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

+ **O.M.P. (COMM) 379/2016 and IA Nos. 9708-9709/2016**

HANDICRAFTS & HANDLOOMS

EXPORT CORPORATION OF INDIA LTD. Petitioner

Through: Mr Amit Kumar and Mr Shaurya
Sahay, Advocates.

versus

**DELHI METRO RAIL CORPORATION
LTD. Respondent**

Through: Mr Shiv Khurana, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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30.11.2016

VIBHU BAKHRU, J

1. Handicrafts and Handlooms Export Corporation Of India Ltd. (hereafter 'HHEC') - a public sector enterprise - has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 11.05.2016 as corrected on 09.06.2016 (hereafter 'the impugned award') passed by the Sole Arbitrator. By the impugned award, the Arbitrator has rejected the claims made by HHEC and has allowed the counter claims made by the respondent (hereafter 'DMRC').

2. The disputes between the parties arose in respect of the Licence Agreement dated 05.01.2011 (hereafter 'the Licence Agreement') entered

into between the parties, whereby a shop at Rajiv Chowk Metro station was licensed by DMRC to HHEC. The Licence Agreement was for a period of six years but was prematurely terminated. Whereas HHEC raised claims of damages and refund of security deposit, DMRC raised a counter claim for balance licence fees and other charges. The Disputes were referred to arbitration. By the impugned award, the claims made by HHEC were rejected and DMRC's counter claims were allowed.

Factual context

3. Briefly stated, the relevant facts are that DMRC invited applications by open advertisement for licensing the kiosks at Metro Stations in Delhi on 'first come first serve basis'. HHEC responded to the aforesaid advertisement and filed a Direct Application Form (DAF) dated 18.03.2010 for licensing a retail outlet on licence for showcasing their products and activities. HHEC's application was accepted; DMRC communicated the same by its letter dated 01.04.2010 and called upon HHEC to pay an aggregate sum of ₹37,56,085/- . The break up of the said amount is as under:

Heads	Amount (in Rs.)
Advance Quarterly License Fee	7,53,840.00
Advance Quarterly Maintenance Charges	8,376.00
S.Tax on Adv. License Fee @ 10.30%	77,646.00
S. Tax on Adv. Other Maintenance Charges	863.00
Interest Free Security Deposit (12 months License Fee)	30,15,360.00
EMD already paid	1,00,000.00
Net amount payable	37,56,085.00

4. HHEC paid the aforesaid amount of ₹37,56,085/- on 12.04.2010. On 28.04.2010, HHEC took possession of the Shop No. RCK-07, measuring 83.76 sq. meters at Rajiv Chowk, Metro Station at a licence fee of ₹3000/- per sq. meter per month and, on 05.01.2011, the parties executed the Licence Agreement.

5. Subsequently, HHEC made complaints regarding seepage/water leakages and choking of drains. DMRC asserts that the said complaints were addressed and the defects were rectified but HHEC disputes the same.

6. HHEC paid the licence fees till 30.06.2011 but did not pay the fee thereafter. DMRC sent a notice dated 11.07.2011 calling upon the HHEC to pay the advance licence fee but HHEC failed to do so. At the request of HHEC, DMRC also extended the time for paying the licence fee till 31.07.2011 but HHEC did not make the payment even during the extended time. Finally, DMRC issued a letter dated 04.08.2011 calling upon HHEC to pay the advance licence fee along with interest within a period of thirty days failing which to treat the communication as a notice for termination of the Licence Agreement

7. HHEC alleged that the seepage and blocking of drains had made the shop unusable. It was further alleged that DMRC had obstructed the shop by a sign board. HHEC further claimed that despite several communications, DMRC had failed to rectify the same. DMRC refuted the aforesaid allegations and by its letter dated 23.09.2011 called upon the HHEC to deposit the dues within a period of 10 days failing which the contract would

be terminated. Since HHEC did not pay the Licence Fees, DMRC - by its letter dated 27.10.2011 - terminated the Licence Agreement

8. HHEC sent a letter dated 03.11.2011 communicating its decision to vacate the Shop in question. The possession of the shop in question was handed over by HHEC to DMRC on 20.11.2011. HHEC requested for a refund of the security deposit. DMRC, on the other hand, called upon the HHEC to pay a sum of ₹15,93,212/- being outstanding licence fee. The parties were unable to resolve their disputes amicably and, consequently, the same were referred to arbitration.

9. Before the Arbitrator, HHEC claimed: (i) ₹30,15,360/- as refund of the security deposit; and (ii) ₹57.07 Lacs as damages on account of the loss suffered.

10. DMRC, on the other hand, raised a counter claim of ₹19,64,222/- against the outstanding dues on account of licence fee and other charges along with interest upto April, 2014.

