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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 6th August, 2018

+ **O.M.P. (COMM) 242/2018**

MARWAR HOTELS LIMITED Petitioner
Through: Mr.S.S.Ray, Ms.Rakhi Ray,
Mr.Vaibhav Gulia, Advs.

versus

FORTUNE PARK HOTELS LIMITED Respondent
Through: Mr.Kunal Kher, Ms.Subiya
Akhar, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA 7500/2018

This is an application seeking condonation of 22 days delay in re-filing the petition.

For the reasons stated in the application, the delay is condoned and the application stands allowed.

O.M.P. (COMM) 242/2018

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996(hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 27th December, 2017 passed by the Sole Arbitrator

allowing certain claims of the respondent.

2. The disputes between the parties are in relation to the Agreement dated 3rd November, 2003, described as Technical, Pre-opening, Operating and Marketing Services Agreement, executed between the parties.

3. The disputes primarily revolved around the claim of the respondent towards the outstanding service fee payable by the petitioner under the said Agreement as also for damages on the account of alleged unlawful termination of the Agreement by the petitioner.

4. The Arbitrator in his Impugned Award has *inter alia* allowed the claim of the respondent for the outstanding service fee to the tune of Rs.39,13,799/-.

5. The Arbitrator in granting the said claim in favour of the respondent has relied upon an acknowledgment dated 15.01.2007 of a balance of Rs.36,33,666/- payable by the petitioner as on 31st December, 2006. The findings of the Arbitrator in this regard are reproduced hereinbelow:

“That brings me to Issue No.3 as to whether the Claimant is entitled to payment of outstanding Service Fee of Rs.39,13,799/-. That a sum of Rs.39,13,799/- was an admitted amount as total outstanding on 25.1.2007 the date on which it has been alleged from the side of the Respondent that the intimation that the hotel has been sold to a third party was given to the Claimant. This amount of Rs. 39,13,079 could not have been withheld by the Respondent. At the time of disposing off the application of the Respondent under section 17 of the Arbitration & Conciliation Act, 1996 I had directed that

I will pass final order with regard to this amount, therefore, I am of the considered view that the Respondent is liable to pay a sum of Rs. 39,13,079 to the Claimant. The Respondent has also not made a deposit of Rs. 20 lakh with the Claimant in terms of Tribunal's order dated 12.06.2010. Argument advanced from the side of the Respondent that the said amount was not due and no acknowledgment of the amount as an outstanding debt was given by the Respondent is totally incorrect. This issue can be decided in view of letter written by the Claimant on 14.11.2006 at page 61 of the statement of claim that the fee and other dues of the Claimant have not been paid since 2006. In the statement of claim at page 63 there is a statement of the Claimant that as on 31.1.2007, the principal total outstanding as on 25.1.2007 amounting to Rs.39,13,799/- were outstanding against the Respondent. There is an acknowledgement at page 65 of statement of claim with the seal of Fortune Ummed Hotel confirming the balance of Rs.36,33,666/- as payable by the Respondent upto 31.12.2006. Therefore, the stand of the Respondent that this was not the admitted amount or they can withheld this amount is without any basis and is contrary to the record and, therefore, I hold that the Claimant's claim of Rs.36,33,666/- is liable to be paid to the Claimant from the date of its payment when the amount became due from 31.12.2006 till the date of realisation along with interest at the rate of 12% per annum. From the aforesaid document, one more thing is discernible i.e. the argument of the Respondent that after 25.4.2006 on which reliance was placed by the Respondent (Mail from Mr.Abinash Maghani of the Claimant at page 72 of the documents) that all services were stopped by the Claimant was not true as the Respondent itself acknowledged the payment of details of outstanding bills which incorporated travelling, advertisement costs, fee and others costs. Therefore, the letter written on 25.4.2006 was only to get the fee for services and other

heads to be paid by the Respondent as arrears from January, 2006. Therefore Issue No.3 is also decided in favour of the Claimant.”

