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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO.36 OF 2016

Prajapati Gunwant Keshavlal)
14/21, Ground Floor, Mata Prasad Chwal,)
Gali No.1. Koldongri, Andheri (East))
Mumbai – 400 069.) ...Petitioner

....Versus....

1). Union of India,)
Representing General Manager)
(Commercial), Western Railway,)
Mumbai.)
2). The Divisional Commercial Manager,)
Western Railway, Mumbai Central,)
Mumbai.) ...Respondents

Mr.Mutahhar Khan with Mr.Rajesh Omprakash Gupta for the
Petitioner.

Mr.Chetan C. Agrawal with Mr.Pravin Mengane, Mr.Pranav Dhakne
and Ms.Jyoti Agrawal for the Respondents.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 22nd JULY, 2019
PRONOUNCED ON : 31st JULY, 2019

JUDGMENT :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short “Arbitration Act”), the petitioner has impugned the arbitral award dated 18th March, 2016 passed by the learned arbitrator rejecting all the claims made by the petitioner.

Some of the relevant facts for the purpose of deciding this petition are as under :

2. The petitioner was the original claimant before the learned arbitrator, whereas the respondents were the original respondents. On 30th November, 2011, the respondents invited tender for leasing of parcel spaces in parcel van of Train No.19023/19024 Ex. Mumbai Central – Firozpur – Mumbai Central. The petitioner submitted his bid in response to the said tender notice. The offer of the petitioner was accepted by the respondents. On 23rd February, 2012, the petitioner and the respondents entered into an agreement. The respondents agreed to lease the space in Break Van / Parcel Van Assistant Guard Cabin of 23 tons in Train No.19023/19024 Firozpur Janta Express from Mumbai Central to Firozpur and back. The petitioner deposited the bank guarantee dated 23rd February, 2012 of Rs.11,88,055/- drawn on the Oriental Bank of Commerce, Mumbai with the respondents as per the terms and conditions of the tender letter dated 31st October, 2011. The said bank guarantee / security deposit was accepted by the respondents vide its letter dated 23rd February, 2012.

3. It is the case of the petitioner that the petitioner forwarded a letter dated 20th August, 2014 to the respondent no.1 to terminate the lease contract as per clause 21.2 of the said agreement dated 23rd February, 2012. On 16th October, 2014, the petitioner once again allegedly forwarded another letter mentioning the reasons for termination of the said agreement dated 23rd February, 2012 and asking for refund of security deposit and other payments due.

4. The petitioner received a notice dated 7th November, 2014 alleging that in terms of clause 7.2 of the agreement entered into between the parties if the petitioner would fail to operate the contract continuously for 10 days, the contract would be cancelled and the security deposit as well as registration fees would be forfeited. The petitioner was also informed that he would be debarred from entering into any tender for one year.

5. On 17th November, 2014, the petitioner replied to the said notice dated 7th November, 2014 alleging that the petitioner had already intimated the respondents about the termination of the contract. On 18th / 19th March, 2014, the respondents addressed a letter to the petitioner alleging that since the petitioner had stopped loading of parcels under the said agreement with effect from 20th October, 2014 without prior advance notice of 60 days as per clause 21.2 of the contract, the contract awarded to the petitioner is terminated with forfeiture of the security deposit and registration fees. The respondents also debarred the petitioner from submitting the tender for a period of one year with the respondents with effect from 18th March, 2015 as per clauses 7.2 and 21.2 of the agreement of contract.

6. The petitioner thereafter filed a petition under section 9 of the Arbitration Act (Lodging No.817 of 2015) for interim relief. By an order dated 29th April, 2015, this Court converted the said arbitration petition into an application under section 17 of the Arbitration Act and directed the learned arbitrator to decide the said application within a period of one month from the date of his appointment. This Court also permitted the petitioner to participate in the bid for new contract

without prejudice to the rights and contentions of both the parties. This Court did not grant any prayers in respect of encashment of the bank guarantee. It was however, made clear that in the event of enforcement of bank guarantee, the petitioner would be entitled to refund of the amount of bank guarantee subject to the decision of the learned arbitrator.

7. The petitioner vide his letter dated 1st April, 2015, raised the dispute and called upon the respondents to appoint an arbitrator. The petitioner demanded a sum of Rs.6,44,00,853/- under nine claims. The respondents appointed an arbitrator for resolution of the disputes between the parties. The petitioner filed a statement of claim before the learned arbitrator. The respondents made counter claim *inter-alia* praying for legitimate freight charges for a period of 60 days against the petitioner. The petitioner filed rejoinder to the counter claim filed by the respondents.

8. It is the case of the petitioner that on 1st March, 2016, the petitioner filed affidavit of evidence before the learned arbitrator. On 18th March, 2016, the learned arbitrator made an Award rejecting all the claims made by the petitioner. The petitioner has impugned the arbitral award dated 18th March, 2016 passed by the learned arbitrator in this petition.

