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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 30th July, 2018

+ **O.M.P. (COMM) 111/2016**

JAGTAR SINGH

..... Petitioner

Through: Mr.Arun Batta, Ms.Neha, Advs.

versus

NORTH DELHI MUNICIPAL CORPORATION Respondent

Through: Mr.Sunil Goel, Standing Counsel with
Mr.Mayank Goel, Mr.Supreet Bindra, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

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 23rd December, 2014 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to 'Agreement relating to Ordinary/Road Side/Car/Scooter/Bus/Tempo parking site at Court Market, Jama Masjid' dated 5th January, 2011.

2. The Arbitrator in the Impugned Award has allowed a remission of 50% of the licence fee payable by the petitioner to the respondent for the first and second year of the contract, however, has further directed that as the petitioner had occupied the premises after the contractual period, for this unauthorized occupation, he shall pay

misuse charges/damages at double the rate of the monthly licence fee after taking into account the remission of 50% as awarded. The Sole Arbitrator has further rejected the prayer of the petitioner for further remission in the licence fee on account of closure of the parking sites as also for the loss of expected profit allegedly suffered by the petitioner due to lesser area being made available for the parking site by the respondent.

3. The petitioner being aggrieved of the above findings has filed the present petition under Section 34 of the Act.

4. As far as the claim of remission in the licence fee due to lesser area being made available by the respondent, the petitioner contends that in terms of the tender document and the site plan attached with the Agreement, the petitioner was to be allotted an area of approximately 4800 sq. mtrs. for use as parking space. The site plan further mentioned the number of vehicles that is, scooters and cars that can be parked in the said area. It is contended that in place of an area of 4800 sq. mtrs., only an area of approximately 1349 sq. meters was made available by the respondent to the petitioner and therefore, the petitioner was entitled to a remission in the licence fee payable in terms of the agreement. Counsel for the petitioner submits that the Arbitrator accepted that only 1349 sq. mtrs. instead of 4800 sq. mtrs. were made available to the petitioner, which is only about 27% of the agreed area, however, the Arbitrator has wrongly restricted the remission in Licence Fee to only 50%.

5. On the other hand, the counsel for the respondent submits that the petitioner was not entitled to seek any remission in the licence fee

and for this purpose, he places reliance on Clause 3 of the Agreement, which is reproduced hereinbelow:

3. Responsibility of tenderer before offering bid:

(a) The tenderer shall inspect the parking site which will be given on 'as is where is' basis and may obtain necessary clarification, if any, regarding the same to his full satisfaction before offering bid for the same.

(b) The tenderer should bid the amount by considering its entire potential to attract the customers. MCD will not be responsible for any decline in the potential of the customers at the parking site for any extraneous/unforeseen reason (a) whatsoever. Any claim for remission on the basis of harm to business interest on extraneous/unforeseen conditions/reasons whatsoever shall be summarily rejected by the MCD without any kind of response to the licensee and the licensee shall not be entitled to make any claim/remission on that account."

6. The Arbitrator in the Impugned Award has discussed this issue and has observed as under:

"In the instant case too, the contention of the Respondents that at 3 stages opportunity was accorded to the Claimants to verify/inspect the parking site and the fact that the site was allotted on 'As is where is basis' is not tenable vis-a-vis the NIT provisions/Site Plans forming a part of the Agreement/Contract signed between the two parties. An internal report on the notings dated 23.02.2011 supplied by of the Respondents reflected the actual area of parking site Coat Market available to the Claimants measuring upto 1349 sq. mtrs. Against 4800 sq. meters. Even though the said noting does not bear the approval of the Competent Authority, there is no documentary evidence submitted by the Respondent to support a contrary position or falsehood of their own

report on file. There is thus a large variance of shortfall in the area specified in the NIT and that actually in possession of the Claimant on the specific parking site.

