

(2016) 02 DEL CK 0107

In the Delhi High Court

Case No : I.A. No. 17938/2015 in O.M.P. (I) No. 407/2015

ITE India Pvt. Ltd.

APPELLANT

Vs

Delhi Tourism and Transportation Development Corporation
Ltd.

RESPONDENT

Date of Decision : 08-02-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, Section 9
Constitution of India, 1950 — Article 14, Article 298, Article 299
Specific Relief Act, 1963 — Section 14(1), Section 14(1) (a), Section 14(1) (c),
Section 41(e)

Citation : (2016) 02 DEL CK 0107

Hon'ble Judges : Manmohan Singh, J.

Bench : Single Bench

Advocate : Krishanendu Datta, Sanjana Saddy and Neeru Sharma, Advocates,
for the Appellant; Gopal Sankaranarayanan, Abhimanyu Garg and Ieeshan
Diwan, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Singh, J.—1. The petitioner has filed the abovementioned petition under Section 9 of the Arbitration and Conciliation Act, 1996, inter alia, to restrain the respondent from dispossessing the petitioner from the commercial outlet and not to act contrary to letter dated 10th June 2015 and 12th June 2015.

2. Brief facts as per the case pleaded in the petition are that the petitioner was awarded the contract for a period of ten years commencing from the COC (the Operational Contract Period) during which the petitioner is authorized to exclusively operate and maintain the facility in accordance with the provisions of the agreement dated 8th August, 2005. The possession of the same was handed over to the petitioner on 23rd August, 2005.

2.1 It was part of the agreement that the petitioner would pay to DTTDC contract Fee for the contract period starting from the COC (the Operational Contract

Period) as per Schedule 2. The Contract Fee would be payable quarterly in advance before the 7th of the relevant quarter.

2.2 The schedule 2 is reproduced herein below:-

2.3 The Agreement contain Clause 1.4 pertaining to "Renewal of Contract". The relevant term is reproduced herein below:

"1.4 Renewal of Contract.

At the end of the stipulated contract period of 10 years, DTTDC may further extend the contract for tenure of 5 years based on mutually agreeable terms and condition."

2.4 The petitioner had sub-contracted the outlets to its sub- contractors and requested for the NOC from DTTDC. However, despite request, from the petitioner to grant the NOC, DTTDC did not provide the same for prolonged period of 4 years, due to which the petitioner suffered because of non-issuance of the required NOC and were not able to utilize the space properly. The respondent issued the NOC belatedly after more than 4 years only on 25th July, 2009.

2.5 Thereafter, on 14th May, 2010, certain disputes arose between the parties and the respondent sent a Show-Cause Notice to the petitioner. As the dispute could not be resolved between the Parties, various rounds of litigations before the Courts were undertaken between the parties, the contents of the orders are not being repeated herein for the sake of brevity and shall be read as part and parcel to the present application.

2.6 The petitioner again raised the issues vide its letters dated 19th February, 2012 and 27th February, 2012 and asked the respondent to amicably settle the dispute. These letters were issued by them pursuant to the Arbitration clause 12 forming part of the contract between the parties. Thereafter, the petitioner filed an Arbitration Petition No. 439/2013 before the Court under Section 11 for appointment of an Arbitrator. The said application was withdrawn by the petitioner for taking recourse of the provisions of Article 12.1 of the agreement and sought liberty to take recourse to an appropriate remedy in accordance with law.

2.7 Thereafter, in view of Article 12.1, petitioner sent a letter dated 11th July, 2013 to the respondent, whereby the petitioner had raised the dispute and appointed his nominee member to the Conciliation Panel and called upon the respondent to appoint its representative/nominee for Conciliation Panel in order to facilitate the conciliation in terms of Clause (b) of Article 12.1 of the agreement. It is submitted that despite the service of the said notice upon the respondent, the respondent did not appoint his nominee to the conciliation panel. The petition for appointment of arbitrator was moved and this Court by its order dated 19th January, 2015 appointed as Sole Arbitrator to adjudicate the disputes between the parties.