11. The Arbitrator examined the evidence led by the parties as well as the terms of the Licence Agreement and concluded that HHEC had failed to establish the loss suffered by it. He further observed that the premises were taken on 'as is where is basis' and therefore HHEC could not avoid its liability to pay the Licence fees as agreed.

12. Accordingly, he rejected the claim of loss made by HHEC. The Arbitrator also rejected HHEC's claim for refund of security deposit as he concluded that HHEC had failed to adhere to the terms of the licence

agreement inasmuch as admittedly, HHEC had not paid the licence fee.

13. Insofar as the counter claims of DMRC are concerned, the Arbitrator allowed the same and awarded a sum of ₹25,03,169/- in favour of DMRC which included the outstanding licence fee along with interest computed at the rate of 24% per annum till the date of the award. In addition, he also awarded future interest at the rate of 15% per annum from 01.06.2016 till the date of payment.

Submissions

14. The principal contention advanced by Mr Amit Kumar, the learned counsel for HHEC, is that the Arbitrator has rejected HHEC's claim for refund of security deposit even though DMRC had not been able to establish a loss. He contended that the Arbitrator has permitted DMRC to forfeit the security deposit although DMRC had neither made any claim for loss nor led any evidence to prove the same. He referred to Section 74 of the Indian Contract Act, 1872 as well as various decisions whereby it has been held that only reasonable damages which have actually been suffered by the party, can be awarded.

15. Mr Kumar further contended that the pre-award interest awarded by the Arbitrator was also excessive and in the nature of penalty, which was not permissible.

16. Mr Khurana, the learned counsel appearing for DMRC countered the submissions made by Mr Amit Kumar. He submitted that the fundamental premise that Arbitrator had not examined the question of the loss suffered by

DMRC was erroneous. He drew the attention of this Court to paragraph 161 of the impugned award wherein the Arbitrator had taken note of the fact that HHEC had terminated the licence agreement on 27.10.2011 and shop in question was licensed to M/s Brindavan Food Products on 21.12.2012. He pointed out that the Arbitrator had, accordingly, calculated the monthly licence fee for the period 27.10.2011 till 20.12.2012 (13 months and 23 days) at the contracted rate and computed the amount of loss at ₹34,59,288/-.

Conclusion

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

18. It is trite law that the scope of interference in an arbitral award is highly restricted and the same cannot be interfered with except on the grounds as specified under Section 34 of the Act. HHEC has sought to place its challenge to the impugned award under Section 34(2)(b)(ii) of the Act as it claims the impugned award to be contrary to the Public Policy of India.

19. I am unable to accept the aforesaid contention. The Arbitrator as a matter of fact found that HHEC was in breach of the Licence Agreement. He had also evaluated the evidence produced by parties, which included correspondence between HHEC and DMRC. He noted that DMRC's communications indicated that DMRC had addressed HHEC's complaints and had cured the defects as pointed out by HHEC. The finding that HHEC was in breach of the Licence Agreement cannot be interfered with in these proceedings.

20. It is well settled that the scope of examination under Section 34 of the Act does not entail re-appreciation of the evidence and as long as the conclusion arrived at by the Arbitrator is plausible, this Court will not supplant its view over that of the Arbitrator. In the facts of the present case, I am unable to accept that any of the finding arrived at by the Arbitrator are perverse or without any material.

21. In **Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49**, the Supreme Court has explained the above principle in the following manner:

“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.”

22. Thus, even if it is assumed - although there is no reason to do so - that the finding of the Arbitrator is erroneous, the same can still not be interfered with in these proceedings.

23. The contention that the Arbitrator has awarded damages - inasmuch as he has rejected HHEC's claim for refund of security - without proof of actual loss, is also unsustainable. The Arbitrator had examined the aforesaid contention and concluded that the loss of licence fee for the period the shop

was lying vacant - that is, from the date HHEC vacated the shop and the date it was let out to M/s Brindawan Food Products Ltd - was 13 months and 23 days. Admittedly, the licence fee for the said period exceeded the security deposit made by HHEC. It is also relevant to note that in terms of the License Agreement between the parties, HHEC was required to make a security deposit amounting to 12 months licence fee; clearly, this was to secure DMRC against any loss on account of default by HHEC. In the present case, the Arbitrator had concluded that DMRC had, in fact, suffered a loss on account of the shop being vacant till 2012 and the said loss exceeded the amount of security deposit.

24. The contention that the pre-award interest awarded by the arbitrator was excessive and in the nature of penalty, also cannot be accepted as it is not disputed that the rate of pre-award interest is in terms of the contract between parties.

25. In view of the aforesaid, I am unable to accept that the impugned award falls foul of Section 34(2)(b)(ii) of the Act and, accordingly, the petition is dismissed. The pending applications also stand disposed of.

26. No order as to costs.

VIBHU BAKHRU, J

NOVEMBER 30, 2016
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