

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

+ **O.M.P. 305/2015**

Reserved on: 3rd May, 2018

Date of decision : 5th July, 2018

**INDIAN RAILWAY CATERING AND TOURISM
CORPORATION LIMITED (IRCTC)**

..... Petitioner

Through: Mr.Nikhil Majithia, Adv.

versus

MAYURI BEN M. CHOTAI

..... Respondent

**Through: Mr.Abhishek Singh,
Mr.Surjeet Singh, Advs.**

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 30.01.2015 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the licenses for Catering Services on trains granted by the petitioner to the respondent.

2. The Petitioner floated a tender document inviting bids for providing on board catering services in its trains to members of the public at large. It invited bids for Train Nos. 2321-22, 2069-70, 1037-38/2149-50, 2561-62, 2553-54, 5635-36, 7037-38 and 2811-12 at different points in time between the years 2002-2003. M/s Mahesh H Caterers a proprietorship concern of Mr. Mahesh M. Chotai, emerged as a successful bidder for the said trains and accepted the Award of License

vide letter dated 13.09.2003 in respect of the 8 trains. Separate agreements were entered into between IRCTC and M/s Mahesh H Caterers for managing the catering services on the trains given as under:

A. 2321/2322	(Howrah-Mumbai-Howrah)	(Awarded on 16.9.2002)
B. 2069/2070	(Durg-Raigarh-Durg)	(Awarded on 27.3.2003)
C. 2553/2554	(Barauni-New Delhi- Barauni) (Vaishali Express)	(Awarded on 9.5.2003)
D. 2561/2562	(New Delhi-Darbhanga-New Delhi)	(Awarded on 12.9.2003)
E. 2149-2150 (1037/1038)	(Pune-Patna-Pune)	(Awarded on 7.10.2003)
F. 7037/7038	(Secundrabad-Bikaner- Secundra)	(Awarded on 3.12.2003)
G. 2811/2812	(Hatia-Lokmaya Tilak Termin-Hatia)	(Awarded on 29.12.2003)
H. 5635/5636	(Guwahati-Okha-Guwahati)	(Awarded on 29.12.2003)

3. These licenses were awarded for the initial period of 5 years at Concession Fee (C.F.) of Rs. 3.70 crores, taking all the offers together. These licenses were to be renewed for a further period of 5 years subject to the 'satisfactory services' being provided by the respondent.

4. The following four pairs of trains were physically handed over for commencement of service to M/s Mahesh H Caterers:

- (i) 2321/2322 (HWH-CSTM-HWH) (Handed over on 20.09.2002)
- (ii) 2069/2070 (Durg-Raigarh-Durg-) (Handed over on 1.4.2003)
- (iii) 2149/2150(1037/1038(Pune-Patna- (Handed over on 14.10.2003)
Pune)
- (iv) 2561/2562 (New Delhi-Darbhanga- (Handed over on 14.12.2003).
New Delhi)

5. The contracts for the remaining four pairs of trains could not be allotted to Mr.Mahesh M Chotai during his lifetime, due to certain operational difficulties of the IRCTC. These were later allotted to the respondent and License Agreement(s) were directly executed with her by the petitioner.

6. Mr.Mahesh M. Chotai died on 07.04.2004 and the respondent made an application to the Petitioner asking for the licenses to be transferred in her name as she was the legal heir of her late husband. Accepting the request of the respondent, it was decided by the Competent Authority that as paragraph 9 of the Catering Policy, 2000 permitted for the transfer of license to the legal heir of an individual or a sole proprietorship concern, the existing licenses being held by the firm under the proprietorship of Late Mahesh H. Chotai be transferred in the name of his legal heir, that is, the Respondent herein. Paragraph 9 of the Catering Policy, 2000 is reproduced hereunder:

“Para 9: TRANSFER OF LICENCE

Transfer of licence to the son/legal heir would be allowed only in the event of death. The licence can be transferred in the name of son/legal heir for the unexpired period of the agreement only on personal approval of the Divisional Railway Manager in case of

small units and Chief Commercial Manager in case of major units."

