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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 15th October, 2018
+ **O.M.P. 1274/2014**
INDIAN RAILWAY CATERING AND TOURISM
CORPORATION LTD Petitioner
Through: Mr. Nikhil Majithia, Advocate (M-9910415522).
versus
M/S AMBUJ HOTELS AND REAL ESTATE (P)
LTD Respondent
Through: Mr. Prafulla R. Tiwary, Advocate (M-9818674154).

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The Indian Railway Catering & Tourism Corporation ('IRCTC') – the Petitioner herein, floated a tender for catering services on New Delhi – Patna Sampurn Kranti Express. The Respondent submitted its bid for the same. By letter dated 15th February, 2002, it was communicated by the Petitioner to the Respondent that the decision was taken to award the tender to the Respondent. Accordingly, the Respondent was called upon to deposit Rs.3,00,000/- towards security deposit; Rs.5,50,000/- towards licence fee and Rs.17,37,000/- towards 1st instalment of concession fee. Total concession fee payable by the claimant was Rs.52.11 lakhs, which was required to be deposited in three equal instalments.

2. The Respondent started its catering services on the aforesaid train w.e.f. 22nd February, 2002, but on 2nd August, 2002, the Petitioner terminated the contract on the ground that the services being provided by the Respondent was not satisfactory. The various complaints that were received

over the period of January to June, 2002, were:

- Passengers not being provided bills/receipts against payment made;
- No first-aid box was available;
- No menu cards were available;
- Carrying of live stock – chickens in live and sick conditions;
- Food served was inedible;
- Extremely unhygienic standard of food served;
- Irregular and late service of meals to passengers;
- Minor children engaged to work in the pantry car.

3. The Respondent invoked the arbitration clause challenging the termination and raising claims. The Ld. Sole Arbitrator appointed, passed Award dated 5th May, 2006, whereby it was held that the Respondent was in default in providing services and as such the termination of the contract was valid. It was also held that the Petitioner had rightly forfeited the concession fee as well as security deposit.

4. The Respondent thereafter, filed its objections to the Award and the High Court, vide order dated 23rd July, 2007 upheld the award dated 5th May, 2006. The relevant observations in the said order are as under:

“A perusal of the award shows that the findings arrived at in this behalf by the arbitrator are to the effect that there were faults on the part of the petitioner in complying with the obligations under the contract. These are findings based on appraisal of evidence and it strite to say that this Court does not sit a court of appeal while examining objections under Section 34 of the Arbitration and Conciliation Act, 1996.

The second aspect is the detention of the money of the petitioner by the respondent amounting to Rs43.24 lakh in respect of which the arbitrator has reached

conclusion that the respondent rightly forfeited the amount.

The matter was heard at some length and thereafter it is agreed by learned counsels for the parties as under:

The petitioner accepts the award to the extent it seeks to affirm the termination of the contract.

Insofar as the forfeiture of Rs.43.24 lakh is concerned, Rs.5.5 lakh out of this amount is towards license fee in terms of clause 2.8. This is for a period of six months. Since for six months period of time undisputedly the petitioner ran the services (contract commenced on 22.2.2002 and was terminated on 2.8.2002), this amount cannot be claimed back by the petitioner.

Issue of refund of security deposit of Rs.3.00 lakh under clause 4.1 of the contract and concession fee forming part of clause 4.2 (first two installments having been paid) are liable to be examined in fresh arbitration proceedings. This is so since the question for forfeiture has to be examined within the parameters of Section 73 and 74 of the Indian Contract Act, 1872. The fresh arbitral proceedings / would be restricted to this aspect alone.

It is agreed that these disputes be referred to a sole arbitrator.....”

Thus, by the above order, while upholding the termination, the computation of damages was referred again to arbitration. Pursuant to the said reference, the impugned award dated 1st July, 2014 came to be passed.

5. 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:

**“AGREEMENT FOR LICENCE TO OPERATE
AND PROVIDE CATERING AND ON BOARD”**

**SERVICES ON TRAIN NO.2393394, PATNA-NEW
DELHI, SAMPURNA KRANTI EXPRESS TRAIN**

4.1 Security Deposit – Licensee shall deposit Rs.3.00 lakh towards Security Deposit along with acceptance of award of license.

4.2 Concession Fee - Licensee will pay to the licensor Concession fee of Rs.52.11 laks in 3 equal quarterly intallments of which the first installment is to be paid before commencement of this agreement and the other two instalments at the interval of three months each.

4.3 Refund of concession fee - In the event of permanent cancellation/withdrawal of train service by the Railway Administration, the agreement shall be terminated without 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.
- ii) No Concession Fee will be refunded. In case train service is cancelled after the expiry of first term i.e., five years.

No claim for any consequential loss of business/damages will be entertained by the IRCTC other than what is specially provided in this para.

4.4 Refund of Security Deposit – The Security Deposit will be refunded without any interest by the IRCTC at the time of peaceful vacation of the pantry car/railway premises by the Licensee after providing for settlement of all dues 0'1' arrears arising out of the use of pantry car/railway premises by the Licensee.

7.10 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 sale judge and whose decision shall be final) it shall be open 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 Concession Fee shall be 'admissible in ease 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.

