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(2021) 04 DEL CK 0269

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 470, 513 Of 2020, Miscellaneous Application No. 8099, 9632, 9634 Of 2020

Delhi Metro Rail Corporation Ltd APPELLANT

Vs

N.S. Publicity (I) Pvt. Ltd. RESPONDENT

Date of Decision : 13-04-2021

Acts Referred:
Arbitration And Conciliation Act, 1996 — Section 33, 34

Citation : (2021) 04 DEL CK 0269

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Tarun Johri, Ankur Gupta, Ankit Saina, S.K. Maniktala, Udit Maniktala, Abhiraj

Final Decision : Disposed Of

Judgement

S. No.,Head,Amount in Rs.,

1.,"Interest free Security Deposit equivalent

to six months License Fee","Â Rs. 3,31,20,000/-",

2.,First Half Yearly Advance License Fee,"Â Rs. 3,31,20,000/-",

3.,"S. Tax on First Half Yearly Advance

License Fee","Â Rs. 34,11,360/-",

Total,,"Â Rs. 6,96,51,360/-",

Less Earnest Money Deposit,,"Â Rs. 17,00,000/-",

Net Amount Payable,,"Â Rs. 6,79,51,360/-",

Sl.

No.",Claim No.,Amount Claimed,Award by the A.T.

1,Claim No. 1,"3,57,56,578","3,57,56,578

2,Claim No. 2,"1,48,41,933","1,48,41,933

3,Claim No. 3,"5,41,92,600","98,41,722

4,Claim No. 4,"2,43,888",Nil

5,Claim No. 5,"3,10,18,992","To be calculated as per

direction of AT in para 14.5

6,Claim No. 6,"1,11,80,540",Nil

7,Claim No. 7,"@ 18% on the amount

of Award",Nil

8,Claim No. 8,Cost of Arbitration,Nil

to the License Fee as late as 02.01.2017, for the period when display sites were not available to NSP. In view of the above, this Court is unable to",,,

fault the decision of the Arbitral Tribunal in rejecting DMRCâ??s contention that NSPâ??s claim were barred by limitation. No interference with,,,

the impugned award is warranted on this ground.,,,

20. The contention that the Arbitral Tribunal had erred in directing that the loss of profits be computed on the basis of NSPâ??s Balance Sheet for,,,

the year 2008-09, that was not on record, is a common ground between both the parties. It is also contended by NSP that the Arbitral Tribunal could",,,

not have directed that loss of profits be computed on the basis of the profit margin as reflected in the Balance Sheet for the year 2008-09. Thus, the",,,

said ground is discussed while considering NSPâ??s challenge to the impugned award.,,,

NSPâ??s Challenge to the impugned award,,,

21. Mr Maniktala, learned counsel appearing for NSP assailed the impugned award, essentially, on four grounds. First, he submitted that the Arbitral",,,

Tribunal had grossly erred in partially denying NSPâ??s claim (Claim no. 3) that it was not liable for License Fee for the period - 01.06.2012 to,,,

31.12.2012. NSP was not granted access to the sites in question during this period as well. Second, he submitted that the Arbitral Tribunal had grossly",,,

erred in directing that NSPâ??s profit margin be determined on the basis of NSPâ??s Balance Sheet for the year 2008-09, which was not on",,,

record. Third, he submitted that the Tribunal had grossly erred in proceeding on

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the basis that overheads as claimed by NSP had been absorbed while",,,

working Claim no. 5 (claim for loss of profit). And fourth, he submitted that the Arbitral Tribunal had grossly erred in not awarding pre-refence and",,,

pendente lite interest and referred to the decision of the Supreme Court in Jaiprakash Associates Ltd. through its Director v. Tehri Hydro,,,

Development Corporation India Ltd: (2019) 17 SCC 786, in support of his contention. He submitted that the said decision was not cited during the",,,

hearing and therefore, NSP had no opportunity to address arguments on the same. Further, he stated that there was no term of the Contract, which",,,

prohibited grant of such interest.,,,

22. NSP had claimed that it was not liable to pay any License Fee for the period (i) 01.06.2012 to 31.12.2012; and (ii) 01.02.2013 to 10.04.2013. The,,,

Arbitral Tribunal had rejected NSPâ??s claim for the period 01.06.2012 to 31.12.2012 but had allowed the same for the period 01.02.2013 to,,,

10.04.2013 and had accepted the claim to the extent of Rs. 98,41,722/-.",,,

23. NSP had quantified its claim in respect of License Fee for the period 01.06.2012 to 31.12.2012 and 01.02.2013 to 10.04.2013 at Rs. 5,41,92,600/",,,

