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

+	FAO(OS) 135/2018

INDIAN RAILWAY CATERING & TOURISM CORPORATION LTD ..... Appellant

Through: Mr. Nikhil Majithia, Adv.

versus

MAYURI BEN M CHOTAI ..... Respondent

Through:

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

O R D E R

% **07.09.2018**

CM Nos. 36051/2018 & 36052/2018 (for exemption)

Exemption allowed, subject to all just exceptions.

Applications stand disposed of.

FAO(OS) 135/2018

1. The present appeal has been filed by the appellant under Section 37 of the Arbitration and Conciliation Act, 1996 read with Section 10 of the Delhi High Court Act challenging the order dated July 05, 2018 passed by the learned Single Judge in OMP No. 305/2015 which was filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award passed by the learned Arbitrator.

2. The facts as noted from the record are that the appellant herein floated a tender inviting bids for providing on board catering services in trains to the members of public at large in the year 2002-03. M/s Mahesh H Caterers a proprietorship concern of Mr. Mahesh M. Chotai emerged as a successful bidder with regard to 8 trains, and accordingly licenses were issued vide letter dated September 13, 2003. The licenses were awarded initially for a period of five years at concession fee of Rs.3.70 crores taking all the offers together. These licenses were to be renewed for a further period of five years subject to satisfactory services being provided by the respondent herein. Mr. Mahesh M. Chotai died on April 07, 2004 and the respondent herein made an application to the appellant asking for transfer of the licenses in her name, as she was a legal heir of her late husband. Accepting the request of the respondent, it was decided that the licenses be transferred in the name of the respondent in terms of paragraph 9 of the catering policy of 2000. Letter dated October 07, 2004 whereby the licenses were transferred stipulated that the same is for the transfer for the unexpired period of the respective licenses held by M/s Mahesh H Caterers.

3. It is a conceded position that on the expiry of the original licenses, the appellant offered extension of licenses to the respondent. However, the said

offer was withdrawn on the premise that the respondent was not entitled to seek renewal / extension of licenses in her capacity as legal heir of original licensee.

4. A dispute arose between the parties over the interpretation and the term “unexpired period” of the license as it was the case of the appellant that the respondent has been granted a limited license by way of transfer of license allotted to the firm. The respondent filed proceedings before the Court of the Senior Civil Judge, New Delhi vide Civil Suit No.16/2011. The Court was of the view that the agreement between the parties provided for arbitration for resolution of the dispute.

5. The main dispute between the parties is whether the respondent has right to be considered for the renewal of license in her favour. The learned Arbitrator has held that the appellant herein has breached the agreement in not allowing the renewal of the respective licenses by stating wrong and improper grounds despite all defined conditions having been fulfilled by the respondent.

6. The similar case of the appellant before the learned Single Judge was that as the respondent has been granted license upon death of her husband only for the unexpired period of licenses, she was not entitled to be

considered for renewal of the licenses. The learned counsel relied upon a letter dated October 07, 2004 issued by the appellant to the respondent communicating the approval of the Competent Authority for substitution of the respondent's name in place of her husband for the unexpired period of the respective licenses. Reliance was also placed upon the clarification dated September 02, 2008 received by the appellant from the Railway Board that "there is no provision in the policy for further renewal of the licenses to the legal heir of the licensee after the expiry of the agreement period". The learned Single Judge was of the view that the interpretation of the catering policy put forward by the Railway Board was patently incorrect and has been rightly rejected by the Arbitrator in the impugned award. The relevant para 29 of which read as under:

> *29. A reading of the above provision would show that a renewal of licence for a second term of five years was provided for subject to the satisfactory performance of the license during the initial tenure. The only financial obligation of the licensee for the extended period was a minimum 10% increase in the prevailing "License Fee" at the time of renewal, which as is evident from the Bid Document, was a fixed percentage of the annual turnover, subject to the minimum guarantee provided in the Bid Document. The above provision would therefore, show that though there was no automatic renewal of the license, the respondent was to be considered, upon request, for renewal of license on the basis of the satisfactory performance of the licensee during the initial tenure. The tenure for all licenses, be it for the original licensee or for those substituted due to the*

death of the original licensees, was a period of five years. Therefore, the provision in the Catering Policy-2000 or in the letter dated 07.10.2004, noting that the substitution is for "unexpired period" of the license, would have no bearing as far as the consideration of the licensee for the renewal of the license is concerned. The respondent, therefore, as a legal heir of the licensee, upon being substituted for her deceased husband for the unexpired period of the license(s), would take the license for the unexpired initial period of five years and also be entitled to be considered for the renewal of the license(s) upon the expiry of the initial period of five years of the license(s). The interpretation to the Catering Policy put forward by the Railway Board was patently incorrect and has been rightly rejected by the Arbitrator in his Impugned Award."

