IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 22.03.2021

\+ **O.M.P. (COMM) 455/2019 & IA 14958/2019**

DELHI DEVELOPMENT AUTHORITY ..... Petitioner

versus

M/S EROS RESORTS AND HOTELS LTD ..... Respondent

AND

\+ **O.M.P. (COMM) 456/2019 & IA 14965/2019**

DELHI DEVELOPMENT AUTHORITY ..... Petitioner

versus

M/S EROS RESORTS AND HOTELS LTD ..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr Rajiv Bansal, Senior Advocate with Mr Vaibhav Agnihotri, Mr Milind Jain and Ms Jasmeet Kaur.

For the Respondent: Mr Harish Malhotra, Senior Advocate with Mr Rajender Agarwal, Mr Anoop Kumar.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The Delhi Development Authority (hereafter the 'DDA') has filed the present petition under Section 34 of the Arbitration and

Conciliation Act, 1996 (hereinafter the 'A&C Act') impugning a common Arbitral Award dated 02.06.2019 (hereafter 'the impugned award') delivered by the Arbitral Tribunal comprising of a Sole Arbitrator, in respect of disputes arising in connection with contracts for sale of two plots of land respectively.

2. The impugned award has been rendered in the context of disputes that have arisen between the parties in relation to Plot nos. 13A and 13B situated at Mayur Vihar District Centre, New Delhi, which were auctioned for the purpose of constructing a hotel. Allotment cum Demand letters dated 30.06.2006 with respect to the aforesaid plots had been issued pursuant to an Auction Notice dated 05.06.2006.

3. By the impugned common award, the Arbitral Tribunal has partly accepted the claims preferred by the respondent (hereafter 'Eros'). The Arbitral Tribunal directed the petitioner to release the Performance Bank Guarantees of ₹5.90 crores and has awarded a sum of ₹12 lacs each against Eros's claim for bank charges for keeping the said Bank Guarantees alive. The Tribunal further allowed simple interest at the rate of 12% per annum on the awarded amount from the date of the award till its realisation.

4. DDA assails the impugned award to the extent as noted hereafter, as being patently illegal and contrary to the fundamental policy of Indian Law.

5. Briefly stated, the relevant facts that are necessary to address the controversy are as under:-

6. DDA issued a public notice for "*Auction of prime plots on freehold basis for construction of Hotels in Delhi*" on 05.06.2006. As per Clause 2.1 of the Auction Notice, the same clarified that "*it will be presumed that the bidder has visited the site and satisfied himself/herself with the prevalent site conditions in all respects including status and infrastructural facilities available etc. before participating in the Auction and offering the bid.*"

7. Thereafter, on 05.06.2006, the respondent (hereinafter 'Eros') participated in the said auction and gave its bid of ₹118 crore for each of the hotel plots (Plot nos. 13A and 13B) located at Mayur Vihar District Centre, New Delhi. Further, as per the terms of Clause 2.6 of the Auction Notice, Eros deposited 25% of the bid amounts as Earnest Money Deposit (EMD), equivalent to ₹29.60 crores for each plot.

8. DDA vide letters dated 30.06.2006 informed Eros that its bid of ₹118 crore for each of the aforementioned plots was accepted by the Vice Chairman, DDA. Accordingly, as per Clause 2(vii) of the Auction Notice read with Clause 3.4(i) of the General Terms & Conditions of the Auction, Allotment-cum-Demand letters (in respect

of Plots bearing nos. 13A and 13B) were issued to Eros directing them to remit the balance 75% amount, that is, ₹88,40,00,050 for each of the aforementioned plots within a period of 90 days from the date of issue of the said letters. Eros vide letters dated 26.09.2007 informed DDA that it had deposited the said amount in respect of Plot nos. 13A and 13B.

9. Thereafter, on 09.11.2006, No Objection Certificates were issued by DDA to Eros. The Deputy Director (CL) of DDA, vide letters dated 09.11.2006, requested the Deputy Director (Bldg.) of DDA to entertain and examine the building plans submitted by Eros in respect of Plot bearing nos. 13A and 13B and release the same on production of No Objection Certificates issued by its office for obtaining the physical possession and execution of lease deeds for the said plots.

