

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

% *Judgment Reserved on: April 02, 2013*
Judgment delivered on: April 09, 2013

+ **Arb.P.No.339/2012**

R.K.ASSOCIATES & HOTELIERS PVT LTD Petitioner
Through Mr.Manish K.Bishnoi, Adv.

versus

AIRCEL LIMITED Respondent
Through Mr.Mayank Jain, Adv. with
Mr.Parmatma Singh, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By this order, I propose to decide the present petition filed by the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator.
2. Learned counsel for the respondent has made his submissions without filing the reply.
3. The case of the petitioner is that the petitioner-Company is engaged mainly in the business of Railway Catering, Hospitality and Hotel Business along with advertising business in the Railways. In November, 2010 the respondent approached the petitioner and expressed its desire to advertise its brand by way of commercial slides, voice by making use of the Live Media Screens installed by the service provider in Shatabdi Express trains, more

particularly, train No.12011-12 (New Delhi-Kalka Shatabdi Express), 12012-14 (New Delhi-Amritsar Shatabdi Express Train) and 12003-04 New Delhi-Lucknow Shatabdi Express Train. The parties entered into an MoU dated 3rd November, 2010 and the petitioner submitted the bank guarantee in question for a sum of ₹50 lac towards securing the advance payment to be received from the respondent. The parties entered into a formal contract on 22nd March, 2011, with a lock-in period of two years from the work's commencement date. Clause 22 of the agreement provides the dispute resolution and adjudication of the inter-se dispute by arbitration.

4. It is further the case of the petitioner that the price terms of the contract were fixed at ₹60 lac per month for two years and that the respondent was to pay a sum of ₹50 lac as advance at the time of signing of the agreement. The said amount was to be given by the respondent to the petitioner against the petitioner's providing a bank guarantee of ₹50 lacs which had already been provided by the petitioner to the respondent in terms of the MoU dated 3rd November, 2010.

5. The petitioner submitted an invoice dated 25th March, 2011 to the respondent for ₹50 lac which was paid. The first installment of ₹1.30 crores was to be paid by the respondent to the petitioner within a week from the date of award of the contract from the Railways against the petitioner's submitting a bank guarantee for the said amount to the respondent. Thereafter, the second installment of ₹1.80 crores was to be paid by the respondent to the petitioner before a week from the date of commencement of the In-Train Infotainment Programme against the petitioner's submitting a bank guarantee for the said amount to the respondent. The balance payment of ₹10.80 crores was to be paid after the submission of monthly bills for the

first 12 months with adjustment of advance from 13th to 18th month and thereafter clearance of all monthly bills from 19th to 24th month from the date of commencement of works.

6. In the meanwhile, as per the payment terms of the contract dated 22nd March, 2011, after the award of permission by the Railways, the petitioner submitted a bank guarantee for ₹1.30 crores to the respondent vide letter dated 20th December, 2011 and thereafter submitted its invoice for the 1st installment for ₹1.30 crores dated 29th November, 2011 which was duly acknowledged by the respondent-Company on 12th January, 2012.

7. Thereafter, the petitioner kept on reminding the respondent that even after the bank guarantee was submitted, the invoice of ₹1.30 crores had not been paid to the petitioner, but the respondent did not pay any heed to the requests of the petitioner who faced a tremendous pressure from the Railways but, the respondent never paid the said invoice amount. The petitioner sent many e-mails and communications but the respondent never paid the amount against the invoice. After the petitioner running from pillar to post sent a request dated 29th February, 2012 to release the payment within 7 days. The petitioner was threatened with the prospect of forfeiture of security and other amounts by the respondent despite of huge investment made by the petitioner.

8. The respondent on 1st April, 2012 sent a notice to the petitioner to terminate the agreement dated 22nd March, 2011 alleging that the petitioner had abandoned the contract. Thereafter, as alleged by the petitioner, under the influence of threat and coercion of encashment of the bank guarantee of ₹1.30 crores, the respondent forcibly took letters dated 12th April, 2012 and 13th April, 2012 from the petitioner wherein the petitioner was forced to

state that it was exiting the agreement even when it never intended to do so. It is stated that the said letters were written by the petitioner under a threat from the respondent of encashment of the bank guarantee of ₹1.30 crores. Soon thereafter, the petitioner invoked the arbitration clause on 16th July, 2012 for appointment of an arbitrator in terms of the agreement. The said notice was sent by the petitioner to the office of the respondent during the court proceedings in the petition under Section 9 of the Act. Despite of service, there was no response on behalf of the respondent for appointment of an arbitrator, thus, the petitioner has filed the present petition for appointment of sole arbitrator.

