(1997) 09 DEL CK 0017

In the Delhi High Court

Case No : OMP No. 54 of 1997 and is No. 2793 of 1997

Indian Tourism Devp. Cooperative Ltd. APPELLANT

Vs

Airports Authority of India RESPONDENT

Date of Decision : 23-09-1997

Acts Referred:

Citation : (1998) 1 AD 286 : (1997) 2 ARBLR 609 : (1997) 69 DLT 370

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : Mr. Mukul Rohtagi and Mr. Anil Amrit, for the Appellant; Mr. R. Sundravaradan, Senior Advocate, Mr. Romesh Keswani and Mr. Sanjay Kunur, for the Respondent

Judgement

K. Ramamoorthy, J.—M/s. Indian Tourism Development Cooperative Ltd. (hereinafter referred to as the petitioner) has filed the above petition u/s 9 of the Arbitration and Conciliation Acts 1996 for an injunction against the M/s. Airports Authority of India (hereinafter referred to as the respondent). I heard the learned Senior Counsel, Mr. Mukul Rohtagi for the petitioner and Mr. R. Sundravaradan Senior Counsel for the respondent for a considerable length of time.

2. The point in my view lies in a very narrow compass. It is a common ground that the contract was entered into between the petitioner and the respondent for a period of one year from November, 1995 to November, 1996 and such a contract was entered on 31.10.1995. In that agreement there is a provision "this agreement shall be valid initially for a period of one year with effect from 19.11.1995. This shall be renewable for a further period of four years on satisfactory performance and mutual agreed financial terms". It is also a common ground that the parties had started negotiations for the renewal but could not come to any terms for entering into the contract for a further period. According to the petitioner, the respondent is trying to impose certain financial conditions which are very unreasonable and if the respondent had been very

reasonable there would have been no problem in coming to a firm commitment. According to the learned Counsel for the petitioner, the petitioner continued to render service in the complex and all of a sudden, the petitioner was asked to stop the work and the cause of action for the petitioner arose on 21.3.1997 when the respondent sought to terminate the licence. The Respondent has stated that there has been no concluded contract and the Petitioner has no cause of action to file the petition and the Petitioner had been abusing its position and the presence of the Petitioner in the Airport complex has become a security threat and, Therefore, it is not in public interest to permit the Petitioner to continue to render service in the complex. Besides this, the Respondent submitted that once the license has not been renewed the Petitioner has no right to be in possession, and Therefore, the petitioner has not made out any prima facie strong case. The petitioner cannot invoked the provisions of Section 9 of the Arbitration and Conciliation Act, 1996. It was submitted by the learned Senior Counsel for the respondent that the arbitration clause could be invoked only if the contract had been renewed and without renewing the contract the Petitioner cannot seek to refer the matter for adjudication by an Arbitrator.

3. I do not want to refer to the facts in great detail except to notice a few facts which are necessary for the purpose of deciding the point involved in this case.

4. On 18.11.1996, the Respondent wrote to the Petitioner in the following terms:

Sir,

Please refer to your letter dated 16.10.1996, on the subject issue.

2. In this connection, it has been decided by the Competent Authority to extend the subject license for a further period of one year w.e.f. 19.11.1996 to 18.11.1997 subject to the following terms and conditions:

(i) Payment of normal license fee @ Rs.332.75 per sq.m. per month for the counter space allotted. The said rate of license fee is due for revision and M/s. Ind-Tour shall pay such revised rates of license fee as may be decided by the Authority.

(ii) In addition to the above stated license fee M/s. Ind-Tour shall pay royalty at the rate of 20% of their gross turnover or Rs. 50,000/- per month (Rupees fifty thousand per month) whichever is higher during the above extended period of licence.

(iii) M/s. Ind-Tour shall submit Security Deposit equivalent to six months license fee and minimum guaranteed royalty in the form of Fixed Deposit Receipt in absolute favor of Airport Director, AAI(IAD), IGI Airport, New Delhi, drawn on any Nationalised Bank.