Based on the above facts, court citations, I am of the considered view that the area actually made available to the Claimant by the Respondent was much short of the area as reflected in the Site Plan. This does not lend any credence to the argument of the Respondents of 'as is where is basis' regarding shortfall in the area allotted & that actually available on the site. However, with regard to business proposition of the site, the fact that the Claimants continued to use the parking site even after the lock in period of 9 months and extended one year period after the expiry of 1st year indicates that the parking site was a viable business proposition in terms of the no. of vehicles that could have been parked vis-a-vis revenue earned. No record/evidence of exact no. of vehicles that were parked on day to day basis has been given by the Claimant in support of his 'Loss of Profit' claim.

I therefore allow and restrict remission of 50% for the first and the second year of the contract. For seventeen months after 05.01.2013 i.e. the expiry of the contract period, I reply on the stipulated clause in the Agreement i.e. Clause no.1 which states that "if the allottee continues to operate the site after expiry of contract, he shall be liable to pay to the Corporation the misuse/damages charges @ double the monthly license fee for such period of unauthorized occupation".

I therefore go by the stipulated condition in the contract. The misuse/damage charges at double the rate of license fee for the 2nd year will be made applicable for the seventeen months & will be determined with 50% remission as already allowed for during the 2 year of the contract in view of shortfall in the area of Parking Site."

7. I have considered the submissions made by the counsels for the parties. The respondent not being in challenge to the Impugned

Award, cannot contend that the Arbitrator has wrongly allowed the remission of the licence fee in favour of the petitioner. As far as the amount of such remission is concerned, the Arbitrator has taken note of the fact that the petitioner did not terminate the Agreement in spite of lesser area being granted to it by the respondent. Not only this, the petitioner had also sought a renewal of the Agreement after the expiry of the first year. The petitioner further occupied the site even after the expiry of the extended term and therefore, balancing the equities, the Arbitrator has granted a remission of 50% in the licence fee. Such approach of the Arbitrator cannot be said to be perverse or unreasonable. The claim of the petitioner being in form of damages, this Court in exercise of its powers under Section 34 of the Act, cannot sit in appeal to reaccess the same. I therefore, find no merit in the contention raised by the counsel for the petitioner in this regard.

8. As far as the Arbitral Award directs the petitioner to pay double the licence fee for the period of occupation beyond the term of the Agreement, the counsel for the petitioner submits that there was no proof of loss adduced by the respondent and therefore, the counter claim of the respondent could not have been granted on the basis of a clause providing for liquidated damages in the contract. He relies upon the judgment of this Court in ***Pragati Construction Company Pvt. Ltd. vs. DDA***, ILR (2012) V Delhi 723 to contend that even where a contract provides for liquidated damages, it is only the upper limit of damages that can be awarded in case of breach of contract, however, the party claiming such damages has to still prove such damages in accordance with Sections 73 and 74 of the Contract Act.

9. I have considered the submissions made by the counsel for the petitioner, however, I find no merit in the same.

10. The Agreement between the parties was initially for the period of 6th January, 2011 to 5th January, 2012. The same was extended for a further period of one year in accordance with Clause 1 of the Agreement, which is reproduced hereinbelow:

“1. Duration of contract:

The contract will be duration of two years with effect from the date of handing over the site to the licensee but the contract shall be renewed after the expiry or one year with the enhancement of monthly licence fee by 10% (ten percent) for the next year, subject to the satisfactory completion of period of first year of contract. However, if the allottee continues to operate the site after expiry of contract, he shall be liable to pay to the corporation the misuse/damages charges @ double the monthly license fee for such period of unauthorised occupation.”

11. The above clause clearly stipulates that in case the petitioner continues to operate the site after expiry of the contractual period, it shall be liable to pay to the corporation ‘misuse /damage charges’ at double the monthly licence fee for such period of unauthorized occupation.

