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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Pronounced on: 16.10.2018

- + O.M.P. (COMM) 119/2016
INDIAN RAILWAY CATERING & TOURISM
CORPORATION LTD Petitioner
versus
A K ROY Respondent
- + O.M.P. (COMM) 120/2016
INDIAN RAILWAY CATERING & TOURISM
CORPORATION LTD Petitioner
versus
A K ROY Respondent
- + O.M.P. (COMM) 122/2016
INDIAN RAILWAY CATERING & TOURISM
CORPORATION LTD Petitioner
versus
A K ROY Respondent
- + O.M.P. (COMM) 125/2016
INDIAN RAILWAY CATERING & TOURISM
CORPORATION LTD Petitioner
versus
A K ROY Respondent
- + O.M.P. (COMM) 130/2016
INDIAN RAILWAY CATERING & TOURISM
CORPORATION LTD Petitioner
versus
A K ROY Respondent
- + O.M.P. (COMM) 133/2016
INDIAN RAILWAY CATERING & TOURISM
CORPORATION LTD Petitioner
versus
A K ROY Respondent
- + O.M.P. (COMM) 158/2016
INDIAN RAILWAY CATERING & TOURISM
CORPORATION LTD Petitioner
versus

A K ROY

..... Respondent

Present: Mr.Sunil Malhotra & Mr.Rajat Malhotra, Advocates for the petitioner- INDIAN RAILWAY CATERING & TOURISM CORPORATION LTD.

Mr.V.P.Singh, Sr.Advocate with Mr.V.K.Ojha, Advocate for the respondent- A K ROY.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. These petitions are filed under section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the award dated 16.08.2013 passed by the learned Sole Arbitrator.
2. Seven separate claim petitions were filed in this case by the respondent. However, all were disposed off by a common award. Material facts, submissions and contentions of the parties are common. Hence, I am disposing of all the above petitions by a common order.
3. The brief facts are that the petitioner invited bids/quotations for award of license purely on *ad hoc* temporary basis for a period of three months to provide catering service through Train Side Vending in seven pairs of trains running on different routes vide its notice dated 13.10.2008. Quotations were invited from empanelled catering service providers.
4. The respondents submitted its quotation/bid. After evaluation the petitioner declared the respondent as the successful bidder. For the purpose of this order I am narrating the facts of OMP (Comm.) 110/2016. The petitioner granted to the respondent a Temporary License for Train Side Vending in Train No.5707-08 on 31.10.2008 for a period of three months on

a quoted license fee of Rs.2,21,501/- per month. The communication of the petitioner clearly stated that the contract was for a period of three months and was to be extended at the sole discretion of the petitioner. The licensee/respondent was required to deposit a sum of Rs.6,64,503/- which was the total license fee for three months by 3.11.2008. The respondent was required to commence the train side vending w.e.f. 1.11.2008.

5. The case of the petitioner is that as per terms and conditions of the contract the petitioner was merely to coordinate with railway administration for issuance of travel authority and medical certificate to the onboard staff of the licensee in the concerned train. It is pleaded that pursuant to the request of the petitioner the concerned railway authorities issued passes to the on board staff of the respondent and discharged its obligation. It is also pleaded that the respondent failed to deposit the entire amount of license fee of Rs.6,64,503/- for three months by 3.11.2008. Only a sum of Rs.2,21,501/- was deposited by 3.11.2008. The case of the petitioner is that under clause 8.2 of the General Terms and Conditions of the License, in case the licensee repudiates the license granted by the petitioner in such an eventuality the petitioner can terminate the license without notice. Further, as per clause 8.1 of the General Terms & Conditions of the License the license fee deposited by the respondent is liable to be forfeited in whole or part. It is further contended that the license granted to the respondent was renewed upto 28.2.2009 and thereafter upto 9.8.2009. The license expired on 9.8.2009 due to afflux of time. It is also pleaded that the licensee failed to provide continuous catering services and breached the contract.

6. Disputes arose between the parties. The petitioner appointed Shri D.P.Tripathi as the Sole Arbitrator. The respondent filed his claim petition.

The petitioner also filed counter claim against the respondent herein claiming an amount of Rs.27,39,197/- being the balance due payable by the respondent. After completion of pleadings the learned Arbitrator framed the following issues:-

- (a) “Whether the Licensee, claimant M/s. A.K.Roy fulfilled its contractual obligations as per the terms and conditions of the contract.
- (b) In the event of failure to perform his part of obligation under contract because of presence of any extenuating circumstances beyond the control of the claimant due to which he failed to provide services.”

