IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment delivered on: 01.04.2022*

\+ **O.M.P. (COMM.) 402/2018 & I.A. NO. 12880/2018**

INDIA TOURISM DEVELOPMENT CORPORATION LTD. (ITDC) ….Petitioner

versus

BOUGAINVILLEA MULTIPEX & ENTERTAINMENT CENTRE PVT. LTD. (BMEL) ....Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Ravi Sikri, Senior Advocate with Ms. Shweta Bharti, Mr. Manoj Kumar, Mr. Sukrit R. Kapoor, Mr. Deepank Yadav & Mr Nitesh Sachdeva, Advocates.

For the Respondent: Mr T.K. Ganju, Senior Adovcate with Mr. Prantik Hazarika, Mr Deepak Chawla & Mr Aakash Khattar, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter **"ITDC"**) has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996

(hereafter the **"A&C Act"**) impugning an arbitral award dated 11.05.2018 (hereafter the **"impugned award"**) rendered by an Arbitral Tribunal constituted by a Sole Arbitrator (hereafter the **"Arbitral Tribunal"**).

2. The impugned award has been rendered in the context of disputes that had arisen between the parties in connection with a License Deed dated 01.03.2013 (hereafter the **"Agreement"**).

3. ITDC is a Government Company under the Ministry of Tourism, Government of India. It owns several properties under the brand 'Ashok Group of Hotels' including the hotel 'The Ashok' situated at Diplomatic Enclave 50B, Chanakyapuri, New Delhi – 110021 (hereafter the **"Ashok Hotel"**).

4. The respondent (hereafter **"BMEL"**) is incorporated under the Companies Act, 1956 and is *inter alia*, engaged in the business of running several screen multiplexes, commercial complex, restaurants and night clubs.

5. On 01.03.2013, the parties entered into the Agreement wherein ITDC granted Leave and License to BMEL to operate an International Cuisine Restaurant cum Night Club under the name 'Stellar', earlier known as 'Pangea', in respect of a space measuring 9552.60 sq. feet within the premises of the Ashok Hotel on an 'as is where is basis' (hereafter **'the Premises'**). The Agreement was for a period of five years commencing from 09.01.2013. BMEL was also entitled to a one-time renewal of the Agreement after expiry of the said agreement.

6. In terms of Sub-clause II(1) of the Agreement, BMEL agreed to make the following annual payments as a fixed lumpsum Guaranteed License Fee:

Year I	₹ 4,44,00,012/-
Year II	₹ 4,44,00,012/-
Year III	₹ 4,66,20,013/-
Year IV	₹ 5,36,13,015/-
Year V	₹ 5,89,74,417

7. After the execution of the Agreement, on 21.01.2013, BMEL paid a Security Deposit of a sum equivalent to the three months' License Fee amounting to ₹1,24,00,368/- *vide* Cheque bearing no. 556465. On the same date, that is, 21.01.2013, in terms of Sub-clause II.7 of the Agreement, BMEL also deposited a Bank Guarantee bearing number 0005INSF13032533 amounting ₹1,24,00,368/-, in favour of ITDC.

8. Disputes arose between the parties as BMEL claimed that ITDC had failed to comply with the terms of the Agreement on several grounds.

9. First, BMEL contended that in terms of the Agreement, it was required to deposit the daily liquor sale at the front office of ITDC, on a weekly basis. In terms of Clause VII of the Agreement, ITDC was required to refund the balance of the liquor sale proceeds to BMEL after deduction of liquor cost, 10% administrative charges as well as applicable tax. According to BMEL, ITDC had failed to pay an amount of ₹2,38,28,836/- due towards BMEL, as refund of the liquor sale proceeds from the period 01.08.2014 till 30.04.2015. BMEL further

contended that ITDC had failed to comply with several liquor orders amounting to ₹ 21,44,014/- and thus, ITDC was obligated to refund the deposit amount in light of cancellation of the liquor orders. Accordingly, BMEL adjusted a sum of ₹ 2,57,21,750 [₹ 2,38,28,836 (on account of refund of liquor sale) plus ₹ 18,92,914 (on account of non-processing the liquor order)] against the license fee. BMEL claimed that an amount of ₹2,51,100/- was still due from ITDC due to ITDC's failure of non-processing the liquor order.

10. Second, ITDC had failed and neglected to address the issue of water seepage, at the Premises. BMEL states that it wrote several letters from March 2015 to July 2015 and raised concerns regarding extensive damage caused to the interiors of the Premises including damage caused to the POP ceiling, upper deck area, CCTV server, UPS server area, wooden flooring, music system and furniture. ITDC by its letter dated 14.07.2015 informed BMEL that the Premises was let out on an 'as is where is basis' and thus, it was not responsible to carry out any repairs or any damage caused due to water seepage under the Agreement.

