IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 13.04.2021

\+ **O.M.P. (COMM) 513/2020 & IA 9632/2020, 9634/2020**

DELHI METRO RAIL CORPORATION LTD. .....Petitioner

Versus

N.S. PUBLICITY (I) PVT. LTD. .....Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Tarun Johri, Mr Ankur Gupta and Mr
: Ankit Saina, Advocates.

For the Respondent : Mr S.K. Maniktala, Mr Udit Maniktala and
: Mr Abhiraj, Advocates.

AND

\+ **O.M.P. (COMM) 470/2020 & IA 8099/2020**

N.S. PUBLICITY (I) PVT. LTD. .....Petitioner

Versus

DELHI METRO RAIL CORPORATION LTD. .....Respondent

Advocates who appeared in this case:

For the Petitioner : Mr S.K. Maniktala, Mr Udit Maniktala and
: Mr Abhiraj, Advocates.

For the Respondent : Mr Tarun Johri, Mr Ankur Gupta and Mr
: Ankit Saina, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Delhi Metro Rail Corporation (hereafter 'DMRC'), the petitioner in O.M.P. (COMM) 513/2020 and N.S. Publicity Pvt. Ltd. (hereafter

'NSP'), the petitioner in O.M.P. (COMM) 470/2020, have challenged an Arbitral Award dated 03.09.2019 passed by the Arbitral Tribunal comprising of a Sole Arbitrator (hereafter 'the Arbitral Tribunal') under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act'). The said award was corrected by the Arbitral Tribunal under Section 33 of the A&C Act by an order dated 21.11.2019. The award as corrected is hereinafter referred to as 'the impugned award'.

2. The impugned award has been rendered in the context of disputes that had arisen between the parties in relation to a contract for "*Outdoor Advertising rights on the civil structures of underground section from Udyog Bhawan to Saket and elevated section from Qutub Minar to Guru Dronacharya Station (excluding)*".

3. The Arbitral Tribunal partly allowed the claims made by NSP and the counter-claims made by DMRC.

4. DMRC assails the impugned award on the ground that the said award is against the public policy of India. It contended that the Arbitral Tribunal while allowing Claim nos. 1, 2, 3 and 5 in favour of NSP had failed to appreciate the relevant provisions of The Limitation Act, 1963. It is contended that the impugned award is perverse and contrary to the terms and conditions of the License Agreement and thus, is liable to be set aside.

5. NSP has also filed a petition, O.M.P. (COMM) 470/2020, objecting the impugned award to the extent that its claims were rejected.

6. Briefly stated, the relevant facts necessary to address the controversy are as under:-

6.1 DMRC is a limited company engaged in providing Mass Rapid Transit System in the National Capital Region. In 2010, DMRC invited tenders for letting out of the "*Outdoor Advertisement rights on the Civil Structures of Underground Section from Udyog Bhawan to Saket and Elevated Section from Qutub Minar to Guru Dronacharya Station*".

6.2 NSP participated in the said tender and submitted its offer dated 29.07.2010, which was subsequently modified by a letter dated 08.11.2010. NSP quoted an amount of ₹6,62,40,000/- (Rupees Six Crores Sixty-Two Lacs and Forty Thousand) per annum.

6.3 The said tender was accepted and, on 10.12.2010, the Letter of Acceptance (hereinafter the 'LoA') was issued to NSP setting out the broad terms of the License Agreement. NSP was requested to sign the License Agreement within seventeen days of the issuance of LOA. Pursuant to the LoA, the parties executed a License Agreement on 20.05.2013.

6.4 The term of the license was for a period of five years starting from the date of commencement of License Fee. In terms of Clause no. 5 of the Tender Application Form, the License Fee would commence thirty days from the date of issue of first approval of the plans for 960 sqm. advertisement space by DMRC.

6.5 As per the terms of the LoA, NSP was requested to pay the following amount within fifteen days from the date of issuance of the said letter.

