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

ARBITRATION PETITION NO. 1150 OF 2016
WITH
ARBITRATION PETITION NO. 1151 OF 2016

Mr.V. Krishnamurthy ...Petitioner
vs
Union of India & Ors. ...Respondents

WITH
ARBITRATION PETITION (L) NO. 923 OF 2016
WITH
ARBITRATION PETITION (L) NO. 924 OF 2016

Union of India & Ors. ...Petitioner
vs
Meena Advertisers & Anr. ...Respondents

Mr.Rajesh Gehani with M.M. Agavekar, Sujal Vikhare for Petitioner in ARBP 1150-2016 & 1151-2017 and for Respondent No.1 in ARBPL 923-2016 and 924-2016.
Mr.Induprakash K. Tripathi for Respondent Nos.1 to 3 in ARBP 1150-2016 & 1151-2017 and for Petitioner in ARBPL 923-2016 and 924-2016.

CORAM : S.C.GUPTE, J.

DATE : 8 APRIL 2019

P.C. :

Heard learned Counsel for the parties.

2 These are cross petitions filed, respectively, by M/s.Meena Advertisers, who are advertising contractors of Railways, and the Railways. The petitions arise out of a reference involving the contractor's claim in respect of bulk advertising rights in the ticketing and non-ticketing zones of Churchgate railway station. The first two petitions are by the contractors,

whereas the other two are by Union of India through Divisional Commercial Manager, Western Railway Administration.

3 The contractor, Meena Advertisers, ('contractor') had submitted a bid in response to a tender notice issued by Western Railway Administration ('Railways') for bulk advertising rights *inter alia* at Churchgate station for both ticketing and non-ticketing zones. The areas made available for display of advertisements, their locations and details, number of displays, specifications, etc. were stipulated in the tender document. In pursuance of the contractor's bid, a contract for bulk advertising rights for both ticketing and non-ticketing zones was awarded by the Railways to the contractor. The contractor's grievance was that for some specified periods during the course of the contract, electricity was either not provided by the Railways or not provided of the required measure and as a result, the contractor could not display glow signs in the designated areas in ticketing and non-ticketing zones. The details and particulars in this behalf were submitted before the arbitral tribunal and these form part of the award. The second aspect to the controversy was relocation of some sites within the designated areas of advertising, due to which the contractor could not display advertisements. The contractor claimed damages in the nature of waiver of part of licence fees towards these claims. The Railways, for their part, encashed a bank guarantee furnished by the contractor towards payment of licence fee dues. The contractor's claim of refund of licence fee was, thus, based on its inability to display advertisements for want of electricity and by reason of relocation of sites, and interest on the principal amount due in this behalf.

4 The learned arbitrator, who was an officer of the Railways, by his two separate awards concerning, respectively, the ticketing and non-ticketing zones of Churchgate railway station, considered different periods of contract for the contractor's claims. In the case of ticketing zone sites, the learned arbitrator considered in all five periods, namely, from (i) 1.11.2005 to 30.4.2006, (ii) 1.5.2006 to 31.10.2006, (iii) 1.11.2006 to 30.4.2007, (iv) 1.5.2007 to 31.10.2007, (v) 1.11.2007 to 14.3.2008 (i.e. the date of termination of the contract).

5 So far as the first period is concerned, the contractor’s case was that between 1.11.2005, i.e. the date of commencement of the contract, and till 12.11.2005, there was no electric supply at all and from 13.11.2005 until 9.12.2005, the supply was far too inadequate, i.e. a mere 35% of the required quantity in KW. The arbitrator considered the documentary evidence placed by the parties before him. From this evidence, which *inter alia* consisted of contemporaneous correspondence between the parties, the arbitrator observed that there was only one metre of 3-phase, whilst the rest were single phase metres as per the Railways’ own letter dated 15.11.2005. The arbitrator went by a common understanding that for the purpose of glow signs, the requirement was of 3-phase metres. Even the lone 3-phase metre was installed only on 13.11.2005 and its capacity was 5.6 KW; the other 3-phase metre was provided on 9.12.2005 with a capacity of 4.9 KW. The arbitrator also noted the Railways’ further letter of 12 January 2006 taking up a position that requisite numbers of 3-phase metres were provided only in the last week, i.e. in the week before 12 January 2006. Since that letter did not indicate any particular date, the date was reckoned by the learned arbitrator in the

