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

\+ **FAO(OS) (COMM) 112/2019 & CM Appl.Nos. 23581/2019 & 23583/2019**

TIMES INNOVATIVE MEDIA LIMITED ..... Appellant
Through: Mr. Krishnendu Datta & Mr. Manish Kumar Srivastava, Advocates

versus

SERVE AND VOLLEY OUTDOOR ADVERTISING PRIVATE LIMITED ..... Respondent
Through: Ms. Haripriya Padmanabhan & Ms. Aishwarya Kane, Advocates

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

O R D E R
% **04.07.2019**

1. This appeal by Times Innovative Media Limited (hereafter 'Times') is directed against the decision dated 15th March, 2019 passed by the learned Single Judge in OMP (Comm) 81/2017, which was a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (Act) filed by the present Appellant against the Respondent Serve and Volley Outdoor Advertising Private Limited ('SVO') challenging an arbitral Award dated 24th July, 2014 by a three member Arbitral Tribunal ('Tribunal').

2. For the purposes of the present appeal, the facts in brief are that the Delhi

Metro Rail Corporation (DMRC) invited bids for putting up commercial advertisements on pre-fabricated and pre-designed backlit panels at the Barakhamba Underground Metro Station and certain other stations. The bid of SVO was accepted by the DMRC and this resulted in a Licence Agreement (LA) being entered into between the DMRC and SVO on 31st December, 2005.

3. In terms of the LA, SVO was to put up advertisements on the spaces pre-designed and pre-fabricated inside the Barakhamba Metro Station as well as Metro Stations on Line-3 of MRTS Phase -1 starting from Ramakrishna Ashram Marg to Dwarka Metro Station (excluding the Barakhamba Road and Rajiv Chowk Stations). SVO was to pay an annual license fee of Rs. 5,00,37,040/- in half yearly instalments. There was a clause for increase in license fee of 5% after completion of every year on a compounding basis. SVO was also to furnish an interest free security deposit to the DMRC, which was also subject to increase of 5% every year on a compounding basis. If the licensee i.e. SVO wished to terminate/surrender the contract, the security amount would get forfeited and any amount paid as advance license fee was also not to be refunded. Late payments were to attract interest @ 24% per annum. The licence was for five years.

4. SVO was unable to comply with the license terms as far as setting up of the pre-fabricated panels. On 25th June, 2008 SVO entered into an Exclusive Marketing Services Agreement (EMSA) with Times in terms of which Times was given the right to market and procure advertisements on the advertising spaces and also collect the revenue generated by the same.

Times made a security deposit of Rs.5,51,65,837/- with SVO pursuant to the above EMSA and in terms of a 'Side Letter' also dated 25th June 2008 which was duly executed by the parties. There was a minimum guarantee amount that was required to be paid by Times to SVO. One of the clauses was that in the event that the LA between DMRC and SVO was terminated for reasons 'solely attributable' to Times, the security deposit made by Times with SVO under the EMSA would stand forfeited.

5. SVO's case was that there were defaults by Times of its obligations under the EMSA read with the Side Letter. Therefore, SVO invoked the arbitration clause in the EMSA stating that in view of the defaults of Times, the LA between the DMRC and SVO came to be terminated. SVO filed a claim petition before the Tribunal and raised several claims. What is relevant as far as the present appeal is concerned, is claim M which related to forfeiture of the security deposit. The said Claim M by SVO read as under:

> "Claim M. FORFEITURE OF SECURITY DEPOSIT - Rs.5,59,54,746/- The Respondent had deposited this amount as security deposit for due discharge of its obligations under the EMS. In view of the failure of the Respondent to discharge its obligations under the EMS the Claimant is entitled to forfeit the same. In this regard it is relevant to state that the Claimant's security deposit with the DMRC was forfeited pursuant to the termination of the License Agreement by DMRC. This termination and forfeiture occurred due to defaults of the Respondent and the Claimant is therefore entitled to forfeit the same in turn from the Respondent."

6. From a reading of the above claim, it is clear that even at that time SVO projected its case for forfeiture of the security deposit on the basis that its

security deposit with DMRC pursuant to the LA had also been forfeited by the DMRC and that both the LA and the EMSA were in the nature of 'back to back agreements'. The quantification of the forfeiture amount in the above terms was as a result of the SVO accounting for the increase in the security deposit corresponding to the increase in the license fee by 5% for every completed year of the LA.

7. It appears that there were parallel arbitration proceedings i.e. one between SVO and the present Appellant and another between SVO and the DMRC. The Tribunal which gave the impugned Award dated 24th July, 2014 acknowledged this fact in para 71 of the Award as under:

> "71. The difficulty in making an accurate assessment of the Claimant's liability under the License Agreement arises from the fact that DMRC is not a party to the present proceedings. Though DMRC had raised demands against the Claimant towards non payment of license fee as well as interest and TDS amounts, the Claimant has seriously contested those claims and we understand that there is a pending arbitration proceeding between the Claimant and DMRC with regard to the said disputes."

8. However, by the time the impugned Award was pronounced by the Tribunal, the Award in the arbitral proceedings between the DMRC and SVO was not passed. That Award came to be pronounced subsequently on 25th May, 2018.

