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

+ **O.M.P. (COMM) 101/2017**

UNION OF INDIA

..... Petitioner

Through Mr J.K. Singh, Standing Counsel
Railways Mr Praveen Kumar, Advocate for UOI.

versus

SATYAM CATERERS LTD.

..... Respondent

Through Mr Jayant Bhushan, Senior Advocate
with Mr Manish Bishnoi, Ms Reeja Varghese,
Mr Ankit Nigam, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

01.03.2017

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VIBHU BAKHRU, J

IA Nos. 2656/2017

1. Allowed, subject to all just exceptions.
2. The application is disposed of.

IA Nos. 2654/2017 (delay 29 days) IA Nos. 2657/2017 (condonation of delay in re-filing)

3. This is an application filed on behalf of the petitioner seeking condonation of delay of 29 days in filing the present petition.

4. The arbitral award (hereafter 'the impugned award') was made on 09.09.2016, however, the petitioner claims that the same was received on 12.09.2016. Admittedly, the impugned award was sent by hand. The arbitrator was one of the serving employees of the Railways and it is

expected that the award would be served on the date it is entered. However, there is no evidence to indicate the date on which the impugned award was received. Indisputably, if the impugned award was received on 09.09.2016 or even on 10.09.2016, the above captioned petition would not be maintainable. However since it is affirmed that the impugned award was received on 12.09.2016, the applications for condoning the delay in filing and re-filing the petition are considered, accepting the said assertion as true and correct.

5. The only ground pleaded by the petitioner for seeking condonation of a delay of twenty nine days is that the department sought legal opinion of an advocate and the deliberations on whether to file objections against the impugned award took some time. The provisions of Section 34 (3) of the Arbitration and Conciliation Act, 1996 (hereafter ‘the Act’) are clear and the time for making an application for setting aside an arbitral award is specified as three months. The court can condone a delay of a further period of 30 days provided that *"the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months"*.

6. In the present case, the explanation given to justify the delay beyond the period of three months can hardly be accepted as a sufficient cause that prevented the petitioner from filing the above captioned petition. Plainly, the petitioner cannot be heard to state that it was prevented from filing the petition as it took time to contemplate whether the petition should be filed in the first place. In view of the above, this court does not find any ground to condone the delay of twenty nine days in filing the petition. It is also noticed

that there has been a further delay of 14 days in re-filing the petition. Thus, even after filing the present petition on 09.01.2017, the petitioner took almost a month and a half to cure the defects and finally filed the petition on 22.2.2017. It is also seen that if the delay in re-filing is included, the petitioner has not filed the present petition within a period of 120 days of receiving the impugned award. A Division Bench of this court in **Delhi Development Authority vs. M/s Durga Construction Co: 2013 (139) DRJ 133** had considered the question whether a delay beyond the period of 120 days (including the delay in re-filing) could be condoned and concluded that this court has the jurisdiction to condone the delay in re-filing, but the discretion to do so must be exercised having regard to the legislative intent of Section 34 (3) of the Act and a lenient view is not warranted.

7. Given the petitioner's explanation for the delay, this court is not satisfied that such discretion should be exercised in favour of the petitioner and the petition is liable to be dismissed on the ground of delay alone.

8. The applications are, accordingly, dismissed. Notwithstanding the same, this court has also examined the petitioner's challenge on the merits of the case.

O.M.P. (COMM) 101/2017 & IA No. 2653/2017 (stay)

9. The above captioned petition has been filed under Section 34 of the Act for setting aside the impugned award.

10. On 17.05.2013, the petitioner (hereafter 'the railways') issued a notice

inviting bids for “*Provision of Catering Services on Train No. 12005/06, New Delhi Kalka Shatabdi Exprerss (Daily)*” from prospective bidders. The last date for submitting the bids was 27.06.2013. In pursuance of the said invitation, the respondent (hereafter 'SCL') submitted its bid, which was opened on 27.06.2013. SCL's bid was found to be the highest and was, accordingly accepted by the railways. Subsequently, the railways issued a letter of award dated 20.11.2013. It is stated that SCL deposited the advance licence fee of an amount of ₹1,25,20,000/- and also furnished a bank guarantee in the sum of ₹31,30,000 as a security deposit.

11. Disputes arose between the parties in respect of the revision of the licence fee on account of increase in the catering tariff. The railways sought to increase the license fee *pro rata* on the basis of the increase in the catering tariff. SCL claimed that such increase was not permissible and the increase in license fee, if any, was to be based on the reassessment of sales.

