

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

+ **O.M.P. (COMM.) 383/2017 & IA No. 12481-12483/2017**

Reserved on: 22nd May, 2018
Date of decision : 19th July, 2018

ADWEL ADVERTISING SERVICE & ANR. Petitioners

Through: Mr. Sachin Datta, Sr. Adv. with
Mr.Sandeep Grover, Ms.Pankhuri Bhardwaj,
Mr.Yatender, Advs.

versus

SOUTH DELHI MUNICIPAL CORPORATION Respondent

Through: Mr.Sanjay Poddar, Sr. Adv. with
Mr.Gaurang Kanth, Ms.Biji Rajesh, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) has been filed by the petitioners challenging the Arbitral Award dated 22.05.2017 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the offer(s) of allotment of contract for display of illuminated kiosks on street light poles on MCD roads (excluding all PWD maintained roads) for the period 01.04.2006 to 31.03.2008 in respect of City Zone, South Zone, West Zone and Central Zone of the MCD, all dated 10.04.2006.

2. The primary dispute between the parties is in relation to the exclusion of all PWD maintained roads from the offer of allotment made

by the respondent in favour of the petitioners and the claim of the petitioners for a consequential reduction in the license fee on this ground.

3. The respondent had issued a Notice Inviting Tender (NIT) on 27.01.2006 in relation to allotment of rights for display of advertisement through kiosks on street poles existing on all MCD roads “including” PWD maintained roads in respect of all the 12 municipal zones from the date of allotment or 01.04.2006 (whichever is earlier) to 31.03.2008 in respect of City, Central and South Zones and for the period 01.04.2006 to 31.03.2008 in respect of remaining nine Zones. The last date of submission of the tender was 16.02.2006 and the NIT prescribed the Minimum Reserve Price per month for the award of such rights.

4. There is no dispute between the parties on the fact that the last date of submission of tender was extended by the respondent till 01.03.2006 vide Corrigendum dated 14.02.2006.

5. It is the case of the respondent that thereafter the NIT was amended by the respondent vide its Public Notice dated 05.03.2006 and a revised NIT was published on that date which excluded PWD maintained roads; gave a uniform period of license for all 12 municipal Zones as 01.04.2006 to 31.03.2008; revised the Minimum Reserve Price per month for various Zones; as also extended the last date of submission of tenders to 10.03.2006. The petitioners dispute the issuance of this Public Notice and submit that it had submitted its tender with the respondent based on the NIT published on 27.01.2006.

6. The respondent vide its letter(s) dated 10.04.2006 made an offer of allotment of the contract for display of illuminated advertisement through kiosks on street poles of MCD roads (excluding all PWD maintained roads) for the period 01.04.2006 to 31.03.2008 in respect of City Zone, South Zone, West Zone and Central Zone of MCD in favour of the petitioners on the monthly license fee offered by the petitioners. It is relevant to note here that such offer letter(s) clearly made reference to the Public Notice published on 05.03.2006 alongwith NIT published on 27.01.2006. The said offer letter(s) also called upon the petitioners to deposit the security deposit equivalent to three months' license fee and one month's advance license fee together with advance advertisement tax and also submit an Agreement duly executed and signed by the petitioners on or before 17.04.2006. The said letter(s) further warned that incase of failure to comply with this condition it shall be presumed that the petitioners are not interested in the offer and the same shall be withdrawn and the earnest money deposited by the petitioners shall be forfeited.

7. The petitioners filed a civil suit being CS (OS) 621/2006 challenging the exclusion of PWD roads from the offer letter(s) dated 10.04.2006. This Court vide its order dated 17.04.2006 was pleased to grant an *ad interim ex-parte* injunction in favour of the petitioners. The same was however, modified by the order dated 17.07.2007, which, on the issue of the applicability of Public Notice dated 05.03.2006 *inter alia* held as under:-

“13. I have heard learned counsel for the parties who have taken me through the relevant documents. As far as the advertisement dated 27.01.2006 is concerned, there is no doubt it includes PWD maintained roads as well. Subsequently, in the minutes of the meeting held on 02.02.2006, the terms of the advertisements were approved to include illumination of kiosks. The public notice dated 05.03.2006 mentions that although, the kiosks will be illuminated the PWD maintained roads have been excluded. I agree with the argument advanced by learned senior counsel for the defendants that the plaintiff had made a bid in pursuance to the public advertisement dated 05.03.2006, otherwise, there was no occasion for him to make a bid less than the reserve price as per the advertisement dated 27.01.2006. It is pertinent to note the fact that the communication dated 10.04.2006 was directly addressed to the plaintiff and in this communication it was clearly mentioned that the PWD maintained roads are excluded. In case, the plaintiff had any reservations while making the endorsement as reproduced in para 8 above he would be entitled to make the payment only from 17.04.2006. These objection could have been raised by the plaintiff at that stage, which only goes to show that he was fairly aware that the PWD roads are not included.”

8. This Court further, by the same order directed the petitioners to pay to the respondent a sum of Rs. 25 Lakhs per month from the month of July 2007, as the dispute as to who was responsible for arranging electricity for illumination of the advertisement kiosks remained to be adjudicated. The extract of the eventual directions passed by this Court are as under:-

“14. On 17.04.2006, while granting the interim order, the plaintiff was asked to deposit the sum of Rs. 20.00 lakhs and by a subsequent order the plaintiff was asked to continue to pay a sum of Rs. 20.00 lakhs per month as well as a security deposit of Rs.

