the starting point for the Contractor to proceed with the work. The single Judge also duly considers the fact that the slow pace of work on the Contractor's part was also partly attributable to the delay by DSIIDC in making payments to the Contractor, which created financial pressure and threw the financial management of the Contractor out of gear.

9. As a summary of his views in the matter, in paragraph 35 of the impugned order, the single Judge says:

“The findings of fact have been recorded by the learned Arbitrator based on the evidence and the documents placed on record by the parties. The findings are plausible. The petitioner has failed to point out any vital evidence that has been left out while arriving at the findings of fact. The learned arbitrator is the master of the quality and quantity of the evidence to be relied upon. The findings recorded are reasonable and cannot be faulted with.”

whereupon, relying on well-worn principles laid down by the Supreme Court in ***Associate Builders vs. Delhi Development Authority*** reported as (2015) 3 SCC 49 and ***H.B. Gandhi, Excise & Taxation Officer-cum-Assessing Authority vs. Gopi Nath & Sons*** reported as 1992 Supp (2) SCC 312 to the effect that a court exercising jurisdiction under Section 34 of

Act does not sit in appeal over the award to re-assess or re-appreciate evidence; and that where there is nothing perverse or irrational, the Court will not interfere in an arbitral award, the single Judge holds that there is no ground for interference in the award and has dismissed the petition.

10. For purposes of the present appeal, it is not necessary for this court to delve deeper into the factual discussion and evidence which the Arbitrator and the single Judge have relied upon for coming to the aforesaid conclusions.

11. It may be noted that the contentions raised by DSIIDC *all* pertain to determination made by the Arbitrator on points of fact; on interpretation of contractual terms; and on subjective assessments and inferences drawn on factual disputes between the parties. Suffice it to say that in the impugned order the single Judge has dealt with the foregoing aspects specifically though briefly, as indeed these should have been dealt with, considering that the Arbitrator is the final arbiter of issues of fact as well as interpretation of contractual provisions.

12. Decision on these aspects are findings of fact and reasonable inferences drawn by the Arbitrator, which have been upheld by the single Judge; and which do not warrant any inference by this court under Section 37 of the Act. We concur with the single Judge on all these aspects.

13. The point that was vociferously argued before us was the alleged bias on the part of the Arbitrator, which bias the DSIIDC contends, vitiated the adjudicatory process and was the cause for an adverse award being made against the DSIIDC.

14. Since bias, *if it at all existed*, would indeed vitiate the arbitration process and would render the award perverse, we put that issue through

closer scrutiny.

15. For completeness it may be mentioned that the issue of bias was raised by DSIIDC by filing an application under Section 12(3)(a) read with Section 16 of the Act before the Arbitrator, which application was dismissed. The dismissal was challenged by DSIIDC by way of OMP No. 120/2015 before a single Judge of this court, which challenge was rejected, with the court advising the petitioner to await the award and to take-up this issue as part of the challenge to the award. FAO (OS) No. 229/2015 filed against the dismissal of OMP No. 120/2015 was also dismissed by a Division Bench of this court.

16. Interestingly, the bias alleged by the DSIIDC against the Arbitrator is premised only on the arbitration fee charged by the Arbitrator.

17. The DSIIDC argues that arbitration fee was payable as per Office Memorandum dated 25.03.2013 issued by the DSIIDC, which should have been in the total sum of Rs. 1,00,000/-, to be shared between the disputing parties.

18. The Arbitrator however fixed a total arbitration fee of Rs. 13.74 lacs, to be shared equally between the parties; and since the DSIIDC failed to pay its share, the Contractor was made to pay the entire arbitration fee. In this backdrop the DSIIDC alleges in effect, that since the entire arbitration fee was paid by the Contractor, the Arbitrator was beholden to the Contractor and *that* informed the passing of the Arbitral Award in the Contractor's favour.

19. It is pertinent to record here that in minutes of arbitration proceedings dated 11.12.2014, when application dated 30.09.2014 filed by the DSIIDC under Section 12(3)(a) read with Section 16 of the Act for recusal was

considered and decided, the Arbitrator recorded as under :

“The Learned counsel for the respondent and the representative of the respondent Mr. M.P. Singh have very fairly stated that neither the department/respondent nor they doubt the integrity of the Arbitrator and that the allegations of impartiality has been raised out of compulsion because of the letters exchanged by the respondent and the Arbitrator and no other ground. They have further fairly stated that respondent cannot doubt the Arbitrator as he has been appointed by the respondent itself. However the Learned Counsel for the respondent stated that he has no other option but to press his application under consideration. In the application, the respondent has contended that order dated 27.03.2014 i.e. the first order of this Forum was never conveyed to the respondent though the respondent has fairly admitted in the application that it had no objections on my appointment as Arbitrator. Even otherwise I was appointed by the appointing authority, who is the officer of the respondent itself.”

“The respondent had contended that there was no consensus arrived at on the issue of fee of the Arbitrator. The respondent maintains that the fee in terms of office memorandum must prevail upon the contract entered into between the parties. It is relevant to note that Clause 25 in categorical terms provides that the cost of reference and of the award (including fee of the Arbitrator) shall be in the discretion of the Arbitrator who has been empowered to fix the cost including his fees. Thus, even the contract between the parties in the explicit terms mandates that it is the Arbitrator who can fix his fees of arbitration. No doubt the parties to the Agreement can arrive at an Agreement for any other fee. In the instant case there is no Agreement between the parties for fees except the clause 25 of the Agreement which mandates that

Arbitrator shall fix the fees for arbitration. Even otherwise Section 38(2) of the Act provides that in the event one party fails to pay his share of fee, the Arbitrator can call upon the other party to make payment for the balance fee. From the order dated 27.03.2014 it is clear that the representative of the respondent had agreed for the Arbitrator's fee in explicit terms. However, since the respondent agreed to pay only 50% of Rs. 1,00,000/-, the claimant was called upon to make the balance payment of the respondent's share as well, which was never objected by the respondent."

