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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.450 OF 2012

Agarsons Container Terminals,
having its Container Terminal at
Sector 1, Dronagiri, Navi Mumbai
and having its office at 207,
Vyapar Bhavan, 49, P.D. Mello Road,
Mumbai – 400 009 through its partner
Mr.Radheshyam Gopichand Agarwal

...Petitioner

...Versus...

National Agricultural Co-operative
Marketing Federation of India Limited,
(NAFED) having its office at
Raj Mahal, 3rd Floor, 84,
Veer Nariman Road, Churchgate,
Mumbai – 400 020.

...Respondent

Mr.Shailesh Shah, Senior Counsel with Ms.Ashwini Pawar i/b
Divekar & Co. for the Petitioner.

Mr.A.Y. Sakhare, Senior Counsel i/b Mr.Shashipal Shankar for the
Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 30TH MARCH, 2015
PRONOUNCED ON : 8TH APRIL, 2015.

JUDGMENT :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short “the said Arbitration Act”), the petitioner has impugned the arbitral award dated 23rd December,

2011, rejecting some of the claims made by the petitioner and allowing part of the counter claims made by the respondent. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The petitioner was the original claimant in the arbitral proceedings, whereas the respondent was the original respondent. The respondent had also filed a counter claim before the learned arbitrator.

3. The respondent was allotted a plot of land admeasuring 20,008.16 square meters, Sector 1 , Dronagiri, Navi Mumbai by CIDCO for the purpose of warehousing vide Agreement of Lease dated 9th September, 1999. According to the said agreement, the construction was to be carried out on the said plot within a period of four weeks from the date of execution of the said agreement.

4. The respondent offered for user of the said land on built, operate and transfer (BOT) for operating empty container yard business. The parties accordingly entered into an agreement on 1st November, 2003. The said agreement was styled as leave and licence agreement. Under clause 2 of the said agreement, the parties agreed that the licence period granted to the petitioner as licensee for permitted use of the plot of land was for a period of five years commencing from the date of commencement of business which would not be later than three months (moratorium period) from the execution of the said agreement, or on handing over the possession for the permitted use of the plot of land, whichever was later. Clause 23 of the said agreement provided that in case of default of any

terms and conditions laid down in the said agreement by any party, the other party without any prejudice to any other rights and remedies available to it under this agreement be entitled to terminate that said agreement. It was further provided that in case the licensee would commit any breach of the terms of the said agreement or vacates the premises before the expiry of tenure of the said agreement because of the earlier revocation of the said licence, the licensee shall be liable to pay to the licensor use and occupation charges at the rate of Rs.5.00 lakhs per month and shall continue to pay till the licensee hands over the vacant and peaceful possession of the land to the licensor after removing the movable machineries.

5. Under clause 33 of the said agreement, it was provided for extension of the said agreement on mutual agreed terms and for compensation in the event of the licensee not handing over vacant and peaceful possession upon expiry of the licence period. Clause 33 of the said agreement, which is relevant for the purpose of deciding this petition is extracted as under :-

“33. Expiry of the licence :

The licensor and the licensee shall, at least six months prior to the expiry of the licence period, may decide the future extension of the Agreement, as mutually agreed upon, at the discretion of the licensor. In case the extension of licence is not agreed upon, then this licence Agreement shall come to an end automatically on the expiry of the period and the licensee shall thereafter have no right to operate from the said premises and in case the licensee fails to remove the movable machinery and hand over the vacant and peaceful possession, the licensee shall be liable to pay Rs.5,00,000/- per month and shall continue to pay the same till the vacant and peaceful possession of the land is handed over to the licensor including the Goodwill.”

6. It is not in dispute that the commencement of the said licence period was on 31st March, 2004 and the date of expiry of the said agreement accordingly was 31st March, 2009.

7. On 1st May, 2008, the respondent addressed a letter to the petitioner, inviting its attention to clause 33 of the leave and licence agreement stating that the petitioner might wish to respond to the respondent within a weeks time as per clause 33 of the agreement, which provided for extension of the leave and licence agreement on mutually agreed terms. The respondent requested the petitioner to expedite the said response.

