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

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Pronounced on: 03.05.2018

+ O.M.P. (COMM) 32/2017

INDIAN RAILWAY CATERING AND TOURISM
CORPORATION LTD(IRCTC)

..... Petitioner

Through Mr.Nikhil Majithia, Adv.

versus

M/S SRINATHJI CATERERS

..... Respondent

Through Mr.Manish K.Bishnoi, Adv.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act) for setting aside the Arbitral Award dated 23.09.2014.

2. Some of the brief facts are that the petitioner is a Public Sector Enterprise under Ministry of Railways. The respondent is a registered partnership firm engaged in the business of catering including providing catering on-board trains. The petitioner floated a tender for Award of License to provide catering (Train Side Vending) Service on 15/22.07.2008 in respect of 66 trains. Being a successful bidder, the respondent was awarded licenses for 15 trains. However, pursuant to the Award of License, the respondent took over and provided services in two trains only. The

petitioner is said to have issued a letter of commencement for six more trains directing the respondent to commence catering services thereof. The respondent failed to do the needful.

3. The case of the respondent was that after the Award of License due to unauthorized vending enroute, they were not allowed to operate by the local mafia. The respondent claims that when they tried to provide services, the staff was brutally beaten up. FIRs were lodged in Triputi and Kadapa in this regard. Further, there were no hot-cases and refrigerator or proper storage space for cooked food in the trains. No provision of pantry car or garbage collection storage was provided. There was no water supply and washing facility. Further, it is pleaded that since the trains were non-vestibuled, it was not possible for the respondent to supply meals to all the coaches of the trains, some of which had a coach length of 18 to 21 coaches. Permission for 8 bearers per train was only given by the petitioner.

4. It is the contention of the petitioner that the respondent has been making needless excuses in view of the fact that the respondent appears to have not understood the model of catering services that were put to tender. The respondent was to specifically provide pre-cooked food and pad items to be loaded from enroute stations or cell kitchens. It is urged that the allegation of the respondent about non-providing of pantry infrastructure was completely irrelevant.

On 24.02.2009, the petitioner communicated to the respondent that the respondent had failed to provide services in 13 trains and issued a notice of default to the respondent. A reply was sent by the respondent on 28.02.2009 stating above noted reasons for its inability to start services. On

11.08.2009, the license for the 13 trains was terminated. The deposits of the respondent were forfeited.

5. The respondent sought refund of the security deposit and license fee which had been forfeited by the petitioner with regard to six trains along with 24% interest. It was pointed out that for seven trains, the petitioner had refunded the license fee and security deposit on 23.12.2010 for which the respondent sought interest for the delay in refund.

6. The respondent moved, a petition under Section 11 of the Arbitration Act before this Court on 03.12.2013. This court in the said petition i.e Arb. Pet. 338/2012 by consent of the parties appointed Mr.M.N.Chopra, IRTC as the Sole Arbitrator to adjudicate the disputes between the parties.

7.(i) The learned Arbitrator in the impugned Award noted the plea of the respondent about the reasons on account of which the respondent was unable to provide vending services in the 13 trains. It noted the plea of the respondent that the catering in the trains were controlled by unauthorized vendors and mafia. It also noted the plea of the respondent about non-availability of hot cases and refrigerator, etc. that the trains were non-vestibuled and hence, it was not possible to readily serve food.

(ii) The award noted the plea of the petitioner that it was the duty of the respondent to carry out the work with due diligence which has not been done. The learned Arbitrator also noted the objection of the petitioner that this was an “accepted item” and hence, the learned Arbitrator had no jurisdiction to deal with the same.

(iii) The plea of “accepted item” and jurisdiction was rejected in the award relying upon the judgment of the Supreme Court in ***J.G.Engineers Pvt. Ltd. vs. Union of India & Anr., (2011) 5 SCC 758.***