9. Mr.Mutahhar Khan, learned counsel appearing for the petitioner invited my attention to some of the clauses of the contract entered into between the parties and in particular clauses 21.1 and 21.2 of the contract which empowers both the parties to terminate the lease contract in accordance with the said provisions.

10. Learned counsel for the petitioner submits that on 20th August, 2013, the petitioner had informed the Divisional Railway Manager (C) conveying his decision to discontinue the lease contract on various grounds mentioned therein. In the said letter, the petitioner referred to clause 21.2 of the contract which empowers the petitioner to terminate the contract by serving 60 days notice. The petitioner requested the respondents to terminate the said lease contract with effect from 20th October, 2014 and to return the security deposit of Rs.11,88,055/-. It is submitted by the learned counsel that the said letter was forwarded to the Divisional Railway Manager's office in two sets. The Divisional Railway Office have affixed its seal on one of the copy and retained another copy which was returned to the petitioner and retained another copy with it.

11. Learned counsel for the petitioner invited my attention to a letter dated 15th October, 2014 from the petitioner addressed to the Divisional Railway Manager (C) referring to the notice for termination dated 20th August, 2014. By the said letter, the petitioner conveyed to the respondents that he was discontinuing the contract by giving mandatory 60 days notice which was given on 20th August, 2014. He would not load parcel with effect from 20th October, 2014 and requested to refund the security deposit and earnest money deposit and other dues to the petitioner immediately. It is submitted by the learned counsel that the said letter was also delivered by the petitioner in the office of the Divisional Railway Manager and also C.C.M. - Churchgate on 17th October, 2014 itself.

12. The petitioner submits that on 7th November, 2014, Deputy

Chief Commercial Manager (F.M.) issued a show cause notice to the petitioner alleging that the petitioner had stopped loading from 20th October, 2014 without any notice and if the petitioner would fail to operate the contract continuously for 10 days, the contract would be cancelled and the security deposit would be forfeited. The petitioner was further informed that the registration fees of the petitioner also would be forfeited and the petitioner would be debarred from entering into the tender notice for one year.

13. Learned counsel for the petitioner invited my attention to a letter dated 17th November, 2014 from the petitioner to the General Manager, Western Railways, Churchgate protesting against the said termination notice and reiterated that the petitioner had issued an advance notice of 60 days on 20th October, 2014 thereby terminating the contract. The petitioner called upon the respondents to refund the security deposit.

14. Learned counsel invited my attention to the affidavit of evidence filed by the petitioner and in particular in paragraphs 4 and 5 in support of the case of the petitioner that the petitioner had already sent a notice of termination dated 20th August, 2014 to the Deputy Manager (C) in compliance with clause 21.2 of the contract. Learned counsel invited my attention to the cross-examination of the witness examined by the petitioner by the respondents annexed at page 157 of the arbitration petition. He submits that even in the cross-examination of the said witness examined by the petitioner, he had deposed that out of two copies delivered by the petitioner of the notice of termination, only one copy was given back by the office of Deputy Railway Manager (C) to the petitioner as an

acknowledgement.

15. The petitioner had kept that copy with himself and did not deliver the said copy to any office. In respect of letter dated 17th October, 2014 also the witness examined by the petitioner deposed that in that case also only one copy was given back to him as an acknowledgement by the office of the Deputy Railway Manager though the petitioner had submitted the copies of the said letter to the Western Railways as well as the Deputy Railway Manager, Mumbai. It is submitted that the petitioner had thus proved by leading evidence that the petitioner had already exercised the option by issuing 60 days advance notice of termination under clause 21.2 of the contract entered into between the parties, which letter was duly delivered to the concerned office.

16. Learned counsel for the petitioner invited my attention to the relevant paragraph of the impugned award insofar as issue of termination of contract by the petitioner as well as on the issue of purported notice of termination by the respondents is concerned. It is submitted by the learned counsel that the learned arbitrator accepted the plea of the respondents that in all cases of hand delivery, original letter as well as the acknowledgement copy with hand delivery stamp is handed over to the person who approaches for seeking such delivery of the document. This system was allegedly followed in Mumbai division since long.

17. On occurrence of the said dispute by the petitioner, the issue was investigated by the Division and the said practice of handing over the original letter to the person approaches for said

delivery has been now discontinued. Learned arbitrator recorded that while examination and cross-examination it was brought to the notice that the claimant had taken advantage of the lacuna of R & D system. The leaseholder had not bothered to make administration aware about the action of serving notice though he was available at the loading point as pointed out by administration that he had indented for attachment of VP by the subject train in the name of BVM Cargo. On these grounds, the learned arbitrator rejected the claim made by the petitioner.

