

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****ARBITRATION PETITION NO.582 OF 2016****WITH****NOTICE OF MOTION NO.2474 OF 2016****IN****ARBITRATION PETITION NO.582 OF 2016**

Hotel Corporation of India Ltd.

....Petitioner

vs

BD & P Hotels (India) Pvt. Ltd.

...Respondents

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Mr. Kevic Setalvad, Senior Advocate, a/w. Mr. Pushkal Mishra and Mr. S.D. Shetty, i/b. M.V. Kini & Co., for the Petitioner.

Mr. Aspi Chinoy, Senior Advocate, a/w. Ms. Rujuta Patil, Ms. Niyathi Kalra and Ms. Sonu Bhasi, i/b. Negandhi Shah & Himayatullah, for the Respondent.

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CORAM : S.C. GUPTE, J.**DATED: 8 JANUARY, 2019****(Oral Judgement):**

. This arbitration petition challenges an award passed by a sole arbitrator in a reference of disputes arising out of a management agreement executed between the parties. The agreement was for management of a hotel owned by the Petitioner.

2. The brief facts of the case may be stated as follows :-

The Petitioner, which is a subsidiary of Air India

Limited, runs and operates hotels throughout India, one of which is the Centaur Lake View Hotel (“hotel”) at Srinagar in the State of Jammu and Kashmir. Sometime in 2005, the Petitioner was interested in running the hotel on a management contract. The Ministry of Civil Aviation, by its communication dated 23 January 2006, conveyed to Air India its in-principle approval for such contract. The Petitioner's board, in its meeting held on 29 September 2006, approved the proposal of offering of the hotel on management contract basis. Advertisements were, accordingly, issued in various publications inviting expression of interest for entering into a management contract. The Respondent herein expressed its interest and submitted its bid. The Petitioner's board approved acceptance of the Respondent's bid for taking the hotel on management contract. On 15 September 2010, on the Respondent paying security deposit and minimum guaranteed amount, respectively, in the sums of Rs.10 crores and Rs.1.08 crores (pro-rata), a management agreement was executed between the Petitioner and the Respondent. Sometime around this time, a petition was filed in the High Court of Jammu and Kashmir by officers and employees of the hotel *inter alia* praying for a restraint order against the Petitioner from executing the management agreement with any third party or alternatively, an order for ensuring security of tenure for the employees, or for application of compulsory retirement scheme or absorption of employees on permanent basis in Air India Limited. By its interim order dated 23 September 2006, the High Court directed the Petitioner to maintain status-quo in respect of service conditions of the employees. By a further order dated 15 October 2010, the High Court made it clear that maintenance of the status of the employees and officers of the hotel would not be construed

to have disabled the Petitioner from transferring the management of the hotel to the management contractor. The Court, however, maintained that any such transfer would be subject to the orders of the Court in the pending petition. The parties thereafter met on various occasions to discuss the modalities of management transfer, including the subject of payment of salary to the employees in view of the orders of the High Court. In the meantime, the Petitioner claims to have received a letter (letter dated 25 February 2011) from the Ministry of Civil Aviation forwarding Minutes of Meeting of Committee of Secretaries ('COS') under the chairmanship of the Cabinet Secretary held on 13 January 2011. It is the Petitioner's case that this letter advised it to review the subject through the Air India Board in the light of the COS decision of 13 January 2011 and submit an action taken report. For the purposes of such review, the Petitioner appears to have obtained a legal opinion on the subject. The Petitioner's board, at its meeting held on 15 March 2011, *inter alia* decided to handover the hotel to the State Government upon valuing the structure and the entire unit. The Respondent, in the meanwhile, addressed communications to the Petitioner *inter alia* requiring the latter to comply with its obligations under the management agreement and calling upon it to complete the formalities and handover the hotel. By its communication dated 31 May 2011, the Government of Jammu and Kashmir *inter alia* informed the Petitioner that the State Government would not take the unit with its employees and that they would continue to remain the employees of the Petitioner. By their letter dated 26 September 2011, the Petitioner thereafter terminated the management agreement on the basis that the provisions of Clause 8.1 thereof, i.e. the force majeure clause, had been triggered. The Petitioner

claimed that in the light of directions received from the State Government, it had no option but to invoke the force majeure clause and terminate the contract. On 7 August 2012, in view of this communication, the writ petition filed by the employees before the High Court of Jammu and Kashmir was disposed of as infructuous. In these facts, the arbitral tribunal had to consider the Respondent's case for specific performance of the management contract.