10. On 17.11.2006, in accordance with Clause 3.14 of the General Terms & Conditions of the Auction, Punjab National Bank (PNB) furnished Performance Bank Guarantees at the instance of Eros. The said Guarantees secured DDA against the obligation of Eros to complete the hotel and make it functional within a period of 42 months from the date of delivery of possession of the sites, failing which PNB undertook to pay DDA a penalty amount.

11. Thereafter, on 04.12.2006, Eros submitted building plans to DDA for approval, which DDA claims were received by the C&I unit of DDA on 14.12.2006.

12. On 05.12.2006, DDA handed over possession of the Plots bearing nos. 13A and 13B to Eros and as per Clause 3.14 of the General Terms & Conditions of the Auction, Eros was required to complete and make the hotel functional by 05.06.2013, that is, within 42 months of the delivery of possession of the plots.

13. On 12.12.2006, Conveyance Deeds in respect of Plot nos. 13A and 13B, Mayur Vihar District were executed in favour of Eros.

14. DDA vide letters dated 22.12.2006 informed Eros that pursuant to its request letters dated 14.12.2006, permission for excavation work in respect of Plot nos. 13A and 13B had been granted to Eros at its own risk and cost subject to the condition that no structure/construction including erecting pillars, flooring etc. would be raised till the building plans are sanctioned by the concerned agency. In addition, DDA also stipulated that stone blasting will not be permitted and all safety measures as provided in I.S. Code No. 3764: 1992 and National Building Code and other statutory provisions would be observed.

15. On 08.01.2007, DDA informed Eros that its submission lacked essential documents in respect of the plots in question (Plot nos. 13A and 13B). Eros submitted the said documents on 24.01.2007.

16. Thereafter, Eros vide letters dated 20.03.2007 submitted five sets of drawings of its Hotel Project at Mayur Vihar in respect of Plot nos.13A and 13B to the Deputy Director (Buildings), DDA with a request that the drawings be forwarded to the Delhi Urban Art

Commission (DUAC) and the Fire Department for grant of No Objection Certificates for the sanction of the project. Eros requested for early action, since the project was to be completed within the fixed period of time. DUAC and the Delhi Fire Services (DFS) granted approval to the drawings by letters dated 18.05.2007 and 04.06.2007 respectively with certain observations.

17. On 06.08.2007, DDA communicated to Eros to submit certain documents mentioned in its office note, as on scrutiny, it was found that they were not attached with the plans. On 27.08.2007, Eros submitted the documents sought by DDA in respect of both the plots.

18. On 12.09.2007, Mr. Amit Sood, Director, Eros submitted undertakings in respect of Plot nos. 13A and 13B and represented that due to certain problems, he was unable to submit the correct drawings, however, he undertook that he was accepting the corrections made by DDA in the drawings and, he would be bound by it. He further undertook not to deviate from the sanction plans as corrected/approved by DDA.

19. On 11.09.2007, DDA approved the plans with certain changes/corrections, however, Eros vide a letter dated 20.09.2007 addressed to the Vice Chairman, DDA sought changes in the plans, as the changes made by DDA were unacceptable to them. Thereafter, Eros vide another letter dated 09.10.2007 requested DDA for an early decision on the issues referred to in their letter dated 20.09.2007.

20. The 1st Technical Committee Meeting of DDA for the year 2008 was held on 16.01.2008. The Minutes of Meeting dated 31.01.2008 reflect that DDA had approved the changes sought by Eros.

21. Thereafter, as per the request of DDA, Eros submitted the revised building plans in accordance with the changes approved by the Technical Committee on 19.03.2008 for Plot no. 13A and on 27.03.2008 for Plot no. 13B.

22. DDA vide letters dated 05.05.2008 communicated to Eros that it had forwarded the set of building plans to DUAC and Chief Fire Officer (CFO) for approval. DDA also communicated to Eros the grant of provisional permission "*for taking up construction of the hotel building up to plinth level pending the statutory licenses of the building plans by the DUAC, CFO and MOEF*" subject to certain conditions.

23. On 14.05.2008, The Secretary, DUAC communicated to Consulting Engineering Service (India) Pvt Ltd (Consultants for Eros) the requirement to ensure submission of the documents/materials to DUAC, as per the DUAC guidelines.

24. On 14.05.2008 (in respect of Plot no. 13B) and 15.05.2008 (in respect of Plot no. 13A), the Deputy Chief Fire Officer communicated to the Joint Director (Building), DDA certain shortcomings/observations in the plans of the hotel and by the aforesaid letters, the Deputy Chief Fire Officer required DDA to

advise Eros to rectify the shortcomings/observations and re-submit the plans along with a model of the proposed building to DFS.