7. An issue arose that there was no automatic renewal of the licenses in terms of the bid document or catering policy. The learned Single Judge agreed with the said proposition by noting the conclusion of the Arbitrator in the impugned award that there was no allegation of unsatisfactory performance of the respondent. The Arbitrator in para 33 held as under:

33. Learned counsel for the petitioner has placed reliance on the judgment of the Supreme Court in Assistant Excise Commissioner & Ors. v. Issac Peter & Ors. (1994) 4 SCC 104, to contend that the doctrine of fairness cannot be invoked in the matters of contract even where the State is a party. He further places reliance on the judgment of the Supreme Court in Bharti Airtel Ltd. v. UOI, (2015) 6 Scale 479, to submit that the renewal clause in a contract does not create any preemptory right for the party for renewal of the contract. There cannot be any quarrel with the proposition of law canvassed by the learned counsel for the petitioner, however, in the peculiar facts of this case, the same cannot come of any assistance to the petitioner. The petitioner being State, its *discretion to renew the license is regulated by Article 14 of the Constitution and must be non-arbitrary and transparent. In the present case, as noted above, the respondent was excluded from consideration for renewal of the license(s) on a totally arbitrary ground. This will be a breach of the contractual term as well."*

8. It may be stated here on the basis of the aforesaid findings, the learned Arbitrator has also granted damages in favour of the respondent. This part of the award was challenged by the appellant before the learned Single Judge by contending; (i) that the award of damages was beyond the terms of reference to the Arbitrator and therefore, Arbitrator has acted beyond its jurisdiction; (ii) clause 2.3 of the financial terms and conditions specifically state that no claim for consequential loss of business / damages will be entertained by IRCTC in the case of cancellation / withdrawal of train service by the Railway Administration, therefore, there was a prohibition on the grant of damages in favour of the respondent; (iii) there was no evidence placed by the respondent in support of her claim for damages and therefore, the same could not have been awarded in her favour.

9. It was the submission of the learned counsel for the appellant before the learned Single Judge that the reference made to the Arbitrator was the following; (i) *whether the claimant being legal heir of the licensee is entitled to renewal of license for a period of five years as per catering policy 2000?*

(ii) if not whether the claimant is entitled to revision of concession fee if on pro-rata basis; (iii) any counter claim of IRCTC. It was contended on behalf of the appellant that in the order dated May 24, 2013 passed by the learned Arbitrator, it has been agreed and recorded that the disputes to be adjudicated by the Arbitrator will remain confined to the terms of reference laid down by the Competent Authority while nominating the sole Arbitrator which was also reiterated by the Arbitrator in his order dated August 13, 2013. It was the contention of the learned counsel for the appellant that the learned Arbitrator could not have traversed beyond the terms of reference, as the same did not provide for adjudication of any claim of damages of the respondent, and as such the damages awarded are untenable.

10. The learned Single Judge agreed with the submission made on behalf of the respondent by relying upon clause 7.10 and clause 10 of the bid document which relates to the questions / disputes or differences to be referred to the Arbitration. It was the conclusion of the learned Single Judge that a reading of the above clauses would show that all the disputes and differences between the parties were to be resolved through Arbitration. The appellant could not have curtailed the scope of such clauses unilaterally by framing restrictive terms of reference. It was also the conclusion that the