8. On 7th May, 2008, the petitioner informed the respondent that the petitioner had been granted moratorium period upto 31st March, 2009 and accordingly at the appropriate time, the petitioner would come forward with fresh proposal.

9. By a letter dated 16th September, 2008 to the petitioner, the respondent referred to the agreement dated 1st November, 2003, letter addressed by the respondent dated 1st May, 2008, reply of the petitioner dated 7th May, 2008 and conveyed that it was decided by the respondent that no further extension of the said licence agreement would be allowed. The respondent requested the petitioner to vacate the plot on or before 31st March, 2009 for peaceful handing over possession thereof to the respondent as per the terms and conditions of the said agreement. The respondent informed that the said notice to be treated as notice of eviction as per the agreement.

10. The petitioner vide their letter dated 26th September, 2008 to the respondent alleged that their competitors had access to the agreement and all correspondence exchanged between the petitioner and the respondent. It was alleged that the competitors of the petitioner succeeded in convincing their potential customers that their arrangement on the plot of land was a very temporary one and the petitioner would have to stop business operations in the near future. The petitioner also alleged that the petitioner had incurred business and goodwill loss estimated to be more than Rs.6.00 crores besides continuous mental harassment due to constant failure which could not even be quantified. The petitioner registered its claim of Rs.6.00 crores on the respondent as compensation against its alleged business and goodwill loss and called upon the respondent to pay their claim within fifteen days from the date of the receipt of the letter. The petitioner also informed that the petitioner was taking necessary legal action for protecting its tenancy of the premises.

11. The petitioner by its letter dated 17th January, 2009 to the respondent referred to the letter dated 1st May, 2008 of the respondent, letter dated 7th May, 2008 of the petitioner and purported to set out the terms and conditions for renewal of the said leave and licence agreement. It was stated in the said letter that all the terms and conditions enumerated in the earlier agreement dated 1st November, 2003 shall remain the same with modification of the clause relating to payment of licence fee. The petitioner also stated that an escalation of 20% in terms of the annual licence fee payable to the respondent be provided. In response to the said letter, the respondent by its letter dated 5th February, 2009 informed the

petitioner that the respondent was not willing for renewal of the agreement with the petitioner and once again requested the petitioner to vacate the said plot on or before 31st March, 2009 as per the terms and conditions of the agreement.

12. The petitioner issued a legal notice through its advocates on 24th February, 2009 to the respondent and invoked the arbitration agreement and called upon the respondent for commencement of the arbitration proceedings under clause 39 of the agreement dated 1st November, 2003.

13. The respondent by its advocate's letter dated 6th March, 2009, responded to the said notice dated 24th February, 2009 and denied the allegations made therein. The respondent contended that there was no question of referring the matter to arbitration under clause 39 of the agreement since clause 33 was absolutely clear and unambiguous.

14. The petitioner filed Arbitration Application (No.74 of 2009) under section 11 of the Arbitration Act before Hon'ble Chief Justice. By an order dated 26th August, 2010, learned designate of the Hon'ble Chief Justice disposed of the said application by accepting the statement made by the respondent that the respondent had already taken action under clause 39 of the agreement and had approached the Central Registrar of Co-operative Societies, Government of India to act as an arbitrator or to appoint his nominee to act as an arbitrator. By the said order the Central Registrar of Co-operative Societies, Government of India was directed to communicate the appointment on or before 30th September, 2010.

The Central Registrar of Co-operative Societies, Government of India accordingly appointed the learned arbitrator.

15. Pursuant to the directions issued by the learned arbitrator, the petitioner herein filed a statement of claim before the learned arbitrator *inter-alia* praying for an award directing the respondent to renew the agreement dated 1st November, 2003 in accordance with the terms and conditions mentioned in the letter dated 17th January, 2009, which was addressed by the petitioner for a further period of five years from the date of award and also prayed for money claim of Rs.7,12,602/- on account of the amount paid by the petitioner to Dhutum Grampanchayat along with interest at the rate of 18% p.a. The petitioner also made a claim for recovery of Rs.63,700/- on account of the expenses alleged to have been incurred for filing of Special Civil Suit against the said Grampanchayat with interest, the claim of damages of loss of business / profit and also on account of compensation for the alleged loss of goodwill and reputation with interest. The petitioner also claimed compensation for defamation and damaging the reputation of the petitioner, its partners and cost of arbitral proceedings.

