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

Date of decision: 2nd August, 2019

+ **O.M.P. 71/2012**

DELHI METRO RAIL CORPORATION LTD. Petitioner

Through: Mr. J. P. Singh, Advocate.
(M:9868766655)

versus

MIC ELECTRONICS LTD AND ANOTHER Respondents

Through: Mr. Arun K. Sharma, Advocate.
(M:9891685368)

WITH

+ **O.M.P. 452/2012**

M/S MIC ELECTRONICS LTD. Petitioner

Through: Mr. Arun K. Sharma, Advocate.
(M:9891685368)

versus

M/S DELHI METRO RAIL CORPORATION
LTD. & ANR.

..... Respondents

Through: Mr. J. P. Singh, Advocate.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(oral)

1. The Court was informed on the last occasion that Mic Electronics Ltd. is in insolvency proceedings before the NCLT, Hyderabad Bench. It was made clear that the Section 34 petitions would not be affected by the moratorium which may be imposed in the said proceedings, as in the present case the objections to the award are to be heard and no recovery is being

directed against the company. The last order reads as under:

“Despite repeated opportunities, the Resolution Professional has not entered appearance before the Court. On the last date, none appeared for MIC Electronics Limited. Today, a letter is submitted that the insolvency process is under way. The hearing in the Section 34 petitions is not affected by the moratorium proceedings and so there is no justification in seeking adjournment. In the interest of justice, subject to payment of costs imposed on the last date, the adjournment is granted.

List on 2nd August, 2019. No further opportunity shall be granted in this matter. On the next date, arrangements shall be made for arguing the matter.”

2. A letter has been placed on record by Mr. Arun K Sharma Id. counsel to the effect that MIC Electronics Ltd is under Corporate Insolvency Resolution Process before the NCLT, Hyderabad and that the Resolution Plan approved has been submitted to the said forum. The said process may continue but it does not come in the way of the present Section 34 petitions being heard and disposed of. In ***Power Grid Corporation of India Ltd. v Jyoti Structures Ltd. O.M.P. (COMM) 397/2016 (Decided on 11th December, 2017)***, a Ld. Single Judge of this Court has already held that unless the assets of the company are being jeopardised in any manner, Section 14 of the IBC does not come in the way of hearing a Section 34 Petition. The relevant portion of the said judgement reads as under:

"In the light of above purpose or object behind the moratorium, Section 14 of the Code would not apply to the proceedings which are in the benefit of the corporate debtor, like the one before this Court in as much these proceedings are not a "debt recovery action" and its conclusion would not endanger, diminish, dissipate or impact the assets of the corporate debtor in any

manner whatsoever and hence shall be in sync with the purpose of moratorium which includes keeping the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the process envisaged during the insolvency resolution process and ensuring the company may continue as a going concern."

3. The ld. counsel for DMRC has been heard in the matter and the Court has perused the award. The present two petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award dated 22nd November, 2011 passed by a three-member Tribunal. The background of the dispute is that the DMRC invited tenders on 14th October, 2007 in respect of installation, operation and maintenance of full-colour day and night LED Video Display Systems at eight metro stations of Line-3. ("works").

4. The contractor submitted its bid dated 14th November, 2007 in which it gave a minimum assurance of Rs.61,21,043/- per month as license fee for 25 screens, namely seven out-door and 18 indoor screens. The bid of the contractor was accepted and the letter of acceptance was issued on 7th February, 2008. The contractor was also to pay a sum of Rs.3,67,56,258/- as interest free security deposit and a sum of Rs. 1,83,78,129/- as first quarterly advance license fee within 10 days of the LOA which was the binding contract between the parties. The contractor paid the quarterly advance and sought exemption from giving the security deposit. Finally, once the DMRC refused to give exemption from furnishing the security deposit, the contractor deposited the said security deposit vide letter dated 10th April, 2008.

5. While the contractor started making arrangements and conducting field surveys for fixing the screens and servers, it sought some clarifications

from the DMRC which was, however, not given by the DMRC. In the meantime, it came to know that orders had been passed by the High Court of Delhi as well as the Supreme Court in respect of installation of display screens. The contractor started installing screens at some locations such as Pragati Maidan, Karol Bagh, Rajendra Place and Janakpuri, however, while the indoor screens could be installed, the outdoor screens could not be installed due to the various orders passed by Courts. The contractor thus issued termination notice dated 30th October, 2009 and the disputes were referred to arbitration.