2.8 It is alleged in the petition that the Tribunal fixed 7th March, 2015 as date for preliminary hearing and the same was thereafter adjourned to 28th March, 2015. However, in the meantime as parties were contemplating amicable settlement. The parties explored, the same and respondent vide its letter dated 12th March, 2015, demanded a sum of Rs. 47.17 lacs, on account of License fee, Service Tax and Interest on delayed payment and further sought an amount of Rs. 18.98 lacs on account of expenditure incurred by DTTDC on legal cases.

2.9 It is stated by the petitioner that in view of the settlement, the petitioner paid the entire amount as demanded by the respondent on account of Lease Rent, Service Tax and Interest vide letter dated 18th March, 2015. It was specifically pointed out in the aforesaid letter that with the amicable settlement of all issues and as the contract/ lease agreement dated 8th August, 2005 stands restored, it was requested that the initial tenure be extended by four years, which petitioner were not able to utilize due to non-granting of the space as per agreement, and further requested to grant the renewal Extension (by five years), totalling to 9 years as per the agreement, for the mutual benefit of all concerned.

2.10 The petitioner vide letter dated 23rd March, 2015, pointed out that the entire amount of Rs. 47.17 lacs as demanded by DTTDC has been paid and as contract/ lease agreement dated 8th August, 2015 having being restored, extend the initial tenure by four years, which petitioner were not able to utilize due to non-granting of required "no objection" to utilize the space as per agreement, and further requested to grant the renewal Extension (by five years), totalling to 9 years as per the agreement.

2.11 The petitioner submits that in order to settle all the matters amicably, the respondent formed a Committee of senior officers from all the departments of DTTDC comprising of Mr. K.B. Sharma (Sr. Chief Manager Projects), Superintendent Engineer or his representative, Mr. Ajay Kumar (Sr. Chief Manager - Catering), Mr. Piyush Agarwal (Sr. Chief Manager - Legal), Mr. Lalit Gulati (Chief Manager - Finance) and Mr.J.K. Jain (Chief Manager - GFS) to consider the following:

- 1) To consider withdrawal of all pending litigation/cases before all forums and issue relating to payment of litigation cost by the operator.
- 2) Issues raised by the Operator relating to non issuance of NOC, entry from Gate No. 3, parking, security, sanitation, lighting, timings etc.
- 3) Whether the Operator is entitled for further extension of time, as he was not given clear period of license as mentioned in the agreement.
- 4) Whether renewal of license for another period of 5 years be considered as required for by the Operator as per the agreement.

After due deliberation by the Committee of DTTDC, it was conclusively decided by the Committee that the petitioner's contract be extended for a further period of five years with new financials in favour of DTTDC.

2.12 The respondent vide its letter dated 7th May, 2015 and 8th May 2015 agreed to provide the facilities of water connection, common lighting, free movement/ no hindrance, proper lighting, cleanliness and proper security on the road from Gate No. 3 to the East Bazaar and control of the Gate No. 3 at the Garden of Five Senses in addition to the other basic facilities and infrastructure.

2.13 The petitioner in response to the letters dated 7th May, 2015 and 8th May, 2015 vide its letters dated 13th May, 2015, appreciated the efforts of respondent to provide facilities at the Garden of Five Senses and further requested for extension/ renewal of the Agreement for the further period as requested earlier.

2.14 The petitioner as instructed by the respondent withdrew its Writ Petition (WPC) 4034 of 2013 and the aforesaid fact has been recorded by the High Court in its Order dated 21st May, 2015. Consequently, as per the instruction of the respondent, the petitioner further sent a letter dated 23rd May, 2015 to sole Arbitrator stating that as the matter has been amicably settled and there is no claim against each other, no proceedings are required.

2.15 The respondent vide its letter dated 26th May, 2015 acknowledged letters dated 13th May, 2015 and 21st May, 2015 and acknowledged the receipt of Rs. 4.50 Lacs on account of litigation charges and further requested to deposit the remaining amount expeditiously. Mr. J.K. Jain, Chief Manager (GFS), was authorized to sign the petition along with the petitioner for withdrawal of arbitration proceedings and further the petitioner were permitted to participate in all the tenders, being eligible, floated by DTTDC. It was specifically stated in the said letter that "Corporation (DTTDC) will process your request for extension as per law".

