(2014) 02 DEL CK 0042

In the Delhi High Court

Case No : O.M.P. No. 260 of 2014

Mayar Health Resorts Ltd. APPELLANT

Vs

Indian Tourism Development Corporation RESPONDENT

Date of Decision : 28-02-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34 8 9
Specific Relief Act, 1963 — Section 34

Citation : (2014) 02 DEL CK 0042

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Sanjay Jain and Mr. A.K. Tandon, Ms. Manjula Gandhi, Ms. Noor Anand, Ms. Aastha Jain and Mr. Shivanshu Kumar, for the Appellant;

Judgement

Manmohan Singh, J.

I.A. No. 3866/2014 (exemption)

Exemption allowed, subject to just exemptions.

The application is disposed of.

OMP No. 260/2014

1. The petitioner has filed an affidavit of Mr. Om Shanker Pandey, informing the Court that on 27th February, 2014 at around 3.00 p.m., the termination notice dated 27th February, 2014 was delivered to the petitioner. Copy of the said notice is annexed as Annexure-M. In the original petition u/s 9 of the Arbitration and Conciliation Act, 1996, the following prayers have been sought:

a) restraining the Respondent from initiating any process of eviction/ dispossession against the Petitioner from the said premises in possession and occupation of the Petitioner.

b) restraining the Respondent from going ahead with the process of calling for tenders vis-a-vis the said premises in possession and occupation of the Petitioner.

2. Few facts of the matter are that the petitioner and the respondent entered into agreement for setting-up an International Standard SPA and Health Club under the name and style of Amatrra in the building premises of Ashok Hotel situated at Chanakyapuri, New Delhi-110021 for a period of 10 years commencing from 1st March, 2004 till 28th February, 2014. In the year 2004, certain disputes arose between the parties with respect to alleged encroachment in the premises which has been litigated at various levels including the Court of law.

3. The respondent vide letters dated 10th August, 2004 and 25th August, 2004 accused the petitioner of violating the terms of the License Deed. Some efforts were made, however, the issue of alleged encroachment could not be resolved. In August, 2006, second report was prepared by the Chief Technical Examiners. The case of the petitioner was that the investigation was carried by it in the absence of the representative of the petitioner. On 31st May, 2007, a Local Commissioner was appointed by this Court in CS(OS) No. 1038/2007 filed by the petitioner seeking injunction against the respondent from interfering its peaceful possession and occupation of the premises during the subsistence of the period of licence. In November, 2007, the Local Commissioner filed his report who took measurement of the entire area. In para 10 of the report of the Local Commissioner, it was stated that the petitioner was in exclusive possession of 19,569 sq. ft. which was well within the 20,000 sq. ft. licensed to it under the License Deed and thus, the petitioner was not guilty of encroachment.

4. The respondent in the pending suit filed by the petitioner moved an application in the year 2007, u/s 8 of the Arbitration and Conciliation Act, 1996. An order was passed by referring the matter to the sole Arbitrator appointed by this Court on 28th April, 2008. It is alleged that in November, 2008, the respondent in its letter addressed to the petitioner has admitted the veracity of the said report of the Local Commissioner, inter-alia, to the effect that, "..... The area occupied by Amatrra at The Ashok was measured and documented by the Commission of Court, which was mutually accepted and signed both by you and The Ashok...." At the same time, statement of claims was also submitted by the respondent before the Arbitrator. In March, 2009, the respondent formulated a new Licensing Policy wherein it prescribed the procedure for licensing of Restaurants/business premises and provided for an automatic first time renewal and further categorized the licenses on the basis of investment involved and fixed the tenure, i.e. First Agreement - 10 years and One Time Renewal - 5 years. Further, para 2 of the new draft License Deed states that, "The Licensee shall be entitled to a one time renewal after the expiry of the original license period, unless he has committed a breach of the terms and conditions of the agreement or has been defaulter in the payment of license fee or guilty of proven misconduct..."

5. The Award was passed by the sole Arbitrator on 6th April, 2009 in favour of

the petitioner and against the respondent dismissing the claims of the respondent by holding in absence of non-challenge of the said report of the Local Commissioner either in the main suit filed by the petitioner before this Court or before the Arbitral Tribunal in the said arbitration proceedings and the findings of the report by the Local Commissioner are binding upon the parties.