7. The petitioner vide letter dated 07.10.2004 informed the respondent that the said transfer of license was only for the unexpired period of the licenses. The letter is reproduced as under:

"This has reference to this office letter of even no. dated 22/04/04 and documents submitted by you regarding substituting the name of Mrs. Mayuriben M. Chotai, for herself and on behalf of her two minor children as legal heirs of late Sh. Mahesh H. Chotai.

Competent authority has approved the name of Mrs. Mayuriben M. Chotai to be substituted for the name of late Sh. Mahesh H. Chotai as the sole proprietor of M/s. Mahesh H. Caterers, for the unexpired period of the respective licences held by M/s. Mahesh H. Caterers. Therefore, empanelment of M/s. Mahesh H. Caterers with IRCTC has also been restored.

In view of the above, you are required to execute rider agreement for different projects being managed under licence from IRCTC for which necessary documents may please be submitted.

Please acknowledge the receipt of this letter."

8. On expiry of the original period of licence, the petitioner first offered extension of licence(s) to the respondent, however, withdrew such offer(s) on the premise that the respondent was not entitled to seek renewal/extension of licences in her capacity as legal heir of original licence.

9. The respondent herein sought extension of the licenses awarded to it for a further period of 5 years. Dispute arose between the parties over the interpretation of the term 'unexpired period' of the licenses, as it was

contended by the petitioner that the respondent had been granted a limited license by way of the transfer of licenses allotted to the firm.

10. The petitioner submitted that by virtue of directions issued by the Ministry of Railways vide letter no. 2005/TG-III/600-72 dated 02.09.2008, it had been clarified that there was no provision in the policy for extension or further renewal of licenses awarded to the legal heir of the licensee after the expiry of the original license period.

11. The respondent submitted that there could not be any objection regarding extension of licenses for a further period of 5 years when the services had been found satisfactory and consent for renewal had been obtained for the same. It was further submitted that according to the law of succession, the wife is the successor and it cannot be a law that she was the legal heir for part of the period and not for the other part.

12. Aggrieved by the decision of the petitioner of not renewing the licenses for another five years, the respondent approached the Court of Civil Judge, New Delhi vide Civil Suit No. 16/2011. The Court vide its order dated 17.02.2011 stated that the agreement between the parties provided for arbitration for resolution of disputes.

13. The sole arbitrator having entered reference on 12.10.2012 passed the Impugned Award on 30.01.2015.

14. The arbitrator has given his detailed findings on the issues raised between the parties. The relevant findings on 'extension of the licenses for a further period of 5 years' are reproduced hereinunder:

“44. Considering all factors involved in the process, the tribunal is of the view that the occurrence of Shri Mahesh’s demise cannot be used to deprive Mrs Mayuri Ben her legally correct and tenable rights. Also the definition of “Licensee” as defined in the agreement, unquestionably also covers such eventualities. The licensee’s right to be considered for renewal of the licenses, cannot be taken away merely because the person/individual involved is a legal heir of an original licensee. After all, it has taken the full mantle, form and shape, of the licensee, and approved by the Respondent. The fact remains that Mrs. Mayuri Ben’s contracts have not been considered for renewal for second term of 5 years, only on this ground as IRCTC has taken “unexpired period” to mean the first term of 5 years only, and not beyond it. It has assumed that the such a transferee licensee is ineligible for renewal for second terms of 5 years. The Tribunal considers that the stance taken runs against the definition of “licensee” enunciated in the bid documents/agreement.

45. It has also been noted by the tribunal from the official noting (produced before it during 10th hearing held on 23rd September 2014) that the three – member Committee (of IRCTC), which deliberated not to recommend renewal of the first of 8 licenses (Trains 2321/2322..HWH-CSTM Express) in September, 2007, did not refer, while dealing with issue, at all, to

- (i) Catering Policy -2000, under which contract was awarded*
- (ii) Concession Fee, collected by the Respondent*
- (iii) Claimant’s satisfactory performance in the first five years of the contract.*

*But the Committee was well aware and recorded that “**the licence is further renewable for a period up to 5 years as per terms and conditions of agreement.**” However, it cited and relied on*

