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

Date of decision: 12.05.2026

\+ O.M.P. (COMM) 448/2023, I.A. 21545/2023 & I.A. 21546/2023

M/S INDOGREEN INTERNATIONAL .....Petitioner

Through: Mr. Debesh Panda and Mr. Piyush Pandit, Advs.

versus

DELHI DEVELOPMENT AUTHORITY .....Respondent

Through: Mr. Sanjay Vashishtha, Mr. Siddhartha Goswami, Ms. Geetanjali Reddy and Mr. Aditya Sachdeva, Advocates.

CORAM:
HON'BLE MR. JUSTICE AVNEESH JHINGAN

AVNEESH JHINGAN, J. (ORAL)

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') seeking setting aside of the arbitral award dated 17.07.2023 (for brevity 'the award').

2. The brief facts are that the respondent/ Delhi Development Authority (DDA) invited bids for sale of plots on freehold basis, for construction of a hotel to provide accommodation for the Commonwealth Games 2010 (CWG). The petitioner/ M/S Indogreen International was the successful bidder of a plot located at Hari Nagar and on 04.01.2008 a Demand-cum-Allotment letter was issued. The hotel project was to be made functional within twenty four months from the date of allotment. Clause 3.14 of the tender document reproduced below provides for furnishing of performance security, equivalent to five percent of the bid amount in the form of a bank guarantee.

"Clause 3.14: Performance Security

The construction of the hotel will have to be completed and made functional within a period of 24 months from the Date of Allotment-cum-Demand letter of the land. The intending Tender 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 24 months shall be levied as under:

Sl. No.	*Delay Period beyond 24 months*	*Penalty Amount*
1.	*upto 30 days*	*1% of the bid amount*
2.	*Above 30 days and upto 90 days*	*2% of the bid amount*
3.	*Above 90 days and upto 180 days*	*4% of the bid amount*
4.	*Above 180 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 allottee/purchaser."

2.1 On 13.05.2008, a Performance Bank Guarantee (for short 'PBG') of Rs.63,05,000/- (Rupees Sixty Three Lakhs and Five Thousand) was furnished. There was a delay in completion of the hotel and dispute arose

between the parties to the *lis*. The terms and conditions agreed between the parties provided for dispute resolution through arbitration. A notice under Section 21 of the Act was issued by the petitioner invoking arbitration. In an application under Section 17 of the Act, the arbitrator permitted encashment of PBG but the amount was to be kept in a Fixed Deposit (FDR) with a nationalized bank. The amount along with interest accrued on FDR shall abide by the outcome of the arbitration proceedings.

2.2 The petitioner claimed damages of Rs.7,00,00,000 (Rupees Seven Crores) towards business losses suffered on account of delay in grant of permissions by the respondent and also the amount realised by the invocation of the PBG.

2.3 The respondent filed five counter-claims, namely: (i) that the claimant was liable to pay the PBG amount for breaching the terms and conditions of the tender; (ii) interest at the rate of 18% per annum on the amount of the PBG; (iii) recovery of all charges payable by the petitioner in accordance with law and policy upon completion of the project; (iv) pendent lite and future at the rate of interest 18% per annum on the counter claims and (v) litigation and arbitration costs of Rs. 2,00,000/- (Rupees Two Lakhs).

2.4 The claims of the petitioner and the counter-claims nos. (ii) to (v) of the respondent were rejected and are not in issue in the present petition. The respondent has chosen not to challenge the award.

3. Learned counsel for the petitioner contends that the award is non-speaking. Counter-claim no. 1 was allowed without considering the pre-requisites of Sections 73 and 74 of the Indian Contract Act, 1872 (for short 'the Contract Act'). The arbitrator erred in holding that the counter-claim is allowed for the reason that the petitioner failed in claim seeking damages for

business loss.

4. *Per contra*, the petitioner is a partnership firm but the claim was filed without proper authorisation and therefore had no *locus standi* to invoke the arbitration proceedings. The submission is that on this ground alone, the award of the counter claim is liable to be upheld.

4.1 The argument is that once the claim seeking refund of the PBG was rejected the natural consequence thereof was that the respondent was entitled to retain the amount realized upon encashment of the PBG.

5. Heard learned counsel for the parties at length and no issue other than those noted above was pressed.

6. The only pin-pointed issue is whether the counter-claim of the respondent that the petitioner was liable to pay the amount of the PBG for breach of terms of the tender document could have been allowed solely on the basis of the rejection of claims of the petitioner for damages towards business loss and for refund of the PBG.

7. It is an admitted fact that the hotel was not completed within the stipulated period of twenty four months. The PBG was encashed in terms of the interim order passed under Section 17 of the Act and the claim of the petitioner seeking refund of the PBG was rejected.

8. The counter claim made is unambiguous that on account of breach of the terms of the tender document the PBG was liable to be invoked and the amount realised is to be retained.

9. There cannot be a dispute with the proposition that for a claim under Sections 73 and 74 of the Contract Act, the twin conditions are required to be fulfilled; first, breach of the contractual conditions and second the actual loss or damage suffered or proof that it was not possible to prove the actual

damage suffered.

