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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 13th December, 2018

+ **O.M.P. 837/2011**

M/S APOLLO TYRES LTD Petitioner
Through: Mr. Avinash Lakhanpal, Advocate.
(M:9811038369)

versus

M/S PREMIER BRANDS LTD Respondent
Through: None.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present appeal arises out of the agreement dated 21st June, 2010 entered into between the Petitioner – M/s Apollo Tyres (*hereinafter*, ‘*Petitioner*’) and the Respondent – M/s Premier Brands Ltd. (*hereinafter*, ‘*Respondent*’), which was appointed as a sole concessionaire for brand licensing and merchandising rights during the Commonwealth Games, 2010 (*hereinafter*, ‘*Commonwealth Games*’). The Respondent entered into the agreement with the Petitioner granting the Petitioner exclusive license to be called as official licensee/sponsor for the Commonwealth Games in the “*TYRES*” category. The Petitioner was to advertise during the run up to the Commonwealth Games and the events surrounding the same. The said agreement had the following clauses: -

- “*Right to official designation of “Official Licensee” of CWG 2010 in the TYRES category*”

and right to exploit that designation all your ATL/BTL communication / promotion. Prior written approval from Licensor to be obtained by Licensee for the usage of the Event Logo and other Intellectual Property (“IP”) of CWG 2010 for their marketing and promotional use

- *Right to ‘Automotive Tyres’ category exclusivity with in the entire CWG 2010 sponsor family*
- *Within 10 working days of signing this agreement, the licensor will provide a letter from the Organizing Committee of the Common Wealth Games 2010 to the Licensee stating clearly that Apollo is the official and exclusive licensee in the Automobile Tyre category for Common Wealth Games, 2010. If this letter is not provided within 15 working days, Apollo has the right to cancel the deal and get a full refund of the Licensee fee paid.”*

License Fee

The License Fee from the Licensee to the Licensor due in consideration of the Benefits provided by Licensor shall be INR 2.00 crores net of tax. Service tax as applicable is over and above.

Termination

*In the event a Party (“**the Defaulting Party**”) fails to materially perform any of its material obligations and warranties herein, the other Party may give the Defaulting Party written notice of any claimed default. The Defaulting Party will have five (5) days after receipt of such notice to remedy the relevant default, where the default is capable of remedy. Where the default is not capable of remedy and the Defaulting Party fails to remedy the default within the aforesaid period, then and in additions to all rights or remedies to which the other Party may be entitled, the other Party may terminate this Deal Memo upon written notice with retroactive effective to the date of default,*

such termination effecting an immediate reversion of rights to Rights Holder and being without prejudice to any accrued obligations and any claim in damages.”

2. The case of the Petitioner is that pursuant to the agreement being signed, the Petitioner paid a sum of Rs.1 crore which was 50% of the agreed license fee between the parties. The fundamental obligation of the Respondent was that within 10 days, approval was to be obtained from the Organising Committee of the Commonwealth Games that the Petitioner was the exclusive licensee in the automobile tyres category. The crucial clause being that if the letter of approval for the exclusive licensee was not obtained in 15 working days, the Petitioner had the right cancel the deal.

3. The letter of approval from the Organizing Committee of the Commonwealth Games was obtained by the Respondent only on 17th July, 2010 and the same was conveyed to the Petitioner on 19th July, 2010. Owing to the fact that various events leading upto the Commonwealth Games, including the Queen's Baton Relay, which was to travel across 28 States and 7 Union Territories, was already underway, and the Petitioner had lost almost 16 days of advertising opportunity, on 20th July, 2010 i.e. one day after being communicated of the approval, the Petitioner issued a notice to the Respondent cancelling the deal. In the said letter, the Petitioner also informed the Respondent that it was no longer interested in advertising during the Commonwealth Games.

4. The Commonwealth Games were held between 3rd October, 2010 and 14th October, 2010. The Queen's Baton Relay commenced on commenced on 29th October, 2009, and arrived at the Commonwealth Games opening ceremony on 3rd October, 2010. The Relay entered India on 25th June, 2010.

After the end of the games, repeated requests were made by the Petitioner to the Respondent for refund of the deposit of Rs.1 crore. In response to one such email, the Respondent informed the Petitioner as under: -

*“Dear Mr. Rajesh Ramakrishnan,
Premier Brands Pvt. Ltd. was appointed as Master Licensing and Merchandising Partner besides sole Concessionaires for the CWG Games Delhi 2010, on May 19, 2010. During the past 3 months, Organising Committee of CWG issued press statements to launch licensed merchandising on 4 different dates including the last on August 9, 2010, but at the very last moment cancelled all of them, with no valid reason. This has severely affected the revenue estimates of the company. Finally we have to take a very sad decision to withdraw ourselves from the CWG Delhi 2010 on Friday August 13, 2010.*

But since the last Saturday we had a couple of meetings with the OC who are pressurizing the company to re-consider its decision. Last evening we had a meeting with the top-most officials of the OC and a decision to be taken that Premier Brands will continue to be the Master Licensee with extra marketing support & concession from the CWG.

We wish to confirm that Premier Brands will continue to be the Master Licensing & Merchandising Partner and sole Concessionaires for the CWG Delhi 2010. All agreements signed with the different licensees will be honored as per the terms of the agreement.