S. No.	**Head**	**Amount in ₹**
1.	Interest free Security Deposit equivalent to six months License Fee	₹ 3,31,20,000/-
2.	First Half Yearly Advance License Fee	₹ 3,31,20,000/-
3.	S. Tax on First Half Yearly Advance License Fee	₹ 34,11,360/-
Total		₹ 6,96,51,360/-
Less Earnest Money Deposit		₹ 17,00,000/-
Net Amount Payable		₹6,79,51,360/-

6.6 NSP submitted six cheques for an aggregate amount of ₹ 6,72,54,846/- towards – (i) Interest Free Security Deposit amounting to ₹ 3,31,20,000/- ; (ii) First Half Yearly Advance License Fee amounting to ₹3,31,20,000/- and; (iii) Earnest Money Deposit amounting to ₹17,00,000/- under the cover of its letter dated 28.01.2011.

6.7 As per the LoA, the liability to pay License Fee as well as the tenure of the Contract would commence from thirty days after the first approval from DMRC, which was granted by DMRC on 03.03.2011. Accordingly, the date of commencement of the license period and the liability to pay the License Fee by NSP was fixed as 02.04.2011.

6.8 On 06.09.2011, DMRC raised an invoice of ₹ 3,65,77,557/- (Rupees Three Crores Sixty Five Lacs Seventy Seven Thousand Five Hundred and Fifty Seven) for payment of License Fee by NSP in terms with the License Agreement. However, NSP by its letter dated 07.09.2011, disputed the same. It claimed that the License Fee was not payable for the advertisement area that was yet to be approved by DMRC and further requested that the amount already paid for the period - 02.04.2011 to 01.10.2011 be adjusted against the next half year's payment, which was due in October 2011.

6.9 By its letters dated 13.09.2011 and 23.09.2011, NSP protested against the invoice raised by DMRC and submitted a detailed working of the areas actually approved by DMRC for the period 02.04.2011 to 01.10.2011. This is because, DMRC had on 03.03.2011 approved the area for display to the extent of only 530 sqm. Subsequently, on 24.06.2011, DMRC approved a further area of 33.60 sqm. and thereafter, on 23.08.2011, approved a further area of 117.4 sqm. of advertisement space.

6.10 On 04.06.2012, NSP requested for reference of the disputes with regard to the payment of License Fee to the Sole Conciliator in terms of

Clause no. 26 of the Tender Application Form. Accordingly, a Sole Conciliator was appointed on 22.08.2012.

6.11 Conciliation proceedings were closed on 25.09.2013 as no consensus could be reached between the two parties. The issue with respect to non-allotment of area was resolved inasmuch as by that date, complete media sites to the extent of 960 sqm. had been approved by DMRC. However, the issue with respect to DMRC's entitlement to License Fee for the area that was not approved by it, and NSP's liability in regard thereto was not resolved.

6.12 DMRC by its letter dated 04.11.2013 issued a notice for termination of the License Agreement for non-payment of ₹8,84,07,792/-, which was demanded by the Invoice No. 1983/2013 dated 20.09.2013. In response to the above letter, NSP by its letter dated 18.11.2013 clarified that it had already paid the License Fee and Electrical Charges for the period 02.10.2013 to 01.04.2014 against utilization of 1006.4 sqm. and the payment of balance amount of ₹5.05 crores was an accounting error.

6.13 On 03.04.2014, NSP surrendered the area of 45.8 sqm., which was over and above the minimum allotted area (that is, 960 sqm.) in view of huge losses suffered by it and the Agreement becoming commercially unviable. The said request was approved by DMRC by its letter dated 29.04.2014.

6.14 Thereafter, on 20.10.2014, NSP issued a notice under Clause 26 of the General Terms and Conditions of the License Agreement giving three months' notice for termination of the Contract. The same was acknowledged by DMRC by its letter dated 04.12.2014. Consequently, a meeting took place between the parties wherein NSP was assured redressal of its grievances and in pursuance thereof, NSP agreed to withdraw its surrender notice.

6.15 The Agreement was for a period of five years from 02.04.2011 to 01.04.2016. The Agreement was temporarily extended twice for a period of one month each. The extended term ended on 01.06.2016.

6.16 Upon conclusion of the Contract, NSP sought refund of the Interest Free Security Deposit amounting to ₹3,57,56,578/-, which had not been refunded by DMRC. NSP further raised several claims, which had not yet been settled by DMRC.