18. It is submitted by the learned counsel that the learned arbitrator in the impugned award did not consider the deposition made by the witness of the petitioner in the affidavit in lieu of examination in chief filed by the petitioner to prove various claims made by the petitioner and also did not consider the fact that there was no cross-examination on the deposition of the witness of the petitioner in the said affidavit in lieu of examination in chief except few questions on the issue of receipt of notice of termination issued by the petitioner or not. He submits that in the entire award the Arbitral Tribunal has ignored the vital and crucial evidence led by the petitioner.

19. It is submitted by the learned counsel that the Arbitral Tribunal relied upon the material alleged to have been not brought on record by the respondents in respect of the alleged investigation carried out by the respondents about the practice followed by the respondents regarding delivery of document without placing such material on record and without giving an opportunity to the petitioner to deal with such alleged practice. He submits that the petitioner had

proved the factum of delivery of the said notice of termination under clause 21.2 of the contract.

20. Learned counsel for the petitioner strongly placed reliance on the judgment of the Supreme Court in case of **Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49** and in particular paragraphs 31, 42 and 42.2. He also placed reliance on the judgment of the Supreme Court in case of **Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India 2019 SCC OnLine SC 677** and in particular paragraphs 31, 40 and 42 and would submit that since the learned arbitrator has ignored the vital evidence produced by the petitioner which demonstrates patent illegality in the arbitral award, the entire award is vitiated and deserves to be set aside.

21. It is submitted by the learned counsel that since the petitioner had exercised his right under clause 21.2 of the contract and had issued 60 days advance notice for termination of the contract, the respondents could not have therefore terminated the contract and forfeited the security deposit, earnest money deposit and registration fees.

22. Insofar as the claim no.2 is concerned, learned counsel for the petitioner invited my attention to the findings of the learned arbitrator at pages 196 and 197 of the arbitration petition. He submits that the said claim for refund of Rs.9,82,938/- advance freight paid for 8 days is rejected by the Arbitral Tribunal on the ground that it had gone through specific provision of contract and policy and had observed that it was enabling clause provided in the agreement

based on satisfaction of the competent authority. Learned arbitrator has rejected the claim on the ground that it was not the right of the petitioner to claim such refund as lease space remained unutilized at the cost of Railways. The respondents had rejected the plea sought by the petitioner after examining the circumstantial evidence.

23. Learned counsel for the petitioner placed reliance on clause 5.1 of the contract and would submit that since the advance lump-sum lease freight made by the petitioner could not be adjusted in view of the contract having being terminated by the petitioner the said amount was liable to be refunded by the respondents to the petitioner. He submits that there was no discretion granted to the respondents to refund the said amount or not as erroneously held by the learned arbitrator. He submits that the finding of the learned arbitrator is contrary to clause 5.1 of the contract and shows patent illegality.

24. Insofar as claim nos.3 and 4 are concerned, learned counsel for the petitioner invited my attention to various findings of fact rendered by the learned arbitrator while rejecting these claims which claims were for refund / freight adjustment and were rejected on the ground that no specific evidence was brought on record by the petitioner in support of these claims. Learned counsel did not make any additional submission on these claims.

25. Insofar as claim no.5 is concerned, it is submitted by the learned counsel that though the learned arbitrator came to the conclusion that in the cross-examination it was reflected that in five instances, the fact of "left behind packages" were established as per

the letter dated 11th December, 2015 addressed by the respondents, the respondents should work out proportionate lease freight due for refund to meet ends of justice and arrange to pay to the leaseholder under advice to the Arbitral Tribunal. He submits that no such directions could be issued by the Arbitral Tribunal to the respondents to work out proportionate lease freight. Learned Arbitral Tribunal itself ought to have adjudicated upon the said claim having rendered a finding in favour of the petitioner. The award in this regard is incomplete and cannot be enforced in law.

26. Insofar as claim no.6 is concerned, learned counsel appearing for the petitioner submits that in respect of this claim also, Arbitral Tribunal instead of adjudicating upon this claim made by the petitioner has directed the respondents to take judicious decision and to convey the decision to the petitioner. Learned arbitrator has also directed the respondents to get the issues on subject of claimed leave pending with the Northern Railway sorted out and reply to the leaseholder with reasoned decision within a period of one month from the date of receipt of award. He submits that no such directions could be issued by the Arbitral Tribunal to the respondents to sort out the issue and to convey the decision to the petitioner.

27. Insofar as the claim no.7 is concerned, it is submitted by the Arbitral Tribunal that the said claim for interest is rejected by the learned arbitrator on the ground that the said claim was outside the scope of agreement. It is submitted that since the respondents had refused to pay the legitimate dues of the petitioner, the respondents were also liable to pay interest under section 31(7)(a) of the Arbitration Act. There was admittedly no bar under the contract from

making payment of interest by the respondents to the petitioner. He submits that the finding rendered by the Arbitral Tribunal shows patent illegality.