25. Thereafter, on 12.06.2008, DDA requested Eros to submit the compliance of observations, as conveyed by DUAC, on 14.05.2008 (with respect to both the plots) and as conveyed by CFO, DFS on 14.05.2008 (in respect of Plot no. 13B) and 15.05.2008 (in respect of Plot no. 13A).

26. The Secretary, DUAC vide letters dated 07.07.2008 to Consulting Engineering Service (India) Pvt Ltd communicated certain observations with the decision that "*the scheme proposal is to be recommended after compliance with the observation of the commission*." Thereafter, Eros vide letters dated 11.07.2008 to the Secretary, DUAC submitted the remaining documents for consideration before DUAC.

27. On 14.08.2008, DUAC, once again, vide letters addressed to Consulting Engineering Service (India) Pvt Ltd communicated certain observations with the decision that "*Not approved. Consistent set of drawings to be submitted to the Commission after compliance of the observations*."

28. Thereafter, on 16.09.2008, DUAC communicated its approval of the plan to Joint Director (C&I) Building, DDA in respect of Plot no. 13A and approval was granted on 19.09.2008 in respect of Plot no 13B.

29. DDA vide a letter dated 22.09.2008 (in respect of Plot no. 13A) and letter dated 24.09.2008 (in respect of Plot no. 13B) requested Eros to submit correct building plans incorporating suggestions of DUAC/Chief Fire Officer within 15 days.

30. Thereafter, Eros vide letters dated 22.09.2008 (in respect of Plot no. 13A) and 24.09.2008 (in respect of Plot no. 13B) submitted the corrected revised building plans incorporating corrections/ suggestions made by CFO and DUAC, which were signed by the Architect and Owner. The aforesaid letter also requested DDA to expedite the sanction of revised building plans.

31. DDA vide letters dated 15.12.2008, communicated to Eros the sanction to "*erect/re-erect/add to/alteration in the building to carry out the development specified in the said application*" in respect of Plot nos. 13A and 13B has been approved with certain conditions stipulated in the said letters.

32. On 04.09.2009, DDA issued notices to Eros that in the event of delay in completing and making the hotel functional within the prescribed period, the Performance Security, to the extent of 5% of the bid amount, shall be encashed as per the schedule mentioned therein and the said period would expire on 05.06.2010. DDA further requested Eros to submit a copy of the completion certificate and proof of making the hotel functional prior to 05.06.2010.

33. Eros vide letters dated 14.10.2009 explained the details that caused the delay for completion of the said project and requested DDA

to withdraw its letters dated 04.09.2009 and return the Performance Security. Thereafter, DDA vide a letter dated 23.12.2009 communicated to Eros that in case of failure to complete the hotel within the stipulated period, its Performance Security in respect of hotel Plots nos. 13A and 13B at District Centre, Mayur Vihar, will be forfeited as per the terms and conditions of disposal.

34. DDA vide letters dated 03.08.2010, once again, requested Eros to submit a copy of the completion certificate and proof of making the hotel functional prior to the date of completion, that is, before 05.06.2010 and get the Bank Guarantees renewed/revalidated up to 31.03.2011, as the same was expiring on 17.11.2010, failing which action for forfeiture of the Bank Guarantees would be taken prior to the expiry of the same.

35. On 27.08.2010, DDA once again requested Eros to renew/revalidate the Bank Guarantees up to 31.03.2011 and submit the same by 15.09.2010.

36. DDA vide letters dated 20.10.2010 informed Eros that since the period of 42 months for construction of the hotel and making it functional had expired on 05.06.2010, the Performance Security would be forfeited in accordance with the terms and conditions of the allotment without any further notice.

37. Thereafter, Eros filed a petition (OMP No. 637/2010 and OMP No. 638/2010) under Section 9 of the A&C Act before this Court and

this Court by an order dated 27.10.2010, restrained DDA from encashing the Performance Security furnished by PNB.

38. Since disputes had arisen between the parties, Eros filed a petition (AA no. 326 of 2011 and AA no. 327 of 2011) under Section 11(6) of the A&C Act before this Court for the appointment of an Arbitrator and accordingly this Court by orders dated 08.11.2011 and 30.11.2011, appointed Justice (Retd.) Anil Dev Singh, former Chief Justice of Rajasthan High Court, as the Sole Arbitrator.