3. The learned arbitrator, by his impugned award, held that the documentary and oral evidence produced by the Petitioner, in the light of the pleadings of the parties, made it clear that the Petitioner was never of the opinion that it was not possible for it to perform the management contract; the parties were actually discussing the modalities of transfer, including the interim arrangement in respect of the employees, till the final decision of the High Court; and without concluding such modalities or arrangement, the Petitioner took a unilateral decision to terminate the management contract without addressing itself to the issue of force majeure conditions. The learned arbitrator held that there was no event, which could have attracted the force majeure clause in Clause 8.1 entitling the Petitioner to terminate the contract. The learned arbitrator has given detailed reasons why this was so. The arbitrator held that the so called force majeure event was of the Petitioner's own creation and that Article 8.1(f) invoked in this behalf by the Petitioner was not attracted. The learned arbitrator, thus, held the purported termination of the contract to be illegal. The arbitrator held that the Respondent had always been and was ready and willing to perform its part of the contract. The learned arbitrator, accordingly, held that the Respondent

was entitled to specific performance of the contract and accordingly, set aside the termination of the agreement as illegal and without authority of law and in breach of contractual obligations of the Petitioner, held the agreement to be valid, subsisting and binding on the Petitioner, and ordered the Petitioner to specifically perform the same *inter alia* by putting the Respondent in possession of the hotel.

4. Mr. Setalvad, learned Senior Counsel for the Petitioner, submits that the impugned award is contrary to public policy of India and also suffers from patent illegality appearing on the face of the award. Learned Counsel submits that contrary to the law of readiness and willingness contained in Section 16(c) of the Specific Relief Act and binding authorities of our Courts on the subject, the learned arbitrator has awarded specific performance. Learned Counsel submits that the Respondent could not be said to be ready and willing to perform its part of the contract at all times upto the date of passing of the impugned award. Learned Counsel particularly lays emphasis on the Respondent having accepted refund of the security deposit and minimum assured guarantee amount. Learned Counsel submits that notwithstanding the Respondent's statement that such refund was accepted without prejudice to its rights and contentions, the very act of the Respondent of accepting such refund amounts to its having accepted the termination of the contract by the Petitioner or, in the alternative, shows want of readiness and willingness on its part to perform the contract. Learned Counsel relies in this behalf on the decisions of Madras High Court in the cases of **H.G. Krishna Reddy and Co. vs. M.M. Thimmiah**¹ and **E.A.**

¹ 1983 (96) LW 88

Thirugnanam vs. V.P. Rajagopal². Learned Counsel alternatively submits that the Petitioner was within its rights to terminate the suit contract under Clause 8.1(f), which dealt with force majeure conditions and respective entitlements of the parties in the event of such force majeure conditions. Learned Counsel submits that the interim order passed by the High Court of Jammu and Kashmir as well as the COS decision referred to above amounts to “material adverse effect” of an action of a government agency within the meaning of Clause 8.1(f) of the management contract. Learned Counsel submits that the arbitrator merely considered whether the subject action came under sub-clause (i) or (ii) of Clause (f) of Article 8.1. Learned Counsel submits that these two clauses were merely illustrative of actions of government agencies coming within the meaning of Clause (f) of Article 8.1, and not exhaustive.

5. The Petitioner's case of want of readiness and willingness on the part of the Respondent or in the alternative, acceptance of the termination on its part is premised only on the latter's acceptance of refund of security deposit and minimum assured guarantee amount. It may be noted at the outset this is not a ground of challenge formulated in the arbitration petition. In its counter-statement, of course, the Petitioner did claim that the Respondent had received refund of the security deposit of Rs.10 crores as well as minimum guaranteed amount of Rs.1.08 crores, and there being no dispute about the same, the Respondent must be deemed to have accepted the termination in its entirety, without any demur. Even here, there was no case of want of readiness or willingness or, waiver, for that matter; the case at best was

² 2006 (1) CTC 809

of unconditional acceptance of the termination. It is doubtful whether and to what extent even such case was pressed before the arbitrator. One does not find any issue specifically framed in that behalf, though in the award the learned arbitrator appears to have briefly adverted to the encashment of the cheques (of refund of security deposit and minimum guarantee amount). The learned arbitrator observed that the encashment had been explained by the Respondent; it was with a rider that the Respondent was willing to bring the money back. It is not in dispute that the acceptance of the refund, which came after the Respondent moved its applications under Section 9 and 11 of the Act, was expressly stated to be without prejudice to its right to challenge the termination and with an assurance to bring back the money in case specific performance was granted. It cannot be described as unconditional acceptance of the termination, and it certainly cannot prejudice the Respondent's right to challenge the termination.

