

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

% Judgment delivered on: 06th January, 2023

+ FAO(OS) (COMM) 180/2022 & CM APPL. 31518/2022 & CM APPL. 31519/2022 & CAV 194/2022

GENERAL MANAGER NORTHERN RAILWAY Appellant

versus

PIONEER PUBLICITY PVT. LTD. AND ANR. Respondents

Advocates who appeared in this case:

For the Appellant: Dr. Sarbjit Sharma, Advocate with Ms. Aakriti Singh, Ms. Ginney Ashuta and Ms. Vidisha Jain, Advocates

For the Respondent: Mr. A.S. Chandhiok, Senior Advocate with Mr. Tarang Gupta, Mr. Mayank Sharma and Ms. Neelam Deol, Advocates

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

SANJEEV SACHDEVA, J.

1. Appellant by way of this Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act) impugns Judgment dated 01.06.2022, whereby the Objections filed by the Appellant under section 34 of the Arbitration Act against the Interim Award III dated 29.10.2012 have been dismissed.

2. By way of Commercial Circular No. 36 of 2006 dated 01.05.2006, the Railway Board announced its intention to implement

its scheme of awarding sole rights for commercial publicity on nominated divisions of the Railways to individual parties.

3. In pursuance thereof, a Notice Inviting Tender was issued by the Railways in December 2006, inviting tenders for commercial publicity in the Delhi Division of the Railways. Respondent – Pioneer Publicity Pvt. Ltd. (referred to as *PPC* by the learned Single Judge) emerged as the successful bidder. Respondent's bid was accepted by letter of acceptance dated 18.05.2007. Thereafter contract dated 20.09.2007 was executed awarding Respondent contract for commercial publicity with sole advertisement rights, with 213147 sq. ft. space, for Delhi Division. The letter of allotment dated 06.08.2007 was issued specifying the availability of some of the sites on specified dates.

4. The terms and conditions of letter of acceptance were accepted by the Respondent and as in pursuance thereto, licence fees, for the first six months of Rs. 11,00,42,750/-, along with security deposit of Rs. 2,28,85,500/- was paid to the Appellant. Sole advertisement rights were given to the Respondent for a period of 5 years from 20.09.2007 to 19.09.2012.

5. The total area awarded to the Respondent, i.e. 213147 sq. ft. was further divided into two categories based on its availability. Section (A) included 63 sites, comprising a total area of 167923 sq. ft, whereas Section (B) included 45 sites, with a total area of 45224 sq.

ft.

6. The Tender Document stipulated that areas mentioned in Section (A) were to be made available on the dates corresponding to each tendered site specified therein and areas mentioned in Section (B) were made available immediately from the date of issuance of allotment letter. It was stipulated that *“The ownership of the existing contracts will pass on to the contractor for display of commercial advertisement only after the expiry of the term of the contract. The contractor will have no locus standi on the advertisement displayed by existing contractor until the expiry of the contract. The list of the contract in the order of their expiry is enclosed along with the terms and conditions of the contract.”*

7. Disputes arose between the parties with regard to the total area to be provided to the contractor for advertisement purposes. The claim of the Respondent was that they were entitled to the entire area of 213147 sq. ft. for the entire period covered by the contract i.e. 20.09.2007 till 19.09.2012.

8. The contention of the Appellant is that area was to be allotted on *as is where is* basis and that *the* entire area was not to be made available from day one but was to be made available as and when the same was handed over by the existing contractors.

9. Respondent approached this court under section 11 of the Arbitration Act seeking appointment of an Arbitral Tribunal. Initially

the Appellant disputed the existence of an Arbitration Agreement, however, later with the consent of the parties, by order dated 26.05.2009, the disputes were referred to the Arbitrator leading to the passing of the interim awards.

10. The Respondents in its claim petition filed before the Arbitral Tribunal *inter alia* claimed its right to be provided 213147 sq. ft. of area of advertising space from the commencement of the contract till its conclusion, i.e. for the entire period of the contract and in the event of non-availability of any particular advertising site, Respondent asserted that the agreement obligated the appellant to provide equivalent area to the Respondent at no extra cost and on the failure of the Appellant to comply with the alternative requirements, claimed refund of the license fee paid by it in respect of the non-available advertising sites.

