IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 07.04.2021

+ **O.M.P. (COMM) 473/2018**

ASHIMA INFRASTRUCTURE PVT. LTD. ..... Petitioner

versus

PARSVNATH DEVELOPERS LTD. ..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Vatsal Kumar and Ms. Amita Saraswat, Advocates.

For the Respondent: Mr. Vineet Sinha and Mr. Manmeet Singh Nagpal, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereinafter 'AIPL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act'), *inter alia*, impugning the Arbitral Award dated 06.07.2018 (hereinafter the 'impugned award') passed by the Arbitral Tribunal comprising of a learned Sole Arbitrator.

2. The impugned award has been rendered in the context of disputes that have arisen between the parties in relation to a Sub-License Agreement dated 01.10.2009.

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3. By the impugned award, the Arbitral Tribunal has partly accepted the claims preferred by the respondent. The Arbitral Tribunal has accepted that the total amount payable to the respondent in respect of its claim is ₹2,25,66,369/-. The Tribunal further allowed interest at the rate of 18% per annum on the said amount as pendente lite and future interest. The Tribunal also awarded costs quantified at ₹2 lacs to the respondent.

4. AIPL assails the impugned award to the extent as noted hereafter, as being patently illegal and contrary to the fundamental policy of Indian law.

5. Briefly stated, the relevant facts that are necessary to address the controversy are as under: -

6. On 26.02.2005, the respondent (hereinafter 'PDL') entered into a Concession Agreement dated 26.02.2005 with the Delhi Metro Railway Corporation (hereinafter 'DMRC'). In terms of the said Concession Agreement, DMRC had allotted the area of Seelampur Plaza comprising of the built-up area at the ground floor and in the subways, under the station box at Seelampur Metro Rail Station, on license for a period of twelve years expiring on 14.03.2017 for developing the said Shopping Station Box/Complex.

7. In terms of the said Concession Agreement, PDL completed the construction of the Shopping Complex and was named as 'Parsvnath Metro Mall'. Further, PDL was entitled to sub-license the areas within

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the said Station Box for the uses/purposes and timeline, as specified in the Concession Agreement.

8. Thereafter, on 1.10.2009, PDL entered into a Sub-License Agreement with AIPL in respect of "*Station Box (Right Wing) admeasuring in aggregate measuring 16,394 Sq. Ft. Super Area (13,115 Sq. Ft. covered area comprising of Ground Floor 8, 740 Sq. Ft. and Mezzanine Floor 4,375 Sq. Ft.) on the Ground and Mezzanine Floor of the Complex, from the Concessionaire for a period/term of 9 years (3 + 3 + 3) (the Term) commencing from the date 2nd Day of Offer of Possession of the Demised Premises or the date of taking over the possession by the Sub Licencee whichever is earlier (the Sub Licencee Commencement Date), which shall not be extended beyond the Concession Period terminating on 14th March, 2017.*" The use of the aforesaid premises was stipulated to be in accordance with the Concession Agreement dated 26.02.2005 signed between PDL and DMRC.

9. AIPL had sub-licensed the said area for running, setting up and operating a celebration/party hall under the name of "*Metro Shehnai*". PDL sub-licensed the aforementioned space to AIPL for a monthly Sub-License Fee of ₹4,00,000/- for the first three years of the term from the date of commencement of the Sub-License Agreement. The said Fee would be increased by 15% after the expiry of every three years of the term. In addition to the said Fee, AIPL was also obligated

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to pay electricity, water and other charges on actual basis directly to PDL or the maintenance agency as appointed by PDL.

10. In order to run the premises as a celebration/party/banquet hall, certain licenses were required to be procured from the Fire Department as well as the Municipal Corporation of Delhi (MCD).

11. On 01.09.2010, MCD informed AIPL of its decision of rejecting AIPL's application and closing its file as the "*Sub License Agreement between M/s Parasvnath Developers Ltd. and M/s Ashima, Securities on 1.10.10 is for running retail outlets not for Banquet Hall*"

12. On 09.02.2011, AIPL vide an email informed PDL that the work regarding obtaining the fire safety certificate was in progress. They also requested PDL to send a representative to connect the fire alarm to the water pipes in their Banquet Hall, in order to obtain the fire safety certificate expeditiously.

13. On 09.09.2011, MCD informed AIPL of its decision to reject the application and close its file as "*The trade of Banquet Hall do not covered under the lease deed agreement*"

14. On 14.09.2011, the Delhi Fire Services (DFS) vide a letter informed AIPL that the Banquet Hall in Seelampur Metro Station is a new occupancy and the fire safety guidelines need to be revised, for such new occupancy, in accordance with the National Building Code-

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Part IV. DFS requested AIPL to forward the plans of the Banquet Hall for issuance of fire safety guidelines.

15. On 19.12.2011, AIPL vide a letter requested PDL to provide certain documents in order to get a Municipal Health Trade License.

16. On 19.12.2011, MCD informed AIPL to provide certain documents in order to obtain the Health Trade License. The MCD also informed them that a failure to submit the documents within seven days would mean that its request for reopening of its rejected case in respect of obtaining the Health Trade License would be treated as cancelled.

17. On 01.02.2012, AIPL vide an email requested PDL to forward the plans of the Banquet Hall to DFS for issuance of fire safety guidelines. It requested PDL to provide them with a copy of the same to process the fire safety certificate.