“Transfer clause” contained in the Catering Policy 2005. It was also aware that the IRCTC had approved the name of Mrs. Mayuri Ben M. Chotai to be substituted for the name of late Shri Mahesh H. Chotai, as the proprietor of M/s Mahesh H Caterers for the unexpired period of the respective licenses held by M/s Mahesh H. Caterers. However, it defaulted in not recognizing the rights vested in the “licensee”. Nor did the approving authority (Managing Director, IRCTC) raise any query on the recommendation of the Committee. In Tribunal’s view the authorities concerned have not applied their mind to the full implications, legal and administrative propriety etc, while refusing to grant renewal for “second term” of five years to the claimant licensee, despite its performance remaining satisfactory in the first 5 years.

46. To state that the “renewal has not been done in view of 2005 policy” is highly misplaced, inappropriate and unjust. Succession has not been disputed. It cannot be said that Mrs. Mayuri Ben is competent and eligible for running the contracts for the residual periods of first five year term, but is ineligible, inexperienced and incompetent for second term of the contracts. Denial of renewal of licences is found dictatorial, discriminatory, unjust, and against canons of natural justice. The claimant has apparently been penalized for “no crime” or at worst, her crime was her husband’s death, which deprived her of the business for second term of five years.

47. Hence, it is established that the Respondent has breached the agreement in not allowing renewal of the respective licenses, by citing wrong and improper grounds, despite all defined conditions having been fulfilled by the claimant.

15. The main dispute between the parties is whether the respondent has a right to be considered for the renewal of license in her favour. It is the submission of the learned counsel for the petitioner that as the respondent

had been granted license upon death of her husband only for the unexpired period of license, she was not entitled to be considered for renewal of the license. In this regard, the learned counsel for the petitioner places reliance on the above quoted letter dated 07.10.2004 issued by the petitioner to the respondent, communicating the approval of the competent authority to the substitution of the respondent's name in place of her husband "for the unexpired period of the respective licenses". Learned counsel for the petitioner further relied upon the clarification dated 02.09.2008 received by the petitioner from the Railway Board, Ministry of Railways, which is reproduced herein below:

"It is reiterated that transfer of license is permitted in the case of death to the legal heir of the licensee for the balance period of the agreement only. There is no provision in the extant policy for further renewal of the license to the legal heirs of the licensee after the expiry of the agreement period."

16. Learned counsel for the petitioner therefore, submits that the license granted in favour of the respondent did not allow the respondent to be considered for renewal of the license.

17. As noted above, the Arbitrator has rejected the stand of the petitioner relying upon the terms of the Bid Document, License Agreement and the Catering Policy. Before considering the submission made by the petitioner, it would therefore, be relevant to quote the relevant clauses from these documents.

18. As far as the Bid Document is concerned, the only provision dealing with the succession of the license is contained in Part-II of

Section 1 of the General Condition of License which is reproduced herein below:

“7.13 Consequence to the death/severance of any partner/s (in case of partnership firm)

If the Licensee is a partnership firm and in case there is the permissible clause in the constitution of the firm that the firm shall not be dissolved by reason of the death of one (in case of partnership partner or the severance of any partner from the business firm) of the firm and in case the performance of the Licensee is entirely satisfactory according to the assessment of the licensor then in such an event the licensor at its discretion may allow the Licensee to continue under the agreement.”

19. The above clause, as is evident from a bare reading of the same, deals only with the case of the death of a partner of a partnership firm and not with the case of an individual licensee. The License Agreement, however, defines the licensee to also include successor and assigns and is reproduced herein below:

*“Shri Mahesh H Chotai, s/o Shri Hakmi Chand D.Chotai resident of G-4 Nityanand Apartment, Vakildadi, Near Punit Ashram, Maninagar, Ahmedbad-380008, Gujarat proprietor of M/s Mahesh H Caterers (herein after called “THE LICENSEE”) having its office at G-4, Nityanand Apartment, Vakildadi, Near Punit Ashram, Maninagar, Ahmedbad-380008, Gujarat, **which expression shall where the context so admits include its successor and assigns of the other part.**” (Emphasis supplied)*

20. At the time of grant of License (s), Catering Policy-2000 issued by the Ministry of Railways on 20.10.2000 was in operation. Clause 9 thereof provides for the transfer of license in the name of legal heirs of

the licensee for the “unexpired period of agreement”. Same is reproduced herein below:

“9. TRANSFER OF LICENCE

Transfer of licence to the son/legal heir would be allowed only in the event of death. The licence can be transferred in the name of son/legal heir for the unexpired period of the agreement only on personal approval of the Divisional Railway Manager in case of small units and Chief Commercial Manager in case of major units.”