1.00 crore. While making the order of deposit of Rs. 20.00 lakhs, the Court had taken into consideration that the roads maintained by PWD were to be excluded in the tender. Having come to the conclusion prima facie that the plaintiff was aware that the PWD maintained roads were not included, the sum of Rs. 20.00 lakhs would be insufficient and thus, the sum of Rs. 20.00 lakhs is increased to Rs. 25.00 lakhs per month. Although, the plaintiff was required to deposit of Rs. 36,13,004/- the remaining amount need not be deposited by the plaintiff keeping in mind that the amount in respect of illumination of kiosks is yet to be decided. Needless to say that the security deposit of Rs. 1.00 crore and also the fact that the plaintiff is a Category 'A' contractor of the MCD will ensure that the interests of the defendants are secured. Accordingly, it is decided that the plaintiff will pay a sum of Rs. 25.00 lakhs per month from the month of July, 2007 to the defendant no. 1 and also the registry is directed to release the security of Rs. 1.00 crore in favour of defendant no. 1. With these observations IA No. 4155/2006 & 9218/2006 stand disposed of."

9. The suit was eventually withdrawn by the petitioners on 17.12.2008.

10. Before the Arbitral Tribunal the petitioners *inter alia* made a claim of reduction of monthly license fee on account of exclusion of the PWD roads. The same was defended by the respondent relying upon the Public Notice dated 05.03.2006, however, it is an admitted case of the parties that the said document was not filed by the respondent before the Sole Arbitrator and it was only with an application dated 04.04.2016 that the respondent sought leave of the Arbitral Tribunal to place a copy of the same on record. The said application was objected to by the petitioners on the ground of inordinate delay in filing of the same.

11. The Sole Arbitrator by his order dated 06.02.2017 allowed the application of the respondent and a copy of the Public Notice dated 05.03.2006 was taken on record.

12. The Sole Arbitrator, vide his Impugned Award rejected the claim of the petitioners with respect to reduction of the license fee on the ground of exclusion of PWD roads *inter alia* relying upon the order dated 17.07.2007 passed by this Court as also on the fact that the bids offered by the petitioners were less than the reserve price fixed in the NIT dated 27.01.2006, which in the opinion of the Sole Arbitrator showed that the petitioners had submitted its bids in response to the Public Notice dated 05.03.2006. The Sole Arbitrator further relied on the fact that the petitioners had not raised any objection to the change in the terms of the NIT and the claim now raised by the petitioners was an afterthought. The Arbitrator further held that the petitioners had not produced any evidence to show the total electricity poles and number of roads covered under the contract and how the exclusion of the PWD roads would entitle the petitioners to claim a rebate of 56.75% of monthly license fee.

13. The learned senior counsel for the petitioners submits that the Sole Arbitrator has erred in law and on fact by not appreciating that the petitioners had submitted its bid in response to the NIT dated 27.01.2006. He further submits that the Public Notice dated 05.03.2006 was not applicable to the present dispute and in fact, only a copy thereof had been filed by the respondent before the Arbitrator and that too at a very belated stage. Relying upon the judgment of the Supreme Court in ***Bagai Construction vs. Gupta Building Material Store***, (2013) 14 SCC 1, he

submits that the Arbitrator has erred in taking the said document on record and relying upon the same while passing the Impugned Award. He submits that the Public Notice dated 05.03.2006 was not proved in evidence and in fact, even if the Arbitrator was to take the same on record, the petitioners should have been granted an opportunity of leading evidence in rebuttal to the same. For this submission he relies upon the judgment of Supreme Court in ***Billa Jagan Mohan Reddy & Anr. vs. Billa Sanjeeva Reddy & Ors.***, (1994) 4 SCC 659. As far as the quotation of the petitioners being below the Minimum Reserve Price is concerned, the learned senior counsel for the petitioners submits that no inference could have been drawn against the petitioners on this account as there had been many instances where parties have quoted below the Minimum Reserve Price and the respondent has accepted the same. In this regard the petitioners also sought to file an additional affidavit contending facts of another tender where, according to the petitioners, the petitioners had quoted below the Minimum Reserve Price and the same had been accepted by the respondent. The learned senior counsel for the petitioners further submits that in any case, the respondent could not have changed the terms of the NIT once the same was issued and in this regard he places reliance on the judgment of the Supreme Court in ***Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation and Ors.***, (2000) 5 SCC 287 and of this Court in ***L.G. Information & Communications Ltd. & Ors. Vs. Mahanagar Telephone Nigam Ltd. and another***, (1999) 51 DRJ 276.

14. I have considered the submissions made by the learned senior counsel for the petitioners, however, I am unable to accept the same. Admittedly, the respondent had issued a NIT dated 27.01.2006 inviting quotation for the display of advertisement through kiosks on street light poles existing on all MCD roads including PWD maintained roads. The said notice prescribed the Minimum Reserve Price for each zone as also stated that the last day of receipt of tenders would be 16.02.2006. There is no dispute that by a Corrigendum dated 14.02.2006, the last date of submission of tender was extended till 01.03.2006. It was only with the Public Notice dated 05.03.2006 that the respondent, not only reduced the Minimum Reserve Price for each zone, but also extended the last date of submission of tender to 10.03.2006. There is no dispute between the parties that the petitioners submitted their tender on 10.03.2006 and its quotation, for atleast two Zones, was below the Minimum Reserve Price stipulated in the NIT dated 27.01.2006.