It is our sincere request to kindly continue with CWG Delhi 2010. If you wish we can re-negotiate on the terms and contract fee of the agreement. We can arrange additional marketing support from CWG Delhi 2010.

But if you have finally decided to withdraw yourselves, we request you to kindly send us a two line mailer, stating that due to the delay you wish to finally withdraw from the Commonwealth Games. On the

basis of your confirmation, we will ask OC to cancel your approval letter and refund the amount at the earliest.

Regards

*Suresh Kumar
Chairman”*

5. The refund was, however, not made and the matter was referred to arbitration. The learned Sole Arbitrator vide award dated 13th September, 2011 rejected the claim of the Petitioner on the ground that the cancellation letter dated 20th July, 2010 was not in terms of the termination clause. Thus, the claim of the Petitioner for refund of the amount of Rs.1 crore was rejected.

6. The submission of learned counsel for the Petitioner is that the non-approval within 10 days, or within the extended period of 15 days, gave a pre-emptive right to the Petitioner to cancel the deal. This clause was not dependant the termination clause in any manner as the approval was absolutely essential for the advertising to commence in time. Thus, time was of the essence of the contract in the present case. The termination clause related to other obligations and warranties and not to a fundamental stipulation, which gave the right to cancel the deal.

7. It is further submitted on behalf of the Petitioner that the sum of Rs.1 crore could not have been forfeited by the Respondent inasmuch as no clause of forfeiture existed in the contract.

8. It is not in dispute that the Petitioner, after issuing the notice dated 20th July, 2010, did not undertake any advertisement or merchandising during the Commonwealth Games. Learned counsel for the Petitioner, upon

instructions, does admit that Apollo Tyres did not do any advertising during the Commonwealth Games. The letter written by the Respondent to the Petitioner clearly shows that there were various issues being faced by the Respondent itself owing to its disputes with the Organizing Committee. The said letter informs the Petitioner that the Organizing Committee had in fact cancelled the contract with the Respondent itself. Thus, the said letter was a crucial document which ought to have been considered by the learned Arbitrator. The letter, in fact, evidences that the Respondent's position as a concessionaire was itself under threat during the said period and the Respondent had no right whatsoever to retain the amount paid by the Petitioner.

9. Ld. Counsel for the Petitioner relies on *Suresh Kumar Wadhwa v. State of M. P. [Civil Appeal no. 7665 of 2009 decision dated 25th October, 2017]*, where the Hon'ble Supreme Court holds that forfeiture being in the nature of penalty, in the absence of a clause for forfeiture, no right is available to forfeit the amount.

10. The following facts are not disputed in the present case: -

- (i) Payment of Rs.1 crore;
- (ii) Non-giving of approval within the stipulated time of 10/15 days;
- (iii) Petitioner having cancelled the contract on 20th July, 2010;
- (iv) Petitioner having not advertised its brand *APOLLO* during the Commonwealth Games and hence no benefit having been derived by the Petitioner.

11. In the context of the above facts, the amount of Rs.1 crore cannot be retained by the Respondent. The award is contrary to the terms of the

contract itself. Furthermore, the amount cannot be forfeited as there was no forfeiture clause and permitting forfeiture of the same would in effect constitute a penalty being imposed without any basis. The Supreme Court, in ***Kailash Nath Associates v. Delhi Development Authority (2015) 4 SCC 136*** has held as under:

“40. From the above, it is clear that this Court held that Maula Bux case [Maula Bux v. Union of India, (1969) 2 SCC 554; (1970) 1 SCR 928] was not, on facts, a case that related to earnest money. Consequently, the observation in Maula Bux [Maula Bux v. Union of India, (1969) 2 SCC 554; (1970) 1 SCR 928] that forfeiture of earnest money under a contract if reasonable does not fall within Section 74, and would fall within Section 74 only if earnest money is considered a penalty is not on a matter that directly arose for decision in that case. The law laid down by a Bench of five Judges in Fateh Chand case [Fateh Chand v. Balkishan Dass, (1964) 1 SCR 515; AIR 1963 SC 1405] is that all stipulations naming amounts to be paid in case of breach would be covered by Section 74. This is because Section 74 cuts across the rules of the English common law by enacting a uniform principle that would apply to all amounts to be paid in case of breach, whether they are in the nature of penalty or otherwise. It must not be forgotten that as has been stated above, forfeiture of earnest money on the facts in Fateh Chand case [Fateh Chand v. Balkishan Dass, (1964) 1 SCR 515; AIR 1963 SC 1405] was conceded. In the circumstances, it would therefore be correct to say that as earnest money is an amount to be paid in case of breach of contract and named in the contract as such, it would necessarily be covered by Section 74.

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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.”

12. Thus, as per the above judgement, Sections 73 and 74 are clearly applicable. Actual loss or damages has to be established which is conspicuously absent.

13. The award is thus liable to be set aside. The amount of Rs. 1 crore be paid to the Petitioner along with interest at the rate of 8% p.a. from 20th July 2010 till date. If the payment is made within 8 weeks, no further interest will be liable to be paid. If no payment is made within 8 weeks, interest at the rate of 10% p.a. will be payable on the awarded amount.

14. The O.M.P. is allowed in the above terms.

DECEMBER 13, 2018

Rekha

**PRATHIBA M. SINGH
JUDGE**