middle of the week commencing from 5 January 2006 and ending on 12 January 2006. The date '9 January 2006' was, accordingly, treated by the learned arbitrator as the date of availability of the metres (though inadequate for the whole of the requisite supply). Thus, the arbitrator held that from 1.11.2005 till 12.11.2005, there was no electricity supply, whilst from 13.11.2005 till 9.12.2005, there was a total number of 5.6 KW electric supply (18.67% of the total, i.e. 30 KW, supply required for the contract) and from 10.12.2005 to 8.1.2006, a total of 10.5 KW electric supply (i.e. 35% of 30 KW). Considering the shortfall in power supply, the arbitrator granted a waiver on a pro rata basis of the licence fee corresponding to the shortfall and accordingly, held that the claimant was entitled to a total adjustment of licence fee in the sum of Rs.26,74,275/-. The arbitrator further considered the contractor's claim for not being able to use 50% of sanctioned power from 9.1.2006 to 30.4.2006. The arbitrator considered in this behalf the contractor's request letter dated 19 May 2006 asking the Railways to provide electrical power connection to glow signs on urgent basis and also that the contractor was not able to operate even 50% of glow signs which were required. The arbitrator also considered that during this period, at many locations, the previous contractors of Railways had continued to occupy the respective spaces allotted to them; their glow signs could be removed and new glow signs installed by the contractor only later. The arbitrator observed that though the complaint about electric supply was addressed to the Railways by their letter of 12 January 2006 (referred to above), the Railways had not responded to the contractor's letter of 19 May 2006 which also dealt with inadequate electric connections which could permit operations only of about 50% of glow signs. The arbitrator, in the premises, held the contractor's claim to be admissible for reduction of 50% of corresponding licence fees for 111 days during 9 January 2006 and 30 April 2006 and accordingly, awarded a sum of Rs.27,76,386/-. The contractor's claim for the first period was, accordingly, quantified at an aggregate sum of Rs.54,50,662/- (Rs.26,74,275/- plus Rs.27,76,387/-).

6 For the second period, the arbitrator considered inability of the contractor to display signs on account of unavailability of 50% sanctioned power from 1.5.2006 to 19.5.2006. For the same reason, which was discussed for the claim in the first period, this claim was awarded in the sum of Rs.9,50,475/- towards denial of 50% locations on account of non-supply of electricity for the period in question. The arbitrator also considered for this period the contractor's claim for removal of five sites of 180 sq.ft. each as per instructions of the Railways. The Railways had advised the contractor to remove boards at these locations and shift them to the wall. According to the contractor, the earlier locations were prime locations, whereas the relocated sites were not acceptable to it and it did not, accordingly, display advertisements at the relocated sites. The Railways, in this behalf, had invoked clause 2.12 of the contract agreement, whereunder they had reserved the right to change the locations of displays from existing locations to other locations as might be considered convenient for the purpose of working of the Railways on the instructions of the General Manager. The arbitrator observed that there was no mention in the Railways' letter of any instructions from the General Manager in this behalf. Besides, the arbitrator held that clause 2.12 required mutual consent for identifying relocated sites, though it permitted the Railways relocation of sites *per se*. The arbitrator observed that the sites offered at

the wall not being acceptable to the contractor and in fact protested by it, the contractor was entitled to refund of licence fee corresponding to the area of the sites removed. Considering that out of 900 sq.ft. claimed, which included five sites, the site of platform no.1/2 Beam 12 was repeated, the claim was considered admissible only for four sites admeasuring an area of 720 sq.ft. The arbitrator, thus, awarded refund of Rs.8,04,960/- towards non-display at this area in the second period. The aggregate award for the second period, thus, worked out to Rs.17,55,435/- (Rs.9,50,475/- plus Rs.8,04,960/-).

