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

Date of decision: 18th January, 2019.

+ **O.M.P. 1489/2014**

M/S DOONS CATERERS

..... Petitioner

Through: Mr. Navin Kumar and Ms. Arpana
Majumdar, Advocates.
(M:9958893564)

versus

UNION OF INDIA

..... Respondent

Through: Mr. Ranjan Sabharwal, Standing
Counsel, UOI. (M:9810072538)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition under Section 34 has been filed challenging the Award dated 24th July, 2014 passed by the learned Sole Arbitrator.

2. M/s. Doons' Caterers (*hereinafter* 'Caterer') had submitted a quotation for management of on-board catering services in Train No. 2483-84, KCVL-ASR Express from Kochuveli to Amritsar Junction. The Indian Railway Catering and Tourism Corporation (*hereinafter* 'IRCTC') had called for the said quotation. The terms of the quotation were: -

- (a) That it was on a purely *ad-hoc* basis;
- (b) It was for a period of six months from the date of commencement of service or take over by the new caterer whichever is earlier;
- (c) The six months period was extendible for a maximum of further three months at the discretion of IRCTC;

- (d) There was a specific clause stipulating *“No extension shall be given after the completion of the total nine (9) months of temporary licence”*.

3. The caterer had submitted its bid/quotation. The amount payable by the caterer was Rs.2,55,200/- per month on the basis of which, the licence was awarded to the caterer on 10th March, 2010 in the following terms:

*“M/s Doon’s Caterers
5198, Basant Road
Pahar Ganj,
New Delhi-110055*

Sub: Award of temporary licence for management of on-board catering services in train no.2483-84, KCVL-ASR Express train.

With reference to your quotation opened on 09.03.10 for the above project, it has been decided to award to you the license for management of on board catering services on train no. 2483-84, KCVL-ASR Express train on a Licence fee of Rs.2,55,200/- per month, on temporary basis for a period of six months.

You are required to convey your acceptance of the terms and conditions of the licence along with demand draft of Rs.15,31,200/- towards license fee for six months, in favour of Indian Railway Catering and Tourism Corporation Ltd., payable at New Delhi.

You are required to deposit the above amount immediately. A format of the acceptance letter is enclosed.

You are required to provide catering services in the above train at w.e.f. 15th March, 2010 Ex. ASR. You are also required to pick up major meals; i.e. lunch and dinner from your own existing infrastructure or tie up for picking up meals en-route with standard suppliers having appropriate facilities for which the

details should be advised immediately.

*Sd/-
Manager (CS)
For GGM/DCS”*

4. The said licence was thereafter extended on 3rd September, 2010 for a further period of three months. The licence fee for the said three months was also directed to be deposited.
5. There is no dispute that insofar as the initial nine-month period is concerned, the caterer has paid the amount of Rs.2,55,200/- per month.
6. However, for whatever reason, the caterer did not wish to continue post the nine-month period. It issued notice on 22nd September, 2010 clearly informing the IRCTC as under: -

*“To,
GGM(CS)
Indian Railway Catering and Tourism Corporation
Ltd.,
9th Floor, Bank of Baroda Building,
Parliament Street,
New Delhi-110001*

*Sub: Management of Catering Service Onboard
Train No.2843-84 ASR-KCVL*

*Respected Madam,
In reference to the above cited subject, we would like
to state as under:-*

The above cited train was awarded to us on a temporary basis through quotation for a period of 6 months and mandatory extension of 3 months. We have successfully completed the tenure of 6 months and further extended for a period of 3 Months vide your letter No.2007/IRCTC/CATG/2483-84/2337 Dated 3rd September 2010 and we have deposited the prescribed

License Fee Rs.765600/- for the extended period of 14th September 2010 to 13th December 2010.

Further more we would like to state that after completion of extended period i.e 13th December 2010, we are not interested to manage the Catering Services of this train after this date.

Hence we would like to inform you kindly make necessary arrangements to provide catering services in the above train and to take over the train after 13th December 2010. This is communicated to you well in advance so that the necessary arrangement can be made at your end.

This is for your action and necessary action please.

***Thanking you,
Yours Truly,***

*Sd/-
FOR DOON'S CATRERS"*

7. The above letter is very clear that the caterer was not interested in continuing to manage the catering services beyond 13th December, 2010. This position is reiterated again on 8th October, 2010.