6. Owing to the various orders passed, the arbitrators came to the conclusion that seven out-door units could not be operational at all. The letter of the contractor did not evince any reply from DMRC and the DMRC terminated the contract vide legal notice dated 30th November, 2009. The contractor then sought the following claims.

“i. Refund of Rs. 1,83,78,129/- paid towards advance license fee.

ii. Refund of Rs. 3,67,56,258/- paid towards security deposit.

iii. Payment of interest @ 18% per annum on the entire amount claimed under i and ii above.

iv. Payment of Rs. 1,80,00,000/- towards the value of the equipment lying with the Respondent together with an interest @ 18% per annum from the date of installation to the date of realization.

v. Payment of Rs. 1,00,00,000/- towards exemplary costs for the Respondent's illegal and high handed conduct.”

vi. Costs of arbitration proceeding.”

7. The arbitral tribunal was constituted and the findings of the arbitral tribunal are that there were orders passed by the Supreme Court since 2007

which prevented the contractor from using or installing the out-doors screens completely. The relevant portion of the award reads as under:

“5.5 The Claimant has pointed out that there was several stringent pre-existing restrictions/limitations for installation of outdoor LED video displays in Delhi region including New Delhi and also NCR (National capital Region.) Such restrictions/limitations were fully known to the Respondent. In this connection, the following has been brought out during arbitration proceedings:

i. Supreme Court of India passed order dated 12.10.2007, directing the Municipal Corporation of Delhi (MCD) to go ahead with the implementation of the Outdoor Advertisement Policy and further granted liberty to those parties who are aggrieved by the implementation to file appropriate application.

ii. The Respondent (DMRC) filed an application on 30.11.2007 to the Supreme Court seeking directions to the effect that the provisions of the Outdoor Advertisement Policy which mandate seeking permission of MCD before erection of any advertisement on public view would not be applicable to the Respondent (DMRC) and also that provision relating to the 50% revenue sharing with MCD is also not applicable to the Respondent. In this appeal, they have also referred to Supreme Court's order dated 27.04.2007 as per which EPCA (Environment Pollution Controlling Authority) for the NCR was directed to examine and file its opinion on the Outdoor Advertisement Policy prepared by MCD. The Respondent has also stated that vide its letters dated 04.07.2007, 05.07.2007 and 19.07.2007 it has communicated to EPCA its views on the Outdoor Advertisement Policy as framed by MCD.

iii. Subsequently, MCD issued a notice dated 10.03.2008 to the Respondent (DMRC) with a direction to ensure and remove each and every

advertisement/boarding displayed by the Respondent by 31.03.2008 failing which the said advertisements would be removed by MCD.

iv. The Respondent further filed application to Supreme Court with a prayer to grant stay of the operation of notice dated 10.03.2008 issued by MCD until the issue raised in its application dated 30.11.2007 is decided.

v. MCD filed its reply to the applications filed by DMRC before Supreme Court seeking stay of the notice dated 10.03.2008 and certain directions. MCD also contended that DMRC was very much part of the negotiations during the policy formulation at EPCA meetings and that DMRC had agreed with the final policy.

vi. The Respondent further filed an affidavit dated 01.09.2008 in connection with the Delhi Outdoor Advertising Policy 2008 before Supreme Court seeking directions from the Court to the effect that the provisions of the Outdoor advertisement Policy which mandates seeking permission of MCD before erection of any advertisement in public view, would not be applicable to DMRC and also that provision relating to the revenue sharing with MCD is also not applicable to DMRC.

vii. The Respondent in March 2009 filed an application before the Supreme Court seeking modification of the order dated 25.04.2008 passed by Supreme Court that the parties therein including the Respondent not to enter into any new contracts or renew contracts which are contrary to the policy adopted by the Bhure Lal Committee.

viii. On 28.08.2009, Supreme Court passed judgment that the restraint order of 25.04.2008 is lifted and that DMRC is now free to erect fresh hoardings or enter into new contracts in that regard subject to the provisions of the Advertisement Policy accepted by it and approved by Supreme Court.

5.6 Earlier, the Claimant vide its letter dated

29.07.2008 addressed to the Respondent had stated that considering the ongoing case for Outdoor Advertisement in Delhi and the court's orders, it had become difficult for it to move ahead with the project and find suitable locations for the outdoor locations.

5.7 Considering the aforementioned events the AT agrees with the Claimant's contention that clearly there were pre-existing restrictions/limitations on outdoor display of advertisements and that the Respondent was aware of these restrictions/limitations before finalizing the agreement with the claimant and eve before issuing Tender Notice. We do strongly feel that it was unreasonable on the part of the Respondent not to disclose such restrictions and limitations in the tender documents or even at the LOA/Agreement stage."

