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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 3rd July, 2018

+ O.M.P. (COMM) 262/2018 & IAs 8404-05-06-07/2018

PARSVNATH DEVELOPERS LTD.

..... Petitioner

Through: Mr.Vijay Nair, Mr.Shubham Paliwal,
Advs.

versus

DELHI METRO RAIL CORPORATION LIMITED Respondent

Through: Mr.Ankur Gupta, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IAs 8405-06/2018

Exemption allowed subject to all just exceptions.

IA 8407/2018

This is an application seeking declaration that the petitioner has complied with the requirements of Section 34 (5) of the Arbitration and Conciliation Act, 1996. As the respondent has appeared, the compliance of Section 34(5) of the Act is duly noted.

Application stands allowed.

O.M.P. (COMM) 262/2018 & IA 8404/2018

1. The petitioner has filed the present petition under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 17th March, 2018 passed

by the Arbitral Tribunal consisting of three Arbitrators. By way of the Impugned Award, the Arbitral Tribunal has *inter alia* upheld the notice dated 9th April, 2012 terminating the Concession Agreement dated 25th February, 2005 executed between the petitioner and the respondent on the ground of misuse of the space allotted to the petitioner under the Concession Agreement.

2. The dispute between the parties is in relation to the Concession Agreement noted above whereby the respondent had granted to the petitioner the right to access, develop, finance, etc. the site at Seelampur Metro Station. The concession period was for 12 years and the possession of the site was handed over to the petitioner on 15th March, 2005.

3. It is the case of the petitioner that upon development of the site, the petitioner vide its letter dated 8th August, 2009 forwarded a draft Sub-Licence Agreement that was proposed to be executed by the petitioner with one M/s Ashima Securities Pvt. Ltd. which provided for usage of the space as a banquet hall.

4. The said draft agreement had been forwarded by the petitioner to the respondent in due compliance with clause 2.3.3 of the Concession Agreement, which is reproduced hereinbelow:-

“2.3.3 The Concessionaire shall prepare a draft Standard format of the sub licence agreement or arrangement which the Concessionaire will be required to sign with the sub licensee for the use of the Project Facility. The Concessionaire shall furnish the draft of such deed to DMRC for modification or suggestion. DMRC shall be entitled to incorporate such clauses as DMRC may consider appropriate to protect DMRC’s interest. The Concessionaire shall enter into sub-

licence arrangements as per the Standard format with the covenants stipulated by DMRC and the Concessionaire shall not incorporate or change in any clauses in the Deed that would have any adverse effect on the covenants incorporated by DMRC. In case of any deviation from the above-mentioned Standard draft of the deed in any particular circumstance, which supersedes or adversely affects DMRC's terms and covenants, the prior written consent of DMRC shall be taken before entering into any such agreement with a sub-licensee."

5. It is the case of the petitioner that in spite of receipt of the draft agreement, the respondent did not raise any objection thereto, giving rise to a legitimate belief in the petitioner that the said usage was permitted under the Concession Agreement.

6. Counsel for the petitioner submits that based on such belief, the petitioner executed the Sub-Licence Agreement with the said M/s Ashima Securities Pvt. Ltd. on 1st October, 2009 who started using the premises for banquet services to the knowledge of the respondent.

7. The respondent, however, vide its letter dated 17th February, 2011 raised an objection against the petitioner using the premises for banquet services and later terminated the agreement vide its notice dated 9th April, 2012. The petitioner in turn advised the sub-licensee to stop the usage of the premises for banquet services vide its letter dated 23rd April, 2012.

8. In view of the above facts, the dispute between the parties was, whether the petitioner was allowed to use the premises for banquet services in terms of the Concession Agreement. The answer to this lies in the interpretation of clause 4.3.2 and 4.3.3 of the Concession Agreement which are reproduced hereinbelow:-

“4.3.2 The nature of the activities and facilities that can be allowed at the Project site is as under:

- Departmental Store, Discount Store, Hypermarket*
- Restaurants, Fast Food Stalls, kiosks*
- Offices, Banks, ATMs*
- Computer Training Centres,*
- Showrooms for Consumer goods like Garments, Electronics / electrical Items, general utilities, etc.*

4.3.3 The Concessionaire may use or allow the use of the Project Facility for other activities which are not envisaged in Clause 4.3.2 above, only after prior written approval of DMRC.”

9. The Arbitral Tribunal, by its Impugned Award has interpreted the terms of the Concession Agreement and has held that in terms of clause 4.3.2, the petitioner was not allowed to provide banquet services and the petitioner required written permission for the same from the respondent under Clause 4.3.3 for the Concession Agreement. The Arbitral Tribunal further relied upon the fact that for another similar Concession Agreement executed between the parties with respect to Kashmiri Gate Metro Station, the petitioner had applied for such permission which had been granted by the respondent on 26th September, 2008. The Arbitral Tribunal therefore, holds that the petitioner was aware that such banquet activity is not permitted in the premises, except on grant of an express permission for the same from the respondent.

11. The contention of the petitioner that as the restaurant activity was permitted in terms of clause 4.3.2 and the activity being carried out by the petitioner was in fact akin to the same and therefore,

allowed, was also rejected by the Arbitral Tribunal. In this regard, the Arbitral Tribunal placed reliance on the Delhi Municipal Corporation (Property Taxes) Byelaws, 2004, and the Delhi Master Plan, 2021 to hold that there is a distinction between the usage of premises as a restaurant and as a banquet hall.

11. I have considered the submissions made by the counsel for the petitioner, however, I am unable to agree with the same. Clause 4.3.2 of the Concession Agreement gives an exhaustive list of permissible usage of the premises. It is not an inclusive or illustrative which can be expanded by the licensee on its own. In fact clause 4.3.3 of the Concession Agreement clearly provides that for any other usage of the premises, the concessionaire would have to take separate written approval for the same.

12. The petitioner was well aware of these conditions and in fact, as noted by the Arbitral Tribunal, for the Kashmiri Gate Metro Station sought such approval which was granted by the respondent.

13. The plea of the petitioner that in certain other tender documents, especially with respect to Nehru Place and Vaishali Metro Stations, the respondent had clearly spelt out the activities which are prohibited or restricted and, therefore, in the absence of such condition, no such prohibition can be implied in the present Concession Agreement, cannot also be accepted. The Concession Agreement has to be interpreted on its own terms and as noted above, once an exhaustive list of usage is given in the Concession Agreement, there is no scope of expanding the same by taking any benefit from some other tender document.

14. In any case, this being a matter of interpretation of the Agreement and the Arbitral Tribunal having interpreted the same in a particular manner, which can by no stretch be said to be unreasonable or perverse, this Court in exercise of its powers under Section 34 of the Act cannot interfere with the same.

15. As far as the plea based on submission of draft Sub-Licence Agreement and lack of objection thereon by the respondent is concerned, it also cannot be accepted. In view of Clause 4.3.2 read with Clause 4.3.3 of the Concession Agreement allowing only prescribed usage of premises and prohibiting others, except “after prior written approval of DMRC”, there cannot be a presumed approval or approval implied through conduct.

16. 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

JULY 03, 2018
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