
2017 eGLR_HC 10006499

Before the Hon'ble MR ANANT S DAVE, JUSTICE the Hon'ble MR. A. Y. KOGJE, JUSTICE

SAMBHAAV MEDIA LTD AND ORS. Vs. COLLECTOR - RAJKOT AND ORS.

SPECIAL CIVIL APPLICATION No: 13823 of 2013 , Decided On: 03/04/2017

(A) [Head Notes Incorporated when Published in GUJARAT LAW REPORTER]

Mr. Mihir Joshi, Senior Advocate with Mr. Kunal Nanavati, Advocate for NANAVATI ASSOCIATES, for the Petitioner(s) No. 1 - 2 Ms. Maithili Mehta, AGP for the Respondent(s) No. 1 MR JAYANT P BHATT, for the Respondent(s) No. 2 - 3

A. Y. KOGJE, J. 1. This petition under Article 226 of the Constitution of India is filed for setting aside order of blacklisting dated 07.08.2013 of the petitioner as well as for setting aside a termination - cum - demand notice dated 01.02.2013.

2. Brief facts are as under:

A. The petitioner, being registered company engaged in the business of publication of outdoor media industry, bided online in response to the advertisement dated 26.12.2007 published in the newspaper inviting the tender to undertake work of designing, financing building, maintaining and transferring 100 bus pickup stands / queue shed at various location on different routes of the bus service maintained by the respondent corporation in the city of Rajkot.

B. After the due tender process, the bid of the petitioner was accepted and a license agreement (herein after referred to as the Agreement) dated 21.02.2008 was executed between the petitioners and respondent2 for the period of 10 years.

C. The petitioner as per the Agreement had to pay an amount of Rs.10,000/ per month per bus stand to the respondent - corporation towards license fees and as against this the petitioner was authorised to display advertisement on such bus stand / queue shed from the private client and was also entitled to receive the advertisement charges.

D. Pursuant to successful entry into agreement, the petitioner proceeded to make huge investment in setting up of the bus stand / queue shed.

E. The petitioner, however, found that on many of the routes though bus stands were erected but bus service was not operational and in fact, during the period between December 2010/2011, there was no bus service at all, as a result of which petitioner was suffering huge losses.

F. As the petitioner was faced with aforementioned difficulties, he addressed communication to respondent - corporation to discontinue with the agreement partially. The petitioner repeated his request, however, no action was taken by the respondent - corporation and thereafter, on the ground that the petitioner has not been able to honour the contract, passed the impugned order on 07.08.2013 directing the petitioner to deposit balance amount Rs.94,63,644/ towards license fees and also blacklisted the petitioner for period of 3 years.

3. Heard Mr. Mihir Joshi, learned senior advocate with Mr. Kunal Nanavati, learned advocate from Nanavati Associates for the petitioners and Shri J. P. Bhatt on behalf of the respondent - Corporation.

4. Learned Senior Advocate for the petitioner submits that after agreement was entered into, the petitioner found that out of total 50 routes demarcated, only 31 routes were operational between the year 2007/2010. Moreover, between the year 2010 - 2011, there was no bus service at all. It was responsibility of respondent corporation to ensure the bus services on such routes. Otherwise there was no meaning for petitioner to showcase advertisement of product of their clients.

4.1 It is submitted that in the year 2011, the petitioner requested the respondent - corporation to cancel and terminate the contract for 50 bus pickup stands out of 100 pickup stands. It was also requested to the respondent to exempt the petitioner from the payment of license fees with effect from 14.06.2012. It is submitted that though the petitioner had invested substantial amount policy of respondent - corporation itself not plying the bus on the routes where pickup stands / queue shed were erected by the petitioner has led to frustration of contract at the behest of respondent - corporation.

4.2 It is submitted that despite the aforementioned position, the respondent corporation instead of responding to the request made by the petitioner, called upon the petitioner company to pay license fees totaling to Rs. 55,90,290/ and indicated that the petitioner would be blacklisted.

4.3 Learned Senior Advocate for the petitioners took this court through communication of the advertiser at annexure - I colly, to indicate that on account of nonplying of the buses on the routes, such advertisers are not ready to put up their advertisement on the erected bus pickup stands.