15. Though the petitioners denied the knowledge of Public Notice dated 05.03.2006, in my opinion, the fact that the petitioners submitted their tender on 10.03.2006 and for two Zones made a bid which was below the Minimum Reserve Price prescribed in the NIT dated 27.01.2006, belies such denial of knowledge by the petitioners. The submission of the petitioners that in some other tenders also the respondent had accepted bids that were below the Minimum Reserve Price cannot be accepted at this stage while considering the challenge of the petitioners under Section 34 of the Act. The respondent in its reply before the Arbitral Tribunal had placed reliance on this fact. In fact, even

this Court in its order dated 17.07.2007 placed reliance on this submission of the respondent. Therefore, any explanation in this regard and proof in support of such explanation should have been filed by the petitioners before the Sole Arbitrator. The petitioners cannot now seek to impugn the Arbitral Award by seeking to place additional documents and submissions on record. It is not the case of the petitioners that the documents now sought to be placed on record by way of additional affidavit before this Court, were not available to the petitioners at the time of the proceedings before the Arbitral Tribunal.

16. The judgment of Supreme Court in ***Billa Jagan Mohan Reddy***, (Supra) would not be of any assistance to the petitioners as in the present case, the parties have gone to trial on basis of the averment of the respondent that the Letters of Offer issued to the petitioners were on the basis of the Public Notice dated 05.03.2006. The petitioners were therefore, well aware of the case of the respondent and contested the same. Though in normal circumstances the petitioners should have been granted an opportunity to lead evidence in rebuttal once the copy of the Public Notice dated 05.03.2006 was taken on record, however, in the present case I do not find any prejudice being caused to the petitioners due to denial of such opportunity and therefore, this itself cannot be sufficient to interfere with the Impugned Award.

17. As far as delay of the respondent to place a copy of the Public Notice dated 05.03.2006 on record is concerned, the Sole Arbitrator in his order dated 06.02.2017 as also in the Impugned Award, has taken note of the fact that the respondent had consistently pleaded that due to

trifurcation of the MCD into three separate Corporations, including the respondent herein, some of the records pertaining to the case had been misplaced / lost and the respondent, despite its best effort to trace the same, had failed.

18. Judgment of Supreme Court in ***Bagai Construction*** (Supra) would have no application inasmuch as in that case the Court was dealing with a suit for recovery and found that the bills in question therein, though being in exclusive possession of the plaintiff therein, for reasons unknown, were not placed on record. In the present case, however, not only are the provisions of the Code of Civil Procedure not applicable in view of Section 19(1) of the Act, but also, the finding of the Arbitral Tribunal that a copy of the Public Notice dated 05.03.2006 could not be placed by the respondent on record at an earlier stage as it had lost all the records relating to the case due to trifurcation of the erstwhile MCD is a valid justification for taking on record a copy of the Public Notice at a belated stage.

19. In any case, it is not as if the respondent has sought to contend a new case before the Sole Arbitrator by filing the copy of the Public Notice dated 05.03.2006. The case of the respondent has always been that the bid of the petitioners was considered and accepted by the respondent only in terms of Public Notice dated 05.03.2006. This stand of the respondent was considered by this Court and accepted by its order dated 17.07.2007 passed in CS (OS) 621/2006 as quoted hereinabove.

20. In any case, all the above discussion will pale into insignificance as the respondent by its communication(s) dated 10.04.2006 clearly offered

allotment of rights to the petitioners excluding all PWD maintained roads. In case such offer was not acceptable to the petitioners, the petitioners could have rejected the same, however, having accepted the same, cannot now seek reduction in the license fee on ground of exclusion of PWD roads. It is settled law that Notice Inviting Tender is a notice to invite an offer from the interested parties. When a bid is submitted in response to Notice Inviting Tender, it is an offer. It becomes a contract only with the acceptance of tender by the authority issuing NIT. In the present case in fact, even this would not have resulted in a concluded contract as letter dated 10.04.2006 required the petitioners to fulfill further conditions like deposit of security deposit, one month's advance license fee and advertisement tax before the contract could be stated to have come into force between the parties. Even if the case of the petitioners is to be accepted that the present case would be governed by NIT dated 27.01.2006 and not by Public Notice dated 05.03.2006, the letters dated 10.04.2006 would be in form of counter offer, which the petitioners could have rejected if they so desired.

21. The judgment of *Monarch Infrastructure* (Supra) relied upon by the petitioners has no application to the facts of the present case as in that case the Court was considering a challenge by an unsuccessful bidder to the award of work to the successful party, who but for the change in the terms of the tender, would have been ineligible to participate in the same. In the present case, the petitioners were the successful party and therefore, it was for them to accept or reject the counter-offer made by

the respondent, but cannot complain of such offer having accepted the same.

22. Similarly in *L.G. Information* (Supra) again this Court was considering a challenge of an unsuccessful party to a tender process and therefore, it would have no application to the facts of the present case.

23. The next challenge raised by the petitioners is to the award of a rebate of Rs.50 lakhs only in favour of the petitioners towards loss of revenue due to non-illumination of kiosks. The learned senior counsel for the petitioners submits that the contract granted in favour of the petitioners was for display of illuminated advertisement through kiosks. Prior to the grant of this contract a meeting was held on 02.02.2006 between various officers of the MCD wherein it was decided that the contractors will be provided electricity for illumination of advertisement during the contract period. However, when the petitioners applied for electricity connection with the BSES, BSES refused to deal with the petitioners and insisted that the MCD should directly take up this matter with the BSES. In this regard, the learned senior counsel for the petitioners has drawn my attention to the letter dated 07.11.2006 addressed by the petitioners to BSES asking for grant of electricity connection as also letter dated 01.12.2006 addressed by the petitioners to the Additional Deputy Commissioner, Advertisement, MCD whereby the petitioners informed the respondent that BSES has refused to grant such electricity connection and has advised that they shall be dealing with MCD directly. The learned senior counsel for the petitioners further submits that due to non grant of electricity connection, the petitioners

suffered a loss inasmuch as the revenue that can be earned by the petitioners from illuminated sites is almost double than non illuminated sites. He further submits that the petitioners were therefore, entitled to the rebate in the license fee. In this regard the petitioners had submitted detailed calculation before the Arbitral Tribunal, however, the Arbitral Tribunal has wrongly held that this claim was only for an amount of Rs. 87,27,572 and also that the petitioners had been unable to prove such claim and held that the petitioners were entitled to a rebate of license fee of only Rs. 50 lakhs on this account.