6.17 By its letter dated 03.05.2017, NSP once again requested for correction, reconciliation and settlement of overcharged bill as well as refund of excess amount along with refund of Interest Free Security Deposit. The said claims were rejected by DMRC by its letter dated 10.07.2017

6.18 Consequently, on 25.08.2017, NSP invoked the Arbitration Clause and accordingly, a Sole Arbitrator was appointed. The parties referred the disputes to the Arbitral Tribunal, and the arbitral proceedings culminated in the impugned award.

7. In the Statement of Claims filed before the Arbitral Tribunal, NSP claimed the following: (i) ₹3,57,56,578/- on account of refund of

Interest Free Security Deposit lying with DMRC; (ii) ₹1,48,41,933/- towards rebate due to gross delay in according permission by DMRC and same being agreed and proposed by DMRC by its mail dated 02.01.2017; (iii) Declaration to the effect that the demand of ₹5,41,92,600/- raised by DMRC was illegal and arbitrary; (iv) a sum of ₹2,43,888/- on account of reverse demand of License Fee for the period 03.04.2014 to 28.04.2014 in respect of surrender of additional area of 45.8 sqm.; (v) ₹ 3,10,18,992/- on account of loss of profit in respect of Sites, which could not be displayed due to inordinate delays in granting approvals for display of advertisements by DMRC; (vi) ₹ 1,11,80,540/- on account of loss of overheads in respect of Sites; (vii) Interest for *pendente lite* and post award period at the rate of 18% per annum on all amounts due from DMRC; and (vii) cost of arbitration.

8. DMRC also raised the following counter-claims: (i) a sum of ₹5,16,51,150/- for outstanding License Fee and electricity consumption; (ii) Interest along with GST on late payment of License Fee along with other outstanding dues amounting to ₹4,99,60,182/-; (iii) Interest along with GST on outstanding dues for the period June 2016-December 2017 amounting to ₹1,41,07,221/-; (iv) a sum of ₹5,900/- as penalty for not maintaining the spaces allotted to NSP; and (v) cost of arbitration.

Impugned Award

9. The Arbitral Tribunal allowed NSP's claim for the refund of security deposit of ₹3,57,56,578/-. The Arbitral Tribunal further awarded interest at the rate of 15% per annum on the said amount from

02.06.2016 as it reasoned that the said amount was refundable to NSP on that date. The Tribunal also allowed Claim no.2 for the sum of ₹1,48,41,933/-. It reasoned that the contract between the parties was a commercial contract and the evidence on record had established that there was considerable delay on the part of DMRC in granting permission and access to the sites for change of display. The Arbitral Tribunal evaluated the evidence brought on record and had found that the delays to the extent of twenty-five months were due to internal issues between various departments of DMRC and were not attributable to NSP. It also noted that DMRC had worked out a relief package and thus, had accepted NSP's claim for the same.

10. NSP had also claimed compensation for denial of access for the periods 01.06.2012 to 31.12.2012 and 01.02.2013 to 10.04.2013. The Tribunal found NSP's claim against denial of access to sites justifiable for the period 01.02.2013 till 10.04.2013 and accordingly, held that DMRC was not entitled to claim the License Fee during the said period. The Arbitral Tribunal computed the said amount of ₹98,41,722/- and allowed NSP's claim to the said extent. Insofar as Claim no. 4 is concerned, that is, claim for 45.8 sqm. of advertisement space that was surrendered by NSP in terms of its letter dated 03.04.2014, the same was not accepted. The Tribunal held that DMRC had accepted the surrender of the said area by its letter dated 29.04.2014 and therefore, NSP would be liable to pay for the same.

11. The Arbitral Tribunal also accepted NSP's Claim no. 5 regarding loss of profit that NSP would have earned had it not been denied access

to the sites. NSP had claimed the gross profit margin of 21.5%. However, the Arbitral Tribunal did not accept the same and held that profit margin would be computed on the basis of NSP's balance sheet for the year 2008-09 on the turnover of ₹11,18,05,375/-. The Arbitral Tribunal denied NSP's claim for overheads and held that the loss on account of overheads as claimed by NSP, were absorbed in the profits as allowed under Claim no. 5. The Tribunal denied NSP's claim for pre-reference and *pendente lite* interest on the claims as allowed.