6. Counsel for the petitioner submits that the Arbitrator has wrongly relied upon the document dated 10th/15th January, 2007 as an acknowledgement of debt on part of the petitioner. In this regard he relies upon the affidavit of Mr.Joginder Sharma, Manager (Accounts) of the petitioner who has stated that the said document was signed by him at the behest of and on the instructions of one Mr.Chetan Bhatnagar without verifying the contents thereof. Counsel for the petitioner submits that the said witness has maintained the above position even in his cross examination.

7. I am unable to agree with the submission made by the counsel for the petitioner. Apart from the fact that this would entail re-appreciation of evidence, which this Court cannot do in exercise of its powers under Section 34 of the Act, the document itself is a confirmation of balance outstanding on behalf of the petitioner. The document is admittedly signed by the Manager (Accounts) of the petitioner and it is completely unbelievable that such an important document would be signed by the Manager (Accounts) merely at the behest and on the asking of someone and without verifying the accounts. The Arbitrator has further relied upon the respondent's letter dated 14th November, 2006 whereby the respondent had claimed the service fee outstanding and other dues from the petitioner

which remained unpaid since 2006.

8. Counsel for the petitioner further challenges the Award of Rs.60 lacs as damages awarded in favour of the respondent for loss of business. He submits that in terms of Article 13(1)(h), in case of breach of the terms and conditions of the Agreement, liquidated damages of Rs.25 lacs were to be paid by the petitioner to the respondent. He submits that, therefore, any amount in excess of the amount prescribed as liquidated damages could not be awarded in favour of the respondent.

9. I am unable to agree with the said submission of the counsel for the petitioner. Article 13 of the Agreement is reproduced hereinbelow:

“ARTICLE XIII-IN THE EVENT OF BREACH

1. In the event of any failure or default on the part of the Owner to observe, discharge, perform, carryout or fulfil any of the responsibilities, obligations, undertakings or covenants on the Owner's part herein contained or in the event of any default by the Owner under any provisions in respect of trade marks, signs, trade names, logos, emblems or any other copyright, FPHL may without prejudice to its other rights:-

a. Discontinue after a notice of 60 days the services to be rendered by it under these terms and withdraw at the cost of the Owner, from the Hotel all staff seconded by FPHL to the Hotel under these terms.

b. Serve notice on the Owner to rectify or cure such failure or default and if such failure or default is rectified or cured by the Owner within 90 days of such notice then FPHL will continue rendering its services.

c. Failure on part of the Owner to correct the default in

the period prescribed in clause b) aforesaid shall amount to a breach and FPHL may at its option terminate this Agreement without further notice to Owner.

d. In the event of breach of the Agreement by Owner and consequent termination, FPHL will be entitled to receive and the Owner shall upon termination, immediately and not later than ten days pay to FPHL the following:

(i) Rs. 25 Lacs (Rs. Twenty five lacs only) at the time of termination which sum the Owner shall pay to FPHL upon receipt of the letter of termination. In event of delay, Owner shall also be liable to pay FPHL interest @ State Bank of India's Prime Lending Rate plus 300 (three hundred) basis points in addition to the other remedies

(ii) In addition to the Rs. 25 lacs in item d(i) above, Service Fee that FPHL would have received for the next three years from date of termination in case the Agreement was carried through or Service Fee for the balance period from date of termination, whichever is less after adjusting the amount of Rs. Twenty five lacs received if any.

e. The Owner agrees that Agreement is non-terminable for the first two years from Operating Date. Should Owner breach the covenant, Owner shall pay to FPHL the following:

(i) Rs. 25 Lacs (Rs. Twenty five lacs only) at the time of termination which sum the Owner shall pay to FPHL upon receipt of the letter of termination. In event of delay, Owner shall also be liable to pay FPHL interest @ State Bank of India's Prime Lending Rate plus 300 (three hundred) basis points in addition to the other remedies

(ii) In addition to the Rs. 25 lakhs in item e(i) above, Service Fees that FPHL would have received for the balance period, incase Agreement was carried through

from date of termination, after adjusting the amount of Rs.Twenty five lacs received if any.

f. The Owner furthers agrees that if Agreement is terminated by FPHL on account of a breach committed by Owner during the lock-in period of first two years of Operating Date, Owner shall pay FPHL the following:

