

\$~20

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 12th October, 2018

+ **O.M.P. 361/2008**
INDIAN RAILWAY CATERING & TOURISM
CORP. LTD.

..... Petitioner

Through: Mr. Hitabhilash Mohanty and Mr.
Saurav Agrawal, Advocates.
(M:8448375846)

versus

M/S AMBUJ HOTEL & REAL ESTATE (P) LTD. Respondent
Through: None.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (oral)

1. The Indian Railway Catering & Tourism Corporation (*‘IRCTC’*) – the Petitioner herein, floated a tender in August, 2005 for “*operation and management of catering and on board services nos.2429-30 H. Nizamuddin - Bangalore City Rajdhani Express Train*”. The Respondent submitted its bid for the same. By letter dated 18th October, 2005 it was communicated by the Petitioner to the Respondent that the decision was taken to award the license to the Respondent.

2. Immediately after the tender was awarded, the Petitioner started receiving complaints as early as in January, 2006 against the Respondent. The various complaints that were received over the period of January to June, 2006, were:

- Non-service of dinner/breakfast and other meals on time;
- Non-maintenance of proper hygienic services;
- Non-deployment of adequate staff on the train for taking care and

providing catering services

- Not providing food cooked with proper Agmark and other certified products;
- Providing adulterated food;
- Misbehaviour of staff deputed by the Respondent;
- Inferior quality of food served to the passengers.

3. In view of all these complaints, the Petitioner took a decision to terminate the catering services awarded to the Respondent on 9th June, 2006. The termination letter has listed all the reasons for the said termination and the termination was to take effect immediately.

4. The termination was challenged in a writ petition. On 20th June, 2006, the Respondent sought refund of concession fee and security deposit and also invoked the arbitration clause. On 28th June, 2006, the Petitioner communicated to the Respondent that the security deposit and the concession fee have been forfeited and cannot be refunded. The learned Arbitrator was also appointed.

5. Before the learned Arbitrator various claims and counter claims were raised, which are as under:

A. Claimant's Prayers and Claims:

S. No.	Prayer and Claims	Award
1.	The impugned cancellation be held to be void, illegal and arbitrary	Treated as Preliminary issue and decide vide order dated 19.7.2007 and not challenged in any forum, Not accepted
2.	Refund of concession fee of	Rs.1,65,30868/-

	Rs.2,70,37,037	
3.	Security deposit of Rs.20,00,000/-	Nil
4.	License fee paid along with Interest @ 24% from date of deposit	Nil
5.	Loss of Profit of 49043994/-	Nil
6.	Investment in Infrastructure, Utensils, Equipment, Cost in establishing base Kitchen to the tune of Rs.1,00,00,000/=	Nil
7.	Loss of Good Will to the extent of Rs.2,00,000/=	Nil
8.	Loss of Opportunity (Rs.2,00,00,000)	Nil
9.	Compensation for mental torture and harassment (Rs.1,00,00,000/=)	Nil
10.	Bar operating against the claimant from participating in future projects be removed	Nil
11.	Cost of litigation including costs incurred towards cost and legal service charges.	Nil

B. Respondents Counter Claims:

S. No.	Counter Claims	Award
1.	Loss of good will and reputation (3 crores)	Nil
2.	Loss due to making alternative arrangement and awarding license temporarily (Rs.40 lacs)	40 lacs
3.	Loss due to detention at Serum Station on 15.1.06 for 1 hr 15 mtd (50 lakhs)	Nil

6. The learned Arbitrator awarded Rs.1,65,30,868/- in favour of the Respondent. The learned Arbitrator also awarded Rs.40 Lakhs in favour of the Petitioner towards counter claim no.2. The said award is under challenge

before this Court.

7. Before going into the merits of the objections raised by the Petitioner, it is necessary to set out the relevant clauses of the tender document. The same are extracted herein as below:

“TENDER DOCUMENTS
GENERAL CONDITIONS OF LICENSE
SECTION – ONE

7.11 Unsatisfactory services etc.

In the event of unsatisfactory service, poor quality of articles, persistent complaints from passengers, and services below the standard or any failure or default at any time on the part of the Licensee to carry out the terms and provisions of the agreement to the satisfaction of the IRCTC (who will be sole judge and whose decision shall be final) it shall be optional to the IRCTC to make any substitute arrangement it may deem necessary at the cost and risk of the Licensee or to forthwith terminate this agreement without any previous notice to the Licensee and in case of such termination the Security Deposit be forfeited by the IRCTC and the Licensee shall have no claim what so ever against IRCTC or any of the officials in consequence of such termination of the agreement. No refund of proportionate Licence Fee shall be admissible in case of Termination under this clause. The Licensee agrees to make good all cost and expenses, if any incurred by the IRCTC for making the substitute arrangements referred to above. The Licensee shall be also be debarred from participating in the future projects of IRCTC for a period of one year.

8.1 - Breach of any terms and conditions of the Licence

In the event of any breach of the said terms and conditions of the Licence, the IRCTC shall be entitled to forfeit the whole or the part of the Security Deposit/Licence fee/Concession Fee besides terminating or revoking the Licence and debarring the Licensee from participating in the future projects of IRCTC.