4.4 He also drew our attention to the statement indicating revenue generated during the period of agreement.

4.5 He also indicated that the petitioner has indeed made payments of the license fees till the period June 2012. He has taken us through the photographs of the sites where such bus pickup stands are erected and the present position and submitted that now in absence of any route for plying bus service, the structure is no more capable of being used. He lastly submitted that as per the agreement, which provided for arbitration clause, arbitration proceedings were instituted pursuant to order passed by this court in Arbitration Petition No. 29 of 2013. The Arbitration proceedings have concluded and the final award is pronounced on 16.10.2015.

4.6 He, therefore, submitted that the decision of the respondent - corporation to blacklist the petitioners, deserves to be set aside.

5. As against this, learned advocate for the respondent - corporation, placing reliance on the affidavit filed on behalf of the respondent, would submit that the petitioner cannot be permitted to go back on the terms and conditions of the agreement entered into with the respondent - corporation. The revenue that may be generated by the petitioner pursuant to display of advertisement is not relevant for the purpose of honouring commitment made by the petitioner under the Agreement to the respondent corporation. It is submitted that as the petitioner has defaulted in making the payment of license fees as per the Agreement to the respondent - corporation, respondent corporation was justified blacklist the petitioners.

6. Having heard learned advocate for the respective parties, it appears that the challenge before this court to the impugned decision which can be split into two parts. First being termination of contract on the basis of default in making payment of license fees and other part being blacklisting the petitioner on the basis of same ground. As is referred herein above, the issue of termination of tender and consequential payment of the license fees and the rival claim of the petitioner on the basis of conditions in the license agreement dated 21.01.2008, was subject matter of arbitration and the arbitrator has already pronounced the final award as mentioned in the preceding paras. Moreover, during the course of the submissions, it is brought to the notice of this court that the said award of the Arbitral Tribunal is already a subject matter of an appeal filed by the respondent corporation before the court having competent jurisdiction. The final Award pronounced by the Arbitrator on the points of reference is reproduced herein below,

"The claim of the claimant is partially allowed. The claimant Sambhav Media Ltd. do recover the amount of Rs.1,69,60,664/ (One Crore Sixty Nine Lac Ninety Thousand Six Hundred Sixty Four only) from the respondent RMC.

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Claimant do recover running interest at the rate of 9% on the amount Rs. 1,69,30,664/ from 03.05.2013 till the date of award i.e. 16.10.2015 from the respondent. Further,

The claimant is awarded amount of costs of Rs. 60,000/ towards the costs of arbitral proceeding.

The claimant do recover running interest at the rate of 15% on the amount of Rs. 1,69,90,664 (Rs.1,69,30,664 + Rs.60,000) from the date of award and thereafter, upto the date of realization of the amount awardable from the respondent.

However, it is decided and ordered that if the payment of the amount awarded as per relief A hereinabove is made within 45 days from the date of the declaration of this award. The rate of interest would be 9% instead of 15%. It is clarified that the payment need to be made within 45 days should be with interest at the rate of 9% to get the advantage to minimum the actual amount payable under the award drawn.

Rest of the claims treated dismissed with no order as to costs."

7. Hence, this court is refraining from dealing with the issues which were already covered under the arbitration proceeding i.e the issue of payment of premium / license fees as per the contract. However, the issue of blacklisting the petitioner for 3 years is still required to be decided by this court.

8. Clause 8 of the preliminary definition of the tender document, is as under:

"Breach" means breach by either party of any of its obligation in this agreement which shall be deemed to have adverse effect to the proposed service."

8.1 Clause20 defines Material Breach,

"Material Breach" means a breach by either party of any of its obligations under this Agreement which has / likely to have a Material Adverse Effect on the Project and which such party shall have failed to care within the Cure Period."

9. The tender document also provides for obligation and rights of the respondent corporation and it is obligatory on the part of the respondent corporation to make available the sites to the licensee for construction and maintenance of pickup stands / queue shed.

