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

**<u>O.M.P.(I)(COMM) 130/2017</u>**

***Date of decision: 30th <u>October, 2017</u>***

HONSHU BUILDCON PVT LTD ..... Petitioner

Through Mr. Rajesh Gupta and Mr.Harpreet Singh, Advs.

versus

NORTH DELHI MUNICIPAL CORPORATION & ANR. ..... Respondents

Through Ms.Mini Pushkarna, Senior Standing Counsel with Ms.Anushruthi, Ms.Vasundhra Nayyar, Mr.Ashwani Mathur and Mr.Sandeep Chopra, Advs

**CORAM:**
**HON'BLE MR. JUSTICE NAVIN CHAWLA**

**<u>NAVIN CHAWLA, J. (Oral)</u>**

This petition under section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as Act) has been filed by the petitioner Honshu Buildcon Pvt. Ltd. praying therein for a stay of implementation of the impugned Cancellation Letter dated 10th March, 2017 issued by the respondent No. 1.

2. Respondent no.1 had issued a Notice Inviting Tender dated 22nd April, 2016 for allotment of cluster-wise display of advertisement within its jurisdiction that is North Delhi Municipal Corporation. A corrigendum dated 2nd May, 2016 was also issued.

3. The petitioner submitted its bid for Cluster no. 4. The same reads as under

| Cluster No. | Name & Location of the Cluster | | Proposed MRP in Lacs |
|---|---|---|---|
| 1. | xxxx xxxx | xxxx | xxxx |
| 4. | *Keshav Puram Red Light to Inder Lok Metro Station to Keshav Puram to Rampura Burari Chowk GT Outer Ring road to Mukarba Chowk to Azadpur Chowk to Mukandpur Chowk to Burari Chowk to (GT Road)* | As per OAP-2007 | 18 |
| | *Burari Chowk to Sant Nagar to Ibrahimpur Chowki to Budhpur GT Road to Mukbra Chowk (Left Side) to Burari Chowk (left side)* | | |
| | *Mukbara Chowk to Badli Village Red Light (Right Side) to Badli Industrial Area to Badli Village to Samay Pur to Nangli Poona to* | | |

| | | | |
|---|---|---|---|
| | *Mukbara Chowk (Right Side).* | | |

4. There is some dispute with respect to the composition of Cluster no. 4 raised by the respondent. However, I need not go into this issue for the purposes of adjudication of the present petition.

5. A Letter of Intent dated 17th May, 2016 was issued in favour of the petitioner, where after the petitioner claims to have deposited a sum of Rs. 89,72,640/- with the respondent, inclusive adjustment of security deposit of other contracts with the respondents.

6. A show cause notice dated 30th June, 2016 was issued by the respondent against the petitioner, where for the Letter of Intent was cancelled by the respondent. This was challenged by the petitioner by way of WP(C) No.5891/2016. This court by way of an Interim Order dated 13th July, 2016 granted an ad interim stay of the operation of letter dated 6th July, 2016 of the respondents. I am informed that the said writ petition is still pending before this court. In the mean time, the respondent issued the Temporary Allotment letter dated 20th July, 2016 in favour of the petitioner for Cluster no. 4.

7. In terms of the above allotment, the petitioner was to deposit a license fee of Rs. 54,67,360/- on a quarterly basis in

advance. There was to be an incubation period of 15 days from the date of allotment. Clause 22 of the terms and conditions of the NIT/tender is relevant for the purpose of adjudication of the dispute raised in the present petition and is therefore reproduced herein.

> "22. Existing display of media will be allowed up to the date of maturity of existing contract. At the time of bidding, it will be assumed that all the sites are vacant and MLF of the existing contract shall be deducted from the MLF amount of successful bidder of cluster(s). After the maturity of existing contract, the MLF as per existing contract will be started to be paid by the cluster holder."

8. The respondent, claiming a default of payment of license fee on part of the petitioner, issued a Demand Notice dated 20th October, 2016 claiming a sum of Rs. 54,67,360/- is due from the petitioner towards the license fee. This demand was reiterated by the respondent in the Demand Notice dated 3rd November, 2016.

9. The petitioner vide its reply dated 5th November, 2016, relying upon Clause 22 of the NIT/tender, contended that the adjustment in the monthly license fee in terms of the said clause has not been made. By another letter dated 1st December, 2016, the petitioner gave certain details of the unipole site which were running by the third party in the cluster allotted to the petitioner. The petitioner therefore claimed an adjustment of Rs.8,37,459/- from the monthly license fee on this account.

10. The respondent, however, vide its final Demand Notice dated 14th December, 2016 reiterated its demand without dealing with the contention raised by the petitioner. The petitioner again made representations dated 15th December, 2016 and 25th December, 2016. Certain payments were also made along with these representations.

11. The respondent, however vide its notice dated 3rd February, 2017 demanded an amount of Rs. 88,43,402/- from the petitioner. With regard to the claim made by the petitioner, the said demand notice stated as under:-

> "In this context, it is to inform you that as per record the Department has deducted the amount of running media in your cluster, further as you stated in your reply, the detail of unipole sites and other media whose MLF has to be deducted may kindly be provided, and MLF of 5 Unipole sites of M/s Ashima Infrastructures Pvt. Ltd. Will be deducted after final outcome of the court case. Further MLF of incubation period i.e. Rs.9,25,000/- has been deducted from the due MLF, after deduction of this much amount, an amount of Rs. 88,43,402/- (including interest) is still due against you upto 03.05.2017."

12. The petitioner not being satisfied again made representations dated 14th February, 2017, 16th February, 2017 and 8th March, 2017 along with certain ad-hoc payments.

