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

ARBITRATION PETITION (L.) NO.1280 OF 2018

Bhavesh Prabhudas Bhide	..Petitioner
Vs.	
Union of India	..Respondent

**WITH
COMMERCIAL ARBITRATION PETITION (L.) NO.1283 OF 2018**

Bhavesh Prabhudas Bhide	..Petitioner
Vs.	
Union of India	..Respondent

**WITH
COMMERCIAL ARBITRATION PETITION (L.) NO.1284 OF 2018**

Meadows Media Brandcom Pvt.Ltd.	..Petitioner
Vs.	
Union of India	..Respondent

Mr.Mohammed Zain Khan with Mr.Syed Nabeel Ali for Petitioner.
Mr.T.J. Pandian for Respondent.

CORAM : G.S. KULKARNI, J.

DATE : 12th FEBRUARY, 2019

Judgment :

1. Heard learned Counsel for the petitioner and learned Counsel for the respondent-railways.

2. These are three petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, “the ACA”) whereby

the petitioners challenge the arbitral awards dated 26 July 2018 of the learned sole arbitrator adjudicating the disputes between the parties as arisen under an agreement dated 13 September 2013 executed between the parties. Learned Counsel for the parties are in agreement that common issues of fact and law arise in these three petitions. Although the awards are different, the agreements between the parties which are in respect of the permission to install “hoardings” on the railway property are identical, as also the cause of action for the petitioners to invoke arbitration is also similar. Learned Counsel for the parties have addressed the Court on Arbitration Petition Lodging No.1280 of 2018, accordingly, this order would refer to the relevant details of the said proceedings.

3. In short the facts are:-

The respondent by its letter dated 19 January 2012 responded to the proposal of the petitioners for display of two hoardings of size 40 x 40 sq. ft. near RUB of CLA-TMBY section Suman nagar on FCFS Basis and offered the same to the petitioner at the rate of Rs.1634.12 ps per square feet per annum inter-alia on a condition that the petitioners would erect structure as approved by the engineering department which would be installed under the supervision of the railway officials and subject to safety measures. The petitioners were to pay rental charges in advance for one year as also submit contract form

in duplicate. The relevant conditions of the respondent's proposal as accepted by the petitioners are conditions Nos.15, 17, 19 and 20 which read thus:-

“15. Party will have to take proper permission for electricity from Sr. DEE office CSTM if required.

17. Party has to take any other NOC / Approval from other dept., outside agencies like RTO, Municipal corporation etc. on their own.

19. The party has to submit the undertaking as “M/s.Manish advertising undertakes to vacate the site whenever required by the railway within a period of ten days from the date of notice. The party will not claim any compensation/damage in case the contract is terminated prematurely. The party will also not claim any legal rights of any nature to continue to use the site by displaying the hoarding.

20. You have to pay amount of Rs.52,29,184/- as a license fee for a period of one year, a security deposit of Rs.10,45,837/- & Rs. 1,04,584/- as structure design charges within 15 days from receipt of this LOA. The duration of the contract is for five years with rate of escalation at 15% on previous year license fee on year to year basis.”

(Emphasis supplied)

4. The period of the said agreement was of 5 years and was to commence from 15 August 2012. Thereafter a formal agreement came to be executed between the parties which inter-alia provided for following relevant clauses:-

“6) ACTION ON FAILURE TO PAY CHARGES

In the event of-failure of payment of-license fee or any other charges payable to the Railway Administration, the Railway Administration will be at liberty to forfeit Security deposit and discontinue the displays forthwith and confiscate the advertisement and other materials of the licensee without prejudice to any rights of the Railway administration and to cancel the contract and also black list the agent/agency and cancel his recognition as an authorized agent.

9. **TERMINATION:**

I. The Railway Administration reserves the right to terminate the contract fully or partially, without assigning any reason / reasons other than mentioned in clause no. (ii) at any time, by giving notice of not less than three months and the Licensee shall not be entitled to any damages or compensation by reason of such termination other than the proportionate abatement of license fee for the period of non display.

II. The licensee is also permitted to foreclose his contract by giving notice of not less than THREE MONTHS.

III. In case of any change in policy guidelines for Commercial Publicity over Indian Railways, the administration will reserve the right to terminate the contract by issuing one month notice to the Licensee.

IV. In case the Licensee fails to start the work within the given validity period and is not willing or responding to continue, the paid rental charges will be forfeited, and the contract will be terminated.

V. In case of breach of any of the conditions breath, mentioned here it agreement shall be liable to be terminated, summarily without assigning any reasons and the decision of the Senior Divisional Commercial Manager in this regard will be final security deposit of the licensee shall be forfeited. The tender will be invited fresh at the risk and cost of the licensee.

