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

\+ **ARB.P. 643/2016**

CONNAUGHT PLAZA RESTAURANT PRIVATE LIMITED ..... Petitioner

Through: Ms. Kanika Agnihotri & Mr. Srinivas Vijaykumar, Advocates.

versus

ASCOT HOTELS AND RESORTS LIMITED & ANR. ..... Respondents

Through: Mr. Rajat Arora & Mr. Jagpreet Singh, Advocates.

CORAM: JUSTICE S. MURALIDHAR

<u>O R D E R</u>

% **30.11.2016**

1. As far as the appointment of an arbitrator to adjudicate the disputes between the parties arising out of the License Agreement dated 19th December, 2006 is concerned, neither party has any objection to the Court appointing an arbitrator.

2. The main bone of contention however is regarding the conditional interim order passed by the learned Additional District Judge (ADJ) on 7th October, 2016 granting the Petitioner liberty to approach the Delhi International Arbitration Centre (DAC) for appointment of an Arbitrator.

3. The Petitioner first filed Arbitration Petition No.154/2016 in the Court of

learned ADJ under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act'). The grievance of the Petitioner Licencee was that its water and electricity connections were being discontinued by the Respondent Licensor as a result of the parties having been unable to resolve their disputes concerning the increase in the Common Area Maintenance (CAM) charges from Rs. 7 per sq. ft. in terms of the License Agreement.

4. On 20th May, 2016, an interim order was passed by the learned ADJ directing the Respondents "to immediately restore the water and electricity supplies to the Petitioner in the premises in question at Dabli, Himachal Pradesh". The Petitioner was asked to "continue to pay to the Respondents the usage charges for electricity and water and such other dues as per the terms already agreed". This was an *ex parte* order. This was on the basis of an undertaking by the Petitioner "to resolve this CAM charges enhancement demand with the Respondents within four weeks from today".

5. At the subsequent hearing on 7th October 2016, the learned ADJ was informed that no settlement could be arrived at. In those circumstances, the learned ADJ ordered that "insofar as the Plaintiff is enjoying the interim protection granted vide order dated 20th May, 2016, the order is extended only by the next two weeks, that is, upto 21st October, 2016. In the meantime, the Plaintiff is at liberty to approach the Delhi International Arbitration Centre for appointment of retired learned Hon'ble Supreme Court or Hon'ble High Court Justice as learned Arbitrator." It was in those circumstances that the present petition under Section 11 (6) of the Act was filed by the Petitioner on 20th October, 2016. Meanwhile the interim order

was extended by the learned ADJ up to 28th October 2016.

6. On 21st October, 2016, this Court in the presence of counsel for the Respondent issued notice in the petition. The matter was again listed on 25th October, 2016 upon an application by the Petitioner pointing out that the interim protection granted by the learned ADJ was operative only till 28th October, 2016. Learned counsel for the Respondent at that stage stated that he needed to take instructions and in those circumstances, the interim order passed by the learned ADJ on 7th October, 2016 was directed by this Court to continue till the next date of hearing.

7. At the previous hearing, an issue was raised by the learned counsel for the Respondent that the payments of enhanced CAM charges were not being be made and that there was no therefore no justification in continuing the interim order. The Court permitted the Petitioner to place on record the details of the payments made by the Petitioner to Respondent since 20th May 2016. The interim order was continued.

8. Pursuant to the above order, an affidavit dated 29th November, 2016 has been filed by the Petitioner enclosing the details of the payments made by it towards the CAM charges, water and electricity.

9. In relation to the above affidavit, it has been pointed out by the learned counsel for the Respondent that the invoice amounts set out therein are incorrect. The monthly invoice amount of CAM charges from May 2016 till September 2016 is Rs. 41,220 whereas what has been indicated is Rs. 24,045/24,150. It appears that the monthly CAM charges were further

increased by the Respondent for the months of September and October to Rs. 78,300/-.

10. In this regard, it is seen that the Licence Agreement provides for increase in CAM charges upon mutual agreement between the parties. It appears that despite their efforts, the parties have been unable to resolve their dispute regarding enhanced CAM charges. It is not denied by the Respondent that the above invoices reflect the CAM charges which have been unilaterally increased by the Respondent and not by mutual agreement between the parties. It is for this reason perhaps that the Petitioner refuses to acknowledge the enhanced CAM charges.

11. As regards the water charges, while the bill amounts set out for the months from May, 2016 to September, 2016 are in terms of the invoices raised by the Respondent, there is a difference in the water bill amounts for the months of September and October, 2016. Invoice No. 049 dated 30th September, 2016 and invoice No. 057 dated 31st October, 2016 are Rs. 13,800/- whereas the Petitioner has indicated the said amounts as Rs.11,213/- for each of those months. Further, the payment appears to be made after deduction of TDS. In this regard, it requires to be noted that the water charges were enhanced unilaterally by the Respondent whereas they had to be raised by mutual agreement between the parties.