24. I have considered the submission made by the learned senior counsel for the petitioners. Before dealing with the same, I would quote the findings of the Arbitral Tribunal on the said issue:

“32. The Claimants do not seem to have pursued the matter with BSES as they have not furnished copies of any further communication addressed to BSES. No documentary evidence has been produced by either party clearly laying down the responsibility of the authority which was to obtain electricity connections from different DISCOMs. The Claimants have stated that it was crucial and significant that the Respondent would facilitate supply of electricity from the electricity distribution companies. In this connection, the Respondent had taken a meeting with the Electricity Distribution Companies on 12/04/2006 which was also attended by the advertisers including the Claimants, with a view to facilitating the supply of electricity to the kiosks installed on electric poles by the Claimant.

33. The fault basically lay with the DISCOMS who failed to spell out the difficulties in providing electricity connections at so many points and in different areas in the meeting organized by MCD as early as 12/04/2006 i.e. much ahead of the date for filing the tenders. Had they expressed their inability in providing connections, the stipulation regarding illuminated kiosks could

have been dropped from the Tender conditions before the parties filed their bids.

34. The parties had not even counted the total number of electric poles on which advertisements were to be displayed before they signed the contract. It is, therefore, difficult to make an assessment as to how non-illumination of kiosks would have affected the revenue earning capacity of the Claimants or the Respondent. The Claimants have not given any cogent explanation as to how they have come to the conclusion that they are liable to pay only 20.13% of the monthly license fee in view of non-illumination of the kiosks.

35. In view of the facts stated above, while it is difficult to hold any one agency solely responsible for not arranging the electricity connections for illuminating the kiosks, there is no doubt that the Claimants' earnings were, to some extent, adversely affected due to non-illumination of the kiosks. There cannot be any foolproof criterion for assessing the loss in the instant case. Under the circumstances, relief can be provided only on an ad hoc basis. In my view, it will meet the ends of justice if the Claimants are allowed a rebate of Rs. 50,00,000/- (Rs. Fifty Lakhs) to compensate them for the loss of revenue due to non-illumination of kiosks as against their claim of Rs. 87,27,572/- demanded towards loss of profit on this account as mentioned under claim no. 10."

25. Reading of the above finding would show that the Arbitral Tribunal has found that the fault basically lied with the DISCOMS in non grant of electricity connections. It further found that the petitioners did not take up the matter further after raising it with BSES and MCD. The Arbitral Tribunal further found that in absence of the total number of electricity poles on which advertisements were to be displayed, it was difficult to make an assessment of the effect of non grant of electricity connection on the revenue earning capacity of the petitioners and

therefore, on an ad hoc basis, has granted a rebate of Rs. 50 lakhs in favour of the petitioners.

26. From the letter dated 07.11.2006, it is apparent that the respondent had issued a No Objection Certificate for the purpose of grant of electricity connection in favour of the petitioners. The letter also relied upon the meeting held between the officers of MCD, BSES and the petitioners in May 2006 in this regard. However, the Arbitral Tribunal also notes that the minutes of this meeting have not been placed on record by either party. For MCD, the explanation as noted above, is that due to trifurcation they have misplaced the documents relating to the contract. The onus was therefore, on the petitioners to have proved before the Arbitrator the exact decision reached between the parties in such meeting.

27. In any case, the petitioners made a grievance regarding non grant of electricity connection to the respondent by its letter dated 01.12.2006, however, thereafter, there is no document on record to show if this issue was taken up by the petitioners with the MCD or BSES and if so, the outcome of the same. It seems that the petitioners did not pursue the same as this Court by its order dated 17.07.2007 had given interim protection to the petitioners by reducing the amount to be paid by the petitioners to Rs. 25 lakhs in place of ₹ 36,13,004 per month on which the contract had been awarded by the respondent to the petitioners, the petitioners were to pay Rs. 25 lakhs per month from July, 2007 onwards. This, however, was an interim arrangement and it was upon the petitioners to prove their claim as to the amount to which they were entitled before the Arbitral Tribunal.

28. As far as the quantification of the rebate is concerned, the learned senior counsel for the petitioners submits that the Arbitral Tribunal has erred in ignoring the evidence led by the petitioners in support of its claim for such rebate. He submits that the petitioners were entitled to a larger amount of rebate based on such evidence. The so called evidence in support of this claim on which reliance has been placed by the learned senior counsel for the petitioners is the following chart:-

“M/S Adwel Advertising Service

ANNEXURE “A”