Arbitration Agreement between the parties, did not contemplate framing of terms of reference by the appointing authority before referring the dispute to the Arbitrator. The learned Single Judge has also dealt with the judgment in the case of ***State of Goa vs. Praveen Enterprises (2012) 12 SCC 581*** as relied upon by the counsel for the appellant and by distinguishing the same held that the Arbitrator was not bound by only terms of reference as framed by the appointing authority while making his appointment. Even otherwise, the learned Single Judge has held that the relief of damages as claimed by the respondent herein is clearly a consequential relief and would be covered by the terms of reference. In fact, it is the conclusion of the learned Single Judge that no objection was taken that the claim No.2 which was related to damages was beyond the terms of reference. The amendment application filed by the appellant was only with regard to correction of error made by the respondent while quantifying its claim under claim No.2. In substance, it was the conclusion of the learned Arbitrator that the parties were well aware of the nature of claims and went to the trial on the same. Therefore, the learned Single Judge rejected the contention on behalf of the appellant that the claim of damages made by the respondent was beyond the term of reference. Insofar as the claim of damages is concerned, the learned Single

Judge has justified the determination of the quantum of damages by the learned Arbitrator. Finally the learned Single Judge had relied upon the judgment of the Supreme Court in the case of ***Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49*** wherein the Supreme Court determine the scope of judicial review under Section 34 of the Arbitration and Conciliation Act, 1996.

11. On the plea of limitation more specifically with regard to grant of damages for at least two trains, the learned Single Judge was of the view under normal circumstances the contention of the appellant would have been entitled to be accepted. However, in the peculiar facts of the present case, the conduct of the appellant itself shows that the appellant was not sure, as to whether the respondent is entitled to seek renewal of license or not. It was only with the clarification dated September 02, 2008 given by the Railway Board, Ministry of Railways that the appellant decided that the respondent was not entitled to seek renewal of license. In fact, till such time clarification was received by the appellant the appellant itself sought the respondent's willingness for renewal of the licenses with respect to four trains and further, the learned Single Judge noted that the respondent filed a Civil Suit on February 17, 2011, wherein an application was filed under

Section 11 of the Arbitration and Conciliation Act seeking appointment of the Arbitrator, therefore, it cannot be said that the claim of the respondent was barred by limitation.

12. Mr. Nikhil Majithia, learned counsel for the appellant has submitted before us that the learned Single Judge in the impugned order dated July 05, 2018 has clearly overlooked the fact that the contract between parties herein allowed the respondent to perform the licenses only for the unexpired period of licenses without any renewal and the respondent having agreed for grant of licenses for the unexpired period, it was not open for the Arbitrator to go beyond the terms of the contract. He stated that even the learned Single Judge has agreed that the contract with the respondent was only for the unexpired period but still he proceeded to hold that the action of the appellant was arbitrary. In substance, it is his plea that the Arbitrator was bound to read the contract as it stood and could not have ignored a specific term of the commercial contract on any ground whatsoever.

13. We are not in agreement with the submission of learned counsel for the appellant for the simple reason when the respondent had agreed to grant the licenses in favour of the respondent herein on the death of her husband, it was necessarily to be for the unexpired period. The aforesaid has rightly

been held by the learned Arbitrator and agreed to by the learned Single Judge on the basis of the terms of the bid documents including clause 3.1. So, it is not a case where the learned Arbitrator and the learned Single Judge have gone beyond the terms of the contract. Even otherwise, the learned Arbitrator having interpreted the provisions of the contract, surely such an interpretation being a possible interpretation, the conclusion of the learned Arbitrator in the award cannot not be set aside.

14. Even though, a reference was made in the appeal to the judgments of the Supreme Court in the case of ***DDA vs. R.S. Sharma & Co. (2008) 13 SCC 80*** and ***ONGC vs. WIG Brothers Builders & Engineers Pvt. Ltd. (2010) 13 SCC 377,*** we may only note that there is no dispute on the proposition of law that the Arbitrator cannot go beyond the contract but surely an interpretation of a contract is within the domain of the Arbitrator and an interpretation having been given to the provisions of a contract which is a possible one, such an interpretation cannot be set aside by a Court in exercise of its his jurisdiction under Section 34. Hence, this plea of Mr. Nikhil Majithia is liable to be rejected.