11. Learned Single Judge in the impugned Judgment has very succinctly extracted the categorization done by the Arbitrator of the various types of advertisement sites as under:

“10. The learned Arbitrator notes, in para 19 of the impugned Award, that the total 213147 sq. ft. of area which, according to Section V of the tender documents, was to be made available to PPC, was divided into Parts A and B, consisting of 63 and 45 items/sites respectively. The 63 sites/items comprising Part A (covering 167923 sq. ft.) were already in occupation by other contractors, consequent to pre-existing advertising contracts executed by the Railways which were still in operation. They would, therefore, become available to PPC only after

expiry of the said contracts, on the dates stipulated in Part A of Section V. Part B consisted of 45 items/sites (covering 45224 sq. ft.), which were vacant and were, therefore, to be made immediately available for possession by PPC. The total area of 213147 sq. ft. was denoted in Section V as the 'P' area.

11. In order to avoid confusion amongst the various categories of sites, a systematic procedure was followed by the learned Arbitrator. Initially, he called upon the parties to assign numbers to the various sites, with which we need not, in this case be particularly concerned. Thereafter, on 31st December, 2009, a joint signed chart was prepared for all the 108 tendered items/sites.

12. Thereafter, 10 Joint Lists of items were prepared by consent of both the parties in the arbitral proceedings, i.e. Joint Lists A, A-1, A-2, B, B-1, C, D, E, F and G. Joint Lists A, A-1 and A-2, which were jointly signed on 10th February, 2010, 5th April, 2010 and 28th April, 2010, respectively covered 39, 15 and 13 sites which the Railways admitted, for various reasons, not to have been able to make available to PPC. Joint Lists B and B-1, which were signed on 10th February, 2010 and 5th April, 2010 covered new sites, or sites of which the area was increased by the Railways on PPC's request. Joint List F covered 13 sites on which display was disrupted due to interference by various local or governmental agencies, who were third parties, and in respect of which the interruption was admitted by the Railways. The remaining disputed sites were, therefore, covered by Joint Lists C, D, E and G.

13. Interim Award-I dated 19th May, 2010 and Interim Award-II dated 1st November, 2010 were passed, by the learned Arbitrator, in respect of the admitted sites covered by Joint Lists A, A-1, A-2, B, B-1 and F, for the

periods 20th September, 2007 (the date of commencement of the contract) to 31st December, 2009. The learned Arbitrator held PPC to be entitled, for the aforesaid periods, to Rs. 1,35,54,035/- and Rs. 1,06,48,631/- respectively.

14. These Interim Awards, i.e. Interim Award-I dated 19th May, 2010 and Interim Award-II dated 1st November, 2010, have not been challenged by the Railways.

15. Interim Award-III, which forms subject matter of challenge in OMP (Comm) 154/2020, dealt with the sites/items covered by Joint Lists C, D, E and G. The particulars of these lists may be provided thus:

- (i) Joint list C covered sites reflected in Part A of Section V of the tender documents (which dealt with sites which would not be immediately made available to PPC as they were already being worked under pre-existing contracts with other contractors), in respect of which no future dates on which the sites would become available were stipulated in the tender documents. There were 4 items in the said Joint List C, of which one item was shifted to Joint List A and 3 items were shifted to Joint List G which dealt with the relief that PPC was seeking in respect of such sites.*
- (ii) Joint List D contained 17 items in respect of which refund was sought, by PPC, owing to delay in sanctioning approval, by the Railways, of the site plans submitted by PPC, as a result of which PPC was unable, during the period for which the site plans remained unapproved, to display on the said sites. There were initially 17 items in Joint List D, of which 8 were shifted to joint list A-1 and 9*

remained to be adjudicated by the learned Arbitrator.

- (iii) *Joint List E comprised items in respect of which PPC alleged that the sites were not feasible for advertising. There were 25 items in Joint List E of which, by consent, 21 items were shifted to Joint List A-1 and A-2 and 4 items remained to be adjudicated by the learned Arbitrator. To these four, one additional item, i.e. Item 169 (Gurgaon Level Crossing) was added, after shifting it from Joint List A-2. There were, therefore, 5 items for adjudication by the learned Arbitrator in Joint List E.*
- (iv) *Joint List G comprised the 41 items, which under Part (A) of Section V of the tender documents, and would not be available to PPC at the commencement of the contract, but would be made available on future dates, specified or unspecified. In respect of these sites, PPC claimed refund of license fee deposited by it, as the Railways had neither made the said sites available at the time of commencement of the contract, nor had provided equivalent alternative sites.”*

12. Learned Single Judge has noticed that the award rendered by the Arbitral Tribunal in respect of Joint Lists D and E had not been challenged by the Appellants.