7 Coming now to the third period, for the same reasons which had been discussed in connection with the earlier periods, the contractor's claim for short supply of electricity was allowed. The contractor, vide letter dated 20 July 2007, had informed the Railways about want of electric supply at three sites admeasuring a total area of 840 sq.ft. for this period. The contractor's case about non-availability of supply at these sites and the Railways' response based on clause 2.2 of the contract were considered in the same light as in case of the corresponding claim for the second period. After considering the matter, thus, the arbitrator observed that the contractor was entitled to refund of Rs.10,67,040/- for this period towards its claim on account of non-display of advertisements. The arbitrator also considered for this period the contractor's claim for adjustment of Rs.2,65,113/- towards non-display due to removal of sites for 36 numbers of glow signs. The arbitrator considered in this behalf the Railways' own admission in their letter of 21.2.2008 that the sites were removed for OHE work and subsequently, relocated between 20.6.2007 to 21.10.2007. The arbitrator, accordingly, held that the contractor was

entitled to this adjustment. The arbitrator, accordingly, awarded the contractor's claim for adjustment of Rs.13,32,153/- (Rs.10,67,040/- plus Rs.2,65,113/-) for the third period.

8 For the fourth period, the claim was for non-display of signs due to relocation of sites of 900 sq.ft. area including five sites of 180 sq.ft. each. For the same reasons, as have been discussed for the periods referred to above, the arbitrator observed that after removing one site from out of these five sites claimed by the contractor (on account of repetition), its claim was admissible for four sites admeasuring an area of 720 sq.ft. and accordingly, held that the contractor was entitled to refund of Rs.10,67,040/- for this period. For relocation of sites for 36 numbers of glow signs, admeasuring a total area of 1288 sq.ft., the arbitrator, once again, went by the admission of the Railways in their letter of 21 February 2008, as in the case of the third period referred to above, and held the contractor to be entitled to adjustment of Rs.11,22,610/-. The arbitrator, accordingly, allowed adjustment of Rs.21,89,650/- (Rs.10,67,040/- plus Rs.11,22,610/-) for the fourth period.

9 For the fifth period, the claim was awarded for the same reason of relocation of sites admeasuring 720 sq.ft., as in the case of the earlier periods referred to above, for refund of Rs.9,20,700/-. In addition, the arbitrator awarded the contractor's claim in the sum of Rs.38,362/- on account of balance unused area equivalent to 30 sq.ft. because of OHE work in this particular period. As in the case of the earlier periods, the arbitrator went by the Railways' admission. The total sum awarded for the fifth period was Rs.9,59,062/- (Rs.9,20,700/- plus Rs.38,362/-).

10 The arbitrator also noted that from the period-wise discussion in the award, it was apparent that the contractor had sufficient amount to its credit at the time of termination of the contract; all payments were made in advance as prescribed by the Railways. The arbitrator, in the premises, made a tabular presentation, showing net claims towards refund/adjustment and observed that out of the contractor's claim of Rs.1,58,49,466/-, Rs.1,16,86,962/- was found to be admissible. The arbitrator found that there was a shortfall in the payment to the tune of Rs.1,08,63,252/- which was admissible. After making adjustment towards such shortfall from the contractor's admissible claim, the net claim was worked out to Rs.8,23,710/-.

11 Based on the discussion in the award, and taking into account the electricity security deposit and adjustment of the amount due to the contractor under another contract (Dadar contract), the arbitrator made his final award in favour of the Respondent contractor in the sum of Rs.46,25,886/-. The arbitrator rejected the Railways' counter-claim towards shortfall in payment and interest, and awarded interest on the contractor's claims at the rate of 6% per annum.

12 Coming now to the award in respect of the contractor's claims concerning non-ticketing zone sites, the learned arbitrator, as in the case of ticketing zones, considered in all five periods, namely, from (i) 1.11.2005 to 30.04.2006, (ii) 1.05.2006 to 31.10.2006, (iii) 1.11.2006 to 30.04.2007, (iv) 1.05.2007 to 31.10.2007, (v) 1.11.2007 to 14.03.2008 (i.e the date of termination of the contract.) .

