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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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+ **O.M.P. 430/2015**

KAPOOR TENT & CATERERS ..... Petitioner
Through: Dr. Anurag Agarwal and Mr. Ajay Kumar, Advocates.

versus

DELHI TOURISM & TRANSPORTATION DEVELOPMENT CORPORATION LIMITED ..... Respondent
Through: Ms. Sujata Kashyap and Ms. Ateka Khan, Advocates.

CORAM: JUSTICE S. MURALIDHAR

O R D E R
% **22.02.2017**

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 20th April, 2015 passed by the sole Arbitrator in the disputes between the Petitioner and the Respondent, Delhi Tourism & Transportation Development Corporation Limited ('DTTDCL') arising out of a Licence Agreement ('LA') dated 1st October, 2004 whereby the Petitioner was granted the licence for running a restaurant, 3 kiosks, and a conference-cum-banquet hall for organising conferences and parties etc. and an open green area for putting up temporary wedding *pandals* with responsibilities of looking after the horticulture and maintenance of open green at Azad Hind Gram Tourist Complex at NH-10 Rohtak Road for a period of 10 years.

2. By a letter dated 14th July, 2004, the Petitioner requested DTTDCL to extend the time period for a period of over five years and for amending the LA to that effect.

3. The LA came to an end on 14th September 2009. Prior thereto on 28th May 2009, the Petitioners requested for an extension for a period of five years. It is stated that, however, by letter dated 7th October 2009, DTTDCL extended the period only by three other months with effect from 14th September 2009.

4. According to the Petitioner, it continued to deposit the licence fee till 2011 on the verbal issuance of the DTTDCL that the LA would be extended. The DTTDCL however served the Petitioner with a termination notice by a letter dated 27th April 2010. Thereupon the Petitioner filed a suit for mandatory injunction. In the said suit an application was filed by DTTDCL under Section 8 of the Act referring to Clause 53 of the Licence Agreement which provided for arbitration. By the order dated 13th April 2011, the disputes were referred to arbitration.

5. The Petitioner filed a claim praying for a direction to DTTDCL to extend the licence for another 5 years. Petitioner also made an application under Section 12 of the Act. While disputing the claim of the Petitioners, the DTTDCL filed its counter claim in which it claimed damages on account of unauthorised occupation. Meanwhile, on 26th August 2011 the property was sealed by the Municipal Corporation of Delhi ('MCD'). According to the MCD the premises could not have been used for running a banquet hall etc.

6. During the pendency of the arbitration proceedings, the DTTDCL filed an

application under Section 17 of the Act praying that the possession of the premises should be handed over by the Petitioner to it. An interim order was passed in the said application by the learned Arbitrator in favour of DTTDCL on 3rd February 2014. On 7th March 2014 an application was filed by the Petitioner before the learned Arbitrator for recall of the above order. This was dismissed by the learned Arbitrator. However, it was directed as and when the property is de-sealed, the DTTDCL ensure that it is done in the presence of the Petitioner to enable it to retrieve its goods.

7. The following issues were framed by the learned Arbitrator:

> "1. Whether the claimant, in terms of the lease agreement dated 01.10.2004 executed between the claimant and the respondent regarding lease of the premises located at Azad Hind Gram Tourist Complex, Rohtak Road, Delhi for a period of 5 years with effect from 15-09-2004 and which period expired on 14.09.2009, is entitled to further extension of lease of the said premises for a period of 5 years?
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> 2 If yes, from which date and on what terms and conditions?
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> 3. Relief?"
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> **Counter Claim**:
> 1. Whether the respondent is entitled to damages @ Rs.3 lacs per month w.e.f. 14.12.2009, the amount of revenue the premises would fetch at the current market value and damages @ Rs. *20,0001*- for the loss of revenue?
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> 2. Whether the respondent is entitled to cost/.penalty *imposed* by MCD for desealing the premises?
> 3. Whether the respondent is entitled to the *interest* on the above amounts and If yes, for which period and at what rate?

4. Relief?"

8. Issue No.1 was answered against the Petitioners and in favour of the DTTDCL. The learned Arbitrator held that there was no obligation on the DTTDCL to grant a renewal of licence for a period of five years. Further it was noticed that by an efflux of time the extended licence period in terms of the agreement dated 1st October 2004 had already expired rendering the claim infructuous. The Petitioner was asked to pay Rs.50,000 as costs to DTTDCL.