12. The aforesaid disputes were referred to the arbitration.

13. The controversy between the parties stemmed from Note No. 4 of the price bid form, which provided “*The variation in license fee shall be determined by Railway, assessing the corresponding changes in catering volumes and income to the Licensee.*”.

14. SCL claimed that the said note was to be modified but the same was inadvertently not done. However, the main clauses 1.3.3 and 8.3 of the Standard Bid Document had been modified. The arbitrator considered the aforesaid dispute and concluded that the revision in the license fee was required to be made on the basis of the clause 1.3.3 and 8.3 of the Standard

Bid Document.

Submissions

15. The learned counsel appearing for the railways submitted that the impugned award militates against Note No 4 of the price bid form and on the strength of the said clause contended that the impugned award was contrary to the provisions of the contract and, consequently, was liable to be set aside.

16. Before proceeding to address the controversy, it would be necessary to refer to certain documents. Clause 1.3.3 of the Standard Bid Document (hereafter 'SBD') published prior to 27.05.2013, reads as under:-

1.3.3. The menus and rates for each service are enclosed at Section – C. Railway reserves the right to modify/alter the catering tariff and menu and such changes in catering charges and menu shall be informed to the Licensee in advance for which the License Fee shall be varied on pro-rata basis. In the event of such changes, the Licensee shall maintain the same quality and hygiene standards for preparation, supply and service of food/meals to passengers as it were prior to such change.”

17. Apparently, the Railway Board decided to amend the aforesaid clause and issued a letter dated 12.03.2013. The relevant extract of which, reads as under:-

“No. 2010/TG-III/600/12/SBD/Pt.IV/ Modification 12.03.2013
The Chief Commercial Manager
All Indian Railways

Sub: Modification in some paras of the revised SBD for awarding

of Rajdhani/Shatabdi/Duronto/Mail/Express trains.

Ref: i) Board's letter No.2010/TG-III/600/12/SBD/1 dated 28.06.2011.

ii) This office letter of even No. dated 22.09.2011 and 17-18/10/2011.

iii) Board's letter no.2010/TG-III/600/12/SBD/1 dated 09.08.2011.

iv) Board's letter No.2011/TG-III/600/33 dated 14.09.2011

v) Board's letter No.2010/TG-III/600/12/SBD/Pt.IV dated 02.01.2013.

In continuation of Para 4.1 of the Catering Policy 2010, Standard Bid Documents for award of contract for catering services on Rajdhani/Shatabdi/Duronto & other Mail/Exp. Trains have been issued vide above referred letters..... Accordingly the following relevant paras have been modified which are given as under for compliance:

(I) **SBD FOR RAJDHANI/SHATABDI/DURONTO TRAINS**

- 1) Para 1.3.3. of the scope of the work of the SBD for Rajdhani/Shatabdi/Duronto trains (Page No.6), proposed to be revised (similar modification in page No. 95) as under:
(underlined words added and underlined cut deleted)

“The menus and rates for each service are enclosed at Section, - C. Railway reserves the right to modify/alter the catering tariff and menu and such changes in catering charges and menu shall be informed to the Licensee in advance for which the License Fee shall be varied **based on the reassessment of sales on pro rata basis**. In the event of such changes, the Licensee shall maintain the same quality and hygiene standards for preparation, supply and service of food/meals to passengers as it were prior to such change

* * * * *

(Vivek Kumar Srivastava)
Director (T&C)"

18. Thereafter, the railways issued a revised Standard Bid Document (hereafter 'the revised SBD'). Admittedly, SCL's bid was submitted

pursuant to this revised SBD. Clause 1.3.3 as well as clause 8.3 of the said revised SBD reads as under:-

“1.3.3 The menus and rates for each service are enclosed at Section, - C. Railway reserves the right to modify/alter the catering tariff and menu and such changes in catering charges and menu shall be informed to the Licensee in advance for which the License Fee shall be varied based on the reassessment of sales. In the event of such changes, the Licensee shall maintain the same quality and hygiene standards for preparation, supply and service of food/meals to passengers as it were prior to such change.

* * * * *

8.3 In the case of any revision in catering tariff, the License fee payable to Railway shall be varied based on the re-assessment of sales, from the date of revision of catering tariff.”