9. As far as the impugned Award dated 24th July, 2014 is concerned, the conclusion of the majority of the Tribunal on Claim M of SVO were as under:

> "However, taking into account the overall facts and circumstances, we hold that the Respondent would be entitled to be refunded only Rs. 2,00,00,000/- out of the security deposit made in terms of the EMS Agreement. Although this refund is not in terms of Clause 6.2 of the EMS Agreement, and hence the rate of interest prescribed and is not attracted, yet we consider it appropriate to grant the same rate of interest, i.e. at the rate of 24% per annum which we have allowed in favour of the Claimant in respect of amounts which were admittedly due, but not paid by the Respondent."

10. The Award of the majority of the three member Tribunal came to the conclusion that both parties had contributed to the default in performing their respective obligations. It was found that while Times had breached the terms of the EMSA repeatedly without justification, which led to SVO's default in performing its obligations under the LA, SVO "also defaulted the performance of its obligations under the license agreement and in any event failed to mitigate by utilising the sum which remained under its control, being the unutilised amount of security deposit" furnished by Times.

11. As a result, while deciding Claim M, the majority Award taking into account the "overall facts and circumstances" held that Times would be entitled to a refund of Rs. 2 crores out of the security deposit made by it under the EMS Agreement and that the remaining amount would be entitled to be retained by SVO. The majority award also granted Times interest @24% amount on the said sum of Rs. 2 crores which was to be refunded by SVO to Times.

12. One of the members of the Tribunal dissented on this particular aspect.

He was of the view that Times would be entitled to refund of half of the security deposit made by it with SVO and quantified this as Rs.2,75,82,918/-.

13. Times challenged the impugned Award before the learned Single Judge under Section 34 of the Act by filing OMP (Comm) 81/2017. While at the time of filing of the petition, the Award in the arbitration between SVO and the DMRC had not yet been pronounced, by the time the petition was finally heard on 5th February, 2019 that Award had been passed (as noticed hereinbefore, on 25th May, 2018). The learned Single Judge has in para 29 of the impugned order noted that "arbitration proceedings have been commenced between the SVO and DMRC" but not the fact that there was in fact an Award in the said proceedings in favour of SVO. The admitted position on both sides is that in terms of the said Award dated 25th May, 2018 DMRC had to refund to SVO the entire amount of security deposit placed by SVO with the DMRC under the LA. This was on the basis that DMRC had in fact suffered no loss as a result of the termination of the LA. The further admitted fact on both sides is that DMRC has accepted the said arbitral Award and has in fact refunded the said security deposit amount to SVO.

14. The learned Single Judge, despite being made aware of the above Award in the arbitral proceedings between the SVO and the DMRC, failed to take note of the above facts in the analysis and discussion of the issues arising out of the impugned Award in the present matter. It is also clear from para 29 that the learned Single Judge was of the view that the issues in the

present arbitration had to be decided "irrespective of the outcome of the arbitration proceeding with the DMRC".

15. As has already noticed hereinbefore, Claim M by SVO against Times was exclusive to the issue of forfeiture of the security deposit placed by Times with SVO under the EMSA. Claim M was raised by SVO on the basis that the LA and the EMSA were in the nature of 'back to back' agreements. The question whether SVO would be entitled to forfeit the entire security deposit placed by Times with SVO would certainly be impacted by any corresponding finding in the arbitral proceedings between the DMRC and SVO qua the security amount placed by SVO with the DMRC which was sought to be forfeited by DMRC. Therefore, the issue arising out of Claim M could not have been decided "irrespective of the outcome of the arbitration proceedings with DMRC". This is particularly because the Tribunal in the impugned Award has itself noted the fact that there was a pending arbitral proceeding ongoing between DMRC and SVO. By the time the learned Single Judge decided the challenge to the said Award the Tribunal dealing with the arbitration between the DMRC and SVO had pronounced its Award in favour of SVO on that particular issue.

16. Interestingly in para 30 of the impugned judgment, the learned Single Judge notes that the Tribunal's findings in the impugned Award have to be read "*in toto*" and that the default by Times which led to default by SVO of its obligations under the LA was a 'back to back default, and hence contributory'. What was perhaps overlooked was that the Award in the arbitral proceedings between DMRC and SVO did have a bearing on the

finding by the Tribunal in the impugned Award concerning the default of both parties and the justification for Claim M by SVO.

17. Consequently, the Court is of the view that the impugned order which overlooks the important development of there being an Award dated 25th May 2018 in the arbitral proceedings between SVO and DMRC and particularly on the issue of forfeiture of security deposit, and to the extent that it proceeds to decide the issue irrespective of that development, cannot be sustained in law. The Court is of the view that the petition filed by Times under Section 34 of the Act requires to be adjudicated afresh by the learned Single Judge taking into account the Award passed by the arbitral Tribunal in the arbitration between DMRC and SVO which as noticed above has been accepted by DMRC and the security deposit forfeited by DMRC has been refunded by it to SVO.

18. In that view of the matter, the impugned order dated 15th March 2019 of the learned Single Judge is hereby set aside and OMP (Comm) 81/2017 is restored to the file of the learned Single Judge for a decision afresh on merits taking into account the above Award dated 25th May, 2018 passed by the Tribunal in the arbitration between SVO and DMRC. The appeal is accordingly allowed. The pending applications are disposed of.

S. MURALIDHAR, J.

TALWANT SINGH, J.

JULY 4, 2019/mw