18. On 03.02.2012, MCD informed AIPL of its decision to reject its application and close its file due to "*Non submission of process fee of Rs. 230 and required documents*".

19. On 05.03.2012, MCD informed AIPL about the shortage of documents in its application to obtain a Health Trade License.

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20. On 02.04.2012, MCD informed AIPL its decision of rejecting its application and closing its file due to "*Non submission of documents*".

21. On 09.04.2012, DMRC vide a letter terminated the Concession Agreement with PDL. DMRC referred to its letters dated 17.02.2011, 15.03.2011, 04.04.2011, 09.12.2011 and reiterated that the operation of a Banquet Hall was not permissible as per Clause no. 4.3.2 of the Concession Agreement and advised PDL to stop the operation of the Banquet Hall with immediate effect and submit its compliance to the office of the Chief Engineer. Further, DMRC stated that due to repeated failures on PDL's part to comply with the instructions issued by it, the same was reviewed seriously and treated as "Concessionaire Event of Default". In furtherance of the same, DMRC issued the said letter as a thirty day "Termination Notice" in accordance with the terms of Clause 10.2 of the Concession Agreement. The said letter stated that in the event of non-compliance and on expiry of the said thirty days from the issue of the letter, that is 08.05.2012, the Concession Agreement would stand automatically terminated and action shall be taken including the encashment of the Bank Guarantee.

22. Thereafter, on 23.04.2012 (incorrectly mentioned as 23.04.2011), PDL vide a letter requested AIPL to refrain from using the premises as a Banquet Hall till the time the issue raised by DMRC had been adjudicated by arbitration. The said letter also recorded that the premises can be put to alternative uses.

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23. Thereafter, on 17.05.2012, AIPL responded to the aforesaid letter. It stated that the said premises were not being used as a Banquet Hall but rather as a Celebration Party Hall and there had been no breach on their part in terms of the Sub-License Agreement signed by them. They further informed PDL that they had never received a copy of the Concession Agreement dated 26.02.2005, as signed by DMRC and PDL and, requested PDL to provide the same within three days of the receipt of the said letter. They had further stated that they had invested a huge amount of money to operate their business at the said premises and were recurring an encashment of ₹15 lacs on a monthly basis.

24. Thereafter, on 28.05.2012 (incorrectly mentioned as 28.05.2011), PDL responded to the aforesaid letter. It stated that a copy of the Concession Agreement dated 26.02.1005 had been provided to AIPL and further, the same was also annexed to and formed a part of the Sub License Agreement between them. The said letter also recorded that neither the issue of non-receipt of a copy of the Concession Agreement had been raised till date nor AIPL sought a copy from them. PDL further requested AIPL, in the interest to safeguard the position of all the parties involved, to refrain from using the premises as a Banquet Hall, till the time the issues had been adjudicated between DMRC and PDL and alternatively, use the premises for other purposes.

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25. Thereafter, on 05.06.2012, AIPL responded to the aforesaid letter. PDL responded vide a letter dated 08.06.2012, denying AIPL's averment that they were not in breach of the Sub-License Agreement. PDL further informed AIPL of the arrears payable by them in respect of the Sub-License Fee, service tax, and electricity charges and requested AIPL to clear the outstanding dues within thirty days of receipt of this notice. PDL, once again, requested AIPL to refrain using the premises as a Banquet Hall, till the time the issues had been adjudicated between DMRC and PDL. The outstanding payments recorded in the letter are reproduced below:

Particulars	Period	Amount
Sub License Fee	February, 2012 to May, 2012	₹16,00,000
Service Tax	September, 2011 to May, 2012	₹3,84,880
Electricity Bill	July, 2009 to March, 2012.	₹31,22,039
Total		₹51,06,919

26. On 12.06.2012, AIPL vide an e-mail informed PDL that the matter of remission in the rent was pending and yet, the two cheques amounting to ₹50,00,000 and ₹36,11,855 respectively were presented by them to the bank for clearance. The said letter recorded that AIPL

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had issued the two said cheques after clearing the dues and PDL was supposed to present the two said cheques to the bank only after the matter of remission had been decided. Further, the two said cheques were not towards the final amount and the final amount was to be decided after resolving the pending issues. AIPL, thus, requested PDL to decide the matter of remission expeditiously.

27. By a letter dated 04.01.2013, AIPL informed PDL about their responsibility in getting the approval from DMRC for using the said premises for any purpose. AIPL stated that it had spent a large sum of money in making the premises a Party Hall in accordance with the terms of the Sub License Agreement and requested PDL to get the approval and permission from DMRC, as per terms of their agreement.

28. On 16.07.2013, AIPL vide an e-mail informed PDL that the fire-fighting system of the Banquet Hall was not working properly. In the said e-mail, it was recorded that the matter was brought to the attention of the Station In-charge of Parsvnath Developers Ltd. and he had told them that the motor of the said premises is not working, as result of which, there was no water supply in the fire-fighting system. The said motor had not been repaired for over two months. They requested PDL to repair the motor at the earliest.

29. On 27.09.2013, DFS vide a letter requested AIPL to submit the approved plan of the Banquet Hall for issuance of fire safety guidelines. The said letter also recorded that despite various efforts by DFS, AIPL had failed to submit the said plans.