(Emphasis Supplied)

whereby it is apparent that before the Arbitrator the DSIIDC itself conceded that it had no doubt as to the integrity of the Arbitrator; and that the allegation relating to bias on the part of the Arbitrator has been raised out of *compulsion* and in the context only of the fee fixed by the Arbitrator. It is also apparent that such fee was paid in its entirety by the Contractor only because the DSIIDC had failed to pay its share of the fee. What is also clear from the aforesaid recording, is that Clause 25 of the Agreement specifically provides that the cost of reference to arbitration and of the award, including Arbitrator's fee, would be fixed by the Arbitrator in his discretion. Accordingly, it was under Clause 25 that the Arbitrator fixed his arbitration fee as he deemed appropriate.

20. As noted by the single Judge, arbitration fee was fixed by the Arbitrator by order dated 27.03.2014, which order was dictated in the presence of both parties; which made it even more untenable for the DSIIDC to raise fixation of fee as a ground for later seeking recusal of the Arbitrator.

21. For ease of reference, it may be useful to extract the relevant portion of Clause 25 of the Agreement, which reads as under:

“25. ... 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....”

(Emphasis Supplied)

22. On the issue of fixation of fee, the single Judge holds that the Arbitrator was well within his authority to fix the fee in accordance with Clause 25 of the Agreement; and was not obliged to follow the mandate of any administrative instructions contained in Office Memorandum dated 25.03.2013. The single Judge further holds that the Arbitrator was bound by the terms of the Agreement and not by administrative instructions issued by the DSIIDC. The single Judge also holds that such interpretation of Clause 25 by the Arbitrator is a reasonable interpretation.

23. The single Judge also opines that, other things apart, the fee fixed by the Arbitrator is in any case reasonable considering the value of claims in dispute, which was Rs. 40.50 crores. To test the reasonableness of the arbitration fee fixed, the single Judge says that on the basis of the fee schedule of the Delhi High Court International Arbitration Centre, the fee for such claim would work out to Rs. 20.15 lacs as against the fee of Rs. 13.74 lacs fixed by the Arbitrator, which was based on the Rules of the Indian Council of Arbitration, New Delhi. The single Judge also opines that

considering the quantum of work involved in adjudication of claims, the fee of Rs. 1 lac stipulated in the DSIIDC's Office Memorandum dated 25.03.2013 was wholly unworkable, meaning thereby that it would have been wholly inadequate. We entirely concur with the opinion of the single Judge in this regard.

24. Furthermore, since DSIIDC failed to make payment of its share of arbitration fee, the Contractor was called upon and paid the entire arbitration fee, including DSIIDC's share of the fee. The single Judge holds that the payment of such share of fee by the Contractor was in consonance and accord with the provisions of Section 38 (2) of the Act, which provision reads as under:

“38. Deposits.

(1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it:

Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.

(2) The deposit referred to in sub-section (1) shall be payable in equal share by the parties:

Provided that where one party fails to pay his share of the deposit, the other party may pay that share:

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.”

(Emphasis Supplied)

and accordingly, there cannot possibly have been anything amiss in the Arbitrator accepting the entire arbitration fee from the Contractor, muchless anything sinister leading to a reasonable doubt as to the Arbitrator's impartiality.

25. The single Judge also deals in fair detail with the precedents cited by the DSIIDC on the issue of alleged bias, which precedents, in our opinion, stand dealt with appropriately and we find no reason to interfere on that count either.

26. In conclusion, we may say:

- (a) that the challenge made by way of this appeal relates essentially to decisions taken by the Arbitrator on points of fact; on interpretation of clauses of the Agreement; and on the subjective, factual inferences drawn by the Arbitrator based on appreciation of documentary and other evidence available before the Arbitrator on record;
- (b) that bias has been alleged against the Arbitrator solely based on the Arbitrator having fixed arbitration fee that was not in conformity with the Office Memorandum issued by the DSIIDC *but* which was well in consonance with Clause 25 of the Agreement in question; which fee was otherwise reasonable considering the quantum of the amount in dispute. The entire fee so fixed was paid by the Contractor since DSIIDC failed to pay its share.

27. We are clear that none of the aspects referred to in (a) above are within the scope and ambit of an appeal under Section 37 of the Act. We

are also of the view that mere fixation of arbitration fee in a manner that is not to the liking of a party, in this case the DSIIDC, and payment of the entire such fee by the Contractor as referred to in (b) above, cannot be ground to allege bias or prejudice against the Arbitrator.

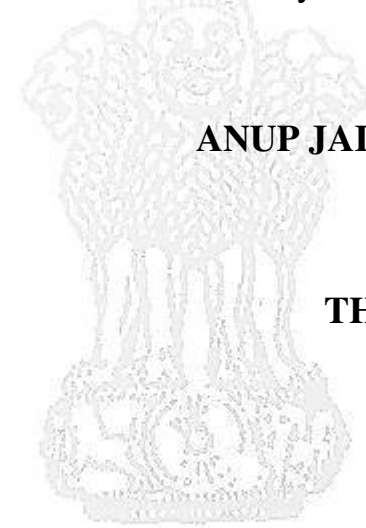
28. We also find nothing patently illegal or unreasonable or perverse in the award; nor do we find any error in the single Judge having upheld the award.

29. For the reasons recorded above, we find no merit in this appeal, which is accordingly dismissed; without however, any order as to costs.

ANUP JAIRAM BHAMBHANI, J.

THE CHIEF JUSTICE

MARCH 12, 2019/uj



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