(iv) In addition to the above M/s. Ind-Tour shall provide the details of their audited gross turnover during the past one year. M/s. Ind-Tour shall also provide details of gross turnover for the extended period on month-to-month basis.

(v) M/s. Ind-Tour shall execute supplementary agreement for the extended period of licence. The award letter shall form a part of Agreement.

Please acknowledge receipt and communicate your acceptance to the above terms and conditions including the financial terms before 18.11.1996.

5. On 18.11.1996, the Petitioner wrote to the Respondent in the following manner:

Sub: Renewal of agreement - counter allotted to us.

Dear Sir,

This has reference to your letter No. AAD/EST/-307(EC)/95 (Ind-Tour) dated 18th November, 1996.

We hereby agree to the terms and conditions including the financial terms as indicated in your above stated letter to operate the subject for a further period w.e.f. 19th November 1996 to 18th November 1997.

6. On 09.12.1996 the Respondent wrote to the Petitioner the following letter:

Sub: license for operating travel and tourism related facilities, information service facilities counter(s) at Terminal-II at IGI Airport - Renewal of Agreement.

Dear Sir,

This is in continuation of this office letter of even number 7031-63 dated 18.11.1996 and subsequent letter dated 20th November, 1996 on the subject noted above.

In this connection, you are hereby advised to submit the followings:

1. Audited Balance Sheet for the past contract between 19.11.1995 and 18.11.1996 and deposit the amount of royalty @ 15% of net profit.

2. As per renewal terms, you are required to deposit the amount of royalty at 20% of the gross turnover or Rs.50,000/- p.m. whichever is higher by 10th day of the calendar month for the preceding month. Hence, you are requested to deposit the same. In addition to above, you shall pay the license fee for the counter space as fixed by AAI from time-to-time in advance by 10th of every month.

3. Execute fresh agreement for the extended period of the license for one year from 19.11.1996 to 18.11.1997 as per revised financial terms.

4. List of Members of your Cooperative Society.

2. You are further advised to furnish the above information by tomorrow i.e. 10th December, 1996, positively, for onward transmission to headquarters, failing which we shall be constrained to take appropriate action as deemed fit.

3. Please acknowledge receipt.

7. On 11.12.1996 the Petitioner wrote to the Respondent in the following:

Sub: license for operating travel and tourism related facilities, information service facilities counter(s) at Terminal IGI Airport - Renewal of Agreement.

Dear Sir,

Please refer to your letter No. AAD/EST-307(EC)/95/IND-TOUR/cooperative 7528 dated 18.11.1996.

1. Audit for the period up to 18.11.1996 is in progress and will be submitted on receipt by 01.01.1997.

2. The contract was renewed on 19.11.96 hence the society can deposit the amount @ 20% of gross turnover only after audit for the month has been completed. We would request you to advise us when we are to make the first payment i.e. from 19.11.96 to 18.12.96 or should we pay for the period of 19.11.96 to 31.12.96. We would also request you to intimate the amount of license fee payable so that the same can be paid immediately.

3. Intimate to us the time and date to execute the fresh agreement. which will have to be done after a meeting to discuss various modalities so that clear-cut procedures are evolved.

4. List of members can be submitted after authentication of the appropriate authority if found essential.

5. We would request for a formal meeting to discuss and finalise the above and also to discuss various operating procedures and also the facilities that will be made available to the society to run the facilitation services. You will appreciate that 70%, of staff and equipment is deployed at the disposal of the AAI which provide no revenue to the society and we would thus request that the staff is treated favorably.

8. On 11.12.1996 the respondent again wrote to the petitioner in the following terms:

Sir,

Further to this office letter of even number dated 09.10.1996 and your letter dated 11.12.96, this is to intimate you that the amount of license fee/security deposit payable by M/s. Ind. Tour is as follows:

(a) Normal license fee @ Rs.332.75 per Sq. m. per month for counter space of 57.70 sq. ms. (36 sq. ms. comprising nine counters inside Customs Arrival Hall and 21.70 sq.ms. comprising 4 counters outside Customs Arrival Hall) which is equal to Rs. 19199.67 per month.