21. Catering Policy-2005 issued in August, 2005 also provided for the transfer of license in favour of the legal heirs of the licensee in form of Clause 9 thereof which is reproduced herein below:

“9. TRANSFER OF LICENCE

Transfer of licence to the spouse/legal heir would be allowed only in the event of death. The licence can be transferred in the name of spouse/legal heir for the unexpired period of the agreement only on personal approval of the Chief Commercial Manager / Divisional Railway Manager / MD,IRCTC as the case may be in case of small units and MD/IRCTC in case of major units. Nomination of the legal heir should be obtained from the licence holder at the time of entering into contract. The nomination should be only amongst the family member.”

22. The above policy was revised by the Circular dated 21.12.2005 issued by the Ministry of Railways, however, there was no change as far as the provision allowing substitution of the legal heirs of the deceased licensee is concerned. Therefore, substitution of legal heirs of deceased licensee was permissible under the Bid Document, License Agreement as also the Catering Policy.

23. As the Catering Policy and even the letter dated 07.10.2014 granting approval of substitution of the respondent in place of her deceased husband as a licensee, provided for such substitution “for the unexpired period” of the license, it would be necessary to determine what this period denotes. For this one would again have to look at the Bid Document. Clause 3.1 of the Financial Terms and Conditions provides as under:

“3. PERIOD OF LICENCE

3.1 Total tenure of Licence

Term of Licence for Pantry Cars will be five years. The Licence may be renewed for another term of 5 years at the sole discretion of the IRCTC and decision of the IRCTC in this regard shall be binding on the Licensee. No additional Concession Fee will be payable by the Licensee on renewal of the Licence. In case of renewal of Licence, minimum Licence fee shall be increased on the basis of actual Sales Turnover subject to a minimum of 10% of the prevailing licence fee, whichever is higher at the time of renewal.

In the case of non-renewal of Licence the Concession Fee/Licence fee or any part thereof are not refundable. Total tenure of the Licence will not exceed 10 years in any case. IRCTC will not be obliged to assign any reason for not renewing the Licensee.”

24. A reading of the above would show that the term of the license is five years, however, there is a provision of its renewal for a further period of five years at the sole discretion of the petitioner IRCTC. What is most important, however, is that for this extended period no additional

Concession Fee is payable by the licensee. This is important because in terms of Clause 5.1 of the Financial Terms and Conditions, the license was to be granted to a party quoting the highest Concession Fee. Clause 5.1 is reproduced herein below:

“5. SYSTEM OF AWARD OF LICENSE

5.1 Award of License to the highest bidder

License to manage catering services in trains/at stations will be awarded to the Party quoting highest Concession Fee subject to fulfillment of the terms and conditions of the License.”

25. Therefore, a reading of the above would also mean that when a licensee quotes the Concession Fee, it would have an expectancy of the license running for a period of ten years (5+5) as no Concession Fee is payable for the extended period of five years. It is also relevant to note that in terms of Clause 2.2 of the Financial Terms and Conditions contained in Section 2 of the General Condition of License, the Concession Fee is payable as a lump sum amount for the five years tenure of the license. Clause 2.2 is reproduced herein below:

“FINANCIAL TERMS AND CONDITIONS

2.2 Payment of Concession Fee

Bidders are required to offer Concession Fee payable by the bidder to IRCTC for the 5 years tenure of the Licence on the basis of the frequency of the train, in the prescribed format. It will be a lump sum amount payable in three equal quarterly installments. The first installment will be payable immediately at the time of award of Licence along with Licence fee and Security Deposit and the other two at the intervals of 3 months each from the date of commencement

of work. The Concession Fee will be in addition to the Licence fee.”