13. The respondent vide its impugned cancellation notice dated 10th March, 2017 informed the petitioner that due to its

default, the allotment stood cancelled with immediate effect and the security amount of Rs.37lacs deposited by it stands forfeited. The petitioner was further, called upon to remove all the display of advertisement in the allotted cluster. The petitioner, as noted above, has challenged this Cancellation Notice before this court.

14. The contention of the petitioner is that there has been no application of mind on part of the respondent to the repeated representations made by the petitioner. It is further contended that perusal of the communication addressed by the respondent would show that none of the concerns raised by the petitioner have been answered and therefore the cancellation is liable to be stayed. The petitioner has relied upon the judgment of this Court in ***ITD Cementation Limited Vs. Public Works Department***, 239 (2017) DLT 588 wherein this court had held that it would be manifestly unfair if the respondent therein is permitted to recover the entire amount of liquidated damages without final adjudication with respect to various contentious issues raised by the petitioner.

15. In my opinion, the above judgment would not apply to the facts of the present case. In ITD Cementation Ltd. (Supra), the issue was with respect to liquidated damages. This would necessarily have involved a question of default and the effect thereof and the respondent could not have been allowed to pre judge the issue at that stage. In the present case, however, the

dispute is with respect to the license fee which was agreed to be paid by the petitioner itself to the respondent.

16. As far as the claim of deduction is concerned, the respondent in its reply filed before this court has submitted that necessary deductions to the extent of Monthly License Fee (MLF) received from other media being displayed have already been granted by it in favour of the petitioner. It has been submitted that there were two Unipoles on which media of other contractors were being displayed. Further, there was media on another parking contractor in the form of one display board at parking site Nani Wala Commercial Complex, Azadpur for which the petitioner has been given proportionate deduction as per the MLF received from media displayed by other parking contractors. It is, further stated that as of date of filing of the reply, there was no Unipole of any other contractor being displayed within the jurisdiction of Cluster no. 4, Civil Line Zone except of display board at parking site mentioned above. It has further been contended that this was informed to the petitioner vide letter dated 20$^{th}$ March, 2017, copy of which has been placed on record.

17. On 21$^{st}$ April, 2017, the petitioner had sought time to file its rejoinder. Further time was sought on 25$^{th}$ July, 2017. However, no rejoinder was filed. The arguments in the matter were heard on 25$^{th}$ October, 2017. On 27$^{th}$ October, 2017, the counsel for the petitioner handed across a bunch of documents

claiming that the said document would show that the stand of the respondent is incorrect and that there still exist media of third party in the area of Cluster no. 4 allotted in favour of the petitioner. The said documents are not supported by any affidavit. The learned counsel, during the course of arguments, sought to explain what these documents mean and contained. However, in absence of any affidavit by the petitioner, it is not found reasonable for this court to rely upon these documents. As an example, one document which was shown related to a "Cluster no. 3, Civil Line Zone" (Page-12 of the additional document), whereas as noted above, the dispute is with respect to cluster no. 4. A submission was made that the heading of the documents is incorrect. This court, at this stage certainly cannot go into the said issue and make such assumptions.

18. The respondent in its reply has filed a calculation sheet showing an amount of Rs. 73,44,228/- as being due from the petitioner till 19th April, 2017. I have been informed that as this Court by its order dated 22nd March 2017 had restrained the respondent from taking any coercive steps against the petitioner, the petitioner has continued to display the advertisement in the area allotted to it and as on 19th October, 2017, the total due from the petitioner is Rs. 1,97,38,097/-. Further, as the license fee is payable in advance on quarterly basis, the license fee actually payable would be Rs. 2,56,16,601/- as on today but for period till 19th January, 2018.

19. As noted above, the dispute between the parties is regarding the presence of media of other third party in the area allotted to the petitioner and the extent of adjustment to be given under clause 22 for such media. The reply filed by the respondent has gone uncontested. The counsel for the petitioner submits that he could not file the rejoinder as certain information and supporting documents were to be gathered. However, as noted above, repeated opportunities were granted to the petitioner to file its rejoinder and in spite of the same, the rejoinder was not filed.

20. The license fee claimed by the respondent is in accordance with the Allotment Letter and the tender conditions. At this stage, therefore, prima facie the claim of the respondent appears to be correct. It is also brought to my notice that the petitioner, having obtained the Interim Order on 22nd March, 2017 finally invoked the Arbitration Agreement only vide letter dated 3rd October, 2017. Further, no payment of license fee was made after filing of the present petition and the interim order of this court.

21. In view of the above, in my opinion the petitioner has not made out a prima facie case in its favour.

22. At the same time, it cannot be lost sight of, that it was only with the letter dated 20th March, 2017 that the respondent first time replied effectively to the repeated representation made by the petitioner.

23. The counsel for the petitioner has offered to pay a sum of Rs.1.5 crores in installments running up to 10th January, 2018. However, the same is not acceptable to the respondent.

24. Taking into account the facts noted above, the Interim Order dated 22nd March, 2017 is vacated. However to balance equities, this order is kept in abeyance for a period of 10 days, taking into the account that the petitioner had enjoyed the interim protection since 22nd March, 2017. If the petitioner within 10 days deposits a sum of Rs. 2 crores with an undertaking to deposit his monthly license fee of Rs.18.50 lacs per month in advance, the respondent shall not act on the Cancellation Notice dated 10th March, 2017. The deposit of the above amount by the petitioner and the acceptance thereof by the respondent shall be without prejudice to the rights and contentions of either party and shall abide by the order passed by the arbitrator.

25. It is clarified that the observations made above are prima facie in nature and would not, in any manner, be binding on the arbitrator.

26. With the above directions, the present petitions is disposed of with no order as to costs.

**NAVIN CHAWLA, J**

**OCTOBER 30, 2017**
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