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

% *Decided on : 27.05.2022*

\+ **FAO(OS) (COMM) 137/2022**

INDIA TOURISM DEVELOPMENT CORPORATION LIMITED (ITDC) ..... Appellant

Through: Mr. Ravi Sikri, Sr. Advocate with Ms. Shweta Bharti, Mr. Manoj Kumar, Mr. Sukrit R. Kapoor, Mr. Deepank Yadav and Mr. Nitesh Sachdeva, Advocates.

versus

BOUGAINVILLEA MULTIPLEX ENTERTAINMENT CENTRE PVT. LTD. (BMEL) ..... Respondent

Through: Mr. T.K. Ganju, Sr. Advocate with Mr. Prantik Hazarika, Mr. Deepak Chawla and Mr. Aakash Khattar, Advocates.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI
HON'BLE MR. JUSTICE VIKAS MAHAJAN

NAJMI WAZRI, J. (ORAL)

FAO(OS) (COMM) 137/2022, CM APPL. 25520/2022, CM APPL. 25521/2022 & CM APPL. 25522/2022

1. This appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 ('Act') impugns the order dated 01.04.2022 in O.M.P. (COMM.) 402/2018, passed by the learned Single Judge of this court dismissing the appellant's petition under Section 34 of the Arbitration and Conciliation Act, 1996, against an Arbitral Award dated 11.05.2018. Primarily, the ground of challenging the order under Section 34(2-A) of the

Act is "patent illegality" appearing on the face of the Award.

2. The learned Senior Advocate for the appellant submits that the Award is against the public policy; that the respondent had been awarded compensation, which is unjustified and is contrary to the admitted facts; that the responsibility to maintain the structure, in which the licensed premises were housed, lay upon the licensee; that the licensed premises were taken after inspection by the licensee on 'as is where is basis'; the leakage in the roof of the structure was not to be repaired by the licensor; therefore damages, etc, as may have been caused to and claimed by the licensee, was entirely because the licensor failed in duly maintaining the structure or keeping it in good repair.

3. The aforesaid order of the learned Single Judge has dealt with the issue as under:

> *"...*
> ***Reasons & Conclusions***
>
> *25. The disputes between the parties essentially stem from the existence of water leakage from the roof of the Premises licenced by ITDC to BMEL. There is no dispute that in March, 2015, there was an incident of water leakage from the roof of the Premises. BMEL claimed that it had placed buckets at various places inside the Premises to collect the water from the leaking roof so as to protect the equipment, furniture and other fixtures. It was suggested by ITDC that the description was exaggerated; however, there is no serious dispute that there was water leakage in March, 2015. It is also not disputed that there were heavy rains during the period 10.07.2015 to 12.07.2015. BMEL claimed that the roof of*

the premises almost caved in and there was continuous water pouring from the roof. This completely destroyed the equipment as well as the décor of the Premises in question. There is ample material on record to show that water had leaked from the roof damaging the interiors and rendering the Premises unfit for being used for the purpose for which it was licenced. The Arbitral Tribunal had examined the material on record and had found that the assertions made by BMEL in this regard were correct.

26. It is seen that ITDC had not seriously contested that there was leakage of water in the Premises from 10.07.2015 to 12.07.2015. ITDC's defence largely rested on two assertions. First, that it had licenced the premises on an 'as is where is basis' and therefore, was not responsible for the upkeep or repairs of the Premises. And Second, that BMEL was required to carry out the repairs of the Premises for its purpose.

27. The Arbitral Tribunal rejected the aforesaid contentions. The Arbitral Tribunal accepted BMEL's assertion that the roof of the Premises over the main area was a tin roof, which was covered by a thin layer of cement. The Arbitral Tribunal was of the view that handing over of the Premises on 'as is where is basis' did not absolve ITDC of its obligation to ensure that the Premises were fit for the purpose for which the same were licenced. There was no dispute that the Premises were licenced to run a high-end International Cuisine Restaurant cum Night Club; the Premises are within the precincts of a Five Star Hotel; and the Licence Fee payable to ITDC was substantial. The Arbitral Tribunal was of the view that considering these facts it was incumbent upon ITDC to at least ensure that the Premises were structurally sound for the purpose for which the same were licenced.

28. The Arbitral Tribunal also referred to the Agreement

which expressly entitled or enabled ITDC to carry out the major structural repairs. Sub-clause VII(I) of the Agreement is relevant and the same is set out below:

> *"**VII. COVENANTS OF THE LICENSEE***
>
> *I. If the Licensee desires any structural alterations to the premises allotted under this Agreement including that of frontage thereof for the purpose of his business, he shall request (in writing) the Licensor to carry out such alterations, as it may deem proper at the cost of the Licensee.*
>
> *The décor/the scheme of the exterior façade of the premise should be as per the design of the Hotel management and this may be got approved by the licensee before execution.*
>
> *However, the Licensor shall have absolute right to carry out any external renovation work during the term of the License Deed. The Licensor may carry out the work at such time and in such manner as is convenient to them and the Licensee hereby undertakes to extend full cooperation to the Licensor and will not create any hindrance or raise any dispute relating to the work to be carried out for such renovation."*

29. Concededly, BMEL was not entitled to carry out any additions or alterations to the Premises except with the express permission of ITDC.