10. **DISPLAY CONDITIONS:-**

i) Approval and Restriction on Displays:

a. The Licensee shall take prior approval of the text/design of the advertisement.

b. It has to be ensured by Licensee that the Advertisements displayed are decent and take care of aesthetics and does not give a cheap or vulgar appearance.

c. The Advertisements will be subject to the normal restrictions in respect of certain category of Advertisements such as smoking, wines and alcoholic drinks, Gutka, Pan Masala, Bidi/Cigarette, having erotic background scenes, competitive advertisements from any Road Transport Companies/Airlines and from Private Insurance Companies offering policies against Railway accidents.

d. The advertisements should; not have pictures of a political parties and/or their leaders.

e. Advertisements that are considered objectionable in the eye of law or otherwise shall not

be displayed. Advertisements prohibited under Various acts & laws of central state Governments and various Local Government Bodies shall not be displayed, There shall not be any sort of obscenity in the design and matter of advertisement material. The Contractor will be fully liable for any contravention in this regard and will be liable under the Law of the land.

Conditions for erection & display of various media

e. It is personal responsibility of the Licensee to take all kinds of permissions/NOCs from outside agencies like Municipality, Road – Transport Authority etc.”

(Emphasis supplied)

5. In clause 21 of the agreement, the parties agreed for reference of the disputes if any, as arisen under the agreement to be referred for arbitration.

6. It is not in dispute that the petitioners were in arrears of the license fee as payable to the respondent. That apart the Municipal Corporation also had initiated action against the hoardings of the petitioners by issuing notices under the Mumbai Municipal Corporation Act, 1888. These notices came to be issued in the month of December 2015. However, it appears that there was some background to these notices, as the petitioners were quite aware that at the relevant time the petitioners would require permission for installation of these hoardings from the Mumbai Municipal Corporation which was also clear from the specific conditions as noted in the offer letter dated 19 January 2012 as also in the agreement entered with the respondent as noted above.

7. The petitioners had also filed a Suit (Suit Lodging No.67 of 2015) against Mumbai Municipal Corporation and Notice of Motion (Lodging) No.240 of 2015 came to be filed in the said suit, however the petitioner could not succeed in getting any favourable orders in the suit against the Municipal Corporation.

8. The Municipal Corporation on 21 January 2015 pulled down the petitioner's hoardings in question on the ground that approvals were not obtained from the Municipal Corporation.

9. Also a Notice of Motion in the suit came to be moved by the petitioner before this Court seeking urgent reliefs. This Court (S.J. Kathawalla, J.) passed an order dated 23 January 2015 observing that the contention of the Municipal Corporation that both the hoardings have been put up without seeking permission from the Corporation and since September 2012, 94 prosecutions were lodged against the petitioners (plaintiffs) for putting up the said hoardings and finally it was decided to pull down the said hoardings. Accordingly, no relief was granted.

10. However, what is significant is that the petitioners' statement came to be recorded that without prejudice to the rights and

contentions of the petitioners, the petitioners shall remove the entire hoardings including the framework within a period of one week from the date of the said order and which was accepted as undertaking to the Court. The order passed by this Court (S.J. Kathawalla, J.) dated 23 January 2015 needs to be noted which reads as under:-

“1. The above Suit is filed by the Plaintiff inter alia for a declaration that the action taken by the Defendant No.1 – Bombay Municipal Corporation in seeking to dismantle/remove/demolish the suit hoardings i.e. two hoardings of 40 x 49 ft., situated at Near Road Underbridge of Kurla Trombay Section, Suman Nagar, Chambur, Mumbai, is illegal, bad in law.

2. The Plaintiff has taken out the above Notice of Motion seeking urgent ad-interim relief restraining the Corporation from removing the two hoardings.

3. The learned Senior Advocate for the Defendant Corporation has informed the Court that both the hoardings have been put up without seeking permission from the Corporation and since September 2012, 94 prosecutions have been lodged against the Plaintiff for putting up the said hoardings. Finally, the Corporation decided to pull down the said hoardings. It is submitted that in fact one of the hoarding has been totally removed. As far as the other hoarding is concerned, the same is partly removed.

4. This Court has informed the learned Advocate appearing for the Plaintiff that in view of the above facts, the question of granting any ad-interim relief restraining the Corporation from removing the hoardings does not arise. Thereupon, the learned Advocate for the Plaintiff, on instructions, undertakes that without prejudice to the rights and contentions of the Plaintiff, the Plaintiff shall remove the entire hoardings including the framework within a period of one week from today. The undertaking is accepted. It is clarified that the work of removal of the hoardings shall be done under the supervision of the officials of the Bombay Municipal Corporation.

2. The Defendants to file their Affidavit-in-Reply within two weeks from today. Rejoinder, if any, to be filed within two weeks thereafter. Stand over to 24-02-2015.”

