IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 21.11.2016

\+ **O.M.P. 5/2016**

ARESKO ESTATES PVT. LTD. ..... Petitioner

Versus

INDIRA GANDHI NATIONAL CENTRE FOR THE ARTS ..... Respondent

<u>Advocates who appeared in this case:</u>
For the Petitioner : Mr B.P. Aggarwal.
For the Respondent : Mr L. R. Khatana with Mr Siddharth Khatana.

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HON'BLE MR JUSTICE VIBHU BAKHRU

<u>JUDGMENT</u>

<u>VIBHU BAKHRU, J</u>

1. Aresko Estates Pvt. Ltd. (hereafter 'Aresko') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 30.09.2015 (hereafter 'the impugned award') passed by the Sole Arbitrator in connection with the disputes that had arisen between Aresko and the respondent - Indira Gandhi National Centre for the Arts (hereafter 'IGNCA').

2. The disputes between the parties relate to a Memorandum of Understanding (hereafter 'the MOU') dated 01.07.2010 entered into between the parties for running a guest house which belongs to IGNCA. Aresko claims that it had spent substantial amounts in renovating and furnishing the said guest house but could not run the same since it was interdicted in doing so by the New Delhi Municipal Council (NDMC).

Aresko's claims - which were essentially in the nature of damages - were rejected by the Arbitrator and this has led Aresko to file the present petition for setting aside the impugned award.

3. Briefly stated, the relevant facts necessary to consider the controversy involved are as under:-

3.1 IGNCA is an autonomous trust under the Ministry of Tourism and Culture, Government of India. It has been allotted the premises at No.11, Man Singh Road, New Delhi.

3.2 IGNCA issued an advertisement inviting Expression of Interest (EOI) from interested and reputed vendors/operators, who were financially sound and having experience and expertise, for the management and running of IGNCA's guest house and cafeteria at No.11, Man Singh, New Delhi (hereafter 'the guest house') on lease basis. The initial term of the contract was for five years extendable for a further period of three to five years on mutually agreed terms and conditions.

3.3 In response to the aforesaid advertisement, Aresko submitted its expression of interest and was successful in securing the contract for running the guest house. Thereafter, the parties entered into the MOU for the management, running, operation and maintenance of the guest house. The term of the said MOU was five years which was extendable for a further period of three/five years as may be decided by IGNCA. In terms of the MOU, Aresko, *inter alia,* agreed to pay specified user charges and was entitled to retain the rent charged for the rooms and conference rooms and sale proceeds from cafeteria, coffee shop, etc. Aresko took possession of the guest house and thereafter, renovated and furnished the same.

3.4 On 08.02.2012, the Chief Architect, NDMC issued a letter directing IGNCA to maintain *status quo* as to the premises and not use the same as guest house or as hotel as the lease did not permit the use of the premises for any mixed use/commercial activity. The same was duly communicated by IGNCA to Aresko by its letter dated 24.04.2012.

3.5 In addition to the above, other disputes had also arisen between the parties; Aresko had alleged that employees of IGNCA were causing loss to Aresko. IGNCA, on the other hand, claimed that Aresko had violated the terms of the MOU. The disputes between the parties were referred to the Sole Arbitrator.

4. Before the Arbitrator, Aresko raised several claims. Aresko prayed that a direction be issued to IGNCA for taking steps to remove the order of *status quo* to permit Aresko to resume the activity of running the guest house (Claim No. 1). It also claimed ₹2,21,73,841/- (Claim No.2) as reimbursement of the investment made and expenses incurred by Aresko on renovating and furnishing the guest house. Aresko further sought reimbursement of expenses amounting to ₹41,75,068/- relating to payment of salaries to staff, consultation fees, etc. (Claim No. 3). In addition, Aresko also made claims for loss of profits (Claim No.4 and 5) and refund of security deposit of ₹30,33,333/-.

5. IGNCA also raised counter claims. IGNCA claimed that Aresko had breached the terms of the MOU and instead of running a guest house, Aresko had advertised the same as a Boutique Hotel named "Indravan" which was contrary to the terms of the MOU. Further, Aresko had inordinately delayed commissioning of the guest house and, therefore, IGNCA had to spend an aggregate sum amounting to ₹3,60,52,931/- on

hosting various guests in other hotels and places. In addition, IGNCA also claimed user charges amounting to ₹3.64 crores; in terms of the MOU, user charges were payable after two months of signing of the MOU. In addition, IGNCA also made a claim for loss of credibility.