28. Insofar as claim no.8 is concerned, it is submitted by the learned counsel that the claim for Rs.14,58,470/- against the theft cases made by the petitioner is rejected by the Arbitral Tribunal on the ground that the provisions in the agreement are silent about the compensation to be paid to the leaseholder in case of theft. He submits that the Arbitral Tribunal has held that the theft is a criminal act of unknown persons and as such separate machinery is provided by the Railways to deal and prevent such instances. Reported matters are still under investigations of security officials and thus the claim is rejected as beyond the scope of the agreement.

29. Learned counsel invited my attention to clauses 16.1 and 16.2 of the contract which deals with the rights of the parties in case of theft. It is submitted that it was the obligation of the respondents to register the F.I.R. and to furnish the copy thereof upon the petitioner. The petitioner was not served with any copy of F.I.R. The respondents did not produce any copy of F.I.R. lodged by the respondents in respect of the theft brought to the notice of the respondents by the petitioner. The finding of the learned arbitrator shows patent illegality and is contrary to the terms of the contract. Learned arbitrator has not rejected the claim of the petitioner on merits.

30. Insofar as claim no.9(A) is concerned, the learned arbitrator has rejected this claim on the ground that the said claim

was made afterthought and no evidence was brought on record to establish that 3000 Kg parcel was left behind. Learned counsel submits that the petitioner was directed by the respondents to shift the said parcel which instructions were followed by the petitioner. The petitioner had notified the said claim immediately. Learned counsel placed reliance on the document annexed at Exhibit C-15 in support of this submission. He submits that the finding rendered by the Arbitral Tribunal is in ignorance of the material and vital document produced by the petitioner and shows patent illegality.

31. Insofar as claim no.9(B) is concerned, learned counsel invited my attention to the findings of fact rendered by the Arbitral Tribunal while rejecting this claim made by the petitioner regarding octroi charges.

32. Insofar as claim no.9(C) is concerned, it is submitted that the said claim is rejected by the Arbitral Tribunal on the ground that the same was beyond the scope of the agreement. He submits that since the petitioner had suffered loss, the petitioner was entitled to seek claim of compensation under section 73 of the Contract Act. There was no bar under the contract from payment of compensation payable by the respondents to the petitioner in case of breach of contract by the respondents. Arbitral Tribunal has not rejected the claim on merits.

33. Mr.Agrawal, learned counsel for the respondents on the other hand submits that the contract awarded was for 350 days in a year. The contract was for a period of three years with effect from 25th February, 2012 till 24th February, 2015. The petitioner was required to

deposit ½ of the lease rent with the respondents. He submits that though under clause 21, right to terminate the agreement vests in both the parties, the petitioner in this case had failed to prove that the notice of termination allegedly issued by the petitioner was served upon the respondents. He submits that the petitioner took advantage of the procedure followed by the dispatch department of the respondents and though collected both the copies after dispatch department of the respondents had affixed the seal showing the acknowledgement, the petitioner did not deliver the original of the said alleged letter to the concerned department.

34. It is submitted that the Arbitral Tribunal has rendered the findings of fact which cannot be interfered with by this Court in this petition. The petitioner not having delivered at all the letter of termination to the concerned department, the purported letter of termination issued by the petitioner did not come into effect. The petitioner not having delivered the parcel in accordance with the provisions of contract, the respondents were justified in terminating the contract and to forfeit the security deposit and registration charges.

35. Learned counsel for the respondents invited my attention to the cross-examination of the respondents' witness by the petitioner on claim no.1. Learned counsel for the respondents however, could not indicate whether any affidavit in lieu of examination in chief was at all filed by the respondents before the Arbitral Tribunal.

36. It is submitted by the learned counsel that the quality and quantity of evidence considered by the Arbitral Tribunal cannot be re-

appreciated by this Court. The petitioner was fully aware of the departmental procedure followed by the respondents regarding termination of contracts as the petitioner had carried out other contracts awarded by the respondents. Learned counsel for the respondents submits that the respondents in this case did not file any counter claim.

37. Mr.Khan, learned counsel for the petitioner in rejoinder submits that the Arbitral Tribunal has not disclosed any reasons as to why claim no.1 was rejected. The respondents admittedly did not file any counter claim. He submits that since the Arbitral Tribunal has not considered vital evidence produced by the petitioner, the arbitral award is totally vitiated and shows patent illegality and thus deserves to be quashed and set aside.

REASONS AND CONCLUSION :

38. I shall first decide the issue whether the petitioner had terminated the contract by exercising rights under clause 21.2 of the Contract by issuing 60 days advance notice to the Railway Administration, whether such notice was duly received by the Railway Administration and if so whether respondents could have terminated the contract thereafter by exercising rights under clause 21.1 of the Contract and could forfeit the security deposit and registration fees submitted by the petitioner.