16. The said claim made by the petitioner was resisted by the respondent by filing the written statement. The respondent also made a counter claim against the petitioner thereby making four claims. Counter claim No.1 was for claiming compensation of Rs.5.00 lakhs per month with effect from 1st April, 2009 till 31st January, 2011 in terms of clause 33 of the said agreement and interest thereon. The respondent also made a claim for Rs.6,50,000/- for the difference in monthly compensation receivable from the Maharashtra State

Warehousing Corporation. The respondent also prayed for an interim relief directing the petitioner to pay an amount of Rs.6,50,000/- on account of their illegal occupation of the premises and also prayed for cost of arbitration.

17. The learned arbitrator framed three issues. Both the parties examined the witnesses before the learned arbitrator. By the arbitral award dated 23rd December, 2011, the learned arbitrator rejected the prayer of the petitioner for renewal of the licence. The learned arbitrator however, passed an award granting money claim in the sum of Rs.1,19,916/- against claim No.1 along with interest at the rate of 15% p.a. from 20th August, 2010 till payment. The learned arbitrator rejected other four claims made by the petitioner. Insofar the counter claims made by the respondent are concerned, the learned arbitrator awarded one of the counter claim and directed the petitioner to pay a sum of Rs.1.10 crores on account of monthly compensation at the rate of Rs.5.00 lakhs under clause 33 of the said agreement from 1st April, 2009 to 31st January, 2011 and also to pay a sum of Rs.1,37,500/- as interest thereon.

18. The learned arbitrator also held that the respondent was entitled to receive and the petitioner was liable to pay Rs.5.00 lakhs per month as compensation under clause 33 of the said agreement from 1st February, 2011 till they vacate the property and hand over it to the respondent. The learned arbitrator rejected the other counter claims and refused to award the claim for arbitration cost in favour of either party. The said arbitral award dated 23rd December, 2011 has been impugned by the petitioner in this petition insofar as the rejection of the other claims made by the petitioner in the said award

and insofar as the counter claim with interest awarded by the learned arbitrator is concerned. The respondent however, has not impugned any part of the award by filing a separate petition.

19. Mr.Shah, learned senior counsel for the petitioner submits that the contract awarded to the petitioner was BOT contract. The petitioner had spent huge amount on carrying out construction on the said plot. He submits that though under clause 33 of the said leave and licence agreement, the petitioner could have given the proposal for extension of the agreement by 30th September, 2008 as the same was to be submitted six months prior to the expiry of the agreement, the respondent rejected the said proposal for extension prior to the expiry of six months which period would have expired on 30th September, 2008. He submits that the respondent had given the proposal by its letter dated 1st May, 2008 which was accepted by the petitioner by a letter dated 7th May, 2008 and thus the rejection of the said proposal by a letter dated 16th September, 2008 to the respondent was contrary to the terms and conditions of clause 33 of the agreement. He submits that in view of the agreement granting an option to the petitioner for apply for extension which right was exercised by the petitioner, the respondent could not have rejected the said proposal.

20. Learned senior counsel submits that there were several meetings held between the partners of the petitioner and the officers of the respondent on the subject of extension of the said leave and licence agreement. The respondent had suppressed these facts from the learned arbitrator and overlooking those facts, illegally had rejected the proposal of the petitioner for extension of the agreement.

He submits that the learned arbitrator has not rendered the impugned award in accordance with clause 33 of the agreement. The award shall be thus set aside by this Court under section 34 of the Arbitration Act.

21. Learned senior counsel submits that one of the officers of the respondent had acted *mala-fide*. Though the petitioner had named such officer in the statement of claim filed by the petitioner, no oral evidence of the said officer was led by the respondent. The learned arbitrator however, overlooked this crucial issue in the impugned award. He submits that the interpretation of the learned arbitrator of the terms and conditions of the leave and licence agreement is not a possible interpretation.