9. As regards the counter-claim, the learned Arbitrator noted that the DTTDCL had not produced any document which could throw light on the market rental rates. Therefore, the learned Arbitrator proceeded to adopt the rates already set down in the agreement dated 1st October 2004 and on that basis directed as under:

> "ii) The claimant shall pay Rs. 1,56,250/- plus service tax per month as license fee/damages from 15-12-2009 till 14-09-2010 subject to adjustment of the amount already paid.
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> iii) The claimant shall pay Rs.2.25 lacs plus service tax per month as license fee/damages from 15-09-2010 till 03-02-2014.
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> iv) The claimant shall pay Rs. 3lacs plus service tax per month as license fee/damages from 04-02-2014 till the date of handing over of the premises to the respondent.
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> v) There are no separate orders on account of damages.
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> vi) There are no orders towards costs/penalty imposed by MCD for de-sealing of the premises.

> vii) The claimant is liable to pay interest @9% p.a. if the above dues are not paid within a period of two months from the date of the Award till the date of payment."

10. This Court has heard the submissions of Dr. Anurag Agarwal, learned counsel for the Petitioner and Ms. Sujata Kashyap, learned counsel for DTTDCL.

11. It was submitted by Mr. Agarwal that the plain wording of the arbitration clause made it explicit that issues covered by the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 ('PP Act') would be outside the purview of arbitration.

12. The arbitration clause in the contract between the parties reads thus:

> "53. That the dispute and differences arising out of in any way touching or concerning the agreement [except those the decisions whereof is otherwise hereinbefore expressly provided for or to which Public Premises (Eviction of Unauthorised Occupants) Act, and the rules framed under or any other law which are now in force or which may here after come into force are applicable] shall be referred to the sole arbitration of a person to be appointed by MD & CEO of the licensor. The decision of such an arbitrator shall be final and binding on the parties. The Arbitration and Conciliation Act, 1996 (as amended from time to time) shall be applicable. It will be no bar if the arbitrator as aforesaid is or has been an employee of the Licensor and award of the Arbitrator will not be liable to be challenged in any court of Law on this account."

13. The fact of the matter is that at no point in time, the Petitioner actually invoked PP Act to object to the jurisdiction of the Arbitrator. The statement

made in the reply to counter claim that the question of damages was outside the purview of arbitration was at best a vague statement. It must be recalled that the Petitioner itself filed a suit in the first place. The disputes were referred to arbitration by the civil court by an order dated 13th April 20111 in an application filed by DTTDCL under Section 8 of the Act. That order was never challenged by the Petitioner. Further, no application was filed under Section 16 of the Act questioning the jurisdiction of the Arbitrator to entertain the claim for damages. Consequently, the Petitioner is estopped from raising a challenge to the jurisdiction of the arbitrator.

14. Dr Agarwal referred to the decision in ***Maruti Suzuki India Ltd. v. India Tourism Development Corporation Ltd. 2011 (6) RAJ 496 (Del)*** where while interpreting a similar arbitration clause, the Court had accepted the contention that an issue falling within the purview of the PP Act cannot be referred to arbitration. The said decision is, clearly, distinguishable on facts. The said decision was at the stage of reference of the disputes to arbitration. However, in the present case the Petitioner itself filed a suit overlooking the arbitration clause and it was DTTDCL which sought arbitration. The Petitioner participated in the arbitral proceedings without raising any objection as to jurisdiction on account of the PP Act. Consequently, the said decision is of no assistance to the Petitioner.

15. In any event, the question of eviction of the Petitioner has become infructuous with the possession of the premises having been already taken over by DTTDCL. Consequently, the Court negatives the plea of the Petitioner that the question of damages was outside the scope of arbitration

and, therefore, the Award is vitiated on that score.

16. It is then contended that in calculating the damages, the learned Arbitrator did not base the conclusion on any evidence whatsoever. In other words, it was contended that the Respondent failed to lead evidence as regards the quantification of damages.

17. The Court is unable to accept the above plea as well. The fact that the Petitioner overstayed in the premises is not in dispute. Even though the property may have been sealed by the MCD, possession was never surrendered by the Petitioner to DTTDCL till after a contempt petition was filed for non-compliance with the order dated 3rd February 2014 of the learned Arbitrator. The plea of the Petitioner, therefore, that it is not liable to pay any damages for the period during which the premises was sealed is untenable. It is always open to the Petitioner to have opted to surrender the premises once it was clear that it was not able to continue any activity therein after it was sealed by the MCD. However, the Petitioner did not choose to do so. It is another matter that according to the DTTDCL the Petitioner continued using the premises even after it was sealed and the DTTDCL had to file a contempt petition to get the interim order of the learned Arbitrator directing the Petitioner to hand over possession.

18. As regards quantification of damages, the learned Arbitrator has applied the rates agreed upon by the parties. Therefore, it cannot be said that the impugned Award is contrary to the fundamental policy of Indian law.

19. No grounds under Section 34 of the Act stands attracted. The impugned Award is accordingly upheld. The petition is dismissed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

FEBRUARY 22, 2017

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