(b) One month''s minimum guaranteed royalty of Rs.50,000/- per month.

(c) In addition to above, you are required to pay license fee for parking area of your cars measuring 100 sq. m. @ 16,630/- per sq. m. per annum which works out to Rs. 16,630/- per annum.

2. Security Deposit:

(a) Security Deposit equivalent to six months'' license fee for the counter space measuring 57.70 sq. ms. amounting to Rs. 114718/-.

(b) Six months'' minimum guaranteed royalty @ Rs. 50,000/- per month amounting to Rs. 3,00,000/-.

(c) In addition to above, you are required to pay Security Deposit equal to six months'' license fee for parking space amounting to Rs. 8,315/-.

Security Deposit may be made in the form of FDR drawn on any Nationalised Bank in absolute favor of Airport Director, AAI (IAD), IGI Airport, New Delhi.

The above said formalities including other formalities like execution of agreement, submission of audited balance sheet for the period between 19.11.95 and 18.11.96 and list of the members of Society may please be submitted in this office latest by 14.12.1996 failing which we shall have no option but to withdraw the offer of extension made vide our letter of even No. dated 18.11.1996 without any further reference.

9. On 18.12.1996 the petitioner wrote to the respondents in the following terms:

Sub: license for operating travel and tourism related facilities, information service facilities counter(s) at Terminal IGI Airport - Renewal of Agreement.

Sir,

This has reference to the letter dated 11.12.1996.

The Co-operative is providing free of Cost service inside the Custom Area under the direct supervision of the AAI. Hence you may consider a methodology to compensate the Co-operative Society for the same. The concert was that the commercial activity undertaken by us was meant to compensate for the cost of staff and equipment, capital in vested for providing free service.

Notwithstanding the above we have deposited the amount required with an express understanding that we will collect the amount charged for the counters keeping into consideration the high cost for the services provided and with an understanding that the excess amount, if any, will be refunded.

You may appreciate that the Co-operative is a non-profit making commercial private enterprise and many of its functions are related to developmental and social cause. As such we should not be treated as a commercial enterprise while deciding on the charges levied on us.

As stated earlier kindly intimate us time and date for a formal meeting to finalise the agreement desired by you.

As mentioned earlier the audited balance sheet from 01.04.1996 to 18.11.1996 can be submitted only after the proper audit which is in progress, and will be tentatively ready by 01.01.1997.

As we have to complete the formalities of seeking approval from the Board of Directors and other requirements of the Co-operative Law.

The draft agreement was also prepared. On 28.12.1996 the petitioner wrote to the respondents in the following terms suggesting some modifications in the draft agreement:

Sub: license for operating Travel and Tourism related facilities, information services facilities counter(s) at Terminal II IGI Airport - Renewal of Agreement.

Dear Sir,

Please refer to our letter dated 11th December, 1996.

In pursuance of the meeting held on 19.12.1996, we had requested for a meeting which was arranged for 23rd December, 1996. Accordingly we had reached the headquarters but we learnt on arrival that the meeting has been cancelled.

As discussed, we had suggested certain modifications in the agreement draft which we hope would be finalised soon and the same can be executed.

The following modifications are suggested:

(1) Gross turnover should be defined as receipts of the Society from vendors by the way of service charges.

(2) The gross turnover should pertain to business conducted Tourism Cooperative at its Airport counters.

(3) The royalty to be paid to Airport Authority of India @ 20% of gross turnover should be calculated on per annum basis (i.e. 20% of gross annual turnover) rather than monthly basis as the business fluctuates from moth to month depending upon the tourist season. Tourism Co-operative shall however continue to pay the minimum amount of Rs. 50,000.00 every month.

(4) As per the original agreement, it was clearly agreed that the contract shall be renewed for a further period of 4 years on satisfactory performance and mutually agreed financial terms. As we have already deposited the royalty and/or fees as per your financial terms, the agreement should be extended for the initially agreed period instead of only one more year.