13. The Appellant had disputed the amounts awarded in respect of Joint Lists C and G. As noticed above List C covered sites which as per the contract would not be immediately made available to Respondents as they were already being worked under pre-existing

contracts with other contractors and in respect of these sites no future dates were stipulated in the tender documents on which the sites would become available. List G comprised sites that were not available at the commencement of the contract, but were to be made available on future dates, specified or unspecified.

14. In respect of the two lists the Arbitrator noticing the conditions of the contract held that as per the tender documents, Respondent was to acquire (a) by the end of 2007, 65% of the total advertising area, admeasuring 135664 sq. ft, (b) by the end of 2008, 87% of the total advertising area, admeasuring 183593 sq. ft. and (c) by October, 2009, the entire advertising area, comprising 213174 sq. ft. The Arbitrator also noticed that by the time of issuance of the allotment letter on 06.08.2007, 2747 sq. ft. of area had been shifted from Part B of Section V to Part A thereof with the result that the area in respect of which the dates by which the sites would be made available to Respondent were postponed stood reduced to 6418 sq. ft.. On 19.06.2010 parties mutually agreed to reduce the total tendered area from 213147 sq. ft. to 199295 sq. ft.

15. The arbitrator further held that between the time of floating of the tender in December, 2006 and commencement of the contract on 20.09.2007, 17 sites, which were earlier included in Part A of Section V, covering 84690 sq. ft., became physically available for use by the Respondent and 46 sites/items, in Part A of Section V of the tender documents, remained unavailable for display covering an area of

88663 sq. ft. 5 items out of the aforesaid 46 items, covering an area of 7534 sq. ft., were settled between the parties and included in Joint Lists A and A-1 and B-1 and were, therefore, covered by Interim Award-I. 41 items, covering 81120 sq. ft. remaining became the subject of the impugned award.

16. The issue for determination before the Arbitrator was whether the liability of the Respondent to pay the license fee of Rs. 22.85 crores (approx.) for the 1st year and the enhanced license fee for the second and third year had any nexus with the Appellant's obligation to provide the entire area of 213147 sq. ft. for the entire period.

17. The Arbitrator referring to Clauses 1, 2, 3, 4 and 16 of the Agreement, and paras 4.1, 4.9 of Section II read with the Annexure and Section V of the tender documents, held that the Appellant was required to make available to the Respondent the entire area of 213147 sq. ft. for display/publicity.

18. In returning the said finding the Arbitrator has relied upon a communication dated 25.07.2007, from the Divisional Railways Manager (DRM), Delhi Division to the NDMC, MCD and the Faridabad Municipal Committee, in which the tender rate, per square foot, for the first year of the contract between the Railways and the Respondent was stated as Rs. 1072.43. This figure of Rs. 1072.43 as noticed by the arbitrator, was arrived at by dividing the total contracted fee payable for the first year, of Rs. 22,85,85,500/- by

213147 sq. ft. This, in the view of the arbitrator, amounted to an acknowledgement that even during the first year of the contract Appellant was required to make available, to the Respondent 213147 sq. ft. of advertising area.

19. Arbitrator has also noticed that in the Joint Lists drawn up by the parties, the rate applied is Rs. 1072/- per square foot for the first year, Rs. 1180/- per square foot for the second year and Rs. 1357/- per square foot for the third year.

20. The Arbitrator further relying upon the various clauses of the Agreement as also the letters dated 20.07.2007 and 29.08.2007 of the Chief Commercial Manager (CCM) to the Senior Divisional Commercial Manager and to the DRM, Delhi Division as also the Background Note, dated 24.07.2007 and the fact that CCM was the head of the commercial department in a zonal railway for all divisions in respect of which, subject to being overruled by the General Manager, the final authority, held that there was a contractual obligation, on the Appellant, to provide 213417 sq. ft. of advertising space during the first year and to the extent the available advertising space fell short of these figures, Appellant was bound to make available to the Respondent the equivalent alternate area at no extra costs and in default, to refund the proportionate advance license fee paid by the Respondent.