13 So far as the first period is concerned, the contractor's case was that between 1.11.2005, i.e. the date of commencement of the contract, and till 12.11.2006, there was no electric supply and from 13.11.2005 until 9.12.2005, the electric supply was far too inadequate, i.e. merely 35% of the required quantity in KW, as in the case of ticketing zones. The arbitrator considered the documentary evidence placed by the parties before him. From the documentary evidence, which *inter alia* consisted of contemporaneous correspondence between the parties, the arbitrator observed that there was only one metre of 3-phase, whilst the rest of the metres were of single phase as per the Railways' own letter dated 15.11.2005. The arbitrator went by a common understanding that for the purpose of glow signs, the requirement was of 3-phase metres. The first 3-phase metre was installed only on 13.11.2005 and its capacity was 5.6 KW; the other 3-phase metre was provided on 9.12.2005 with a capacity of 4.9 KW. The arbitrator also noted the Railways' further letter of 12 January 2006 taking up a position that the requisite number of 3-phase metres were provided only in the last week, i.e. in the week before 12 January 2006. Since that letter did not indicate any particular date, the date was reckoned by the learned arbitrator in the middle of the week commencing from 5 January 2006 and ending on 12 January 2006. The date of provision of these metres was, thus, treated as 9 January 2006. This date was, accordingly, treated by the learned arbitrator as a date of availability of the metres. Thus, the arbitrator held that from 1.11.2005 till 12.11.2005, there was no electricity supply, whilst from 13.11.2005 till 9.12.2005, there was a total number of 5.6 KW electricity supply (i.e 18.67% of KW supply required for the contract order) and from 10.12.2005

to 8.1.2006 a total of 10.5 KW electric supply (i.e. 35% of 30 KW) was provided. Considering the shortfall in power supply, the arbitrator granted a waiver of licence fee on a pro rata basis of the licence fee corresponding to the period-wise shortfall and accordingly, held that the claimant was entitled to a total adjustment of licence fee in the sum of Rs.23,92,275/- towards non-availability of electric supply/insufficient electric supply. The arbitrator further considered the contractor's claim for adjustment of licence fee of Rs.8,07,251/- towards six sites for a total area of 437.25 sq.ft. which were not made available to the contractor for the entire first six monthly period i.e November 2005 to April 2006. The arbitrator took into consideration the contractor's request letter dated 29 May 2006 addressed to the Railways requesting the latter to provide electric supply for glow signs on urgent basis. The arbitrator held that as the claim in the first period was admissible on pro rata basis till 8.01.2006, a similar claim for want of space for the period from 01.11.2005 to 8.01.2006 would not be admissible for non-display of glow signs which could not be displayed for want of electricity, on account of want of space. The arbitrator held that the claims for the above sites were admissible except the first claim, i.e 10'x2' D/S (double side)=40 sq.ft. as the claimant was provided space for display of video instead of glow signs. Thus, according to the arbitrator the claim was admissible for 112 days to the tune of Rs.4,49,814/-. The arbitrator considered a further claim made by the contractor for three sites admeasuring a total area of 285 sq.ft., which were blocked by boot polish vendors thereby causing loss of advertising value for the contractor's sites for the period from November 2005 to April 2006. The arbitrator considered the Respondent's letter dated 21 February 2008, which reflected that boot polish vendors were on the site from long before the commencement of the contract. The arbitrator considered the Respondent's reply and held that the presence of boot polish vendors occupying the sites was known to the contractor much before entering into the subject contract with the Railways and the sites being the same as notified in the tender notice, the contractor's claim was unjustified. The arbitrator, in the premises, held the contractor's claim only partly admissible for the period from 01.11.2005 to 30.04.2006 and accordingly, quantified it at an aggregate of sum of Rs.28,42,089/-(Rs.23,92,275/- plus Rs.4,49,814/-).