2.16 The petitioner vide its letter dated 29th May, 2015 acknowledge receipt of letter dated 26th May, 2015 and pointed out that though both parties have incurred the cost but just to maintain the cordial relations and keeping in mind the future extension of GOFS and promotion of tourism in Delhi, the petitioner are agreeing to make payment for the DTTDC litigation cost as a goodwill gesture and accordingly cheques for the foil amount of Rs. 18.98 lacs was given to DTTDC which have already been encashed by DTTDC.

2.17 The relevant contents of the aforesaid letter dated 10th June, 2015 is reproduced herein below for the convenience of this forum:-

"I am to further inform the following:

1. Vide our letter no. GFS/249/2010-II/DTTDC/PF-I, dated 13.10.2011 vide which operational contract between DTTDC and M/s. ITE India Pvt. Ltd. was terminated stands withdrawn.

2. The operational contract which would expire on 08.08.2015 is extended for a period of five years w.e.f. 09.08.2015 on the following terms and conditions:-

- a. M/s. ITE India Pvt. Ltd. would pay a license fee of Rs. 50 Lacs per annum plus

service tax or 22% of the revenue share, whichever is higher, w.e.f 9th August 2015.

b. To deposit an amount of Rs. 12.50 lakhs plus service tax as quarterly license fee for the quarter 9th August 2015 to 08.11.2015 in advance as per the Clause 2.2 of the operational contract.

c. The license fee would increase by 7% over the immediate previous year license fee per annum every year.

d. You are further requested to furnish a bank guarantee of Rs. 50 lakhs in favour of DTTDC valid for a period of 13 months w.e.f. 9th August 2015. The amount of bank guarantee to increase by 7% every year as per para {c} above.

e. M/s. ITE India Pvt. Ltd. to submit audited balance sheet for every year w.e.f 09.08.2015 to DTTDC.

All other terms & conditions of the operational contract entered between DTTDC including schedule of payment of license fee would remain un-changed.

In case the above is agreeable to you, kindly send your acceptance at the earliest."

2.18 The petitioner on receiving the offer dated 10th June, 2015, accepted the same in toto vide its letter dated 12th June, 2015 and further sent the advance cheque of for the Lease Rent of Rs. 12,50,000/- (Less IDS) for the period 9th August, 2015 to 8th November 2015 in compliance, of letter dated 10th June, 2015.

2.19 The respondent by its letter dated 12th June, 2015 acknowledge the receipt of the advance payment on account of Lease Rent from 9th August, 2015 to 8th November, 2015 and further confirmed that the operational contract between DTTDC and ITE India is extended for a period of five years w.e.f. 9th August, 2015. It was further stated that afresh operational contract would be entered between ITE India Pvt. Ltd. and DTTDC incorporating the terms and conditions as mentioned in the letter no. GFS/249/2010- 11/DTTDC/PF-I/443 dated 10th June, 2015.

2.20 It is contended by the petitioner that thereafter the parties discussed and approved the Agreement incorporating the terms and conditions as mentioned in letter dated 10th June, 2015 for signing by both the parties around the 26th June, 2015. Mr. J.K. Jain, Chief. Manager (GFS) was authorized to sign the agreement on behalf of the respondent. The petitioner has been waiting for the respondent to confirm the date for formal signing of the agreement however, no intimation has been received by the petitioner till date, despite the petitioner's repeated request and reminders.

2.21 On the basis of the respondent extending the contract for a period of five years vide the respondent's letters dated 10th June, 2015 and 12th June, 2015, the petitioner has further sub-contracted/ extended the contract for the outlets

to various Parties for a period of five years. On enquiry, the officials of the respondent have always been stating that the petitioner's representative would be called for the formal signing of the agreement and that the same is only a formality as the term of the agreement dated 8th August, 2005 was already been extended for five years from August 2015 to August 2020, as already confirmed by the respondents in their earlier communications.

Despite these assurances nothing concrete has been forthcoming from the respondent and that the petitioner is smelling foul play as has been done by the respondent earlier.

3. It is alleged by the petitioner that the petitioner has been getting feelers from unknown sources that if the demands for illegal persona gratification are not met, the formal signing of the agreement, which is just a mere formality, will not be completed and hindrances will be created for operation of the outlets, as has been done in the past. Whenever there is a change in the top management of the respondent, DTTDC Ltd., the consequences, of the same are suffered by the petitioner, without any rhyme or reason.

