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

% *Date of Decision: 12.12.2023*

+ **FAO(OS) (COMM) 216/2023**

DELHI STATE INDUSTRIAL AND
INFRASTRUCTURE DEVELOPMENT
CORPORATION LTD.

..... Appellant

Through: Ms Anusuya Salwan, Mr
Bankim Garg and Ms Sarika
Singh, Advocates.

versus

BAWANA INFRA DEVELOPMENT
PVT. LTD.

..... Respondent

Through: Mr Dheeraj P. Deo, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The appellant (hereafter '**DSI IDC**') has filed the present intra court appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning a judgment dated 16.03.2023 (hereafter '**the impugned judgment**') rendered by the learned Single Judge of this Court in OMP(COMM) 24/2019 captioned *Bawana Infra Development Pvt. Ltd. v. Delhi State Industrial and Infrastructure Development Corporation Limited*.

2. The respondent had filed the said application under Section 34 of



the A&C Act impugning an arbitral award dated 12.09.2018 (hereafter '**the impugned award**') rendered by the Arbitral Tribunal comprising of a Sole Arbitrator.

3. The impugned award was rendered in respect of the disputes that had arisen between the parties in connection with a Concessionaire Agreement dated 20.07.2011 (hereafter '**Concessionaire Agreement**'). In terms of the Concessionaire Agreement, the respondent had undertaken to develop, operate and maintain infrastructure and utilities in Bawana Industrial Area, Delhi by deploying its own resources. The concession period was fifteen years out of which total of two years were provided for construction and redevelopment of the industrial area. In consideration, the respondent was entitled to receive an annual annuity of ₹7.48 crores for a period of thirteen years.

4. The respondent was also charged with the obligation of maintaining the industrial area and was also entitled to recover maintenance charges from various industrial units/allottees of industrial plots for maintenance of the Industrial Area.

5. The respondent had raised several claims before the Arbitral Tribunal including claims arising out of delay in issuance of completion certificate; default in payment of the dues; reimbursement of unpaid charges for Combined Effluent Treatment Plants (CETP); sewerage charges and water charges along with interest; and additional expenses incurred on road restoration works, amongst others. The controversy in the present appeal is confined to claim no.7 and claim no.11. Claim



no.7 raised by the respondent relates to the payment of interest on account of delay in payment of maintenance charges. DSIIDC had released 75% of the maintenance amount collected by the respondent but had withheld the remaining amount. The said amount was released to the respondent after some delay and the respondent had preferred a claim for interest for the period of the delay in the release of the said amounts. The Arbitral Tribunal had rejected the said claim. However, the learned Single Judge found that the said rejection was in disregard to contractual provisions.

6. The second issue (claim no.11) relates to the payment of interest on delayed payment on monthly instalments. The Arbitral Tribunal had rejected the said claim on the ground that the Concessionaire Agreement did not provide for payment of any interest. However, the learned Single Judge had faulted the Arbitral Tribunal rejecting the claim on the said ground as Section 20.21 of the Concessionaire Agreement expressly provides for payment of interest, if the amounts are not paid within the time stipulated for making the said payment. This question was considered by this Court in its order dated 11.10.2023 whereby this Court did not find any infirmity with the decision of the learned Single Judge in setting aside the impugned award in respect of claim no.11. Paragraph 14 and 15 of the order dated 11.10.2023, which record this Court's conclusion are set out below:

“14. The second issue relates to the interest on the monthly payments payable to the respondent (claim no. 11). The learned Arbitral Tribunal has rejected the claim of interest on the delayed payment of monthly instalments on the ground that the



Concessionaire Agreement does not provide for payment of interest. The said findings of the learned Arbitral Tribunal are, *ex facie*, erroneous and overlook Section 1.2 and Section 20.21 of the Concessionaire Agreement. These clauses expressly provide for the obligation to pay interest for delayed payments. The relevant sections of the Concession Agreement, as set out in the impugned judgment, are reproduced below:

“Section 1.2 Interpretations

(p) unless otherwise provided, any interest to be calculated and payable under this Agreement, shall accrue pro-rata on a monthly basis and from the respective due dates as provided for in this Agreement.

Section 20.21 Interest and Right of Set off and Lien

Any sum which is due and payable under any of the provisions of this Agreement by one party to the other shall, if the same not paid within the time allowed for payment thereof, be deemed to be a debt owed by the Party responsible for such payment to the Party entitled to receive the same. Such sum shall until payment thereof carry interest at the rate specified herein, and if not specified at the rate of SBI PLR plus 2% (two percent) per annum, from the due date, and until the date of payment or otherwise realisation thereof by the Party entitled to receive the same, Without prejudice to any other right or remedy available, under this Agreement or under law, the Party entitled to receive such amount shall also have the right of set off.

Provided this provision for payment of interest for delayed payment shall not be deemed or construed to (i) authorise any delay in payment of any amount due by a party or (ii) be a waiver of the, underlying breach of the payment obligations.