Detail of License fee of Four Zones & Amount Payable of MCD

<i>Zone</i>	<i>Licence Fees P.M.</i>	<i>Total number of Kiosks in the Zone</i>	<i>Kiosks on roads allowed to be displayed by the</i>	<i>Kiosks on Roads denied to the Claimant and occupied/displayed by others</i>	<i>Kiosk allowed to the Claimant in (%)</i>	<i>Kiosks on roads denied to the Claimant in (%)</i>	<i>Total in (%)</i>	<i>Displayed Non-Illumination Sides (50% of Column 6)</i>	<i>Licence fees Payable (% of Column 9 of Column 2)</i>
<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>6</i>	<i>7</i>	<i>8</i>	<i>9</i>	<i>10</i>
<i>Central</i>	<i>825501</i>	<i>1635</i>	<i>800</i>	<i>835</i>	<i>49%</i>	<i>51%</i>	<i>100%</i>	<i>24.50%</i>	<i>202248</i>
<i>South</i>	<i>1236501</i>	<i>3353</i>	<i>876</i>	<i>2477</i>	<i>26%</i>	<i>74%</i>	<i>100%</i>	<i>13.00%</i>	<i>160745</i>
<i>West</i>	<i>745501</i>	<i>1758</i>	<i>735</i>	<i>1023</i>	<i>42%</i>	<i>58%</i>	<i>100%</i>	<i>21.00%</i>	<i>156555</i>
<i>City</i>	<i>805501</i>	<i>769</i>	<i>433</i>	<i>336</i>	<i>56%</i>	<i>44%</i>	<i>100%</i>	<i>22.00%</i>	<i>177210</i>
	<i>3613004</i>	<i>7515</i>	<i>2844</i>	<i>4671</i>	<i>43.25</i>	<i>56.75</i>	<i>100%</i>	<i>20.13</i>	<i>696758</i>

29. A reading of the above would show that this is merely a table made by the petitioners without any supporting documents for any of the figures mentioned therein. It is based on an assumption of percentage, given without any supporting document. It cannot be treated as a primary piece of evidence.

30. The other so called evidence in support of this claim is paragraph 48 of the evidence by way of affidavit filed by the petitioners before the Arbitral Tribunal. The same is reproduced herein below:-

“48. I say that in order to make kiosks ready for installation of illuminated display, electricity connection was required and

Electric meter was to be installed for every pole. I say that the electrification was to be done in a manner that was/is both safe and aesthetically appropriate. I say that in order to make street poles ready for installing of illuminated advertisement panels considerable expenditure of more than Rs. 15 lacs were-was incurred by the Claimant and benefit of this expenditure would, have continued for other advertisers also in future. I say that the Sales revenue for advertisement on illuminated kiosks was/is almost 4 to 5 times the sale revenue of non-illuminated Kiosks. I say that due to lack of provision of illumination for their display the kiosks of the Claimant were effectively being exhibited only for about 50% duration of time thus, drastically reducing the Claimant's revenue generation as also the Respondent entitlement of monthly license fee. I say submit that exclusion of PWD Roads has already reduced the liability towards the monthly license fee of the Claimant up to 44%, which further stood reduced by 50% thereof due to non-illumination of the kiosks. I say therefore, the actual liability of the Claimant toward payment of license fee was 20.13% only of monthly license fee. I say that in fact the respondent was/is only entitled to the monthly license fee amount of Rs. 6,96,758/- per month, being 20.13% of Rs.36,13,004/- Rupees Thirty Six Lacs Thirteen Thousand and Four). ”

31. A reading of the above paragraph would again show that the same is not supported by any documents and is based on supposition. It can at best be said to be the claim of the petitioners and not evidence in support of the same.

32. The learned senior counsel for the petitioners further places reliance on an additional affidavit filed on behalf of the petitioners before this Court in the Civil Suit being Suit No. 621/2006. The paragraphs of the affidavit on which reliance was placed are reproduced hereinunder:-

3. I state that in the current NIT the defendant MCD made specific representation to the effect that the kiosks would be allowed to be illuminated for which the plaintiff had submitted its bids at almost

double the amount or the previous monthly license fee which is clearly evident from the following comparative table.

<i>S. No.</i>	<i>Zone</i>	<i>Monthly License fee Previous term</i>	<i>Monthly License fee current term</i>
<i>1.</i>	<i>City</i>	<i>4,26,751/-</i>	<i>8,05,501/-</i>
<i>2.</i>	<i>Central</i>	<i>5,26,251/-</i>	<i>8,25,501/-</i>
<i>3.</i>	<i>South</i>	<i>5,11,751/-</i>	<i>12,36,501/-</i>
<i>4.</i>	<i>West</i>	<i>--</i>	<i>7,45,501/-</i>

4. I state that it was only because of the defendant's representation that the illuminated kiosks would be allowed and that the plaintiff had submitted its bid for monthly license fee on almost double the amount.

5. I state that the revenue for advertisement on illuminated kiosks is almost five times the monthly rent from the prospective clients of the plaintiff. To this effect plaintiff craves leave of this Hon'ble Court to file documents in support thereof. In addition thereto it is submitted that during the previous term of the contract also all the PWD roads were allotted to be exhibited under the same contract. The plaintiff is submitted the following documents to this effect:-

(A) In support of rates for non-illuminated kiosk—

- (i) Purchase Order dated 28.3.2006;*
- (ii) Purchase Order dated 9.8.2006;*
- (iii) Purchase Order No.CCI/DEL/06/544*

(B) Rates for illuminated kiosk

(i) Purchase Order dated 26.7.2006 issued by Ogilvi Landscape

(ii) Purchase Order dated 10.9.2006

The aforesaid documents are being annexed herewith and marked as ANNEXURE-I(Colly)

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8. I further state that because of the facility of electricity/electricity connection having not been provided by the defendant MCD, the plaintiff has not been able to fully utilize and

exploit the said sites. The sites are being exhibited only for 50% duration of the time, thus reducing the plaintiff's liability and defendant's entitlement to about 35% of the total monthly license fee, as against this the plaintiff is already paying 50% of the monthly license fee to the defendant and the same at the said rate stands paid upto date i.e. upto 18.11.2006.