(Emphasis supplied)

11. It appears that the dispute between the petitioners and the Mumbai Municipal Corporation rested at this position and as observed by this Court in the above order passed in the suit dated 23 January 2015.

12. The petitioners thereafter invoked the arbitration agreement and sought reference of the disputes as arising under the hoarding agreements in question to an arbitral tribunal. Accordingly, an arbitral tribunal came to be constituted. The petitioners filed a statement of claim. In the statement of claim filed before the arbitral tribunal, the petitioners made the following two claims:-

“ a) This Hon'ble authority may kindly grant a sum of Rs.2,50,00,000/- as monetary damages incurred by the Claimant herein alongwith interest @ 18% per annum till realization of the said amount as per claim as annexed as damages and other amended amount as may be submitted by the Claimant subsequently or as this Hon'ble Tribunal may determine;

b) The Respondent be directed to grant a period of 10 years to continue with the contract at the specified location i.e. Suman Nagar RCT Junction as a fresh contract and pay necessary rent to the Respondent as per their rate card applicable as on current date.”

13. The respondent/railway apart from opposing claims as made by the petitioners also made a counter-claim in regard to the arrears of license fee payable till removal of the said hoardings upto 21 January 2015.

14. The arbitral tribunal considering the material/evidence on record rejected the claims as made by the petitioners and allowed the

counter-claim for arrears of the license fee as made by the respondent.

The operative portion of the impugned award reads thus:-

- “1. Claim of Claimants for Rs.2,50,00,000/- towards monetary and goodwill damages is rejected.
2. Claim of Claimants for fresh allotment of same hoarding at the same location for the period of ten years as per the railways rate card is also rejected.
3. Claimants shall pay Rs.22,15,227/- to the Respondents towards arrears of license fees within a period of 60 days from publication of Award.
4. Claimants shall pay Rs.18,10,251/- to the Respondents towards penal interest @ 12% for all delayed payments and the outstanding amount till today, within a period of 60 days from publication of the Award.
5. If both the amounts mentioned in para 3 & 4 above remained unpaid the same shall carry interest @ 12% per annum till actual payment.
6. There is no order as to cost.
7. The Arbitration Fees shall be borne by the parties equally. The fees schedule is being given separately.”

15. The awards in other two petitions are also on the similar line. The amounts of the license fee are different under the agreement in question.

16. Learned Counsel for the petitioners in assailing the impugned awards has made the following submissions:-

- (i) The action on the part of the Municipal Corporation to remove hoardings was illegal in as much as the Municipal Corporation had no authority to pull down the hoardings which were on the railway property. In contending that the Municipal Corporation would not have any authority on the hoardings which were located at the railway land, the petitioners refer to the decision of the Division Bench of this Court in Writ Petition

No.1648 of 2017 decided on 21 December 2017 where the Division Bench has held that the provisions of Section 328 and 328A of the Mumbai Municipal Corporation Act would not be applicable to the hoardings erected by Railways on the railway as defined in Clause (31) of Section 2 read with section 197 of the Railways Act, 1989 and railway administration would not be liable to pay any tax to the Corporation in respect of any advertisement made on any part of the railways, unless a Notification to that effect is issued by the Central Government under Section 185 of the Railways Act, 1989.

(ii) As the Municipal Corporation had no jurisdiction and in law and did not have any concern to the hoardings on the railway land, the respondent ought to have safeguarded the hoardings and prevented the Municipal Corporation from removing the hoardings.

(iii) Though the petitioners never approached the respondent after the hoardings were removed for restoration, nonetheless the petitioners would be entitled for damages as prayed for in the statement of claim.

(iv) Learned Counsel for the petitioners though would not dispute that the petitioners were in arrears of the license fee, however, would submit that the award is bad in as much as the petitioners ought to grant installments to the petitioner for payment of the said amount of arrears of license fees, and the same can be accordingly cleared by the petitioner. There is no other contention urged and argued on behalf of the petitioner.

17. On the other hand, learned Counsel for the respondent would support the award and submit that the award in as much as it allows the counter-claim of the respondent, would not require any consideration as there is no dispute that the petitioners were in arrears of payment of license fees and the petitioners are agreeable to pay the licence fees however in installments. It is submitted that it is not the policy of the respondent that they would accept payment in installments and therefore, such contention as made by the petitioners even in the context of the counter claims is not tenable. As regards the petitioners' contention that the Municipal Corporation having no jurisdiction on the hoardings which were put on the railway property, it is submitted that at the relevant time, in January 2015 the position in law was not clear and that the Municipal Corporation had accordingly asserted its authority under the Municipal Corporation Act in removing the petitioners' hoardings. It is submitted that the litigation (Writ Petition No.1648 of 2017 as decided by the Division Bench of this Court) as filed on behalf of the respondent was initiated in the year 2017 and the judgment of this Court was delivered on 21 December 2017. It is contended that thus in the facts of the present case the said decision has no application in as much as the hoardings of the petitioners were removed by the Municipal Corporation in January 2015. It is submitted that the position in law which is now available in view of the said decision of the Division Bench