12. In the present case, the extended period of licence would have expired on 5th January, 2013. It is apparent from the record that with the respondent asking the petitioner to vacate the parking site, the petitioner filed a suit praying for restraining the respondent from re-tendering the said site. By an order dated 7th February, 2013, an

interim order was passed in favour of the petitioner restraining the respondent from re-tendering the parking site. The petitioner continued to retain the parking site till 6th June, 2014 and eventually by an order dated 27th June, 2014 passed by the Sole Arbitrator on an application under Section 17 of the Act, the interim order passed was finally vacated. In such eventuality, quantification of the damages that the respondent would have suffered due to unauthorized occupation of the parking site by the petitioner could not be made. In ***Kailash Nath Associates vs. Delhi Development Authority & Anr.*** (2015) 216 DLT 433, the Supreme Court has considered the law of damages and has held as under:

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1 *Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.*

43.2 *Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.*

43.3 *Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.*

43.4 *The section applies whether a person is a plaintiff or a defendant in a suit.*

43.5 *The sum spoken of may already be paid or be payable in future.*

43.6 *The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.*

43.7 *Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”*

13. In **ONGC vs. Saw Pipes**, (2003) 5 SCC 705, the Supreme Court had held as under:

“64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Section 73 and 74 of the Contract Act and the ratio laid down in Fateh Chand case [Fateh Chand v. Balkishan Dass, (1964) 1 SCR 515 : AIR 1963 SC 1405], SCR at p. 526 wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated’ and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is

entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasises that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him...

(Emphasis Supplied)”

14. In the present case, it cannot be disputed that the respondent would have suffered a loss due to continuation of the petitioner at the parking site even after the contractual period. As noted, the respondent was restrained from re-tendering the parking site due to an interim order passed by the Court. It is not the case of the petitioner that the liquidated damages mentioned in Clause 1 of the Agreement are in the nature of a penalty.

15. In view of the above and as the Arbitrator has granted damages in favour of the respondent strictly in accordance with the contractual terms, the Award cannot be faulted.

16. The next challenge of the petitioner against the Impugned Award is to the rejection of the claim of the petitioner for remission of

licence fee on account of closure of parking site due to various events. Counsel for the petitioner has drawn my attention to the averments made in the Statement of Claim in support of the claim of remission, which is reproduced hereinunder:-

*“ii. remission of **101** days on account of closure of the parking area allotted to the Claimant. The details of which are as follows:*

- a. The entire parking remained closed on every Sunday i.e. 54 Sundays in a year- 54 days.*
- b. Republic Day - 6 days.*
- c. Digging of Parking Site by Delhi Jal Board.*
- d. 2 days on account of World TB Day on 24.03.2011.*
- e. parking closed for 5 days for Independence Day celebration as per the directions of the department and Deputy Commissioner of Police (Traffic) to maintain law and order in the area.*
- f. The parking remained closed for 16 days for holding of Bakra Mandi from 23.10.2011 to 7.11.2011.”*

17. Counsel for the petitioner has further drawn my attention to the reply filed by the respondent to the Statement of Claim wherein the respondent, in the submission of the counsel for the petitioner, has not denied the averments made by the petitioner. The relevant extracts from the reply are quoted hereinbelow:

“25 That the contents of para 25(I)(II) and (III) of the corresponding paras of the statement of claim are wrong and denied. Since the contractual obligation qua the parking site was on agreed terms of ‘as is where is basis’ therefore, there is no occasion for the claimant to present the false claims as mentioned in these paras although as per the own admission of the claimant in the statement of claim, the lawful grievances have been considered by the respondent and appropriate remission

has been granted. Entertaining the present statement of claim shall tantamount to re-open the issue and the claimant is not entitled to re-agitate the issue. No loss of business has accrued to the claimant rather the institution of the present statement of claim against the respondent is an attempt to withhold the recovery of the outstanding dues as per the counter claim annexure 'R-1' as mentioned in the preliminary submission."