10. The foundation of the counter-claim i.e., breach of the terms of the tender document by the petitioner was not dealt with and no finding in that regard is recorded. The impugned award is bereft of reasons for allowing counter-claim no. 1 and falls in the teeth of Section 31(3) of the Act whereby the arbitrator is obligated to pass a reasoned award.

11. The counter-claim awarded without determining the breach of contract and the actual loss or damage suffered, is contrary to Sections 73 and 74 of the Contract Act, is against public policy and the law laid down by the Supreme Court in **Kailash Nath Associates v. DDA**, **(2015) 4 SCC 136**:

> "43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:
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> 43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.
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> 43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act..."

11.1 The Division Bench of this court in **Tower Vision India (P) Ltd. v. Procall (P) Ltd**., 2012 SCC OnLine Del 4396 held:

> "16. Consequence for breach of the contract are provided in Chapter VI of the Indian Contract Act, 1872, which contains three sections, namely, section 73 to section 75. As per section 73 of the Indian Contract Act, the party who suffers by the breach of contract is entitled to receive from the defaulting party, compensation for any loss or damage caused to him by such breach, which naturally arose in usual course of things from such breach, or which the two parties knew when they make the contract to be likely the result of the breach of contract. This provision makes it clear that such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach. The underlying principle enshrined in this section is that a mere breach of contract by a defaulting party would not entitle the other side to claim damages unless the said party has in fact suffered damages because of such breach. Loss or damage which is actually suffered as a result of breach has to be proved and the plaintiff is to be compensated to the extent of actual loss or damage suffered. When there is a breach of contract, the party who commits the breach does not eo instanti, i.e., at the instant incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. No pecuniary liability thus arises till the court has determined that the party complaining of the breach is entitled to damages. The court in the first place must decide that the defendant is liable and then it should proceed to assess what the liability is. But, till that determination, there is no liability at all upon the defendant. The courts will give damages for breach of contract only by way of compensation for loss suffered and not by way of punishment. The rule applicable for determining the amount of damages for the breach of contract to perform a specified work is that the damages are to be assessed at the pecuniary

> amount of difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed and not the sum which it would cost to perform the contract, though in particular cases the result of either mode of calculation may be the same. The measure of compensation depends upon the circumstances of the case. The complained loss or claimed damage must be fairly attributed to the breach as a natural result or consequence of the same. The loss must be a real loss or actual damage and not merely a probable or a possible one. When it is not possible to calculate accurately or in a reasonable manner, the actual amount of loss incurred or when the plaintiff has not been able to prove the actual loss suffered, he will be, all the same, entitled to recover nominal damages for breach of contract. Where nominal damages only are to be awarded, the extent of the same should be estimated with reference to the facts and circumstances involved. The general principle to be borne in mind is that the injured party may be put in the same position as that he would have been if he had not sustained the wrong."
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> (emphasis supplied)

12. The Supreme Court in **Gayatri Balasamy v. ISG Novasoft Technologies Ltd.**, (2025) 7 SCC 1 held that while an arbitral award cannot be modified under Section 34 of the Act, a severable part of the award may be set aside. The relevant paragraphs are quoted below:

> "32. In the present controversy, the proviso to Section 34(2)(a)(iv) is particularly relevant. It states that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the arbitral award which contains decisions on matters non-submitted may be set aside. The proviso, therefore, permits courts to sever the non-arbitrable portions of an award from arbitrable ones. This serves a twofold purpose. First, it aligns with Section 16 of the 1996 Act, which affirms the principle of *kompetenz-kompetenz*, that is, the arbitrators' competence to determine

their own jurisdiction. Secondly, it enables the Court to sever and preserve the "valid" part(s) of the award while setting aside the "invalid" ones. [The "validity" and "invalidity", as used here, does not refer to legal validity or merits examination, but validity in terms of the proviso to Section 34(2)(a)(iv) of the 1996 Act.] Indeed, before us, none of the parties have argued that the Court is not empowered to undertake such a segregation.

33. We hold that the power conferred under the proviso to Section 34(2)(a)(iv) is clarificatory in nature. The authority to sever the "invalid" portion of an arbitral award from the "valid" portion, while remaining within the narrow confines of Section 34, is inherent in the Court's jurisdiction when setting aside an award.

34. To this extent, the doctrine of *omne majus continet in se minus*—the greater power includes the lesser—applies squarely. The authority to set aside an arbitral award necessarily encompasses the power to set it aside in part, rather than in its entirety. This interpretation is practical and pragmatic. It would be incongruous to hold that power to set aside would only mean power to set aside the award in its entirety and not in part. A contrary interpretation would not only be inconsistent with the statutory framework but may also result in valid determinations being unnecessarily nullified.

13. The grant of counter-claim of the respondent by a non-reasoned award is severable, not dependent or intricately connected to other claims.

14. For the reasons recorded above, the impugned award being unreasoned is against public policy and is set aside qua the counter-claim no.1. All pending applications are also disposed of.

AVNEESH JHINGAN, J

MAY 12, 2026/Pa/vs