(iv) The learned Arbitrator further noted that on 11.08.2009 all 13 contracts awarded to the respondent were cancelled under Clause 9.1 of the Contract. However, on 23.12.2010 a cheque refunding an amount of Rs.83,35,470/- for seven trains was received by the respondent. No reasons were given as to why refund for only seven trains was given and order dated 11.08.2009 cancelling the contract and forfeiting the amount was partly reversed. The learned Arbitrator directed the petitioner to produce the noting file as to how and why only partial refund has been made. The noting file stated that for seven trains letter of commencement of services had not been issued to the respondent and hence, refund of the license fee and security deposit was directed for the said seven trains. It also noted that for four trains letter of commencement of services had been issued and hence, both license fee and security deposit for these four trains was forfeited by the respondent. No explanation was forthcoming from the file regarding the balance two trains. The learned Arbitrator noted that there are no valid reasons as to why the petitioner chose to only partially refund the security deposit and license fee. There appears the award holds to be no application of mind and due diligence by the petitioner. Further, the learned Arbitrator also noted that no action was taken by the petitioner to eliminate unauthorized vending which prevented the respondent from commencing the train side vending. Accordingly, an award was passed to refund the entire license fee and security deposit for the balance six trains being a total of Rs.69,79,000/-. The petitioner was also directed to refund the said amount within 30days from the date of the Award failing which the respondent would be entitled to interest @9% p.a. till realization of the amount.

8. I have heard learned counsel for the parties.

9. Learned counsel for the petitioner has sought to argue that the Award is liable to be set aside on the following grounds:-

(i) It is submitted that the learned Arbitrator has adjudicated upon “excepted matter” and in view thereof, the Award passed by the learned Arbitrator is liable to be set aside as the learned arbitrator had no jurisdiction to adjudicate such matters.

(ii) He further pleaded that the claim of the respondent was barred by limitation. The licenses had been terminated on 11.08.2009. It is pleaded that the respondent claims to have invoked the arbitration clause on 10.08.2011 but there was no proof of the petitioner having received the said notice. No such evidence was even led before the learned Arbitrator. Hence, it is pleaded that the Award grants a claim that is barred by limitation.

(iii) It is further pleaded that admittedly, the respondent could not commence the services and hence, the petitioner is entitled to forfeit the security deposit and the license fee. The findings in the Award to the contrary are misplaced and perverse and the Award is liable to be set aside.

10. Learned counsel for the respondent has refuted the contentions of the petitioner. Reliance has been placed on the judgment of the Supreme Court in the case of *J.G.Engineers Pvt. Ltd. vs. Union of India & Anr. (supra)* to contend that there was no excepted matters which ousted the jurisdiction of the learned Arbitrator. On the issue of limitation, it has been pleaded that the communication dated 10.08.2011 was hand delivered with receipt. That apart, it has been pleaded that the respondent had received refund of a partial refund of the dues under the contract on 23.12.2010. Admittedly, the petition seeking appointment of an Arbitrator was filed on Sept. 2012. Hence, there can be no occasion to claim that the claim of the respondent

was barred by limitation. On merits, it was reiterated that it was on account of the reasons elaborated in the Award that the respondent was not able to commence the services and the respondent cannot be made to suffer.

11. I may now deal with the contentions of the petitioner. Regarding the contention that the issue of forfeiture of security deposit and license fee was an “excepted matter” and hence, beyond the scope of arbitration proceedings, reference may be had to the relevant clauses. Clauses 8.1, 8.2, 9.1, 9.2 and 10.1 of General Conditions of License read as follows:-

“8. EVENTS OF DEFAULT

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| 8.1 | Breach of any terms and conditions of the Licence and of the License | In the event of any breach of the said terms and conditions of the Licence, the IRCTC shall be entitled to forfeit the whole or the part of the Security Deposit/License fee besides terminating or revoking the License and debarring the Licensee from participating in the future projects of IRCTC.” |
| 8.2 | Termination of licence on other events of default | The licensor shall also be entitled at any time forthwith to terminate the Licence without notice in any of the following events, that is to say (a) in the event of the Licensee being convicted by a court of law under the provisions of criminal procedure code or any other law (b) in the event of the Licensee being a proprietor or, if a firm, any partner in the Licensee firm being at any time be adjudged insolvent or a receiving order or order for administration of his estate made against him or shall take any proceeding for liquidation or composition under any insolvency Act for the time being in force or make any conveyance or assignment of |

his interest or enter into any agreement or composition with his creditors for suspended payment, or if the firm be dissolved under the partnership Act or, in the event of Licensee being a company, if the company shall pass any resolution to be wound up either compulsorily or voluntarily (c) Repudiation of agreement by Licensee or otherwise evidence of intention not to be bound by the agreement. (d) Failure to adhere to any of the due dates of payment specified in the terms and conditions. Immediately on the determination of this agreement the Licensee shall peacefully vacate the premises and the trains and hand over to the licensor/railway administration all articles in the custody or possession of the Licensee and shall remove all his stores and effects from the said premises/trains. In default the licensor shall be entitled to enter and take possession of the said premises/trains and to lock up the same or remove the furniture or other articles of the Licensee that may be lying there and to dispose of the same by sale or otherwise without being liable, for any damage, and all expenses incurred in connection therewith, shall be deducted by the licensor from the sale proceeds or from the Security Deposit or pending bills of the Licensee.