Impugned Award

6. The Arbitrator rejected the claims made by Aresko. Aresko's prayer for directing IGNCA to obtain the requisite clearance/permission from NDMC to enable Aresko to resume the activity of running the guest house was rejected by the Arbitrator as he found that Aresko had not made a grievance of the *status quo* order passed by NDMC at the material time. More importantly, the term of the MOU had already expired and, therefore, the Arbitrator held that the directions as prayed for by Aresko could not be granted. It is relevant to note that the learned counsel for Aresko has not assailed the decision of the Arbitrator to reject Aresko's claim for resuming the activity of running the guest house.

7. The Arbitrator further rejected the Aresko's claim for reimbursement of ₹2,21,73,841/-, which was claimed to have been incurred for renovating and furnishing the guest house. The Arbitrator found that Aresko had not taken any approval from the concerned Committee of IGNCA for incurring the said expenditure as required under the MOU. Therefore, Aresko could not claim any reimbursement. Similarly, Aresko's claim for reimbursement of expenditure incurred on payment of salary to staff, consultation fee amounting to ₹41,75,068/- was also rejected by the Arbitrator; he held that there was no reference to such expenditure under the MOU and further there was no material to indicate that such expenses were necessary as the guest house was not functional. The claims made for loss of profit were

also rejected as the Arbitrator found that there was no failure on the part of IGNCA to conform to any of the terms of the MOU, which could have resulted in delay in the operations of the guest house. The Arbitrator held that the claim made by the Aresko was not based on facts and, therefore, rejected the same.

8. In regard to Aresko's claim for refund of the security deposit (Claim No.6), the Arbitrator held that IGNCA would be liable to refund the security deposit if the same was not subject to fulfilment of any condition by Aresko. He left the decision on the competent authority in IGNCA to take a view on the compliance of conditions necessary for release of the security deposit. Aresko's claim made on account of alleged loss of reputation and credibility were also rejected for lack of evidence. Aresko's claim for interest was also rejected since the same would arise only if any of the other claims were accepted by the Arbitrator.

9. The Arbitrator also rejected the counter claims made by IGNCA. He held that since the guest house never became operational, the demand for the payment of user charges by the IGNCA would be "*unfair*". He also rejected the claim for reimbursement of the amounts claimed to have been incurred by IGNCA in hosting guests in other hotels.

10. However, in order to do equity between the parties, the Arbitrator directed that a sum of ₹40 lacs be paid to Aresko as consideration for furnishing and renovations carried out by Aresko. He further directed that the security money lying with IGNCA be refunded to Aresko subject to fulfilment of any condition stipulated for refund of the security deposit. Lastly, the Arbitrator directed Aresko to vacate the premises and handover the same to IGNCA within a period of one month failing which the

Arbitrator directed Aresko to pay a daily fine of ₹30,000/-. He further directed the payment of interest at the rate of 10% by both parties for any delay in meeting their respective obligations.

Submissions

11. Mr B. P. Aggarwal, learned counsel appearing for Aresko submitted that the impugned award is perverse and opposed to public policy as there was no dispute as to the amounts spent by Aresko in renovating and furnishing the guest house. He submitted that denial of Aresko's claim for reimbursement of the amounts spent on furnishing and renovations, only on the ground that no specific approval had been taken for such expenditure, was erroneous and contradictory to Arbitrator's finding that it was not believable that the work had continued for one and a half years without the knowledge of IGNCA, if not with the consent of the competent authorities.

12. Mr Aggarwal further submitted that Aresko could not run the guest house because of the *status quo* order directed by the Chief Architect, NDMC. He submitted that it was IGNCA's obligation to ensure that the premises could be used as a guest house and that was the basic premise on which the bids were invited by a public advertisement. He stated that since the use of the premises for which IGNCA had entered into the MOU was not permitted, it was obliged to compensate Aresko for the expenditure incurred and loss suffered by it. He further contended that the Arbitrator had failed to decide the issue regarding refund of security deposit and had left the same to the discretion of competent authority of IGNCA and, thus, had failed to adjudicate the claim. He further submitted that there was no material before the Arbitrator for awarding a penalty of ₹30,000/- per day

for any delay on the part of Aresko to handover the possession of the guest house to IGNCA.