39. The claims made by Eros in the Statement of Claims for Plot nos. 13A and 13B are identical. They are summarised as under:-

Claim No. 1	Release the performance bank guarantee for ₹5.90 crores
Claim No. 2	₹15,16,464.00 towards expenses incurred for renewing the bank guarantee.
Claim No. 3	Interest at the rate of 24% per annum on the amount spent on renewing the bank guarantee and on the amount kept as margin money with the bank far keeping the bank guarantee alive
Claim No. 4	Cost of ₹37 lakhs on account of arbitration.

40. DDA also made counter-claims. The counter claims made by DDA are summarised as under:-

Counter Claim No. 1	Amount of the said performance bank guarantee, that is, ₹5.90 crores for the various acts, omissions, breaches and defaults of the claimant particularly its failure to perform its obligations under the contract.
Counter Claim No. 2	Interest on the said amount of performance bank guarantee of ₹5.90 crores at the rate of 18% per annum.
Counter Claim No. 3	Pendente lite and future interest at the rate of 18% on the counter claim amounts.
Counter Claim No. 4	Cost of various litigations which are quantified at ₹2,00,000/- as well as the actual cost of the present arbitral proceedings including specifically the fee of the arbitrator.

41. The Arbitral Tribunal allowed Claim No. 1, partly allowed Claim No. 2 and rejected Claim No. 3 and 4 raised by Eros. The Tribunal rejected all the counter claims raised by DDA. The Tribunal directed the release of the Performance Bank Guarantees of ₹5.90 crores in favour of Eros. The Tribunal further allowed a sum of ₹12 lacs against Claim no 2 and allowed interest at the rate of 12% per annum on the amount awarded in its favour from the date of the award till its realisation.

42. Aggrieved by the impugned award, DDA has filed the present petition.

Submissions

43. Mr Bansal, learned Senior Counsel appearing for DDA assailed the impugned award on, essentially, three fronts. First, he submits that the impugned award is inherently contradictory as far as the issue of delay is concerned. He submits that while at some places, the Arbitral Tribunal has held that the parties were jointly responsible for the delay in processing of the plans, yet in some paragraphs, the Arbitral Tribunal had concluded that DDA was 'largely' and 'substantially' responsible for the delay in completion of the Hotel Project. He submits that since the Arbitral Tribunal had concluded that Eros was also responsible for the delay, it was incumbent upon the Arbitral Tribunal to apportion damages between the parties. He submitted that even if the entire amount, as claimed by DDA was not awarded, it would be entitled to damages proportionate to the delay for which it was not responsible. He referred to the decision of this Court in ***Union of India v. Sanghu Chakra Hotels: (2008) 152 DLT 651***.

44. Second, he submitted that the Arbitral Tribunal has returned findings which are either contrary to the record or without any evidence to support them. He referred to the conclusion of the Arbitral Tribunal regarding the progress of the construction prior to sanction of the plans. Whilst Eros had accepted that it had continued with the construction, he submitted that the Arbitral Tribunal had ignored the

same. Next, he submitted that the Arbitral Tribunal had proceeded on the basis that Eros had completed the Hotel Project even though it was admitted that the commercial complex had not been completed. He pointed out that Eros was permitted limited use by a letter dated 21.09.2010 and the same could not be considered as completion of the project. Next, he submitted that the Arbitral Tribunal had not considered that the plans were processed on the basis of a specific undertaking that Eros would accept any correction made by the Deputy Director (Buildings) and therefore, it was precluded to challenge the same. He further contended that the award for an amount of ₹12 lakhs is without any evidence whatsoever.

45. Third, Mr Bansal submitted that the contract between the parties stipulated that the Hotel Project would be completed within a period of forty-two months. The same included the time for obtaining sanctions from independent agencies, however, the Arbitral Tribunal had excluded the same from the time available with Eros for completing the Hotel Project. He further submitted that in terms of the award, the Hotel Project would be completed once the hotel was made operational and the limited use of the same would not amount to completion of the Hotel Project. He submitted that the award was, thus, contrary to the terms of the agreement.

46. Fourth, he submitted that the Arbitral Tribunal had decided issues beyond the scope of reference. He contended that the contract

for development of commercial land would fall within the scope of the expression of a contract relating to public utility and therefore, DDA was not required to prove damages. He relied upon the decision of the Supreme Court in ***Kailash Nath Associates v Delhi Development Authority: (2015) 4 SCC 136*** in support of his contention.

