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

+ **O.M.P. (COMM) No. 69/2019 & I.A. Nos. 2148/2019, 2149/2019
& 2150/2019**

Date of decision: 12th February, 2019

DELHI TOURISM & TRANSPORTATION DEVELOPMENT
CORPORATION LTD.(DTTDC) Petitioner

Through: Ms. Sujata Kashyap, Advocate.

versus

GRAVISS CATERING PVT. LTD. Respondent

Through: Mr. Sanjeev Mahajan, Advocate.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL):

Facts

1. This petition is directed against an award dated 20 March 2018 passed by a sole Arbitrator. The background in which the instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 (in short '1996 Act') has been filed is set out hereafter:

2. However, before I proceed further, I would like to indicate that the petitioner i.e. Delhi Tourism and Transportation Development Corporation Limited would be hereafter referred to as 'DTTDC' while the respondent i.e. Graviss Catering Private Limited would be referred to

as 'GCPL'; and wherever necessary, DTTDC and GCPL will be collectively referred to as 'parties'.

3. DTTDC, it appears, in 1988 had purchased the Qutab Restaurant site (hereafter referred to as 'Premises') from Indian Tourism Development Corporation (ITDC) on "as is where is basis". DTTDC, in turn, awarded a license for running a fast food counter and restaurant to Leman International Private Limited, which is the predecessor-in-interest of GCPL. The license had a tenure of ten years. Upon expiry of the tenure, it was renewed for a further period of ten years. A fresh Licence Deed dated 12 April 2001 was executed in this behalf between GCPL's predecessor-in-interest and DTTDC. The license fee was pegged at Rs.80,000/- per month. GCPL paid the license fee for the entire period of ten years in advance. Thus, GCPL paid a total sum of Rs.96 lakhs to DTTDC, *albeit*, in advance.

4. It appears that on 2.01.2007, GCPL received an intimation from DTTDC that it should not organise marriages in the lawns abutting the premises.

5. In response thereto, on 5 January 2007 GCPL, wrote to DTTDC that the Licence Deed executed between them permitted marriages to be held in the lawns, however, in deference to DTTDC's request, it would henceforth not allow for marriage functions to be held in the lawn.

5.1 Furthermore, in the very same communication, it was brought to the notice of DTTDC that the Archaeological Survey of India (in short

‘ASI’) has also raised objections in the past, which were addressed and, therefore, *ex-post facto* sanction was granted by ASI on 22 March 2005.

6. It appears that despite the steps taken by DTTDC and GCPL in not having marriage functions being held in the lawns abutting the Premises, the Municipal Corporation of Delhi (in short ‘MCD’) proceeded to seal the same on 31 January 2007.

7. This situation arose on account of directions issued by the Monitoring Committee (in short ‘MC’) appointed by the Supreme Court.

8. The sealing of the Premises led to the Chairman and Managing Director, DTTDC writing a series of letters to the MC requesting to de-seal the same. The record shows that these letters are dated 23.3.2007, 8.5.2007 and 17.5.2007. Via these letters, DTTDC sought to convey to the MC that it should de-seal the Premises as an undertaking had already been given by GCPL that it will not hold marriage functions in the lawn abutting the licensed Premises.

8.1 Evidently, the request for de-sealing made by DTTDC did not have any immediate effect on the MC. Finally, on 25 May 2009, the Premises was de-sealed.

9. In view of the fact that the Premises had remained sealed for nearly 28 months and the tenure of the license was coming to an end on 31 January 2011, on 17 August 2009 GCPL wrote to DTTDC to extend the tenure of the license for the period the Premises had remained sealed. According to GCPL, running the Premises for the remaining period i.e., 1

year 8 months, was not feasible unless the tenure of the license was extended for the period it had remained sealed.

10. Apparently, DTTDC on 8 January 2010 constituted a Committee to examine the request of GCPL for extension of the tenure of the license. The record shows that the representative of GCPL was requested to appear before the Committee for the said purpose and in this behalf, a notice dated 21 January 2010 was served on GCPL. The record further shows (and *qua* which there is no dispute raised in the pleadings) that the Committee, in fact, recommended that the tenure of the license should be extended.

10.1 Apparently, the recommendation made by the Committee was not accepted by the CMD of DTTDC and, therefore, the proposal of GCPL did not bear fruit.

11. It appears that on 10 March 2010, the MC passed, once again, an order for sealing the Premises. This led to the MCD sealing the Premises on 24 January 2011.

11.1 In the interregnum, it appears, DTTDC took out fresh tenders for giving on license the Premises. GCPL, being aggrieved, assailed the same by way of a writ petition.

