

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

Reserved on: 19.11.2018

Date of Decision : 02.07.2019

- + O.M.P. (COMM) 104/2018 & I.A. Nos.3004/2018, 13731/2018
DELHI METRO RAIL CORPORATION Petitioner
Through: Mr.Sudhir Nandrajog, Sr. Adv.
with Ms.Vibha Mahajan Seth,
Adv.
versus
TRAFFIC MEDIA INDIA PVT. LTD. Respondent
Through: Mr.Ravi Sikri, Sr. Adv. with
Mr.Deepak Yadav, Adv.
- + O.M.P. (COMM) 117/2018
TRAFFIC MEDIA INDIA PVT. LTD Petitioner
Through: Mr.Ravi Sikri, Sr. Adv. with
Mr.Deepak Yadav, Adv.
versus
DELHI METRO RAIL CORPORATION Respondent
Through: Mr.Sudhir Nandrajog, Sr. Adv.
with Ms.Vibha Mahajan Seth,
Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 29.11.2017 passed by the Sole Arbitrator adjudicating the disputes that had arisen between the parties in relation to the License Agreement dated 01.07.2010 executed between the parties (hereinafter referred to as the 'Impugned Award').

2. As both the parties to the arbitration proceedings are aggrieved by the Impugned Award and have filed these petitions challenging the same, the petitions are being disposed of by this common order. In this order Traffic Media India Private Limited shall be referred to as the ‘petitioner’ and the Delhi Metro Rail Corporation Limited shall be referred to as the ‘respondent’.

3. By the License Agreement dated 01.07.2010 (hereinafter referred to as the ‘License Agreement’) the respondent had agreed to provide bare advertising spaces inside ten stations starting from Qutub Minar to HUDA City Centre to the petitioner. The license was for a period of five years. Clause 3.3 of the License Agreement obliged the petitioner to pay a fixed annual license fee of Rs. 4,32,00,000/-, to be paid half yearly in advance. This annual license fee was to increase by 5% after completion of every year on a compounding basis.

4. Clause 3.4 of the License Agreement provides for “Security Deposit” in form of a Bank Guarantee and Cash Deposit. It is reproduced hereinunder:-

“3.4 The licensee may note that all references to ‘Security Deposit’ in this agreement and hereafter, will mean, refundable security deposit equivalent to one year license fees in the form of six months bank guarantee and six months cash deposit in the form of bank draft/pay order. The Bank Guarantee shall be kept valid at all times during the currency of the license agreement. The security deposit will be escalated by 5% after every year on compounding basis. Accordingly the bank guarantee will also be enhanced along with the

cash deposit by the licensee, every year. In case additional areas are approved and taken up by the licensee, then the security deposit will also be increased accordingly on pro rata basis in bank guarantee as well as in cash deposit. The refundable security deposit will only be refunded upon successful completion of the full term of the licensee.”

5. Clause 3.7 of the License Agreement further provides that the Security Deposit shall be returned only after completion of the full term of the license period. It is reproduced hereinbelow:-

“3.7 That the LICENSEE has deposited with DMRC an interest free security deposit of Rs. 4,32,00,000/- (Rupees Four Crore and Thirty Two Lakhs only/-) equivalent to one year’s license fees (Six Months License fee in cash by way of DD/Pay order and another Six Months in the way of Bank Guarantee) for bare advertisement spaces licensed within 7 (Seven) days of issue of acceptance letter. This amount will only be refunded after completion of the full terms of the license period i.e. Five (5) years from commencement date of license as per clause 8(b). The interest free security deposit will also be increased by 5% (Both shall be increased by 5% i.e. Bank Guarantee as well as cash deposit) after completion of every year on compounding basis. This is applicable for the interest free security deposit submitted for the additional spaces/areas offered and accepted.”

6. Clauses 8, 9 and 22 of the License Agreement reiterate the above and are reproduced hereinunder:-

“8. The licensee will be charged License fee for a minimum of 2000 sq.m advertisement areas even if not fully utilized. For all purposes this total advertisement area of 2000 sq.m will be treated as one lot. The License fees will be charged as follows:

(a) Inside Ten (10) stations (Qutab Minar to Huda City Centre) – Bare Advertisement spaces to be identified by the Licensee and approved by DMRC up to 200 sq.m per station is offered totaling to 2000 Sq.m.