12. DMRC's contention that Claim nos. 2, 3, 5 and 6 preferred by NSP were barred by limitation was rejected by the Arbitral Tribunal.

13. The counter claim of DMRC for payment with regard to License Fee was allowed to a limited extent. However, the same could not be quantified as the Arbitral Tribunal held that the accounts had not been reconciled. However, the Tribunal set down the principle on which such License Fee was required to be computed. Similarly, the Arbitral Tribunal allowed the claim of interest. However, the same could not be quantified in the impugned award. A tabular statement summarizing the award as set out in the impugned award is reproduced below:

"17.2 Claimant's Claims

Sl. No.	Claim No.	Amount Claimed	Award by the A.T.
1	Claim No. 1	3,57,56,578	3,57,56,578
2	Claim No. 2	1,48,41,933	1,48,41,933
3	Claim No. 3	5,41,92,600	98,41,722
4	Claim No. 4	2,43,888	Nil

5	Claim No. 5	3,10,18,992	To be calculated as per direction of AT in para 14.5
6	Claim No. 6	1,11,80,540	Nil
7	Claim No. 7	@ 18% on the amount of Award	Nil
8	Claim No. 8	Cost of Arbitration	Nil

17.3 Respondent's Counter Claim

Sl. No.	Claim No.	Amount Claimed	Award by the A.T.
1	Claim No. 1	5,16,51,150	To be calculated as per direction of AT in para 16.1
2	Claim No. 2	4,99,60,182	To be calculated as per direction of AT in para 16.2
3	Claim No. 3	1,41,07,221	Nil
4	Claim No. 4	5,900	Nil
5	Claim No. 5	Pendente-Lite	Nil
6	Claim No. 6	Cost of Arbitration	Nil

14. In addition to the above, the Arbitral Tribunal also awarded future interest at the rate of 15% per annum, if the awarded amounts were not settled within a period of sixty days from the pronouncement of the award.

Reasons and Conclusion

DMRC's challenge to the impugned award

14. Mr Tarun Johri, learned counsel appearing for DMRC had assailed the impugned award, essentially, on three grounds. First, he submitted that the interest awarded on the security deposit was contrary to the terms of the Contract. Second, that the Claim nos. 2, 3, 5 and 6 preferred by NSP were barred by limitation and the Arbitral Tribunal had grossly erred in entertaining the said claims. Third, that the award of loss of profits awarded by the Arbitral Tribunal is patently illegal and without any evidence. He had submitted that although NSP had produced purchase orders, its signatories had not been examined. He further stated that no reliance could be placed on NSP's Balance Sheet for the year 2008-09 as the same was not a part of the record. Lastly, he submitted that the Tribunal had erred in disallowing the counter claims.

15. DMRC's contention that the impugned award is patently illegal insofar as it provides interest on the security deposit, is unmerited. There is no dispute that the security deposit made by NSP was an interest free deposit, which was liable to be adjusted against any amounts due from NSP. It is relevant to note that the Arbitral Tribunal has not awarded any interest for the period when the Contract was in subsistence. Admittedly, the Contract in question expired on 02.06.2016 and on that date, the security deposit would require to be refunded or adjusted against other dues of NSP. The Arbitral Tribunal has awarded interest on the delay in payment of License Fee to DMRC and has also, accordingly, allowed interest on the security deposit.

16. This Court finds no infirmity with the said decision. In any view of the matter, the award of interest on the refundable security deposit

cannot be held to be patently illegal, warranting any interference by this Court. If the security deposit was adjusted against any License Fee due to DMRC on the date of expiry of the Contract then no interest on the said amount would be payable to DMRC to the extent of such adjustment. However, the Arbitral Tribunal also allowed interest and the License Fee. Correspondingly, awarding interest on the security deposit cannot be faulted.