14 For the second period, the arbitrator considered the contractor's claim of Rs.8,07,251/- claiming adjustment of licence fee towards six sites for a total area of 437.25 sq.ft., which area was not made available to the contractor for the entire period of first six months, i.e May 2006 to October 2006. The arbitrator considered the contractor's letter dated 29 May 2006 addressed to the Railways which mentioned that the above sites were not made available for display of glow signs by the Railway officials. The letter also mentioned that the Railway officials did not provide adequate electric supply and changed the location of display of glow signs at these locations. The arbitrator further considered a letter dated 28 May 2007 which gave details of the sites which were not made available for display of glow signs by the Railway officials. The arbitrator held the claims to be admissible except the first one, i.e 10 x 2 (double side) = 40 sq.ft. as the contractor was provided permission to display video instead of glow signs. The claim was accordingly reduced from 437.25 sq.ft. to 397.25 sq.ft. and the arbitrator awarded an adjustment of licence fee of Rs.7,22,915/- towards this claim. Secondly, as for the contractor's claim for sites that were blocked by boot polish vendors causing an alleged

loss to advertising value, the same was rejected for the same reasons as discussed above. Thirdly, the arbitrator considered the contractor claim for adjustment of licence fee of Rs.4,25,125/- for inability to display signs on account of unavailability of 50% sanctioned power from 1.5.2006 to 19.5.2006. The arbitrator considered in this behalf the contractor's request letter dated 19 May 2006 asking the Railways to provide electrical power connection to glow signs on urgent basis and also that the contractor was not able to operate even 50% of glow signs which were required. The arbitrator observed that the contractor had in the first period made a similar claim for adjustment of licence fee due to non-availability of electric supply or shortfall upto 8.01.2006. The arbitrator held that it was therefore clear, that full electric supply was made available by 9.01.2006. The arbitrator noted that had the electricity not been provided as per the requirement of the contractor by the relevant time, the contractor would have been entitled to a similar claim for the period from 09.01.2006 to 30.04.2006 i.e claim as per the first six months of the first year. The arbitrator held that since there was no claim made for the relevant period i.e 9.01.2006 to 30.04.2006 for 50% shortfall and accordingly claim for 19 days i.e 01.05.2006 to 19.05.2006 became superfluous. The arbitrator also considered the contractor's claim for adjustment of licence fee of Rs.3,32,316/- for two sites of 160 sq.ft. and 140 sq.ft. admeasuring a total area of 300 sq.ft. for 108 days towards non-visibility of these sites due to setting up of police booths as per instructions by the Railways. The Railways had advised the contractor to remove the boards displayed at these locations and shift them towards the wall. According to the contractor, the earlier location was a prime location, whereas the relocated site was not acceptable to it and it did not, accordingly, display advertisements at the relocated site. The arbitrator considered the letter dated 21 February 2008 addressed by the Respondent and held that the Respondent's plea in the letter that adjustment was admissible from 11.8.2007 was incorrect as the police booths were positioned immediately after the bomb blast, i.e from 12.07.2006 as claimed by the contractor. The arbitrator, accordingly, awarded a sum of Rs.3,27,564/- towards this claim for the second period. The arbitrator considered the claim for adjustment towards one site of 6'x6' for the period from May 2006 to October 2006 towards disconnection of power for shifting of electric connections at the site as per the instructions of the Railways. As there was no evidence placed on record to substantiate this claim, the arbitrator rejected it. For the second six monthly period of contract, i.e 1.05.2006 to 30.10.2006, the arbitrator, thus, awarded an aggregate sum of Rs.10,50,479/- (Rs.7,22,915/- plus Rs.3,27,564/-).

15 Coming now to the third period, for which the contractor had claimed adjustment of licence fee of Rs.9,28,325/- for six sites admeasuring a total area of 437.25 sq.ft., as the sites were not made available to the contractor for this period by the Railways, for the same reasons as discussed above, the arbitrator found the contractor to be entitled to adjustment of licence fee in the sum of Rs.8,31,603/-. On the claim of the contractor on account of non-availability of sites due to obstruction by boot polish vendors for this period, for similar reasons as mentioned above, the arbitrator held against the contractor. Towards the claim of adjustment of licence fee for non-visibility of sites due to setting up of police booths, the arbitrator, for the same reasons noted above, granted a sum of Rs.6,28,020/-. The arbitrator, accordingly, awarded an

aggregate sum of Rs.14,59,623/- (Rs.8,31,603/- plus Rs.6,28,020/-) for the third period.