4. It is submitted by the respondent that the respondent had vide letter dated 4th August 2015 withdrawn the letters dated 10th June 2015 and 12th June 2015 and same was duly conveyed to the petitioner on 4th August, 2015 by speed post and on 5th August 2015 by e mail. Along with the said letter the respondent had returned the post dated cheques of 9th August, 2015 vide letter dated 4th August, 2015 which came back with postal remarks that no body was found to receive even after repeated attempts to deliver. It is the case of the respondent that the letters were withdrawn prior to the filing of the petition and same was suppressed by the petitioner from this Court.

5. Being a state instrumentality, the respondent's actions cannot be arbitrary or unfair, else they would offend Article 14 of the Constitution of India. Injunction can be sought against such arbitrary actions. Reliance is placed on the following judgments:

- (1) Old World Hospitality v. Indian Habitat Centre, 73 (1997) DLT 371;
- (2) Pioneer publicity Corporation v. Delhi Transport Corporation, , 103 (2003) DLT 442;
- (3) Atlas Interactive (India) Pvt. Ltd. v. BSNL & Anr., 126 (2006) DLT 504;
- (4) Ramjee Power Construction Ltd. v. Union of India & Ors., , 127 (2006) DLT 346;
- (5) Panchkuian Road Refugee VyaparSangh& Ors. v. Delhi Metro Rail Corporation & Ors., , 130 (2006) DLT 553;
- (6) NHAI v. RSB Projects Ltd., , 2012 II AD Delhi 550 and
- (7) Banarsi Das v. Cane Comm., , AIR 1963 SC 1417.

6. The Supreme Court in the matter of Trimex International FZE Ltd. v. Vendanta Aluminium Ltd., 2010 (1) Arb.LR 286(SC) held that where the contract is concluded orally or in writing, the mere fact that a formal contract has to be prepared and initiated by the parties would not affect either the acceptance of the contract so entered into, or implementation thereof, even if the formal contract has never been initiated.

7. The following facts are admitted between the parties:-

(i) The contract was for the period of ten years which was to be expired on 8th August, 2015.

(ii) As per communication exchanged between the parties, it was to be extended for a further period of five years from 9th August, 2015.

(iii) No agreement was executed in view of the discussion and exchange of letters. The earlier letters written by the respondent for extension of time for further period of five years have been withdrawn.

(iv) The petitioner itself is not using the suit property. It is merely an agent who is authorizing other third party to use the same.

(v) The case of the respondent is that the petitioner has violated the terms and conditions of contract who had miserably failed to pay amount as per the earlier contract between the parties. The petitioner was in default towards Additional Space charges, License fee, payment of 1% turnover, Service tax amount, failed to furnish fresh Bank Guarantee, failed to give TDS certificate, copies of Insurance and yearly returns were also not given, failed to pay interest on delayed payment etc.

(vi) Due to consistent default on the part of the petitioner the respondent terminated the contract. Petitioner never challenged the termination but moved petitions being OMP no. 727/2011 and OMP No. 870/2011 for restraining the respondent from encashing the Bank Guarantee furnished by the petitioner and to restrain the respondent from terminating the agreement dated 8th August, 2005 respectively.

8. It is the admitted position that the termination of contract had already been effected prior to the filing of the petition, therefore, by order dated 7th November, 2012 the Court was pleased to dispose of the petition OMP 870/2011 by accepting the statement of the respondent that the petitioner would be "dispossessed from the commercial outlet by following due process of law and not to encash the bank guarantee till adjudication of liabilities as per law. Both the said petitions were disposed of by order dated 7th November, 2012.

The petitioner had also filed Arb. P. No. 486/2014 for appointment of arbitrator for the disputes arising out of agreement. The said petition was disposed of by order dated 19th January, 2015 whereby the Arbitrator was appointed to adjudicate disputes as referred to in letter dated 11th July, 2013 of the

petitioner. Respondent also initiated proceedings under Public Premises Act for eviction and damages. The respondent was also given liberty to take the issue of jurisdiction of Arbitrator in view of Section 15 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1972.

9. During pendency of above cases, the petitioner approached the respondent for amicable settlement of all disputes subject matter of the above cases.