17. DMRC's contention that the impugned award is liable to be set aside as the Arbitral Tribunal had erred in entertaining the claims, which were barred by limitation, is also unpersuasive. NSP's Claim no.2 related to the period prior to 29.05.2013. Its Claim no.3 related to the period 01.06.2012 to 10.04.2013. Its claim for loss of profits and overheads (Claim nos. 5 and 6) also related to the same period. It was, thus, contended that the same were barred by limitation. It was also contended on behalf of DMRC that the said claims were the subject matter of Conciliation, which had failed. It was pointed out that NSP had sought Conciliation in respect of its subject claim regarding allotment of full advertisement area of 960 sqms. and with regard to the pending dues in respect of the area that could not be utilized by NSP. However, no consensus could be arrived and the issue remained unresolved. The Conciliator terminated the conciliation proceedings by his letter dated 25.09.2013 recording that no consensus was arrived at between the parties.

18. Mr Johri, contended that since the claims made by NSP had been denied and the parties had failed to resolve their disputes by

Conciliation as early as on 25.09.2013, NSP's claims raised subsequently were clearly barred by limitation. The Arbitral Tribunal had evaluated the evidence and the material produced by the parties. It concluded that although Conciliation between the parties had failed on 25.09.2013, however, the disputes between them were the subject matter of various discussions and NSP's claims were finally denied by DMRC on 10.07.2017. NSP invoked the Arbitration Clause immediately thereafter, in terms of its notice dated 25.08.2017. The Tribunal further observed that the subject disputes essentially related to the License Fee and since DMRC had preferred a counter claim for the same, it could not contend that NSP's claims were barred by limitation.

19. In addition to the above, it is also relevant to note that the Contract continued to subsist till 01.06.2016. There is ample evidence on record to establish that the parties had continued their discussion with regard to the disputes. More importantly, DMRC accepted to grant a rebate with regard to the License Fee as late as 02.01.2017, for the period when display sites were not available to NSP. In view of the above, this Court is unable to fault the decision of the Arbitral Tribunal in rejecting DMRC's contention that NSP's claim were barred by limitation. No interference with the impugned award is warranted on this ground.

20. The contention that the Arbitral Tribunal had erred in directing that the loss of profits be computed on the basis of NSP's Balance Sheet for the year 2008-09, that was not on record, is a common ground between both the parties. It is also contended by NSP that the Arbitral

Tribunal could not have directed that loss of profits be computed on the basis of the profit margin as reflected in the Balance Sheet for the year 2008-09. Thus, the said ground is discussed while considering NSP's challenge to the impugned award.

NSP's Challenge to the impugned award

21. Mr Maniktala, learned counsel appearing for NSP assailed the impugned award, essentially, on four grounds. First, he submitted that the Arbitral Tribunal had grossly erred in partially denying NSP's claim (Claim no. 3) that it was not liable for License Fee for the period - 01.06.2012 to 31.12.2012. NSP was not granted access to the sites in question during this period as well. Second, he submitted that the Arbitral Tribunal had grossly erred in directing that NSP's profit margin be determined on the basis of NSP's Balance Sheet for the year 2008-09, which was not on record. Third, he submitted that the Tribunal had grossly erred in proceeding on the basis that overheads as claimed by NSP had been absorbed while working Claim no. 5 (claim for loss of profit). And fourth, he submitted that the Arbitral Tribunal had grossly erred in not awarding pre-refence and *pendente lite* interest and referred to the decision of the Supreme Court in ***Jaiprakash Associates Ltd. through its Director v. Tehri Hydro Development Corporation India Ltd: (2019) 17 SCC 786***, in support of his contention. He submitted that the said decision was not cited during the hearing and therefore, NSP had no opportunity to address arguments on the same. Further, he stated that there was no term of the Contract, which prohibited grant of such interest.

22. NSP had claimed that it was not liable to pay any License Fee for the period (i) 01.06.2012 to 31.12.2012; and (ii) 01.02.2013 to 10.04.2013. The Arbitral Tribunal had rejected NSP's claim for the period 01.06.2012 to 31.12.2012 but had allowed the same for the period 01.02.2013 to 10.04.2013 and had accepted the claim to the extent of ₹98,41,722/-.