26. Therefore, for the renewed period of license, the licensee was not to pay any further Concession Fee, however, was only required to pay the license fee as provided in Clause 2.1 of the Financial Terms and Conditions.

27. The License Agreement made the Bid Document a part of the License Agreement. As far as the tenure of the license is concerned, it was mentioned to be for a period of five years. Therefore, the renewal of the license will be governed by the terms of the Bid Document which have been quoted herein above.

28. As far as the Catering Policy is concerned, Catering Policy-2000 in Clause 14.6 thereof, provides for tenure as also the renewal of such license. The same is quoted herein below:

“14.6 Tenure:

14.6.1 The tenure of license for major units will be five (5) years. There should not be an automatic renewal. However, railways reserve the right for renewal of licence only once for a second term of five (5) years, in the case of satisfactory performance.

14.6.2 The monitoring of performance of the licensees should be strengthened. Finance and outside consultants should be involved. Opinion of passengers should be taken by distributing standard forms and results should be computerised. Complaints, should be analysed for their genuineness and corrective action should also be taken. Grievance, cells should

be strengthened on Zonal Railways. Licensees should have accountability and loyalty to railways. The monitoring of performance will also include performance as reported through an Annual Confidential Reports (enclosed as Annexure I &II) during the term of licence as circulated vide Commercial Circular no. 55 of 2000. Prompt payment of all railway dues, complaints of serious nature against licensee regarding quality of food and services, reasonable increase in sales turnover during the period of licence, public opinion, conducted from time to time and inspection reports of senior railway officers. Railway should maintain a performance report of major Licenses. The licence should be renewed by the committee equivalent to the committee, which originally awarded the licence with the acceptance of the accepting authority.

14.6.3 The railways will give no, extension after expiry of the licence (second term in case of renewal) and fresh tenders be called well in time.

14.6.4 The enhancement of licence fee at the time of renewal should be based on actual sales turnover, subject to a minimum of 10% increase of the prevailing licence fee at the time of renewal.”

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.

30. Learned counsel for the petitioner further submits that there was no automatic renewal of the license in terms of the Bid Document or the Catering Policy. He submits that the right of the respondent could at best be stated to be one of being considered for such renewal. He therefore, submits that the renewal having been rejected even on a wrong interpretation of the policy, cannot grant a right in favour of the

respondent to claim damages. I am unable to agree with the said submission of the learned counsel for the petitioner. Though, it is correct that in terms of the Bid Document as well the Catering Policy, the only right created in favour of the licensee is one for being considered for the renewal of license(s) and such renewal of license is not automatic in nature, at the same time, it creates a right in favour of the respondent to be considered for renewal with the parameter of satisfactory performance of the license alone being put into consideration. In the present case, the respondent was never considered for renewal on the basis of her performance. There was, therefore, a complete denial of the right of the respondent for such consideration.

31. The Arbitrator in his Impugned Award has held that there was no allegation of unsatisfactory performance of the license(s) against the respondent. Even before me it has not been alleged that the respondent would not have been eligible for the renewal of the license(s) on the basis of unsatisfactory performance of the license during the initial period.

32. The Arbitrator has further noted that the petitioner itself had filed a list of 59 trains wherein similar Catering Service Contracts, which commenced in the years 2001-2005, had been renewed by the petitioner. It was only in the case of the respondent, apart from cases where licenses had been cancelled in the initial term itself, that the license was not renewed. In fact, the Arbitrator concludes his discussion of the grant of renewal of license(s) vis-à-vis the respondent in the following words:

“In fact, the lists provided by the Respondent make it reasonably clear that the treatment meted out to the

claimant is highly exceptional and discriminatory, especially when the performance was not a ground or issue between the parties.”

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.

34. As far as the award of the damages in favour of the respondent by the Arbitrator is concerned, the learned counsel for the petitioner raised three contentions;

1. The Award of damages is beyond the terms of the reference to the Arbitrator and therefore, the Arbitrator has acted beyond its jurisdiction;

2. Clause 2.3 of the Financial Terms and Conditions specifically state that no claim for any consequential loss of business/damages will be entertained by IRCTC in the case of cancellation/withdrawal of train service by the Railways Administration, therefore, there was a prohibition on grant of damages in favour of the respondent; and
3. There was no evidence led by the respondent in support of its claim for damages and therefore, the same could not have been awarded in its favour.