(b) Commencement of Licensee fee:

Case-1: If all plans & other details as detailed in clause 6 above are submitted in one lot within 30 days of issue of LOA, then license fee will commence 30 days from the approval (in part/full) of such plans & details by DMRC.

Case-2: If all plans & other details as detailed in clause 6 above are not submitted in one lot within 30 days of issue of LOA then license fee will commence 30 days from the approval (in part/full) of such submissions by DMRC.

Case-3: If licensee fails in submitting plans & other details as detailed in clause 6 above within 30 days of issue of LOA then license fee will commence on 60th days counted from the date of issue of LOA.

The Licensee fully comprehends and understands that no additional time would be given beyond 30 (Thirty) days from the date of approval by DMRC and the license fee for the total space (@ 200 Sq.m per station is offered totaling to 2000 Sq.m) will be charged even if the sites are not utilized. The Licensee must ensure the fabrication installation and commissioning of all the panels within 30 (Thirty) days from the date of approvals given to the first lot of plan submissions by DMRC. The licensee voluntarily agrees not to seek any claim, compensation, damages or any other consideration whatsoever on any pretext whatsoever on account of his inability to fabricate, install and commission the advertisement panels.

The first half yearly license fee will have to be paid within 7 (Seven) days of the award of license/issue of letter of acceptance. Adjustment if any will be done in the second half yearly license fees.

The earnest money deposit of the licensee will be adjusted against the refundable interest free security deposit. This amount will only be refunded after completion of the full term of the license period. Five (5) years from commencement date of license. The License fees for subsequent years will be increased from the date it become due irrespective of the dates from which other advertising spaces have been handed over.

9. *The Earnest money of Rs. 10,00,000/- (Rupees Ten Lakhs only/-) given along with the lender would be adjusted against the interest free refundable security deposit equivalent to one year's (12 months) license fees (Six Months License fee in cash by way of DD/Pay order and Six Months in the way of Bank Guarantee). This amount shall be refundable only on completion of the full term of the agreement. This amount will be increased by 5% (both shall be increased by 5% i.e. Bank Guarantee as well as cash deposit) every year on compounding basis. This is also applicable for the interest free security deposit for the additional areas/spaces offered and accepted.*

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SECURITY DEPOSITS

22. *The earnest money submitted by the licensee at the time of tender will be adjusted against the (interest free) security deposit equivalent to one year's (12 months) license fees (Six Months License fee in cash by way of a DD/Pay order and Six Months in the way of Bank Guarantee), before the commencement of the agreement without occurring any interest for the due and satisfactory fulfillment of the terms and conditions of this agreement. The interest free security deposit will be refunded only on satisfactory completion of the contract period i.e. Five (5) years from commencement date of Licensee, taking into consideration that all DMRC dues are cleared. If*

additional panels are offered to and accepted by the licensee, then additional security deposit equivalent to one year's license fees (Six Months License fee in cash by way of DD/Pay order and Six Months in the way of Bank Guarantee) for the additional spaces/panels will have to be deposited before the hand over of the panels/advertising spaces along with the amounts indicated in the letter of award. This additional interest free security deposit will also be refundable only along with the original interest free security deposit. The interest free security will be increased by 5% (Both shall be increased by 5% i.e. Bank Guarantee as well as cash deposit) per annum on compounding basis. This is also applicable for the interest free security deposit submitted for the additional areas/space."

(Emphasis supplied)

7. Clause 19 of the License Agreement provides for surrender of license by the petitioner by giving three months notice. The said Clause further provides for forfeiture of security deposit, which is the main reason for dispute between the parties. Clause 19 of the License Agreement is reproduced hereinafter:-

"Surrender of License

Clause 19

If the licensee wants to surrender (terminate) the contract, he will be allowed to do so after giving 3 (three) months notice. However, security deposit of the licensee will stand forfeited. The unused licensee fee for that particular six months will also not be refunded. Part surrender or termination will not be accepted and termination will be considered for the full license by DMRC on surrender (termination) by licensee at all stations at the cost of the licensee within 7 (Seven) days of issue of acceptance of surrender. This clause applies to the additional panels/advertising spaces offered and accepted also."

