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

% ***Date of Decision : 14.10.2024***

\+ **O.M.P. (COMM) 452/2022, I.A. 18213/2022 (Stay)**

ABUNDANCE INDIA .....Petitioner

Through: Mr. Pradeep Kumar Khatana, Advocate (through VC).

versus

M/S GEMINI PROPERTY DEVELOPERS .....Respondent

Through: Mr. M. V. Mukunda and Ms. Sregunpriya A, Advocates.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (*Oral*)

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter *'the A&C Act'*) assailing an arbitral award dated 20.08.2022. The said arbitral award has been rendered in the context of an agreement dated 23.03.2018 (hereinafter *'the agreement'*) entered into between the parties. Since the respondent (hereinafter *'Gemini'*) needed funds to expand its business, by virtue of the said agreement, the petitioner (hereinafter *'Abundance'*) agreed to arrange the same on the terms and conditions specified in the said agreement.

2. Since Gemini is an entity incorporated out of India, the Arbitral Tribunal in the present case was constituted pursuant to an order dated 27.02.2020 passed by the Supreme Court in ARB.P.(C) No. 11 of 2019. Pursuant to the said order, the arbitration was conducted under the aegis of the Delhi International Arbitration Centre (DIAC).

3. In the arbitration, Gemini (claimant) alleged failure on the part of Abundancein adhering to its obligation under this agreement and sought the following reliefs:-

(i) Direction upon Abundance to return the Security Cheque;

(ii) Direction upon Abundance to pay to Gemini a sum of Rs. 14,16,000/- (= Rs. 12,00,000/- Agreement fee + 18% GST) alongwith interest at 18% p.a. from 10.04.2018 until realisation; and

(iii) Direction upon Abundance to pay Gemini's legal costs.

4. The learned Sole Arbitrator after elaborately considering the material and evidence on record, reached the conclusion that Abundance had no wherewithal or intention to act as per the agreement, and made no sincere efforts to fulfil his contractual obligations.

5. It was further concluded that Abundance's entitlement to the fee contemplated under the agreement was conditional upon completion of services and that Abundance miserably failed on this count. Consequently, following reliefs were granted to Gemini and against Abundance by the learned Sole Arbitrator:-

(i) Abundance shall return to Gemini the Security Cheque, bearing number 000352 for an amount of AED 23,094,930/- drawn on Bank of Baroda, within a period of four weeks from the date of this Award.

(ii) Abundance shall pay to Gemini an amount of Rs. 14,16,000/- along with interest @ 9% p.a. with effect from 10.04.2018 until realisation. As of 20.08.2022, this amount has become Rs.19,72,546.19/- (Rs. 14,16,000/- + Rs. 5,56,546.19).

(iii) Abundance shall pay to Gemini an amount of Rs.5,40,334/- towards Arbitration costs. In the event these costs are paid within a period of four weeks from the date of this Award, no interest would be payable by Abundance. However, if remaining unpaid after four weeks from the date of this Award, Abundance shall pay to Gemini interest @ 9% p.a. on the said amount from the date of this Award until realisation.

6. It is notable that in the arbitral proceedings, there was non-compliance on the part of Abundance with the directions regarding payment of Rs.1,84,387/- towards arbitral and other costs. Also, Abundance failed to pay costs amounting to Rs. 20,000/- imposed on it during the course of arbitral proceedings.

7. Consequently, Abundance's share of arbitral costs were paid by Gemini and it was directed in the impugned award that Gemini would be entitled to recover the said amount from Abundance with interest @ 9% p.a. from the date of payment to the DIAC until realisation.

8. During the course of the present proceedings, *vide* order dated 13.02.2024, it was directed by this court as under:-

> *"5. ....In this view of the matter, the Petitioner shall deposit 50% share of the arbitration fee, amounting to Rs. 1,84,387/-, with the worthy Registrar General of this Court within two months, failing which, the petition would not be liable to be heard."*

9. The aforesaid directions were reiterated *vide* order dated 29.07.2024. By the said order, further costs were imposed on the petitioner in view of non-compliance with the aforesaid directions contained in the order dated 13.02.2024. Even thereafter, there was continued non-compliance by the petitioner. Consequently, *vide* order dated 04.10.2024 it was directed as under:

> *"6. It is made clear that if the directions contained in orders dated 13.02.2024 and 29.07.2024 are not complied with before the next date of hearing, the present petition shall be dismissed on the next date of hearing."*

10. The petitioner continued to remain non-compliant and on 09.10.2024, yet again, an adjournment was sought on behalf of the petitioner. Consequently it was directed as under:-

> *"1. Directions contained in the order dated 04.10.2024 have not been complied with. Learned counsel appearing for the petitioner yet again requests for an adjournment.*
>
> *2. In the interest of justice, list on 14.10.2024.*
>
> *3. It is made clear that no further adjournment shall be granted in the present matter."*

11. In the aforesaid background, the conduct of the petitioner betrays complete lack of bonafides. This court expresses its dismay of the conduct of the petitioner as a result of failure to pay:

(i) its share of arbitral costs as per the DIAC Rules.

(ii) the costs imposed by the learned Sole Arbitrator.

(iii) failure to pay costs in terms of the order dated 13.02.2024 and subsequent orders of this Court.

12. Notwithstanding, however, an opportunity has been granted to the petitioner to make its submissions today.

13. Learned counsel for the petitioner today essentially seeks to re-agitate the factual findings rendered in the impugned award. The respondent submits that such a merit based review of the arbitral award is not permissible, especially, considering that Section 34(2)A of the A&C Act clearly contemplates that in an international commercial arbitration, even patent illegality appearing on the face of the award is not a permissible ground for setting aside the same.

14. Be that as it may, during the course of the arguments, it was also noticed that during the pre-arbitral stage, the respondent had approached the

High Court of Punjab and Haryana under Section 9 of the A&C Act; the said petition was entertained by the High Court of Punjab and Haryana since Gemini is situated in Gurgaon, Haryana. Furthermore, the High Court of Punjab and Haryana passed an order dated 06.09.2018 staying the encashment of cheque no. 00352 amounting to AED 23,094,930. The said order was made absolute till outcome of the proceedings before the Supreme Court under Section 11 A&C Act and pronouncement of the arbitral award, by order dated 06.12.2019 passed by the said court.

15. Reference is apposite to Section 42 of the A&C Act, 1996 which clearly prescribes that *"where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceeding and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court"*. As such, *ex facie*, this court has no jurisdiction to entertain the present petition.

16. The Supreme Court of India in ***State of West Bengal v. Associated Contractors*** (2015) 1 SCC 32 has held that where an application is filed under Section 9 A&C Act before the 'Court' as defined under the act, all subsequent applications or petitions would lie only to the same 'Court'. It was held therein as under:

> *"18. In contrast with applications moved under Section 8 and 11 of the Act, applications moved under Section 9 are to the "Court" as defined for the passing of interim orders before or during arbitral proceedings or at any time after the making of the arbitral award but before its enforcement. In case an application is made, as has been made in the present case, before a particular court, Section 42 will apply to preclude the making of all subsequent applications under Part I to any court except the Court to which an application has been made under Section 9 of the Act."*

17. In view of the aforesaid, this Court is not inclined to entertain the present petition; the same is consequently dismissed.

18. The pending application/s also stands disposed of.

SACHIN DATTA, J

OCTOBER 14, 2024/*at, dn*