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

6. Learned counsel for the Petitioner submits that Clause 8.1 permits the IRCTC to forfeit both the security deposit as also the concession fee in case the contractor is in breach of Clause 7.10. The submission of the Ld. Counsel for the Petitioner is that there was a deficiency of service resulting in termination of the contract by IRCTC. In the earlier round before the Learned Arbitrator, the clear finding was that the termination was valid. Relevant portion of the said award is set out herein below:

*“v) Considering the above I cannot agree with the contention that the cancelation be held void and illegal and arbitrary.
Claim No.3 and 4*

Since, the cancellation is upheld and reinstatement is not justified, claim No.3 and 4 being directly linked to Claim No.2 of reinstatement cannot be considered in order or justified and no relief is granted to the claimant.”

7. This award of the Arbitrator having been upheld and the High Court having remanded the matter for a limited purpose, the breach having been established and not questioned, the Learned Arbitrator erred in holding that the forfeited amounts are in the nature of penalty. It is his submission that once the parties entered into a commercial contract with their eyes open, if there is a breach, the IRCTC is entitled to proceed in accordance with the contract. It cannot be held to be a penalty.

8. Learned counsel for the Respondent however submits that he has not received instructions despite repeated letters to the Respondent. He placed on record a letter dated 2nd January, 2018. He submits that he is unable to assist the Court. In this matter, Mr. Pradeep Ranjan Tiwary, Advocate had appeared for the Respondent and filed a reply. Learned counsel appearing currently submits that Mr. Tiwary had expired and after that they have been appearing in this matter and seeking instructions from the Respondents. It is their submission that despite repeated telephone calls and letters to the Respondent's authorised personnel, no instructions are forthcoming. The Respondent thus has complete notice of the present proceedings and has chosen not to instruct any counsels. The Court thus has no option but to proceed further in the matter.

9. 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, as well as the High Court. The

Ld. Sole Arbitrator, however, in the impugned award observed as under:

“23. The argument of learned counsel for the respondent No.1 that the entire security amount and concession fee had to be forfeited by respondent No.1 cannot be sustained and in view of the provisions of Section 74 of the Contract Act, this tribunal has to find out reasonable amount of compensation payable by the claimant to respondent No.1 on account of breach of contract by the claimant. Moreover, as per clause 4.4 of the agreement, the purpose of deposit of security was settlement of all dues/arrears arising out of the use of pantry car/ railway premises by the claimant at the time of vacation thereof and nothing else. The plea raised by the claimant for the refund of the entire security deposit and concession fee cannot be sustained as the respondent No.1 is entitled to recover reasonable compensation from the claimant.

24. In this case the Concession Fee of Rs.52.11 lakhs was for a period of 5 years, but the claimant could run the catering services for a period of six months only which was one tenth of the total period. The respondent No.1 therefore can reasonably deduct of Rs.52.11 lakhs towards Concession fee and appropriate the same towards compensation for the loss suffered by it on account of the breach of Contract by claimant. This amount comes to Rs.5,20,000/-.

25. The claimant had deposited a sum of Rs.43.24 lakhs with respondent No.1 towards security deposit of Rs.3 lakhs; license fee and two installments of concession fee. Out of the total sum of Rs. 43.24 lakhs, the licensee fee of Rs.5.5 lakhs has to be deducted as it stands consumed for the reason that the claimant had run the pantry car for six months. The High Court had also held that this amount cannot be claimed back by the claimant. Out of the balance of Rs.37.74 lakhs, the respondent No.1 may deduct a sum of Rs.5.20 lakhs which appears to be reasonable compensation to

respondent No.1 on account of breach of contract by the claimant and termination of its contract. The balance of Rs. 32.54 lakhs is liable to be refunded by respondent No.1 to the claimant which includes the security deposit of Rs. 3 lakhs and the part of the Concession Fee. It is therefore held that the claimant is entitled to recover a sum of Rs.32.54 lakhs from the respondent No.1.”

From the above finding, it appears that the Arbitrator has committed an error in awarding a sum of Rs.32.54 lakhs to the Respondent. 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.32.54 lakhs to the Respondent.

10. 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.”

11. The security deposit, concession fees and licence fees are three distinct amounts and payments under the contract. A perusal of the tender clearly reveals that the license fee is in addition to the concession fee. The learned Arbitrator has erred in holding that only the security deposit could have been forfeited and not the concession fee. This is a glaring error and a complete misreading of the tender conditions and general conditions of license. A perusal of the two clauses i.e., Clause 4.1 and 4.2, shows that the Security Deposit and the Concession Fee are separate and distinct components. One is not interlinked with the other. Clause 8.1 permits the Petitioner to forfeit both amounts when it uses the language “*whole or the part of the Security Deposit/License fee/Concession Fee*”, besides terminating the contract. Considering that the termination was upheld due to the pathetic and abysmal quality of services provided, the forfeiture cannot be held to be unreasonable. If the consequences of termination are provided for and the same are not unreasonable as held in **ONGC (supra)**, the same cannot be set aside, by holding that the forfeiture is in the nature of penalty. The impugned award is, thus, not sustainable. The same is set aside.

12. OMP is accordingly allowed.

**PRATHIBA M. SINGH
JUDGE**

OCTOBER 15, 2018/Rahul