11.2 This writ petition, which was filed in this court, was numbered as: Writ Petition (Civil) No. 2083/2012. GCPL, however, did not succeed in its pleas made before this Court, whereby extension of the tenure of the license was sought, apart from seeking waiver of the license fee.

11.3 The Court held that the petitioner had no vested right to seek extension of the license tenure. Plea for refund of the license fee was also rejected.

12. It is in this backdrop that the instant arbitration proceedings were commenced. GCPL lodged six claims, while DTTDC lodged a counterclaim for damages.

13. The learned Arbitrator passed an award in favour of GCPL for a total sum of Rs.83,90,000/- along with interest. Insofar as claim No. 1 is concerned, interest at the rate of 12% per annum with effect from 31 January 2007 when the Premises was sealed, till the date of realisation of the amount was granted. However, in respect of claim Nos. 3 and 4, the learned Arbitrator awarded interest at the rate of 12% per annum from the date of the award till the date of realisation of payment.

13.1 Pertinently, the counterclaim filed by DTTDC was rejected.

14. Being aggrieved, DTTDC, as indicated at the very outset, assailed the award by instituting the instant petition.

Submissions of counsel

15. Ms. Kashyap, appeared for DTTDC in support of the petition, while GCPL was represented by Mr. Mahajan.

16. Ms. Kashyap, broadly, challenged the award on the following grounds:-

(i) The learned Arbitrator had failed to recognise the fact that the tenure of the license had expired on 31 January 2011, despite which, physical possession of the Premises was not handed over on the said date.

Therefore, in terms of Clause 14 of the Licence Deed, GCPL was required to pay damages at the rate provided therein i.e., Rs.40,000/-, per day from the date when the license expired i.e., 31 January 2011, till the date the Premises were physically handed over to DTTDC i.e., 12 July 2012.

(ii) The sole Arbitrator erred in directing refund of license fee in favour of GCPL for the period for which the Premises lay sealed.

(ii)(a) It was contended, in this context, that DTTDC had the right to revoke or terminate the Licence Deed even before its tenure ended and, therefore, the decision of the learned Arbitrator to grant refund of license fee for the period the Premises remained sealed was contrary to the provisions of Clause 13 of the Licence Deed.

(iii) That the award is against the public policy of India as the learned Arbitrator failed to consider the fact that the issues raised by GCPL stood already adjudicated upon by the High Court in Writ Petition (Civil) No.2083/2012. While dismissing the petition, the High Court had rejected GCPL's prayer for waiver of license fee. Therefore, the issues raised before the learned Arbitrator were barred by the principles of *res judicata*.

(iv) The learned Arbitrator erred in granting a sum of Rs.7.5 lakhs in favour of GCPL towards salary of employees for the period for which the Premises lay sealed, as under Clause 10 of the Licence Deed, GCPL was required to keep DTTDC indemnified against all such claims. The learned Arbitrator overlooked this fact and, therefore, erred by granting

refund of license fee. GCPL had no vested right to seek renewal of license. DTTDC was dealing with a public asset and, therefore, could have awarded the license in favour of any person or entity other than GCPL.

17. Mr. Mahajan, on the other hand, refuted the assertions made by the counsel for DTTDC. Learned counsel submitted that the grounds raised by DTTDC to assail the award were beyond the purview of Section 34 of the 1996 Act.

17.1 Mr. Mahajan submitted that a contractual arrangement obtained between the parties. The learned Arbitrator had returned a finding of fact that GCPL had adhered to the terms contained in the Licence Deed.

17.2 According to the learned counsel, the learned Arbitrator, in particular, had held that holding of marriage functions was within the scope and ambit of the license and, therefore, there was no breach by GCPL; the fact that the license was defective inasmuch as it permitted use of the Premises contrary to the regulatory regime was something for which DTTDC had only itself to blame.

17.3 GCPL on account of an inherent defect in the licence had suffered a loss and, therefore, was entitled to the monies under various heads awarded by the learned Arbitrator.

Reasons

18. Having heard learned counsel for the parties and perused the records, I must first set down the findings of fact returned by the learned Arbitrator and thereafter, consider whether they fall foul of various

provisions of the 1996 Act, in particular, Sections 34 and 28(3) and the principles settled by Courts.

(i) That GCPL had obtained all necessary permissions, sanctions, and licences which were required to run the Premises. Reference to the various permissions, which were nearly eight in number, is made in paragraph 9 of the award.

(ii) Under the license, GCPL was permitted to run the Premises not only as a restaurant/bar but also for banquets. This fact is clearly borne out from the recital of the Licence Deed. For the sake of convenience, the relevant portion is reproduced as under:-

“Whereas they have agreed to renew the license of the licensee to run the fast food counter, restaurant cum bar and banqueting facilities, the style and system of operation of the complex for the running of the restaurant/bar and banqueting will totally be at the discretion of the second party.”

