

(2013) 05 DEL CK 0405

Delhi High Court

Case No: LPA No. 170 of 2012

M/s. Zoom-Toshali Sands
Consortium

APPELLANT

Vs

Indian Railway Catering and
Tourism Corporation Ltd.

RESPONDENT

Date of Decision: May 29, 2013

Acts Referred:

- Contract Act, 1872 - Section 60, 62

Citation: (2013) 200 DLT 790 : (2013) 4 ILR Delhi 2758

Hon'ble Judges: D. Murugesan, C.J; Jayant Nath, J

Bench: Division Bench

Advocate: Maninder Singh, along with Mr. Rajiv Kapur and Ms. Vatsala Rai, for the Appellant; Saurav Agarwal along with Mr. Vipul Sharde, for the Respondent

Final Decision: Allowed

Judgement

Jayant Nath, J.

In the present appeal, the appellant impugnes the order dated 15.11.2011. The brief facts of the writ petition giving rise to the present appeal are that the respondents invited sealed bids from 14.2.2007 to 06.3.2007 for developing, operating and maintaining budget hotel at Bhubaneshwar through private participation. Annexure 7 to the bid document is stated to contain a draft agreement, which was to be executed by the parties.

2. The last date of submission of bids was 08.3.2007. After opening the technical bid and the financial bid, the respondent awarded the license to the appellant for developing, operating and maintaining of budget hotel at Bhubaneshwar. The license was granted for a period of 30 years. It is the contention of the appellant that on 20.8.2008, the respondent sent the final license agreement for signatures and in the said Draft Agreement, there were material changes as compared to the Draft

Agreement, which formed part of the bid document. It is stated by the counsel for the appellant that Clauses 3.1 viii, 6, 16.2, 18.1 and 18.2 of the Agreement now sent were contrary to Clauses 7.3 and 7.4 of the Draft Agreement. The relevant clauses 7.3 and 7.4 are as follows:

7.3. The Licensed Asset will continue to be owned by the IRCTC and the Sub-Licensee shall have no rights in the Licensed Asset other than those explicitly stated in this Agreement. At the expiry of the licence period or earlier termination under any clause of the agreement, the ownership of the hotel building and all related assets will be transferred to IRCTC.

7.4. The Sub-Licensee shall have no right to give the licensed asset and/or the licensed premises on rent, lease and/or license to any third party. The Sub-Licensee cannot, without prior approval of IRCTC, assign its rights under this agreement. Violation of this clause shall be a ground for immediate termination of this agreement. IRCTC on receiving written request for assignment of the rights of the sub-licensee may accept or reject at its own discretion without giving any reason whatsoever. The decision of IRCTC in this regard shall be final and binding on the Sub-Licensee. Whenever the right of the Sub-Licensee under this agreement is transferred or assigned in any manner whatsoever, the transferee shall be bound by all the covenants and conditions contained herein and be answerable in all respects thereof. Without prejudice to the foregoing and notwithstanding any consent granted by IRCTC, in case of any such transfer/assignment, the Sub-Licensee and the transferee shall both be jointly and severally liable to the IRCTC for compliance with the covenants and conditions, contained in this agreement and breach by the transferee shall be deemed to be a breach by the Sub-licensee.

7.31 Subject to the terms of the license agreement, both parties may modify/amend terms of this agreement in writing, whenever considered necessary, on mutually agreed terms.

3. The details of material variance as per the appellant with the Clauses of the Draft Agreement, which formed part of the Tender bid are as under:

A. Clause 3.1 (viii) The Licensee shall not part with or create any encumbrance or third party right on the whole or any part of the property. Without prior written approval/permission of IRCTC, the Licensee shall have no right to give the property (or any part thereof) on rent, lease, license or part with possession in any manner in favour of any third party other than for purpose of room rental, Banquets, Party rooms/conference halls on daily tariff basis as part of normal hotel operations.

B. Clause 6 in the final license agreement has put the onus of the financing arrangement completely on the sub-licensee at their own cost.