(i) Rs. 25 Lacs (Rs. Twenty five lacs only) at the time of termination which sum the Owner shall pay to FPHL upon receipt of the letter of termination. In event of delay, Owner shall also be liable to pay FPHL interest @ State Bank of India's Prime Lending Rate plus 300 (three hundred) basis points in addition to the other remedies

(ii) In addition to the Rs. 25 lacs in item f(i) above, Service Fees that FPHL would have received for the next five years from date of termination in case the Agreement was carried through, or Service Fee for the balance period from date of termination, whichever is less after adjusting the amount of Rs.Twenty-five lacs received if any.

g. IT IS EXPRESSLY UNDERSTOOD that the provision of adjustment of Rs. Twenty five lacs would be available to Owner only if Owner had paid the said amount to FPHL within ten days as agreed above, In the event that Owner fails to pay the amount of Rs.Twenty-five lacs as stipulated above then in the event, no adjustment of the aforesaid amount of Rs.Twenty-five lacs would be available to Owner against the adjustment of Service fee which would then be paid by Owner to FPHL in addition to the sum of Rs.Twenty-five lacs.

h. The parties agree that the sum of Rs. Twenty-five lacs towards liquidated damages for loss of goodwill, reputation. and disassociation cost etc. which cannot be quantified in terms of money and are considered as irreparable loss. The parties therein agree that the loss shall not be less than Rs. Twenty-five lacs and have been restricted to Rs.Twenty five

lacs for the said purpose.

i. The parties further agree that for ascertaining the damages for earnings of the balance period, regard shall be given to the last twelve months performance

2. In the event of the failure of the Owner to meet its liabilities to its creditors or on its entering into any composition or arrangements with his creditors or any proceedings being commenced against the Owner for liquidation or bankruptcy or if any proceedings are commenced against the Owner seeking appointment of a receiver, trustee or liquidator of all or a substantial part of the Owner's assets then in any such event FPHL will be at liberty forthwith without notice to terminate this Agreement, claim liquidated damages from the Owner as governed by clause XIII of this Agreement.

3. In the event of FPHL failing to meet its liabilities and entering into a composition or arrangement with its creditors' or in the event of liquidation proceedings being commenced against FPHL or on a receiver or liquidator being appointed of the whole or a substantial part of the assets of FPHL then in any such event the Owner shall have the right to terminate this Agreement without notice and without prejudice to its claim for damages.

4.i. In the event of any failure or default on the part of FPHL to observe, discharge, perform, carry out or fulfil any of the responsibility, obligations, undertakings or covenants on FPHL's part herein contained, the Owner may without prejudice to its other rights serve notice on FPHL to rectify or cure such failure or default within 90 days of such notice.

ii. If, upon receipt of such notice, FPHL shall promptly rectify or cure such failure or default (or take action to rectify or cure such failure or default if such failure or default is not susceptible of being cured within (90) days then such notice shall be of no force and effect.

iii. If, on the other hand, FPHL shall fail to comply with such notice and cure or rectify such failure or default, the Owner may terminate this Agreement without further notice to

FPHL

5. The rights granted hereunder shall not be in substitution for but shall be in addition to any and all rights and remedies for breach of contract granted by applicable provisions of law.

6. Upon termination of this Agreement for any cause whatsoever all accounts other than liquidated damages payable hereinabove upon termination, due and owing between the parties shall become due and be paid with sixty (60) days of the Date of Termination of this Agreement.”

10. Article 13 (1)(d)(i) of the Agreement provides that the petitioner, upon termination of the Agreement shall immediately and not later than ten days therefrom pay to the respondent a sum of Rs.25 lacs. Article 13(1)(d)(ii) states that in addition to a sum of Rs.25 lacs, the petitioner shall also pay service fee to the respondent that would be received by it for the next three years from the date of termination, in case the Agreement was carried through or service fee for the balance period from the date of termination, whichever is less after adjusting the sum of Rs. 25 lakhs.