(iii) That because GCPL had acted as per the terms and conditions of the license, DTTDC pleaded with the MC to de-seal the Premises. This fact is borne out from a perusal of letters dated 23 March 2007, 8 May 2007 and 17 May 2007.

(iv) GCPL was not in breach of the conditions stipulated in the license between 1 February 2001 and January 2007. Since the Premises had been sealed thereafter, GCPL suffered a loss. Qua sealing of the Premises no fault could be laid at the doorstep of GCPL.

(v) The license issued by DTTDC in favour of GCPL was inherently defective as it permitted user of the Premises for activities which were not permissible in law. The sealing of the Premises had occurred despite the fact that GCPL was not at fault.

19. It is in the background of the aforesaid findings of fact which, in turn, emerged on appreciation of material evidence on record that the learned Arbitrator came to the following conclusions:-

19.1 That claim No. 1, whereby, refund of license fee was sought had to be granted in favour of GCPL. Accordingly, refund of license fee at the rate of Rs.80,000/- per month for the period of 28 months spanning between 31 January 2007 and 25 May 2009 (which is the period for which the Premises lay sealed) was ordered. The total amount, thus, awarded under claim No. 1 was Rs.22,40,000/-.

19.2 Insofar as claim No. 2 was concerned, whereby GCPL had demanded a sum of Rs.40 lakhs on account of repairs, renovations made, loss by way of depreciation of goods and articles due to sealing, refund of service tax and other taxes, etc., the same was declined.

19.3 The learned Arbitrator, however, allowed claim No. 3, which was a claim for loss of profit, for the period of 36 months. Qua this claim, GCPL had sought recovery of Rs.54 lakhs. The learned Arbitrator accepted the plea of GCPL that it ought to be awarded a sum of Rs.1.5 lakhs per month towards loss of profit. In calculating 36 months, the learned Arbitrator not only factored in the period of 28 months when the

Premises lay sealed, but also a part of the remaining period of the license tenure in which it could not run its business.

19.4 As far as claim No. 4 was concerned, which was a claim for salary of employees and security paid during the period spanning between 31 January 2007 and 31 January 2011, the learned Arbitrator awarded only a sum of Rs.7.5 lakhs as against a demand of Rs.27 lakhs.

19.5 Claim No. 5, by which, GCPL sought recovery of Rs.14 lakhs being expenses, undertaken to take recourse to various remedies to challenge the sealing order, the same was rejected in totality by the learned Arbitrator.

19.6 Insofar as claim No. 6 was concerned, which was a claim for grant of interest at the rate of 18% per annum on monies claimed under various heads, the learned Arbitrator awarded interest, *albeit*, at the rate of 12% per annum. As alluded to hereinabove, the period for which interest is to run qua claim No. 1 commences from 31 January 2007 and ends on the date when the amount under the said head is realised. As regards claim Nos. 3 and 4, which are the other claims awarded in favour of GCPL, the learned Arbitrator has held that interest will run from the date of the award till the date of realisation of payments under those claims. The reasoning given, which according to me is correct, is that interest under these heads can only run from the date when adjudication of claims is made which results in quantification of the amounts payable.

20. Therefore, given the aforesaid findings of fact, which to my mind, emerge from the record, let me examine whether or not the objections raised on behalf of the DTTDC have any merit.

21. The principal contention of Ms. Kashyap is that since DTTDC had the right to revoke the license at any time, refund of license fee could not have been ordered.

21.1 This submission of Ms. Kashyap is completely untenable for the following reason. The findings returned by the learned Arbitrator clearly demonstrate that GCPL was not in breach and because if it was so, DTTDC itself would not have pleaded with the MC that the Premises should be de-sealed. Given this situation, neither did DTTDC actually revoke or terminate the license nor was there any ground available to DTTDC to terminate the license.

21.2 GCPL was unable to use the Premises as it was sealed on account of a use which was not permissible in law. This eventuality occurred since DTTDC issued a license in favour of GCPL, which was inherently defective. The learned Arbitrator, thus, rightly came to the conclusion that GCPL should be refunded the license fee for the period for which the Premises lay sealed i.e. the period of 28 months.

22. The other contention of Ms. Kashyap was that since GCPL had failed to hand over the Premises on the date when the license expired i.e. 31 January 2011, therefore, it should have been ordered to pay damages at the rate of Rs.40,000/- per day as stipulated in Clause 14 of the Licence Deed.

