

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 22.10.2013

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Judgment delivered on: 13.01.2014

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OMP 357/2013

XEROX INDIA LIMITED

..... Petitioner

VERSUS

M/S. COMPUTERS UNLIMITED AND ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Rajat Joneja, Advocate

For the Respondents : Ms. Manjula Gupta, Advocate for R-1

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the Act) to lay challenge to an award dated 26.11.2012 passed by a sole arbitrator appointed by this court.

1.1. The arbitrator was appointed vide order dated 07.02.2007 in a petition filed under Section 11 (6) r/w. Section 11(8) of the Act by respondent no.1, which is the original claimant, in the present proceedings. Notably, by this order, not only was the arbitrator appointed, but his fee at the rate of Rs. 11,000/- per hearing, subject to a maximum of Rs. 1,10,000/-, was also fixed.

1.2. It appears that, thereafter an application was moved before this court which had consent of both parties, to allow parties to fix the fee in consultation with the arbitrator. This order was passed on 16.07.2008. I have adverted to this aspect in the opening part of my judgment itself, as

much of the consternation displayed by the petitioner is with respect to costs awarded. I, therefore, propose to examine the tenability of the challenge, in some detail, in the latter part of my judgment.

2. Coming back to the facts of the case: the disputes between the parties arise out of a Sales Promotion Agency Agreement dated 20.08.1999 (in short the agreement) entered into between the parties herein. Under the said agreement, respondent no.1, a sole proprietorship concern namely M/s. Computer Unlimited was appointed as one of the sole promotion agents for selling the products of the petitioner which included various equipments and systems described in Annexure –A to the said agreement. For its efforts, respondent no.1 was to be paid service charges in relation to orders procured by it and accepted by the petitioner.

2.1. It may be noted that the relationship of a Sales Promotion Agent (in short SPA) obtained between the petitioner and respondent no.1 since 1993. Prior to the execution of the aforementioned agreement on 20.08.1999, the agreement had been renewed twice after the gap of three years; which was the tenure of the agreement. The agreement under consideration was also required to run for a period of three years subject to its renewal. Unfortunately, for respondent no.1, the agreement was unilaterally terminated by the petitioner on 01.01.2002.

2.2. This gave rise to claims by respondent no.1 which, having not been settled, impelled respondent no.1 to take recourse to arbitration proceedings.

2.3. Before the arbitrator, parties filed their respective pleadings. Infact, the petitioner appears to have filed a sur-rejoinder as well. Respondent no.1 raised 26 claims. There were no counter claims raised by the petitioner.

2.4. Both the petitioner and respondent no.1 examined one witness each.

On behalf of respondent no.1, its proprietor, Mr. Santanu Biswas (CW-1) tendered his evidence while on behalf of the petitioner, Mr. P.R. Ranganath (RW-1) tendered his evidence. Examination-in-chief was carried out by the two witnesses by furnishing their respective affidavits. Both witnesses were subjected to cross-examination by the opposite party.

2.5. It is pertinent to notice that with respect to costs awarded by the learned arbitrator, the petitioner quite curiously stressed the fact that respondent no.1's witness Mr. Santanu Biswas (CW-1) was cross-examined over 23 sittings spanning a period from 13.12.2008 to 24.07.2010, while the petitioner's witness Mr. P.R. Ranganath (RW-2) was cross-examined, in about 9 sittings, between 11.09.2010 and 15.12.2010. The impact of this submission will be dealt with by me, while dealing with the issue pertaining to the award of costs by the learned arbitrator.

3. The learned arbitrator, had struck, five issues between the parties. These being:

- “...(i). Whether the claimant had any relationship with the respondent?
- (ii). Whether the Sales Promotion Agreement dated 20.08.1999 was duly terminated in accordance with the law and if not so, with what effect?
- (iii). Whether the conduct of the respondent is above board and whether it discloses an unfair attempt to withhold legitimate moneys payable to the claimant?
- (iv). What claims is the claimant entitled to?
- (v). Interest, Costs and Expenses...”

4. In so far as issue nos.(i) to (iii) are concerned, the learned arbitrator returned findings of fact against the petitioner.

4.1. As regards issue no.(iv) is concerned, the learned arbitrator allowed

15 of the 25 claims lodged by respondent no.1, all of which except one were fully allowed. To be noted, claim no.1 was bifurcated in two parts i.e., 1(a) and 1(b) out of which, only Claim 1(b), was allowed.