11. In the same manner, Article 13(1)(h) provides for liquidated damages for loss of goodwill, reputation and disassociation cost etc, which cannot be quantified in terms of money. At the same time, Article 13(1)(i) provides that for ascertaining the damages for earnings of the balance period, regard shall be given to the last 12 months performance. Therefore, the amount of Rs.25 lacs has been provided in the Agreement as minimum damages that would be payable only in relation to loss of goodwill, reputation and disassociation cost etc. Over and above these, the damages

ascertained on the earnings of the last 12 months as has been provided in Article 13(1)(i) of the Agreement, have to be paid by the petitioner in case of its breach. In the present case, no challenge has been made to the finding of breach by the petitioner. Therefore, the petitioner has been rightly held liable to pay damages over and above Rs. 25 lakhs.

12. The Arbitrator has also considered these clauses of the Agreement and has held as under:-

“As far as loss of business being suffered by the Claimant for a period of four years because of illegal termination of the agreement, the termination of the agreement took place on 25.1.2007 when six years were remaining of the operating period of the agreement. Clause XIII.1.i deals with the agreement between the parties as to how to ascertain the damages earnings of the balance period and that specifically states that the regard shall be given to the last twelve months performance. Although in paragraph 19 of the statement of defence, the Respondent has come out with the plea that the obligation was not discharged by the Claimant under the agreement; the hotel’s performance was very poor; the services rendered by the Claimant were not up to the standard and the Claimant has not suffered any damages and it claimed a sum of Rs.60 lacs per annum for a period of four years due to the loss of this hotel. The argument of the Respondent that the Claimant did not take any step to build any hotel at Jodhpur and, therefore, they cannot claim compensation at the rate of Rs.60 lacs per annum from the Claimant is without any basis. I have already held that Respondent was in breach of the agreement. The Claimant shall be entitled to damages restricted for abrupt breach of the agreement for a period of one year i.e. for a sum of Rs.60,00,000 (Rupees sixty lacs) out of a claim of Rs.

2,40,00,000, because for abrupt termination of agreement a brand Hotel must have made effort to find some other property for tie up. Therefore, the claim is restricted only for one year as loss of business amounting to Rs. 60,00,000 (Rupees sixty lacs).”

13. In fact as far as the liquidated damages are concerned, the Arbitrator has confined the same to Rs.25 lacs observing as under:-

“That brings me to the claim of liquidated damages which the Claimant has claimed for Rs.1,00,92,807/-. According to the Respondent in the event of breach by the Respondent, he is liable to pay liquidated damages as per Article XIII(h) of the agreement equivalent to Rs.25,00,000/- plus service fee for a period of three years from the date of termination of the agreement. It restricts liquidated damages for loss of reputation and disassociation costs to Rs. 25 Lakhs.”

14. Counsel for the petitioner has further submitted that the Arbitrator in the Impugned Award has granted cost of litigation quantified at Rs.6 lacs in favour of the respondent though in the Statement of Claim filed, the respondent had claimed only Rs.2 lacs towards cost of litigation.

15. I again do not find any merit in the submission made by the counsel for the petitioner.

16. In the Statement of Claim, while making a claim towards cost of litigation, the respondent had made the following submission:

“f) Cost of the Litigation:

After illegally and abruptly discontinuing/terminating the Agreement, the Respondent failed to pay the various amounts due to the Claimant and also refused to come forward and

have the arbitrator appointed, as per the mechanism stated in the Agreement, which required and compelled the Claimant to approach the Hon'ble High Court of Delhi to seek various reliefs from time to time. The Claimant spent a sum of Rs.2,00,000/- towards litigation costs (excluding the cost of present arbitration proceedings). Since the Claimant, was compelled to incur these costs/expenses because of the Respondent, the Respondent is liable to pay the same to the Claimant and accordingly an award be passed in favour of the Claimant for the said amount."

17. A reading of the above would show that the abovementioned cost was confined only to the alleged litigation cost prior to the arbitration proceedings. The Arbitrator on the other hand, in the Impugned Award has granted cost which is for the arbitration proceedings itself and which the Arbitrator was entitled to grant in terms of Section 31(8) of the Act.

18. In view of the above, I find no merit in the present petition and the same is accordingly dismissed, with no order as to costs.

NAVIN CHAWLA, J

AUGUST 06, 2018

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