Reasons and Conclusion

47. The disputes between the parties, essentially, relate to the right of DDA to encash the security for delay in completion of the Hotel Project. According to DDA, it is entitled to recover damages as contemplated under Clause 3.14 of the General Terms & Conditions of the Auction. The said Clause is set out below:-

> "3.14 Performance Security
>
> The construction of the hotel will have to be completed and made functional within a period of 42 months from the date of possession of site/land. The intending auction purchaser shall be required to deposit the performance security to the tune of 5% of the bid amount before the time of execution of the conveyance deed which shall be in the nature of a bank guarantee in an approved form valid for 4 years. The institution furnishing such security shall be subject to the approval of the same by the Authority. The penalty for delay in completion of the hotel beyond 42 months shall be levied as under:-

Sl. No.	Delay Period beyond 42 months	Penalty Amount
1.	Above 1 day and upto 30 days	1% of the bid amount
2.	Above 31 days and upto 90 days	2% of the bid amount
3.	Above 91 days and upto 180 days	4% of the bid amount
4.	Above 11 days and upto 360 days	5% of the bid amount

Bank guarantee amount, to the extent there is delay in completion of hotel will be encashed as per the schedule mentioned above. The date of completion will be treated as the date on which necessary completion certificate is obtained by the intending auction purchaser."

48. In terms of the aforesaid Clause, Eros had also submitted Bank Guarantees equivalent to 5% of the bid amounts.

49. Whilst DDA claims that it is entitled to encash the Bank Guarantees as the delay in completion of the project was in excess of 365 days, Eros disputes the said contention and claims that DDA was not entitled to encash the Bank Guarantees as the delay in completion of the project is attributable to DDA.

50. In the aforesaid context, the Arbitral Tribunal had examined the documents and the material available on record and rejected DDA's claim for penalty under Clause 3.14 of the General Terms & Conditions of the Auction, as the Arbitral Tribunal had found that DDA was substantially responsible in delay in completion of the Hotel Project.

51. The Tribunal noted that the Vice-Chairman of DDA had held a meeting with the auction purchasers to emphasise that the hotels were required to be constructed expeditiously. He had extended assurances that the Buildings Department of DDA would sanction the building plans expeditiously and the auction purchasers could simultaneously apply to other agencies like Fire Service, Environment Department, Airport Authority of India etc. He had also assured the auction purchasers that DDA would try to expedite the matters with the Environmental Authority. Insofar as Eros is concerned, it had expressed an apprehension that the plots purchased by it had no approach road. In this regard, Eros was assured that development in the said area would be expedited and the Chief Engineer (EZ) would be asked to take action in this regard.

52. The Arbitral Tribunal noted that whilst DDA had held out assurances that full cooperation would be extended by DDA, it had failed and neglected to act with due despatch. The Arbitral Tribunal examined the delay in completion of the Hotel Project in three phases.

53. The Tribunal noted that the first phase began with the submission of plans. Admittedly, Eros had submitted the plans with DDA on 04.12.2006. However, the Tribunal found that the same were scrutinized more than a month later. A file noting dated 08.01.2007 indicated that there were certain objections such as an undertaking for providing the water harvesting system was not enclosed; the letter of

physical possession not enclosed; the control drawing was not signed by a Senior Architect; the building plan did not show the water harvesting proposal and; the form of application was not enclosed. The said observations were communicated to Eros and it complied with addressing the same by submitting the documents on 24.01.2007.

54. The Tribunal noted that even at that stage, DDA had not completed scrutiny of the plans and further observations in this regard were noted on 19.02.2007. The Tribunal found that since the Hotel Project was a time bound project, it was incumbent upon DDA to scrutinize the plans expeditiously. However, even as on 19.02.2007, DDA had not completely scrutinized the same. The Tribunal found that it took almost three months to complete scrutinization of the plans. According to the Tribunal, the same ought to have been completed within a reasonable period of two weeks and therefore, the Tribunal held that the delay beyond a period of two weeks was attributable to DDA.