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30. On 18.11.2013, MCD informed AIPL that a prosecution had been launched against their Banquet Hall for operating without a Health Trade License and directed AIPL to apply for the same, failing which the said Hall would be closed down.

31. Various disputes arose between the parties regarding the delayed payment of Sub-License Fee, service tax, electricity charges and other charges. Vide letters and emails dated 23.05.2013, 06.08.2013, 22.08.2013, 06.09.2013, 12.11.2013, 23.12.2013, 10.01.2014, 17.02.2014, 10.03.2014, 19.03.2014, 22.03.2014, 20.06.2014, 20.12.2014, 24.02.2015 and 31.03.2015, PDL called upon AIPL to make the outstanding payments. AIPL had responded to some of the aforesaid letters. In a letter dated 06.01.2015, AIPL enclosed two cheques (i) Cheque bearing no 319870 for ₹10,00,000 (ii) Cheque bearing no 319871 for ₹8,96,412 for settling and clearing the entire payment of electricity charges for the premises for the period 1.07.2009 to 31.10.2014.

32. On 17.01.2014, MCD informed AIPL of its decision to reject their application and closing its file due to "*Non submission of documents*".

33. On 04.02.2014, DMRC vide a letter informed PDL that it had never accorded approval to run the premises as a Banquet Hall and the same was contrary to the provisions of their Agreement. The said letter stated that DMRC had failed to understand how AIPL had applied for using the premises as "*Swimming Pool in Banquet Hall*",

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whereas permission had not been granted to use the said premises as a Banquet Hall in the first place. Further, from the documents, it appeared that PDL/AIPL had not obtained any permission from the local administration to run the premises as a Banquet Hall and was being used in an unauthorized manner over the years.

34. On 05.02.2014, the Office of the Joint Commissioner of Police: Licensing, informed AIPL that the pending documents in respect of issuance of an Eating House License had not been submitted and requested AIPL to submit certain documents contained in the letter and its application in person in E-SLA to proceed further.

35. Thereafter, on 20.02.2014, AIPL vide a letter requested PDL to issue the said documents asked by the Office of the Joint Commissioner of Police: Licensing along with the Fire NOC on a priority basis.

36. On 12.03.2014, MCD issued a closure notice under Section 423 of the Delhi Municipal Corporation Act, 1957 (DMC Act) and in accordance with the powers delegated under Section 491 of the DMC Act, called upon AIPL to close down the trade activities within three days of receipt of the said notice.

37. On 23.06.2014, AIPL reminded PDL to submit the aforesaid documents along with fire NOC in an expedient manner in order for them to obtain the license from the Office of the Joint Commissioner of Police: Licensing.

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38. On 05.08.2014, PDL vide an email requested AIPL to pay the rent.

39. On 09.08.2014, AIPL vide an email responded to the aforesaid email sent by PDL and requested it to submit the documents required by the Health Officer, East Delhi Municipal Corporation (EDMC) to get the requisite license. The said email recorded that AIPL would pay the rent and other charges within a month of receiving the pending documents from PDL. Further, the matter of pending electricity payments was also referred to in the said email.

40. A meeting was held between AIPL and PDL on 03.02.2015. The Minutes of the Meeting for the aforesaid recorded that the representative of AIPL agreed to make the pending payment of ₹11,97,562 for electricity charges, thereby withdrawing their letter dated 06.01.2015 and ₹67,63,552 as rental charges before 06.02.2015.

41. On 10.03.2015, AIPL vide an email brought DMRC's letter dated 22.01.2015 to PDL's attention. The said letter stated that DFS had not issued the fire safety certificate for the Banquet Hall in absence of approved plans and DFS was not the licensing authority in the said matter. In this regard, AIPL requested PDL to sort out the matter and, provide them with the approved plans and fire safety certificate of the premises in order to get approval from EDMC to run the premises.

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42. Thereafter, on 12.06.2015, PDL vide a legal notice informed AIPL about its failure to adhere to the terms and conditions as set out in the Sub License Agreement. The said letter recorded that as per the records maintained by PDL, as on 11.06.2015, AIPL was in arrears amounting to ₹1,38,60,096, details of which are below: -

Particulars	Period	Amount
Sub License Fee	Part October, 2009 and December, 2013 to June, 2015	₹88,90,000/-
Service Tax	January,2013 to July, 2013 and December 2013 to June, 2015	₹15,23,248/-
Electricity Bill	July, 2009 to March, 2015.	₹34,46,848/-
Total		₹1,38,60,096/-

It further requested AIPL to pay the outstanding dues amounting to ₹1,38,60,096 in respect of outstanding license fee, service tax, electricity charges along with interest at the rate of 18% per annum within a period of thirty days from the receipt of the said notice, failing which PDL would be entitled to terminate the Sub-License Agreement.

43. Thereafter, on 15.07.2015, AIPL responded to the aforesaid notice. It stated that due to the failure on PDL's part to submit the requisite documents in order to get a Health Trade License from EDMC, it had suffered a huge financial loss in operating the premises.

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Further, the said letter recorded that AIPL had applied for issuance of Fire Safety Certificate to the Delhi Fire Service Department, however, the same was rejected on the ground that DMRC was the authority to issue the requisite certificate. In pursuant to the same, AIPL had requested PDL to take up the matter with DMRC, but the same had not been done. Further, with regard to the electricity bills, there had been a discrepancy in the meter reading and the consumption, yet two cheques had been submitted by AIPL to clear the outstanding electricity payments.