30. The question whether handing over the Premises on 'as is where is basis' absolves ITDC from making sufficient disclosure regarding the condition of the Premises, is a contentious issue. The Arbitral Tribunal had accepted the view that stipulating such condition (as is where is basis) did not absolve ITDC from disclosing that the Premises had a temporary roof (which was

otherwise not evident on a visual inspection). Clearly, this view cannot be stated to be one which is not plausible and/or one, that no reasonable person could accept. There is ample authority for the proposition that stipulating the condition – 'as is where is', does not absolve the contracting parties to make a minimal disclosure.

31. The Arbitral Tribunal held that this was a fundamental breach of the Agreement. The Arbitral Tribunal held that failure on the part of ITDC to carry out the necessary repairs to ensure that the Premises was fit for the purpose for which the Premises were licenced, was a fundamental breach of the terms of the Agreement. The Arbitral Tribunal accepted the view that since ITDC had failed to carry out the repairs of the roof of the Premises to prevent water leakage, which was essential for the same to be used for the purpose it was licenced for, also relieved BMEL for complying with its obligation to pay the Licence Fee.

32. Mr. Sikri had also drawn the attention of this Court to the material examined by the Arbitral Tribunal. He had submitted that the Certificate of the Independent Engineer which was relied upon by the Arbitral Tribunal was not signed by the person who had purportedly carried out the inspection. The said Certificate enclosed along with the documents was an unsigned Certificate. He pointed out that the signed Certificate had been produced during the course of examination of CW2 (Mr. Amit Zutshi) but it was not signed by the person who had carried out the inspection. He submitted that the Arbitral Tribunal could not rely on any document which had two versions as it was clear that the same had been manufactured.

33. In this regard, it is relevant to note that the Indian Evidence Act, 1872 does not apply to proceedings before

the Arbitral Tribunal. Thus, sensu stricto, the Arbitral Tribunal was not precluded to consider the same. CW-2 (Mr. Amit Zutshi) had produced the Independent Engineer's Certificate. He was also cross-examined. The Certificate produced by him was marked as Ex.CW-2/11. The decision of the Arbitral Tribunal as to the evidentiary value of the Certificate is final. This Court is not required to reappreciate and consider each and every piece of evidence or material that is placed before the Arbitral Tribunal. It is clear that the Independent Engineer's Certificate was not the only material placed before the Arbitral Tribunal. CW-2 had also affirmed that the roof of the licenced Premises was a tin roof, which was covered with cement.

34. In Associate Builders v. Delhi Development Authority; (2015) 3 SCC 49, the Supreme Court had observed that "A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score."

35. The impugned award cannot be interfered with on the ground that one of the documents may be inadmissible in evidence or is of little evidentiary value.
…"

4. It is noted that the respondent-claimant had conceded that some part of the Award, that is Rs. 2.5 crores towards loss of profits and Rs. 50 lacs towards loss of goodwill and reputation, was not justified. Accordingly, the same was set aside.
5. What the appellant seeks in this appeal is essentially re-appreciation of the evidence apropos the free and full access of

the respondent to inspect the premises before the licensee signed the contract. It is a matter of record that the licensee did inspect the premises but it was not disclosed by Indian Tourism Development Corporation Ltd ('ITDC') that the building was a temporary structure and that a notice dated 30.01.2013 had indeed been issued by the Ministry of Urban Development, Land and Development Office, calling-upon the appellant to regularize certain unauthorized constructions, i.e. the temporary structure. The learned Senior Advocate for the respondent submits that these two disclosures would have been vital in the decision making as the same would have revealed the inherent defects in the structure. He further submits that under section 57 of the Indian Easements Act, 1882, the grantor of license is duty-bound to disclose to licensee any defects in the property affected by the license. The said section reads as under:

> *" 57. Grantor's duty to disclose defects.-The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware."*

6. He contends that the non-disclosure of vital information and development about the "temporary structure" was unfair on the part of ITDC. He says that with aid of the building plans, provided by the licensor, the respondent/licensee could not have ascertained that the roof of the building was temporary. The Arbitral Award has dealt with this issue extensively, which *inter-alia* reads as under:

"...

