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

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Date of Decision: 23.01.2024

+ **FAO (COMM) 16/2024 & CM Appls.4225-26/2024**
RAMESH KUMAR Appellant
Through: Mr. Sameer Kaushik, Adv.

versus

DELHI DEVELOPMENT AUTHORITY Respondent
Through: Ms. Manika Tripathy, Standing
Counsel with Mr. Rony John,
Adv.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE TARA VITASTA GANJU

VIBHU BAKHRU, J.

1. The appellant has filed the present appeal under Section 37 of the Arbitration and Conciliation Act (hereafter '**the A&C Act**') impugning the order dated 05.10.2023 (hereafter '**the impugned order**') delivered by the learned Commercial Court in *OMP (COMM) No. 122/2019* captioned *Ramesh Kumar v. Delhi Development Authority*.

2. The appellant had preferred the application (*OMP (COMM) No. 122/2019*) under Section 34 of the A&C Act impugning an Arbitral Award dated 10.08.2019 (hereafter '**the impugned award**') whereby the appellant's claims were partly allowed.



3. The appellant is essentially aggrieved by the impugned award to the extent that his claims are being rejected.
4. The appellant was allotted a parking site located at Azadpur Subzi Mandi, Delhi by the respondent (hereafter 'DDA'). The said allotment was pursuant to a public notice inviting tenders issued by the DDA. The appellant had participated in the open tender and was declared successful. The appellant accepted the allotment in terms of a letter dated 12.03.2012 and also deposited the advance license fees of ₹ 9,33,000/-.
5. It is the appellant's case that the parking site was encroached upon and the same was not made available to him. Although, the appellant had accepted the allotment, he also informed the DDA regarding the said encroachment.
6. The principal claims raised by the appellant related to the remission of the license fee commensurate with the parking space that was encroached and was, therefore, unavailable to the appellant. According to the appellant, the site was encroached to the extent of 50% to 80%. Therefore, the license fee was required to be reduced to the said extent. The appellant also claimed compensation for loss sustained due to non-availability of site.
7. The DDA had also filed a counter claim for an amount of ₹ 87,14,766/- being as arrears of unpaid license fee as well as service tax payable on the said amount.
8. The Statement of Claim and Counter Claim made before the Arbitral Tribunal are set out below:
Statement of Claim:



A.	Remission/refund @ 50% of the License Fee paid in excess @ 18% interest from 21.03.2012 to October 2013, as 50% of area not made available	₹ 29,54,500/-
B.	Compensation of business losses sustained because of non-availability of parking site as per contract	₹ 48,38,000/-
C.	Refund of Earnest Money Deposited @ 18% interest	₹ 6,22,000/-
D.	Refund of advance amount paid @ 18% interest	₹ 9,33,000/-
E.	Refund of loss incurred on infrastructure arrangements	₹ 1,00,000/-
F.	Compensation for Mental Torture	₹ 5,00,000/-
G.	Litigation Expenses	₹ 5,00,000/-”

Statement of counter claim:

“1	Payment of License Fee from 21.03.2012 to 20.03.2013	₹ 37,32,000/-
2.	Payment of License Fee from 21.03.2013 to 20.03.2014	₹ 41,04,000/-
3.	Payment of License Fee from 21.03.2013 to 20.03.2014	₹ 45,15,720/-
4.	Service Tax @ 2% of License Fee alongwith Monthly License Fee	₹ 2,47,046/-
5.	Interest at the rate of 15% per annum	To be computed
6.	Pendente Lite and Future Interest at the rate of 15% per annum	To be computed after Award on the awarded amount
	Amount paid by the Respondent	₹ 38,84,000/-
	Total	₹ 1,25,98,766/- (-) ₹ 38,84,000/- = ₹ 87,14,766/- ”



9. It was DDA's case, before the Arbitral Tribunal, that the offers were invited on '*as is where is*' basis. Therefore, the appellant's claim for remission of license fee on account of any encroachment on the site was unsustainable. DDA also claimed that the terms and conditions of the allotment also clearly provided that the tenderer may inspect the site and satisfy himself of the location, area and its business prospects. DDA contended that the tenderers (including the appellant) were put to notice to inspect the site before furnishing their bids. They were invited to examine the condition of the site in respect of which bids were invited on '*as is where is*' basis. DDA contended that the tenderers were required to factor-in the condition of the site for furnishing the bids.

11. The Arbitral Tribunal did not accept DDA's contention in entirety. The Arbitral Tribunal concluded that DDA could not seek license fee for the entire site when the same was not provided to the appellant. The Arbitral Tribunal held that DDA was required to provide vacant and unencumbered possession of the parking site. However, the Arbitral Tribunal also found that the appellant had failed to prove the precise extent of the encroachment. It noted that the appellant's claim regarding the extent of encroachment was varying.

12. The Arbitral Tribunal found, on the basis of the record, that DDA had admitted that 25 % of the parking site was encroached and thus, made the impugned award on the basis of the said admission.

13. The learned counsel appearing for the appellant submitted that there was ample evidence on record to establish the extent of encroachment. He submitted that the appellant had produced



photographs showing the encroachment on site. He also pointed out that the appellant had, at the outset, while accepting the allotment, intimated the extent of encroachment to DDA.

14. Concededly, DDA has disputed the extent of encroachment as claimed by the appellant. DDA had also relied upon documents in support of its defence.

15. It is thus, apparent from the above that the principal dispute involved is appreciation of evidence regarding the extent of encroachment. The Arbitral Tribunal's observation to the effect that the appellant claim as to the extent of encroachment was varying and not consistent, is duly supported by the material on record.

15. The appellant essentially invites this Court to reappraise the material and evidence placed before the Arbitral Tribunal for determining the question as to extent of encroachment. Clearly, this exercise is impermissible under Section 34 of the A & C Act. It is well settled that an arbitral tribunal is the final adjudicator of the question of the fact¹. It is also trite that "*reappraisal. of evidence by the court is not permissible and as a matter of fact exercise of power to reappraise the evidence is unknown to the proceedings under Section 30 of the Arbitration Act 1940*"². This principle is equally applicable to an application to set aside an arbitral award under Section 34 of the A&C Act.

16. Following the aforesaid view, the learned Commercial Court has declined to interfere with the impugned award and in our view,

¹ Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49

² Arosan Enterprises Ltd v Union of India: (1999) 9 SCC 449



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rightly so.

17. We find no infirmity with the decision of the learned Commercial Court in rejecting the appellant's challenge to the impugned award.

18. The appeal is unmerited and is accordingly dismissed. Pending applications are also disposed of.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

JANUARY 23, 2024/r