44. AIPL further stated that it was justified in withholding the outstanding payments and PDL's demand of ₹1,38,60,096 as mentioned in their letter dated 12.06.2015, had been denied. AIPL further stated that since the disputes and differences had not been solved between the parties, it was constrained to invoke Clause 33 of the Sub-License Agreement and requested PDL to appoint an Arbitrator to adjudicate the issues.

45. On 12.08.2015, PDL responded to the aforesaid letter and denied all allegations levelled against them. However, the said letter recorded that since AIPL had invoked Clause 33 of the Sub License Agreement, PDL appointed Justice K.S. Gupta, a former Judge of this Court, to act as the Sole Arbitrator. Thereafter, AIPL filed a petition under Section 11(5) of the A&C Act, and this Court vide an order dated 01.04.2016 referred the said matter to the Delhi International Arbitration Centre (DIAC).

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46. Thereafter, AIPL handed over the possession of the vacant premises to PDL on 01.05.2016, however, it had failed to pay the outstanding dues and as a result of which, PDL adjusted the outstanding electricity charges with the security deposit.

47. The Claims made by PDL in the Statement of Claims before the learned Arbitrator are summarized below: -

Claim No. 1	Prayer for directions to the Respondents to pay to the Claimant outstanding of Sub-Licence Fee amounting to Rs.1,25,90,700 along with outstanding. Service Tax amounting to Rs.22,55,637 along with an interest thereon @ 18% p.a. i.e. from the date of accrual and till 30th April 2016 amounting to Rs.32,96,063/-
Claim No.2	Prayer for directions to the Respondents to pay to the Claimant outstanding of electricity charges amounting to Rs. 34,46,848/- along with interest thereon @ 18% PA i.e. from the date of accrual and till 30th April, 2016 amounting to Rs. 21,76,121/-
Claim No. 3	Pass an order directing the Respondent to handover TDS Certificate for the financial year 2015-16 ;
Claim No. 4	Claim for pre-suit, pendente lite and future interest @ 18% p.a.
Claim No. 5	Claim for costs (as per actuals)

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48. The counter claims made by AIPL, in their reply to the Statement of Claims filed by PDL, are summarized below: -

Counter Claim No.1	Amount of Rs.12,45,579/- in terms of Annexure R-1
Counter Claim No.2	Amount of Rs.15,00,000/- towards the damages as explained in paragraph 15 of the counter claim
Counter Claim No.3	Amount of Rs.12,001000/- towards refund of interest fee security deposit.
Counter Claim No.4	Amount of Rs.50,00,000/- towards costs of fixtures and fittings as detailed in paragraph 17 of the counter claim.
Counter Claim No.5	Counter claim for interest at the rate of 18% per annum on the recoverable amount, that is, on Rs. 89,45,579/-

49. Thereafter, PDL filed its rejoinder-cum-reply to the counter claims filed by AIPL on 02.12.2016, which reinforced their earlier stance and denied the liability to pay counter claims to AIPL.

50. On 03.12.2016, the Tribunal framed the issues for reference, which are stated as under: -

> i. Whether the claim has been signed, verified and filed by a competent person? OPP
>
> ii. Whether the Claimants are entitled to sub-license fee and other charges as claimed in Para 7 of the claim? OPP

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iii. Whether the Claimants are entitled to interest? If so, at what rate? OPP'

iv. Whether the Claimants are entitled to TDS certificate? OPP

v. Whether the Respondents are entitled to suspension of part of license fee? If so, how much? OPR

vi. Whether the Respondents have fixed equipment, assets, machinery, fitting and fixtures? If so of what value? OPR

vii. Whether the Respondents left the above equipment etc. in the premises at the time of vacation? OPR

viii. Whether the Claimants had assured the Respondents to compensate for the above equipment etc.? If so, how much Respondents are entitled to on the said account? OPR

ix. Whether the Claimants are liable to pay a sum as mentioned in Para 16 of counter-claim? OPR

x. Whether the Claimants are liable to refund the security amount? OPR

xi. Whether the Respondents are entitled to interest? If so at what rate? OPR

xii. Whether the Respondents are entitled to damages as mentioned in Para 17 of counter claim? OPR

xiii. Relief.

51. The Tribunal had observed that PDL had demanded the Sub-License Fee, service tax and electricity charges amounting to ₹1,82,93,185/- from the month of July, 2009 till 30.04.2016 in their Statement of Claims. An amount of ₹12,00,000 had been adjusted as

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security deposit from the aforesaid amount and thus, the claim of PDL stood at ₹1,70,93,185. The Tribunal had further examined that AIPL had defaulted in payment of the Sub-License Fees from the month of October 2009, that is, from the inception of the Agreement.