4.2. Claim no.26 was covered under issue no.(v), which was partially allowed. The claims which were fully allowed were claim nos.1(b), 9, 10, 11, 13, 16, 17(a), 18, 19, 20, 21, 23, 24 and 25. One claim i.e., claim no.7, was partially allowed. The remaining claims being: claim nos.1(a), 2, 3, 4, 5, 6, 8, 12, 14, 15 and 22 were rejected. Two parts of claim no.17 i.e., claim nos.17(b) and 17(c), were not considered.

4.3. The total value of the 25 claims lodged by respondent no.1 (excluding claim for costs and expenses) was a sum of Rs.21,79,938/-, out of which claims worth Rs.9,77,288/- were either rejected or not considered. The value of the claims allowed was thus: Rs.12,02,650/-.

4.4. Claim no.26 which, as indicated above, was covered by issue no.(v), included interest, costs and expenses.

5. It is important to note that apart from the objection taken by the petitioner with regard to the amount awarded qua interest, costs and expenses, the challenge in respect of the other claims was restricted to claim nos.9, 10, 11, 13 and 17. Since qua claim no. 17 only claim no.17(a) was allowed, the challenge, as would be obvious, would be restricted to the said part of the claim, as the other two sub-claims i.e., claim nos. 17(b) and 17(c), were not considered. In terms of value, these claims amount to a cumulative sum of Rs.7,01,528/-, which is nearly 58% of the total value of the claims allowed by the learned arbitrator.

6. With the aforesaid preface, let me also indicate the findings arrived at by the learned arbitrator in respect of issue nos.(i) to (iii).

6.1. In so far as issue no.(i) is concerned, the learned arbitrator clearly found that there existed a relationship between the parties herein, which was pivoted on the aforementioned agreement executed on 20.08.1999. The learned arbitrator found that the said agreement came into effect from 01.04.1999.

6.2. As regards issue no.2, the learned arbitrator found that the petitioner had terminated the agreement with respondent no.1 vide communication dated 01.01.2002. He also found that the petitioner purported to terminate the agreement in exercise of power conferred under clause 19.1 of the agreement, which obliged the petitioner to give 30 days' notice. It was found by the learned arbitrator that the said notice was not given and therefore, the termination was "null and void". The necessary consequences of this finding of the learned arbitrator were, which he recorded in the impugned award, that the agreement would have run its entire course from 01.04.1999 till 31.03.2002.

6.3. In so far as issue no.(iii) was concerned, the learned arbitrator recorded a finding of fact that despite several opportunities having been granted by him to produce the documents in the petitioner's power and possession, the said documents were not produced and therefore, he would have to record adverse findings against the petitioner. The discussion with regard to the same begins at paragraph 58 of the impugned award and ends at paragraph 92.

6.4. I must note though that with regard to the petitioner's conduct, there are several other paragraphs in the impugned award, in which the learned arbitrator has adversely commented upon the conduct of the petitioner in keeping back relevant documents. The reason why production of documents

was necessary was, the unravelling of the fact that respondent no.1 being only a SPA (which procured orders for sale of products of the petitioner), the details with regard to despatch of the products, their installation, generation of invoice, and consequent, receipt of money were available with the petitioner. The fact that these documents were in possession of the petitioner got revealed during the deposition, of its own witness in cross-examination. The learned arbitrator adverts to this aspect of the matter, in paragraph 61, at internal page 30 of the impugned award. The relevant extract reads as follows :-

“...Ques. How did you prepare Ex.R/3?

Ans. This was verified through our computer record and then prepared. We have all these customer accounts in the system, from which we can validate the date of sale, date of installation, and payment receipt date. These are the key parameters used for the Sales Commission Validation as per policy based upon which the amount shown in this report calculated. By customer’s account, I mean the accounts of the customers who have been supplied and sold the machines/equipments of the company...”
(emphasis is mine)

6.5. At this stage, I may also note the summation of the learned arbitrator, made in paragraphs 87 to 90 of the impugned award, qua the deliberate attempt made by the petitioner in keeping back records, with a view to deny what, according to the arbitrator, were just claims of respondent no.1. The relevant extracts read as follows :-

“...87. After hearing both the parties and in view of the facts, circumstances and well settled judicial principles, the Arbitrator is of the opinion that the all the original documents pertaining to SPA including those relating to orders, sales and commission of SPAs are with the respondent company who has deliberately, intentionally and malafidely withheld the said documents from the Arbitrator, despite being repeatedly directed by the arbitrator

to produce the same. The arguments made by the claimant have distinctive weight and that the Arbitrator agrees with the same.

