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

Judgment Reserved on: May 05, 2016
%   *Judgment Delivered on: June 02, 2016*

+   **FAO(OS) 291/2015**

M/S FOODWORLD ..... Appellant
Represented by: Mr.Sandeep Sethi, Sr.Advocate instructed by Mr.Ateev Mathur, Advocate.

versus

INDIAN RAILWAY CATERING &
TOURISM CORPORATION LTD (IRCTC) ..... Respondent
Represented by: Mr.Nikhil Majithia, Advocate.

+   **FAO(OS) 363/2015**

M/S FOODWORLD ..... Appellant
Represented by: Mr.Sandeep Sethi, Sr.Advocate instructed by Mr.Ateev Mathur, Advocate.

versus

INDIAN RAILWAY CATERING &
TOURISM CORPORATION LTD (IRCTC) ..... Respondent
Represented by: Mr.Nikhil Majithia, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Two contracts were awarded in favour of the appellants M/s Foodworld (in short 'Foodworld') for catering in Train No.2859/60 (Geetanjali Express) and Train No.2975/76 (Jaipur-Mysore Express). The two agreements were for a period of five years commencing from July 01,

2006 Ex.Howrah in respect of Geetanjali Express and from January 16, 2006 for a period of five years in respect of Jaipur Mysore Express.

2. In respect of Geetanjali Express, though Notice Inviting Tender (in short 'NIT') was issued only for on-board catering service however, vide addendum dated March 09, 2006 tender documents were issued for provision of bedroll service as well. Foodworld vide their letter dated May 09, 2006 accepted the terms and conditions for providing on-board catering services however, vide separate letter inquired about the payment for terms of bedroll services. Terms of payment for bedroll were specified and Foodworld was asked to start operation for both catering and bedroll w.e.f June 15, 2006 when Foodworld requested for appointment for sub-licensee M/s Aram Services to provide bedroll kit. On a permission being granted for appointment of sub-licensee, Foodworld commenced on-board catering services on July 01, 2006 and the bedroll services on October 06, 2006. Vide letter dated July 24, 2007 Foodworld wrote for being relieved from rendering bedroll services and vide the letter dated May 19, 2008 Foodworld requested for being relieved from the licence w.e.f. July 01, 2008 as the prices of raw material had increased. IRCTC vide its letter dated July 22, 2008 informed Foodworld that surrender of catering licence in breach of condition of agreement would entail consequence and issued a show cause notice as to why action be not taken for terminating the licence for Geetanjali Express, forfeiture of security deposit and debarment in participation in future project of IRCTC for a period of one year. Foodworld consented to the imposition as proposed in the show cause notice. On September 22, 2008, Foodworld reiterated that it was rendering catering services on Minimum Licence Fee (in short 'MLF') and not licence

fee as per Bid. Thus payment of ₹8,93,250/- towards licence fee for the period July 2008 to September 30, 2008 on the calculation of minimum licence fee was made by Foodworld which cheque was encashed by IRCTC. Vide their further letter dated October 13, 2009 IRCTC informed Foodworld that their licence stood terminated w.e.f. February 15, 2009 and the security deposit was forfeited. They were debarred from participating in future projects of IRCTC for a period of one year and demanded balance on pro-rata licence fee.

3. In Jaipur Mysore Express after the agreement dated March 03, 2006 effective from January 16, 2006 for a period of five years was entered into IRCTC asked Foodworld to provide bedroll services w.e.f. October 09, 2006 for which permission was sought to appoint sub-licensee M/s Aram Services. Vide letter dated January 15, 2007 Foodworld was sought to be relieved from catering services w.e.f January 18, 2007. Since no response was received, Foodworld continued providing services but sought to surrender licence on November 02, 2007 on the ground that journey from Jaipur to Mysore was reduced by 6.5 hours leading to losses. Show cause notice was issued whereafter Foodworld deposited three months' licence fee for the period May 16, 2008 to August 15, 2008, that is, @ ₹3.53 lakhs per month pro-rata amount based on the bid amount. On December 29, 2010 a tripartite agreement was entered into between South Western Railways, Foodworld and IRCTC and the original contract dated March 03, 2006 was assigned to Indian Railways.