7. On issue No.1 the learned Arbitrator concluded that it is an admitted fact that the respondent did not operate the license except for a brief period in some of the trains and the respondent did not fulfil its obligations of providing Train Side Vending services.

Regarding the second issue, namely, as to whether there were extenuating circumstances beyond the control of the respondent for his non-performance, the learned Arbitrator noted the pleas of the respondent, namely, that the services were commenced on 3.11.2008 for which all arrangements were mobilised by the respondent. However, on one of the trains, 2497-98 when the service was started on 3.11.2008 Ex.New Delhi, vendors of the previous licensee boarded the train at Delhi Subzi Mandi and there was a dispute and manhandling of the respondent's vendor. The vendors were de-boarded alongwith all the eatable materials at Panipat. Similar problems were also encountered from the previous licensees in other trains. It is also the case of the respondent that despite his willingness to continue the services in the train he did not get support either from the

petitioner or from the Railway Protection Force to prevent unauthorised vending and obstruction by the previous licensee and their vendors. Hence, the plea of the respondent is that he had no option but to discontinue the services to avoid manhandling of his staff.

8. The learned Arbitrator also noted that the license was initially given for three months from 1.11.2008 though the respondent deposited the licence fee of only one month. Despite the failure of the respondent to start the service and his failure to deposit the balance license fee, the petitioner sanctioned temporary extension of the license upto 28.2.2009 and subsequently to August 2009. The learned Arbitrator concludes that the extension of the license by the petitioner is a clear indication that the petitioner did appreciate the difficulties and problems being encountered by the respondent and hence kept extending his license from time to time. The award notes that the petitioners were within their rights to cancel the license given that the respondents had failed to deposit the entire license fee and to start/continue the service. Yet the petitioner kept extending the license. The learned Arbitrator also noted that had the respondent not had the intention of carrying on the business of providing the Train Side Vending service on the trains, he would not have paid substantial amount of money as license fee to the petitioner at the risk of the same being forfeited. The award concludes that both the parties had genuine intentions to fulfil their contractual obligations and yet the contract failed. The award concludes that there was something more to it and for this one has to go deeper into the background.

9. The learned Arbitrator then noted the background of the Scheme of the petitioner. Prior to 2005 the Train Side Vending services were managed by the Railways themselves. The license was given by the Divisions under

the policy directives of the Zonal Railways/Railway Board. This policy was revised with the setting up of the petitioner corporation from the year 2005. The petitioner was authorised to call for applications and grant license for the said service on trains on All India basis. Under the revised arrangement the petitioner was to co-ordinate with the zonal railways who in turn were required to coordinate and issue necessary directives to the Divisions to ensure that the respondent was issued proper medical certificate and travelling authority for its staff. Under the earlier arrangement only one single agency was involved but now three separate agencies are involved. The petitioner had no control or supervision over the other two agencies, namely, the zonal railways and the divisions who were required to facilitate the successful implementation of contractual obligations of the petitioner. Hence, the learned Arbitrator concludes that in view of the lacunae and drawback in the revised policy under the petitioner the experiment failed. Large number of litigation has ensued between the parties to the other similar contracts after 2005 when the new scheme was launched. Ultimately, the Ministry of Railways has reverted back to the previous arrangement in 2010.

10. Based on the above conclusions the learned Arbitrator noted that the respondent had deposited a total license fee of Rs.46,07,729/-. As the respondent could not fulfil the contractual obligations of providing Train Side Vending service in seven pairs of trains allotted to him due to the inherent flaw in the revised system of licensing of TSV services and other extenuating factors beyond the control of the respondent, an award was passed in favour of the respondent directing the petitioner to refund 70% of the license fee deposited by the respondent i.e. Rs.32,25,410/- alongwith interest @ 18% per annum from the date of award till amount is refunded.

Balance 30% was directed to be forfeited by the petitioner. All other claims/counter-claims were rejected.

11. I have heard learned counsel for the parties. Learned counsel for the petitioner has submitted as follows:-

- (i) The learned Arbitrator has dismissed the pleas of the petitioner in a single line without giving any reasons.
- (ii) It is pleaded that the claim of the petitioner was for forfeiture of the full amount deposited by the respondent plus payment of the license fees for the full duration of the contract which the respondent had not paid. It is pleaded that none of these issues were considered in the award by the learned Arbitrator.