39. A perusal of Clause 21.1 of the Contract indicates that under the said clause Railway Administration has right to terminate the operation of this contract for any reason whatsoever after serving

one month notice to the lease holder. Under Clause 21.2 of the Contract on the other hand, the lease holder has right to terminate the agreement for reasons whatsoever after serving 60 days notice to the Railway Administration. The lease holder however is not allowed to terminate the contract before one year, in case of any contract whether it is on short term or long term and if it does so, its security deposit and registration fee shall be forfeited and he shall be debarred from entering into any tender for one year.

40. In the facts of this case, it was the case of the petitioner that after 2.5 years of the date of the contract awarded to the petitioner, due to various reasons recorded by the petitioner in the letter dated 20th August, 2014, the petitioner had proposed to discontinue the lease contract and accordingly issued a notice on 20th August, 2014, which was served upon the Divisional Railway Manager's office on 20th August, 2014. The petitioner served another notice dated 16th October, 2014. On 17th October, 2014 referring to the earlier notice dated 20th August, 2014 and requesting the respondents to refund the security deposit, earnest money deposit, registration fees and other dues.

41. The petitioner had admittedly filed an affidavit of evidence before the Arbitral Tribunal in the month of March, 2016. In paragraphs 4 to 6 of the said affidavit in lieu of examination-in-chief, the petitioner deposed that he himself had visited the office of Divisional Railway Manager's office with the notice for termination dated 20th August, 2014. He had given the said letter to the clerk of the respondents by hand delivery. He had two copies of said letter, one as original for the respondents to be retained and second as

office copy for the use of the petitioner's office. The clerk on behalf of respondents acknowledged the receipt of the said letter and retained the original copy with him and handed-over the office copy to the petitioner after putting a rubber stamp on it.

42. The said witness further deposed that the the carbon copy was handed-over to the petitioner by the said clerk and he left the premises of the respondents. Similarly, in paragraph 5 of the said affidavit of evidence, the petitioner deposed that he had served another letter dated 16th October, 2014 in which there was a reference to the letter of termination dated 20th August, 2014 and had requested the respondent to arrange the refund of security deposit, the earnest money deposit and other dues. The said letter was addressed to DRM (C), Mumbai Central of the respondents and also with a copy to the General Manager Building, CPTM. The said letter was submitted in three sets i.e. one for the respondents, one for the Divisional Manager and one as the office copy of the petitioner with acknowledgment on it. The name of the clerk who have accepted the said notice was Mr. Babu, who had put the stamp of the respondents and also signed on those copies in token of acknowledgment thereof.

43. The witness examined by the petitioner was cross-examined on this aspect. The petitioner was asked whether in his case, he had collected the original letter from R & D Section for onwards delivery to Commercial Department and was done by the said Division in hand delivery cases when both the sets of papers i.e. original and acknowledged copy were given back to the party to deliver the letter at his own responsibility to the consignee/addressee, the petitioner deposed that out of the two

copies, only one copy was given back to him as an acknowledgment. He had kept that copy with him and did not deliver it to any office.

44. In respect of the letter dated 17th October 2014, the petitioner was asked as to how he had given original letter by hand delivery to Commercial Branch. The petitioner deposed that in that case also only one copy was given back to him as acknowledgment. He had submitted two copies of the said letter to both Western Railway Head Quarter as well as DRM, Mumbai Central office. The petitioner also deposed that no letter of termination was received by the petitioner from Divisional office. The termination letter was received from Chief Commercial Manager, Western Railway Head Quarter office. The witness admitted that he was aware of the railway procedure and he had received the letter of termination of the contract in past.

45. A perusal of the record further indicates that though the respondents did not file any affidavit in lieu of examination-in-chief, the petitioner was allowed to ask few questions to the witness of the respondents, which are at page nos. 153 and 154 of the arbitration petition. The petitioner asked a question as to how the witness was deposing in the written statement that the petitioner had suppressed the fact of delivery of notice. The witness deposed that the matter was got investigated through AMM/BCT, who was controlling officer for R & D Section. According to his report dated 31st October, 2017, both the copies were handed back to the party for delivering to the addressee at his own responsibility. He further deposed that as the division was not in receipt and lease holder produced no evidence of handing over the said letter dated 20th August, 2014 from the date of

R & D stamp and subsequently the copy of letter dated 20th August, 2014 was enclosed with the letter dated 16th October, 2014 by hand delivery, it clearly proves that the notice copy was not delivered in time and suppressed the fact of delivery.

46. It is clear that though the petitioner had filed a detailed affidavit in lieu of examination-in-chief on the issues including the issue of service of notice of termination, there was hardly any cross-examination on the said issue. On the contrary, by cross-examining the petitioner, the respondents have proved the case of the petitioner. The respondents did not examine any witness, who had alleged to have submitted the report dated 31st October 2014. No such report was forming part of the record before the Arbitral Tribunal.