55. The period covered under the second phase commences from the stage when DDA had communicated its observations regarding the plans. The Tribunal found that discussions were held between Eros and DDA on 13.03.2007. Eros had addressed the concerns raised by DDA and offered explanations with regard to the observations made regarding the plans. Eros had further requested that the plans be forwarded to the DFS and DUAC. The building plans were, thereafter,

forwarded to DUAC. The Tribunal had found that the letter forwarding the plans to DUAC indicated that even at that stage, DDA had not completed scrutiny of the plans as the letter mentioned that DDA had only scrutinized the plans from the point of view of land use, ground coverage, FAR, site coverage, heights and set back. In view of the above, the Arbitral Tribunal concluded that the plans were only partially examined.

56. Whilst the Tribunal accepted that DDA could sanction the plans only after the approval was accorded by DUAC and the Fire Department, it held that the same did not preclude DDA from scrutinizing the plans to ensure that it complied with the necessary requirements. The Tribunal also referred to Paragraph 6.7.4 of the Building Bye-Laws, which required DDA to complete scrutiny of the plans within the prescribed period of sixty days. However, DDA had taken an inordinately long time to do so.

57. The Arbitral Tribunal considered the delay in third phase, which commenced from the stage when DUAC and DFS granted permissions to the plans submitted by Eros.

58. DUAC had accorded approval to the building at a meeting held on 04.05.2007 and DFS had approved the plans on 04.06.2007, subject to its recommendations for fire prevention and safety measures.

59. The Arbitral Tribunal found that thereafter, there were delays occasioned by the DDA making changes in the plans, which it subsequently withdrew. One of the major changes made by DDA was changing the main entry to the hotel. By a letter dated 05.07.2007, DDA required Eros to fix the main entry to the hotel from an internal road and not from the main road. The Arbitral Tribunal noted that even though DDA had scrutinized the plans earlier on 08.01.2007 and 19.02.2007, it had not made any such suggestions. The Tribunal noted that by the time the same was communicated to Eros, seven months had elapsed after it had submitted its plans.

60. The Arbitral Tribunal noted that in the month of September, 2007, DDA, once again, made further changes to the plans and referred them as corrections. It was Eros's case that it was compelled to accept the said changes failing which the plans would not be released. It accordingly gave undertakings with respect to Plot nos. 13A and 13B to the aforesaid effect. The Arbitral Tribunal examined the office note dated 11.09.2007, which indicated that the undertakings had been given as per directions. In view of the above, the Arbitral Tribunal accepted the contention that Eros had been compelled to give the undertakings to secure sanction to the plans submitted by it. Thereafter, Eros requested DDA for removing the changes made by it while sanctioning the plans. The Arbitral Tribunal noted that DDA took considerable time to process Eros's request. Eros in its letter dated 27.11.2007 addressed to the Lieutenant Governor had protested that DDA made several arbitrary changes in the plans

after the same were approved by DUAC and DFS. It also referred to various representations sent to the Vice-Chairman, DDA. In the said letter, it also gave instances of various other hotels where the required heights in various areas and large porches had been sanctioned.

61. On 10.03.2008, Eros sent another letter to Vice-Chairman, DDA protesting that it was still awaiting the decision on various issues relating to atrium, commercial use of basement, clear heights of public areas (lobby), restaurant, banquet hall, engineering plant room etc. porches and the entrance to the hotel. The Arbitral Tribunal took note of the said letter and observed that Eros was unable to go ahead with the construction due to the aforementioned pending issues.

62. The Arbitral Tribunal found that after pursuing with the Technical Committee, Eros was successful in securing the corrections/changes made by DDA in the building plans. The decision of the Technical Committee was intimated to Eros on 10.03.2008. The Tribunal noted that by this time, almost fifteen months had passed and only twenty-seven months out of the forty-two months were left to complete the hotel and make it operational.

63. In view of the above, the Tribunal concluded that the changes made in the plans by DDA had led to considerable wastage of time and the fact that the Technical Committee had accepted Eros's representation indicated that the said changes were not necessary.

Accordingly, the Tribunal concluded that DDA was '*overwhelmingly responsible for the time lag between claimant's request for seeking changes in the plans and the acceptance of its request by the Technical Committee*'.

64. It was DDA's contention that the time consumed in sanctioning the plans, had no adverse effect in construction of the hotel according to DDA. The said contention was not accepted by the Arbitral Tribunal. The Arbitral Tribunal noted that DDA had not specified any date on which the construction was started. It reasoned that it obviously could not have started before the grant of permission to take up construction of the hotel building up to the plinth level and by that time, seventeen months had already gone by from the date of handing over of possession of the plots in question.