8. The petitioner filed a Writ Petition, being WP (C) No. 3771/2012, before this Court *inter alia* challenging Clause 19 of the License Agreement. On 07.09.2012 this Court passed the following order on an application filed by the respondent seeking modification of the earlier order dated 10.07.2012 passed by this Court:-

“CM No. 8931/2012 (for modification of order dated 10.07.2012)

Mr Sapra, learned senior counsel, on instructions of Mr Mayank Shyam, Director of the petitioner, submits that the petitioner will pay the rental for the period July to December, 2012 amounting to Rs 2,74,84,333/- alongwith interest at the contractual rate, by 31.10.2012. He submits that he shall also keep the bank guarantee alive, as directed by this court, till the disposal of the writ petition.

Mr Sapra further submits that the security deposit will be enhanced by a further 5%. The enhanced value will be supplemented by depositing a cash to the extent of 50% and by furnishing a bank guarantee for the remaining half. Mr Sapra says that he will give a notice for surrendering the license by 01.10.2012 and the license will be surrendered by December, 2012.

With the aforesaid statement on record, the learned counsel for the respondent, on instructions of Mr A.S. Rao, representative of DMRC, says that he does not wish to press the captioned application.

Accordingly, the application stands disposed of. Needless to say during the pendency of the writ petition, bank guarantee will not be encashed and that the petitioner will be entitled to operate the license till 31.12.2012.”

9. The petitioner thereafter issued notice dated 28.09.2012 surrendering the license with effect from 01.01.2013 / 31.12.2012.

10. The respondent by its letter dated 22.10.2012 accepted the surrender of license and called upon the petitioner to extend the validity of the Bank Guarantee till 31.03.2013 or alternatively deposit the amount

in the form of a demand draft equivalent to the Bank Guarantee amount and take back the Bank Guarantee. The respondent, in the above letter, also stated that the final dues shall be intimated later.

11. On 12.01.2016 the hearing of the petition was adjourned on the ground that the petitioner intended to approach the respondent for an out of Court settlement.

12. The petitioner thereafter by a letter dated 21.01.2016 called upon the respondent to arrange for conciliation/mediation in its office in order to settle the disputes. In the said letter the petitioner asserted that during the hearing on 12.01.2016, this Court had suggested that the petitioner should approach the respondent for an out of Court settlement.

13. The respondent by its letter dated 28.01.2016 appointed a Sole Conciliator for examination of the claims and Counter Claims of the parties.

14. On 18.03.2016 the petitioner withdrew the Writ Petition.

15. On 26.05.2016 the Sole Conciliator recorded the failure of the conciliation proceedings.

16. On 01.06.2016 the Sole Arbitrator was appointed.

17. As noted hereinabove, the main dispute between the parties is whether the respondent was entitled to forfeit the security deposit on the surrender of the license by the petitioner under Clause 19 of the License Agreement. The Arbitrator by his Impugned Award has held that though the respondent was legally correct to forfeit the security deposit but the

same was against business ethics and does not meet the criteria of natural justice. Relying upon the terms of another Agreement executed by the respondent with a third party, the Arbitrator has further held that the ends of justice would be met with if the respondent forfeits three months license fee instead of the whole of the Security Deposit. The Arbitrator has therefore allowed the respondent to retain Rs. 1.19 crores while directing the balance Security Deposit to be refunded to the petitioner.

18. The learned senior counsel for the respondent submits that the claim of the petitioner was barred by the Law of Limitation. He submits that the cause of action for making such claim arose in favour of the petitioner on 01.01.2013 when the surrender of the license became operational. He submits that the petitioner requested for conciliation/mediation only by letter dated 21.01.2016 and upon failure of such conciliation proceedings, the Arbitrator was appointed only on 01.06.2016. By both these dates the claim of the petitioner was barred by the Law of Limitation.

19. He further submits that the petitioner had itself claimed interest on the Security Deposit with effect from 31.12.2012 thereby evidencing that even as per the petitioner the cause of action for making the said claim arose with effect from the said date. He submits that the cause of action for making the said claim did not get postponed merely because the respondent finalized the accounts at a later date or agreed to the appointment of a Conciliator on the request of the petitioner.