52. The Tribunal observed that AIPL's contention that loss of business had been caused to them is, wholly, unmerited. AIPL had failed to justify their claim of loss of business due to non-performance of contractual obligations on PDL's part. The Tribunal referred to Clause 28.5(vii) of the Sub License Agreement, wherein it is stated that the "*Licencee shall neither be liable/responsible for any failure of the business of the Sub-licencee in the Said premises, nor be liable/responsible for any inter-se dispute between/amongst the Sub-Licensees.*"

53. The Tribunal referred to Clause 2.2 of the Sub License Agreement to adjudicate the dispute on providing the TDS Certificate. The said Clause 2.2 of the Sub-License states that "*The sub-licencee shall furnish the certificates, evidencing deposit of the amount of tax with the appropriate authority of income tax, to the concessionaire annually*" and the Tribunal held that PDL was entitled to the TDS Certificate by AIPL.

54. The Tribunal also held that there was no merit in AIPL's contention regarding the dispute of pending electricity payments. PDL had claimed a sum of ₹34,36,848 as pending electricity charges. AIPL contended that it had issued two cheques with its letter dated

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06.01.2015, for fulfilling its obligations towards the said pendency. PDL had contended that the issued cheques were not sufficient to clear the entire payment and a meeting had been conducted on 03.02.2015 between PDL and AIPL to discuss the said issue. The Tribunal referred to the Minutes of Meeting dated 03.02.2015, wherein the representative of AIPL had agreed to withdraw its letter dated 06.01.2015 and pay the outstanding dues on electricity and outstanding monthly rental before 06.02.2015. And since AIPL agreed to pay the outstanding dues in the said meeting, the Tribunal held that there was no merit in the assertion of AIPL that there not liable to pay the electricity charges.

55. Further, the Tribunal referred to Clause 6.3 of the Sub-License Agreement, wherein it is stated that "*The Concessionaire shall also be liable to pay interest @ 18% per annum to Sub licensee on the amount due and outstanding from the date it is due*" and held that AIPL was liable to discharge the entire electricity payment along with interest at the rate of 18% per annum.

56. With respect to AIPL's contention regarding PDL's failure to provide the necessary documents in order to obtain licenses from relevant authorities (Municipal Health Trade License from EDMC and Fire Safety Service License from Delhi Fire Services), the Tribunal referred to Clause 5.1 and 5.2 of the Sub-License Agreement. The said Clauses are reproduced as under: -

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> "5.1 A period of 90 days (ninety) has been allowed from the date of handing over possession for carrying out fit outs by the sublicencee. No sub-licence fee shall be payable for said period allowed for fit outs.
>
> 5.2 The Licencee, upon execution of an Indemnity Bond by the Sub-Licencee would permit the Sub-Licencee to carry out the fit outs/ interior works in the Said Premises. The Sub-Licencee hereby confirms that it shall carry out, implement and execute all interior works/ designs of the Said Premises in compliance/ adherence with the layouts/ plans approved/ guidelines issued by the licencee from time to time in this regard. The Sub-Licencee further confirms that it shall obtain all pre-requisite sanctions, approvals, licences from all the Statutory/ Competent Authorities which may be necessary for carrying out fit outs and start-up/ commencement of its business in the Said Premises."

The Tribunal held that the aforesaid clauses, as contained in the Sub-License Agreement, clearly indicate that AIPL had to comply with all the statutory compliances in the fit-out period, that is, within ninety days of delivery of possession. The Tribunal observed that the documents filed by AIPL demonstrated that applications to the concerned authorities for grant of statutory approvals had been made after a period of two years from the date of signing of the agreement. The Tribunal further referred to Clauses 8 (i), (ii) and, 9(ii), (iii), (iv), (v), (vii), (ix) and (x) of the Sub-License Agreement, which stipulate that the responsibility to obtain the requisite licenses and statutory permissions clearly lied with the Sub-Licensee, that is, AIPL. The Tribunal also opined that AIPL had adopted a "*very casual and indifferent approach*". The Tribunal had observed that AIPL's burden

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for the aforesaid aspect was not discharged by writing some vague and casual emails dated 09.02.2011, 12.09.2011 and 04.01.2013 to PDL for approval for various licenses, as getting the requisite clearances and licenses was entirely the duty of AIPL. Therefore, the Tribunal had held that the aforesaid clauses of the Sub License Agreement clearly stipulated that it would be AIPL's responsibility to take approvals from the concerned authorities and also be liable to pay the Sub-License Fee, service tax and electricity payments. The Tribunal had also held that "*Looking from another angle, the Respondent sub-lessees completely shattered the concept of mutuality when they unilaterally stopped paying the undisputed and clearly quantified monthly lease consideration, putting the Claimants in seriously jeopardised position*."

57. Further, to discuss the aspect of loss of business as contended by AIPL, the Tribunal referred to a letter dated 09.04.2012 issued by DMRC to PDL. The said letter recorded that the operation of the Banquet Hall was not permissible in accordance with Clause No. 4.3.2. of the Concession Agreement and the said letter was to be treated as thirty days 'Termination Notice', in terms of Clause 10.2 of the Concession Agreement. The Tribunal observed that in spite of the said notice, AIPL continued their business as usual and had only paid a part of the lease amount till December, 2013. Further, the Tribunal also relied on an email dated 17.02.2014 from PDL to AIPL, wherein it was recorded that PDL had requested AIPL to produce necessary licenses for running the Banquet Hall and in the absence of which,

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DMRC would take necessary action which may cause termination and closure of the leased premises. The Tribunal had observed that the aforesaid letter issued by DMRC and the email sent by PDL clearly reflected that AIPL had without authorization operated the Banquet Hall without any requisite approvals from the concerned authorities. Further, the Tribunal also opined that AIPL had been at fault for setting up new activities like s swimming pool, which were not permitted as per the Agreement and even though PDL had not sent the relevant documents for taking licenses and approvals from the concerned authorities, the fault clearly lied with AIPL for "*its causal and indifferent approach for obtaining the requisite clearances*". The Tribunal referred to an email dated 17.02.2014 from PDL to AIPL which recorded that "*you are sending only receipt of application which is for 'swimming pool in banquet hall' for Seelampur and for Kashmere Gate, you have permission for eating house not for banquet hall which is expired*".