88. The above detailed conduct of the respondent leaves no doubt in the Arbitrator's mind that the respondent has adopted a hide and seek approach with the Arbitration proceedings only with a view to delay making payments to the claimant. The present case is a classical case, where the respondent, being a huge company, has been relying upon its dilatory muscle power to prevent making legitimate payments to the claimant. There was nothing preventing the respondent from filing all the original documents. The Arbitrator gave various opportunities to the respondent to file all the original documents in its power and possession. However, the respondent chooses not to do so, for reasons best known to itself. Further, such original documents, if produced, would have demonstrated the bluff that the respondent company has been playing with the claimant and the arbitration proceedings, thereby abusing the process of law and making mockery of the present arbitration. The averment of the respondent that the documents are not traceable since the records pertaining to the case are very old, clearly is not tenable. The bluff of the respondent is further exposed by the cross examination dated 11.9.2010 at 1pm, of Mr. P.R. Ranganath (RW-1), which indicated that the affidavit filed by Mr. Manish Gupta dated 1.09.2010 was incorrect and that the relevant documents used for the sales commission validation were with the Respondent company. The respondent has been playing hot and cold at the same time, so as to delay making legitimate payments to the claimant.

89. From the record, it is disclosed that the respondent is a big company, using computers and computer resources for all its operations. The relevant documents in question in the present matter, appear to be computer output, generated from computers and computer resources. There was nothing stopping the respondent company from filing electronic records as well as data and information in the electronic form, resident on its computers, computer systems, computer networks and computer resources,

which had a bearing, nexus, association or connection of any kind whatsoever, with the transactions in issue in the present proceedings. However, the same was deliberately not done, for reasons best known to the respondent.

90. It is well settled law that an adverse presumption shall be drawn against the party in default to the effect that evidence which could be but is not produced would, if produced, have been unfavourable to the person who withholds it. The rule is contained in the well-known maxim: omnia praesumuntur contra spoliatorem. If a man wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted. The Arbitrator hence draws an adverse inference against the respondent for its deliberate, intentional and malafide conduct of withholding and not filing all the documents in its power and possession in the present Arbitration proceedings...”

(emphasis is mine)

7. It is in the background of the aforesaid that one has to consider the objections of the petitioner with respect to claim nos.9, 10, 11, 13 and 17(a).

8. I may note, at this stage, on behalf of the petitioner arguments were advanced by Mr. Rajat Joneja, while on behalf of respondent no.1, submissions were made by Ms. Manjula Gupta.

9. I propose to discuss the abovementioned claims in seriatim. Before I do that, I must touch upon one aspect of the matter in respect of which a vigorous argument was raised by Mr. Joneja, which was that, the learned arbitrator contrary to any known procedure had allowed respondent no.1 to file additional documents alongwith an additional affidavit. For this purpose, my attention was drawn to a proceeding sheet of 21.03.2009. In my opinion, the objection is without merit. The learned arbitrator has dealt with the objection of the petitioner exhaustively in the proceedings held on

21.03.2009. Apart from the fact, that the arbitrator came to the conclusion that the proceedings before him were not fettered by the strict procedural rules of the Indian Evidence Act, 1872 or the Code of Civil Procedure, 1908 (CPC), he was of the view that having given an opportunity to both parties to file remaining documents vide his order dated 13.12.2008, no fault could be found with respondent no.1 having taken the said opportunity and the petitioner having failed to file any documents in response thereto. It is not as if the petitioner did not have an opportunity to rebut. It is just that, consistent with the petitioner's past conduct, it chose not to file a document lest details of the sales transactions, which got consummated with the help of respondent no.1, get revealed.

CLAIM No.9

10. Under claim no.9, respondent no.1 had sought release of Rs.1,48,800/- in respect of disputed / withheld claims. The claim consists of 20 different items in respect of orders which were procured by respondent no.1 against which wrongful deductions of commissions due on such orders were made by the petitioner. In addition to this, the claim includes monies wrongfully adjusted in respect of consumables and spares, which were directly sold by the petitioner to the customers. The wrongful deductions made on this account were subject matter of eight invoices which the petitioner had raised on the District Magistrate at Jalpaiguri, bearing invoice Nos. U2670 to U2677; all of which were dated 06.06.1995. The total amount adjusted against these eight invoices was a sum of Rs. 59,797/-. It appears that a statement of claims was submitted by respondent no.1 to the petitioner, the cumulative total of which, was Rs.1,48,800/-. The petitioner's officers on their part had sought supportive documentation only

with regard to claims, which were mentioned under serial nos.1, 5, 7, 8, 9, 12 and 16. The total of these claims in respect of which documents were sought, amounted to Rs.49,452/-. Thus, qua the balance claims, which amounted to Rs.99,348/-, no documents were sought by the petitioner's officers for substantiating the said claims.

11. It was argued on behalf of the petitioner that since no documents were supplied for claims amounting to Rs.49,452/-, the entire amount could not have been awarded in favour of respondent no.1. I may only note that there is no articulation of this argument in precise terms in the written submissions though, at the bar, Mr. Joneja had made such an attempt.