24. NSP had also produced evidence in support of its claim that it had not been denied access to the sites from June 2012 to December 2012 as well,,,

as for the period 01.02.2013 to 10.04.2013. NSP had relied on a letter dated 06.08.2012, inter alia, stating that it had not been granted access to the",,,

site for the past two months. It had also relied on the letters dated 05.09.2012, 21.09.2012, 26.11.2012 and 29.11.2012 in support of its contention that",,,

NSP had established that DMRC had denied access to the sites from June 2012 to December 2012.,,,

25. Whilst, the letter dated 06.08.2012 does indicate that NSP had raised the issue regarding denial of sites for the prior two months, the other letters",,,

relied upon by NSP indicate that the same related to other issues as well. In its letter dated 05.09.2012, NSP acknowledged that it had received a",,,

letter from the Conciliator and had accepted the same. The Arbitral Tribunal had evaluated the evidence led by the parties including the oral testimony,,,

and had observed as under:,,,

â??14.3.8.21. From the cross examinations of witnesses of both the parties, pleadings from the Claimant does suggest that there was denial to access",,,

sites started around June, 2012 and continued till 30.04.2013. However, the only

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thing that get conclusively established is the events that took place",,,

from 01.01.2013 to 30.04.201 3.,,,

14.3.8.22. The amount of license fee, so collected for the afore-stated period of default/breach, namely, from (i) 01.06.2012 to 31.12. 2012; and (ii)",,,

01.02.2013 till 10.04.201 3 computes to Rs.5,41,92,600/-(Rupees five crore forty one lakh ninety two thousand six hundred only), which the respondent",,,

is not entitled to claim from the claimant is admissible only for the period 01.02.2013 till 10.04.2013.,,,

14.3.8.23. Claimantâ??s claim in para 3.12 is partially allowed in respect of license fee, so collected for the period of default/breach, from 01.02.2013",,,

till 10.04.2013 computes to Rs.98,41,722/-, which the respondent is not entitled to claim from the claimant.â??",,,

26. It is relevant to note that DMRC had disputed that it had denied access to NSP. The witness examined for DMRC had also affirmed that NSP,,,

had been granted access to the sites. The documents on record do not show that NSP had asked for any specific permission for access of a particular,,,

site, which was specifically denied. The controversy thus, relates to evaluation and appreciation of evidence.",,,

27. The scope of interference with an arbitral award is limited. This Court cannot undertake a judicial review on merits. In this case, the Arbitral",,,

Tribunal had examined the evidence and formed an opinion. The impugned award clearly indicates that whilst the Arbitral Tribunal was convinced that,,,

NSP had been denied access for the period 01.02.2013 to 10.04.2013 as the communication between the parties clearly established the same, the",,,

Arbitral Tribunal was not entirely convinced that NSP had been denied access for the period 01.06.2012 to 31.12.2012. Given the limited scope of the,,,

present proceedings, no interference with the said opinion would be warranted as the evaluation of evidence falls squarely within the jurisdiction of the",,,

Arbitral Tribunal.,,,

28. Insofar as the award of Rs. 98,41,722/- is concerned, the arbitral award does not give any clue as to how the said amount has been computed.",,,

According to the impugned award, NSP was not liable for the License Fee during the period 01.02.2013 to 10.04.2013 but the impugned award does",,,

not indicate as to how the License Fee for Rs. 98,41,722/- has been computed. This Court had pointedly asked the learned counsel for DMRC, if there",,,

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was any material on record that could sustain the said computation. However, he was also unable to refer to any document or indicate the manner in",,,

which the said amount had been computed.,,,

29. Mr. Maniktala had referred to paragraph 38.3 of the present petition, wherein it was affirmed that the rebate for the period 01.02.2013 to",,,

10.04.2013 worked out to Rs. 1,36,20,600/-. Thus, according to NSP, there is an error in the computation of the claim even to the extent it had been",,,

allowed.,,,

30. NSP claimed that it could sell advertisement space / sites at a rate ranging from Rs. 9000 per sqm to Rs. 8000 per sqm, depending upon the size",,,

and location of the site. It claimed that the average rate worked out to Rs. 12,500 per sqm. It claimed that it would earn approximately 21.5% of the",,,

gross turnover after adjusting for reasonable vacancies. It also produced copies of purchase vouchers from its various clients to establish the rates on,,,

which space/sites could be sold. NSP further claimed that it had been denied the benefit of advertisement sites (as claimed under Claim no. 2) and it,,,

had also been denied access to the approved sites (being subject matter of Claim no. 3). The witness for NSP (CW1) also testified as to the average,,,

vacancy period as well as the amounts that could be recovered from selling the sites. The Arbitral Tribunal accepted NSPâ??s claim that it was,,,

entitled to loss of profits on a turnover of Rs. 11,18,05,375/. However, it did not accept NSPâ??s claim of a gross profit margin of 21.50%. The",,,