65. It is DDA's case that the said finding is contrary to the record, as Eros had in its reply averred as under: -

> "Competent Authority approved the case on 11.12.2008 and building plans were released on 15.12.2008 during this period the construction of building was going on and the construction of the building was completed up to second floor at the time of revised sanction".

66. The Arbitral Tribunal found that the said averment could not be read to mean that the construction was going on continuously without

any impediment. The assertion that the building was raised till the second floor by the end of the year 2008, does not mean that Eros could carry out the construction in full swing, oblivious of the fact that the building plans as submitted, remained to be approved.

67. Mr Bansal, had earnestly contended that the said conclusion is contrary to the record. However, this Court is unable to accept the said contention. The Arbitral Tribunal had evaluated the evidence and pleadings and had rendered its decision in the context of material on record.

68. The Arbitral Tribunal had meticulously examined the material placed by the parties and concluded that DDA was substantially responsible for the delay and therefore, was not justified in invoking the Bank Guarantees. The Arbitral Tribunal's conclusion is set out below-:

> **"Summation of cause of delay**
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> 107. The main cause of delay was the so-called corrections made in the building plans by the Respondent while granting sanction to the plans by its letter dated September 14, 2007. As already pointed out these corrections were made after the approval of plans by the DUAC and DFS. At the cost of repetition, it may be pointed out that the changes sought by the Claimant were with regard to tinkering by the building department of the DDA in the plans, such as entrance of the hotel changed to rear of the plot, reduction of height of public

areas like the entrance, lobby, restaurant, banquet hall, gym and plant room and the main porch of the entrance of hotel, which were ultimately accepted by the Technical Committee constituted by the DDA. However, by the time the Technical Committee of the Respondent acceded to the request of the Claimant to make the changes in the so-called corrected plans, several months had already been spent in the exercise. In the circumstances, therefore, the Claimant cannot be accused of having breached Clause 31.4 of the contract for not being able to secure the Completion Certificate from the DDA before expiry of the stipulated period of 42 months from the date the possession of the plots was handed over to it. After the Technical Committee allowed the aforesaid demand of the Claimant relating to the changes in the building plans, the Respondent directed the Claimant to submit revised plans, which was complied by it. After the submission of the revised plans, both the Respondent and the Claimant were equally responsible for the time consumed until the final sanction of the plans. But this does not change the fact that by the time the changes sought by the Claimant were approved by the Technical Committee, almost a period of 15 months had gone by. In other words, only 27 months out of 42 months were left to complete the hotel and to make it operational. Besides, even if the Respondent is right that construction of the hotel was going on, as observed earlier, construction above the plinth level was not possible before May 5, 2008. Obviously, the Claimant cannot be held responsible for not being able to secure the completion certificate by June 5, 2010 within 42 months of receiving possession of the plots. Furthermore, time taken in completing the process of sanction to the revised plans will not

> change the lethal effect of the aforesaid delay which had already taken place because of the acts of the Respondent. In view of the aforesaid finding, the Respondent was not justified in involving the bank guarantees furnished by the bank at the instance of the Claimant."

69. This Court finds no ground to interfere with the aforesaid decision. It is well settled that the scope of interference under Section 34 of the A&C Act is limited. This Court does not act as the first appellate Court and cannot re-evaluate the evidence and supplant its opinion over that of the Arbitral Tribunal. The said principle has been clearly explained in the following oft-quoted passage from the decision of the Supreme Court in ***Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49***, in the following words:

> "It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts."

70. Mr Bansal, contended that since the Arbitral Tribunal has not held DDA responsible for the entire delay, the damages are required

to be apportioned. The said contention is unpersuasive. The issue before the Arbitral Tribunal was whether DDA was justified in invoking the Bank Guarantees and enforcing penalty for the delay in completion in terms of Clause 3.14 of the General Terms & Conditions of the Auction. Since it was found that DDA was substantially responsible, plainly, it could not impose any penalty for the same.

71. It was contended on behalf of DDA that the impost contemplated under Clause 3.14 of the General Terms & Conditions of the Auction was in the nature of liquidated damages and not penalty. Mr Bansal further contended that since the Hotel Project was regarding development of commercial land and the same amounted to developing a public utility, it was not necessary for DDA to establish that it had suffered any losses. He also submitted that the Arbitral Tribunal had proceeded on an erroneous basis that there were no pleadings to the effect that the said amount was a genuine pre-estimate of losses.