11. BMEL claimed that it had appointed M/s Solutions Inc. as an Independent Structural Engineer for inspection of the Premises. On the basis of the report furnished by the Independent Engineer, BMEL claimed that the Premises was covered by a temporary roof and thus, the Premises was not suitable to operate as a lounge and bar. On 11.07.2015, BMEL closed its operations at the Premises as according to it, the Premises was unfit for use.

12. On 06.11.2015, BMEL terminated the Agreement in terms of Sub-clause IV(2) of the said agreement, with effect from 11.07.2015 on grounds that the roof of the premises was temporary; there was a possibility of mishap in the event the roof was not renovated; and, ITDC had failed to comply with its obligations under the Agreement to renovate the Premises.

13. ITDC by its letter dated 10.02.2016 denied that there was termination of the Agreement with retrospective effect from 11.07.2015 and stated that BMEL's letter dated 06.11.2015 would be treated as a six month advance notice of termination. ITDC also requested BMEL to pay an amount of ₹3,92,87,940.99/- which stood outstanding as on 31.01.2016.

14. On 30.05.2016, ITDC informed BMEL to pay the outstanding license fee which was due till 05.05.2016 within seven days failing which it would be compelled to auction the materials and goods of BMEL to recover the arrears. On 02.06.2016, BMEL invoked the arbitration clause in terms of Sub-clause V(I) of the Agreement and, sought reference of the disputes to arbitration. ITDC by its letter dated 07.07.2016 refuted the same, as according to it, the dispute fell within the ambit of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971.

15. BMEL filed a petition before this Court, on 20.07.2016, under Section 11 of the A&C Act (being Arb. P. No. 437 of 2016) for appointment of an arbitrator. In the meanwhile, ITDC by its letter dated

07.09.2016 sought recovery of ₹ 5,56,12,181.70/- as outstanding license fee due from BMEL and exercised its lien over the goods and articles lying at the Premises in the event, BMEL failed to pay the outstanding license fee. BMEL replied to the aforesaid letter on 15.09.2016 denying the allegations of ITDC on the ground that it had stopped using the Premises since 11.07.2015 and was thus, not liable to pay any license fee thereafter.

16. On 15.09.2016, ITDC in the presence of the Public Notary and representative of BMEL prepared an inventory of the goods located at the Premises. Thereafter, on 17.09.2016, ITDC took possession of the moveable properties belonging to BMEL in the presence of the Public Notary and sealed the Premises. Aggrieved by ITDC's conduct, BMEL filed a petition under Section 9 of the A&C (being OMP (I) (Comm) 376/2016) whereby this Court by an order dated 04.10.2016 directed ITDC to hand over the moveable properties to BMEL.

17. Whilst, the petition filed by BMEL under Section 11 of the A&C Act was pending before this Court, on 27.09.2016, ITDC proceeded to file an application under Section 7 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 before the learned Estate Officer for recovery of ₹73,09,67,920/- for arrears of rent, water charges, electricity charges and damage. However, this Court by an order dated 17.01.2017 (being Arb. P. 437/2016), appointed the Arbitral Tribunal and held that "*there was no occasion for BMEC* [BMEL] *in the proceedings before the Estate Officer under the PP Act* [Public Premises (Eviction of Unauthorised Occupants) Act, 1971], *to pursue*

the claims urged by it in its notice dated 2nd June 2016 and have them adjudicated."

18. The arbitral proceedings culminated in the impugned award. By the impugned award, the Arbitral Tribunal allowed the claims of BMEL. A tabular statement of the claims allowed by Arbitral Tribunal is set out below:

S. No.	Claim	Amount (Rs.)
1.	Refund towards non-processing of liquor order of the Claimant	₹ 2,51,100/-
2.	Security Deposit and Bank Guarantee of Claimant deposited by the Claimant in terms of the License Deed	₹ 2,48,00,736/-
3.	License Fee paid by the Claimant to the Respondent from execution of the said License Deed till date	₹ 2,18,85,505/-
4.	Capital expenditure incurred towards setting up of the outlet	₹ 8,22,33,434/-
5.	Loss of business suffered by the Claimant on account of closure of the Outlet from the date of termination of the said license deed i.e. 11.07.2015 till conclusion of the term of License Deed	₹ 2,50,00,000/-
6.	Loss of reputation and loss of goodwill of the Claimant	₹ 50,00,000/-
Total Award		₹ 15,91,70,775/-