12. On the other hand, Ms. Gupta submitted that the petitioner, firstly, did not pay monies even in respect of those claims qua which no documentation was sought, as obviously, as per the petitioner, as well, these were valid claims.

12.1. In so far as the claims in respect of which an objection was raised, which were 7 in number, 5 claims related to short payment. No explanation was given by the petitioner's witness (RW-1), with regard to short payments. That apart, respondent no.1 had supplied documents which indicated the machine serial number; the model number, and the order control number (OCN), which were sufficient for the petitioner to examine the validity of the claims.

13. Having examined the documents as well as the contentions of the learned counsel for the parties, I am of the view that no fault can be found with the learned arbitrator in allowing the said claim in full. It is obvious that there was no dispute raised by the petitioner with regard to claims amounting to Rs.99,348/-, out of the total claims worth Rs.1,48,800/-. The

dispute with regard to the balance claim in the sum of Rs.49,452/- was half-hearted, in the sense that, even though, respondent no.1 had supplied whatever information was available with it, the petitioner for some unknown reason, chose not to examine the same.

13.1. Furthermore, even out of the 7 items, which formed part of the disputed amount of Rs.49,452/-, 5 items related to short payment. This aspect was indicative of the fact that transactions had taken place. The dispute, if any, was with regard to the amount. Since, it was well within the power of the petitioner, to examine the validity of the documents supplied, it ought to have articulated its objection to the payment rather than questioning the consummation of the transaction itself. Though in the pleadings of the petitioner there is a reference to the fact that the claims are time barred, no such submission was made before me. As a matter of fact, no attempt was made to either plead or demonstrate that the claims were time barred. The burden of the petitioner's defence was that there was absence of supporting documents, an aspect which has been dealt with by the learned arbitrator in great detail in the impugned award by holding that the petitioner has been responsible for keeping back documents and that it is a fit case for drawing adverse inference; as noticed hereinabove. I find no merit in the objection raised by the petitioner. It is accordingly rejected.

CLAIM No.10

14. Against the aforementioned claim, respondent no.1 sought an amount equivalent to Rs.1,13,206/- for failure on the part of the petitioner to replace a xerox machine which respondent no.1 apparently had supplied to the petitioner's customer at the request of the Calcutta office of the petitioner. The learned arbitrator seems to have taken note of the documentary evidence

filed in that behalf as well as the testimony of CW-1 in cross-examination dated 02.05.2009 to come to the conclusion that respondent no.1 was entitled to a reimbursement in the sum of Rs.1,13,206/-. There, is once again, nothing articulated either in the petition, written submissions or even in the oral submissions, which would persuade me to hold that the claim was wrongly allowed. It appears that the petitioner set up a defence that a machine was supplied to an entity by the name of Delta Xerox, which was re-possessed on 31.12.2000 due to non payment of dues by the said customer.

14.1. Respondent no.1, on the other hand, had contended that the case set up by the petitioner that the machine was re-possessed was false. This according to respondent no.1, would have come to light, if relevant documents were filed by the petitioner. According to respondent no.1, the old machine of the petitioner, was bought, under a buy-back scheme and the cost of the new machine was, accordingly, adjusted by a sum of Rs.30,000/-. Since, the new machine, was supplied by respondent no.1 out of its “stock and sale account”, at the say so of the petitioner’s Calcutta office, the petitioner was required to either replace the machine or reimburse the cost. Since, the machine was not replaced, respondent no.1 laid a claim for the value of the machine, which was a sum of: Rs.1,13,206/-.

14.2. In my view, the objection of the petitioner, if at all, pertains to appreciation of evidence; the testimony of CW-1 in cross-examination was not rebutted, and therefore, I see no reason to overturn the finding returned qua claim no.10.

CLAIM No.11

15. In respect of this claim, the learned arbitrator has awarded a sum of

Rs.1,31,438/- qua defective machinery supplied to respondent no.1. It appears that respondent no.1 maintained a stock and sale account with the petitioner, whereunder machines stocked by respondent no.1 were bought from the petitioner. It is from this account that respondent no.1 appears to have sold one machine to Beekay Auto Private Limited. The said machine being defective had to be replaced by the petitioner. Since no replacement had been made, respondent no.1 made a claim for money. It is the finding of the learned arbitrator that the petitioner has not disputed this claim of respondent no.1 either in its pleadings or in its evidence by way of rebuttal.