9. I further state that there was a tripartite meeting dated 7.11.2006 in the office of MCD wherein MCD agreed to provide electricity and issued necessary direction to BSES in this regard for supply of connection supply to bidders. An affidavit to this effect had already been filed by the plaintiff before this Hon'ble Court. I further state that subsequent to said decision in meeting dated 7.11.2006, the plaintiff has already applied to BSES for supply of electricity vide its letter dated 7.11.2006. A copy of said letter is being annexed herewith as ANNEXURE-2."

33. It would first be noted that the above was an affidavit filed in the Suit. It is not shown if the documents which were sought to be relied upon in the said affidavit were filed before the Arbitral Tribunal. In any case, the said affidavit is also based on supposition rather than any evidence in form of documents.

34. The Arbitral Tribunal in its Impugned Award has considered the evidence led before it on this claim and has also observed that as it cannot be held that the MCD was solely responsible for arranging the electricity connection and the parties have not even counted the total number of electricity poles on which the advertisement had to be displayed, therefore, it was difficult to make an assessment as to how non illumination of kiosks would have affected the revenue earning capacity of the petitioners. This being a finding of the fact cannot be interfered with by this Court in exercise of its power under Section 34 of the Act.

The claim granted in favour of the petitioners was akin to damages and it was for the Arbitral Tribunal to have assessed the same on the basis of the evidence led before it. In absence of any admissible evidence, the Arbitral Tribunal has given an ad hoc figure of damages as rebate in the license fee which cannot be interfered with by this Court in exercise of its limited jurisdiction.

35. In *Associate Builders vs. DDA*, (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 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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42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

42.1 (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

“28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India.—

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in

accordance with the substantive law for the time being in force in India;”

42.2.(b) A contravention of the Arbitration Act itself would be regarded as a patent illegality – for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

“28. Rules applicable to substance of dispute. (1)-(2)

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

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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 months 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 thinks 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.”

36. In ***National Highways Authority of India v. ITD Cementation India Ltd.***, (2015) 14 SCC 21, the Supreme Court reiterated the limits of jurisdiction of a Court exercising power under Section 34 of the Act in the following words:-

“25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The Court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair-minded or reasonable person could do.”

37. In fact the learned senior counsel for the respondent has contended that it was not the responsibility of the respondent to ensure the provision of electricity connection in favour of the petitioners and therefore, the

Arbitral Tribunal has erred in granting a rebate of Rs. 50 lakhs in the license fee in favour of the petitioners, in my opinion, as the respondent has not challenged the Impugned Award, such submission cannot be accepted. Therefore, for the purpose of the present order the finding of the Arbitral Tribunal in the Impugned Award that the petitioners are entitled to the rebate in the license fee is to be accepted.

38. The next objection of the petitioners is to Claim No. 3, which was seeking a rebate of Rs.44,78,980 from the license fee on account of removal of poles by Government Agencies/Departments. It was the claim of the petitioners that large number of poles had been removed by various Government Agencies like DIMTS, DMRC etc. from time to time entitling the petitioners to seek a rebate in the license fee payable.

39. The Arbitral Tribunal has considered this claim, however, has held that the petitioners have been unable to prove the quantum of claim under this head in form of the number of poles that were there at the time of the grant of license and that had been removed by various authorities from time to time. In absence of such proof, the Arbitral Tribunal has placed reliance on a report of an Internal Committee constituted by the respondent to consider the claims and counter claims of the parties. As the Committee had recommended a rebate of ₹ 16, 38,134 in favour of the petitioners, the Arbitral Tribunal has granted the same.

40. The learned senior counsel for the petitioners submits that the Arbitral Tribunal has ignored the evidence led by the petitioners in support of the above claim. He submits that such evidence was found in various letters written by the petitioners to the respondent seeking rebate

in the license fee on account of the electricity poles, allotted to the petitioners, being removed from the road. He submits that these letters have never been refuted by the respondent and, therefore, should be accepted and constitute evidence in support of the claim.

41. To consider the submissions made by the learned senior counsel for the petitioners it would be appropriate to first reproduce the sample letters that have been relied upon by him in support of this claim. The first such letter is dated 09.04.2007, which is reproduced herein below:-

“Kindly refer to our letter dated 23.2.07 wherein we had requested that since Delhi Metro had removed all the poles on Mehrauli -Gurgaon road we are unable to display the kiosks and that since you have granted similar rebate to other parties in areas like Karol Bagh Zone etc. due to DMRC constriction, we should be provided the same from 1.2.2007.

We are also constrained to point out that the High Speed Corridor system project initiated by the Transport Department has removed all poles from the Chirag Delhi Road starting from Chirag Delhi Crossing till Khanpur Crossing which is approximately 350 poles. Hence we request you to allow us rebate from 15th Feb. onwards as these poles were removed by RITES. Ltd. who is the contractor for the Transport Deptt. of Delhi for High capacity bus stops.

You have not replied to our earlier letter dtd 23.2.07 and we await your immediate and quick response because there is a huge License Fee being paid by us to MCD.”

42. The second such letter is dated 03.03.2008 contents whereof are reproduced hereinbelow:-

“This has reference to our contract for pole kiosks allotted to us by MCD in South Zone.

We wish to state that the Delhi Metro Rail Corporation has removed our pole kiosks for the last 6 months and are not allowing us to put up the pole kiosks on the following roads.

1. MG Road

2. Aurobindo Marg near Yusuf Sarai.

We request you to kindly take up this matter with DMRC and in the meantime we are being allowed display on these roads which have been allotted to us by you, the proportionate rebate on these roads may be informed to us.”