C. Clause 16.2 In the eventuality of the licensee not complying with the terms and conditions of the agreement or the directions of IRCTC or the Project Manager,

IRCTC can impose a penalty upto a maximum of 2% of Net Turnover of previous year in the given financial year. This imposition of penalty would be in addition to and without prejudice any other such action that IRCTC may take under this agreement.

D. Clause 18.1 The Licensee will built, operate and maintain the budget hotel during the term of the license as a user and will have no interest in the premises, property, building and the fitting and fixtures attached to the building.

E. 18.2 The Licensee shall not assign in favour of any person this agreement or the benefits and obligations hereunder save and except with prior consent of IRCTC.

4. The material changes are made in the draft Agreement sent with letter dated 20.8.2008. That various correspondences took place between the parties on the subject, viz., variance in the terms and conditions of the proposed agreement as compared to the Draft Agreement, which was part of the tender documents. Finally, on 04.8.2009, the respondent issued a show cause notice to the appellant as to why the letter of award be not withdrawn and cancelled. A reply was sent by the appellant. Vide letter dated 10.12.2009, the respondent cancelled the award in favour of the appellant, forfeited the security deposit of Rs. 28,16,606/- and debarred the appellant for a period of one year. Hence, the present writ petition was filed, which was dismissed by the learned Single Judge vide orders dated 15.11.2011.

5. Learned Senior Counsel appearing for the appellant submits that pursuant to the tender made by the appellant, and award of licence to the appellant, a binding contract was formed between the parties. One of the conditions of the binding contract was that the formal agreement incorporated as part of the tender documents would be executed. It is further submitted that the respondent cannot make any modifications in the formal agreement unilaterally. The agreement, which was part of the tender documents, had to be executed by the parties without any modification or variance unless the appellant gives consent with the said modifications. The respondent could not unilaterally modify or vary the terms of the appellant which were binding on the parties. Hence, it is submitted by the learned Senior Counsel for the appellant that the entire basis for issuing show cause notice and termination of the license by the respondent is wholly illegal and arbitrary and liable to be quashed. The learned Senior Counsel relies upon the judgment of the Supreme Court in the case of [Delhi Development Authority, N.D. and Another Vs. Joint Action Committee, Allottee of SFS Flats and Others](#), where the Apex Court held that the terms and conditions of the contract can indisputably be altered or modified. This, however, cannot be done unilaterally unless there exists any provision either in the contract itself or in law. Novation of contract in terms of Section 60 of the Contract Act must precede the contract-making process. The parties thereto must be ad idem so far as the terms and conditions are concerned.

6. Learned Senior Counsel for the appellant also relied upon a judgment of the Division Bench of this Court in the case of Hind Broadcasting Company Pvt. Ltd. &

Anr. Vs. UOI (LPA No. 71/2000 decided on 14.9.2009), which related to a tender issued by the Union of India. NIT in that case specifically provided for furnishing of a certificate to the effect that the applicants had read the license conditions and undertake to fully comply with the terms and conditions therein. The draft license conditions were part of the NIT. It was also noted that the controversy that arose in that case was because the respondent introduced certain new terms and conditions and insisted that the contract should be preceded on such revised terms and conditions. The Court held that the respondent while exercising the powers of forfeiture is required to act within the four-corners of the contract. While doing so, the terms and conditions of the contract cannot be altered so as to include extraneous matters, which were not contemplated by the parties. The forfeiture in that case was struck down.

7. On the other hand, the learned counsel for the respondent contends that the submissions of the learned Senior Counsel for the appellant are erroneous. He relies on various communications sent by the respondent where he contends that the entire focus of the appellant was on bankable documents, whereas Clause 7.4 of the Draft Agreement does not permit the appellant to assign the assets. It is further contended that the expression "bankable document" was only to create a charge on the land. It is submitted that the appellant was deliberately delaying the execution of the contract hoping to extract concessions from the respondent. It is further contended that apart from not signing the agreement, the appellant is also guilty of breach of other terms and conditions of the agreement. It is stated that the appellant has not cooperated in providing relevant necessary documents in respect of special purpose vehicle (SPV) created by the appellant for the consortium. It is further contended that SPV that was formed by the consortium members was formed by one Zoom Motels (A) Ltd. who was not a consortium member at all. Hence, it is the contention of the learned counsel for the respondent that the termination order passed by the respondent is justified and the present appeal is liable to be dismissed. It may, however, be noted that the respondent has not filed any counter-affidavit before the writ court. Similarly, no response was filed in the present proceedings.