47. A perusal of the finding rendered by the Arbitral Tribunal indicates that the Arbitral Tribunal has rejected the claim no.1 and the plea of the petitioner having submitted the letter of termination under Clause 21.2 of the Contract by following alleged practice followed by the department of the respondents in respect of the service of the letter of termination. Though, the petitioner had in his evidence specifically referred to the name of the clerk who had affixed the rubber stamp of the respondents on the copy of the two letters served by the petitioner and had also affixed his signature, the respondents did not examine the said clerk Mr. Babu. The Arbitral Tribunal has totally ignored the vital evidence produced by the petitioner to the effect that the petitioner had exercised his right to terminate the contract under Clause 21.2 of the Contract by submitting 60 days advance notice of termination.

48. In my view, since the petitioner had already terminated the contract by exercising rights under Clause 21.2 of the Contract, which notice was duly received by the respondents in compliance with the said provision, subsequent termination of the contract by the respondents on 18th/19th March, 2015 and forfeiting the security deposit and registration fees is contrary to the terms of the contract. In my view, the findings rendered by the Arbitral Tribunal shows total non application of mind and shows patent illegality. The Arbitral Tribunal could not have considered departmental procedure of delivery of letters which was neither forming part of record nor proved by the respondents. Award in respect of claim no.1 is set aside.

49. So far as claim no.2 is concerned, the petitioner had made a claim for refund of advance freight in the sum of Rs.9,82,938/- paid for 8 days, which could not be adjusted due to various reasons. The petitioner had placed reliance on clause 5.1 of the Contract in support of the claim no.2. A perusal of the impugned award in so far as claim no.2 is concerned, it indicates that the Arbitral Tribunal has rejected the said claim on the ground that the said clause 5.1 was an enabling clause provided in the agreement, which was based on the satisfaction of the competent authority. It is further held that the said clause did not create any right in the petitioner to claim the refund of the amount due to any unutilization of the leased Space. In my view, this finding of the Arbitral Tribunal is *ex-facie* contrary to Clause 5.1(ii) of the Contract. The said clause does not provide any discretion on the respondents to refuse refund of such amount or not. The Arbitral Tribunal has not rejected this claim on merits but has rejected, proceeding on the premise that the said Clause 5.1 of the Contract conferred a discretionary power upon the respondent to grant such

refund or not. This interpretation of the contract is *ex-facie* impossible interpretation. The award thus shows patent illegality on this ground also. This part of the award also is set aside.

50. In so far as claim nos. 3 and 4 are concerned, I have perused the reasons recorded by the Arbitral Tribunal. The Arbitral Tribunal has rendered a finding that no specific evidence was brought on record by the petitioner to establish that specific quantity was left behind due to the shortage of time provided for loading. In my view, this finding of fact rendered by the Arbitral Tribunal not being perverse cannot be interfered with by this Court in this petition under Section 34. In my view, the said finding is rendered after considering the evidence produced by the petitioner. No case for interference is made out in respect of this claim. This part of the award is accordingly upheld.

51. In so far as claim no.5 is concerned, the petitioner had made this claim in the sum of Rs.9,20,806/- and Rs.61,38,711/- on the ground that parcel van was not placed for loading for three hours as per agreement as sometime the parcel van/train was on the platform only for 15 to 20 minutes at Mumbai Central Station instead of 35 minutes resulting in various packages left behind on the railway station.

52. The witness examined by the petitioner was asked a question in the cross-examination whether the petitioner had brought out the issue of left over parcel to the notice of parcel staff at the station and if so to produce the evidence, if any. The witness examined by the petitioner deposed that he had brought out the issue

of left over parcel to the notice of parcel staff at the station. He did not have memos but he would like to submit wharfage receipt issued by the administration showing 29 in numbers. The witness also deposed that he had approached the GRP/RPF for filing of FIR along with joint report for such cases of left over parcels, however, they refused to register the FIR.

53. A perusal of the award in so far this claim is concerned, indicates that the Arbitral Tribunal instead of considering the said claim on the basis of the evidence and pleadings on record, observed that during the cross-examination of the respondents, it was revealed that in five instances the fact of left behind packages was established as per letter dated 11th December 2015 of the respondents. It was also admitted by the respondent that in five cases, the left behind packages was on railway account division. The Arbitral Tribunal directed the respondents to workout the proportionate lease freight due for refund to meet the ends of natural justice and to arrange and pay the due sum to the petitioner under advice to the Arbitral Tribunal. The petitioner also had led oral evidence on this issue. The witness examined by the respondents in the cross-examination by the petitioner on this issue, confirmed that the record at the railway station shows that there were five cases of "left behind parcels" after departure of the train.