(5) A new clause has been added that the security deposit is to be forfeited for any breach of trust of agreement and further that the contract can be terminated with a 30 days notice period by Airports Authority of India. This was not a part of our earlier agreement and we feel that these conditions are too stiff and against the interest of the society. As such Serial No.30 on page 14 of the original

agreement clearly provides for procedures for dealing with any disputes and difference and the same shall be adhered to.

It is requested that in view of the ex party cancellation of the earlier meeting which was fixed on 23rd December, 1996, another date for the meeting be fixed so that the apparent differences regarding the terms and conditions pointed out in our letter are amicably sorted out and a mutually agreed settlement is made.

In the meantime it is requested that instead of 31st December, 1996 the date for the execution of the mutually agreed settlement is extended till 31st January, 1997.

Our performance has clearly established the services and the capabilities and the professionalism of the Society. We have already paid the whole sum and we were asked to sign papers which were desired by the Airport Authority of India as we were given these terms and conditions on the last day of our contract. We have no other alternative.

We further request you for a favourable consideration and revision of the new terms set by you. In case there is a problem, I would request that the matter be referred to the Authority as per terms of contract.

10. On 17.01.1997 the respondent wrote to the petitioner in the following manner.

Sub: license for operating travel & tourism related facilities, information services facilities counter(s) at T-II, IGI Airport - Renewal of Agreement.

Sir,

This has reference to this office letter of even number dated 23.12.1996 on the above subject. In this connection, it is intimated that the contentions made vide your letter dated 28.12.1996 have been forwarded to our headquarters for consideration. However, we regret to state that you have not come forward to submit the audited part balance sheet for the period 01.04.1996 to 18.11.1996 and make payment of royalty @ 15% of your net profit.

Also with regard to the extension of license for the period w.e.f. 19.11.1996 and payment of royalty, you are required to make payment at the rate of Rs. 50,000/- per month or 20%, of the gross turnover whichever is higher. It may he mentioned that after making payment of advance royalty/license fee for the first month vide your letter dated 13.12.1996 you have not made any further payments for the subsequent months. You have also not submitted details of your gross turnover figures for the period w.e.f. 19.11.1996 till date. The said gross turn figures were required to be submitted on a monthly basis for the preceding month.

In view of the above, you are requested to immediately submit the details of our gross turnover figures and make payment of royalty accordingly. Also a license fee for the counter space may also be deposited.

11. On 24.01.1997, the petitioner wrote to the respondent in the following terms:

Sir,

You may appreciate that auditing of account takes considerable time. Our auditor has not yet given the audit report the letter from auditor is enclosed. In any case as per our agreement with you the audit report was to be submitted to you with six months after the period of one year.

It is not possible to give you the turnover till our agreement is duly signed. We have already submitted to you our view on the agreement. We will request to arrange for the meeting at the earliest and execute the agreement as per our observations.

Till then the rent and royalty as decided is being paid.

12. Again on 27.01.1997, the respondents wrote to the petitioner stating that the license period was extended with effect from 19.11.1996 and the respondents wanted certain details. The letter is in the following terms:

Sub: license for operating travel and tourism related facilities, information services facilities counter(s) at Terminal-II, IGI Airport - Renewal of Agreement.

Dear Sir,

Please refer to letter No. AAD/EST-307(EC)/95/VOL.II/8155, dated 17.1.97 and other earlier references, i.e. letters dated 09.12.1996 and dt. 23.12.1996 from IGI Airport on the above noted subject.

2. It is noticed that you are not meeting properly and adequately with certain requirements under which your license was extended for a period of one year w.e.f. 19.11.1996 and other details requested subsequently. This is considered to be a serious lapse on your part.

3. Therefore, you are requested to meet with the following requirements immediately and in any case latest by 31.1.97:

(i) Furnish the audited Balance Sheet of your business at IGI Airport between 1.4.96 and 18.11.96;

(ii) Furnish the details of gross turnover of your business at IGI Airport between 19.11.96 to 30.11.96 and 1.12.96 to 31.12.96;

(iii) Furnish the details and particulars of the members of your society. The date on which the last elections of the society were held and the particulars of the office-bearers of the society may also be indicated.