8. In view of the submissions made by the counsel for the parties above, it is quite apparent that there have been changes made by the respondent in the Draft Agreement, which was a part of the tender documents. Clause 3.17 of the Bid Document specifically states that on issue of letter of award, the successful bidder is required to sign the agreement within 15 days of issue of the letter of award. The Draft Agreement is part of Clause 7 of the Tender Document. It is obvious that if we compare the terms of the Draft Agreement, which is Clause 7 of the tender documents and the proposed license agreement now sent by the respondent, on 20.8.2008 there are some material changes in the terms and conditions. The said new terms and conditions are at variance with the terms and conditions stated in the Bid documents. Clearly, it was impermissible for the respondent to unilaterally

change the terms and conditions. On issue of letter of Award, a binding contract came into being between the parties. u/s 62 of the Indian Contract Act, 1872, it is only when the parties agree, a new contract can be substituted for the original. The said Section 62 of the Indian Contract Act reads as follows:

62. Effect of novation, rescission, and alteration of contract.-If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

9. The judgment relied upon by the learned Senior Counsel for the appellant in the case of Delhi Development Authority & Anr. Vs. Joint Action Committee, Allottee of SFS Flats & Anr. (supra) clearly holds that a party cannot unilaterally amend the contract. Hence, the action of the respondent in attempting to modify the proposed Draft Agreement between the parties was clearly a untenable act and the license could not be terminated on the said ground.

10. There is, however, some force in the contention of the respondent authority that most of the communications which were sent by the appellant sought additional concessions from the respondent. Reference may be had to communication dated 27.8.2008 sent by the appellant in response to letter dated 20.8.2008 of the respondent. In the said communication, the appellant stresses that the draft agreement now sent for signatures to the appellant does not address the issues/concerns of the lenders. Even a communication dated 23.9.2008 sent by the appellant stresses on the request that licensee should be entitled to assign all its rights and interest in the license assets in favour of the lenders/financial institutions for securing financial assistance to execute the project. Similar is the stand of the appellant in the representation dated 04.11.2008. However, there can be no bar for a party to request for new terms to be negotiated in a contract. Such request would not imply that the respondent had a right to unilaterally change the terms of the contract which were provided for in the tender documents and which had been accepted by the parties. Hence, this contention of the respondent has no bearing on the issue at hand.

11. The other ground on which the respondent has contended that the licence awarded to the appellant has been terminated is that the SPV formed by the Consortium members of the appellant is not in accordance with the terms of the tender and the appellant has failed to provide the details as demanded by the appellant. In this context, reference may be had to the allegations made by the respondent in the show cause notice dated 04.8.2009. The relevant part of the show cause notice, viz., Para 10 reads as under:

10. Besides, you have caused substantial delay to the project on one pretext or the other although the Final Concession Agreement had been sent to you for execution long back. You have also not co-operated in providing all the relevant and necessary documentation in respect of the SPV created by your consortium for the purposes of

the present project.

12. Hence, the only allegation in the show cause notice in this regard was that the appellant had not co-operated and provided relevant and necessary documentation in respect of the SPV created by the Consortium for the purpose of the present projection.

13. In contrast, the communication dated 10.12.2009 by which the award in favour of the appellant was withdrawn states on this issue as follows:

30. Another fact that cannot be ignored is that you have not provided the entire details as demanded by IRCTC in respect of the consortium SPV. Clauses 5.3, 5.4.3, 5.5, 5.6, 5.8, 5.9 and 5.13 of the tender document dealt with situation where a consortium is awarded the license. The MOU dated 26.03.2007 submitted by you between the Consortium members was required [see Clause 5.3 of the tender document]. However, as per Clause 7 of the MOU submitted by you, it was provided that the members of the Consortium would enter into a Prime Consortium Agreement form of a special purpose vehicle fully defining and describing the respective duties and obligations. You were called upon to produce this document vide letter dated 09.06.2009, but you have refused to provide this document in your response dated 16.06.2009 on the pretext that the Prime Consortium Agreement was to merely set out certain commercial understandings between the consortium members and has no bearing on the scope of work of each member. This plea of yours is completely contrary to clause 7 of the MOU dated 26.03.2007.