15.1. With these findings on record, one cannot but concur with the view of the learned arbitrator that this claim has to be fully allowed. Mr. Joneja has failed to demonstrate that these findings are incorrect. Mere assertion that no supporting documents have been filed is not good enough once a specific stand was taken in the pleadings backed by the testimony of the witness, which has not been rebutted by the petitioner.

CLAIM No.13

16. Under this claim, respondent no.1 sought monetary compensation in respect of a trip to Austria which its proprietor had earned on achieving the targets set out by the petitioner. In respect of this claim as well, it appears that respondent no.1 has made assertions in the pleadings backed by the testimony of its witness CW-1. Evidently, the petitioner did not dispute the fact that on achieving targets as set out by it, the proprietor of respondent no.1 was eligible to take a trip to Austria. The stand of the proprietor of respondent no.1 that he was assured by the Sales Manager of the petitioner at the Eastern Region Dealers Conference held at Fort Radisson, Calcutta in January, 2001, that he would be compensated to the tune of Rs.40,000/- in

lieu of trip to Austria, was not denied either by way of statement of defence or in the evidence led by way of rebuttal. In these circumstances, the arbitrator allowed the claim in favour of respondent no.1. This claim also turns on the appreciation of material placed before the learned arbitrator. Mr. Joneja has not placed before me any evidentiary material which would demonstrate that the petitioner had as a matter of fact challenged the assertions of respondent no.1 made in regard to the said claim. In my view, no interference is called for with respect to the said claim.

CLAIM No.17(a)

17. Claim no.17(a) pertains to payment of commissions for third and fourth quarters of the year 2000. Under this head, respondent no.1 had made a claim for a sum of Rs.2,68,084/-. It appears that the petitioner asked for being supplied with the machine serial number qua a machine listed at serial no.13 (which was valued at Rs.2,872/-), in the summation sheet (forming part of table 1 appended to the affidavit filed by its witness – CW1) submitted by respondent no.1, in that behalf. Consequently, out of a total claim of Rs.2,68,084/-, the petitioner had no problem with regard to an amount equivalent to Rs.2,65,212/-. Despite this, the petitioner did not release the amounts with respect to those transactions qua which it did not require validation.

17.1. The argument advanced on behalf of the petitioner, once again, was, that no supporting documents had been furnished in support of the claim for commission. The learned arbitrator rejected the objection on behalf of the petitioner, while noting the fact that respondent no.1 had provided the machine serial number and the OCN in its affidavit of evidence even with regard to the residual amount of Rs.2,872/- qua which, the petitioner had

raised an objection. The learned arbitrator also records the fact that the petitioner's witness RW-1 in his cross-examination had admitted the fact that no validation was sought in respect of the remaining amount payable towards commission, which was quantified at Rs.2,65,212/-.

17.2. Having regard to the above, I cannot but come to the conclusion that no interference is called for even in respect of this claim.

INTEREST, COSTS AND EXPENSES

18. This brings me to the last though, one of the most tenaciously fought claims, which is covered by the learned arbitrator under issue no.(v). This claim pertains to: the award of interest, costs and expenses, by the learned arbitrator. The learned arbitrator has awarded interest at the rate of 14% p.a. on all claims awarded in favour of respondent no.1 from 01.04.2002 till the date of award i.e., 26.11.2012. Thereafter, interest has been awarded at the rate of 18% p.a. till the date of payment; once again, on all claims awarded in favour of respondent no.1.

18.1. The total amount awarded towards costs and expenses is a sum of Rs.30,11,300/-. However, there appears to be a calculation error in the award as the sum total of various amounts awarded by the learned arbitrator, under the heading costs and expenses comes to Rs. 30,71,300/- (excluding a sum of Rs.3,07,500/- paid by respondent no.1 towards the petitioner's share of the arbitrator's fee) and not Rs. 30,11,300/-.

18.2. In so far as interest is concerned, the rationale provided by the learned arbitrator is : that in terms of clause 7.1 of the agreement obtaining between the parties, the petitioner was required to pay interest at the rate of 14% p.a. on the security deposit. It is pertinent to note that during the course of arbitration proceedings, the petitioner had remitted a sum of Rs.50,000/- to

respondent no.1, alongwith interest. In these circumstances, the learned arbitrator was of the view that though, the demand for interest, had been made by respondent no.1, at the rate of 18% p.a., 14% p.a. would be a reasonable rate of interest for the pre-reference period and pendente lite period. Given the fact that the petitioner had, according to the learned arbitrator, harassed respondent no.1 by deliberately delaying the release of the amounts payable to it; – he awarded interest at the rate of 18% p.a. for the period commencing from the date of the award till realization of payment.