12. Learned counsel for the respondent has, however, reiterated that he was obstructed from carrying out the terms of the contract and there was no assistance from the petitioner in this regard.

13. I may deal with the plea of the petitioner that the submissions of the petitioner including the counter claim have been dismissed by a non-reasoned award.

14. Section 31(3) of the Arbitration Act reads as follows:-

“Section 31(3)

(3) The arbitral award shall state the reasons upon which it is based, unless—

- (a) the parties have agreed that no reasons are to be given, or
- (b) the award is an arbitral award on agreed terms under section 30.”

15. Hence, unless agreed upon to the contrary by the parties, the award has to give reasons upon which it is based. The Supreme Court in *Anand*

Brothers Private Limited vs. Union of India and Others, (2014) 9 SCC 212

held as follows:-

“9. Reference may also be made to The Arbitration and Conciliation Act, 1996 which has repealed the Arbitration Act of 1940 and which seeks to achieve the twin objectives of obliging the Arbitral Tribunal to give reasons for its arbitral award and reducing the supervisory role of Courts in arbitration proceedings. Section 31(3) of the said Act obliges the arbitral tribunal to state the reasons upon which it is based unless the parties have agreed that no reasons be given or the arbitral award is based on consent of the parties. There is, therefore, a paradigm shift in the legal position under the new Act which prescribes a uniform requirement for the arbitrators to give reasons except in the two situations mentioned above. The change in the legal approach towards arbitration as an Alternative Dispute Resolution Mechanism is perceptible both in regard to the requirement of giving reasons and the scope of interference by the Court with arbitral awards. While in regard to requirement of giving reasons the law has brought in dimensions not found under the old Act, the scope of interference appears to be shrinking in its amplitude, no matter judicial pronouncements at time appear to be heading towards a more expansive approach, that may appear to some to be opening up areas for judicial review on newer grounds falling under the caption "Public Policy" appearing in Section 34 of the Act. We are referring to these developments for it is one of the well known canons of interpretation of statutes that when an earlier enactment is truly ambiguous in that it is equally open to diverse meanings, the later enactment may in certain circumstances serve as the parliamentary exposition of the former.

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14. It is trite that a finding can be both; a finding of fact or a finding of law. It may even be a finding on a mixed question of law and fact. In the case of a finding on a legal issue the

Arbitrator may on facts that are proved or admitted explore his options and lay bare the process by which he arrives at any such finding. It is only when the conclusion is supported by reasons on which it is based that one can logically describe the process as tantamount to recording a finding. It is immaterial whether the reasons given in support of the conclusion are sound or erroneous. That is because a conclusion supported by reasons would constitute a "finding" no matter the conclusion or the reasons in support of the same may themselves be erroneous on facts or in law. It may then be an erroneous finding but it would nonetheless be a finding. What is important is that a finding presupposes application of mind. Application of mind is best demonstrated by disclosure of the mind; mind in turn is best disclosed by recording reasons. That is the soul of every adjudicatory process which affects the rights of the parties. This is true also in the case of a finding of fact where too the process of reasoning must be disclosed in order that it is accepted as a finding in the sense the expression is used in Clause 70."

16. The Supreme Court in the case of ***Som Datt Builders Ltd. Vs. State of Kerala, (2009) 10 SCC 259:-***

"20. Section 31(3) mandates that the arbitral award shall state the reasons upon which it is based, unless - (a) the parties have agreed that no reasons are to be given or (b) the award is an arbitral award under Section 30. That the present case is not covered by Clauses (a) and (b) is not in dispute. In the circumstances, it was obligatory for the arbitral tribunal to state reasons in support of its award in respect of claim Nos. 1 and 4B. By legislative mandate, it is now essential for the arbitral tribunal to give reasons in support of the award. It is pertinent to notice here that Act, 1996 is based on UNCITRAL Model Law which has a provision of stating the reasons upon which the award is based.

21. In *Union of India v. Mohan Lal Capoor*, this Court said: (SCC p.854, para 28)

“28.Reasons are the links between the materials on which certain conclusions are based and the actual conclusions.”