6. The judgements relied upon by learned Counsel for the Petitioner are clearly distinguishable. In the case of **E.A. Thirugnanam (supra)**, the purchaser had not only demanded refund of advance paid by him by his notice, but followed it up by filing a suit for recovery of the advance. He subsequently appears to have amended his plaint and prayed for specific performance. The court noticed that despite reply by the vendor expressing his willingness to execute a sale deed, the purchaser was not willing to get the sale deed executed and the evidence of his means to pay the consideration merely showed his readiness, but not his willingness. Apart from the fact that unlike in the case of **E.A. Thirugnanam**, in our case there is no pleading of want of readiness and

willingness, even the facts in that case are clearly distinguishable from the facts of our case. In our case, the acceptance of the refund was not only stated to be 'without prejudice', but there was an express offer to bring the money back. If, on these facts, the arbitrator refused to treat the acceptance as an unconditional acceptance giving rise to a discharge of the counter-party, the conclusion cannot be termed as perverse or impossible or something which no fair and judiciously minded person could have arrived at. The conclusion, in the premises, is not amenable to any challenge under Section 34 of the Act. In **Krishna Reddy's** case (supra) also, the question of readiness and willingness of the purchaser in accepting refund of advance paid for the purchase, though stated to be without prejudice, was considered in the particular context of the facts of that case. The purchaser's statement in the plaint in that case of his readiness and willingness was traversed in his pleadings by the vendor and there was no offer on the part of the purchaser at the time of acceptance of refund to bring the money back. In our case, there is no traverse of the Respondent's case of readiness and willingness. So also, not only was the acceptance of the refund made after making it clear that the Respondent was intending to seek performance, there was an offer to bring back the money, when the refund was accepted. These are clearly distinguishing facts, and the ratio of **Krishna Reddy's** case does not apply to these.

7. Coming now to the case based on force majeure clause, i.e. Article 8.1(f) of the contract, it may be noted at the outset that the case involves two aspects, namely, the correct interpretation of the particular article and its applicability to the facts of the case. Both these aspects are

primarily for the arbitrator to decide, and as held by the Supreme Court in **Associate Builders vs. Delhi Development Authority**³, unless the view taken by the arbitrator on either of these aspects is either impossible or such as no fair and judiciously minded person may have taken, the view cannot be said either as a determination against the terms of contract or outside his jurisdiction or perverse and as such, opposed to public policy of India. Clause 8.1(f) came within Article 8, titled “Force majeure”, under the management contract. Article 8.1 defined 'force majeure event' as any of the enumerated events (in clauses (a) to (h) thereof), which is *“beyond the control of the party claiming to be affected thereby (“Affected Party”) and which the Affected Party has been unable to overcome or prevent despite exercise of due care and diligence, and prevents the Affected Party from performing its obligations under this agreement”*. Article 8.2 provided for obligations of the parties in case of occurrence of a force majeure event. Under clause (a) of Article 8.2, the Affected Party was required to notify the other party of occurrence of a force majeure event. Under clause (b), after such notification, the parties were expected to meet and hold discussions in good faith in order *inter alia* to assess the impact of the force majeure event, its likely duration and formulate damage mitigation measures. So far as performance of obligations by either parties is concerned, Article 8.3 *inter alia* provided (clause (b) thereof) that the Affected Party's excuse from performance would be of no greater scope and of no longer duration than was necessitated by the concerned force majeure event. The force majeure events described in the Article (Article 8.1(f)) included any judgement or order of a court of competent jurisdiction or statutory authority

3 2015 (3) SCC 49

against the management company. If the force majeure event be what was described in Article 8.1(f), then upon exhaustion of remedies available under applicable laws, the management company was entitled to terminate the agreement. As for the Petitioner, it had the option to terminate the agreement straightaway after occurrence of any event under Article 8.1(f). The Petitioner's case in this behalf before the arbitrator was two-fold. Firstly, it was submitted that the order of the High Court of Jammu & Kashmir directing status quo as regards services of its employees was liable to be treated as a force majeure event, entitling the Petitioner to terminate the agreement. Secondly, the Petitioner relied upon the COS direction, requiring it to reconsider its decision to offer the hotel on a management contract basis and instead consider giving it to the State government. None of these so-called force majeure events would have entitled the Petitioner to terminate the management agreement. The High Court order was merely an interim stay; it was meant to be contested. It would have at the most constituted a force majeure event requiring the parties to meet and hold discussions for assessing its impact and formulate damage mitigation measures, which the parties in fact did. Besides, the order made it clear that it did not come in the way of performance of the management contract. The order, at any rate, was not against the management company and thus, would not have been covered by clause (i) of Article 8.1(f). As for the COS directive, as the minutes of COS indicate, what was discussed in the COS meeting was the issue of "Restructuring of Centaur Lake View Hotel, Srinagar". It was noted that M/o Civil Aviation (CA) had stated before the COS that the State Government had indicated that they were not interested in taking over the hotel and hence, the Ministry had already