18.3. In my view, no lacuna can be found with the reasoning of the learned arbitrator both for pre and post award period. While the former is based on a measure provided in the agreement obtaining between the parties, the latter is based on a rate provided in the Act itself. Given the conduct of the petitioner, which has been noted, quite extensively by the learned arbitrator, I do not propose to interdict the award on this score.

19. This brings me to the award of costs and expenses.

19.1. As noted by the learned arbitrator, he held 84 sittings in the matter till 23.07.2011. The learned arbitrator allowed expenses amounting to Rs.4,62,000/- at the rate of Rs.5,500/- per sitting for these 84 sittings. The rationale provided by the learned arbitrator was that: “various claims of respondent no.1 had been allowed”.

19.2. A perusal of the record would show that when order dated 07.02.2007 was passed by this court in Arb. P. No.305/2006 whereby, Mr. Pavan Duggal was appointed as an arbitrator; the fee of the arbitrator was fixed at Rs.11,000/- per sitting subject to a maximum of Rs.1,10,000/-. The understanding was perhaps that the proceedings would be over in 10 sittings.

Since, this proved to be an incorrect assumption, a joint application was moved by the parties being: IA No.7446/2008 in the disposed of petition i.e., Arb. P. No.305/2006, to seek modification of the direction issued earlier qua the fee payable to the learned arbitrator. This application was allowed vide order dated 16.07.2008 when, this court ruled that the parties would fix the fee in consultation with the arbitrator. Consequently, the cap on the fee was removed.

19.3. Having regard to the fact that out of the total claims valued at Rs.21,79,938/-, claims worth Rs.12,02,650/- were allowed, which is, nearly 55% of the total claims (excluding the claim for interest, costs and expenses), respondent no.1 can be given if at all a reimbursement of 55% of fee paid to the arbitrator upto this stage i.e., 23.07.2011. This being an amount of Rs.2,54,100/-; the breakup of which is as follows:-

- (i). Rs.60,500/- (55% of Rs.1,10,000/-)
- (ii). Rs.1,93,600/- [55% of Rs.3,52,000/- (Rs.4,62,000/- minus Rs.1,10,000/-)]

19.4. The arbitrator has awarded actual expenses towards costs and fee of advocates, Mr. A.K. Ganguli and Ms. Barnali Basak, amounting to Rs.35,000/- and Rs.25,000/-, respectively; totalling to Rs.60,000/-.

19.5. According to me, the principle adopted above, will have to be applied, which is that only 55% of a sum of Rs.60,000/- will be payable. The sum payable under this head will be Rs.33,000/-.

19.6. In so far as expenses incurred in the proceedings in the High Court are concerned, against a total claim of Rs.1,26,500/-, the learned arbitrator has awarded an amount of Rs.75,000/- while acknowledging the fact that no proof has been filed; however, based on his experience that expenses

towards litigation in the High Court would at least result in incurring the costs referred to above, he has awarded the said sum.

19.7. Having regard to the fact that the cost of litigation in the High Court has appreciated considerably, I do not propose to modify the said amount awarded by the learned arbitrator.

19.8. In so far as expenses incurred towards drafting petitions, affidavits of evidence, supplementary affidavits, additional affidavits and reply to miscellaneous applications are concerned, the learned arbitrator has awarded a sum of Rs.1,00,000/- which again, I do not intend to interfere with as, it appears to be reasonable.

19.9. The next head, is the fee payable to Ms. Manjula Gupta, for appearance before the arbitrator. The learned arbitrator has awarded a sum of Rs.3,55,300/- based on actual expenses. Similarly, for the appearance of senior advocate, Mr. Shambhu Prasad Singh, a sum of Rs.12,30,000/- has been awarded. In my view, costs under both the heads, would have to be scaled down to 55% as was the principle applied for the arbitrator's fee. Therefore, against a total sum of Rs.15,85,300/- being the fee paid to Ms. Gupta and Mr. Shambhu Prasad Singh, respondent no.1 will be reimbursed a sum of Rs. 8,71,915/-.

20. Against expenses incurred on stenography, typing, photocopy, postage and other miscellaneous expenses, the learned arbitrator has awarded a sum of Rs.21,000/- which again, I do not intend to interfere with.

20.1. As regards costs incurred by the proprietor of respondent no.1 on his various visits from Darjeeling to Delhi and back, the learned arbitrator has awarded a sum of Rs.6 Lakhs which includes expenses incurred towards fare, lodging, food and local travel. Notably, respondent no.1 had made a

claim for a sum of Rs.9,58,847/- based on the fact that he made 40 trips to Delhi and that he was required to stay in Delhi for 300 nights. In addition to this, it was claimed that 90 nights were spent in transit. The Arbitrator notes that in respect of reimbursement of the said costs, no proof was filed even while recognizing the fact that the proprietor of respondent no.1 had litigated the matter for nearly 7 years. The learned arbitrator thus, recognizing the aforesaid circumstance, as also the fact that, the proprietor of respondent no.1, had to travel a distance of over 1000 kilometres, thought it fit to award a sum of Rs.6 Lakhs, towards expenses.