58. The Tribunal referred to Section 73 of the Indian Contract Act, 1872 and held that AIPL had failed to establish that the alleged fall in income had arose due to the conduct of PDL and the loss in income to seek compensation from PDL was not remote or indirect. Further, the Tribunal opined that AIPL ought to have produced their account books for the specific period and essential documents to show the decrease in bookings or foot fall, however, nothing had been produced by AIPL. AIPL was also required to distinctly establish within the provisions of the Sub-License Agreement, the obligation cast upon PDL to perform,

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their fault and how such alleged default and consequent loss of income was attributable to PDL.

59. The Tribunal also observed that AIPL had failed to explain why the statutory obligations had not been discharged by them during the fit-out period of three months, even more so when as a concession, the lease amount was not payable during that period. Further, no help had been asked from PDL to discharge the said obligations. Thus, the Tribunal had concluded its findings and held that AIPL had failed to provide any evidence for the alleged loss of business after the issuance of the public notice by DMRC and therefore, they were not entitled to any suspension with regard to the license fee.

60. With respect to the issue of the furniture and fixtures left at the premises and subsequent claims thereof, the Tribunal had referred to Clause 10.5 of the Sub-License Agreement. The said Sub-clause contained that the sub licensee (AIPL) would have the right to take away its movable assets from the said premises before handing over possession of the premises. And thus, the Tribunal held that AIPL was not entitled to claim the monetary value of the movable property left at the premises.

61. With respect to the issue of refund of security deposit, the Tribunal referred to Clause 6 of the Sub-License Agreement. The said Clause states that "*The said security deposit shall be adjustable against amounts due from the Sub-Licencee to the Concessionaire on account of any undisputed amount of arrears of Sub-Licence fee,*

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water bills, electricity bills, CAM charges etc. then remaining due to the Concessionaire". The Tribunal also referred to Clause 27.1 of the Sub-License Agreement, wherein it is stated that the sub-licensee (AIPL) would waive, abandon, its right for refund of interest free security deposit.

62. On 06.07.2018, the Arbitral Tribunal rendered the impugned award and decided issue nos. 2-11 in favour of PDL and against AIPL. Accordingly, the Tribunal awarded a sum of ₹2,25,66,369/- to PDL, in respect of its claims. The Tribunal further allowed interest at the rate of 18% per annum on the said amount as pendente lite and future interest. The Tribunal also awarded costs quantified at ₹2 lacs to PDL.

63. Aggrieved by the impugned award, AIPL has filed the present petition.

Submissions

64. Mr. Kumar, learned counsel appearing for AIPL has assailed the impugned award on, essentially, four grounds. Firstly, he submitted that the Arbitral Tribunal had ignored the provisions of the Agreement between the parties, which allowed AIPL to a rent free fit-out period of ninety days. He submitted that the learned Tribunal had computed the rent payable to PDL from October, 2009 onwards without considering Clause 5.1 of the Sub-License Agreement, which expressly provided that "*no Sub-Licence fee shall be payable for the*

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said period allowed for fit outs". The said Clause entitled AIPL to a period of ninety days for carrying out the necessary fit-outs.

65. Next, he submitted that the security deposit was required to be refunded by PDL at the time of handing over the possession of the premises in question. He submitted that PDL could only adjust 'undisputed' dues from the said amount. He submitted that the Tribunal had misread and misapplied Clause 6.2 of the Sub License Agreement, while discussing the issue of refund of security deposit. He submitted that the said Clause provided for adjustment of security deposit against the amounts due from the Sub-Licensee (AIPL) to the Concessionaire (PDL) on account of 'undisputed' amount of arrears of Sub License Fee, electricity charges etc. and the Tribunal had ignored the fact that the claims of PDL for arrears of the outstanding payments were 'disputed' claims. And since there were no undisputed claims on the date of handing over of possession of the premises, the security deposit was required to be refunded on the said date. He further submitted that the Arbitral Tribunal had awarded interest on the claims allowed in favour of PDL, however, it has not provided any interest due to AIPL.

66. Next, he submitted that with respect to the dispute regarding the payment for furniture, fittings etc., the Tribunal had ignored the existence of an agreement between PDL and AIPL, wherein PDL had agreed to retain the fittings and fixtures and provide financial concession to AIPL for the same. Thus, PDL had effectively agreed to

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not pull out the fixtures and fittings and keep it intact. He submitted that AIPL had provided the list of assets/equipment installed at the premises and claimed ₹50 lakhs on account of the said goods.