72. The Arbitral Tribunal did not accept the aforesaid contention. It noted that Clause 3.14 of the General Terms & Conditions of the Auction referred to the impost as a penalty for the delay in completion of the hotel, and not as damages.

73. Having noted the above, the Arbitral Tribunal also accepted the contention that the said nomenclature would not be determinative of nature of the levy. The Arbitral Tribunal, thereafter, proceeded to examine the nature of levy in a factual context and found that the penalty provided was not to provide for any loss or damage that DDA would sustain if the hotel was not completed within the stipulated period, but it was to instil fear of punishment in the mind of the tenderer that if he fails to complete the Hotel Project, he would be slapped with a penalty for delay.

74. The conclusion of the Arbitral Tribunal is based on cogent reasons. It had noticed that Eros had paid the entire consideration for the project land and therefore, the view expressed by the Arbitral Tribunal that the impost mentioned in Clause 3.14 of the General Terms & Conditions of the Auction is a penalty and not liquidated damages, is a plausible view. Concededly, there is no term in the Auction Notice, which stipulates that the said levy is a genuine estimate of damages. It was also noted that the Bank Guarantees furnished by PNB also mentioned the said impost as a penalty and not a genuine pre-estimate of damages. Indisputably, the question of DDA suffering any damages in these facts is remote.

75. As observed earlier, the scope of interference under Section 34 of A&C Act is highly restricted and the view held by the Arbitral Tribunal can by no stretch be held to be perverse, patently illegal on

the face of the record or one that falls foul of the fundamental policy of Indian Law.

76. The next question to be examined is whether the award of a sum of ₹12,00,000/- each for extending the Bank Guarantees is patently illegal. Eros had claimed a sum of ₹15,16,464/- towards extending the Bank Guarantees in each of the two contracts. The Arbitral Tribunal has allowed the claim of Eros to the extent of ₹12,00,000/-. However, the Arbitral Tribunal is silent as to the reasons that had persuaded the Arbitral Tribunal to quantify the claim of ₹12,00,000/-. The relevant extract of the impugned award allowing the aforesaid claim is set out below:

> "**Claim no.2**
>
> Under this claim, the Claimant claims expenses incurred for renewing the bank guarantee from time to time. Keeping in view the facts and circumstances of the case, the claim is allowed to the extent of Rs. 12 lakhs. Accordingly, an award in a sum of Rs. 12 lakhs is passed in favour of the Claimant and against the Respondent. The Claimant is also entitled to simple interest @ 12% pa on the amount awarded in its favour from the date of the award till its realisation."

77. It is apparent from the above that the Arbitral Tribunal has not indicated any reason whatsoever for allowing the claim quantifying the sum of ₹12,00,000/-. Since the Arbitral Tribunal had concluded that DDA was not entitled to invoke the Bank Guarantees and directed

DDA to forthwith release the same, it may follow that the Arbitral Tribunal had also considered awarding Eros the expenses for keeping the Bank Guarantees alive. However, there is no reason whatsoever as to how the award for a sum of ₹12,00,000/- was determined by the Arbitral Tribunal.

78. In terms of Sub-section (3) of Section 31 of the A&C Act, the arbitration award is required to be reasoned unless, the parties agree otherwise. The relevant extract of Section 31 of the A&C Act reads as under:

> "**31.** ***Form and contents of arbitral award***.—(1)-
> (2) * * *
> (3) *The arbitral award shall state the reasons upon which it is based*, unless—
> (*a*) the parties have agreed that no reasons are to be given, or
> (*b*) the award is an arbitral award on agreed terms under Section 30."

79. In ***Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1***, the Supreme Court had observed that "*The mandate under Section 31(3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if the need be.*"

80. This Court finds that the impugned award to the extent that it allows the claims of Eros for expenses against the Bank Guarantees to the extent of ₹12,00,000/- is unreasoned and there is no material to substantiate the said amount. Therefore, the impugned award to the extent that it awards the said amount, falls foul of Section 31(3) of the A&C Act and thus, cannot be sustained.

81. In view of the above, this Court sets aside the impugned award to the limited extent that it awards ₹12,00,000/- against Claim No.2 in each of the two cases.

82. The petitions are disposed of in the aforesaid terms. The pending applications are also disposed of.

VIBHU BAKHRU, J

MARCH 22, 2021
MK/pkv