10. It is the case of the respondent that the petitioner vide letter dated 27th February, 2015 showed interest only to reconcile its accounts and to settle all the pending issues amicably and withdraw all pending litigations/ cases at all forums such as Delhi High Court, Arbitrator, PP Act proceedings before Estate Officer etc.

10.1 The respondent had also in order to resolve the pending issues and all disputes between the parties agreed to forego its damages to an extent of Rs. 1 crore approximately as claimed under Section 7 of the P.P. Act proceedings and vide letter dated 12th March, 2015.

10.2 By letter dated 18th March, 2015 the petitioner paid Rs. 47.17 lakhs and TDS certificates as per the letter dated 12th March, 2015 of the respondent towards full and final settlement of all dues and pursuant thereto all the disputes between the parties stood settled.

10.3 On settlement of pending dues the petitioner by letter dated 23rd May, 2015 informed the Arbitrator that both the parties had amicably settled the disputes as referred before the Tribunal as such had no claim against each other and as such no pleadings/ claims had been filed by any party before the Tribunal. The petitioner also submitted before Tribunal that in view of the amicable settlement of all disputes between the parties no proceedings are required to be commenced before the Tribunal. Therefore, in view of withdrawal letter, the proceedings were required to be Arbitrator legally.

10.4 The petitioner had also vide order dated 21st May, 2015 in terms of letter dated 8th May, 2015 issued by the respondent withdrawn the W.P.(C) No. 4034/2013. Pursuant to the letter dated 8th May, 2015 as per the terms of settlement agreed between the parties the respondent had also on 28th May, 2015 withdrawn the petition pending before the Estate Officer under Section 4 and Section 7 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1972. After settlement of all the pending issues inter se the parties and withdrawal of all cases arising out of earlier disputes, the petitioner by letter dated 2nd May, 2015 requested the respondent to consider extension/renewal of his operational contract for additional five years on expiry of its term of licence period.

11. It has come on record that to consider further five years" extension of contract on its expiry by efflux of time on 8th August, 2015, the respondent constituted a Departmental Committee which recommended extension on some presumptive increment on the existing Annual Concession fee in the line of

request received from the petitioner. Deliberations of the committee to arrive at such recommendations is not available in the recommendations dated 23rd April 2015. Decisions for extension of the Contract for a period of 5 years was informed to the petitioner vide letter dated 10th June, 2015.

It is alleged by the respondent that the recommendations were given by the Committee without going into the details of revenue which the petitioner is receiving on account of various rent agreements with different sub lessees. At the time of recommendations by the Committee there was no data available with the Committee.

On 29th June, 2015 file was sent to the second highest officer of the respondent who had in order to gain more revenue for the respondent raised points for further deliberations and suggested to place the matter before the Board for consultations and directions. Financial Controller was also asked to examine the issue afresh and suggested to call for fresh tenders for open and fair competition in the market to bring transparency in view of sea change in law of allotment of public largesse in the last one decade where the fairest way of allotment was mooted out to be through public tender.

When the file was referred to GM of the respondent, he gave his deliberations as follows:

- a) Decision of grant of extension is based on some presumptive increment and any decision which is not based on any empirical data is likely to result into lesser revenue for the DTTDC;
- b) Granting an extension to an operator who has been in continuous litigation over payments with the DTTDC and was prohibited in participation of other tenders of the Corporation cannot be given the benefit of extension; and
- c) Suggested to refer the matter before the Board for consultations and directions for further deliberations.

Pursuant thereto the Financial Controller vide his noting dated 21st July, 2015 suggested for referring the matter to designated committee and to make recommendations in view of the facts and circumstances of the case.

12. The main question before this Court is as to whether withdrawal was in accordance with law cannot be decided in these proceedings under Section 9 of the Arbitration and Conciliation Act, 1996.

13. The post-dated cheque by the petitioner was retained and the BG of Rs. 50 lacs sent by the petitioner passing out the order dated 7th August, 2015 has not been encashed. The respondent is ready and willing to return it to the petitioner.

14. It is admitted position that no formal agreement/contract has been executed between the parties for renewal of the allotment to the petitioner.