15. It is also the submission of Mr. Nikhil Majithia that the learned Single Judge has erred in upholding the damages awarded by the learned Arbitrator

both on the ground that the claim of damages was beyond reference, and there was no evidence before the learned Arbitrator that the respondent had actually suffered the damages. In this regard, he would rely upon the judgment of this Court in the case of ***Ahluwalia Contract (India) Limited vs. Union of India MANU/DE/3179/2017*** and ***State of Goa vs. Praveen Enterprises (2012) 12 SCC 581.*** We cannot accept this submission of Mr. Nikhil Majithia for the precise reason stated by the learned Arbitrator by relying upon clause 7.10 and clause 10 of the bid document from a reading of which it clearly emerges that all the disputes and differences of the parties were to be resolved through Arbitration. Even otherwise, the learned Single Judge was right that the relief of damages as claimed by the respondent was clearly a consequential relief and would be covered by the reference which included *"whether the claimant being the legal heir of the licensee is entitled to renewal of license for a period of five years as per catering policy 2000."*

16. Insofar as the judgment of the Supreme Court in the case of ***State of Goa (supra)*** is concerned, the learned Single Judge has held that unless arbitration agreement requires the Arbitrator to decide only specifically referred disputes, the claimant / respondent herein while filing the statement

of claim or thereafter, may amend or add to the claims already filed. He held that the Arbitrator was not bound by only the terms of reference as framed by the appointing authority while making his appointment. The conclusion is justified. On the quantum of damages, the learned Single Judge has in paras 52 to 56 justified the claim i.e. claim No.2 in the following manner:

> *"52. As for the quantified claim for "loss of expected profits" (Claim no 2),the claimant has sought a claim of Rs 2,31,25,000 (Two crores and thirty one lakhs and twenty five thousands rupees) , for the duration of five years, for which its licenses became inoperative due to non -renewal. The sum of expected profit has been worked out by the claimant, on the basis of projected /estimated annual sale turn over of Rs. 3,08,33,334 (Rupees three crores, eight lakhs, thirty three thousand ,three hundred and thirty four only) which ,in turn, has been derived from annual license fee of Rs. 37,00,000,(Rupees thirty seven lakhs) as specified and paid by the claimant and mentioned in the claim petition. The bid document itself stipulates that, apart from the offer of "Concession Fee", the successful bidder will have to pay 12% of estimated annual sales turn over. Such an amount is indicated in each of the 8 bid documents, which is part of the agreement, between the parties. In other words, by implication, the Claimant presumably perceived that the sales turn over for five years of these 8 contracts would be Rs. 15,41,66,670 (Rupees fifteen crores, forty one lakhs ,sixty six thousand and six hundred seventy only). The Claimant estimated that it expected a profit of 15% of the sales turnover. Thus, it assessed Rs 46,25,000 (Rupees forty six lakhs and twenty five thousand) to accrue to it as annual average profit from the business under these licenses, which aggregates to, Rs 2,31,25,000 (Rupees two crores , thirty one lakhs, twenty five thousands) for a period of five years.*
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> *53. However on further scrutiny of the replies to the*

Tribunal's questions, it is noted that the claimant furnished following two vital figures:
i. Total license fee paid during five years: Rs 3,16,15,060 (giving an annual average of Rs 63,23,012)
ii. Total Concession fee paid during five years :Rs 3,70,03,833 Respondent, in its defence statement, also submitted details of C.F. (Concession fee) and L.F (License Fee) which were paid to it by the claimant, year -wise and train wise.(R-I) . While comparing the data, it has been seen that the figures of amounts received on account of C.F. from the Claimant are slightly higher. As per Respondent, Claimant paid C.F. to the tune of Rs 3,97,28,750 for all 8 contracts, combined together during the five years.(R-l)
54. As stated earlier, the figures of License fee paid to the Respondent by the Claimant in the five year period, were to the tune of Rs. 3.16 crore (rounded off to the nearest lakh). The parties have not contested or disputed the figures of each other despite opportunities given by the Tribunal. To make a realistic assessment, however, the tribunal has taken the lower of the two figures given by the parties for the purpose of assessing the expected loss of profits. If one takes the License Fee (L.F.) figures as Rs. 3.16 crores , it emerges that Rs 63 lakhs (rounded off), were paid by the Claimant towards licence fee as an annual average, for five years for all 8 licenses put together. Imagining that the renewals were granted to the claimant, this amount would have gone up by a minimum increase of 10% over and above it, in accordance with norms of bid document/agreement, implying thereby, that the license fee to the tune of Rs 69 lakhs (rounded off) per year would have been payable in the second leg of 5 years. In other words, claimant would have been payable in the second leg of 5 years. In other words, claimant would have paid Rs.3.45 crore in the second leg, as L.F. for the 8 licences, assuming other factors unchanged. This, in turn would yield a sales turn over of Rs 29 crores for five years.
55. For further scrutiny, the claimant has also furnished its Balance Sheets and Profit and Loss A/Cs for the years w.e.f 2002- 2003 to 2010-2011, in support of his claim. However,