(iv) Furnish an agreement as per draft provided by our IGI Airport for the extended period of license from 19.11.1996 to 18.11.1997 as per the revised terms.

4. It may please be appreciated that in the absence of the aforesaid information

by 31.1.97, we shall be constrained to take further appropriate action including termination of your services for the subject licence.

13. On 30.01.1997, the petitioner wrote to the respondents requesting for a meeting for resolving the issues at an early date.

14. On 31.01.1997, the respondents wrote to the petitioner that a meeting would be arranged after requisite details are given by the petitioner. On 5.2.1997, the petitioner wrote to the respondents giving the following details:

Sir,

This is in continuation of our previous letter dated 03.02.1997. Following are the details required by your office:

1. The tentative gross receipts by the society for the period 19.11.96 to 30.11.96 and 1.12.96 to 31.12.96 is as under:

19.11.96 to 30.11.96 - Rs. 1,21,020.50;

1.12.96 to 31.12.96 - Rs. 3,80,676.00;

You are requested to adjust the turnover to be paid on annual basis Please note that the figures are tentative and not audited.

2. Membership list is enclosed herewith. Elections were held on 18.02.96.

Fresh mid-term election is being ordered in April, 1997.

3. A provisional balance sheet for the period 1.4.96 to 18.11.96 is attached.

4. Some letters of appreciation received are enclosed. These are only the salient ones and highlight our performance and utility of the facilitation centre.

5. A copy of article in Business Today on Multi State Co-operative is also attached.

6. Bank Account statement is attached.

15. It is stated by the petitioner that which the respondents demanded had also been paid on 13.12.l996 and these are the details of payment in the following terms:

Sub: Payment for rent and license fee.

Dear Sir,

Please find enclosed the following cheques:

Cheque 027788 dt. 12.12.96 Rs. 50,000/-

2. Cheque 027787 dt. 12.12.96 Rs. 19,199.67/-

3. Cheque 27787 dt. 12.12.96 Rs. 16,630/-

The following are for monthly rent/monthly fixed amount and parking amount.

Also enclosed is the balance sheet (audited). As regard the FDR the same will be submitted by Monday before lunch.

16. On 16.12.1996 the petitioner wrote to the respondents giving security letter which is in the following terms:

Sub: Submission of FDRs

Dear Sir,

Please find enclosed F.D.Rs of Rs. 3,00,000.00 and Rs.1,14,718.00 for security deposit against 6 months premium granted royalty and for 6 months license fee for royalty and for 6 months license fee for counter space measuring 57.70 sq. mtrs.

The numbers of the same are 241082 and 241083 drawn on Oriental Bank of Commerce.

16A. On 21.02.1997, the Petitioner wrote to the respondent requesting it to take a decision so that agreement could be finalised. It is also stated that on the receipt of the draft agreement from respondents the petitioner will be in a position to sign execute the same containing mutually agreed terms and conditions.

17. On 27.02.1997 the respondent issued show-cause notice for termination of license on the basis that the petitioner was guilty of major violations in operating the licence. On 08.03.1997 the petitioner submitted his Explanation. On 21.03.1997 the respondents stated as under:

Sub: Termination of license for operating travel and tourism related facilities, Information Service Facilities Counter(s) at Arrival Area of Terminal-II, IGI Airport.

Sir,

Please refer to your letter No. TC/97/48 dated 08.03.1997 i.e. the reply that you have given to our show cause notice issued vide letter No. AAD/EST-307(EC)/ Vol.II/8767 dated 27.2.1997 on the above noted subject.

2. We have carefully considered your reply. It is a matter of record that your reply to our show cause notice is not satisfactory vis-a-vis all the violations indicated therein stand admitted by you directly or indirectly.