35. As far as the first contention is concerned, the learned counsel for the petitioner places reliance on the letter dated 12.10.2012 by which the Arbitrator had been appointed. He submits that by this letter specific terms of the reference had been framed as under:

- “(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 refund of concession fee on pro-rata basis?”*
- “(iii) Any counter claim of IRCTC?”*

36. Learned counsel for the petitioner further submits that in the order dated 24.05.2013 passed by the Arbitrator, it had been agreed and recorded that the issues 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. This was reiterated by the Arbitrator in his order dated 13.08.2013. Learned counsel for the

petitioner relying upon the above, submits that the jurisdiction of the Arbitrator was confined to the terms of reference and he could not have traversed beyond the same; the terms of reference did not provide for adjudication of any claim of damages of the respondent. He places reliance on the judgment of the Supreme Court in ***State of Goa vs. Praveen Enterprises***, (2012) 12 SCC 581, in support of this proposition. He further submits that the claim for damages was made by the respondent by way of an application seeking amendment to the Statement of Claim, which was wrongly allowed by the Arbitrator by way of his order dated 10.10.2013, rejecting the submission made by the petitioner in this regard in the following words:

*“4.(i) The tribunal has noted and concluded **that it is ultimately the arbitration agreement, which determines the scope of the disputes between the parties.** The words, language and contents of the arbitration agreement delineate the scope of the arbitral disputes, referred to the arbitration. The role of appointing authority, claimant's notice invoking the arbitral clause, the terms of reference formulated by the tribunal.....all of them are secondary and have to be subservient to the spirit and scope of the arbitration agreement. In the light of all above, this tribunal's considered view is that Para 10 (Arbitration clause) of (SECTION ONE) of the agreement entered between the parties, states that" all disputes "are to be referred for arbitration. There are no specific disputes listed anywhere in the agreement, which are excluded from the purview of arbitration. Hence, all disputes (with no exception) are referable to arbitration.(Though, the words" excepted matters" have been used in the para, but no such matters are specified anywhere in the agreement clearly demarcating areas, which are not to be referred to arbitration).*

(ii) Additionally, there is no specific requirement laid down Para 10 of Section One of the agreement, wherein it is legislated that Managing Director /IRCTC (appointing Authority in the instant case) will formulate terms of reference of disputes while nominating the arbitrator. The appointing authority could have referred "specific disputes" to the arbitrator, if such a clause, existed in the agreement. The arbitration clause does refers to the appointing authority, whose role is only to appoint the arbitrator.

(iii) The facts of the claimant approaching the Respondent, moving the civil court, and High Court of Delhi and obtaining the arbitration, through these steps, are all on record. Hence, it is not found relevant now, at the stage of moving an amendment of the claim under section 23 (3) of Arbitration Act 1996."

37. Learned counsel for the respondent submits that in terms of Clause 7.10 and Clause 10 of the Terms and Conditions contained in the Bid Document, all disputes and differences arising under or in connection with the Agreement or relating thereto were to be referred to the Sole Arbitrator. The claim of damages being in relation to the terms of the License and breach thereof by the petitioner was therefore, within the jurisdiction of the Sole Arbitrator. Clause 7.10 and Clause 10 of the bid document are reproduced herein below:

"7.10 All questions/disputes and or differences.

All questions, disputes and, or differences arising under or in connection with this agreement or in touching or relating to or concerning the construction, or affect of presents (excepts as to matters the decision whereof is other-wise herein before, expressly provided for) shall be referred to the-sole arbitration of the officer/officers or

persons nominated by the Managing Director/IRCTC impose decision in this regard shall be binding on the Licensee.

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10. ARBITRATION.

10.1 In the event of any dispute or difference arising under these conditions of Licence or in connection with this Licence (except as to any matters, the decision of which is specifically provided for by these or the special conditions) the same will be resolved by Arbitration, as per the provisions of 'The Arbitration and Conciliation Act - 1996.' The venue of the Arbitration shall be Delhi. All questions, disputes and or differences arising under or in connection with this agreement or intouching or relating to or concerning the construction, or affect of presents (excepts as to matters the decision whereof is other-wise herein before, expressly provided for) shall be referred to the sole arbitration of the officer/officers or persons nominated by the Managing Director/IRCTC impose decision in this regard shall be binding on the Licensee."