20.2. The difficulty with this claim is that, respondent no.1, has not filed any documents, such as, air or railway tickets, verifiable bills and invoices qua expenses incurred on lodging, food, and local travel etc. However much, one may recognize, that travelling and cost of living in the city of Delhi is not cheap, reimbursement of purported actual costs can only be made against some verifiable proof.

20.3. In the absence of such verifiable proof, one has to adopt a measure which would appear to be reasonable, based on the arbitrator's own experience. In the case of ***Municipal Corporation of Delhi vs M/s. Jagan Nath Ashok Kumar & Anr. (1987) 4 SCC 497*** the Supreme Court observed that the arbitrator can rely upon his own experience, as long his conclusions are backed by reason. The relevant observations are extracted hereinbelow:-

“...5. It is familiar learning but requires emphasis that Section 1 of the Evidence Act, 1872 in its rigour is not intended to apply to proceedings before an arbitrator. P.B. Mukharji, J. as the learned Chief Justice then was, expressed the above view in *Haji Ebrahim Kassam Cochinwalla v. Northern India Oil Industries Ltd.* [AIR 1951 Cal 230 : 85 CLJ 176] and we are of the opinion that this represents the correct statement of law on this aspect. Lord

Goddard, C.J. in *Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Ltd.* [(1948) 2 All ER 186, 188, 189] observed at pages 188-89 of the report as follows:

“A man in the trade who is selected for his experience would be likely to know, and, indeed, would be expected to know, the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case, according to the affidavit of the sellers, they did take the point before the arbitrator that the Southern African market has ‘slumped’. Whether the buyers contested that statement does not appear, but an experienced arbitrator would know, or have the means of knowing, whether that was so or not and to what extent, and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken, I think, that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the courts looked with jealousy on the jurisdiction of arbitrators. The modern tendency is, in my opinion, more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the courts should be slow indeed to set aside his award...”

6. This in our opinion is an appropriate attitude...

...8. After all an arbitrator as a judge in the words of Benjamin N. Cardozo, has to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in the social life...”

(emphasis is mine)

20.4. In this context, let me examine the tenability of the amount awarded by the learned arbitrator, only to satisfy the conscience of this court in view of the vehemence with which, this claim was opposed by Mr Joneja, on

behalf of the petitioner.

20.5. Before me, the learned counsel for the petitioner did not dispute the fact that the proprietor of respondent no.1 had taken 40 trips to Delhi. It may well be argued that proof in this regard had to be tendered by respondent no.1. Having regard to the fact that 84 sittings were held by the learned arbitrator till 23.07.2011, it cannot be unreasonable to accept that the proprietor of respondent no.1 had visited Delhi, at least, on 40 occasions between 04.06.2007 i.e., when the arbitrator entered upon reference and 23.07.2011. If one were to make a pro-rata calculation of the amount awarded by the learned arbitrator, which is a sum of Rs.6 Lakhs under this head then, on each trip the proprietor of respondent no.1 would have spent, approximately, Rs.15,000/-. This sum would include to and fro fare, lodging, food and expenses incurred on local travel. Given the fact that the distance between Darjeeling and Delhi is nearly 1400 kilometres, the average to and fro train fare during 2007-2012 would not be less than Rs.4,000/-. Therefore, on fare itself, respondent no.1, would have, on a very conservative estimate spent, at least, Rs.1,60,000/- (i.e., Rs.4,000/- x 40 trips).

20.6. Though, it is asserted on behalf of proprietor of respondent no.1 that he spent 300 nights in the city, in addition to 90 nights in the transit, there is no proof with regard to the same. If one were to take the most conservative rate into account for lodging, food and local travel, a person would spend, at least, Rs.1,500/- a day. If one were to discount the 90 nights evidently spent by the proprietor of respondent no.1 in transit even then, the proprietor of respondent no.1 would have spent a sum of Rs.4,50,000/-.

20.7. The sum total of the fare and lodging expenses would come to a

figure of nearly Rs.6,10,000/-. Therefore, in my view, the arbitrator in awarding a sum of Rs.6 Lakhs, by taking recourse to his experience, has not granted an amount which can be said to be excessive.

