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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on : 03rd April, 2018
Pronounced on : 06th April, 2018**

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O.M.P.(I) (COMM.) 23/2018

WANDERLUST TRAVELS PVT LTD Petitioner
Through: Mr.Sanjeev Narula, Mr.Vinit
Trehan and Mr.Aditya Trehan,
Advocates.

versus

DELHI TOURISM AND TRANSPORTATION
DEVELOPMENT CORPORATION LTD. Respondent
Through: Mr.Prashanto Chandra Sen, Sr.
Advocate with Ms.Puja Dewan,
Mr.Uday Seth and Mr.Parth
Kochatta, Advocates.

**CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA**

YOGESH KHANNA, J.

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'the Act') has been filed by the petitioner against the respondent in respect of an agreement dated 10.11.2017 executed between them.

2. The brief facts as alleged by the petitioner are as follows:

(a) The petitioner is one of India's leading adventure sports company with over 25 years of experience in the field of adventure sports having worldwide affiliations and technical collaborations in U.K, U.S.A and Germany. The petitioner is approved by the

Ministry of Tourism, Government of India and is a member of ATOAI, IATO, PATA, TUV, TAAI and other internationally recognized organizations in adventure sports. The petitioner has set up and successfully operated over 1000 adventure events for government as well as private sectors in the last 25 years and various stakeholders have lauded the efforts of the petitioner. The respondent in the past has been involved in the conduct of adventure sports at the Garden of Five Senses ("the premises");

(b) the petitioner since the year 2013 has been conducting adventure sports activities ranging from few days up to 6 months at the premises on instructions of the respondent. The respondent after realizing the long term viability of an adventure sports park at the premises after following the requisite legal procedure awarded the legal tender to set up and operate adventure park at the premises to the petitioner vide its letter dated 11.08.2017;

(c) on 15.09.2017, the officials of the respondent visited the premises to earmark the area for establishing the adventure sports activities in front of the rocky terrain (allegedly referred as "the Topiary Garden"). In absence of any mention of the exact dimension on the ground with specifications of area the above team keeping in mind the concerns of the Horticulture Department not to disturb any shrubs & plants did the due allocations at the unused and *banjar* land. The petitioner Company had been allocated only *banjar*, wasteland unused area which had been covered with dried thorny waste;

(d) on 11.10.2017 the agreement has been executed between the petitioner and the respondent vide which the respondent granted

the permission to use the premises for setting up and operation of adventure park at the premises for a period of 5 years at a monthly rent of ₹ 50,000/- along with revenue share @ 2% of the revenue generated from the ticket sales.

(e) from 02.11.2017 onwards the petitioner allegedly started installing the equipment in the area ear-marked by the team as detailed above and vide e-mail dated 02.11.2017 addressed to Mr.Vikram, Manager of the respondent categorically represented the area of activity as well as the space to be occupied by the Company and detailed the same in the e-mail dated 02.11.2017 and vide said email the location as well as the area had been categorically specified and communicated to the respondent to which the respondent did not object and in fact allowed the installation process as it was as per the earmarked area decided by the respondent in front of the rocky terrain allegedly referred as "the Topiary Garden" by the respondent;

(f) on 13.11.2017 the respondent vide letter bearing reference number F.No.Adv/DTTDC/2016-17/0050/827 to the Additional Commissioner of Police (Licensing), P.S, Defence Colony, New Delhi recognized the fact that the installation work is almost complete and requested him to grant permission to the petitioner to operate the adventure sports activities as mentioned in the agreement;

(g) vide another letter dated 13.11.2017 bearing reference No. F. No.Adv/DTTDC/2016-17/0050/ 828 asked the petitioner (if possible) to submit the drawings, measurements and structure safety certificate to the respondent. In turn the petitioner vide letter

dated 18.11.2017, categorically responded to the respondent that completion certificate as well as structure safety shall be handed over after the full erection is done. That after the receipt of the letter dated 18.11.2017, the respondent did not respond. However, the work could not be completed due to the incident dated 27.11.2017;

(h) on 27.11.2017 at around 05.30PM, in the process of installation of the zip line wire by the employee of company's contractor; some of the wires got entangled in the branches of one tree (species- "Ficus Suila) and in the process of sorting out the entangled wires, the top branches of the tree broke off. The matter was reported to the petitioner and immediately on the very next day i.e morning of 28.11.2017, Mr.Anuj Garg, General Manager of the petitioner visited the site and found out that the tree trunk was still intact and had not been uprooted and that the top branches of the tree inadvertently came down due to the installation process by the employee of the petitioner's contractor. It is pertinent to mention that as per the Horticulture department stated that the tree eventually would regain back it original life condition;