20. The learned counsel for the respondent further submits that the petitioner was not entitled to seek exclusion of time spent in pursuing the

Writ Petition under Section 14 of the Limitation Act, 1963 as the petitioner had not filed any application under the said Section before the Arbitrator nor any basis for availing the same have been mentioned by the petitioner in the Statement of Claim. He relies upon the judgment of this Court in ***Union of India vs. Mahavir Industries***, 152 (2008) DLT 339 to contend that in the absence of such application and pleadings, the petitioner was not entitled to the exclusion of time under Section 14 of the Limitation Act, 1963.

21. The learned counsel for the respondent further submits that in any case, the petitioner was not entitled to the exclusion of time under Section 14 of the Limitation Act, 1963 as it failed to satisfy the conditions mentioned in the said Section. He submits that the withdrawal of the Writ Petition was neither for defect of jurisdiction nor for any other cause of similar nature. He further submits that the petitioner cannot be said to be pursuing the Writ Petition *bona fide* as defined in Section 2(h) of the Limitation Act, 1963. He places reliance on the judgment of the Supreme Court in ***Bakhtawar Singh vs. Sada Kaur***, AIR 1996 SC 3488 and ***Madhavrao Narayanrao Patwardhan vs. Ram Krishna Govind Bhanu***, AIR 1958 SC 767 .

22. I have considered the submissions made by the learned senior counsel for the respondent, however find no merit in the same. In the first place it is to be noted that upon receiving the letter of the petitioner surrendering the license, the respondent by its letter dated 22.10.2012 called upon the petitioner to extend the validity of the Bank Guarantee, which was part of the Security Deposit, till 31.03.2013 and also informed

the petitioner that the final dues will be intimated shortly. The Statement of Defence filed by the respondent indicates that the respondent prepared the final statement of account on 16.05.2013. Secondly, on the date of issuance of the surrender notice by the petitioner, the Writ Petition filed by the petitioner challenging Clause 19 of the License Agreement was already pending before this Court. In the said Writ Petition, the respondent by its reply had contended that in view of availability of an alternate remedy in terms of conciliation and arbitration, the Writ Petition was not maintainable. In light of such objection, the petitioner invoked the conciliation remedy by its letter dated 21.01.2016 and withdrew the Writ Petition on 18.03.2016.

23. Section 14 of the Limitation Act is reproduced hereinunder:-

“14. Exclusion of time of proceeding bona fide in court without jurisdiction. —

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.”

24. In **Roshanlal Kuthalia & Others vs. R.B. Mohan Singh Oberoi**, (1975) 4 SCC 628, the Supreme Court held that any circumstance, legal or factual, which inhibits entertainment or consideration by the Court of the dispute on merits, comes within the scope of Section 14 and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy to one who has a right.

25. In **Union of India and Others vs. West Cost Paper Mills Ltd. and Another(III)**, (2004) 3 SCC 458, the Supreme Court again explained the scope of section 14 of the limitation act in the following words:-

“14.....However, Section 14 of the Limitation Act is wide in its application, inasmuch as it is not confined in its applicability only to cases of defect of jurisdiction but it is applicable also to cases where the prior proceedings have failed on account of other causes of like nature. The expression “other cause of like nature” came up for the consideration of this Court in Roshanlal Kuthalia v. R.B. Mohan Singh Oberoi and it was held that Section 14 of the Limitation Act is wide enough to cover such cases where the defects are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance, legal or factual, which inhibits entertainment or consideration by the court of the dispute on the merits comes within the scope of the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right.”

26. In *M.P. Steel Corporation vs. Commissioner of Central Excise*, (2015) 7 SCC 58, the Supreme Court re-emphasized that Section 14 of the Limitation Act, 1963 is based on the principle which advances the cause of justice and the Courts must always lean in favour of advancing the cause of justice, since justice and reason is at the heart of all legislation.

27. In *Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and Others*, (2008) 7 SCC 169, the Supreme Court explained the policy of Section 14 and the approach to be adopted by the Courts in the following words:-

“22. The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a

court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (sic of) law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded.”