54. In my view, the Arbitral Tribunal ought to have been adjudicated upon the said claim itself and could not have directed the respondents to consider the said claim in the impugned award with the direction to inform about the progress to the Arbitral Tribunal. Several findings were rendered in favour of the petitioner. The

impugned award shows patent illegality and thus this part of the award deserves to be set aside. Such directions issued by the Arbitral Tribunal are not enforceable. This part of the award is accordingly set aside.

55. In so far as claim no.6 is concerned, the petitioner has made a claim for refund of Rs.29,88,391/- towards the freight paid but not adjusted. A perusal of the reply filed by the respondents to this claim made by the petitioner indicates that it was the case of the respondents that the competent authority had approved for freight adjustment on account of Delhi Election, LBT Strike / Bharat Bandh, Maharashtra Election on various dates for outward traffic. However, in case of VPU of train No. 19023-24 on round trip passes the freight adjustment may be granted subject to the approval of Senior DCM-LDLS for the freight adjustment/special leave for inward traffic. The respondent had forwarded the request of the petitioner for special leave to Senior DCM-LDLS, however, no reply had been received from Senior DCM-LDLS for the special leave for the said occasion.

56. A perusal of the award indicates that the Arbitral Tribunal has rejected this claim on the ground that the enabling provisions are based on the satisfaction of the competent authority and does not confer any right on the petitioner. In my view, this conclusion of the Arbitral Tribunal is contrary to the provision of the contract and totally perverse and shows patent illegality. In so far as pending applications of the petitioner are concerned, the Arbitral Tribunal directed the Western Railway, BCT Division to take judicious decision immediately and to convey the decision to the petitioner. The Arbitral Tribunal also directed the respondents to get the issues of subject of claimed due

pending with the Northern Railway be sorted out and to reply the petitioner with reason within the period of one month from the date of the receipt of the award. In my view, the Arbitral Tribunal ought to have decided the claim itself and could have issued such directions to the respondents to sort out the issue and to take a judicious decision. The award cannot be enforced in law and is incomplete. The findings rendered by the Arbitral Tribunal shows patent illegality. The award in respect of the claim no.6 is accordingly quashed and set aside.

57. In so far as claim no.7 is concerned, the petitioner had made a claim for interest @ 24% on the total claim. The Arbitral Tribunal has rejected the said claim for interest on the ground that the said claim was outside the scope of the contract entered into between the parties. It is not the case of the respondents that there was any bar under the provisions of the contract for payment of interest to the contractor. If the Arbitral Tribunal would have allowed any of the claims made by the petitioner, the Arbitral Tribunal had powers to award interest from the due date till payment and/or realization under Section 31(7)(a) of the Arbitration Act, in view of their being no contract to the contrary. This part of the award is *ex-facie* contrary to Section 31(7)(a) of the Arbitration Act and also contrary to the provisions of the contract entered into between the parties and shows patent illegality and is accordingly quashed and set aside.

58. In so far as claim no. 8 is concerned, the petitioner had made claim of Rs.14,58,470/- arising out of theft cases, which were certified by the railway authorities, according to the petitioner. The

petitioner had relied upon the joint statement before the Arbitral Tribunal and had invoked Clauses 16.2 and 15.4 of the Contract. A perusal of the arbitral award in so far as this claim is concerned, indicates that the Arbitral Tribunal rejected this claim on the ground that the same was beyond the scope of agreement. It is held that the provisions in the agreement are silent about the compensation to be paid to lease holder in case of theft. It is further held by the Arbitral Tribunal that theft is a criminal act of unknown person and as such separate machinery is provided by railway under RPF/GRP to deal and prevent such instances. Reported matters are still under investigation of Security Officials.

59. A perusal of Clause 16.2 of the Contract, indicates that FIR has to be lodged with the GRP and a copy of the same will be given to the lease holder. The said provision does not bar the contractor from claiming any compensation out of such theft. In my view, this part of the award rejecting the said claim on the ground that the same was beyond the scope of agreement is contrary to the terms of Clause 16.2 of the Contract. The Arbitral Tribunal had not rejected the said claim on merits. The award shows patent illegality and non-application of mind and thus is quashed and set aside.

60. In so far as claim no. 9A is concerned, this claim arose on the ground that the petitioner was compelled to get loaded/ transferred the packages from one VP to another VP attached with the same train on 20th August 2014. In shifting the packages at Surat Station, the lease packages with weight admeasuring 3000 kg was left behind because of short of time and not properly stacked in next VP. The Arbitral Tribunal rejected this claim on the ground that the

said claim was after thought and no evidence was produced on record by the petitioner to establish that 3000 kg parcel was left behind. The learned Counsel for the petitioner invited my attention, to the document annexed at Exh.(C-15) in support of his submission that this claim was immediately lodged by the petitioner. The Arbitral Tribunal ignored the vital evidence while rejecting the said claim and has arrived at a perverse finding that the said claim was made as and by way of after thought and that also without any evidence. In my view, the findings rendered by the Arbitral Tribunal in ignorance of the vital document would amount to patent illegality and thus this part of the award also is set aside.