approved the proposal for giving the hotel on a term management contract; for this purpose an agreement had been signed, but employees had approached the High Court. The Chief Secretary of Jammu and Kashmir thereupon stated in the meeting that though this had indeed been conveyed earlier by the State, it was now of the view that, with some fresh investment, the hotel could be revived, provided funds could be made available on easy terms. The Chief Secretary also stated that “since land is on lease basis with the Hotel Corporation, the latter cannot **perhaps** lease it out further. Hence, a management contract, as proposed by the M/o CA, **may not** be feasible” (Emphasis supplied). What the Cabinet Secretary thereupon directed was that M/o CA “**may** re-examine the matter with reference to the legal issue relating to further leasing of the land indicated by the State Government as well as the latter's offer to take over the Hotel” (Emphasis supplied). The decision taken by COS was this : “M/o Civil Aviation will **re-examine** the matter regarding restructuring of the Centaur Lake View Hotel, **with reference to the legal issue relating to further leasing of the land indicated by the State Government as well as the latter's offer to take over the Hotel**” (Emphasis supplied). Based on this decision, M/o CA addressed a communication to the CMD of Air India Ltd. on 25 February 2011 calling for review of the matter, and submission of an Action Taken Report by 7 March 2011. In the first place, the COS decision communicated to the Air India Board could not be termed as a direction to terminate the management agreement. It is quite clear that even the Board did not think so. It in fact appears to have called for a legal opinion on whether or not giving of the hotel on a management contract amounts to further leasing of the property. The legal opinion was to the effect that it did

not. The Board appears to have thereafter and in spite of the opinion, forwarded a proposal on its own to the State Government of Jammu and Kashmir to transfer the hotel on 'as is where is' basis to the State Government along with its employees. The State Government does not appear to have accepted the main terms of the Air India Board resolution. Effectively, therefore, there was nothing to show acceptance of the Air India proposal by the State Government. The minutes of meetings of the Air India Board which followed (meetings of 28 June 2011 and 15 September 2011) indicate that there was no agreement between the State Government and Air India for take over of the hotel by the former. The last meeting of 15 September 2011, by which the Air India Board took a decision to terminate the management contract, simply decided to set up a committee of representatives to work out details of a possible transfer. On these facts, which are not in dispute, the learned arbitrator's conclusion that the purported force majeure event never occurred at all, is clearly a reasonable and possible conclusion based on the material placed before the arbitrator.

8. The learned arbitrator further held that even assuming in favour of the Petitioner, Article 8.1(f) was not attracted. Article 8.1(f) (i) was not attracted because there was no order, at any rate, against the management company, i.e. the Respondent herein, and that was not even the case of the Petitioner. Article 8.1(f)(ii) was also not attracted, since there was no action of any government agency having any jurisdiction over performance of management services or obligations of the management company under the management contract. These are also possible conclusions based on a reasonable interpretation of the

management contract. Learned Counsel for the Petitioner submits that the arbitrator has considered only clauses (i) and (ii) of Article 8.1(f), though these clauses were merely illustrative and not exhaustive of all cases under the Article. Article 8.1(f) is but part of Article 8.1 which describes a 'force majeure event'. The main clause has three distinct elements : the first, the event must be beyond the control of the party claiming to be affected thereby; the second, the affected party must be unable to overcome or prevent the event; and the third, it must prevent the affected party from performing or discharging its obligations under the contract. The arbitrator's conclusions effectively show that there was no such case; if anything, the event was of the Petitioner's own making. There is, in that case, nothing for Article 8.1 to get triggered, whether the event fell within clauses (i) or (ii) of Article 8.1 (f) or even outside these clauses.

9. The impugned award, accordingly, does not merit any interference under Section 34 of the Act. The arbitration petition is dismissed. The parties shall bear their own costs of this petition.

10. In view of the dismissal of the arbitration petition, nothing survives in the notice of motion (Notice of Motion No.2474 of 2016) and the same is disposed of.

(S.C. GUPTE, J.)