43. A reading of the above letters would show that while there is a mention of the number of poles that have been removed by the authorities, it is not mentioned what would be the proportion of these poles to the total number of poles that were in existence in the Zones allotted to the petitioners pursuant to the tender. The Arbitral Tribunal has also taken note of the fact that apart from filing such letters on record, the petitioners has not tendered any evidence or witness from any Governmental Authorities in support of the contents of the letters.

44. The learned senior counsel for the respondent has also drawn my attention to various discrepancies in the claims made in these letters when compared to the calculation sheets that have been filed by the petitioners before the Arbitral Tribunal in support of its claim. The said calculation sheet is reproduced hereinunder:-

<i>M/s Adwel Advertising Service</i>					
<i>Details of Calculation Rebate of South Zone</i>					

<i>Sl. No.</i>	<i>Particulars</i>	<i>Rebate for Period</i>	<i>Months</i>	<i>Amount</i>	<i>Total</i>
1	Less: 405(Four hundred & Five) Kiosks Removed by DMRC at Aurobindo Marg in South Zone i.e. 405*183.50 P.M.	01.02.07 to 31.10.08	21	1560678	
2	Less: 105(Four hundred & Five) Kiosks Removed by DMRC at M G Road in South Zone i.e. 151*183.50 P.M.	01.02.07 to 31.10.08	21	581889	2142567
Details of Calculation of Rebate of Central Zone					
1	Less: 412 (Four hundred & twelve) Kiosks removed From Chirag	01.04.07 to 31.10.08	19	1979002	

	<i>Delhi by DIITMS i.e. 252.81*412 P.M.</i>				
	<i>Less: 40 (Forty) Kiosks in Central Zone removed by DMRC of LSR 252.81*40 P.M.</i>	<i>01.06.07 to 31.10.08</i>	<i>17</i>	<i>171904</i>	<i>2150906</i>
<i>Details of calculation of Rebate of City Zone</i>					
<i>Sl.No.</i>	<i>Particulars</i>				
	<i>Less: 115 Kiosks removed from City Zone i.e. 230.44*115 P.M.</i>	<i>01.04.08 to 31.10.08</i>	<i>7</i>	<i>185507</i>	<i>185507</i>
			<i>Total Rs.</i>		<i>4478980</i>

45. A reading of the above calculation sheet would also show that again there is no basis given for making such claim.

46. The learned senior counsel for the petitioners further submits that the Arbitral Tribunal has erred in placing reliance on the report of the

Committee appointed by the respondent. He submits that the said committee, in its attempt to reduce the entitlement of the petitioners, had arbitrarily increased the number of poles that were available in each Zone and further the Committee has confined its exercise only to the removal of poles by DMRC and not by other agencies.

47. I have considered the submissions made by the learned senior counsel for the petitioners, however, I find that the Arbitral Tribunal has passed its Award in favour of the petitioners and against the respondent by relying upon the Committee Report as an admission of the respondent to the claim of the petitioners. As a Claimant, the onus of proof of the claim was on the petitioners. It was for the petitioners to have led evidence in support of its claim and petitioners cannot succeed merely because the report of the Committee appointed by the respondent was incorrect. In fact, if this report is to be ignored from evidence as an admission of liability of the respondent, there would be no basis for granting any rebate in the license fee in favour of the petitioners and the entire claim of the petitioners would have failed.

48. It is also relevant to refer to a few terms of the NIT issued by the respondent on 27.01.2006 pursuant to which the Contract was granted in favour of the petitioners. Clause 5 of the Terms and Conditions called upon the intending tenderer to inspect the road / street light poles before submitting tenders and clearly stated that no remission in license fee shall be given on the ground that the display of kiosks is objected to by any authority.

49. Clause 6 of the Terms and Conditions is most relevant and is reproduced hereinbelow:-

“Number of street light poles

6. During the period of allotment, the number of street light poles existing on any MCD road or PWD maintained road in the MCD area of any of the zones, may increase or decrease and for such increase/decrease of the poles, the allottee/advertiser shall not have any right to claim any compensation/remission on account of such increase or decrease in the number of kiosks. Any street light pole(s) is/are liable to be removed without any notice to the advertiser, if necessitated, for carrying out repairs, maintenance, shifting of poles, laying of power lines, widening of road(s)/pavements or for any other purpose.”

50. In view of the above Clause, in fact, the claim of the petitioners was not even maintainable before the Arbitral Tribunal. As the respondent has not challenged the Impugned Award before this Court, this Court refrains from making further comments on the very maintainability of the claim of the petitioners.

51. As far as the quantification of such claim is concerned, Clause 21 of the Terms and Conditions cast an obligation on the petitioners to maintain a proper record of the advertisements displayed by it in respect of each kiosk and submit true monthly statements showing the number of kiosks displayed during the preceding month. Clause 21 is reproduced hereinbelow:-

“Statement of Accounts

21. The advertiser shall maintain proper record of the advertisements displayed by him in respect of each kiosk and

produce the same on demand before the Commissioner or any other officer authorized by him in this behalf. The advertiser shall also submit true monthly statement showing the number of kiosks displayed during preceding month, at the time of payment of licence fee/ground rent and advertisement tax.”

52. Admittedly, the petitioners did not submit the monthly statements as required in Clause 21 of the Terms and Conditions. This would have been the primary evidence in support of the claim raised by the petitioners as it would have shown, on a month to month basis, the number of poles / kiosks adversely affected due to their removal by any Governmental Authority. The petitioners being in breach of the Terms and Conditions, cannot be allowed to take advantage of its own wrong and place the burden of proof on the respondent to disprove its claim.