22. Insofar as the rejection of claim No.2 is concerned, learned senior counsel placed reliance on clause 16 of the leave and licence agreement and would submit that the petitioner under the said clause was liable to pay all taxes, dues, levies, cess and charges that may be levied by the government authorities or any local authorities, including any increase therein during the licence period in respect of the empty container depot service and not the municipal taxes which was demanded illegally by the Grampanchayat. He submits that since the said Grampanchayat had threatened the petitioner of dire consequences, the petitioner had deposited a sum of Rs.5.00 lakhs with the said authorities without prejudice to the rights and contentions of the petitioner. He submits that the said liability of the municipal taxes was that of the respondent and not of the petitioner. He submits that though the petitioner has filed a suit against the Grampanchayat in which the

respondent has been impleaded as a party respondent, the learned arbitrator has rejected the said claim merely on the ground that the suit is pending. He submits that the question whether under the said leave and licence agreement such taxes were to be borne by the petitioner or by the respondent cannot be adjudicated upon by the Civil Court and the said issue ought to have been decided by the learned arbitrator himself. He submits that the award suffers from non-application of mind on the part of the learned arbitrator.

23. Learned senior counsel submits that since the petitioner had already spent huge amount under the said BOT contract, since the respondent did not extent the period of agreement though obliged to do so under clause 33 of the said agreement, the petitioner suffered huge loss of profit and other damages. He submits that similarly since the respondent had made document entered into between the parties and the correspondence exchanged available to the competitors of the petitioner, the petitioner suffered loss of reputation and goodwill in the market. The learned arbitrator thus ought to have allowed all these claims for compensation made by the petitioner which are wrongly rejected by the learned arbitrator without any sufficient reasons.

24. Learned senior counsel lastly submits that though in the counter claim filed by the respondent before the learned arbitrator, the respondent had prayed for monthly compensation against the petitioner as per clause 33 of the agreement at the rate of Rs.5.00 lakhs per month with effect from 1st April, 2009 till 31st January, 2011 i.e. for a period of twenty two months, the learned arbitrator however, in the impugned award has allowed not only the said claim but has

also awarded the claim for compensation for the period 1st February, 2001 till the said property is vacated by the petitioner and is handed over to the respondent. He submits that the relief granted in paragraph 8 of the impugned award by the learned arbitrator is beyond the reliefs sought by the respondent and thus the learned arbitrator has exceeded his jurisdiction by awarding such relief. He submits that this part of the award can be severed from the other part of the award and thus has to be set aside by this Court.

25. Mr.Sakhare, learned senior counsel for the respondent on the other hand invited my attention to the relevant provisions of the leave and licence agreement and submits that under clause 33 of the said agreement, the parties had agreed to decide future extension of the agreement at least six months prior to the expiry of the licence period and that also the same was at the discretion of the licensor. He submits that though the respondent had invited the attention of the petitioner to the said clause by their letter dated 1st May, 2008 with a request to respond to the same within a weeks time to the respondent, the respondent did not submit any proposal for extension. On the contrary, by a letter dated 7th May, 2008, the petitioner conveyed that at the appropriate time the petitioner would come forward with a fresh proposal. He submits that since the petitioner did not come forward with any fresh proposal between the period 7th May, 2008 and 15th September, 2008, the respondent vide its letter dated 16th September, 2008 informed the petitioner that no further extension of the said leave and licence agreement would be allowed as decided by the respondent. The respondent was thus justified in calling upon the petitioner to vacate the plot on or before 31st March, 2009. The said notice issued by the respondent was to

be treated as a notice of eviction as per the said leave and licence agreement.

26. Learned senior counsel submits that the petitioner for the first time made a proposal for extension of the leave and licence agreement vide its letter dated 17th January, 2009, suggesting that all the terms and conditions enumerated in the leave and licence agreement dated 1st November, 2003 shall remain the same, however, with an escalation of 20% in terms of the annual licence fee. He submits that since the respondent had already conveyed its decision not to grant any extension vide its letter dated 16th September, 2008 and since the petitioner did not make any proposal, the respondent vide its letter dated 5th February, 2009 once again rejected the said proposal. He submits that in any event, the said proposal was submitted by the petitioner for the first time after 30th September, 2008 i.e. beyond the time prescribed under clause 33 of the leave and licence agreement.