10. It is obligatory on respondent - corporation to permit the licensee to construct and maintain facilities on the location and also provide with the help and guidance to establish such pickup stands. The licensee will also be granted advertisement rights as per approved design. It is obligatory upon the corporation to ensure that no bearers are erected or placed by any government agency on city bus pickup stands / queue shed. The documents also provided a right to terminate agreement if the licensee defaults in fulfilling any of the obligations and responsibility. Over and above, this termination clause also provided under item of obligation and rights of the bidder wherein, Clause 5 is relevant which, as under:

"Termination:

Bidder Event of Default the following events shall constitute an event of default by the Bidder (a "Bidder Event of Default") unless such Bidder Event of Default has occurred as a result of RMC Event of Default or a Force Majeure Event.

Either party may terminate the Agreement by giving one month notice to the other party."

11. The annexure to the tender document provided for the agreement describes the project as,

"Description of the Project: Construction and maintenance of 100 nos. of Good quality pick up stand/queue shed at predefined location in Rajkot City as specified in the tender.

Name of work:

To design, Finance, Build, Maintain and Transfer of good Quality pick up stand / queue shed in Rajkot City on License basis under PPP mode."

12. The scope of work under the Clause 3 of the agreement, is as under :

"Scope of Work:

c. There shall be no financial contribution from RMC for building the bus pick up stand / queue sheds and their maintenance during the license period.

d. To enable the licensee to recoup the investment, advertisement rights on the bus pick up stand / queue shed will be granted to it during the license period. Provided that, the licensee shall pay necessary fees, cess, taxes, levies etc., to any agency or authority under law.

e. Once the bus pick up stand / queue shed is built, it becomes RMCs property & civic facility except the advertisement right granted to it by RMC. The ownership of the site and the structures built by the licensee thereon shall always continue with the RMC. The Licensee shall have no interest or claim or title over the land or the structure of any other amenities and facilities provided thereat and shall be responsible to maintain them while availing the advertisement rights during the license period. The Licensee will be granted advertisement rights as per the approved designs. The installation or fixing or enclosure or attachment of display boards or material shall be subject to safety and security of the commuters and also the rules and regulations of the concerned authorities including RMC and payment of necessary fees, cess, tax etc."

13. Clause 4 refers to Rights of the licensee, which is as under:

"Rights:

Licensee will collect advertisement fees/ charges/ costs from the parties for whom the advertisements are displayed to recoup its investment for construction and maintenance of the facility as per the terms and conditions of the agreement."

14. Arbitration Clause - 12, is as under:

"Arbitration:

In the event of any dispute or difference whatsoever arising between the two parties in connection with this agreement, they shall confer at least once to attempt to amicably resolve any such dispute or difference by mediation, conciliation or similar means."

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15. Annexure - H is the first communication dated 20.12.2011 to bring to the notice of the respondent - corporation about the practical difficulties of maintaining the pickup stands / queue shed, as there was no bus services for utilising such bus pickup stands erected. In fact, there were theft committed at such places and there was no commercial use of such pick-up stands and hence, the request was made to discontinue the agreement in connection with 50 such bus pickup stands / queue shed. While for remaining 50 bus shelters again by communication dated 14.06.2012 (annexure - I), a request was made to the respondent corporation to grant exemption from making payment of license fees as no bus service was operational on that routes and the petitioner is not making any income from putting up advertisement on such pickup stands / queue shed where bus service is nonoperational.

16. Instead of responding to the communication, by communication dated 31.07.2012, the respondent corporation proceeded to issue a showcause notice for making payment of license fees which appears to have started from month of March, 2012, till October, 2012. The showcause notice was also for the purpose of blacklisting the petitioner.

17. It appears that the petitioner made an attempt to settle the issue by offering upfront payment and also forwarded the cheque an amount of Rs. 35,32,598/ to be accepted as full and final settlement for both operable and non operable bus stands. Against this, the respondent - corporation issued a communication dated 05.01.2013 crediting the cheque amount and asking the petitioner to deposit balance, thereby not accepting proposal of the petitioner for full and final settlement.

18. This issue need not be dealt any further as the parties are already seeking their respective remedy before the Arbitration Forum.