38. A reading of the above clauses would show that all the disputes and differences between the parties were to be resolved through Arbitration. The petitioner could not have curtailed the scope of such clauses unilaterally by framing restrictive terms of reference.

39. The Arbitration Agreement between the parties does not contemplate any terms of reference to be framed by the appointing authority before referring the disputes to the Arbitrator. Referring to Section 23 of the Act, the Supreme Court in ***Praveen Enterprises*** (Supra) has held that unless the Arbitration Agreement requires the Arbitrator to decide only specifically referred disputes, the claimant can, while filing

the Statement of Claim or thereafter, amend or add to the claims already filed. In the present case, therefore, the Arbitrator was not bound by only the terms of reference as framed by the appointing authority while making his appointment.

40. In any case, the terms of reference in the appointment order was, whether the claimant (respondent herein) was entitled to the renewal of the licence. The relief of damages as claimed by the respondent herein is clearly consequential relief which, in my opinion, would be covered in the said reference. In this regard it is important to note that in the original Statement of Claim filed by the respondent, the respondent had indeed claimed damages in Claim no. 2. In the reply filed to the Statement of Claim, there was no plea taken by the petitioner that such claim was beyond the terms of reference. The amendment application relied upon by the counsel for the petitioner, was filed as there was a calculation error made by the respondent while quantifying its claim under Claim no. 2. Therefore, the petitioner is not right in its contention that the claim of damages was raised only with the amendment application. The parties were well aware of the claim of the respondent and went to trial on the same. In the present case, therefore, the petitioner cannot be allowed to take shelter behind the plea that the claim of damages made by the respondent herein was beyond the terms of reference.

41. In this regard the learned counsel for the respondent has rightly relied upon the judgment of the Supreme Court in *Tarapore & Co. vs. State of M.P.*, (1994) 3 SCC 521, wherein the Supreme Court held as under:-

“25. The aforesaid shows that the present was not a case where on the basis of the terms of the agreement entered between the parties it can be held that the arbitrator had no jurisdiction to make the award because of there being no express provision for it in the contract. Therefore, on the basis of what has been stated in Good Luck Carpets according to which if a challenge is made to the award on the ground that the arbitrator has no jurisdiction, the only way to test the correctness is to look into the agreement itself because the jurisdiction of the arbitrator flows from the reference and a reference can be only with regard to such disputes which are contemplated by the agreement, it cannot be held that the arbitrators had no jurisdiction to make the award because of lack of specific provision permitting the claim at hand. This does not conclude the matter. It has to be seen whether the term of the agreement permitted entertainment of the claim by necessary implication. It may be stated that we do not accept the broad contention of Shri Nariman that whatever is not excluded specifically by the contract can be subject-matter of claim by a contractor. Such a proposition will mock at the terms agreed upon. Parties cannot be allowed to depart from what they had agreed. Of course, if something flows as a necessary concomitant to what was agreed upon, courts can assume that too as a part of the contract between the parties.”

42. Following the above judgment this Court in ***Lift and Shift India Pvt. Ltd. vs. Container Corporation of India Ltd.*** 2007 (99) DRJ 499, held as under:-

*“33. There is no dispute in the legal proposition that the arbitrator has to decide claims in accordance with the terms of the contract and cannot exceed his jurisdiction by deciding questions not referred to him. However, something that flows as a necessary concomitant to what to what was adjudicated upon may be assumed to be part of the contract in view of the judgment in ***Tarapore and Co.*** case (supra). An award rendered in excess of jurisdiction is liable to be set aside.”*

43. As far as reliance of the petitioner on Clause 2.3 of the Bid Document is concerned, the same in my opinion, has no application to the facts of the present case. Clause 2.3 of the Bid Document is reproduced herein:-

“2.3 Refund of Concession Fee

In the event of permanent cancellation/withdrawal of train service by the Railway Administration, the agreement shall be terminated without any notice or assigning any reasons. In such an event refund of Concession Fee will be admissible in the following manner:-

- i) the proportionate Concession Fee will be refunded, if the train is cancelled within a period of five years from the date of operation of this agreement.*
- ii) no Concession Fee will be refunded in case train service is cancelled after the expiry of first term i.e. five years.*

No claim for any consequential loss of business/damages will be entertained by the IRCTC other than what is specially provided for in this para.”