27. Learned senior counsel submits that since the petitioner failed to take any steps and was not ready and willing for extension of contract, the petitioner could not seek any such relief in the arbitration proceedings. The learned arbitrator has after considering the pleadings, documents and oral evidence has rendered the finding of facts which cannot be interfered with by this Court under section 34 of the Arbitration Act.

28. Insofar as claim No.2 is concerned, learned senior counsel submits that the petitioner has already filed a civil suit against the notice of demand raised by the Grampanchayat in which

the respondent has been impleaded as a party defendant. The learned arbitrator has rightly rejected the said claim on the ground that the said suit is pending. The learned arbitrator however, has granted part relief in favour of the petitioner as far as the taxes for the period prior to the date of leave and licence agreement is concerned. He submits that it was the case of the respondent that the Grampanchayat had no authority to seek any recovery of the taxes in view of the fact that the CIDCO was the planning authority in respect of the plot in question. He submits that if the petitioner loses in that suit and it is held in that suit that the Grampanchayat was entitled to issue such notice for recovery of taxes, in that event the petitioner can invoke arbitration agreement again for the purpose of adjudication whether under the terms of the leave and licence agreement, the liability of all such taxes would be that of the respondent or the petitioner. He submits that in view of the pendency of the suit, the learned arbitrator was justified in rejecting substantial part of the claim made by the petitioner.

29. Insofar as the claims for compensation made by the petitioner and rejected by the learned arbitrator is concerned, he submits that the petitioner has failed to prove its entitlement to the said claim and also quantification in respect thereof. The learned arbitrator has rendered a finding of fact and has rightly rejected the said claims. This Court cannot interfere with such findings of fact which are not perverse under section 34 of the Arbitration Act.

30. Insofar as the submission of learned senior counsel for the petitioner that the learned arbitrator has awarded compensation beyond the prayers of the respondent is concerned, he submits that

since the petitioner did not vacate the plot of land though the said leave and licence agreement was not extended by the respondent, the learned arbitrator has rightly awarded the said claim.

31. In rejoinder, learned senior counsel Mr.Shah for the petitioner submits that the respondent could not have rejected the proposal for extension before expiry of six months prior to the date of 31st March, 2009. He submits that the findings rendered by the learned arbitrator on this issue are perverse and thus this Court can interfere with such finding of fact. Insofar as the rejection of the substantial part of claim No.2 is concerned, he submits that though the suit filed by the petitioner against the Grampanchayat and the respondent is pending in the Civil Court, since the issue as to whether under the leave and licence agreement whether the liability of such municipal taxes would be that of the petitioner or not can be decided only by the arbitrator and thus this Court shall set aside that part of the award and the matter be referred to the learned arbitrator for deciding that issue afresh. Insofar as the rejection of the claims for compensation made by the petitioner is concerned, he submits that the petitioner had proved all these claims as well as their entitlement and thus the learned arbitrator has wrongly rejected those claims.

32. Insofar as the submission of Mr.Sakhare, learned senior counsel for the respondent that since the petitioner has not vacated the land though the said leave and licence agreement was not extended and thus the learned arbitrator has rightly awarded the claim for compensation beyond the period of 31st January, 2011 is concerned, he submits that the learned arbitrator could not exceed

his jurisdiction by granting such claim which was not even made by the respondent.

REASONS AND CONCLUSIONS :

33. The leave and licence agreement clearly indicates that the period of licence provided under clause 2 of the said agreement was for five years from the date of commencement of business which was not to be later than three months from the execution of the said agreement or on handing over the possession for the permitted use of the plot of land, whichever is later. It is not in dispute that the licence period commenced from 31st March, 2004 and expired on 31st March, 2009. A perusal of clause 33 which provides for future extension of the agreement, clearly indicates that the said decision about the future extension of the agreement was required to be taken by the parties at least six months prior to the expiry of the licence period i.e. on or before 30th September, 2008.