3. The subject license was extended vide our letter No. AAD/EST307(EC)/95/Ind-Tour/7028 dated 18.11.1996 for a period of one year from 19.11.1996 to 18.11.1997 inter-alia on the financial terms that you will pay royalty @ 20% of your gross turnover or Rs. 50,000/- per month whichever is higher, besides the normal license fee for space as well as other terms and conditions which were indicated in the draft agreement provided to you Along with the said letter. All the terms and conditions, including the financial terms were unequivocally accepted by you vide your show cause notice, it is further noticed that you are

withdrawing yourself from the payment of agreed percentage of your gross turnover i.e. 20% vis-a-vis you are not agreeing to the definition of gross turnover which was informed during a meeting at our Corporate Office held on 5.2.1997.

4. In view of the above, besides the other violations, we have no other alternative but to withdraw the offer of extension of the subject license conveyed vide our letter dated 18.11.1996. Thus, the license stands terminated forthwith.

5. You are hereby advised to comply with the following instructions latest by 31.3.1997;

(i) Hand over peaceful vacant possession of the premises allotted to you i.e. counter space measuring 36 sq. ms. comprising nine counters inside the Customs Arrival Hall and 21.70 sq. ms. comprising four counters outside the Customs Arrival Hall.

(ii) Remove all the furnitures, fixtures and equipment(s) brought in by you. It is hereby clarified that AAI shall not be responsible for the safety and the security of any such equipment/fixture not removed by you.

(iii) Surrender all the entry passes issued to your employees for operating the said counters.

(iv) Remove the vehicles parked by you in the designated parking area at Terminal-II of IGI Airport.

6. It may please be noted that on your failure to comply with the above latest by 31.03.1997, AAI shall be constrained to resume the possession of the above counters at your risk and cost.

7. This is with out prejudice to our rights and contentions for claiming damages and recovery of outstanding dues.

On 21.03.1997 the respondents issued the letter terminating the license on the main ground that the petitioner unequivocally accepted all conditions including the financial terms but in reply to show cause notice the petitioner was withdrawing from the payment of agreed percentage of gross turnover. Therefore, there was no concluded contract between the parties and the license stands terminated.

18. The learned Senior Counsel, Mr. Mukul Rohtagi submitted that the whole thing started in 1995 regarding doing the business in the complex by which the respondents allotted nine counters inside the Customs Hall at Terminal-II and six counters outside the Customs Arrival Hall-II at the ground floor in Indira Gandhi international Airport for travel and tourism related facilities at a single window on the terms and conditions contained in the agreement. The arrangement was that service was to be rendered free in the nine counters inside the Customer Arrival Hall and six counters outside. The petitioner could not do business on commercial basis and it could make up only license is granted for the fresh period agreed

upon. There had never been any complaint against the petitioner and as a matter of fact, the performance of the petitioner was appreciated by all concerned. The respondent had made a firm commitment for further four years and, Therefore, the petitioner is entitled to render service for five years from 1995 and there can be no termination of the license by the respondent.

19. The learned Senior Counsel, Mr. R. Sundravaradan for the respondent submitted that there were certain reports about the petitioner made by some authorities and they would show that the petitioner did not act in accordance with the terms of the agreement but was misusing the privilege that was given to it.

20. I do not want to give a finding at this stage on the factual matrix, but, for the purpose of prima facie, consideration of the matter, a perusal of the correspondence would show that the parties were negotiating for the renewal on mutual agreed terms and conditions and there had been no consensus and consequently no contract was executed for the year 1996-97. The respondent might have employed the nomenclature that it was terminating the license but this is not very much relevant. The clause in the agreement is very clear that renewal was to be on mutual agreed terms and there had been no mutual agreement. I am not able to accept the argument on behalf of the petitioner that the demand made by the respondent is very unreasonable and, Therefore, the petitioner should be permitted to continue to render service for the entire period of five years. The only remedy of the petitioner is to seek for specific performance of the contract for renewal and that has not been done. The petitioner indirectly seeks to have the relief by referring the matter for arbitration by invoking the arbitration clause in the agreement. The arbitration clause is intended only for resolving the disputes which would arise between the parties during the currency of the agreement. The arbitration clause does not contemplate that renewal also should be the subject matter of the arbitration. Therefore, I am of the view the petitioner has not made out a prima facie strong case for the grant of injunction and, Therefore, the application for injunction is dismissed. There shall be no order as to costs.