67. Lastly, he submitted that the learned Tribunal had erred in awarding PDL it's claim for payment of outstanding electricity charges, without considering the fact that AIPL was granted the Sub-License for only the right wing of the premises, however, the charges related to both the wings of the said premises. He further submitted that the Tribunal had erroneously relied on the Minutes of Meeting dated 03.02.2015, without considering that AIPL had denied the said minutes. The said Minutes recorded that AIPL had agreed to pay the outstanding electricity charges. He submitted that there was no evidence on record to establish that either a meeting had taken place on 03.02.2015 or AIPL had agreed to pay the outstanding charges.

68. Mr. Sinha, learned counsel appearing for PDL, countered the aforesaid submissions. First, he submitted that in regard to the dispute raised with the rent free fit-out period, AIPL was liable to pay the Sub-License Fee with effect from 01.10.2009, as stated under Clause 4.1 of Sub-License Agreement. The free fit out period of ninety days was immediately preceding to the execution of the said Sub-License Agreement dated 01.10.2009. AIPL was given liberty to carry out furnishing work, immediately preceding to ninety days from the date of execution of the said Sub-License Agreement. He referred to a statement dated 10.12.2014, proved by AIPL, during the arbitration

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and the same made it abundantly clear that during the period from 01.07.2009 to 30.09.2009, electricity expenses were charged on actual consumption basis and nothing else was charged for ninety days immediately preceding to 01.10.2009.

69. Next, he submitted that in regard to the dispute of interest on the security deposit and adjustment thereof, the security deposit of ₹12,00,000/- was an interest free deposit and was adjustable against the outstanding Sub-License fee, electricity charges, as per Clause 10.4 of the Sub-License Agreement. And, AIPL vacated the premises on 01.05.2016 and at the time, a sum of ₹1,82,93,185/- was payable by it. The security deposit was adjusted to the aforesaid outstanding amount on 01.05.2016 and thus, AIPL is not eligible for interest.

70. Next, he submitted that in regard to the dispute of electricity charges, the Arbitrator had held in award that AIPL paid a sum of ₹18,96,412/- with a letter dated 06.01.2015. Since the said amount was not sufficient to clear the entire payment, a meeting was convened between AIPL and PDL on 03.02.2015, wherein AIPL undertook to pay the balance amount and therefore, AIPL is bound to pay the entire electricity charges.

71. Next, he submitted that in regard to the dispute of payment for furniture and fittings left over by AIPL at the time of vacation of the demised premises, AIPL had the right to take away all its movables assets before leaving premises, as per Clause 10.5 of Sub-License Agreement and it had failed to remove the same. He submitted that in

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the event the movable assets were left over by AIPL, it was not entitled to claim any monetary value for the alleged assets.

72. Lastly, he submitted that the present petition was barred by limitation. He stated that the petition, though filed within thirty days after the expiry of three months from the date of the award, remained under objections and was re-filed after the expiry of the condonable period of thirty days. He submitted that filing under objections cannot be considered filing within the time frame of one hundred and twenty days. Further, he submitted that the cause of delay has not been satisfactorily explained.

Reasons and Conclusions

73. The first and foremost contention to be considered is whether the Arbitral Tribunal had ignored the covenant of the agreement between the parties, which entitled AIPL to a rent free fit-out period. The learned counsel appearing for AIPL had contended that the Arbitral Tribunal had computed the rent payable to PDL from October, 2009 onwards without considering Clause 5 of the Sub-License Agreement, which entitled AIPL to a period of ninety days for carrying out fit-outs. Clause 5.1 of the said Agreement expressly provided that "*no Sub-Licence fee shall be payable for the said period allowed for fit outs*".

74. The said contention is unmerited. Clause 4 of the Sub-License Agreement expressly provided that the rent would commence from

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01.10.2009. There appears to be no dispute with regard to the fit-out period and the same is clearly an after-thought. The learned counsel appearing for PDL had referred to the submissions filed before the Arbitral Tribunal, which indicated that AIPL had paid electricity charges from August, 2009 onwards. It was contended that this was because AIPL had been granted possession for carrying out fit-outs and no rent had been charged for this period. He had also conceded that there is no material on record to establish that AIPL had not been provided with the rent free fit-out period, as agreed between the parties.

75. The second question to be addressed is whether the impugned award is liable to be set aside on the ground that PDL had not compensated AIPL for the equipment and other materials left at the site.

76. There is no dispute that AIPL had provided the list of assets/equipment installed at the premises. The details of the same were mentioned in the memo executed at the time of AIPL handing over the premises to PDL on 01.05.2016. The Arbitral Tribunal had also noted the details of the said assets. A tabular statement recorded in the memo dated 01.05.2016 is set out below: -

S.No.	Name of Property/equipment/asset
1.	DG Set 125 KVA with Battery
2.	Submersible pump with Panel
3.	Fire Detector with Panel

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4.	Sprinklers
5.	Floor Tiles
6.	False ceilings with fittings with wire but without Choke lamps
7.	Fire Hose Reel-07 NBT 3 nuzzle (already handed over to Mr Tripathi)
8.	Fire Hose Cabinet – 2 Nos.
9.	Electrical Panel-03 Nos.
10	Key of DG set
11.	Key of Glass Door-01 No.