the Respondent's argument carries weight that the Balance Sheets and Profit and Loss Accounts, furnished by the claimant, even if certified by a Chartered Accountant, are not worthy of reliance and credence, as they are not exclusive and specific accounts of the 8 catering licenses of the contracted trains. The tribunal has also noted that these documents cover much larger spectrum of activities, transactions and assets, and liabilities of the petitioner, hence they need not be relied upon.

56. At the same time, data related to C.F. and LF. furnished by the parties are relied upon, as it correlates and compares well, and are also in tune with the figures given by the Respondent. Considering all these facts, the tribunal has confined itself to the Claimant's projected annual sales turnover of Rs 3.08 crores only as reflected in the claim petition; and has ignored the calculations made out above, for determining the anticipated profits, which the petitioner could have earned in the second term of five years. Against the claimant's claim of expected profit @ 15% of the total annual business volume (Rs 3,08, 33,334) i. e. Rs 46,25 ,000 per annum, and the total claim of Rs 2, 31 25, 000 for five years, the tribunal is of the considered view that a profit margin at rate of 12% of the total sales turn over will be more reasonable, reliable, justifiable and would meet the demands of natural justice for both the parties. It needs to be mentioned that it is the same minimum percentage, which IRCTC expects from each license for itself as annual license fee. This works out to be Rs. 36,00,000 (Rupees thirty six lakhs) per annum (rounded off) and would amount to a total sum Rs 1.80 crores (Rupees one crore and eighty lakhs) as anticipated profit for the five years, which the petitioner could have earned, if it was allowed to continue undertaking catering services on the 8 licensed pair of trains, and which was prevented by the Respondent. The amount of Rs. 1.80 crores (Rupees One crore and eighty lakhs) stands payable by Respondent to the Claimant within a period of 30 days from the date of award. Thus, the claim No 2 for loss of anticipated profits is sustained."

17. The learned Single Judge by referring to the judgment of the Supreme Court in ***Associate Builders (supra)*** held that the parameters, the award of damages and quantification thereof by the Arbitrator cannot be interfered with, which we concur with. Also the fact that this Court not being the first appeal Court, it cannot interfere with the errors of fact. Further the fact that there is some basis for the learned Arbitrator to quantify the damages, we are of the view that the conclusion of the learned Arbitrator on the quantum of damages also cannot be interfered with. As far as the reliance placed by Mr. Nikhil Majithia on the judgment of a Coordinate Bench of this Court in the case of ***Ahluwalia Contract (India) Limited (supra)*** is concerned, in that case it was held that damages cannot be granted as a matter of course; some material evidence is necessary. We find in the present case as noted above, the damages granted were in the nature of loss of profit @ 36 Lacs per annum and for five years, the same was quantified at Rs.1.80 crores.

18. Surely, there is some basis for the learned Arbitrator to come to such a conclusion, and it is not the case of the appellant herein that the respondent would not have earned the said profit during the renewal period. Further the judgment in the case of ***Ahluwalia Contract (India) Limited (supra)*** is distinguishable wherein the the claim of loss of profit was rejected by the

learned Arbitrator which was also upheld by the learned Single Judge unlike the case in hand where the plea of damages in the nature of loss of profit was accepted by the learned Arbitrator.

19. We do not see any reason to interfere with the impugned order dated July 5, 2018, more so when it is an appeal under Section 37 of the Arbitration and Conciliation Act. The appeal is dismissed. No costs.

CM No. 36050/2018 (for stay)

Dismissed as infructuous.

CHIEF JUSTICE

V. KAMESWAR RAO, J

SEPTEMBER 07, 2018/*aky*