53. In view of the above, I find no merit in the objection against the Award under Claim no. 3.

54. The last challenge made by the petitioners against the Impugned Award is to the finding of the Arbitral Tribunal under Claim no. 8 to the effect that the petitioners are liable to pay monthly license fee for Central, South and City Zones for the period 01.11.2008 to 25.05.2009. It is submitted by the learned senior counsel for the petitioners that the petitioners could not have been made liable to pay the license fee for this period as the same did not fall in the contractual period of the license. To appreciate this argument a few dates would need to be considered.

55. It is an admitted case between the parties that the period of the contract / license granted in favour of the petitioners under the letters

dated 10.04.2006 expired on 31.03.2008. On 12.08.2008 the respondent had called upon the petitioners to vacate the site and move their kiosks as the period of license had come to an end on 31.03.2008. The petitioners, instead of removing the kiosks and vacating the site, informed the respondent that it was operating under the interim order passed by this Court in CS (OS) No. 621/2006 and therefore, cannot be removed. In fact, the petitioners went ahead and filed an application, being IA No. 10416/2008 in the said Suit, seeking initiation of contempt proceedings against the respondent. This Court by its order dated 29.08.2008 passed on the above application, directed the respondent to ensure compliance of the orders dated 17.04.2006 and 17.07.2007 passed in the said Suit.

56. In an appeal filed by the respondent being FAO (OS) 420/2008 this Court vide its order dated 22.10.2008, while leaving it open to the petitioners to participate in the fresh auction being conducted by the respondent for the said sites, recorded the undertaking of the petitioners that incase the petitioners are not the successful bidder they shall hand over the possession of the sites to MCD to operate their contract from the date it is awarded.

57. In the auction that followed, the petitioners were declared successful in respect of South, Central and City Zones, however, could not be issued the license as the respondent claimed arrears of the license fee against it. The Arbitral Tribunal has held that as the petitioners were unsuccessful with respect to the West Zone, they are not liable to pay any license fee beyond 31.10.2008.

58. For the Central, South and City Zones, wherein petitioners have been successful in the auction but could not be granted the license as the respondent was insisting on the payment of the arrears of the license fee which was in dispute, the petitioners filed another Suit, being CS (OS) No. 2298/2008, and this Court by its order dated 04.11.2008 restrained the respondent from awarding the contracts to any other person. The respondent finally issued the Provisional Offer Letter in favour of the petitioners for the three Zones on 08.12.2008 and the Suit was withdrawn by the petitioners on 09.01.2009. The new Agreement was awarded only on 26.05.2009 to be effective from 01.06.2009. The Arbitral Tribunal has therefore, held that as the new licenses came to be awarded only on 26.05.2009, the petitioners would remain liable to pay the license fee till such date.

59. The learned senior counsel for the petitioners submits that the Arbitral Tribunal has erred in not appreciating that in terms of the order dated 22.10.2008 passed by this Court in FAO(OS) No.420/2008, the petitioners are deemed to have handed over the possession of the sites to the respondent on 30.10.2008 and thereafter, the petitioners have continued to retain the possession of the site in the three Zones pursuant to being successful in auction for these Zones. He submits that the claim for the period beyond 30.10.2008 is therefore, not governed by the contract in question and no liability for this period can be fastened on the petitioners on basis of such Agreement.

60. I have considered the submissions made by the learned senior counsel for the petitioners and I am in partial agreement with the same.

This Court vide its order dated 22.10.2008 had allowed the petitioners to remain in possession till the auction which was to be conducted by the respondent on 31.10.2008. This Court further recorded the undertaking of the petitioners that in case the petitioners are not successful in the auction, they shall hand over the possession of the sites to enable the MCD to operate the new contract from the date it is awarded. The petitioners were successful in such auction for three Zones and therefore, would be deemed to have retained possession of the site under the old contract till the new contract is awarded. As there were certain disputes due to demand of arrears of license fee made by the respondent for grant of the new contract, the same led to further litigation and as noted above, the Provisional Offer Letters were issued by the respondent in favour of the petitioners on 08.12.2008. The petitioners in the meantime retained the possession pursuant to the interim order passed by this Court on 04.11.2008 in CS (OS) No. 2298/2008. The said Suit was finally withdrawn by the petitioners only on 09.01.2009. The petitioners therefore, can be said to have been in possession of the site under the contracts in question till 09.01.2009, when the new Provisional Offer Letters would have come into operation. Therefore, for the period up to 09.01.2009 the petitioners were under an obligation to pay the license fee. However, for the period after 09.01.2009, the license fee would be governed under the Provisional Offer Letters and by the subsequent contracts.

61. In view of the above, as far as Claim no. 8 is concerned, the Impugned Award, in so far as it directs that the petitioners shall be liable

to pay monthly license fee for Central, South and City Zones for the period 09.01.2009 to 25.05.2009, cannot be sustained and is set aside. It is made clear that the finding of the Arbitral Tribunal that the petitioners are liable to pay the monthly license fee for Central, South and City Zones for the period 01.11.2008 to 08.01.2009 is sustained and remains operative.

62. The learned senior counsel for the petitioners also raised an objection against the award of the amount under counter claim no. 1 in favour of the respondent, however, on being confronted with the fact that the same is based on the monthly license fee and the admitted amounts paid by the petitioners to the respondent and thereafter reduced by the amounts being awarded in favour of the petitioners in terms of the Impugned Award, the learned senior counsel for the petitioners did not press the same any further. It may however be noted that the amount awarded in favour of the respondent under counter claim no. 1 shall stand modified due to partial setting aside of the Award with respect to claim no. 8 as mentioned above.

63. In view of the above, the present petition is partially allowed with no order as to cost.

NAVIN CHAWLA, J

JULY 19, 2018/rv