16 For the fourth period, on the claim for adjustment of licence fee, for obstruction caused due to boot polish vendors occupying the sites, the arbitrator held against the contractor for the same reasons as are discussed above. The arbitrator awarded a sum of Rs.8,31,603/- towards non-visibility of sites due to setting up of police booths, for similar reasons as are mentioned above. The arbitrator allowed adjustment of licence fee in the sum of Rs.6,28,020/-. The arbitrator, thus, awarded an aggregate sum of Rs.14,59,623/- (Rs.8,31,603/- plus Rs.6,28,020/-) for the fourth period.

17 For the fifth period, for the contractor's claim for adjustment of licence fee for the area of 437.25 sq.ft., the arbitrator made an award to the extent of Rs.7,17,016/-. In addition, the arbitrator awarded the contractor's claim for Rs.5,41,485/- on account of non-visibility of sites due to setting up of police booths for the particular period. As regards, the claim of the contractor for adjustment of licence fee towards one site which was removed for making arrangements for setting up of a restaurant for the period from November 2007 to April 2008, the arbitrator allowed the claim from December 2007, since the restaurant was set up from December 2007 and awarded a sum of Rs.1,36,752/- on that account. The arbitrator, thus, awarded an aggregate sum of Rs.13,95,253/- (Rs.7,17,016/- plus Rs.5,41,485/- plus Rs.1,36,752/-).

18 The arbitrator also noted that from the period-wise discussion in the award, it was apparent that the contractor had sufficient amount to

its credit at the time of termination of the contract. The payments were made in advance as prescribed by the Railways. The arbitrator, in the premises, made a tabular presentation showing net claims towards refund/ adjustment and observed that out of the contractor's claim of Rs. 1,35,16,778/-, the claim of Rs.82,07,067/- was found to be admissible. The arbitrator found that there was shortfall in the payment to the tune of Rs. 60,17,339/- which was admissible. After making the adjustment of this shortfall from the contractor's admissible claim, the net claim of the contractor was worked out to Rs.21,89,728/-.

19 Based on the discussion in the awards, and considering electricity security deposit and adjustment of the amount due to the contractor under another contract (Andheri contract), the arbitrator made his final award in favour of the Respondent contractor aggregating to Rs.58,00,728/-. The arbitrator rejected the Railways counter-claim towards shortfall in payment and interest. The arbitrator awarded interest at the rate of 6% per annum to the contractor on the principal amount due.

20 The awards in respect of ticketing and non-ticketing zones are challenged by the contractor to the extent of the arbitrator's refusal to grant 18% interest on the principal amount due to the contractor instead of 6% interest awarded. The Railways, on the other hand, challenge the awards on the contractor's claims for all five periods.

21 The discussion in the awards, particularly in the light of what has been noted above, clearly indicates that the arbitrator has reasonably construed the contract between the parties, including, in particular, Clause

2.12 of the agreement, and based on a fair and reasonable assessment of evidence, has come to his findings towards adjustments due to the contractor on account of non-display of advertisements due to breaches of the contract on the part of the Railways. The arbitrator's award for these different periods based on non-supply of electric connection (want of supply altogether as well as inadequacy of the supply provided) and relocation of sites by the Railways, is clearly a possible view. The view is supported by evidence. It cannot said that the award is either based on no evidence or exhibits a view which no fair or judiciously minded person would take of the material before him. There is nothing shocking in it. The award of these claims in respect of bulk advertising rights in both ticketing and non-ticketing zones of Churchgate stations, accordingly, does not merit any interference under Section 34 of the Arbitration and Conciliation Act, 1996. So far as interest is concerned, it was clearly within the discretion of the learned arbitrator and his award of 6% interest cannot be termed either as an impossible view or a view which no fair or judiciously minded person would take. There is equally nothing shocking about such view. In the premises, the challenges of both the Railways and the Contractor must fail.

22. Accordingly, all four petitions are dismissed. No order as to costs.

(S.C. GUPTE, J.)