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

+ **FAO(OS) 112/2019 & C.M. Nos. 27274-27277/2019**

UNION OF INDIA

..... Appellant

Through: Mr. Rajeshwar Singh, Advocate.

versus

M/S DOONS CATERERS

..... Respondent

Through: Mr. Navin Kumar, Ms. Rishmit Kaur
& Ms. Priya Goyal, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

ORDER
05.07.2019

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1. The Union of India (UOI) has preferred the present appeal to assail the order dated 18.01.2019 passed by the learned Single Judge in OMP No.1489/2014. The learned Single Judge, by the impugned order, has allowed the said OMP, wherein the respondent had preferred objections under Section 34 of the Arbitration & Conciliation Act to the award dated 24.07.2014 passed by the learned Sole Arbitrator. By the impugned order, the learned Single Judge has, consequently, set aside the award passed in favour of the appellant UOI.

2. The respondent submitted its quotation for management of on-board catering services in Train No.2483-24, KCVL-ASR Express from Kochuveli to Amritsar Junction. The terms of the quotation, inter alia, were for a

period of six months from the date of commencement of service or take over by the new caterer, whichever is earlier. The six month period was extendable by a maximum period of further three months by IRCTC. It was specifically provided that no extension shall be given after the completion of the total period of nine months of temporary license. The respondent submitted its bid of Rs.2,55,200/- per month – on the basis of which, the license was granted to the respondent on 10.03.2010. It was extended on 03.09.2010 for a further period of three months. Admittedly, the initial nine-month period expired and the respondent paid the license fee of Rs.2,55,200/- per month.

3. The respondent expressed its inability to continue with the license on the same license fee. Consequently, it sent a communication on 22.09.2010 to the IRCTC, wherein it, inter alia, stated that after completion of the extended period on 13.12.2010, they would not be interested to manage the catering services on the said train. The IRCTC was asked to take over the services.

4. On 27.10.2010, a tripartite agreement was signed as the said train was transferred from IRCTC to Northern Railways. Even on 27.10.2010 itself, the respondent informed the Railways, wherein it, inter alia, stated:

“... .. Today we have received letter from IRCTC, North zone that for railway authorities are pressurizing to execute the transfer agreement. We are willing to sign the tripartite agreement under the following mentioned conditions.

That under no circumstances, we would be compelled to continue to manage the catering services of this train after 13.12.2010 & would discontinue the services after the

completion of the date.

If it is acceptable to Northern Railway authorities, then we are willing to sign tripartite transfer agreement... ..”

5. The tripartite agreement was signed after issuance of the said communication which, inter alia, provided that the licensee shall continue to provide catering services in the said train for the tenure awarded by the IRCTC, unless terminated earlier by CCM/NR.

6. On 06.12.2010, the respondent informed the Northern Railways that they could continue to manage the catering services on the aforesaid train only on the basis that they would pay the reserve license fee of Rs.51,000/- per month and not the quoted amount of Rs.2,55,200/- per month.

7. On 10.12.2010, the respondent was told to detach the pantry car from the train on the ground that it had refused to provide catering services. The various Divisional Managers were directed to make alternate arrangements and the respondent was directed to vacate the pantry car as per schedule. However, on 31.12.2010, the Northern Railways addressed a communication to the respondent, wherein the respondent was again called upon to give its consent to provide catering services continuously till further orders in the said train on the same terms & conditions, i.e. on the quoted rate of Rs.2,55,200/- per month as license fee. The respondent did not agree to give consent to the aforesaid terms and vide letter dated 07.01.2011 had again made it clear that they would do so but only on the reserve license fee and not on the license fee paid by them.

8. The respondent was, thus, asked to continue to provide the services

which it did. Since the respondent did not pay the license fee of Rs.2,55,200/- per month and continuously paid Rs.51,000/- per month as per its pre-disclosed condition for continuing to provide the services, the appellant sought to raise a claim in arbitration.

9. The learned Arbitrator allowed the said claim and, consequently, the respondent preferred the aforesaid objections. The learned Single Judge has held that in the light of the aforesaid correspondence, it was clear that the respondent was not bound to continue to pay license fee of Rs.2,55,200/- per month for the period beyond the initial period of nine months. The discussion found in the impugned order reads as follows:

“19. This Court has heard learned counsels for the parties. The first and foremost glaring fact in this case is the stand of the Caterer in the repeated letters written to the Railway authorities. The letters are clear and categorical. Even prior to the expiry of nine-month period, the caterer has informed the Railways that it is not interested in continuing to manage the catering services on the train. The letters dated 27th September, 2010 and 8th October, 2010 are clear to this extent. The finding of the Arbitrator that no letter was written by the caterer prior to 13th December, 2010 is thus contrary to the record itself. Further, the contractual terms clearly stipulated that no extension would be contemplated beyond 13th December, 2010. This is clear from the initial award of the contract as also the tripartite agreement signed during the currency of the contract. In fact, the tripartite agreement, in clause 5, specifically mentioned 13th December, 2010 as the last date of the catering services. Both these findings of the Arbitrator i.e. that no letter was written prior to 13 th December, 2010 and that the contract was extended are, therefore, contrary to the records as also to the terms of the contract itself.