8. Thereafter, on 27th October, 2010, a tripartite agreement was signed as the train was being transferred from the IRCTC to Northern Railways. This was accepted by the caterer. However, even in letter dated 27th October, 2010, the caterer informed the Railways as under: -

*"To
Chief commercial Manger(catg)
Northern Railway,
Baroda House,
New Delhi-110 001*

Sub: Signing of tripartite transfer agreement of train

no. 2483-84 ASR -KCVL Exp

Respected sir,

In reference to the above mentioned subject and in continuation of our previous letter dated 22.9.2010 & 8/10/10 & letter to IRCTC, North Zone dated 18.10.2010 (copy enclosed). We have already intimated you vide these above mentioned letters that we are not willing to continue to manage catering services on this train after 13.12.2010. Hence for the transfer agreement will be kept in abeyance. Therefore transfer agreement has may not be executed.

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.

This is for your action and necessary action please.

Thanking you,

Yours Truly

Sd/-

FOR DOON'S CATRERS"

9. The tripartite agreement was thereafter signed. The said agreement also clearly stipulated that the licence would continue till 13th December, 2010. Clause 5 reads: -

"5. Terms and Conditions of the Agreement

The license shall continue to provide catering services in Train No. & name 2483 KCVL to ASR Exp till 13.12.2010 i.e. for the tenure awarded by IRCTC, Unless terminated earlier by CCM/NR, IRCTC hereby assign its rights and liabilities as Licensor to the Indian Railways acting through CCM/NR. The terms and conditions as provided in the agreement dated 28.10.10 signed between M/s Doon's Caterers and IRCTC shall for the basis this agreement. However, following amendments shall prevail over the earlier agreement."

10. On 6th December, 2010, the caterer informed the Northern Railways that if it has to continue to manage the catering service, it is acceptable to do so only on the basis that it would be liable to pay the reserve licence fee of Rs.51,000/- per month and not the quoted amount of Rs.2,55,200/- per month. This is clear from paragraph 2 of the letter dated 6th December, 2010 which reads as under: -

".... 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....."

11. On 10th December, 2010, the caterer was told to detach the pantry car from the train on the ground that it had refused to provide catering services vide letter dated 6th December 2010. The various Divisional Managers were directed to make alternate arrangements. In this communication, the caterer was directed to vacate the pantry car as per schedule.

12. Curiously, however, on 31st December, 2010, the Northern Railways addressed a letter to the caterer in the following terms: -

*“M/s Doon’s Caterers,
5195, Basant Road,
Paharganj,
New Delhi-110055.*

*Sub: Catering Contract of Train No.2483/84 (ASR
KCVL Mail/Express).*

*Ref: This office letters of even no. dated 10.12.2010
& 14.12.2010.*

*You are advised on Mobile Phone to provide catering
services in the said train continuous till further orders.*

*Now you are advised to submit in writing your consent
to provide catering services continuously till further
orders in the said train on the same terms and
conditions on the quoted rate of Rs.2,55,200/- per
month as license fee, at the earliest so that further
action may be taken accordingly.*

*Sd/-
(N.L. Meena)
Dy. Chief Comml. Manager/Ctg.”*

13. In response to this letter, the caterer informed the Northern Railways on 7th January, 2011 as under: -

*“Now, we are again being forced to continue
managing the services of this train at prevailing license
fees whereas its already been clarified by us that in
case Northern Railway want us to contribute managing
the catering services of this train then we will do so **but
only on the reserve license fees and not of the bided
license fees**, we still stand by our previous stand.”*

14. Communications to the effect that the caterer was being forced to continue the management of the catering services in the train were written by the caterer to the Northern Railways. The said communications are dated

10th May, 2011 and 14th September, 2011. No decision was, however, communicated to the caterer as to the license fee payable. It is clear, at this stage, that the caterer had never agreed to pay a sum of Rs.2,55,200/- per month. Each and every communication of the caterer has stated this fact clearly to the Railway authorities. The issue not being resolved, the caterer invoked arbitration on 7th December, 2011 and sought appointment of an Arbitrator. This request was reiterated on 4th June, 2012. Thereafter, the Railways appointed a Sole Arbitrator to resolve the disputes. The impugned Award then came to be passed on 24th July, 2014.

15. The learned Arbitrator has arrived at a finding that after the expiry of the nine-month period, the caterer never requested the Railways to reduce the amount of licence fee on negotiations. The Arbitrator also concluded that the caterer had accepted, by conduct, to continue the catering services on the earlier terms. The findings of the Arbitrator are extracted herein below: -

“BRIEF FACTS OF THE CASE: -

The catering contract of the Train No. 12483/12484 (ASR-KCVL Exp.) was awarded to M/s. Doon's Caterers by IRCTC on temporary basis w.e.f. 14.03.10 and renewed upto 13.12.10 on monthly license fee of Rs.2,55,200/- per month. Catering of the said train was taken over by the NR from IRCTC on 28.10.10. After expiry of the extended period of contract on 13.12.10, the said contract was not renewed on paper, before this respondent never requested either to discontinue to provide catering services or to reduce the amount of license fee on negotiation.