Provided further, in the event any sums whatsoever are due and owing to DSIIDC shall recover the same by appropriating such dues from the Annuity, Performance



Security and/or exercising lien over the revenue of the Concessionaire generated from the Project.”

15. Clearly, the learned Arbitral Tribunal has ignored the express provisions of the Concessionaire Agreement, and has rendered a finding contrary to the same. We find no infirmity with the decision of the learned Single Judge in setting aside the Arbitral Award in respect of claim No. 11.”

7. In view of the above, the only question to be considered is whether the learned Single Judge had erred in interfering with the impugned award in respect of rejection of claim no.7. At this stage, it would be relevant to refer to the Statement of Claim setting out the relevant claim – claim no.7:

“73.2 That, the aforesaid letters indicate that the maintenance charge was payable. The Respondent later released only 75% of the said amount and withheld 25%. Thus, once the entitlement and the right of the Claimant having been substantiated, there was no reason for withholding the aforesaid sum, thus the Respondent is liable to pay interest on the amount illegally withheld.”

8. DSIIDC contested the aforesaid claim on the ground that it was justified in withholding the part of the maintenance amount as the respondent had not met the maintenance standards. It was contended that the said sums were released after the respondent had discharged its obligations in respect of maintaining the Industrial Area. Paragraphs 73.1 and 73.2 of the Statement of Defence are set out below:

“73.1 In response to the contents of paragraph 73.1 of the Statement of Claim it is submitted that as the Claimant (Concessionaire) had failed to fulfill its obligations



under the Agreement, the Respondent did not release the maintenance charges to the Claimant (Concessionaire). However, the Claimant (Concessionaire) repeatedly requested the Respondent to release some portion of the maintenance charges. The Respondent keeping into consideration the interest of the Project and believing assurances of the Claimant (Concessionaire) released 75% of the maintenance charges. It is pertinent to note that thereafter the Claimant (Concessionaire) began to demand releasing of the balance 25% maintenance charges as well. The Respondent once again believing the assurances of the Claimant (Concessionaire) that it will perform its duties as per the Agreement released the said 25% of the maintenance charges as well. It is also important to note herein that the Claimant (Concessionaire) is not entitled to claim any interest on the withheld 25% of the maintenance charges as the same was done by the Respondent due to the Claimant's (Concessionaire's) failure to fulfill its obligations under the Agreement, all of which have been enumerated hereinabove.

It is humbly submitted that as the Claimant (Concessionaire) failed to fulfill its obligations under the Agreement therefore the Respondent since September, 2016 has withheld 10 % of the maintenance charges collected from the unit owners.

- 73.2 In response to the contents of paragraph 73.2 of the Statement of Claim it is denied that the Claimant (Concessionaire) was entitled to receive maintenance charges. It is also denied that the Respondent has illegally withheld any amount and that it is liable to pay interest on the said withheld amount. It is submitted that although the work(s) were incomplete and not as per the prescribed service level standards the Respondent in the interest of the Project and the Project Area released 75%



of the maintenance charges on assurance of the Claimant (Concessionaire) that all work(s) would be completed on urgent basis and maintained as per the Agreement. However, till date the Claimant (Concessionaire) has failed to complete the work and it has no right to raise any claim against the Respondent.”

9. The respondent had countered the aforesaid contention and claimed that the respondent had acknowledged the project completion based upon the recommendation of a third-party engineer and it had completed all punch list items as well. Therefore, withholding any amount was impermissible. The respondent had also relied upon Clause 11.4 of the Concessionaire Agreement. The relevant extract of which is set out below:

“Clause 11.4 Maintenance Charges and Other Charges

(a) (i) The Concessionaire shall with effect from the Annuity Commencement Date have the right to collect, and deposit into the Designated Account, and enforce the Maintenance Charges as per charges notified by DSIIDC for the Industrial Estate.

(ii) The Concessionaire shall have the right and full freedom from the Appointed Date to charge, collect, and deposit into the Designated Account, and enforce charges for water supplied from sources other than DJB by it in the Industrial Estate, at rates determined by the Concessionaire on a cost plus basis, which have been approved and notified by DSIIDC. The Concessionaire shall charge for water supplied by it from DJB sources, at rates specified by the DJB. The Concessionaire shall coordinate with the Existing Unites and New Units to ensure that they all have installed functional meters at their cost, and that reading in the meter is recorded periodically before an invoice is raised for collecting charges in relation to supply of water in the Industrial Estate.

(iii) The Concessionaire shall with effect from the Appointed Date have the right to charge, collect, and deposit into the



Designated Account, and enforce charges for sewerage charges, CETP as per charges notified by DSIIDC.

(b) Payment of Revenue to Concessionaire

(iv) DSIIDC shall within fifteen (15) days from the end of each month, transfer into the Escrow Account maintained by the Concessionaire the total amount of money deposited by the Concessionaire into the Designated Account from collection of Maintenance Charges and Other Charges.