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9.CONSEQUENCES OF DEFAULT

- “9.1 Consequence In the event of failure to provide, on board
 of failure to and catering services in train within a
 start the maximum period of 15 days, from the date
 services of letter for award of licence or as advised

by IRCTC, IRCTC reserves the right to annul the Licence and forfeit the Security Deposit, Licence fee, in the whole or part thereof as provided under terms and conditions of the licence. Licensee shall be debarred from participating in the future projects of IRCTC for a period of two years. The decision of IRCTC will be final and binding in this regard.

- 9.2 Notice for termination In case of any event of default mentioned in Clause 8 having occurred, it shall be lawful for the IRCTC any time thereafter to terminate the Licence agreement and forfeit the Security Deposit, SUBJECT HOWEVER, to the IRCTC having given to the Licensee fifteen (15) days prior notice in writing to remedy or make good such breach and in spite of such notice the Licensee having failed to remedy the breach. Upon termination of this Licence agreement as aforesaid, the Licensee shall deliver vacant and peaceful possession of the trains to the IRCTC/Railways. The License shall be also debarred from participating in the future projects of IRCTC for a period of two years.

10.ARBITRATION

- 10.1 Arbitration In the event of any dispute or differences arising under these conditions of License or in connection with this License (except as to any matters, the decision of which is specifically provided for by these or the special conditions) the same will be resolved by Arbitration, as per the provisions of The Arbitration and Conciliation Act, 1996. The venue of the

Arbitration shall be Delhi. All questions, disputes and or differences arising under or in connection with this agreement or in touching or relating to or concerning the constructions, or affect of presents (excepts as to matters the decision whereof is otherwise herein before, expressly provided for) shall be referred to the sole arbitration of the officer/officers or persons nominated by the Managing Director/IRCTC/Director, IRCTC whose decision in this regard shall be final and binding on the Licensee.

12. The arbitration clause i.e. clause 10.1 provides that dispute and differences shall be referred to arbitration except the matters, the decision of which is specifically provided for by these or the special conditions. Clause 9.1 states that in the event of failure to provide on-board catering services within 15 days from the date of letter of award of license, the petitioner has the right to annul the license and forfeit the security deposit and license fees. The decision of the petitioner in this regard would be final and binding. According to the petitioner, the decision to forfeit the security deposit and the license fee was taken under Clause 9.1 and hence, the same is an “excepted matter” and there could have been no arbitration on the same.

13. I may look at the legal position in this regard. The Supreme Court in ***J.G.Engineers Pvt. Ltd. vs. Union of India & Anr. (supra)*** held as follows:-

“18. Thus what is made final and conclusive by Clauses (2) and (3) of the agreement, is not the decision of any authority on the issue whether the contractor was responsible for the delay or the Department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who committed breach.

That is, if the contractor admits that he is in breach, or if the arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decision as to who is responsible for the delay in execution and who committed breach is not made subject to any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract.

19. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal.”

14. Similarly, the Supreme Court in ***BSNL & Anr. vs. Motorola India Pvt. Ltd., (2009) 2 SCC 337*** held as follows:-

“27. The abovestated position can be ascertained through the judgment of this Court in *State of Karnataka v. Shree Rameshwara Rice Mills* [(1987) 2 SCC 160] . This Court in the said case, made a clear distinction between adjudicating upon an issue relating to a breach of condition of contract and the right to assess damages arising from a breach of condition. It was held that the right conferred to assess damages arising from a breach of condition does not include a right to adjudicate upon a dispute relating to the very breach of conditions and that the power to assess damages is a subsidiary and consequential power and not the primary power.

28. Clause 20.1 regarding excepted matters reads:

“In the event of any question, dispute or difference arising under this agreement or in connection therewith (*except as to the matters, the decision to which is specifically provided under this agreement*),...”