9. The main contention of the respondent is that the petitioner has unconditionally exited from the agreement dated 22nd March, 2011 and asked for return of the bank guarantee for an amount of ₹1.30 crores dated 19th December, 2011. The respondent has, therefore, accepted the demand of the petitioner and returned the bank guarantee in question, thus, there is no live dispute raised by the petitioner. The learned counsel for the respondent has also referred the two letters dated 12th April, 2012, 13th April, 2012 written by Media On Track Entertainment, a Unit of the petitioner.

10. I have considered both the letters relied upon by the respondent. The relevant extracts of the letter dated 12th April, 2012 read as under:-

“.....Your kind attention is drawn to the fact that we have already been awarded the contract by Northern Railways vide their letter dated 25.11.2011 and same was intimated to your office vide email dated 26.11.2011 wherein we had sought the payment of the first installment of Rs.1,30,00,000/-.

Thereafter we had submitted the required bank guarantee Vide No.93071PEBG110068 for an amount of Rs.1,30,00,000/- on 20.12.2011 vide letter of even number, and submitted the invoice for the first installment vide Bill No. RKAHPL/AIRCEL/2011-12/001 dated 29.11.2011 duly acknowledged by your office but unfortunately we have not received the first installment amount of Rs.1,30,00,000/- till date inspite of our reminders dated 27.12.2011, 11.1.2012 & 29.2.2012.

Now since you have failed to pay us the amount of the invoice, we hereby unconditionally exit from the agreement dated 22.3.2011 and call upon you to return our bank guarantee Vide No. No.93071PEBG110068 for an amount of Rs.1,30,00,000/- dated 19.12.2011....”

11. The relevant extracts of the letter dated 13th April, 2012 read as under:-

“.....Kindly refer to our letter dated 12/04/2012 wherein we have expressed our intention to unconditionally exit from the agreement dated 22.03.2011 and called upon you to return our Bank Guarantee vide no. 93071PEBG110068 of date 20.12.2011.

Further we would like to inform you that we are willing to refund the 1st Installment of Rs. 50 Lacs under the agreement dated 22.03.2011 received by us. However, this is subject to the return of our Bank Guarantee for Rs. 130 Lacs (as aforesaid) and Rs. 50 Lacs vide no. 93001PEBG100025 dated 04/11/2011 in favour of Aircel Ltd.

We would like to clarify that the 1st installment of Rs. 50 Lacs would be refunded by us only after you have returned our BG of Rs. 130 Lacs. Thereafter the amount of Rs. 50 Lacs will be refunded by DD or Payorder by us in exchange of the Bank Guarantee of Rs. 50 Lacs lying

with your office.....”

12. It is the admitted position that both the letters were acknowledged by the respondent who has issued the letter dated 27th April, 2012 to the petitioner by which the respondent had returned the bank guarantee dated 4th November, 2011 for ₹1.30 crores and also admittedly paid the sum of ₹50 lac to the petitioner, as in the said letter it is alleged that the same were returned in view of the amicable acceptance of the petitioner’s intention to exit from the contract with the respondent.

13. It is also the admitted position that Section 9 petition filed by the petitioner was also dismissed by order dated 23rd August, 2012 wherein the interim order passed on 22nd June, 2012 was vacated. While disposing of that petition, the Court also made the inquiry from the petitioner whether after return by the respondent the said bank guarantee which was received by the petitioner, had the petitioner written any letter to the respondent or any complaint given to the authority, to the effect that the petitioner was forced to exit the contract due to coercion. The answer of the petitioner before the Court was negative. After having considered both the letters dated 12th April, 2012 and 13th April, 2012, I reject the submissions of learned counsel for the petitioner for grant of prayer made in the present petition, as it is settled law that it is for the Court to examine as to whether claim raised by the parties is a dead claim or whether the parties have already concluded the transaction and have recorded the satisfaction of their mutual rights and obligations regarding financial claims. After examining the abovementioned documents, this Court is satisfied that there is no question or issue remaining to be decided between the parties in view of the

admission made by the petitioner in the letters dated 12th April, 2012 and 13th April, 2012. Thus, the reliefs sought by the petitioner cannot be granted as there is no live claim(s) between the parties. Thus, the prayer sought by the petitioner cannot be allowed. The petition is dismissed. No costs.

(MANMOHAN SINGH)
JUDGE

APRIL 09, 2013