28. Applying the above test, it cannot be held that the petitioner was not entitled to the benefit of Section 14 of the Limitation Act for the exclusion of the time during which the Writ Petition remained pending before this Court. The Arbitrator has also considered the above issue in the Impugned Award and has held that the claim of the petitioner was not barred by the Law of Limitation.

29. Reliance of the respondent on the judgment of the Supreme Court in ***Bakhtawar Singh*** (Supra), is ill-founded as in that case the plaintiff therein had failed to produce any evidence to show that the permission to withdraw the suit was given on the ground that the suit was bound to fail by reason of some formal defect or there were sufficient grounds for allowing the plaintiffs to institute a fresh suit in respect of the same subject matter. In the present case, however, the petitioner not only invoked the conciliation mechanism as provided in the License Agreement during the pendency of the Writ Petition itself but also invoked the Arbitration Agreement immediately on failure of such conciliation proceedings.

30. Equally, only because the petitioner did not invoke such Conciliation Mechanism earlier but continued its challenge to Clause 19

of the License Agreement in the Writ Petition, it cannot be said that the petitioner was not prosecuting the Writ Petition in 'good faith'. Therefore, the judgment of the Supreme Court in ***Madhavrao Narayanrao Patwardhan*** (supra), can come to no assistance to the respondent.

31. As far as the plea of the respondent that in the absence of an application under Section 14 of the Limitation Act, the petitioner could not have been granted the benefit thereof, it is not denied that in the Statement of Claim filed by the petitioner before the Arbitrator the petitioner had pleaded the facts relating to the pendency of the Writ Petition leading up to the appointment of the Arbitral Tribunal. In view of such pleadings the petitioner cannot be denied the benefit of Section 14 of the Limitation Act for mere absence of a formal application under the said Section. Infact, no such formal application is mandatory to be made for seeking benefit of the said Section. The pleadings justifying such exclusion of period can be made even in the plaint/statement of claim.

32. In ***Bhagwati Prasad v. Chandramaul***, (1966) 2 SCR 286, the Supreme Court has held that though a plea is not specifically taken in the pleadings, the same would not necessarily disentitle a party from relying upon it if the other party knew that the said plea was involved in the trial and had the opportunity to meet the same. I may only quote paragraph 10 of the judgment as under:

“10. But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of substance. If a plea is not

specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.”

33. The above judgment was followed by the Supreme Court in ***Ram Sarup Gupta (Dead) by LRs v. Bishun Narain Inter College and Ors.***, (1987) 2 SCC 555, which in turn was approved in ***Smt. Rajbir Kaur and Anr. v. M/s S.Chokesiri and Co.*** (1989) 1 SCC 19.

34. In ***Mahavir Industries*** (Supra), relied upon by the respondent, the Court had found that there were no pleadings before learned Single Judge either by way of a separate application under Section 14 of the Limitation Act or by way of incorporating the same in the petition itself, satisfying the test of Section 14 of the Limitation Act. In the present case, however,

such pleadings were before the Arbitrator in the Statement of Claim filed by the petitioner and, therefore, the judgment can come to no assistance to the respondent.

35. On the merits of the claim, the learned senior counsel for the respondent submits that the Arbitrator has clearly re-written the terms of the contract between the parties by relying upon another contract. He submits that such a contract was not a matter of trade usage and the Arbitrator, therefore, had no power to re-write the Contract by directing forfeiture of security deposit only to the extent of three months of license fee instead of the complete amount as prescribed in Clause 19 of the License Agreement. He places reliance on the judgment of the Supreme Court in *Food Corporation of India vs. Chandu Construction & Anr.*, (2007) 4 SCC 697 & *Satyanarayana Construction Company vs. UOI*, (2011) 15 SCC 101.

36. I am in agreement with the submission made by the learned senior counsel for the petitioner. Section 28(3) of the Act reads as under:-

“28. Rules applicable to substance of dispute.--

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(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.”

37. It may be correct that where the Arbitrator interprets the terms of the Agreement between the parties, Court exercising jurisdiction under Section 34 of the Act cannot interfere with such Award merely because it would prefer another interpretation, at the same time, the Arbitrator

cannot re-write the Contract between the parties or refuse to apply the terms thereof merely because it finds the same to be not reasonable. In ***Central Bank of India Ltd., Amritsar vs. The Hartford Fire Insurance Co. Ltd***, AIR 1965 SC 1288, the Supreme Court has held as under:-

“7. The contention of the appellant is based on the interpretation of clause 10. Now it is commonplace that it is the Court’s duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however it may dislike the result.”