22.1 This submission is also, in my view, without merit.

22.2 It is pertinent to note that the counterclaim of DTTDC was pivoted on this very ground.

22.3 The learned Arbitrator has dealt with the same, in my opinion, quite correctly, by holding that GCPL had used the Premises in accordance with the terms of the Licence Deed. The fact that the license was not in consonance with the provisions of the law, is an aspect for which DTTDC could blame only itself and no one else.

22.4 Furthermore, the learned Arbitrator also ruled in no uncertain terms that DTTDC had failed to prove that it had suffered a loss between 1 February 2011 and 12 July 2012 (which is the date when the Premises were handed over to DTTDC). Furthermore, the learned Arbitrator has also noted that while the license fee for the Premises was fixed at Rs.80,000/- per month, the rate of damages provided in Clause 14 is pegged at Rs.40,000/- per day.

22.5 Ms. Kashyap has not drawn my attention to any material that which would upstage these findings.

22.6 Given the aforesaid findings of fact, in my view, the submissions made by Ms. Kashyap that the learned Arbitrator ought to have granted damages between 1 February 2011 and 12 July 2012 cannot be sustained.

23. I may only note, at this stage, that the other components of the counterclaim also failed based on the same logic. These aspects are referred to in paragraphs 35¹ and 36² of the award.

24. The other objection taken by Ms. Kashyap was that the issues raised in the writ petition bearing No.2083/2012 which was disposed of by this Court on 13.4.2012 raised issues which were *pari materia* with the issues that arose before the learned Arbitrator and, therefore, the principles of *res judicata* would apply is also unsustainable for the following reason:-

(i) The scope of the writ petition was entirely different from the action filed before the learned Arbitrator. Via the writ petition, GCPL sought to challenge the issuance of fresh tender by DTTDC and waiver of license

¹ After considering the pleas raised by the parties and their submissions this Tribunal is of the considered view that the Counter Claim raised by the Respondent is without any merit and as such cannot be sustained. The user of the premises by the Claimant was in terms of the license issued by the Respondent and if it was found to be illegal the Respondent only was to be blamed. The unauthorized constructions in the premises as alleged by ASI stood condoned by grant of ex-post facto sanction. The objection of the ASI in regard to the running of the restaurant cum bar and banqueting within the precincts of a protected monument was also to be met by the Respondent only which had permitted the aforesaid use thereof by the Claimant. In fact it was incumbent upon the Respondent only to properly know and understand the permissible use of the demised premises and then issue a licence in consonance thereof. The whole blame therefore was on the Respondent only.

² The Counter Claim raised by the Respondent at the rate of Rs.40,000/- per day w.e.f 01.02.2011 to 12.07.2012 cannot be sustained as the Respondent has not proved the loss suffered by it. The Respondent could not permit the running of any restaurant etc., in the said premises even after 31.01.2011, in view of the sealing of the premises by the Monitoring Committee and the objections being raised by the ASI. Without proving the loss the Respondent cannot claim any damages from the Claimant. It is strange that earlier license fee of the premises was Rs.80,000/- p.m, only but the damages are being claimed at the rate of Rs.40,000/- per day. The records show that the Claimant was the actual sufferer as after the de-sealing of the premises even it had spent considerable amount on renovation etc. For considering the request for the extension of the license also the Respondent took considerable time. It constituted a Committee for the purpose which was of the view that the license should be extended but the Managing Director of the Respondent did not agree. The Claimant had to approach the High Court by filing a Writ Petition. Unpaid property tax cannot be recovered from the Claimant for the period subsequent to the expiry of the License Deed. Similarly the legal expenses allegedly incurred by the Respondent cannot be recovered from the Claimant as the Claimant was a really aggrieved party and was invoking legal remedies for the redressal of its grievances.

fee. Before the learned Arbitrator, GCPL had raised monetary claims which arose on account of factum of sealing of Premises. This Court while dismissing the writ petition did not deal with the aspect as to whether or not GCPL was responsible for the Premises being sealed. In other words, did GCPL breach the conditions of the license by using the Premises for the purpose other than that for which it had been licensed to it? This aspect was squarely within the ken of the learned Arbitrator. The Writ Court was not required to examine this aspect of the matter and, therefore, the principles of *res judicata* would not apply.

24.1 Furthermore, it appears that this aspect was not even propounded on behalf of DTTDC before the learned Arbitrator. To my mind, a litigant cannot raise an objection in a Section 34 petition without laying the foundation for the same in its action preferred before the Arbitral Tribunal. Thus, this submission of Ms. Kashyap, as indicated above, being without merit, is rejected.

25. In the foregoing circumstances, I find that none of the grounds raised in the petition have any merit and, accordingly, the petition is dismissed. Consequently, all pending applications are also dismissed. Parties shall, however, bear their own costs.

RAJIV SHAKDHER, J.

FEBRUARY 12, 2019
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