15. The contract is still unexecuted and unconcluded as per the requirement of

the letter dated 12th June, 2015 of the respondent. Assuming through that signing of a formal contract was a mere formality, alleged contract is not specifically enforceable under Section 14(1) (a) of the Specific Relief Act, 1963. Besides the above, no injunction can be granted in view of Section 41(e) of the said Act which states that an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced.

16. In the case of *IOC v. Amritsar Gas Service*, , (1991) 1 SCC 533, the Supreme Court has held that a dealership agreement containing a clause entitling either party to terminate the agreement with thirty (30) days" notice was determinable in nature, and therefore, in terms of Section 14(1) of the Specific Relief Act, 1963 (hereinafter referred to as "Specific Relief Act") a relief of restoration of dealership cannot be sustained. Section 14(1) (c) of the Specific Relief Act states that a contract which is in its nature determinable cannot be specifically enforced. It was further held that even if the termination of the agreement was illegal, the only relief which could be granted was the award of compensation for the period of notice.

17. A similar view was espoused by the Supreme Court in *E. Venkatakrishna v. Indian Oil Corporation and Ors.*, , (2000) 7 SCC 764 wherein it was held that "II all the arbitrator could do, if he found the termination of the distributorship to be unlawful was to award damages, as any civil Court would have done in a suit". The appellant therein was appointed as a dealer of the first respondent to distribute liquefied petroleum gas and the dealership agreement therein contained a termination clause that the distributorship could be terminated if the dealer did any act which was prejudicial to the interests of the respondent.

18. Therefore, the relief cannot be granted being contrary to the provisions of the Special Relief Act. Even if the termination of the agreement was found to be unlawful, the only relief which could have been granted is damages/compensation for the period of notice as provided in the contract. However, in the present case, the situation is more worse. Even the formal fresh agreement for renewal of the allotment has not been executed. Before expiry of the earlier period of contract, the decision was taken by the respondent not to renew the contract any further. Thus, the suggestion for renewal of the contract for further five years before the expiry of earlier contract and in the absence of the fresh execution, the arguments of the petitioner cannot be accepted. The petitioner is merely an agent. The only remedy lies with the petitioner is to claim damages or compensation, if any, as per law. The relief sought in the present petition cannot be granted while dealing with the application under Section 9 of the Act. None of the decisions referred to by the petitioner is applicable to the facts of the present case, as in those cases, it was held that the termination was bad, however, in the present case, the formal fresh agreement between the parties has not been executed.

19. The Supreme Court in *Manohar Lal (D) by LRs. v. Ugrasen (D) by LRs. and Ors.*, , (2010) 11 SCC 557 held that the "Court cannot grant a relief which has

not been specifically prayed by the parties." In *Bharat Amrat lal Kothari v. Dosukhan Samad Khan Sindhi and Ors.*, , AIR 2010 SC 475, the Supreme Court held that, "Though the Court has very wide discretion in granting relief, the Court, however, cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner."

20. I agree with the said submission of the respondent that Government contracts, i.e. contracts between private individuals on the one hand, and the government, or some authority, on the other have come to assume a very significant place in modern economy. In government contracts there is need to protect public interest.

21. It is correct that the government contracts found in Article 298 and 299 of the Constitution of India. Article 299 has been embedded in the Constitution not for the sake of mere form but for the protection of general public. It is also true that the public interest would suffer by enforcement of the extension of the period without following due process of tender. Contract has not been executed as yet and cannot be enforced.

22. It is also well settled that in the matter of economic tests the scope of judicial review is very limited. The Court does not interfere with an economic decision taken by the State. The Government is entitled to make pragmatic decisions which may be necessary and called for under the prevalent peculiar facts and circumstances of the case.

23. In the present case, the renewal of contract has not been signed. The letter did not conform to the requirements of contract, therefore, no obligation enforceable at law flowed therefrom. The letters dated 10th June 2015 and 12th June 2015 have been withdrawn in order to avoid the interest of the petitioner at the cost of the State. There is no agreement/contract executed inter se the parties.

24. There is no merit in the petition. The same is accordingly dismissed. All pending applications also stand disposed of. The interim order already passed on 7th August, 2015 is vacated.

25. No costs.

26. Dasti under the signatures of the Court Master.