61. In so far as the claim no. 9B and 9C are concerned, the petitioner had claimed loss or profit in the sum of Rs.64,39,296/- and prayed for realization of registration fees of the petitioner respectively. The Arbitral Tribunal has rejected both these claims on the ground that these claims were beyond the scope of agreement. It is held that there did not exist any provision for claiming business loss etc. It is not the case of the respondents that any of the provisions of the contract bars the payment of compensation on the ground of unlawful termination of the contract or in case of breach of contract by the respondents. The Arbitral Tribunal has not rejected this claim on the merits of the claim. This part of the award shows patent illegality and is quashed and set aside.

62. Mr. Agrawal, learned Counsel for the respondents could not point out any affidavit in lieu of examination-in-chief filed by the respondents, if any, before the Arbitral Tribunal. The Arbitral Tribunal followed a very unique procedure by allowing the petitioner to ask few

questions in cross-examination without there being any evidence led by the respondents. Such procedure followed by the Arbitral Tribunal is unknown to law. Be that as it may, though there was no cross-examination on most of the part of deposition of the petitioner, the Arbitral Tribunal having overlooked and ignored the uncontroverted part of the vital evidence in the impugned award, the findings rendered by the Arbitral Tribunal overlooking and ignoring the vital and material piece of evidence would fall under the ground of patent illegality.

63. The Hon'ble Supreme Court in case of **Ssangyong Engineering and Construction Co. Ltd.** (supra) has held that a decision which is perverse, as understood in paragraphs 31 and 32 of the Judgment of Supreme Court in case of **Associate Builders v/s. Delhi Development Authority, (2015) 3 SCC 49**, will no longer be a ground for challenge under the "Public Policy of India" but would certainly amount to a patent illegality appearing at the face of the award. It is held that a finding based on no evidence at all or an award which ignores vital evidence in arising at its decision would be perverse and liable to be set aside on the ground of patent illegality. It is also held that a finding based on documents taken on the back of the parties by the Arbitrator would also qualify as a decision based on no evidence in as much as such decision is not passed on evidence led by the parties and therefore would also have to be characterized as perverse.

64. In my view, the Judgment of the Hon'ble Supreme Court in case of **Ssangyong Engineering and Construction Co. Ltd.** (supra) clearly applies to the facts of this case. Several findings

rendered by the Arbitral Tribunal as already referred to aforesaid in respect most of the claims having been rendered totally ignoring the vital evidence produced by the petitioner, being perverse demonstrate a clear case of patent illegality and thus deserves to be set aside. In my view, there is no merit in the submission of the learned Counsel for the respondents that since in this case the Arbitral Tribunal had rendered various findings based on the evidence on record, same cannot be re-appreciated by this Court. In *catena* of the decisions, it is held by the Hon'ble Supreme Court and this Court that findings rendered by the Arbitral Tribunal if are perverse and as recently held in case of **Ssangyong Engineering and Construction Co. Ltd.** (supra), such perverse finding of fact can be set aside on the ground of patent illegality.

65. Mr. Agrawal, learned Counsel for the respondents did not dispute that no counter claim was filed by his client before the Arbitral Tribunal.

66. Though, this Court has held that the findings in respect of most of the claims rendered by the Arbitral Tribunal while rejecting these claims are totally perverse, contrary to the terms of the contract and ignoring the vital evidence produced by the petitioner and shows patent illegality, this Court is not empowered to allow any such claims, which are rejected by the Arbitral Tribunal. This Court can only set aside or upheld the award. Court can modify any part of the Arbitral Award, which is severable. It is held by the Hon'ble Supreme Court in case of **Mcdermott International Inc v/s. Burn Standard Co. Ltd & Ors. 2006 (11) SCC 181**, that Court cannot correct an error of the Arbitral Tribunal and make an award, Court cannot allow

a rejected claim. The principles laid down by the Hon'ble Supreme Court in the said Judgment are applicable to the facts of this case. I am respectfully bound by the principles laid down by the Supreme Court in the said judgment.

67. I, therefore, pass the following order:-

i). Arbitral Award in respect of Claim Nos.1, 2, 5, 6, 7, 8, 9A, 9B and 9C is set aside. Award in respect of Claim Nos.3 and 4 is upheld.

ii). Commercial Arbitration Petition No.36 of 2016 is partly allowed.

iii). The petitioner would be entitled to invoke arbitration agreement recorded in the contract again in respect of Claim Nos. 1, 2, 5, 6, 7, 8, 9A, 9B and 9C.

iv). There shall be no order as to costs.

(R.D. DHANUKA, J.)