126. The above said legal position is clear from reading of Section 62(d) and (f) of the Indian Easements Act, 1882, which reads thus:

> *"62. License when deemed recoked -*
> *(a) to (c) xxxx*
> *(d) Where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right;*
> *(e) xxx*
> *(f) Where the license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable;"*
> *(Emphasis laid by this Tribunal)*

127. As the performance of the contract between the parties in respect of the premises either becomes exclusive or implicit on the ground of contract being void as laid down in Section 56 of the Indian Contract Act, 1872, which provisions has expressly states that "an agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful"

128. The learned Senior Counsel has further aptly placed strong Reliance on the judgment of the Hon'ble Apex Court in the case of M.I Builder Pvt.Ltd., and. Radhey Shyam Sahu and Others reported in AIR 1999 SC 2468 and the provisions of Section 62(f) of the Easement Act, 1882, would aptly apply to fact situation of this case; wherein the apex court has held that licence was granted in the said case for a specific purpose and the purpose has attained or abandoned or becomes impracticable, the license in respect of the outlet premises deemed to be

revoked. In the present case also, the purpose for which the license was granted to the claimant in respect of the Outlet premises, it has become impracticable to use because of the inaction on the part of the respondent in not taking positive steps for effecting repairs of the roof of the premises to prevent rain water leakage inside the premises.

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136. ANSWER TO ISSUE No.7:

Issue No.7 is required to be proved by the respondent that it has granted the license in respect of the licensed premises to the claimant 'as is where as basis' and maintenance of it is the sole obligation of the claimant. The said issue is required to be answered against the respondent on the basis of the law laid down by the Delhi High Court, Bombay High Court and as per the provisions of Section 57 of the Easement Act. For the reasons assigned by this Tribunal, in answer to Issue Nos.2 to 5, this Tribunal has to hold that the respondent had the absolute duty to carry out external renovation and repair work of the structure of the Outlet premises for preventing leakage from the roof of the premises and the respondent cannot take the refuge under the defence of the respondent as pleaded that premises was given to the claimant which defence of it 'as is where is basis' is wholly misconceived and untenable in law and therefore, the plea urged in this regard by the respondent cannot be accepted by this Tribunal.

As the claimant could not know the structure of the Outlet Premises by doing physical inspection of the same from inside at the time of taking the premises on license, which fact is also admitted by the respondent's witness RW1 in his cross examination to the question No.71 which reads thus:

> *115. "Q.No.71. I put it to you that- 'as is where is basis' does not mean abdication of*

respondent's fundamental obligation to assure that the licensed premises is habitable and unusable for the purpose of which the License Deed is entered into between the parties?

Ans: I agree that the premises should be usable.

...

141. In view of the above findings and reasons recorded by this Tribunal on the above contentious issue that the respondent has committed fundamental breach of contract which has made the claimant to close its Restaurant-·cum-Bar, that was being run in the Outlet premises, as it has become practically impossible to use the premises and therefore, that itself deemed to have terminated the licence deed apart from the factual position that claimant has issued notice on 6.11.2015 narrating the facts, grounds for which the termination of the license deed with retrospective effect, from 11th July, 2015 is perfectly legal, valid and the said action of the claimant is based on the statutory provisions of Section 62(d) and (f) of the Easement Act and further issue Nos.3 & 4 are answered against the respondent for the reasons recorded in the earlier paragraphs with reference to the admitted facts, and evidence on record and law laid down in this regard both by the Delhi and Bombay High Courts.

..."

7. The dicta of the Supreme Court in *Delhi Airport Metro Express Private Limited vs Delhi Metro Rail Corporation Limited*, (2022) 1 SCC 131, reads *inter-alia* as under:

"*...*

26. A cumulative reading of the UNCITRAL Model Law and Rules, the legislative intent with which the 1996 Act is made, Section 5 and Section 34 of the 1996 Act would make it clear that judicial interference with the arbitral awards is limited to the grounds in Section 34. While

deciding applications filed under Section 34 of the Act, Courts are mandated to strictly act in accordance with and within the confines of Section 34, refraining from appreciation or reappreciation of matters of fact as well as law. (See Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570] , Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd. [Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306] .)
..."

(Emphasis supplied)

8. Despite the aforesaid limits and restraint on re-appreciation of evidence, the appellant would rather urge that this court re-appreciate the evidence differently from the way it was understood and adjudicated upon by the learned Tribunal, on the issue whether the licensee had an occasion to inspect the premises fully and freely or that they were fully informed of all issues concerning the premises/structure. The nature and quality of evidence produced before the learned Arbitrator is not for the court to re-appreciate in this appeal under section 37 of the Arbitration and Conciliation Act, 1996. Furthermore, no patent illegality is shown in the Award, warranting interference by this court. Fairness of procedure is in public interest, and full disclosure of relevant facts and developments apropos a property/asset/a commercial entity, is expected for a fair

commercial transaction, especially from entities under Article 12 of the Constitution of India. It is expected that their actions would always be imbued with the spirit of fairness.

9. There is no merit in this appeal. It is accordingly dismissed.

NAJMI WAZIRI, J

VIKAS MAHAJAN, J

MAY 27, 2022
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