13. Mr L. R. Khatana, learned counsel appearing for IGNCA countered the submissions made by Mr Aggarwal. He referred to various terms of the MOU and submitted that Aresko had breached the terms of the same and instead of operating a guest house as contemplated under the MOU, it had sought to exploit the premises for commercial purposes which was impermissible under the terms of the MOU. He submitted that this was the principal reason which prompted NDMC to pass the *status quo* order. He emphatically submitted that Aresko could use the guest house only for limited purposes as specified under the MOU but instead it had issued advertisement indicating the guest house to be a Boutique Hotel.

14. With regard to the claim for refund of security deposit, he submitted that the same was appropriated by IGNCA towards its claims.

15. I have heard the learned counsel for the parties.

16. Aresko's claim that IGNCA be directed to obtain the necessary approvals and clearances and be directed to extend the licence was rejected by the Arbitrator, *inter alia,* for the reason that term of the MOU had already elapsed. The Arbitrator further found that Aresko was in breach of the MOU and, therefore, the said claim could not be accepted. None of the reasons indicated by the Arbitrator can be stated to be patently illegal or perverse and as such are not amenable to judicial review under Section 34(2)(b)(ii) of the Act. The learned counsel for Aresko also did not make any grievance in this regard.

17. The main contention advanced on behalf of Aresko relates to its

claim for reimbursement of expenses incurred by Aresko in renovating and furnishing the guest house. The said claim was rejected by the Arbitrator principally on the ground that prior permission for the same had not been obtained from IGNCA. In this regard, clause 11 of the MOU is relevant and is reproduced below:-

> "11. The accommodation in the Guest House is not furnished and equipped. The Second Party shall get the furnishing items and design approved from the Committee constituted by IGNCA before procurement action for furnishing the Guest House."

18. A plain reading of the aforesaid clause clearly indicates that Aresko was obliged to take approval for items and designs from the committee constituted by IGNCA before initiating any action for procurement of items for furnishing the guest house. Indisputably, no such permission was taken. The contention that IGNCA was aware of Aresko's activity of furnishing and renovating the guest house and, therefore, is obliged to pay for the same, cannot be accepted. Merely because IGNCA was aware of Aresko's activity need not imply that it had approved the design and items used for furnishing the guest house or had accepted the liability to pay for the same. Further, there is a serious dispute as to the necessity for the extensive renovation and furnishing carried out by Aresko. It is IGNCA's claim that instead of renovating and furnishing the guest house to be used for the limited purpose as specified in the MOU, Aresko intended to use the guest house as a boutique hotel and had embarked on furnishing the same on an exaggerated scale. Clearly, the extent of furnishing and renovation required for a guest house and a boutique hotel would be different. Further, the furnishing and renovation was to be completed within a period of two months and that period was exceeded many times

over.

19. In any view of the matter, the Arbitrator's decision that IGNCA cannot be called upon to pay for such renovations and furnishing cannot be termed as perverse or in conflict with the Public Policy of India.

20. Similarly, the Arbitrator's decision to reject Aresko's claim for expenses towards salaries of staff, consultation fee and staff food amounting to ₹41,75,068/- cannot be faulted. The Arbitrator had rejected the same by pointing out that there is no reference in the MOU for such expenditure and further there was no material to indicate that such expenditure was necessary, considering that guest house was not running.