6. In July, 2009, the respondent challenged the award passed by the sole Arbitrator by way of filing a Section 34 petition under the Arbitration and Conciliation Act, 1996 in OMP No. 389/2009 before this Court. The said petition is still pending and the same is listed on 20th May, 2014 for final disposal. Mr. Jain, learned Senior counsel states that in case the claims submitted by the respondent before the Arbitrator are allowed in the pending petition filed by the respondent u/s 34 of the Act, the petitioner is liable to pay the amount along with interest claimed by the respondent.

7. In April, 2012, the respondent vide its Board Resolution amended its new Licensing Policy of 2009. The petitioner by letter dated 1st August, 2013 wrote to the respondent for renewal of the License Agreement for a further period of 10 years with effect from 1st March, 2014. The respondent on 12th August, 2013 sent the reply to the said letter, stating that the renewal would be made by Unit Licensing Committee subject to compliance of certain conditions and approval of C&MD.

The petitioner on 1st September, 2013 replied to the respondent''s letter dated 12th August, 2013 and informed the respondent that the petitioner had complied with and satisfied all the conditions of the Unit Licensing Committee. The petitioner has also cleared all its dues with the respondent till September, 2013. Even, the petitioner wrote a letter dated 2nd October, 2013 in this regard and reminded the respondent for a renewal of the License Deed. However, no reply was given by the respondent.

8. The respondent on 6th January, 2014 filed an application being I.A. No. 162/2014 seeking disposal of OMP No. 389/2009 in view of the petitioner''s term of license coming to an end by 28th February, 2014. On 20th January, 2014, the respondent was directed to file an affidavit disclosing instances where license has been renewed contrary to the License Policy. The respondent sought the liberty to consider the petitioner''s request for renewal. On 14th February, 2014, an affidavit was filed by the respondent along with an alleged Licensing Policy of 2013 passed in alleged Board Meeting dated 26th December, 2013. By order dated 17th February, 2014, the application being I.A. No. 162/2014 filed by the respondent was disposed of with a direction to list the OMP on 20th May, 2014 for final disposal.

9. It is the admitted position that on 1st August, 2013, the petitioner wrote a letter to the respondent, applying for the renewal of license for Amatrra SPA at The Ashok Hotel, as the same is due to expire on 28th February, 2014. It was alleged in the letter that the petitioner seeks automatic renewal of the said

license for a further period of 10 years with effect from 1st March, 2014 and asked the respondent to inform the petitioner if any further formalities are required. The respondent vide its letter dated 12th August, 2013 has acknowledged the letter dated 1st August, 2013 written by the petitioner and informed the petitioner that as per the Policy of the Corporation, first renewal would be made on the recommendation of the Unit Licensing Committee, subject to the compliance of the following conditions and approval of C&MD, and not automatic as mentioned in the petitioner''s letter. The said conditions are as under:-

i) There are no dues outstanding against the licensee.

ii) There is no dispute pending in any forum/court/or otherwise between the licensee and ITDC on account of the outlet in question.

iii) The proposed license fee will not be less than the previous rate.

iv) The proposed annual escalation percentage in the license fee will be @ 10% per annum of the immediately preceding year.

v) There will not be any change in the major terms and conditions of the License agreement, including the nature of business.

10. In reply to the said letter, the petitioner on 2nd September, 2013 has given the status of the payments in para 1 to 6 of the said letter. It was further mentioned in the said letter dated 2nd September, 2013 that as regards the dispute over the extra area, the same was rested by the report of the Local Commissioner dated 14th November, 2007. In any case, the said subject matter is a part of the dispute which is sub-judice in OMP No. 389/2009 filed by the respondent. Though, the petitioner is prepared to resolve the said dispute with regard to the objections filed by the respondent by an amicable settlement. Mr. Sanjay Jain, learned Senior counsel states that as far as the conditions No. (iii), (iv) & (v) as mentioned in the letter of the respondent dated 12th August, 2013 are concerned, the petitioner accepted the same. With regard to conditions No. (i) & (ii), as already mentioned that if the objections filed by the respondent u/s 34 are allowed, the petitioner shall pay the entire amount with interest.