20. Further, the Railways had, on 31st December 2010, called

upon the caterer to continue on the terms of Rs.2,55,200/- being payable per month. This letter was replied to immediately by the caterer on 7th January 2011, that it would not be interested in continuing on the old terms. The Railways, therefore, were told unequivocally that the caterer does not wish to pay a sum of Rs.2,55,200/-. It is obvious from the correspondence on record that the Railways appeared to have been under some kind of pressure to continue the catering service on this train and had orally communicated to the caterer to continue to provide the service. After letter dated 7th January, 2011, there remained no ambiguity whatsoever and the Railways ought to have taken a decision immediately as to whether it needed the catering service to be continued or not. While the caterer is clear in its various communications, there is no letter written communication by the Railways telling the caterer to vacate the pantry car or stop the catering services. It is thus incorrect for the Arbitrator to hold that there was an acceptance, by conduct, by the caterer for payment of Rs.2,55,200/-.

21. The Arbitrator, while noticing some of the letters, has arrived at a finding contrary to the correspondence on record as also to the contractual terms. Learned Arbitrator has also considered the amount being paid by the caterer on two other trains; being Train No.2217-18, Kerala Sampark Kranti Express and old Train No. 2653-54 CDG-Kouchuvali Sampark Kranti Express.

22. The caterer being clear in its stand and there being no agreement for payment of Rs.2,55,200/-, the Ld. Arbitrator could not have gone into the issue of equivalent damages in awarding the amounts to the Railways. The Award is clearly contrary to the terms of the contract. No letter has been pointed out to the Court wherein the caterer agreed for payment of Rs. 2,55,200/-. The finding of the Arbitrator that the caterer never requested to reduce the amount of license fee is not correct. Repeated letters of the caterer have in no uncertain terms informed the Railways that the caterer did not wish to continue on the existing terms. The finding that the tenure was extended on the same terms is also not correct. In fact, the Arbitrator

wrongly holds that the tenure was extended on the same terms. The Arbitrator notices the fact that the caterer asked the Railways to make arrangements for catering w.e.f. 13th December, 2010. The Arbitrator also records that the caterer was willing to continue only on the reserve license fee of Rs.51,000/- per month. In this background, the finding of the Arbitrator in the conclusion i.e. "In view of the above observations it is clear that the respondent itself has offered rate of the contract @ Rs.255200/- per months as a license fee which is approximately five time of the reserved price." is untenable. The caterer never offered Rs.2,55,200/- as a license fee. The Arbitrator's finding that there was an implied consent, is also not made out from the correspondence.

23. The Division Bench judgment in Benara (supra) is clear that simply by conduct, it cannot be said that there was a contract, in the absence of a consensus between the parties. The letter of the Railways dated 31.12.2010, was at best an offer which was not accepted by the Caterer. There being no consensus ad idem on the amount payable per month, between the parties, there cannot be a binding contract."

10. The submission of learned counsel for the appellant/ UOI is that while making its offer to continue to operate the catering services in the train in question beyond the initial period of nine months with license fee of Rs.51,000/- per month, the respondent had left it to the appellant to take a decision. In this regard, reference is made to communication dated 06.12.2010 issued by the respondent. This communication, insofar as it is relevant, reads as follows:

"Respected Madam

In continuation to our previous letters dated 8-10-2010 (Enclosed) we had requested you that kindly do not transfer this train from IRCTC as we would not be managing the catering services of this train after the expiry of the temporary tenure

awarded to us by IRCTC Ltd, this was further clarified while signing the Tripartite Transfer Agreement vide our letter dated 27-10-2010 (Enclosed) reason behind this was financial implications.

It's requested that if we are instructed to continue managing the catering services of this train then we would only be submitting the reserve license fees of Rs.51000/- per month only not the quoted fees of Rs.2,55,200/- per month.

As the tenure for this train is expiring on 12-12-2010 we humbly request you to kindly make necessary arrangements for taking over the catering services of this train wef 12-12-2010 Ex Amritsar or advise as accordingly

This is for your information & necessary action please."

11. We do not find any merit in this submission of learned counsel for the appellant. The respondent in clear and categorical terms made it clear to the appellant that if they were required to continue managing the catering services in the train in question, they would be paying only the reserve license fee of Rs.51,000/-, and not the quoted license fee of Rs.2,55,200/- per month. The use of the expression "*or advise as accordingly.*" in the letter dated 06.12.2010 only sought the response of the appellant to the acceptance of one, or the other, of the two options given by the respondent; the two options being that it would discontinue to provide the services, or it would continue to provide the same on reserve price of Rs.51,000/-. The said expression cannot be construed to mean that the respondent left it to the appellant to dictate terms to it with regard to fixation of license fee. We find ourselves in complete agreement with the findings made by the learned Single Judge.

12. In the light of the aforesaid, we do not find any merit whatsoever in

the present appeal. The same is dismissed with costs of Rs.10,000/- to be paid to the Delhi High Court Advocates Welfare Fund. The costs be paid within four weeks.

VIPIN SANGHI, J

RAJNISH BHATNAGAR, J

JULY 05, 2019

B.S. Rohella