	[along with interest at the rate of 8% per annum from the date of demand notice dated 02.06.2016 till its realisation]

Submissions

19. Mr. Sikri, learned senior counsel appearing for ITDC has assailed the impugned award essentially on five fronts. First, he submitted that the finding of the Arbitral Tribunal that ITDC was in fundamental breach of the Agreement is, *ex facie* erroneous. He submitted that ITDC had licenced the Premises on an 'as is where is basis and therefore, it could not be held responsible for any leakage that had developed in the roof of the Premises. He submitted that it was not in dispute that BMEL had inspected the Premises and had satisfied itself regarding the nature and condition of the Premises. It had also carried out renovation work. The Arbitral Tribunal had failed to appreciate the above and therefore, the impugned award is, *ex facie* erroneous.

20. Second, he submitted that the Arbitral Tribunal had relied upon the purported report of an Independent Engineer. However, the said report was neither signed nor brought in evidence. The said engineer was also not examined. Thus, the impugned award is based on no evidence

21. Third, he submitted that the decision of the Arbitral Tribunal to award costs of renovation and equipment is based on a Certificate issued

by a Chartered Accountant, who had not examined the equipment claimed to have been damaged. Further, there is no evidence as to the damage suffered by BMEL and therefore, the award for damage cost is *ex facie* erroneous.

22. Fourth, he submitted that BMEL had sought to terminate the Agreement with retrospective effect which is, *ex facie* untenable. In terms of the Agreement, BMEL was required to give a six months' advance notice of termination, which it had failed to do.

23. Lastly, he submitted that the decision of the Arbitral Tribunal to award a sum of ₹2.50 crores on account of loss of business and a sum of ₹50 lacs for loss of reputation and goodwill is also, *ex facie* erroneous. The Arbitral Tribunal had found that there was no cogent evidence to support such claims, yet had awarded the aforesaid amounts.

24. Mr. Ganju, learned senior counsel appearing for BMEL submitted that the award was well reasoned and the same was rendered after appreciation of evidence and accordingly, the same could not be interfered with under Section 34 of the A&C Act. He submitted that the contentions advanced by Mr. Sikri tantamount to seeking re-adjudication of the disputes that have been decided by the Arbitral Tribunal and the same is impermissible. He drew the attention of this Court to various findings of the Arbitral Tribunal in support of his contention that the impugned award was supported by cogent reason.

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**
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> 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 co-operation 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 CW-2 (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.

36. In view of the above, the decision of the Arbitral Tribunal that BMEL was not obliged to pay any licence fee after 11.07.2015 cannot be faulted. BMEL had made a claim for a sum of ₹10.10 crores for refund of the licence fee. However, the Arbitral Tribunal had not allowed the said claim and had held that BMEL was liable to pay licence fee for the period it had used the Premises.

37. BMEL's claim for damages to its equipment and the loss suffered by it was accepted by the Arbitral Tribunal to the extent of 50%. BMEL had produced a Chartered Accountant's Certificate and its Statement of Accounts reflected the amount spent by it for purchase of equipment and interior decoration to set up the restaurant/night club. Since equipment had been used for two years, the Arbitral Tribunal restricted the award to 50% of the amount claimed. This Court is unable to accept that the said decision is without any material or basis. The award of damages is premised on the finding that ITDC had breached its obligations to make a fair disclosure regarding the Premises and to ensure that the same was fit for the purpose for which the same was licenced. Thus, this Court is unable to accept that any interference is warranted in regard to the said award of damages.

38. Insofar as the award of loss of profit and loss of reputation and goodwill is concerned, there is merit in Mr. Sikri's contention that the same is without any basis and is also inconsistent with the findings of the Arbitral Tribunal. The Arbitral Tribunal had found that the said claim was unsubstantiated. Notwithstanding the same, the Arbitral Tribunal has awarded a ballpark figure of ₹2.5 crores towards loss of profits and ₹50 lacs towards loss of goodwill and reputation. Mr. Ganju had during the course of arguments readily conceded that the impugned award to the extent of award of ₹2.5 crores towards loss of profits and ₹50 lacs towards loss of goodwill and reputation, was untenable.

39. In view of the above, the impugned award to the extent that it awards a sum of ₹2.5 crores towards loss of profits and ₹50 lacs towards loss of goodwill and reputation, is set aside.

40. The petition is disposed of in the aforesaid terms. The pending application is also disposed of.

VIBHU BAKHRU, J

APRIL 01, 2022
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