34. It further indicates that the terms and conditions were to be mutually agreed upon and the said extension was at the discretion of the licensor. It further provides that in case of extension of the leave and licence agreement not agreed upon, then the leave and licence agreement would come to an end automatically at the expiry of period and the licensee shall have to vacate and hand over possession and shall remove movable machinery. The said clause further provides for compensation at the rate of Rs.5.00 lakhs per month if possession thereof was not handed over to the licensor upon the expiry of the licence period.

35. It is thus clear on the plain reading of the said clause 33 that the decision for extension of the licence period was to be taken

prior to six months of the expiry of the licence period. It was at the discretion of the licensor ultimately whether to grant such extension or not. Even if the licensor would have agreed for extension, the terms and conditions of such extension was to be decided mutually. A perusal of the correspondence on record clearly indicates that the respondent by its letter dated 1st May, 2008 had invited the attention of the petitioner to the said clause No.33 and had requested to respond to the said letter expeditiously. The petitioner however, by its letter dated 7th May, 2008 informed the respondent that since the agreement would initially expired on 31st March, 2009, the petitioner would come forward with a fresh proposal. The petitioner however, did not make any proposal till the middle of September, 2008. The last date of taking a decision whether the said leave and licence agreement shall be extended or not was to be taken on or before 30th September, 2008.

36. The respondent therefore, exercised its right under the said clause No.33 and informed its decision to the petitioner that no further extension of the leave and licence agreement would be allowed. By the said notice, which was to be treated as a notice of eviction, the respondent also called upon the petitioner to vacate the plot on or before 31st March,2009 to the respondent as per the terms and conditions of the agreement.

37. A perusal of the record indicates that the petitioner for the first time by its letter dated 17th January, 2009 informed the respondent that all the terms and conditions enumerated in the leave and licence agreement dated 1st November, 2003 shall remain the same with a modification of the clause relating to payment of licence

fee. For the first time, the petitioner conveyed that the escalation of 20% in terms of the annual licence fee payable to the respondent be provided. It is clear that the said proposal with the terms and conditions which the petitioner had suggested was made to the respondent only after 30th September, 2008 which, in my view, was not in accordance with clause No.33 of the leave and licence agreement. The respondent has thus rightly rejected the said proposal once again vide letter dated 5th February, 2009.

38. Insofar as the submission of learned senior counsel for the petitioner that there were meetings held by and between the partners of the petitioner with some of the officers of the respondent, in which the petitioner forwarded the terms for extension of the leave and licence agreement is concerned, a perusal of the record does not indicate that the petitioner has proved any such allegations before the learned arbitrator by producing any minutes of any such meeting or by leading any other evidence. I am thus not inclined to accept this submission of learned senior counsel for the petitioner.

39. In my view, there is no merit in the submission of learned senior counsel for the petitioner that the petitioner could make the proposal any time prior to 30th September, 2008. A perusal of clause No.33 clearly indicates that the decision in respect of the extension of the leave and licence agreement was to be taken prior to 30th September, 2008. The petitioner did not convey its proposal though agreed to convey by a letter dated 7th May, 2008 till 15th September, 2008. The respondent thus in my view was justified in conveying its decision not to extend the leave and licence agreement and calling upon the petitioner to vacate and hand over the land to the

respondent.

40. A perusal of the impugned award clearly indicates that the learned arbitrator has considered this issue while dealing with issue No.1 and has also dealt with all the submissions, documents and oral evidence led by the parties and has rendered the findings of fact that the respondent had waited for about four months after receipt of the letter dated 7th May, 2008 addressed by the petitioner, but no communication was received from the petitioner. The learned arbitrator also interpreted clause 33 and has held that the extension was subject to the discretion of the respondent. The respondent had legitimately exercised its right as per clause 33 vide its letter dated 18th September, 2008 after waiting for more than four months from concrete response from the respondent to its letter dated 1st May, 2008. The learned arbitrator also considered the cross-examination of the witness examined by the petitioner who admitted that the petitioner did not make a proposal for renewal of the leave and licence agreement within the period prescribed under clause 33 of the agreement. He also admitted that the letter dated 17th January, 2010 setting out their proposal for renewal of the licence was written after expiry of time framed under clause 33. The learned arbitrator has interpreted such clause 33 and has held that the reference to the term “within six months as stipulated in the agreement” in the letter of the petitioner dated 7th May, 2008 was not correct as the term mentioned in clause 33 of the agreement was “at least six months prior to the expiry of the licence period”.