Arbitral Tribunal held that, there was no basis advanced by NSP for establishing the said margin. The Tribunal thereafter, proceeded to observe that",,,

the tender documents submitted by NSP would also include its financial details for the accounting years 2006-07, 2007-08 and 2008-09. It reasoned",,,

that the profit margin, as disclosed in the said financial details, could be accepted as a gross profit margin on the basis of which NSPâ??s claim for",,,

loss of profits could be allowed.,,,

31. It is contended on behalf of NSP that the Arbitral Tribunal had grossly erred in restricting NSPâ??s claim to gross profit as disclosed in its,,,

audited balance sheet for the year 2008-09, which was not a part of the arbitral record. It is also contended that there is no reason for the Arbitral",,,

Tribunal to reject the gross profit margin of 21.50% as NSPâ??s witness had deposed to the aforesaid effect and the same had not been seriously,,,

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disputed by DMRC. As noted earlier, DMRC is also aggrieved by the Arbitral Tribunalâ??s decision in allowing the claim and quantifying it on the",,,

basis of a document (the audited balance sheet for the year 2008-09), which was not on record. There is considerable merit in the contention that the",,,

Arbitral Tribunal could not have allowed the claim on the basis of material that was not on record and not relied by either parties. Once, the Arbitral",,,

Tribunal concluded that NSP had failed to establish the gross profit margin as claimed by it, it was required to proceed on that basis.",,,

32. In the facts of the present case, it does appear that there was no serious contest to the gross-profit margin as claimed by NSP. Nonetheless the",,,

Arbitral Tribunal had concluded that NSP had failed to establish the same. In this view, it could proceed to reject the claim or allow it to the extent that",,,

it considered reasonable. But it could not direct that it be calculated on the basis of accounts for the year 2008-09, which were neither produced nor",,,

relied upon by parties.,,,

33. In view of the above, the impugned award to the extent that it awards loss of profit based on NSPâ??s audited balance sheet of 2008-09 is",,,

concerned, is set aside.",,,

34. The Arbitral Tribunal had rejected NSPâ??s claim for loss of overheads on the ground that â??these cost have been absorbed while working of,,,

profit in claim no.5â??. The said conclusion is patently erroneous.,,,

35. NSPâ??s claim for profits had been derived after accounting for all expenditure. NSP had structured its claim for net profit which it would have,,,

earned in the event, DMRC had performed its obligations and had made available the advertisement space as agreed and granted access to it.",,,

NSPâ??s claim for loss of overheads was in the nature of reimbursement of costs that it had incurred on overheads, which were allocated towards",,,

the Contract in question. NSPâ??s claim that the said costs would have been met by the revenue earned from the sale of advertisement sites, had",,,

DMRC provided the same. Thus, the claim of overheads was over and above the claim for loss of profits and the decision of the Arbitral Tribunal that",,,

such overheads had been absorbed in profits is patently erroneous on the face of the record.,,,

36. The next question to be examined is whether the impugned award is liable to be interfered with on the ground that the Arbitral Tribunal has not,,,

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awarded any pre-reference or pendente lite interest in favour of NSP. While NSP may be correct in its contention that the Contract in question did not,,,

proscribe grant of pendente lite and pre-reference interest, the same does not lead to the conclusion that NSP was entitled to pre-reference and",,,

pendente lite interest. The decision whether to award interest in the given facts and circumstances of this case, rests with the Arbitral Tribunal and",,,

warrants no interference by this Court.,,,

37. In view of the above, the impugned award is set aside to the extent that it deals with NSPâ??s Claim nos. 3, 5 and 6, that is, claim against denial",,,

of License Fee for the period 01.06.2012 to 31.12.2012 and 01.02.2013 to 10.04.2013; claim for loss of profits; and claim for loss of overheads.,,,

38. It is not open for this Court to remand the matter to the Arbitral Tribunal. Given that this Court has found the decision of the Arbitral Tribunal with,,,

regard to the aforesaid claims unsustainable, it is necessary to observe that the parties are at liberty to avail their remedies afresh in the aforesaid",,,

regard.,,,

39. The petitions are disposed of in the aforesaid terms.,,,

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