18. I am unable to agree with the submissions of the counsel for the petitioner. The respondent, in its reply, has stated that due remission had been granted in favour of the petitioner. The Arbitrator has also taken note of this in paragraph X of the Impugned Award, which is reproduced hereinbelow:

"X. ENTITLEMENT TO REMISSION FOR LOSS DUE TO CLOSURE

The Claimants have already been compensated by the Respondents for the loss of 58 days for the closure of parking site. Further since the Claimants have failed to put any evidence on record regarding the closure of the parking site for additional 43 days and there being an express bar in the agreement on the remission. I feel that the Claimants are adequately compensated and the claim therefore stands disallowed."

19. It was for the petitioner to have proved its claim by leading cogent evidence rather than relying upon mere alleged vague denials of the respondent.

20. In any case, this being a matter of appreciation of evidence, it cannot be interfered with in exercise of the powers under Section 34 of the Act.

21. The last challenge of the petitioner to the Impugned Award is to

the rejection of the claim of loss of expected profit due to respondent making lesser area available to the petitioner. The said claim has been rejected by the Arbitrator making the following observations.:

“XI. LOSS OF EXPECTED PROFIT DUE TO BREACH OF CONTRACT BY THE RESPONDENTS. (Rs. Ten Lacs)

The Claimants have relied upon Hon'ble Supreme Court decision in the matter of M/s AT Brij Pal Singh vs state of Gujarat AIR 1974 SC 1703, Mohd. Salamatullah vs Govt. of A.P. AIR 1977 SC 1481, Dwarka Das vs. State of M.P. 1999 Vol III Arb. LR. 291 SC for compensating the Claimants towards loss of expected profit which the Claimants would have earned in case he had been handed over the area as mentioned by the Respondents in the contract. The Claimants have however not supported their claim with any documentary evidence towards loss on expected profit. No balance sheet, or accounting details towards losses incurred have been produced by the Claimants. No details with regards to actual no. of cars/scooters that were actually parked over 2 year contract period have been given vis-a-vis that reflected & part of the Site Plan/Agreement. The Claimants have not given any evidence in support of actual no. of vehicles that they were able to park on the said site during 2 years, 2 months. They were supposed to maintain a record and account for it for specific expenditure incurred.

In the agreement there was a provision for vacation of site after 9 months. But the Claimants continued to operate the site for the second year at a further enhanced rate of 10%. Besides he continued to operate the site for further 17 months after the period mentioned in the contract. This indicates that his business could not have been running at a loss as there was no compulsion for him to continue after 9 months. In the absence of any income-expenditure figures and a profit/loss statement in support of losses incurred the Argument of loss of expected profits is not maintainable in the instant case. I do not allow any

claim on the account of loss of expected profits to the Claimant.”

22. Counsel for the petitioner submits that as it was not disputed by the respondent that only an area of approximately 27% of the allotted area was made available to the petitioner, even in absence of any proof of damages, some reasonable damages could have been awarded in favour of the petitioner.

23. I have considered the submissions made by the counsel for the petitioner however, as the Arbitrator has held that there was no evidence led in support of this claim, the Award cannot be faulted. In the above circumstances, the Court/Arbitrator may even in absence of proof of damages award nominal damages on account of breach of contract by other party, however, merely because the same are not granted in a given case, the Award cannot be set aside in exercise of its powers under Section 34 of the Act. The petitioner had all parameters available to it on the basis of which it could have sustained its claim for damages. As contended by the counsel for the petitioner, the number of vehicles that were allowed to be parked on the parking site were mentioned in the site plan annexed to the agreement itself. The petitioner could have led evidence to show what were the actual number of vehicles that were parked during the contractual period at the site. The petitioner did not produce its books of accounts. As noted above, the petitioner failed to produce any evidence before the Arbitrator and therefore, cannot be heard to challenge the Award.

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

NAVIN CHAWLA, J.

JULY 30, 2018
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