in Writ Petition No.1648 of 2017 was not available at that point of time. It is further submitted that the agreement in question, and the offer letter at the relevant time was very clear in as much as the petitioners had agreed for a condition of obtaining prior permissions and approvals from the Municipal Corporation for installation of the said hoardings. The petitioners were therefore clearly bound by the terms and conditions of the agreement and the offer letter which provided that the petitioners should obtain appropriate permission from the Municipal Corporation. The petitioners having not obtained permission, ultimately, action was taken by the Municipal Corporation to remove the hoardings. It is submitted that the contention of the petitioners that the railways ought to have prevented the removal of the hoardings is misconceived and contrary to the said express terms and conditions of the agreement and the offer letter. Learned Counsel for the respondent would submit that in fact, a statement as made on behalf of the petitioners and recorded in the order dated 23 January 2015 by this Court in the above suit to the effect that the petitioners shall remove the entire hoardings including the framework within a period of one week from the date of the said order, was recorded as an undertaking to the Court. After such undertaking is given to this Court in the proceedings of the suit as filed by the petitioners, against the Municipal Corporation, there is no question of petitioners making a claim for damages against the

petitioners for removal of said hoardings. Learned Counsel for the respondent would accordingly submit that no ground whatsoever is made to interfere in the impugned award under the jurisdiction of this Court under Section 34 of the ACA.

18. I have heard learned Counsel for the parties. With their assistance, I have also perused the impugned award and the agreements in question and the documents as placed on record.

19. It is quite clear that the petitioners were informed well in advance by an offer letter dated 19 January 2012 that the petitioners ought to have taken appropriate permission from the Municipal Corporation for installation of the hoardings. The agreement subsequently entered is also clear that permission is required to be obtained from the Municipal Corporation in regard to the said provisions. It is not in dispute that the petitioners never obtained such permission from the Municipal Corporation and eventually faced prosecution as initiated by the Municipal Corporation and ultimately an action of removal of the said hoardings. Thus, the petitioners' contention that action of Municipal Corporation was illegal, is not a valid argument for the petitioners to submit that the respondent would be liable to pay damages as claimed in the statement of claim. The

contention of the petitioners that the Municipal Corporation would have no jurisdiction to take any action in regard to the hoardings which are on the railway property would also not be correct as this was not the legal position on the date of parties entered into the agreement in question or in January 2015 when the hoardings were removed by the municipal corporation. In fact, what can be clearly seen is that this position in law was laid down by the Division Bench of this Court in the judgment which was pronounced on 21 December 2017 in Writ Petition No.1648 of 2017 (supra). Therefore, it would not be correct for the petitioners to contend that on the day (January 2015) when the hoardings were pulled down by the Municipal Corporation, the Municipal Corporation had no authority to take any action against these hoardings.

20. It is quite clear that the entire argument of the petitioners that the railways ought to have prevented the removal of the hoardings, is contrary to the express terms and conditions of the offer letter and the agreement. The petitioners themselves have given undertaking of removing the hoardings as stated before the Court and as recorded in the order dated 23 January 2015 passed in the suit. At the relevant time, the petitioners could not have made a claim either for restoration of the said hoardings or for any damages for removal of the hoardings by Municipal Corporation.

21. In so far as award of the counter-claim is concerned, the petitioners have fairly not disputed that there were arrears of license fee and only contention of the petitioners is that the petitioners be granted time for payment of the arrears of license fees which offer is not accepted by the respondent. Thus, the challenge to the impugned award on the ground of counter-claim being allowed by the arbitrator also would not sustain.

22. Having perused the impugned award, it is quite clear that the learned sole arbitrator has taken into consideration the terms and conditions of the agreement as also the obligations of the parties arising under the agreements in question. The findings as recorded by the learned arbitral tribunal are clearly within the framework of the contract and the evidence/material which was placed on record. Thus, in regard to two claims as made by the petitioners, there is no scope whatsoever for interfering in the impugned awards within the limited jurisdiction of this Court under Section 34 of the ACA. Arbitration Petition (L.) No.1280 of 2018 accordingly rejected. No costs.

23. Learned Counsel for the parties would submit that no separate reasons are required to be given in considering the arbitration petition Nos. (L) No.1283 of 2018 and Arbitration Petition (L) No.1284

of 2018 as the ground of challenge would be identical except the date of the agreement and the amounts of counter-claims as awarded by the arbitrator. Accordingly, these petitions are also rejected in terms of the reasons of the above order passed in Arbitration Petition (L.) No.1280 of 2018.

[G.S. KULKARNI, J.]