8.2 – Termination of Licence on other events of default

The Licensor shall also be entitled at any time forthwith to terminate the Licence without notice in any of the following events, that is to say (a) in the event of the Licensee being convicted by a court of law under the provisions of criminal procedure code or any other law (b) in the event of the Licensee being a proprietor or, if a firm, any partner in the Licensee firm being at any time be adjudged insolvent or a receiving order or order for administration of his estate made against him or shall take any proceeding for liquidation or composition under any insolvency Act for the time being in force or make any conveyance or assignment of his interest or enter into any agreement or composition with his creditors for suspended payment, or if the firm be dissolved under the partnership Act or,

in the event of Licensee being a company, if the company shall pass any resolution to be wound up either compulsorily or voluntarily (c) Repudiation of agreement by Licensee or otherwise evidence of intention not to be bound by the agreement, (d) Failure to adhere to any of the due dates of payment specified in the terms and conditions. Immediately on the determination of this agreement the Licensee shall peacefully vacate the premises & the pantry and hand over to the licensor/railway administration all articles in the custody or possession of the Licensee and shall remove all his stores and effects from the said premises/pantry. In default the licensor shall be entitled to enter and take possession of the said premises/ pantry and-to lock up the same or remove the furniture or other articles of the Licensee that may be lying there and to dispose of the same by sale or otherwise without being liable, for any damage, and all expenses incurred in connection therewith, shall be deducted by the licensor from the sale proceeds or from the Security Deposit or pending bills of the Licensee.

9.2 - Notice for termination

In case of any event of default mentioned in Clause 8

having occurred, it shall be lawful for the IRCTC any time thereafter to terminate the Licence agreement and forfeit the Security Deposit, SUBJECT HOWEVER to the IRCTC having given to the Licensee fifteen (15) days prior notice in writing to remedy or make good such breach and inspite of such notice the Licensee having failed to remedy the breach. Upon termination of this Licence agreement as aforesaid, the Licensee shall deliver vacant and peaceful possession of the pantry car to the IRCTC/Railways. The License shall be also be debarred from participating in the future projects of IRCTC for a period of one year.

GENERAL CONDITIONS OF LICENSE
SECTION – TWO

2.0 FINANCIAL TERMS AND CONDITIONS

2.1 - Payment of Licence fee

Licence fee @ 15% of running bills, submitted by the Licensee, shall be charged on basis of occupancy of the train certified by the Train Superintendent on duty.

2.2 Payment of Concession Fee

Bidders are required to offer consolidated Concession Fee payable by the bidder to IRCTC for the 5 years tenure of the Licence in the prescribed format. It will be a lump sum amount payable in three equal installments over a period of two years. First installment should be paid at the time of award of licence, second installment after one year of payment of the first installment and the third installment before the end of the second year. The Concession Fee will be in addition to the deduction of Licence fee @ 15% on running bills.

.....

2.4 - Refund of Concession Fee

In the event of permanent cancellation/withdrawal of train service by the Railway Administration, the agreement shall be terminated without any notice or assigning any reasons. In such an event refund of Concession Fee will be admissible in the following manner:-

*i) the proportionate Concession Fee will be refunded, if the train is cancelled within a period of five years from the date of operation of this agreement.
No claim for any consequential loss of business/damages will be entertained by the IRCTC other than what is specially provided for in this para. ”*

8. A perusal of the tender document clearly reveals that there are separate amounts which were to be deposited by the Respondent at the time of awarding of tender. Clause 2.2 of General Conditions of license, Section-Two mentions the consolidated concession fee which was to be paid by the Respondent. Clause 2.1 of the main General Conditions of License, Section-One specifies the security deposit, which was to be paid by the Respondent. As per clause No.7.11 of the General Conditions of License, Section-One, the Petitioner has the right to forfeit the Security deposit in case of unsatisfactory services. Further, clause no.8.1, of the same, also clearly provides that if there is any breach of any terms and conditions of the license, the security deposit, license fee and concession fee could be forfeited, in whole or in part.

9. Learned Arbitrator has clearly come to the conclusion while answering claim Nos.8 & 9 that the termination of the contract is valid. Relevant portion of the award in respect of claim nos.8 & 9 is set out below:

“Claim No 8

Since the termination of agreement is valid in the given circumstances under Clause 7.11, there is no ground to award relief for loss of opportunity.

Claims No 9

As discussed above, the contract was terminated on account of poor catering services and public complaints in this regard. No one should be awarded for his own lapses and thus no compensation can be

granted for mental torture and harassment, which otherwise have not been substantiated with evidence. Rather there is no rebuttal to the fact that the respondent suffered due to conduct of claimant.”

10. Thus, there is no dispute that the termination by the Petitioner of the Respondent’s license on account of poor catering service has been completely upheld by the learned Arbitrator. However, it appears that in claim No.2, the Arbitrator has committed an error. In claim No.2, the Arbitrator has wrongly considered the license fee as the concession fee and has deducted license fee from concession fee and has refunded a sum of Rs.1.65 crores to the Respondent.

11. The Supreme Court in ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705***, on the question of damages, held as under:

“68. From the aforesaid discussions, it can be held that:--

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.”

12. A perusal of the tender clearly reveals that the license fee is in addition to the concession fee. This is clear from clause No.2.2 of General Conditions of License. The learned Arbitrator has also erred in holding that only the security deposit could have been forfeited and not the concession fee. These are glaring errors and a complete misreading of the tender conditions and general conditions of license. A perusal of the two clauses shows that the Security Deposit and the Concession Fee are separate and distinct components. One is not interlinked with the other. Clause 8.1 permitted the Petitioner to forfeit both amounts. Considering that the termination was upheld due to the pathetic and abysmal quality of services provided, the forfeiture cannot be held to be unreasonable. Award is, thus, not sustainable. Thus, the Award in respect of claim No.2 is set aside.

13. Award of the counter claim of Rs.40 Lakhs as per counter claim no.2 is upheld. Petitioner is free to execute the award in the above terms.

14. OMP is disposed of.

PRATHIBA M. SINGH
JUDGE

OCTOBER 12, 2018/dk