41. The learned arbitrator has also rendered a finding that the letters dated 1st May, 2008 and 7th May, 2008 did not partake the

character of an agreement. It is held that the letter dated 1st May, 2008 was merely a proposal seeking the consent for extension whereas the letter dated 7th May, 2008 as also subsequent letter of September, 2008 of the petitioner did not intend to give consent so as to constitute an agreement for extension in terms of clause 33 of the agreement. The learned arbitrator held on interpretation of clause 33 that ultimately it was at the discretion of the licensor whether to grant extension or to refuse it even if intention for extension did not put forth by the petitioner within stipulated period. In my view, the learned arbitrator has rightly held that the petitioner was not entitled for renewal of the licence for a further period of five years as prayed. In my view, the learned arbitrator has interpreted the terms of the agreement which interpretation is not only a possible interpretation but is the correct interpretation. Even if such interpretation is considered as possible interpretation, this Court cannot substitute such possible interpretation by any other interpretation of this Court. In my view, the learned arbitrator has rendered the findings of fact on consideration of the pleadings, documentary as well as oral evidence which findings, in my view are not perverse and thus no interference with such findings of fact is permissible under section 34 of the Arbitration Act.

42. Insofar as claim No.2 is concerned, a perusal of the record indicates that the learned arbitrator has allowed claim in the sum of Rs.1,46,137/- which was for the period prior to November, 2003 i.e. the date of entering into the leave and licence agreement with interest at the rate of 15% p.a. from 20th August, 2008 till payment. Insofar as the said part of the claim towards payment made by the petitioner to the Grampanchayat is concerned, the learned arbitrator

has rejected the said claim on the ground that the dispute with regard to the taxes levied by Dhutum Grampanchayat is being litigated before a Court of Law and the said matter is *sub-judice*. It is held by the learned arbitrator that the parties have to wait for the final outcome of the said suit.

43. Insofar as the submission of learned senior counsel for the petitioner that the Civil Court will not be able to decide the issue whether under the leave and licence agreement and more particularly under clause 16 of the leave and licence agreement, the petitioner was at all liable to pay any property taxes to the municipal corporation or not and thus the issue ought to have been decided by the learned arbitrator only is concerned, a perusal of the record indicates that the respondent had opposed to the said claim and the levy of the municipal taxes by Dhutum Grampanchayat on the ground that the CIDCO being the planning authority, the Grampanchayat was debarred from recovering the taxes.

44. In the said suit, filed by the petitioner, not only the said Grampanchayat is a party defendant, but the respondent also has been impleaded as a party defendant. The Civil Court will decide as to whether the levy of the taxes by the Grampanchayat was legal or not. The question of entitlement of the petitioner for recovery of the said amount deposited with the municipal corporation by the petitioner would arise subsequently. If the petitioner succeeds in the suit and the said levy is set aside by the Civil Court, the petitioner will be eligible to seek refund of the amount deposited with the Grampanchayat. I am inclined to accept the submission of Mr.Sakhare, learned senior counsel for the respondent that if the

petitioner does not succeed in the civil suit and if it is held that the levy of taxes by the Grampanchayat was proper and valid, the petitioner in that event can apply for recovery of the said amount by invoking arbitration agreement again at that stage.