(emphasis supplied)

Therefore, it is clear from this provision, matters which will not fall within the arbitration clause are questions, disputes or differences, the decision to which is specifically provided under the agreement. Clause 16.2 is not a clause wherein any decision-making power is specifically provided for with regard to any question, dispute or difference between the parties relating to the existence of breach or the very lack of liability for damages i.e. the levy of liquidated damages.

Hence, the question whether the other party committed a breach cannot be decided by the party who is alleging breach. A contract cannot provide that one party will be the arbitrator to decide whether he committed the breach or the other party committed the breach.

15. Hence, what follows from the above judgments of the Supreme Court is that where a contractor has accepted that it is at fault and has not been able to provide on-board catering services or there is an award to the effect, the petitioner would be within its right to forfeit the security deposit and license fee in whole or in part and the said decision would be final and cannot be a subject matter of an arbitration proceedings. However, the fact that as to whether the respondent has committed a breach or not cannot be decided by the petitioner as noted above. The learned Arbitrator has rightly concluded that the above dispute cannot be termed to form part of the “excepted matter” and hence rightly adjudicated the dispute between the parties. It is the case of the respondent that on account of failure of the petitioner to provide the necessary facilities and to take steps to control the

illegal and unauthorized vendors and mafia operating enroute, the respondent could not provide the services. The learned Arbitrator has also recorded a finding of fact in this regard accepting the version of the respondent. This plea of the petitioner cannot be said to be “excepted matter” as it could not be adjudicated upon by the petitioner.

There is no merit in the plea of the petitioner that the decision to forfeit the license fee and security deposit was within the term “excepted matters”.

16. There are no reasons to interfere in the said findings. Interpretation of the contract is within the domain of the learned Arbitrator. The Supreme Court in *McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors.*, (2006) 11 SCC 181 noted as follows:-

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission* (2003) 8 SCC 593) and *D.D. Sharma v. Union of India* (2004) 5 SCC 325].

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

17. The next contention raised by the petitioner relates to limitation. A perusal of the Award shows that while making submissions before the learned Arbitrator, the petitioner has made no such submission about the claim being time barred. The Award does not deal with this contention. The petitioner cannot now be permitted before this court to raise the issue of limitation for the first time.

18. In my opinion, even otherwise, the plea is misplaced.

19. The respondent has placed on record a copy of the legal notice invoking the Arbitration clause dated 10.08.2011. The copy is said to have been hand delivered and has the stamp. There is no reason to not accept the plea of the respondent that the said notice was duly delivered to the respondent. That apart, the respondent has received partial refund from the petitioner on 23.12.2010. The Arbitration Petition under section 11 of the Act was filed on 3.12.2013. Hence, it cannot be pleaded that the claim is beyond limitation.

20. As far as the findings that the default is of the petitioner is concerned, the learned Arbitrator, as noted above, recorded a finding of fact that the petitioner failed to take any concrete action in coordination with the Zonal Railways to eliminate unauthorized vending which prevented the respondent from commencing train side vending services. The learned Arbitrator also relied upon para 3.1 of the contract to plead that there was an obligation on the petitioner to coordinate with the Zonal Railways to solve major problems which would have enabled the respondent to provide catering services. The learned arbitrator also noted that the decision of the petitioner to refund the security deposit and the license fee for 7 trains and not for all the trains was

whimsical inasmuch as the respondent had been unable to commence services of 13 trains. This is a finding of fact recorded by the learned Arbitrator. The settled legal position is that the findings of fact recorded by Arbitrator cannot be normally disturbed.

21. The Supreme Court in *Associate Builders. vs. DDA., (2015) 3 SCC 49* on the said aspect of finding of fact by the learned arbitrator held as follows:-

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

1. a finding is based on no evidence, or
2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or
3. ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In **H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons**, 1992 Supp (2) SCC 312 at p.317, it was held:

7. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

In *Kuldeep Singh v. Commr. of Police*, (1999) 2 SCC 10 at para 10, it was held:

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R.Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*(2012) 1 SCC 594, this Court held:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has

been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

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22. There are no reasons to conclude that the findings of fact recorded in any manner suffer from illegality or perversity.
23. There is no merit in the present petition and the same is dismissed. All the pending applications, if any, is also dismissed.

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JAYANT NATH, J.

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