38. In ***Food Corporation of India*** (Supra), the Supreme Court emphasized that:-

*“11. It is trite to say that the arbitrator being a creature of the agreement between the parties, he has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the court. We may, however, hasten to add that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error (see *Associated Engg. Co. Vs. Govt. Of A.P. and Rajasthan State Mines & Minerals Ltd. Vs. Eastern Engg. Enterprises*).”*

39. In ***Associate Builders vs. Delhi Development Authority***, (2015) 3 SCC 49, the Supreme Court again emphasized that:-

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

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

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

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

43. *In McDermott International Inc. v. Burn Standard Co. Ltd.,(2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)*

“112. It is trite that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission, (2003) 8 SCC 593:2003 Supp (4) SCR 561 and D.D.Sharma v. Union of India.] (2004) 5 SCC 325.

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court

will not exercise its jurisdiction unless it is found that there exists any bar on the fact of the award.

44. *In MSK Projects (I) (JV) Ltd. v. State of Rajasthan, (2011)10 SCC 573; 2012 3 SCC (Civ) 818, the Court held : (SCC pp. 581-82, para 17)*

“17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See Gobardhan Das v. Lachhmi Ram, AIR 1954 SC 689, Thawardas Pherumal v. Union of India, AIR 1955 SC 468, Union of India v. Kishorilal Gupta & Bros., AIR 1959 SC 1362, Alopi Parshad & Sons Ltd. v. Union of India, AIR 1960 SC 588, Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji, AIR 1965 SC 214 and Renusagar Power Co. Ltd. v. General Electric Co. (1984) 4 SCC 679; AIR 1985 SC 1156)”

45. *In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306, the Court held: (SCC pp. 320-21, paras 43-45)*

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta

Brother Steel Tubes Ltd. [(2009) 10 SCC 63: (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296: (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)

43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.* [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

40. In ***Ssangyong Engineering & Construction Co.Ltd. v. National Highways Authority of India (NHAI)***, 2019 SCC OnLine SC 677, the Supreme Court, considering the amendments made in Section 34 of the Act by the Arbitration and Conciliation (Amendment) Act, 2015, has held as under:

“41. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A).”

xxxx

69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent “errors of jurisdiction”, it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as “disputes” within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of “patent illegality”, which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the arbitral tribunal.”

41. This however is not sufficient for disposing of the challenge to the Award.

42. The Award has also been challenged by the petitioner on the ground that even if the parties were to remain bound by Clause 19 of the License Agreement, forfeiture of the security deposit by the respondent was not justified even to the extent of three months license fee as awarded by the arbitrator in the Impugned Award. The petitioner has therefore, filed its petition challenging the Award.

43. It is submitted by the learned senior counsel for the petitioner that for forfeiting any part of the security deposit, the respondent was under an obligation to show the loss or damage suffered by it due to termination of the Agreement. He submits that upon surrender of the license, the respondent had issued fresh tender, however, did not disclose the result thereof. Apart from the fact that it was on the respondent to have proved the loss suffered by it, in the absence of such disclosure of the result of the re-tender process, an adverse inference should have been drawn by the Arbitrator against the respondent and therefore, the respondent was not entitled to retain any part of the security deposit.

44. On the other hand, the learned senior counsel for the respondent reiterates that forfeiture of the security deposit was in accordance with the terms of the License Agreement. He further submits that the License Agreement itself records that the same had been entered into by the respondent with a view to part finance its project, which is to provide public transport/public utility service. He submits that in such a case the loss suffered by breach of Contract cannot be quantified. Relying upon the judgment of this Court in *NTPC Vidyut Vyapar Nigam Ltd. vs. Saisudhir Energy Ltd.*, 248 (2018) DLT 141 (DB), he submits that

forfeiture of the security deposit was reasonable damage and therefore should have been granted in full.