23. NSP had quantified its claim in respect of License Fee for the period 01.06.2012 to 31.12.2012 and 01.02.2013 to 10.04.2013 at ₹5,41,92,600/

24. NSP had also produced evidence in support of its claim that it had not been denied access to the sites from June 2012 to December 2012 as well as for the period 01.02.2013 to 10.04.2013. NSP had relied on a letter dated 06.08.2012, *inter alia*, stating that it had not been granted access to the site for the past two months. It had also relied on the letters dated 05.09.2012, 21.09.2012, 26.11.2012 and 29.11.2012 in support of its contention that NSP had established that DMRC had denied access to the sites from June 2012 to December 2012.

25. Whilst, the letter dated 06.08.2012 does indicate that NSP had raised the issue regarding denial of sites for the prior two months, the other letters relied upon by NSP indicate that the same related to other issues as well. In its letter dated 05.09.2012, NSP acknowledged that it had received a letter from the Conciliator and had accepted the same. The Arbitral Tribunal had evaluated the evidence led by the parties including the oral testimony and had observed as under:

"14.3.8.21. From the cross examinations of witnesses of both the parties, pleadings from the Claimant does suggest that there was denial to access sites started around June, 2012 and continued till 30.04.2013. However, the only thing that get conclusively established is the events that took place from 01.01.2013 to 30.04.201 3.

14.3.8.22. The amount of license fee, so collected for the afore-stated period of default/breach, namely, from (i) 01.06.2012 to 31.12. 2012; and (ii) 01.02.2013 till 10.04.201 3 computes to Rs.5,41,92,600/- (Rupees five crore forty one lakh ninety two thousand six hundred only), which the respondent is not entitled to claim from the claimant is admissible only for the period 01.02.2013 till 10.04.2013.

14.3.8.23. Claimant's claim in para 3.12 is partially allowed in respect of license fee, so collected for the period of default/breach, from 01.02.2013 till 10.04.2013 computes to Rs.98,41,722/-, which the respondent is not entitled to claim from the claimant."

26. It is relevant to note that DMRC had disputed that it had denied access to NSP. The witness examined for DMRC had also affirmed that NSP had been granted access to the sites. The documents on record do not show that NSP had asked for any specific permission for access of a particular site, which was specifically denied. The controversy thus, relates to evaluation and appreciation of evidence.

27. The scope of interference with an arbitral award is limited. This Court cannot undertake a judicial review on merits. In this case, the Arbitral Tribunal had examined the evidence and formed an opinion. The impugned award clearly indicates that whilst the Arbitral Tribunal was convinced that NSP had been denied access for the period 01.02.2013 to 10.04.2013 as the communication between the parties clearly established the same, the Arbitral Tribunal was not entirely convinced that NSP had been denied access for the period 01.06.2012 to 31.12.2012. Given the limited scope of the present proceedings, no interference with the said opinion would be warranted as the evaluation of evidence falls squarely within the jurisdiction of the Arbitral Tribunal.

28. Insofar as the award of ₹98,41,722/- is concerned, the arbitral award does not give any clue as to how the said amount has been computed. According to the impugned award, NSP was not liable for the License Fee during the period 01.02.2013 to 10.04.2013 but the impugned award does not indicate as to how the License Fee for ₹98,41,722/- has been computed. This Court had pointedly asked the learned counsel for DMRC, if there was any material on record that could sustain the said computation. However, he was also unable to refer to any document or indicate the manner in which the said amount had been computed.

29. Mr. Maniktala had referred to paragraph 38.3 of the present petition, wherein it was affirmed that the rebate for the period 01.02.2013 to 10.04.2013 worked out to ₹1,36,20,600/-. Thus,

according to NSP, there is an error in the computation of the claim even to the extent it had been allowed.