.... Considering all the aspects and by considering the financial constraints of respondent as expressed in their earlier communication, Railway Administration

has extended the tenure of the contract on the same terms and conditions as agreed previously without increasing the license fee. The respondent was asked to continue the catering services on the previously agreed rate of Rs.2,55,200/- per month as license fee and to deposit the outstanding license fee.

The respondent was advised to submit its consent for providing catering services in the said train till further order but consent was not given on paper by the respondent rather he continued to provide the catering service in the said train and as such gave acceptance by action.

..... The same was reiterated in the subsequent letters by the respondent but on the other hand, respondent was ready to continue on the reserved license fee.

..... Respondent was asked to deposit the license fees Rs.9,27,226/- for the period of 14.12.10 to 20.07.11 vide claimants letter no.13-AC/M-Exp.2483-84/2010 dt. 10.12.10, 14.12.10, 31.12.10, 17.01.11 & 03.05.11, M/s. Doon's Caterers giving reference of all previous letters requested to appoint arbitrator.

CONCLUSION: -

In view of the above observations it is clear that the respondent itself has offered rate of the contract @ Rs. 2,55,200/- per month as a license fee which is approximately five time of the reserved price. This cost is being supposed to increase day by day but considering the request of respondent, license fee was not increased at the time of extension. Respondent continued to provide service on the previous terms and conditions as mentioned in the letter for extension of the contract. This indicates that terms and condition have been accepted by action by the respondent. In case the terms and conditions were not acceptable by

respondent, it would have discontinued the service. In support of its plea, the respondent has produced two judgments and extracts of a commentary on Contract Act 1872 which do not seem to be acceptable in this context. Moreover, respondent M/s. Doon's Caterers has been awarded the license for the management of on board catering service in many trains and license fee of any train is much more than Rs. 3 lacs per month. Similar type/similar distance Train No. 2217-18-Kerla Sampark Kranti Express (old Train No. 2653-54 CDG-Kouchuvali Sampark Kranti Express) has also been allotted at the license fee Rs. 35,77,000/- per annum. Moreover, continuation in providing service by the respondent amounts to implied consent on his part, as such there is no justification to allow the respondent to continue the catering services on reserve price of Rs. 51,000/- per month. The respondent is therefore being directed to pay the outstanding amount of license fee Rs. 55,21,827/- to the claimant within a period of three months failing which the respondent shall also be liable to pay interest @ 18% per annum on the awarded amount from the date of award till the payment is made. The respondent is being exonerated from paying the interest @ 12% per annum as claimed from the date of institution of the claim petition till realization of the claimed amount.

The cost of the litigation will be borne by the parties themselves.

As such, I hold the opinion that action taken by claimant is justified & Claimants claim for recovery for a sum of Rs.55,21,827/- is tenable & award of Rs. 55,21,827/- is awarded in favour of claimants i.e. Assistant Commercial Manager/Catering, Northern Railway, HQ Office, Baroda House, New Delhi.

That the expenses incurred on non-judicial stamp papers shall be borne by the Respondent.

That any other expenses incurred by the parties in connection with the arbitration will be borne by themselves.

This award is given and signed by me at New Delhi on this 24th July, 2014.

Submissions of parties:

16. Mr. Navin Kumar, Ld. Counsel for the Petitioner, submits that the findings of the Arbitrator are completely contrary to the record inasmuch as the various letters written by the caterer clearly show that the caterer repeatedly informed the Railways that it would not be able to continue the catering services on the quoted price of Rs.2,55,200/- and had clearly communicated that it would only be able to pay a sum of Rs.51,000/- which was the reserve price on a monthly basis. It is further submitted that the caterer had actually vacated the pantry car on 13th December, 2010. However, only upon repeated pressure from the Railways, it was forced to provide the catering services. Learned counsel points out that the present caterer was providing catering services in other trains and owing to the relationship with the Railways, it had continued to provide the services. However, simultaneously, the communications exchanged between the parties wherein the caterer had informed the Railways that it cannot pay the quoted price but only the reserve price. Learned counsel further submits that for any contract to come into existence, under Section 7 of the Indian Contract Act, 1872 there has to be an unqualified and unequivocal acceptance. There being no acceptance for payment of Rs.2,55,200/- per month, the Award by the Arbitrator directing the caterer to pay the said amount is not sustainable. Learned counsel relies upon ***Benara Bearings &***

Pistons Ltd. v. Mahle Engine Components (I) P. Ltd. 2017(2) Arb. LR 419 (Delhi) (DB). Paragraphs 15 to 17 of the said judgment, relied upon, are extracted herein below: -