44. A bare reading of the above clause shows that the same is confined only to cases where the Railway Administration decides to permanently cancel or withdraw certain train services. In the present case, it is not the allegation of the petitioner that any train service was cancelled or withdrawn by the railways. The issue between the parties was only regarding whether the respondent is entitled to seek renewal of the license or not.

45. As far as the quantification of damages is concerned, the Arbitrator, while determining the quantum of damages had given the following justification.

“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.

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-I)

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 L.F. 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.”

46. In **Associate Builders vs. Delhi Development Authority**, (2015) 3 SCC 49, the Supreme Court has held as under:-

“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 [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

“General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”.

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . 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 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating 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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56. Here again, the Division Bench has interfered wrongly with the arbitral award on several counts. It had no business to enter into a pure question of fact to set aside the arbitrator for having applied a formula of 20 month instead of 25 months. Though this would inure in favour of the appellant, it is clear that the appellant did not file any cross-objection on this score. Also, it is extremely curious that the Division Bench found that an adjustment would have to be made with claims awarded under Claims 2, 3 and 4 which are entirely separate and independent claims and have nothing to do with Claims 12 and 13. The formula then applied by the Division Bench was that it would itself do “rough and ready justice”. We are at a complete loss to understand how this can be done by any court under the jurisdiction exercised under Section 34 of the Arbitration Act. As has been held above, the expression “justice” when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court think is unjust on the facts of a case for which it then seeks to substitute its view for the arbitrator’s view and does what it considers to be “justice”. With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact.”

47. Tested on the above parameters, the award of damages and quantification thereof by the arbitrator cannot be interfered with.

48. The learned counsel for the petitioner has further submitted that the Arbitrator in his Impugned Award has held that the claim of the respondent for seeking renewal of license(s) as also, due to refusal

thereof, claim of damages, would be barred by the Law of Limitation for at least two trains, however, the Arbitrator has still gone ahead and awarded damages by holding that a claim as a whole is not barred by the Law of Limitation. He submits that each train being a different contract, would be governed by its own period of limitation and therefore, award of damages for at least two trains in question would be barred by the Law of Limitation. In normal circumstance, the contention of the petitioner would have been entitled to be accepted, however, in the peculiar facts of the present case, the conduct of the petitioner itself shows that the petitioner was not sure as to whether the respondent is entitled to seek renewal of license or not. It was only with the clarification dated 02.09.2008 given by the Railway Board, Ministry of Railways, that the petitioner decided that the respondent was not entitled to seek renewal of the license. In fact, till such clarification was received, the petitioner itself had sought respondent's willingness for renewal of the licence with respect to four trains as under:-

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|-------|------------------------------------|--------------|
| (i) | 2321/2322 (HWH-CSTM-HWH) | (28.2.2007) |
| (ii) | 2069/2070 (Durg-Raigarh-Durg) | (29.2.2008) |
| (iii) | 2149/2150(1037/1038) (PA-Patna-PA) | (8/9.6.2008) |
| (iv) | 2561/2562 (DBG-NDLS-DBG) | (9.6.2008) |

49. The respondent on 17.02.2011 had filed a Civil Suit against the petitioner challenging the non grant of renewal of license, which was dismissed by the Court vide order dated 17.02.2011 on the ground of remedy in form of arbitration being available to the respondent. Thereafter, the respondent filed an application under Section 11 of the

Act seeking appointment of an Arbitrator and therefore, it cannot be said that the claim filed by the respondent was barred by the Law of Limitation.

50. In view of the above, I find no merit in the present petition and the same is dismissed, however, with no order as to cost.

NAVIN CHAWLA, J

JULY 05, 2018/Pragya/arya/rv