77. AIPL had claimed ₹50 lacs on account of the said goods. However, the Tribunal found that there was no agreement between the parties whereby PDL was obliged to compensate AIPL for the said assets. The Tribunal had noted Clause 10 of the Sub-License Agreement, which entitled the sub-licensee to take away its moveable assets including any equipment, fixtures and fittings from the said premises. Thus, AIPL had a right to take away all its moveable assets and there is no material on record to establish that AIPL was prevented from doing so. In the absence of any material to establish that PDL had agreed to pay for the fixtures or fittings left behind by AIPL, the Arbitral Tribunal's decision to deny AIPL monetary claim for the same, cannot be faulted.

78. The third ground urged on behalf of AIPL is with regard to the electricity charges. It was contended that the Arbitral Tribunal had erred in allowing PDL's claim for electricity charges without considering that AIPL was granted the Sub-License for only a part of

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the premises. He submitted that there was only one electricity meter for both wings and therefore, AIPL could not be compelled to pay electricity charges for both the wings, as the premises sub-licensed to it were only on the right-side wing. He had submitted that the Arbitral Tribunal had relied on the Minutes of the Meeting held on 03.02.2015, whereby it was recorded that AIPL had agreed to pay the balance amount due for electricity charges without, considering that AIPL had denied the said minutes. He submitted that there was no evidence on record to establish that the meeting had taken place on 03.02.2015 or that AIPL had agreed to pay the balance charges.

79. AIPL had paid a sum of ₹18,96,412/- under the cover of its letter dated 06.01.2015 as the amount due by it on account of consumption of electricity. AIPL relied on the said letter to claim that it had discharged its liability on account of electricity dues in full. PDL had produced a copy of the Minutes of the Meeting dated 03.02.2015, wherein it is recorded that AIPL had agreed to pay the balance amount due for electricity charges and withdraw its letter dated 06.01.2015. The Arbitral Tribunal had accepted the same. The contention that the finding of the Arbitral Tribunal is without evidence, is unmerited. PDL's witness (Shri Mayank Jain, CW-1) had affirmed that a meeting was convened on 03.02.2015 at the request of AIPL. At the said meeting, AIPL had agreed to withdraw the letter dated 06.01.2015 and also pay the balance amount against the electricity dues. He had also produced an email dated 04.02.2015 forwarding the minutes of the said meeting to PDL. This Court is not

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required to re-evaluate the evidence in these proceedings. It is apparent that the Arbitral Tribunal had based its decision on relevant material and the evidence on record. Thus, the impugned award cannot be interfered with on this ground.

80. The last question to be examined is whether the Arbitral Tribunal had erred in not awarding any interest on the security deposit furnished by AIPL. Mr. Kumar, contended that the security deposit was required to be refunded by PDL at the time of handing over the possession of the premises in question. He submitted that PDL could only adjust undisputed dues from the said amount. And since there were no undisputed dues on the date of handing over of possession on 01.05.2016 - the security deposit was required to be refunded on that date. He submitted that although the Arbitral Tribunal had awarded interest on the claims allowed in favour of PDL, it has not provided any interest due to AIPL.

81. There is some controversy as to the manner in which the security deposit due to AIPL, had been adjusted. Paragraph 21.2 of the impugned award did indicate that AIPL had been granted credit for the deposit due after providing for interest on the amounts due to PDL. This could mean that the security deposit would be adjusted towards interest that had accrued on the amounts allowed to PDL. The same would be clearly erroneous since it is not disputed that the security deposit was to be refunded to AIPL at the time of handing over of possession of the premises.

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82. Paragraph 21.2 of the Arbitral Award is set out below: -

> "21.2 A sum of Rs.1,25,90,700 on account of sub-licence fee, Rs.22,56,637/- against Service Tax with interest @ 18% PA amounting to Rs.32,96,063/- from the date of accrual till 30th April, 2016 and Electricity Charges of Rs.34,46,848/- with interest @ 18% in i.e. Rs.21,76,121/- total Rs.2,37,66,369/- less Rs.12,00,000/- (deducted from Security Deposit) i.e. **Rs.2,25,66,369/-** along with interest @ 18% pre-arbitration, pendente lite and future."

83. However, the parties had reconciled the calculation and the learned counsel for AIPL had confirmed that the interest of ₹32,96,093/- computed by the Arbitral Tribunal on the sums due to PDL on account of Sub-License Fee and service tax is in accordance with the terms of the Agreement from the date when the amounts became due till 30.04.2016, that is, till the handing over of possession of the premises. Similarly, the interest due on electricity charges computed at ₹21,76,121/- was being computed only till the date of handing over of possession. Thus, the amount of ₹2,37,66,369/- had been found to be the amount due by AIPL to PDL on the date of handing over of possession. The Arbitral Tribunal had adjusted the amount of ₹12,00,000/- being the security deposit refundable to AIPL from the said amount. Thus, it is not disputed that AIPL had got full credit of the security deposit on the date of handing over of possession of the premises. The Arbitral Tribunal has awarded pre-arbitration, *pendente lite* and future interest on the remaining amount, that is, ₹2,25,66,369/- after deducting the security deposit and therefore, the

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question of awarding interest on the security deposit does not arise. As stated above, the same was adjusted as on the date of handing over of possession of the premises in question. This Court must observe that the petition was adjourned to enable the learned counsel for AIPL to verify the same. He had after examining the same conceded that AIPL's claim for interest on security deposit would not survive in view of the above.

84. In view of the above, this Court finds no ground to interfere with the impugned award. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

APRIL 07, 2021
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