30. NSP claimed that it could sell advertisement space / sites at a rate ranging from ₹9000 per sqm to ₹8000 per sqm, depending upon the size and location of the site. It claimed that the average rate worked out to ₹12,500 per sqm. It claimed that it would earn approximately 21.5% of the gross turnover after adjusting for reasonable vacancies. It also produced copies of purchase vouchers from its various clients to establish the rates on which space/sites could be sold. NSP further claimed that it had been denied the benefit of advertisement sites (as claimed under Claim no. 2) and it had also been denied access to the approved sites (being subject matter of Claim no. 3). The witness for NSP (CW1) also testified as to the average vacancy period as well as the amounts that could be recovered from selling the sites. The Arbitral Tribunal accepted NSP's claim that it was entitled to loss of profits on a turnover of ₹11,18,05,375/. However, it did not accept NSP's claim of a gross profit margin of 21.50%. The Arbitral Tribunal held that, there was no basis advanced by NSP for establishing the said margin. The Tribunal thereafter, proceeded to observe that the tender documents submitted by NSP would also include its financial details for the accounting years 2006-07, 2007-08 and 2008-09. It reasoned that the profit margin, as disclosed in the said financial details, could be accepted as a gross profit margin on the basis of which NSP's claim for loss of profits could be allowed.

31. It is contended on behalf of NSP that the Arbitral Tribunal had grossly erred in restricting NSP's claim to gross profit as disclosed in its audited balance sheet for the year 2008-09, which was not a part of the arbitral record. It is also contended that there is no reason for the Arbitral Tribunal to reject the gross profit margin of 21.50% as NSP's witness had deposed to the aforesaid effect and the same had not been seriously disputed by DMRC. As noted earlier, DMRC is also aggrieved by the Arbitral Tribunal's decision in allowing the claim and quantifying it on the basis of a document (the audited balance sheet for the year 2008-09), which was not on record. There is considerable merit in the contention that the Arbitral Tribunal could not have allowed the claim on the basis of material that was not on record and not relied by either parties. Once, the Arbitral Tribunal concluded that NSP had failed to establish the gross profit margin as claimed by it, it was required to proceed on that basis.

32. In the facts of the present case, it does appear that there was no serious contest to the gross-profit margin as claimed by NSP. Nonetheless the Arbitral Tribunal had concluded that NSP had failed to establish the same. In this view, it could proceed to reject the claim or allow it to the extent that it considered reasonable. But it could not direct that it be calculated on the basis of accounts for the year 2008-09, which were neither produced nor relied upon by parties.

33. In view of the above, the impugned award to the extent that it awards loss of profit based on NSP's audited balance sheet of 2008-09 is concerned, is set aside.

34. The Arbitral Tribunal had rejected NSP's claim for loss of overheads on the ground that "*these cost have been absorbed while working of profit in claim no.5*". The said conclusion is patently erroneous.

35. NSP's claim for profits had been derived after accounting for all expenditure. NSP had structured its claim for net profit which it would have earned in the event, DMRC had performed its obligations and had made available the advertisement space as agreed and granted access to it. NSP's claim for loss of overheads was in the nature of reimbursement of costs that it had incurred on overheads, which were allocated towards the Contract in question. NSP's claim that the said costs would have been met by the revenue earned from the sale of advertisement sites, had DMRC provided the same. Thus, the claim of overheads was over and above the claim for loss of profits and the decision of the Arbitral Tribunal that such overheads had been absorbed in profits is patently erroneous on the face of the record.

36. The next question to be examined is whether the impugned award is liable to be interfered with on the ground that the Arbitral Tribunal has not awarded any pre-reference or *pendente lite* interest in favour of NSP. While NSP may be correct in its contention that the Contract in question did not proscribe grant of *pendente lite* and pre-reference interest, the same does not lead to the conclusion that NSP was entitled to pre-reference and *pendente lite* interest. The decision whether to award interest in the given facts and circumstances of this case, rests with the Arbitral Tribunal and warrants no interference by this Court.

37. In view of the above, the impugned award is set aside to the extent that it deals with NSP's Claim nos. 3, 5 and 6, that is, claim against denial of License Fee for the period 01.06.2012 to 31.12.2012 and 01.02.2013 to 10.04.2013; claim for loss of profits; and claim for loss of overheads.

38. It is not open for this Court to remand the matter to the Arbitral Tribunal. Given that this Court has found the decision of the Arbitral Tribunal with regard to the aforesaid claims unsustainable, it is necessary to observe that the parties are at liberty to avail their remedies afresh in the aforesaid regard.

39. The petitions are disposed of in the aforesaid terms.

VIBHU BAKHRU, J

APRIL 13, 2021
RK