“15. It will be seen from the e-mail dated 18.03.2016 that Mahle was insisting that the MRP be affixed by them before invoicing the goods to the appellant and they propose to adopt the MRP/selling structure as per their earlier e-mail dated the 3rd of February. On the other hand, the e-mail of 21.03.2016, while it indicates that the appellant had signed the distribution agreement, also makes it clear that the appellant was sticking to its stand on the MRP as per its final confirmation in September, 2015. By virtue of the e-mail dated 21.03.2016, the appellant also requested Mahle to sign the distribution agreement before commencement of business for the year. It is an admitted position that Mahle never signed the distribution agreement. It is also clear that Mahle withdrew from the negotiations with regard to the distribution arrangement by virtue of its subsequent letter dated 21.04.2016. Furthermore, there was no consensus with regard to the issue of MRP. We are of the view that without the business model and the issue of MRP having been sorted out, the distribution agreement, even if it had been signed by Mahle, would be unworkable. We agree with the learned Single Judge who found that although the parties could be regarded as being ad idem insofar as the terms of the distribution agreement were concerned, they were certainly not ad idem with regard to the commercial terms. We also entirely agree with the observation of the learned Single Judge that the commercial model on the basis of which the distribution agreement was to be worked remained a subject of discord. We also agree with the finding that the issues relating to MRP and margins were not divorced from and, in fact, were intertwined and interlaced with the distribution

agreement that was being proposed by the parties. We fully endorse the following observations of the learned Single Judge on this aspect of the matter (at page 22 of Arb. LR)

“42. It is difficult to accept Mr Nayar's contention that the issues relating to MRP and Margins were completely divorced from the Distribution Agreement that was being negotiated by the parties. The correspondence between the parties clearly indicates that the parties were ad idem in respect of the terms of the Distribution Agreement, which outlined their business relationship. However, an agreement as to the commercial terms/business model on the basis of which the parties were to conduct their business - which was also simultaneously being negotiated by the parties - remained elusive. The issues with regard to margin, invoicing, fixing of MRP are fundamental to the business arrangement proposed between the parties; clearly, without the consensus in regard to those issues, the question of proceeding forward would not arise. It is in this context, that Mahle had on 14.03.2016 unequivocally stated that the other issues being raised were not being taken into consideration and the business would have to conform to the business plan already approved by its management. The said e-mail must be read in the context of Benara's previous mail requesting that the day to day management issues be resolved separately from the issues related to the Distribution Agreement. The Distribution Agreement between the parties is for distribution of Mahle's products. In absence of the parties being ad idem as to the commercial terms, the Distribution Agreement would be a non starter.”

16. We may also point out that if the e-mail dated 18.03.2016 is a proposal, then the e-mail dated

21.03.2016 could have been regarded as an acceptance of the proposal only if it had not been clarified by the appellant that they would stick to the stand of MRP as per their final confirmation in September, 2015. The e-mail dated 21.03.2016 would, therefore, not operate as an acceptance but as a counter-proposal which was never accepted by Mahle and negotiations were finally dropped by Mahle's letter of 21.04.2016.

17. A point had been raised by the learned counsel for the appellant that Mahle had by its conduct indicated that the distribution agreement dated 17.03.2016 had culminated into a binding contract. However, we are in complete agreement with the observation of the learned Single Judge that the fact that Mahle supplied its products to the appellant while the distribution agreement and the commercial terms were being negotiated, did not mean that the appellant was appointed as an exclusive distributor of Mahle products or that the proposed distribution agreement dated 17.03.2016 had matured into a binding contract."

17. Mr. Rajan Sabharwal, learned counsel for the Respondent, on the other hand, submits that there is no doubt that the catering service was continued by the caterer. Having continued to provide the catering service the least the caterer should be directed to pay, is the quoted amount which the Caterer itself had operated under, for the previous nine months. The conduct of the caterer of continuing to provide services, in fact constitutes an acquiescence of the communication written by the Railways to the effect that the caterer would be liable to pay Rs.2,55,200/- per month.

18. It is further submitted that the scope of Section 34 does not permit reappraisal of the facts. Even insofar as interpretation of the agreement is

concerned, the Arbitrator's interpretation ought to be taken as final. Unless there is a glaring perversity in the Award, this Court ought not to interfere in the same.

Findings:

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 13th 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.

24. There is no dispute that the caterer has paid a sum of Rs.51,000/- per month which was the reserve price for the entire period. Accordingly, the Award is not sustainable and the same is set aside. The OMP is allowed.

25. There shall be no order as to costs.

PRATHIBA M. SINGH
JUDGE

JANUARY 18, 2019

Rekha