(i) on 29.11.2017 the petitioner through its Managing Director-Major S.K. Yadav met the Deputy Conservator of Forest, South Range in person and vide letter dated 29.11.2017(duly received by the forest department) appraised him about the inadvertent incident and also the corrective measures undertaken by the Petitioner. The Deputy Conservator of Forest, South Range informed Major S.K. Yadav that no action was required, as the tree had not been uprooted; therefore as per the concerned official from the forest

department, no penal action would be required in such case. Accordingly, the petitioner vide letter dated 30.11.2017 to the GM, of the respondent appraised about the stand of the forest department and also submitted the duly received copy of the letter as submitted to the Department Conservator of Forest by the petitioner and accordingly requested the GM, DTTDC to allow the petitioner to resume the installation process as the dead line was short approaching;

(j) on 01.12.2017 the petitioner again submitted a representation to the department of forest detailing the inadvertent incident along with the photographs and the corrective measures already taken by the petitioner. The petitioner also requested the concerned forest department to give in writing regarding their decision upon the inadvertent incident, which was accordingly done on the letter dated 1.12.2017 itself;

(k) on 06.12.2017 petitioner addressed the letters to both the General Manager as well as the Managing Director of the respondent and apprised them about the clearance note given by the Deputy Conservator of Forest, South Range pertaining to the inadvertent incident of accidental pruning of the tree by the employee of Company's contractor. The petitioner again clarified that not only the redressal step as advised the respondent officials of planting 31 trees of the same height have been executed but also a clearance from the forest department has also been taken; therefore the petitioner be allowed to resume with the installation process as otherwise the petitioner shall suffer irreparable

loss/harm as the work had been stalled from 27.11.2017 and it is incurring heavy losses by each passing day;

(l) on 14.12.2017 in spite of the above-stated diligent efforts taken by the petitioner to redress the issue of inadvertent pruning of tree, the respondent has issued the Show Cause Notice bearing No.F.No.Adv/6301/2013-14/DTTD/CIPF-I dated 14.12.2017 ("the first Show Cause Notice"), which had been received by the petitioner on 16.12.2017;

(m) on 18.12.2017 the petitioner submitted a detailed reply to the notice and requested the respondent to afford an opportunity for personal hearing. But till date no communication has been received from the respondent;

(n) on 28.12.2017 respondent again issued the Show Cause Notice bearing no.ADV /DTTDC/2017-18/0083/2023/RRI ("the second Show Cause Notice/arbitrary directive" received on 29.12.2017 by the petitioner. The petitioner has been issued the correspondence dated 28.12.2017 worded as 'Show Cause Notice' alleging the encroachment by the Company of the notional area that was allotted to it.; however, in reality it is an arbitrary directive to the Company to vacate the premises and suffer irreparable loss as no opportunity had been granted to the Company to explain its version. The respondent vide this arbitrary directive/second Show Cause Notice has directed the Company to remove the legally installed equipment's of Zip Line Tower, Zip Line Landing Tower, Bungee Jumping, Bunging landing within 5 working days without even giving an opportunity to the Company to put forth its version. It is shocking to know that the respondent

in spite of being a governmental instrumentality has chosen to bypass the cardinal principles of natural justice viz an opportunity to the Company to put forth their version of the present case/allegations raised by the DTTDC. The said action has impinged both legal as well as fundamental right of the petitioner; (o) on 04.01.2018 the respondent again called upon the petitioner to submit the response to the notices and hence this petition.

3. This Court while dealing with instant petition had passed the following orders dated 18.01.2018, 23.01.2018 and 15.02.2018, which notes:-

18.01.2018

“The grievance of the petitioner is by issuing a show cause notice the respondent is intending to terminate the agreement. He is also concerned with the safety of the public as the equipments are not fully installed in the premises yet the respondent is allowing the public/ students to use such equipment.

Issue notice to respondent through all modes, dasti as well, returnable for 23.01.2018 and in the meanwhile the staff of the respondent should take steps for not allowing the public to use such equipment till it is fully installed and also safeguard the equipment of the petitioner lying in its premises.

Order dasti under the signature of the Court Master.

23.01.2018

This order is in continuation of the order dated 18.01.2018. It is submitted by learned counsel for the respondent that the contract with the petitioner has not been terminated and in case equipments are installed in the area specified, the petitioner completes the work in terms of the contract.

Ordered accordingly.

Learned counsel for the respondent seeks time to file reply.

List on 15th February, 2018.