21. Aresko's claim for loss of profits was also rightly rejected by the Arbitrator in view of his finding that Aresko was in breach of the MOU. The Arbitrator had noted that the NDMC's letter directing *status quo* to be maintained was issued on 08.02.2012, which was more than one and a half years after signing of the MOU and even by that time, Aresko had not commenced running of the guest house. The Arbitrator had held that NDMC's letter could not be the reason for Aresko's failure to commence running of the guest house within the time as specified. It also concluded that IGNCA was not responsible for the delay in operationalizing the guest house. The learned counsel appearing for Aresko has also not seriously contested the aforesaid finding and has not addressed any contention to canvass that IGNCA was responsible for any delay in operationalizing the guest house prior to the letter dated 08.02.2012. Thus, the Arbitrator's finding that Aresko was in breach of the MOU, cannot be faulted. There is also a serious dispute whether IGNCA was responsible for the *status quo* order issued by NDMC; IGNCA claims that the same was issued only

because Aersko had advertised the guest house as a boutique hotel. The Arbitrator also found that IGNCA had submitted the necessary clearances and no grievance in this regard was raised at the material time. The Arbitrator's finding cannot be held to be perverse or not informed by reason and thus warrant no interference in these proceedings.

22. In the circumstances, the claim for loss of profits does not arise and are rightly rejected by the Arbitrator. Further, the claims for loss of reputation and credibility as well as interest are also clearly unsustainable in view of the findings and were rightly rejected by the Arbitrator.

23. Even if it is accepted – although there is no reason to do so - that the Arbitrator's findings are erroneous, it cannot be disputed that the same would be errors within the jurisdiction of the Arbitrator. The findings are clearly neither perverse nor patently illegal and, therefore, are not amenable to challenge as being opposed to Public Policy of India.

24. Insofar as the decision of the Arbitrator to direct IGNCA to pay a sum of ₹40,00,000/- for furnishing and renovations is concerned, it is possible to contend that such direction was not sustainable in view of the findings arrived at by the Arbitrator. However, IGNCA has accepted the award and has not filed a petition to set aside the award. The learned counsel for Aresko was also pointedly asked whether Aresko would be interested in removing all furniture, furnishings and other movables instead of accepting the sum of ₹40,00,000/- as directed by the Arbitrator. The learned counsel for Aresko had unequivocally responded in the negative. Thus, the said direction is also sustained.

25. The next controversy to be decided relates to refund of the security

deposit. The Arbitrator had left the decision to refund the security deposit to the competent authority of IGNCA. It had further indicated that the same is liable to be refunded if it was not subject to fulfilment of any condition on part of Aresko. The Arbitrator had also unequivocally held that since the guest house had not become operational, IGNCA's demand for user charges "*would be somewhat unfair*". In this view, IGNCA could not be permitted to appropriate the security deposit towards user charges. The finding that charging user charges would be unfair has not been challenged by IGNCA and, therefore, Aresko's security deposit can be appropriated only against fulfilment of any other condition for which the security deposit had been furnished. Since the Arbitrator had not taken any decision on the said issue, the question as to refund of security deposit still remains undecided. The Arbitrator has in fact failed to fully decide the claim referred to it and Aresko's grievance in this regard is justified.

26. The decision of the Arbitrator to award penalty at the rate of ₹30,000/- per day on failure of Aresko to handover the guest house within one month or the date of the award, is also not sustainable. The said decision is wholly unsupported by any material on record. Plainly, the penalty of ₹30,000/- per day is without any basis. It is trite law that damages in the nature of penalty or terrorem are not permissible and the same must be reasonable damages which are required to be established by cogent material. Imposition of damages cannot be whimsical or arbitrary. Since there is no material which would justify a direction for imposition of daily fine of ₹30,000/-, the said direction is liable to be set aside.

27. In view of the above, the impugned award to the extent that it directs levy of daily fine of ₹30,000/- for not handing over the guest house within

one month from the date of the award is set aside. Further, since the claim for refund of security deposit has been left to IGNCA, it naturally follows that Aresko would be at liberty to seek recovery of the same and raise further disputes in the event the security deposit is appropriated against any unjustified charges. It is also clear that the security deposit cannot be appropriated against user charges because: (a) IGNCA's claim for user charges has been rejected and IGNCA has accepted the same; and (b) that Arbitrator has unequivocally held that levy of user charges would be unfair. In this view, IGNCA can appropriate the security deposit against non-fulfilment of other conditions as the Arbitrator had left the decision on IGNCA. However, if Aresko does not accept the same, it would be at liberty to contest the same in accordance with law.

28. The petition is disposed of with the aforesaid observations.

VIBHU BAKHRU, J

NOVEMBER 21, 2016
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