4. In nutshell, in Geetanjali Express, IRCTC withdrew the services of bedroll whereas in Jaipur Mysore Express bedroll service was incorporated by virtue of addendum dated October 09, 2006 and in Geetanjali Express,

Foodworld requested for being relieved from the licence w.e.f. July 01, 2008 whereas in Jaipur Mysore Express, Foodworld asked to be relieved from catering services w.e.f. January 18, 2007. As a matter of fact which is not disputed by IRCTC, Foodworld continued catering services in Geetanjali Express till February 15, 2009 and in Jaipur and Mysore Express for the entire term till the same was handed over to the concerned Zonal Railway on the basis of a tripartite agreement.

5. In view of the dispute reference was made to the Sole Arbitrator wherein Foodworld claimed release of charges for bedroll services amounting to ₹30,34,227/- in Geetanjali Express and ₹17,69,669/- in respect of Jaipur Mysore and that they were not liable to pay the bid licence fee for the remaining period. IRCTC admitted that Foodworld continued to provide the catering services on the train, however, its case was that Foodworld failed to deposit quoted/bid licence fee and that IRCTC never waived off the Foodworld's liability to pay quoted licence fee. Further IRCTC denied termination of contract in case of Geetanjali Express on July 01, 2008 on the plea that operations continued till February 15, 2009 and in respect of Jaipur Mysore Express till the same was handed over to the concerned Zonal Railways pursuant to the tripartite agreement. IRCTC also claimed that the bedroll charges were adjusted against outstanding licence fee of both the trains.

6. The learned Arbitrator vide the award dated January 09, 2015 held IRCTC to be entitled to ₹95,73,326/- in respect of Geetanjali Express and ₹1,00,37,575/- in respect of Jaipur Mysore Express towards outstanding licence fee and after adjustment of bedroll commission, net amount of ₹65,39,099/- in respect of Geetanjali Express and ₹82,17,905/- in respect of

Jaipur Mysore Express was payable to IRCTC allowing the counter claim of the IRCTC. Interest @ 9% p.a. from the date of claim, that is, October 12, 2012 to the date of award was granted and in case the payment was not made in 30 days, IRCTC was held entitled to interest @ 18% per annum. The reasoning of the learned Arbitrator was:

> *"A contract cannot be rescinded unilaterally and the parties cannot resile from the said obligation. In case the claimant exhibits his intention not to continue with the operation of the train and withdraw the services, it amounts to repudiation of the agreement within the meaning of clause 8.2 of the terms of license. But in this case, the licensee, admittedly, provided catering services for a period till the train was actually taken over by the respondent and the services were regulated by the agreement between the parties. Thus I hold that the licensees are liable to pay license fee on bid amount for the entire period, the train was actually operated by them."*

7. In a challenge to the common award, the learned Single Judge vide the impugned order dated April 16, 2015 dismissed the two petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (in short 'the Act'). Hence the present appeals.

8. Before dealing with the rival contentions it would be appropriate to note the terms of Exit Policy of IRCTC and the relevant clauses of the agreement.

9. The Exit Policy of IRCTC provided as under:

> *"I* *<u>Exit after one year of operation</u>*
>
> * *In case service provider gives in writing to surrender the train, he should give 3 months prior notice, so that IRCTC have time to appoint new licensee.*

* *In case of exit under this clause, security deposit, licence fee and concession fee, if any, will be forfeited.*

* *Such licensee will be debarred to participate in future projects of IRCTC for a period of one year.*

* *Licensee will also pay an amount equal to the security deposit as penalty at the time of making a request to surrender the train.*

II. <u>Exit after two years of operation</u>

* *In case service provider gives in writing to surrender the train, he should give 3 months prior notice, so that IRCTC have time to appoint new licensee.*