15.02.2018

The learned counsel for the petitioner submits per agreement dated 11.10.2017 executed between the parties the respondent was required to do the following:-

“A. DTTDC's Obligations

DTTDC's obligations shall be the following:

- 1. DTTDC will provide a space in front of the natural rock known as "Topiary Garden" in front of solar but which have huge rocks for rock climbing and some given area beneath for other activities.*

xxx”

The learned counsel for the respondent submits area provided in the agreement may be used by the petitioner to install the equipments. The learned counsel for the petitioner also says the petitioner is using only the said area but since no document is filed on record by the respondent which show if the respondent had ever demarcated the area and given to petitioner. Since huge investments is allegedly made by petitioner and since

sports activities are stalled by the respondent and despite that rental are being charged by the petitioner it would be appropriate if the MD/CEO of the respondent and MD of petitioner sit together on 21.02.2018 at 04.00PM in the office of the MD of the respondent itself and sort out this issue qua demarcation of land.

List on 14.03.2018.

Copy of this order be given dasti to both the parties.”

4. In the said meeting nothing fruitful came out. The learned counsel for the petitioner argues that after being declared a successful bidder, a meeting was held on 15.09.2017 for physical demarcation of the land and on 10.10.2017 a draft agreement was received by the petitioner by email and it was executed on 11.10.2017 between the parties. The petitioner started installing the equipment at designated place on 12.10.2017 and sent a letter dated 02.11.2017 (annexure A-4) to the respondent to say all activities have been started as per the tender list.

5. The learned counsel for the petitioner refers to clause No.36 of the agreement dated 11.10.2017 and Annexure I which notes as under:-

“36. In order that repeat customers are 'generated for the Soft Adventure Park, the licensee would also be required to upgrade its activities from time to time. Various activities of Soft Adventure Park should be changed every year. This will retain the imaginative interest of uses. (list of various

adventure activities, which can be organized is at Annx.1

Annexure 1

S.No.	Adventure Activities
1	Velcro Wall
2	Sumo Wrestling
3	Human Gyro
4	Zip Line + Free fall
5	Wooden Rock Wall
6	Rope obstacle Wall
7	Paint Ball Battle Game
8	Burma Bridge
9	Water Zorb
10	Water Roller
11	Human Zorb
12	Bungee Jumping+scad
13	ATV's
14	Land Zorbing
15	Big Glove Boxing
16	Gladiator
17	Bungee tug off war
18	Olympic Archery
19	Air Rifle Shooting
20	Inflatable Rock Wall
21	Rocket Boom
22	Inflatable Sumo Wrestling
23	Mountain Bike
24	Multiple activity tower
25	Human Sling shot
26	Army Obstacle Course
27	Revolving Obstacle
28	Human Fussball
29	Remote Controlled Catapult
30	Trampoline Catapult
31	Bull Ride
32	Running Bungee

6. The learned counsel for the petitioner argues 85% of revenue is to be generated from Items No.4 & 12 of above Annexure 1 namely Zip Line + Free Fall and Bungee Jumping. It is submitted the respondent is rather a partner in the revenue as the respondent would not only receive lease rent but also has a share of 2% in the revenue so generated.

7. The learned counsel for the petitioner then argued qua an incident dated 27.11.2017 where a tree was decapitated, but the said issue was resolved on 28.11.2017. Further in the show cause notice dated 27.11.2017 there is no mention of the fact if petitioner had encroached upon any area but nevertheless the respondent issued a second show cause notice dated 28.12.2017 alleging the petitioner has encroached upon a large area of Garden of Five Senses and such encroachment be removed.

8. Admittedly, as per the site plan shown to this Court the petitioner has gone beyond the sanctioned area. Further, as per the summary of facts provided by the petitioner herein the installation of the equipment started on 02.11.2017 and it is not clear as to when the installation was complete, hence it is question of fact to be seen in evidence by the learned arbitrator. Further Annexure 1 would show Bungee Jumping and Zip Line for which such alleged encroachment is made are not the only activities which the petitioner may carry out. Thirty other activities are in the list which the petitioner may start in the area earmarked.

9. Further clause No.9 of the agreement notes:-

“9.That all the correspondences will be addressed to the Managing Director and CEO, DTTDC, New Delhi.”

10. It was alleged though all the correspondences were to be addressed to the Managing Director or to the CEO, DTTDC, New Delhi but the letter dated 02.11.2017 was sent by an email contrary to the agreement. Cutting short the controversy, the land as stated in the agreement, admittedly is now demarcated which otherwise could also be located by looking at the plan and it clearly show the petitioner has installed its equipment beyond the area sanctioned. The disputes if they have used only the area given and had not encroached upon any land needs to be adjudicated before the learned arbitrator and it require evidence. The contract being determinable, its specific performance cannot be ordered. The prayers made in the petition, for reasons aforesaid cannot be granted. The petition has no force and is accordingly dismissed.

11. No orders as to costs.

YOGESH KHANNA, J

APRIL 06, 2018

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