The SPV, M/s. Zoom Motels (Bhubaneswar) (P) Ltd. was incorporated on 14.09.2007 and documents in that regard were forwarded to IRCTC on 11.02.2008. It was noticed that the Lead Members [M/s. T.K. International Limited] was not a founder member or even a shareholder in the new company and the Articles of Agreement had no reference to the MOU dated 26.03.2007 or to the terms. When this fact was brought to your notice by IRCTC letter dated 10.04.2008, you responded on 15.04.2008 by stating that you would adhere to the terms and conditions of the MOU. Subsequently, you forwarded a certificate of the Chartered Accountant dated 10.05.2009 that M/s. T.K. International Limited holds 33% share in the SPV. In its letter dated 09.06.2009, IRCTC has asked you to produce the proof of such shareholding on the basis of which the C.A. had issued the Certificate stating that 33% shares are held by M/s. T.K. International Ltd., but no such document has been forwarded till date. Online search by IRCTC has shown that there is no shareholding in favour of M/s. T.K. International Limited in the SPV. It has also been found that the share holding reported by you vide your letter 16.06.2009 does not match with the annual return filed with the Registrar of Company. There is no mention about the aforesaid transfer of shares in the Annual return of the Company for the year 2008, in respect of which the AGM was held on 11.08.2008.

M/s. T.K. International Limited did not have 33% shareholding since incorporation. It is clear that the SPV so constituted was not in accordance with Clauses 5.4.3 and 5.13 at the time of its incorporation and even later. The said clauses required that the SPV had to be promoted and incorporated by the Consortium Members. The SPV was not formed by the Consortium Members, but was formed by one M/s. Zoom Motels (P) Ltd., when was not one of the Consortium members at all, and this Company held 9900 shares out of the 10000 issued shares. It has been later informed that the shares of this SPV were transferred on 20.04.2008 in the ratio of 67% [6700 shares] and 33% [3300 shares] in favour of the Consortium members, M/s. Zoom Developers (P) Ltd. and M/s. T.K. International Limited. When you were asked to produce the documents in support of the shareholding, the same was never forwarded to us.

It is also peculiar to note that M/s. T.K. International had no representative Director in the Board of Directors till recently. It has been informed to us that only recently one Mr. T.H. International Limited. Your conduct in the aforesaid regard shows that the SPV is a bogus entity and is not in accordance with the bid documents.

14. Clearly, the facts stated in the communication dated 10.12.2009 terminating the award are materially different from the allegations stated in the show cause notice. The only violation stated in the show cause notice is the non-supply of information of relevant documents. In fact, perusal of the correspondence between the parties before the show cause notice shows that the respondent was pressing the appellant to execute the modified agreement sent vide communication dated 20.8.2008. The request for details of SPV was only an additional request. Nowhere, it is stated that the execution of the agreement cannot be done until the said demand regarding details of SPV are not met. Reference may be had to letters dated 21.1.2004, 27.1.2009, 13.4.2009, 11.5.2009, 09.6.2009 written by the respondent to the appellant. Clearly, the perusal of these communications would show that the complaint of the respondent relates to non-supply of the documents and information by the appellant. In fact, various documents/clarifications were supplied by the appellant. This defect regarding document appears to be such that the appellant can cure on getting opportunity for doing the needful.

15. In view of the above, we quash the communication dated 10.12.2012 issued by the respondent. Other consequential action will be taken by the respondent in terms of terms and conditions of the tender documents.

16. Neither of the parties have brought on record, the present status of the project. In fact, before the learned Single Judge on 05.8.2010, the learned Additional Solicitor General while appearing for the respondent had made a statement that without prejudice to their rights and contentions, they are willing to consider the case of the appellant herein if a fresh bid is submitted by it pursuant to the tender now proposed to be floated by the Respondent. However, nothing is placed on record as to whether such a tender has been is being floated and if so, its results. The present

appeal is allowed as above.