20.8. Evidently, the learned arbitrator awarded some additional costs which, apparently were incurred after 04.08.2011 by respondent no.1. Affidavit in that regard was filed on 11.09.2012. A perusal of the award would show that a draft award had been made ready by the learned arbitrator on 03.09.2012. Since the petitioner had not paid arrears with respect to its share of the fee, the matter had to be fixed for hearing on 6 occasions i.e., on 11.09.2012, 17.09.2012, 22.09.2012, 15.10.2012, 29.10.2012 and finally on 26.11.2012.

20.9. Respondent no.1 thus utilized the dates of hearing given by the learned arbitrator to file additional affidavit, as indicated above, for claiming reimbursement of costs towards advocates' fees and qua costs incurred in respect of trips made by its proprietor. The amount awarded towards the senior advocate's and the instructing advocate's fees was a sum total of Rs.1,08,000/-, while the amount towards expenses incurred on trips made by the proprietor of respondent no.1 in the period after August, 2011 was a sum of Rs.60,000/-. To be precise, the amount was claimed for trips made during the following periods: 13.10.2011 to 24.10.2011; 18.04.2012 to 02.05.2012; 11.07.2012 to 16.07.2012; and 01.09.2012 to 11.09.2012. Thus, the total amount awarded was a sum of Rs.1,68,000/-.

21. In my view, in so far as senior advocate's and instructing advocate's fees is concerned, against a sum of Rs.1,08,000/-, respondent no.1 should be able to seek reimbursement of only Rs.59,400/- (being 55% of the total fees). With regard to expenses incurred by the proprietor of respondent

no.1, on his visits to Delhi, I would award a sum of Rs.60,000/- which is also the amount awarded by the learned arbitrator, as the total amount based on the following calculations comes to a figure of Rs. 76,000/-.

- (i). for 4 trips at the rate of Rs.4,000/-, a sum of Rs.16,000/- as to and fro fare
- (ii). for lodging, food, and local travel at the rate of Rs.1,500/- for a period of 40 days, a sum of Rs.60,000/-

22. In addition to the above, in order to secure the award, respondent no.1 paid a sum of Rs.3,07,500/- being share of costs of the petitioner, which were paid by respondent no.1. This amount would have to be awarded in full to respondent no.1.

23. Therefore, the total amount that I would award to respondent no.1 towards costs and expenses will be a sum of Rs. 23,81,915/-, the break-up of which is as follows :-

S. No.	Particulars	Amount Awarded by arbitrator (Rs.)	Modified amount as awarded by directions contained hereinabove (Rs.)
1.	Share of the fee of the Arbitrator borne by respondent no.1	4,62,000/-	2,54,100/-
2.	Expenses incurred towards costs and fee of Mr A.K. Ganguli and Ms Barnali Basak, Advocates	60,000/-	33,000/-
3.	Expenses incurred in the proceedings in the High Court	75,000/-	75,000/-
4.	Expenses incurred towards drafting petitions, affidavits, applications,	1,00,000/-	1,00,000/-

	etc.		
5.	Fee paid to Ms Manjula Gupta, Advocate and to Mr Shambhu Prasad Singh, Sr. Advocate for appearance before arbitrator	15,85,300/-	8,71,915/-
6.	Expenses incurred on stenography, typing, photocopy, postage, etc.	21,000/-	21,000/-
7.	Expenses incurred by proprietor of respondent no.1 on his visits from Darjeeling to Delhi and back	6,00,000/-	6,00,000/-
8.	Additional expenses incurred on account of Sr. Advocate's and instructing advocate's fees paid after 04.08.2011	1,08,000/-	59,400/-
9.	Additional expenses incurred by proprietor of respondent no.1 after 04.08.2011 on account of his visits to Delhi for the period spanning between 13.10.2011 and 11.9.2012	60,000/-	60,000/-
	<u>Sub Total: Rs. 30,71,300/-</u> (Note: in the award the total is erroneously shown as Rs. 30,11,300/-)		
10.	Refund of amount paid by respondent no.1 on account of the petitioner's share of the fee paid to the arbitrator	3,07,500/-	3,07,500/-
	Grand Total:	33,78,800/-	23,81,915/-

23.1. Consequently, against a total sum of Rs. 33,78,800/- awarded by the learned arbitrator, the total amount under this head shall stand modified to Rs. 23,81,915/-, in view of the directions issued hereinabove.

24. In view of the discussion above, the challenge laid by the petitioner with respect to claim nos.9, 10, 11, 13 and 17(a) is rejected. The rate of interest awarded by the learned arbitrator for pre-reference period, pendente lite period and, post the date of the award till its payment is sustained. The award is modified to the extent indicated above only qua costs and expenses.

25. Petition is disposed of in the aforesaid terms with a direction that in so far as the present proceedings are concerned, parties shall bear their own expenses.

RAJIV SHAKDHER, J.

JANUARY 13, 2014

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