45. I have considered the submissions made by the learned counsels for the parties. Section 74 of the Contract Act, 1872 (the Contract Act) is reproduced hereinunder:-

“74. Compensation for breach of contract where penalty stipulated for.—

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the [Central Government] or of any [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

46. In *Kailash Nath Associates vs Delhi Development Authority & Anr*, (2015) 4 SCC 136, the Supreme Court summarized the law on compensation for breach of Contract under Section 74 of the Contract Act as under:-

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.

44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further, we cannot accept the view of the Division Bench that the fact that DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award of damages—namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall.”

47. It may be true that the purpose of the License Agreement was for financing the project undertaken by the respondent, however, the said purpose itself could not dispense with the proof of actual damage or loss being proved by the respondent. The loss suffered by the respondent is only in terms of the license fee unlike in the case of ***NTPC Vidyut Vyapar Nigam Ltd.*** (Supra) wherein the loss suffered was in form of damages or loss to the society as the contract had been entered into with the object of reducing India’s dependence on non-renewable sources of energy.

48. In the present case the submission of the petitioner that the respondent had failed to show any actual damage or loss suffered by it due to the surrender of the license by the petitioner, was not refuted by the respondent. It was also not refuted that the respondent had indeed re-tendered the advertising spaces, however, had failed to produce before the Arbitrator the result of such tender. In the present case the damages or loss were clearly ascertainable and quantifiable. The onus of proving the same was on the respondent, which it failed to discharge. In absence thereof, the direction of the Arbitrator allowing the respondent to retain three months license fee cannot be sustained and is set aside.

49. The next challenge of the petitioner is to the rejection of the claim of the petitioner towards reimbursement of expenses incurred by it in keeping the Bank Guarantee(s) to the tune of Rs. 2.38 crores (forming part of the security deposit) alive even after the surrender of the License Agreement.

50. The Arbitrator has rejected the said claim of the petitioner observing as under:-

“Claim II

Reimbursement of charges incurred by the Claimant in keeping the bank guarantee to the tune of Rs. 2.38 crores (forming part of the Refundable Security Deposit) alive during the pendency of the instant Arbitration proceedings.

Bank guarantee(s) were being kept alive, firstly as per directions of the High Court and later on as per directions of the Arbitrator. This was required till the dispute was adjudicated. Charges for keeping these alive was a contractual

obligation and expenses on this account have to be borne by the claimant.”

51. The learned senior counsel for the petitioner has placed reliance on the following judgments to contend that as the petitioner was forced to keep the Bank Guarantees alive during the pendency of the arbitration proceedings, it was entitled to claim reimbursement of expenses for keeping such Bank Guarantee(s) alive:

- (i) ***P.C.Sharma & Anr. vs. Delhi Development Authority***, (2006) SCC Online 218;
- (ii) ***Dai-Ichi Karkaria Ltd. vs. ONGC*** (2012) SCC OnLineBom 1794;
- (iii) ***M.V. Kew Bridge vs. Finolex Industries Ltd.*** (2014) SCC OnLineBom 618.

52. I do not find any merit in the submission of the learned senior counsel for the petitioner. The Arbitrator has considered the claim of the petitioner and has rejected the same giving reasons for the same, which cannot be said to be unreasonable or perverse so as to warrant any interference of this Court in exercise of its limited powers under Section 34 of the Act.

53. In the present case the petitioner had challenged the validity of Clause 19 of the License Agreement by way of a Writ Petition and only after much delay invoked the contractually stipulated mechanism of conciliation and arbitration. In the order dated 07.09.2012 passed in the Writ Petition, the petitioner itself had offered to keep the bank guarantee(s) alive during the pendency of the Writ Petition. Therefore, in

the peculiar facts of the present case, the rejection of the claim of the petitioner for reimbursement of the charges incurred by it for keeping such Bank Guarantee(s) alive, cannot be faulted. Equally, the judgments cited by the learned senior counsel for the petitioner would be of no assistance to petitioner's case.

54. The next challenge of the respondent is to the award of Rs. 65 lakhs allowed in favour of the petitioner towards reimbursement of expenses incurred by the petitioner on fabrication, installation, electrification and commissioning of the advertising panels at the ten metro stations.