19. It is pertinent to point out that the object of coming out with the tender of setting up of pickup stands / queue shed, reads as under:

"Rajkot is the largest city of Saurashtra region of western state Gujarat. It has observed the highest economic growth rate in the region. As a part of its many initiatives to build matching infrastructure facilities in the City, Rajkot Municipal Corporation (RMC) proposes to build good quality pick up stands / queue shed on Design, Finance, Built, Maintain and Transfer (DFBMT) basis under the Public Private Partnership (PPP) mode on license basis under competitive bidding process in initial stage to cover main roads of the city by 100 pick up stands / queue shed. The project envisages the private agency to Design, Finance, Build and maintain quality and standard bus pick up stand / queue shed during the license period where after the structures and all other facilities and amenities forming part of the pick up stand shall revert to RMC. To enable the Selected Agency (Bidder) to recoup the investment, advertisement rights on the Bus Pick up Stand / Queue Shed will be granted to it during the license period.

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20. Considering the aforesaid, it is obvious for any bidder to expect that after having put in investment or erected of pickup stands / queue shelters by investing in infrastructure / man power etc., the successful bidder was left to himself to generate revenue from the advertisers and share such revenue with the respondent corporation. The revenue generation, therefore, would have direct connection with advertisement put up on such shed / pickup stands and the advertiser will come forward with such shed where there is a traffic of commuters by bus when bus services were rendered operational on these routes. It cannot be expected from the successful bidders to generate any revenue when no advertiser would be ready and willing to put up any advertisement where there is nil traffic of bus commuters. It is also indicated that most of shed put up on sites which were either in abandoned condition or dilapidated on account of being unused due to lack of bus service on that routes. When the petitioner has brought all these aspects to the notice of the respondent - corporation well in advance, it was expected of the respondent corporation to have taken a pragmatic view so that sanctity of this agreement on the basis of tender process could have been maintained.

21. Failure on part of corporation to maintain the bus service would amount to default at the end of respondent - corporation, though, it is argued that by the learned advocate for the respondent corporation that the making the bus service operational was not the condition of agreement which was executed between the parties. This court is not able to accept such argument as very foundation is for erecting bus pickup stands / queue shed for the bus services and the traffic on such bus service would be deciding factor for putting up advertisement which was ultimate source of revenue. When the scope of revenue was discouraged by the action of respondent - corporation, the arguments of the learned advocate for the respondent corporation need not be accepted.

22. The petitioner submitted detailed explanation to the showcause notice communicated by the respondent corporation by its reply dated 14.02.2013, wherein the petitioner tendered reasonable explanation including the practical difficulties faced by the petitioner. The explanation given by the petitioner appeared to be valid explanation which ought to have been taken into consideration by the respondent corporation for the purpose of taking of impugned decision. It appears that while taking impugned decision, the respondent corporation has not dealt with any of the explanation and merely on the ground on which showcause notice was issued, the impugned decision of blacklisting the petitioner was taken. The documents which were furnished to the corporation including statement of account to demonstrate the huge expenditure which was incurred by the petitioner in setting up of all pickup stands / queue shed and the revenue received by the petitioner during operation of work contract, ought to have been taken into consideration by the respondent corporation. Therefore, taken into consideration the fact that the petitioner had acted in time by making written representation to the respondent corporation about practical difficulties faced on account of nonplying of bus services, the expenditure incurred by the petitioner in setting up pickup stands / queue shed and the fact that the petitioner has made payment as per contract till 2012 is not disputed and as the valid explanation given by the petitioner to the notice of the respondent corporation not considered by the corporation while passing impugned order, does not justify blacklisting the petitioner by passing impugned order. Thus, impugned order of blacklisting the petitioner is arbitrary unreasonable exercise of power by RMC, violets Article 14 of the Constitution and deserves to be set aside.

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23. In view of the aforesaid, the petition deserves to be allowed partially. The order dated 07.08.2013 passed by the respondent corporation in so far as blacklisting the petitioner for the period of three years on account of violation of condition No.30 of the work contract is hereby set aside. Rule is made absolute to the aforesaid extent. No order as to costs.

Petition Partly allowed