(c) Recovery of dues

Any default by an Existing Unit and New Unit, in the payment of ground rent, Maintenance Charge, and/or Other: Charges to the Concessionaire; shall be governed by this Section 11.4(c).

(i) DSIIDC, hereby appoints the Concessionaire as the duly authorized person on behalf of DSIDC to commence prosecution and other proceedings under the Act for recovery of dues, and shall within seven days of the execution of this Concession Agreement, issue a special order in this behalf pursuant to Section 28 of the Act.

(ii) Upon the occurrence of a default in payment of ground rent, Maintenance Charge and/or Other Charges to the Concessionaire, the Concessionaire is authorized to undertake the following.

(aa) suspend the provision of services being provided pursuant to this Agreement, to the defaulting Existing Unit, and New Unit;

(bb) commence recovery proceedings pursuant. to the special order in this regard issued by DSIIDC under Section 28 of the Act;

(cc) for the recovery of any dues that cannot be, undertaken under Section 28 of the Act if any DSIIDC shall initiate and pursue recovery proceedings upon an application in this regard made by the Concessionaire, and subject always to sufficient amounts having beer received pursuant to such proceedings shall provide the Concessionaire only such amount from such



total recovered amount which is equivalent to the unpaid dues for which recovery proceedings had been initiated. The Parties agree that immediately upon recovery of any dues by DSIIDC, DSIIDC shall specify to the Concessionaire the costs incurred by it in relation to the recovery proceedings, and the Concessionaire shall forthwith deposit such amount into an account specified by DSIIDC.”

10. The principal controversy to be addressed by the Arbitral Tribunal was whether withholding of any amount due from maintenance charges was permissible under the Concessionaire Agreement. DSIIDC sought to justify the same on account of failure on the part of the respondent to carry out the maintenance work as stipulated. The respondent disputed the same on merits. Additionally, it relied on the contractual provisions to contend that the amount due on account of maintenance could not be withheld for failure to maintain the service standards.

11. The Arbitral Tribunal accepted DSIIDC’s contention and held that it had satisfactorily explained withholding of 25% of the maintenance charges with effect from April 2014 to October 2015, as the respondent (claimant before the Arbitral Tribunal) had not adhered to the service level standards as required. The Arbitral Tribunal rejected the respondent’s claim.

12. It is conceded that the Concessionaire Agreement does not contain any provisions entitling DSIIDC to withhold any amount from the maintenance charges as collected. The Concessionaire Agreement also stipulates the recourse available in the event of non-compliance of the service level standards. Clause 12.5.2 of the Concessionaire



Agreement is relevant and is set out below:

“12.5.2 Reduction in Annuity on account of non adherence to Service Level Standards

(a) If in an Annuity Payment Period, the Concessionaire fails to maintain the Project in accordance with the Service Level Standards, then it shall be liable for payment of damages in accordance with Sub-section (b) below. In the event the Concessionaire fails to make payment of the damages under Sub-section (b) below within the time period stipulated for the same, then the aggregate sum of such unpaid damages in an Annuity Payment period shall be computed and certified by the Third Party Engineer and aggregate sums of such damages shall be reduced from its Annuity payment for the respective Annuity Payment Period.

(b) Damages

(i) In the event that the Concessionaire fails to repair or rectify any defect or deficiency set forth in the Service Level Standards within the period specified therein, it shall be deemed to be in breach of this Agreement and the DSIIDC shall be entitled to recover damages, to be calculated and paid for each day of delay until the breach is cured, at the higher of (a) 0.5% (zero point five percent) of Average Daily Annuity, (and) (b) 0.1% (zero point one percent) of the cost of such repair or rectification as estimated by the Third Party Engineer. Recovery of such damages shall be without prejudice to the rights of the DSIIDC under this Agreement, including the right of Termination thereof and the right to impose fines pursuant to Section 9.1.1(c)

(ii) The damage set forth in this Sub-section (b) may be assessed and specified forthwith by the Third-Party Engineer, provided that the DSIIDC may in its discretion, demand a smaller sum as damages, if in its opinion, the breach has been cured promptly and the Concessionaire is otherwise in compliance with its obligations hereunder, the concessionaire shall pay such damages forthwith and in the event that it contests such damages, the Section 19 (Dispute Resolution Procedure) shall apply.”

13. In view of the above, we find no real controversy that DSIIDC



was not entitled to withhold any part of the maintenance charges on account of deficiency, as alleged. The Concessionaire Agreement contains specific procedure for payment of damages in the event that the respondent failed to maintain the service level standards. It is not disputed that the procedure for reduction in annuity payment was not implemented.

14. It is apparent that the Arbitral Tribunal had not considered the contractual provisions while addressing the dispute involved under claim no.7. The impugned award also does not refer to any of the clauses of the Concessionaire Agreement.

15. In view of the above, we find no infirmity with the decision of the learned Single Judge in setting aside the impugned award in respect of claim no.7, as well.

16. The present appeal is, accordingly, dismissed.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

DECEMBER 12, 2023

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