22. In *Woolcombers of India Ltd. v. Woolcombers Workers Union and Anr.*, this Court stated (SCC pp.320-21, para 5)

“5....The giving of reasons in support of their conclusions by judicial and quasi-judicial authorities when exercising initial jurisdiction is essential for various reasons. First, it is calculated to prevent unconscious unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous considerations.”

23. In *S.N. Mukherjee v. Union of India*, the Constitution Bench held that recording of reasons:

“(i) guarantee consideration by the authority; (ii) introduce clarity in the decisions; and (iii) minimise chances of arbitrariness in decision making.”

24. Learned senior counsel for the contractor referred to a decision of Delhi High Court in the case of *Delhi Electric Supply Undertaking v. Victor Cable Industries Limited* and submitted that where the arbitrator has referred to facts of the case and has noticed some reasoning which in view of Arbitrator was sufficient to arrive at conclusion for granting relief, award cannot be stated to be unreasoned. He also referred to yet another decision of Delhi High Court in the case of *Kumar Construction Company v. Delhi Development Authority and Anr.* wherein it has been observed that the Arbitrator is not expected to write elaborate judgment and where Arbitrator has noticed contentions

of the counsel, it cannot be said that Arbitrator failed in stating reasons for the award.

25. The requirement of reasons in support of the award under Section 31(3) is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the arbitral tribunal. It is true that arbitral tribunal is not expected to write judgment like a court nor it is expected to give elaborate and detailed reasons in support of its finding/s but mere noticing the submissions of the parties or reference to documents is no substitute for reasons which the arbitral tribunal is obliged to give. Howsoever brief these may be, reasons must be indicated in the award as that would reflect thought process leading to a particular conclusion. To satisfy the requirement of Section 31(3), the reasons must be stated by the arbitral tribunal upon which the award is based; want of reasons would make such award legally flawed.”

17. As noted above, the conclusion of an arbitrator has to be supported by reasons. The learned arbitrator is not expected to write an elaborate judgment. The Arbitrator need not give elaborate and detail reasons in support of his finding.

18. The learned Arbitrator is a former Secretary of the Railway Board and belongs to the IRTC Service. A perusal of the Award would show that the Award gives limited reasons for the conclusion of facts. However, a closer look would show that it does clearly spell out the reasons and conclusions. The learned Arbitrator has noted the pleas of the respondent, namely, that the respondent commenced the services on 3.11.2008 ex.Delhi. However, there was a dispute on manhandling of the respondent's vendors who were deboarded alongwith all eatable material at Panipat. Similar problems were encountered in six other pairs of trains. The Award also notes that the

respondent was willing to continue with the services but did not get any support from the petitioner or the Railway Protection Force to prevent unauthorised vending and obstruction.

The Award also notes that the respondent was in default in payment of license fee and in commencement/extension of the services, yet, the petitioner chose to extend the license of the respondent for a period of three months in different spells spreading over a period of nine months indicating that the petitioner was appreciative of the difficulties being faced by the respondent.

The Award also notes that the petitioner had no control or supervision over the two agencies involved, namely, the Zonal Railways and the Divisions which were required to facilitate successful implementation of the contractual obligations of the licensee/respondent.

The Award is then passed in view of the inherent defects in the revised system of license (i.e. the lack of control the petitioner had on the Railway Authorities who were to implement the service) and other extenuating factors beyond the control of the respondent (i.e. harassment and physical obstruction of the vendors by the previous contractor), and the fact that neither the Railways nor the Railway Protection Force took any steps to control the previous vendors as discussed and analyzed above. Hence, there is no merit in the plea of the petitioner that the contention of the petitioner were dismissed by a non-reasoned Award.

19. It is also manifest from a reading of the award that the learned Arbitrator has come to a finding of fact that the failure of the respondent to complete the necessary services was on account of the factors stated which were beyond the control of the respondent. Petitioner other than

providing a license was not in a position to co-ordinate with the concerned railway authorities to ensure that the license was actually implemented.

20. These are findings of fact recorded by the learned Arbitrator. This court cannot sit in appeal on the said findings recorded by the learned Arbitrator. In this context reference may be had to the judgment of the Supreme Court in *Associate builders vs. DDA (2015) 3SCC 49* when the Court 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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21. There is no merit in the petition and the same is dismissed. All pending applications, if any also stand disposed of accordingly.

(JAYANT NATH)
JUDGE

OCTOBER 16,2018

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