45. In my view, since the validity of the said levy of taxes by the Grampanchayat itself is in issue in the said suit, the learned arbitrator was right in rejecting in rejecting the said claim for the taxes paid for the period of licence on the ground that the said matter was *sub-judice* and the parties have to wait for the final out come of the said suit. The statement of the learned senior counsel for the respondent is accepted. In my view the learned arbitrator has rightly rejected the said part of the claim by holding that the parties will have to wait till the out come of the said suit. In my view since this Court has accepted the statement made by the learned senior counsel that if the petitioner fails in the said suit, the petitioner would be entitled to invoke arbitration agreement again at that stage for recovery of the said claim, the rights of the petitioner are protected. I therefore, do not propose to interfere with that part of the award also.

46. Insofar as claim Nos.3 to 5 i.e. compensation under the different heads are concerned, the learned arbitrator has rejected all such claims by rendering a finding that the petitioner had failed to substantiate those allegations made by the petitioner against the officers of the respondent Mr.A.K. Dabral, Zonal Co-ordinator (WZ) or that the petitioner had been harassed and the said officer had leaked out the agreement and correspondence between them. The learned arbitrator has held that the witness examined by the petitioner in his cross-examination has admitted that the petitioner

did not make any complaint regarding their alleged harassment by Mr.A.K. Dabral to any authority of the respondent. The petitioner also could not produce any documentary evidence to prove the said allegation. Insofar as claim No.4 is concerned, it is held that the said claim is totally vague and general and has not been substantiated by any credible evidence whatsoever. Similarly the learned arbitrator has rejected claim No.5, which was the claim for defamation and for damaging the reputation of the petitioner on the ground that the criminal complaint filed by the respondent is pending investigation and on other grounds. In my view, the petitioner has failed to prove its entitlement to make such claims and also quantification before the learned arbitrator. The petitioner could neither substantiate its claim nor proved the same. The learned arbitrator after considering the documentary as well as oral evidence has rendered the findings of fact which are not perverse and thus no interference with such findings of fact is permissible under section 34 of the Arbitration Act.

47. Insofar as the submission of learned senior counsel for the petitioner that the learned arbitrator has awarded compensation under counter claim No.1, in favour of the respondent for the period from 1st February, 2011 till the petitioner vacates the property and is handed over to the respondent is concerned, a perusal of the counter claim indicates that the respondent had claimed compensation at the rate of Rs.5.00 lakhs per month only for period from 1st April, 2009 to 31st January, 2011 and not beyond the said period. The learned arbitrator however, has allowed compensation also from 1st February, 2011 till the date of the petitioner vacating the said property and handing over possession thereof to the petitioner. In my view, the learned arbitrator has exceeded his jurisdiction by directing

the petitioner to pay compensation for the period from 1st February, 2011 till the date of possession of the property is handed over to the respondent. Since there was no prayer for compensation beyond 31st January, 2011, the learned arbitrator could not have awarded any compensation for the subsequent period. Mr.Shah, learned senior counsel appearing for the petitioner is thus right in his submission that the said part of the award is without jurisdiction and deserves to be set aside. I am therefore, of the view that the directions issued by the learned arbitrator in paragraph 8 of the impugned award holding that the respondent is entitled to receive from the petitioner a sum of Rs.5.00 lakhs per month as compensation under clause 33 of the agreement from 1st February, 2011 till the date of handing over of possession to the respondent is set aside. It is made clear that I have set aside the said part of the award only on the ground that there was no prayer in the counter claim to that effect made by the respondent.

48. Insofar as counter claim No.1 awarded by the learned arbitrator directing the petitioner to pay a sum of Rs.5.00 lakhs per month for the period from 1st February, 2009 to 31st January, 2011 is concerned, it is not in dispute that the petitioner has not vacated the property though the licence has come to an end on 31st March, 2011. The learned arbitrator has rightly awarded the said claim in terms of the agreement for the period which was claimed in counter claim No.1. Thus that part of the award cannot be interfered with.

49. I therefore, pass the following order :-

a). The arbitration petition is partly allowed.

b). The direction issued by the learned arbitrator in paragraph 8 of the impugned award, directing the petitioner to pay compensation from 1st February, 2011 till the date of handing over possession of the property to the respondent and interest thereon is set aside. Rest of the award is upheld.

c). The arbitration petition is disposed of in the aforesaid terms.

d). There shall be no order as to costs.

(R.D. DHANUKA, J.)