55. The learned senior counsel for the respondent submits that it was the petitioner who surrendered the license. The petitioner, therefore, was not entitled to contend that it could not make full recovery of the investment allegedly made by it or was to be reimbursed the same by the respondent. Relying upon Section 108(h) of the Transfer of Property Act, 1882, he submits that it was for the petitioner to have removed the advertising panels from the stations and it is not the case of the petitioner that the respondent ever refused to allow the petitioner to remove the same. Therefore, the claim of the petitioner was not maintainable and has been wrongly granted by the Arbitrator.

56. On the other hand, the learned senior counsel for the petitioner submits that the Arbitrator has rightly allowed such claim in favour of the petitioner. He submits that the petitioner had made investment keeping in view the period of the license. However, due to the arbitrary action of the respondent, the petitioner was forced to surrender the license and

therefore could not make full recovery of its investment. He submits that the Arbitrator having considered all the facts has partly awarded the claim in favour of the petitioner and this Court in exercise of its power under Section 34 cannot interfere with the same.

57. I have considered the submissions made by the learned counsels for the parties. Clause 4 and 7 of the License Agreement are relevant to the issue and are reproduced hereinunder:-

“4. The cost of preparation of the advertisements/media/inserts will be borne solely by the licensee. The licensee will also maintain all the media /inserts and advertisements as per standards indicated by the authorised representative from the operations and maintenance department of DMRC the licensor.

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7. The licensee fully understands and comprehend that all panels constructed / fabricated, installed and commissioned by him/her/them in the ten (10) Stations (Qutub Minar to Huda City Centre), will become the sole property of DMRC at the end of the license period i.e. five (5) years from commencement date of license.”

58. A reading of the above clauses would show that the petitioner was to set up the advertisement panels at its own cost and on termination of the license by efflux of time these were to become the sole property of the respondent.

59. Though a similar consequence on a surrender of license is not provided for in the License Agreement and the License Agreement is silent on the same, in my opinion, the fact that such panels were to

become sole property of the respondent on termination of the license by efflux of time would only show that the petitioner could not claim the cost spent in setting up such panels even where the petitioner prematurely terminates the said agreement by exercising its right to surrender the same. Surrender of the license was a unilateral decision of the petitioner. In the Impugned Award there is no finding of the Arbitrator that such surrender was forced upon the petitioner by the respondent. It was also not the case of the petitioner that the petitioner sought removal of such panels but the respondent prevented the same. I may also note that in the original Statement of Claim filed by the petitioner before the Arbitrator, this was not a claim raised by the petitioner.

60. For the above reasons, the Impugned Award, insofar as it directs payment of Rs. 65 lakhs towards compensation for fabrication, installation, electrification and commissioning of the advertising panels by the respondent to the petitioner, cannot be sustained.

61. The next challenge of the petitioner is to the rejection of claim of interest on the amount of security deposit ordered to be refunded in the Impugned Award. The counsel for the petitioner submits that as the respondent was wrongfully retaining the security deposit, it cannot escape the liability to pay interest. He places reliance on the judgment of ***Kailash Nath Associates vs. DDA*** (Supra) and in ***Union of India vs. N.K. Garg and Co.***, 2015 SCC OnLine Del 13324.

62. I have considered the submission made by the learned senior counsel for petitioner and find merit in the same. The Arbitrator in the Impugned Award has considered the question of award of interest and

has held that as the respondent was legally entitled to retain the security deposit, interest was not awarded in favour of the petitioner. It has been held in this judgment that the respondent was not entitled to retain the security deposit as it failed to prove any loss suffered by it due to surrender of license by the petitioner. However, at the same time, as the petitioner first filed a Writ Petition challenging the Clause 19 of the License Agreement (which it later withdrew) and later arbitrator was appointed only on 01.06.2016 (on failure of Conciliation Proceedings), the petitioner is held entitled to interest at the rate of 6% per annum with effect from 01.06.2016.

63. The last challenge of the petitioner is to the overstay charges allowed by the Arbitrator in favour of the respondent. I do not find any merit in the challenge. The Arbitrator has infact applied the reduced rate of damages as are otherwise applicable to the subsequently executed Contracts. The same being reasonable, deserves no interference of this Court.

64. In view of the above, both the petitions partly succeed. The parties shall bear their own costs.

NAVIN CHAWLA, J

JULY 02, 2019/rv