* *In case of exit under this clause, security deposit, licence fee and concession fee, if any, will be forfeited.*

* *Such licensee will be debarred to participate in tender for the same train. This is for your information and records please."*

10. Two clauses of the tender document, that is, clause 2.8 and 12.9 which are relevant, we note:

> *"2.8: IRCTC reserve the right to withdraw the provision of bedroll and cleaning services by the licensee at any stage and will not be responsible for any loss or damage, which the licensee may incur in the process.*
>
> *Licensee shall not be liable for any claim or damages etc on this account."*
>
> *"12.9: The licensor reserves the right to amend any of the clauses of the agreement and also to add fresh clauses from time to time. The rider agreement in this regard shall be executed between the parties within 15 days of the*

> *amendment/changes. Further, IRCTC reserves the right to extend or reduce the time stipulated in any clause in the tender/licence conditions herein above, in order to meet operational exigencies. The decision of the Managing Director of IRCTC in this regard shall be final."*

11. The grievance of the appellants is primarily that based on the facts of Geetanjali Express both the learned Arbitrator and the learned Single Judge decided the matter whereas in case of Jaipur Mysore Express, Foodworld had completed its full term and thus the Exit Policy was not applicable to it. It is further contended that after having suffered penalties for surrendering the licence, the appellant could not have been made liable to pay the licence fee in terms of the agreement. IRCTC having consented to the termination of the agreement, under no circumstance could it recover the amount under the agreement.

12. The contention of learned counsel for IRCTC is that in the case of Jaipur Mysore Express the licence was voluntarily continued by the Foodworld. Since Foodworld continued performing the licence for the entire duration there was no termination of the contract. This being a finding of fact by the Arbitrator was not open to challenge either in a petition under Section 34 or an appeal under Section 37 of the Act. In respect of Geetanjali Express the contention of learned counsel for IRCTC is that Foodworld's interpretation that original contract stood unilaterally terminated w.e.f. July 01, 2008 is incorrect specially because there was no such clause in the contract. Even if contract stood novated, the licence fee was still required to be paid.

13. As noted above in Geetanjali Express, Foodworld continued to

operate even after July 01, 2008 till February 16, 2009 and in Jaipur Mysore Express from March 13, 2006 for the complete five years having entered into an agreement firstly with IRCTC and thereafter a tripartite agreement with South Western Railways and IRCTC. In case of Jaipur Mysore Express having performed the licence for the entire duration with no mid way termination of contract, Foodworld has been rightly directed to pay as per the commercial contract, that is, financial bid in terms of the licence and not the floor/reserved price. Applying the principle of quantum meruit since Foodworld performed the contract for the entire period, forfeiture of the security deposit, licence fee and concession fee, if any, in terms of the Exit Policy was not warranted and thus the learned Arbitrator and the learned Single Judge erred in not considering that having performed the contract the forfeiture was liable to be set aside.

14. In Geetanjali Express even after notice to be effective from July 01, 2008 Foodworld continued to perform the contract till November 15, 2009. The contention of Foodworld that it was forced to continue is unsustainable. It had the option to quit in terms of the Exit Policy, however, since it performed the contract till February 15, 2009 it was required to pay the fee in terms of the commercial contract, that is, Financial Bid and not the floor/reserved price till the period it performed the contract. Having continued to perform the contract, Foodworld cannot escape the liability for the period it performed the contract. Thus with respect to Geetanjali Express we find no error either in the impugned judgment of the learned Single Judge or the award passed by the learned Arbitrator.

15. Consequently, FAO (OS) No.291/2015 challenging the impugned judgment relating to Geetanjali Express is dismissed. FAO(OS)

No.363/2015 relating to Jaipur Mysore Express is allowed. The respondent will refund the security deposit, licence fee and concession fee, if any, forfeited to Foodworld within 30 days with interest @ 8% p.a.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

JUNE 02, 2016
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