11. Mr. Jain, learned Senior counsel appearing on behalf of the petitioner states that in view thereof, all the conditions and recommendations of the Unit Licensing Committee are satisfied as mentioned in the letter dated 12th August, 2013. He further states that on 29th November, 2013, the petitioner has also made the payment by way of account payee cheques towards full and final settlement of all the outstanding dues up to September, 2013.

12. The petitioner has also challenged the validity of alleged Licensing Policy of 2013 passed in alleged Board Meeting dated 26th December, 2013. It is stated that the Policy is arbitrary, illegal and unenforceable against the petitioner, as the same is against the test of equity, fairness and also against the public policy. The present petition has been filed by the petitioner on 25th February, 2014. As the

license was to expire on 28th February, 2014, the respondent issued a termination notice dated 27th February, 2014. The same is placed on record by way of the affidavit of Sh. Om Shanker Pandey, Senior Vice President of the petitioner-Company as Annexure-M.

13. Learned Senior counsel has referred para 21 of the petition wherein it is stated that the respondent had followed its practice for automatic renewal of the license deeds in several cases similar to the case of the petitioner, such as, Sagar Ratna, Central Bank of India, China Town, Kumgang, Steel, Kashmir Club, Capitol, Mashrabiya, etc. wherein the license deeds of licensees had been automatically renewed by the respondent, even though said license deeds did not contain clauses for automatic renewal.

14. In the case of v Pioneer Publicity Corporation Vs. Delhi Transport Corporation and Another, , this Court speaking through Hon''ble Mr. Vikramajit Sen, J. on the objections raised by the respondents therein u/s 34 of the Specific Relief Act coming into play in these types of cases has held as under:-

...I cannot appreciate the Respondent''s stand that its decision to put an end to the Contract was to implement the direction of the State Government. This is merely an ipse dixit. Keeping in view the provisions of Order XXXIX Rule 2 it is no longer possible to contend that the Court does not possess power to prohibit or prevent the breach of contract. If this is possible in the realm of private contracts, it is an obligation in the realm of public enterprises. Furthermore, the provisions of Specific Relief Act relied upon by Ms. Singh are not attracted for the simple reason that the contract itself prohibits the claim of grant of compensation. A distinction must be drawn between a termination and determination...

15. Similarly, in the case of Atlas Interactive (India) Private Limited vs. Bharat Sanchar Nigam Limited and Anr., OMP No. 482/2004 decided on 17th February, 2005, this Court observed as under:-

...In the realm of private contracts, the freedom, which is available to a private party, in respect of the performance of contractual obligations, is not available to the State or its instrumentalities in the same measure because every action of the State has to be just, fair and devoid of arbitrariness. The State or its instrumentalities cannot conduct themselves like ordinary businessmen playing games with others for monetary gains. State cannot behave like a man in the street and indulge in arm-twisting tactics. Its conduct and actions have to be exemplary and decisions have to be free from arbitrariness, bias and unreasonableness. The reputation of the country and its credibility in business world are far more important than certain economic gains which appear to be unfair and unjust.

It was further held in the said judgment that:-

....The respondent No. 1, by its conduct, allowed the petitioner to invest more and more funds in the project and thereby drove petitioner to a situation where it would not only suffer huge financial loss but loss of trade reputation and goodwill also which may not be compensated in terms of money. The balance of convenience is more in favour of the petitioner inasmuch as the agreement can still be acted upon by both the parties in terms of their obligations a detailed in the agreement. In this petition u/s 9 of the Act, this Court is not at all in a position to order specific performance of the contract inasmuch as it can be ordered by the Arbitral Tribunal only in terms of the arbitration agreement between the parties. This Court can only restrain respondent No. 1 from terminating the Franchisee Agreement in question till the Arbitral Tribunal adjudicates the controversies between the parties.

16. In view of the above, issue notice to the respondent, on filing of process fee and Regd. A.D. Covers within a week, returnable on 20th March, 2014.

17. Till the next date of hearing, the respondent shall not take or initiate any coercive action against the petitioner. Dasti, under the signatures of the Court Master.