12. As regards the electricity bills, the Petitioner states that it has direct connection from the Himachal Pradesh State Electricity Board (HPSEB) and has been paying the charges as per the bills directly to HPSEB. In the circumstances, there is some substance in the stand of the Respondent that it

is not responsible for the electricity supplied to the Petitioner and perhaps the apprehension expressed by the Petitioner in that regard was not justified.

13. It is pointed out that although under the License Agreement a separate space is to be provided to the Petitioner for installing its own Diesel Generator (DG) set, it is the Respondent which has so far been providing to the Petitioner the facility of DG set already installed in the premises by the Respondent. However, it is stated that the Petitioner has not been paying the charges for use of the DG set to the Respondent. Therefore, this too is another dispute.

14. Ms. Kanika Agnihotri, learned counsel for the Petitioner, states that the Petitioner will take steps to have its own DG set installed in one month's time and till such time, the Respondent should not discontinue providing the facility of the DG set to the Petitioner.

15. Another area of dispute is regarding the non-return by the Respondent of the deposit made with it by the Petitioner. In this regard, it is stated that a sum of Rs. 1.75 crores was initially deposited by the Petitioner with the Respondent under the terms of the Licence Agreement. In terms of Clause 7.2 of the Licence Agreement, Rs. 1.5 crores was to be returned within two years of commencement of commercial operations. This, admittedly, has not been done till date. Further, at the end of every quarter, interest on the deposit was to be paid by the Respondent to the Petitioner. It appears that a sum of around Rs. 37 lacs towards interest is still due by the Respondent to the Petitioner. The stand of the Respondent, however, is that there are far more dues owed by the Petitioner to the Respondent which ought to be

adjusted against the amount payable by the Respondent to the Petitioner. This is another dispute which obviously will be examined by the Arbitrator.

16. As regards the interim order passed by the learned ADJ, it is seen that in terms of Section 9 (2) of the Act as amended with effect from 23rd October 2015, arbitral proceedings shall commence within a period of 90 days from the date of passing of an interim order under Section 9 (1) "or within such further time as the court may determine". The learned ADJ therefore was perhaps not justified in extending the interim protection only up to 28th October, 2016 and requiring the Petitioner to seek the appointment of an Arbitrator by that date. Further, the interim order was only to the effect that the Respondent will not disconnect the water and electricity connections till then.

17. Learned counsel for the Petitioner assures the court that as far as the water charges are concerned, the amount that was agreed between the parties will continue to be paid to the Respondent without fail, as and when it falls due. As far as the electricity bill is concerned, since payments are directly being made by the Petitioner to the HPSEB, there is no question of the Respondent being restrained from disconnecting the electricity.

18. As regards the facility of the DG set charges, counsel for the Respondent points out that the Petitioner unilaterally on a month-to-month basis but discontinued doing so from September, 2014 onwards. According to the Respondent, the sum due from 11th September, 2014 to 31st May, 2016 together with interest works out to Rs. 1,94,558/-.

19. In the circumstances, it is directed that subject to the Petitioner making the above payment of Rs. 1,94,558/- within two weeks from today to the Respondent and continuing to pay the current DG set charges as and when due, the facility of existing DG set will be extended to the Petitioner till such time the Petitioner instals its own DG set , which in any event should be completed within eight weeks from today. All of the above interim directions will continue till such time the learned Arbitrator varies, modifies or vacates all or any of them in an application by either party in accordance with law.

20. The Court, accordingly, proposes Mr. Justice R.V. Easwar, a former Judge of this Court (Mobile No.9560899997) as sole Arbitrator to adjudicate all the disputes between the parties including their claims and counter-claims. The arbitration shall take place under the aegis of the Delhi International Arbitration Centre ('DAC'). The fees of the learned Arbitrator will be in terms of the Delhi High Court Arbitration Centre (Arbitrators' Fees) Rules.

21. In the first instance, the proposed Arbitrator will make a disclosure to the DAC in terms of Section 11 (8) read with Section 12 (1) of the Act and, thereafter, enter upon reference. The DAC will provide to the parties copies of the said disclosure. In the event the disclosure is not made within a reasonable time or such disclosure discloses the inability of the proposed Arbitrator to act as such, it will be open to the parties to apply to this Court for directions.

22. The petition is disposed of. A copy of this order be communicated to the

proposed Arbitrator as well as Additional Coordinator, DAC forthwith.

S. MURALIDHAR, J.

NOVEMBER 30, 2016
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