19. Although, the SBD had been modified, the format for the price bid form continued to retain Note 4, which reads as under:-

“4. The license fee quoted by the Licensee is liable to be varied on a pro-rate basis, in the event of the changes in originating and terminating stations of the train, leading to increase or decrease in journey time of the train or changes in catering tariff after submission of bid. The variation in license fee shall be determined by Railway, assessing the corresponding changes in catering volumes and income to the Licensee.”

20. Thus, there was a clear repugnancy between Note 4 of the price bid form and Clause 1.3.3 and Clause 8.3 of the revised SBD. The question whether the clauses 1.3.3 and 8.3 of the revised SBD would prevail over the afore-quoted Note 4 was the principal controversy before the arbitrator. In order to address the same, the arbitrator referred to a letter dated 04.09.2013

whereby the Railway Board had, inter alia, clarified the issue. The relevant extract of the clarification sought by SER and the clarification provided are set out below:-

S.No.	Clarification sought by SER	Remarks by Board
3	As per clause no. 1.3 (Para-c) (Page No.10) of scope of catering services on trains of modified in some paras of the revised SBD for mail/express trains vide Board's letter no. 2010/TG-III/600/12/SBD/Modification dated 12.03.2013 that Railway reserve the right to modify/alter catering tariff and menu, for which the license fee shall be varied based on re-assessment of sales. Instead of making re-assessment of sales for increase in the license fee towards modification/alteration of catering tariff and menu, it should be increased in proportionate ratio w.r.t. modification/alteration rates, Railway Board may kindly allow.	Railway may please follow clause No. 1.3 (Para-c) (Page no10) of scope of catering services on trains of modified in SBD for mail/express trains vide Board's letter no. 2010/TG-III/600/12/SBD/Modification dated 12.03.2013.

21. The aforesaid clarification was reiterated by the Railway Board in the letter dated 16.07.2015. The arbitrator relied upon the same and passed the impugned award, the operative part of which, reads as under:-

- “i) Respondent is directed to follow system of reassessment in accordance to the Railway Board's directive as given in revised SBD dated 12.03.13 ie clause 1.3.3 and clause 8.3 in Section D of SBD i.e. Master License Agreement, for revision of license fee upon revision of catering tariff in those Rajdhani/Duronto/Shatabdi trains which are subject to Arbitration in this case.
- ii) Respondent shall follow the process/formula for fixation of reassessed licence fee as given in para 18.2 of

Catering Policy 2010, revised vide CC-82/2012 (Correction Slip No.2 to catering policy-2010) dated 31.12.2012 in those Rajdhani/Duranto/Shatabdi trains which subject to Arbitration in this case.

iii) Based on (i) & (ii) above, respondent shall recalculate licence fee to be realised upon revision of catering tariff in those Rajdhani/Duranto/Shatabdi trains which are subject to Arbitration in this case and

- a) Difference in license fee payable, if any, by the Claimant shall be realised immediately.
- b) Difference in license fee refundable, if any, to the Claimant may be adjusted in future license fee. In such a case, the Respondent is not liable to pay any interest.

iv) No order as to the costs.”

22. It is clear that the railways intended to alter the SBD to provide for increase in the License Fee on the basis of reassessment of sales and not on pro-rata basis. The amendments carried out in the SBD expressly indicate the said intention. It was thus clear that in case there was any increase in the catering tariff, the license fee would be reassessed. Note 4 of the price bid form, however, was not altered and this clearly appears to be an oversight as is apparent from the clarification issued by the Railway Board subsequently.

23. In the circumstances, the contention that the impugned award runs contrary to the terms of the contract, cannot be accepted. The arbitrator has interpreted the contract which contains two conflicting clauses and has taken an informed decision. This Court finds no infirmity with the said decision.

24. It is well settled that the question as to interpretation of an agreement between the parties is within the jurisdiction of the arbitrator. Even if it is

assumed - although there is no reason to do so and this court does not - that the arbitrator had made an error in interpreting the contract, such an error is within the jurisdiction of the arbitrator and cannot be interfered with by this court. This was explained by the Supreme Court in **Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.:** (2009) 10 SCC 63, in the following words:-

“....an error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award”.

25. In the circumstances, the present petition is also liable to be dismissed as being devoid of any merit.

26. The petition and pending applications are, accordingly, dismissed.

MARCH 01, 2017
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VIBHU BAKHRU, J