While there were some defaults by the contractor in installing the indoor display screens, from time to time, the arbitral tribunal found that the DMRC did not fully apprise the contractor of the factual situation in respect of the orders passed by the Courts in respect of the outdoor screens. The tribunal also noticed the various letters and the meetings which were held between the parties. Finally, the Supreme Court order came to be vacated only on 28th August, 2009, however, by then a substantial period of the contract i.e., two years had itself expired. Under these circumstances, the contractor had decided to terminate the contract on 30th November, 2009.

8. The tribunal further holds that the DMRC was conscious of the fact that several orders of the Court existed, which barred the contractor from installing out-door advertisement displays. Further, since outdoor advertisements had been banned, the DMRC itself, vide order 11th November, 2009 had waived the license fee from the period from 25th April,

2008 to 28th August, 2009, during which the ban was operating. Thus, the tribunal was concerned with the advance license fee that was deposited, as also the security deposit which was made by the contractor.

9. The tribunal, after going into the factual situation and appreciating the various orders passed by the Court, comes to the conclusion in paragraph 5.8 of the award that under Clause 2.4.1 of the Tender Documents, the Licensee i.e., contractor is bound to comply with the orders passed by the Courts from time to time. The said paragraph reads as under

“5.8. The Respondent has brought out that Clause 2.4.1 of the Tender Documents provide that the Licensee shall comply and abide by the judgement passed from time to time by Supreme Court or any other judicial body. It is, however, noted that the same clause, by providing that 'Instructions issued by DMRC for complying with such judgements have to be followed by the Licensee' lays the responsibility, of issuing appropriate instructions to the licensee, with the Respondent. In fact, it is noted that, the Respondent did actually take up the matter with the Court and MCD at all stages, but did not share any such information with the Claimant. Nor did it issue any instructions to the Claimant in the matter. We infer that with the type of problems connected with the provision of outdoor displays, it is for the Respondent to settle matters with the concerned authorities. We further note that, recognizing the restrictions/ limitations imposed by the Court on outdoor display, the Respondent by letter dated 11.11.2009 (RS/1 - Page14) has itself waived off the licensee fee for the period from 25.04.2008 up to 28.08.2009, period for which the ban was operating.

5.9. Thus, we conclude that as far as outdoor screens are concerned the Claimant cannot be held responsible for its failure to provide such screens.

5.10. In addition to 7 outside locations for display, there were 18 indoor locations for LED-video display. Arbitral Tribunal examined the reasons as to why the work could not be done to provide inside displays.”

10. Under these circumstances, the tribunal directs refund of pro rata license fee in respect of the seven out-door screens. Para 5.17 reads as under:

“Taking into consideration the above mentioned background, the AT has come to the conclusion that since the Claimant is not held responsible for failure or outdoor screens, it is not liable to pay Performance Deposit and Advance License fee for the 7 outdoor screens and that the proportional Performance Deposit and Advance License Fee paid by the Claimant for the outside displays should be refunded to the Claimant on pro rata basis.”

11. The above finding of the arbitral tribunal is in fact, completely justified considering the fact that there was a ban on installation of out-door displays and screens. The fundamental purpose of the contract was that the contractor could utilise the LED screens for putting up advertisements. The uncertainty that prevailed due to the ban in fact would have resulted in the contractor not being able to utilise the advertisement space to its full capacity. The orders of the Courts, that were passed from time to time would result in a situation wherein the contractor could not afford pay the guaranteed license fee. There were some reasons which the arbitral tribunal discusses, that resulted in even some of the indoor screens not being fully utilised by the contractor. In respect of the indoor screens, the tribunal permitted DMRC to retain the security deposit and the advance license fee. The only refund which was directed is in respect of the seven out-door LED

displays, which cannot be argued as being perverse or unreasonable. Accordingly, the award directing the refund on a pro rata basis is upheld. Insofar as interest is concerned, the arbitral tribunal has awarded compound interest @ 12 % p.a., the same is converted into simple interest @ 12 % per annum from the date of award to the date of payment.

12. If the DMRC makes the payment to the company within a period of two months, no further interest would be liable to be charged. If there is any delay in making the payment, after the period of two months expires, interest @ 8 % per annum on the awarded sum shall be payable. Both the OMPs are disposed of.

AUGUST 02, 2019

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**PRATHIBA M. SINGH
JUDGE**