21. The contention of Dr. Sarbjit Sharma, learned counsel

appearing for the Appellants that the award suffers from patent illegality manifested on the face of the award itself is not sustainable. Learned counsel has sought to impugn the award by referring to the terms and conditions of the contract and has merely reiterated the submissions that have already been negated by the Arbitrator as also the learned Single Judge in the Impugned Judgment.

22. The contention of the appellant that Appellant was not liable to provide the entire area of 213417 sq. ft. from the date of the commencement of the contract itself and throughout the period of contract of 5 years has already been negated by the Arbitrator by a detailed reference to the terms and conditions of the contract and the correspondence emanating from the Appellant.

23. The *Arbitral Tribunal* has in great detail examined and assessed the contractual conditions and the evidence placed before it and has analysed the relevant clauses of the contract and taken a view, which is plausible.

24. Further, contention of learned counsel for the appellant that learned Single Judge, despite holding that the interpretation of the Arbitrator of note to Section V of the tender document was erroneous, held that the Appellant was bound to provide to the Respondent the entire area of 213417 sq. ft., is also not sustainable.

25. Learned Single judge in the impugned judgment has noticed the distinction drawn by the Arbitrator between the two contractual

concepts of ‘area’ and ‘site’ and thus reiterated the finding that Respondent was entitled, *ab-initio*, and during the entire term of the contract to be provided with 213417 sq. ft of advertising area. BY the impugned Judgment, the learned single judge interpreting Section V, the Note in Section V as well as in Clause 16, has held that in respect of the sites which were already being operated by other contractors, under pre-existing contracts, Respondent would acquire advertising rights only consequent on the expiry of the said contracts but that would not detract from the requirement of providing, to the Respondent 213147 sq ft of advertising area throughout the contract.

26. With regard to the interpretation of the Note in Section V, to a limited extent, the learned single judge has disagreed that the tender documents entitled Respondent to equivalent area, to compensate for the area which was not immediately available for advertising, at no extra cost.

27. Learned Single Judge has held that in respect of locations/sites, which were being operated by contractors with whom pre-existing contracts were still continuing, the right of Respondent would emerge only after the said contracts came to an end but that did not derogate, from the obligation, of the Appellant, to provide, during the entire term of the contract, 213417 sq. ft. of advertising area.

28. While disagreeing with the interpretation of the Arbitrator that Respondent was entitled, by virtue of the Note in Section V, to

advertising area, equivalent to the area, which was covered by pre-existing contracts, at no extra cost, the learned Single Judge has held that the Respondent is entitled not to additional area but to refund of advance license fee deposited by it, proportionate to the advertising area not made available.

29. Looked at from another angle, in case the contention of appellant was to be accepted, it would amount to unjust enrichment by the Appellant. Admittedly, out of the 213147 sq. ft. of area which, according to Section V of the tender documents, was to be made available to the Respondent, an area of 167923 sq. ft. was already in occupation of other contractors, consequent to pre-existing contracts. This would imply for the period that the said area or parts thereof were under pre-existing contract, Appellant would have received license fee from the earlier contractors as also the Respondent for the same area. This would clearly amount to double enrichment.

30. There is no gainsaying that the *Arbitral Tribunal* is the master of the factual arena and even if it goes wrong while deciding the factual issues, unless there is something manifest from the face of the award that is so grave as to move the conscience of the court that the error would result in a monumental miscarriage of justice, no interference by the court is called for.¹

31. Where the *Arbitral Tribunal* assesses the material and evidence

¹ *Food Corporation of India v. Shanti Cereals Pvt. Ltd., 2010 (3) ARB.L.R. 296 (Del)(DB)*

placed before it in detail, the court while considering the objections under Section 34 of the Arbitration Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an award passed by an *Arbitral Tribunal* cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the *Arbitral Tribunal* is a plausible view on the facts, pleadings and evidence before it. Even if on the assessment of material, the court while considering the objections under Section 34 of the Act is of the view that there are two views possible and the *Arbitral Tribunal* has taken one of the possible views, which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the *Arbitral Tribunal* if the view taken by the *Arbitral Tribunal* is reasonable and plausible.²

32. The Supreme Court of India in *Delhi Airport Metro Express (P) Ltd. v. DMRC*, (2022) 1 SCC 131 held that *Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression “patent illegality”. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition,*

² *Jhang Cooperative Group Housing Society v. P.T Munshi Ram & Associates Private limited: 202(2013) DLT 218.*

contravention of law not linked to public policy or public interest is beyond the scope of the expression “patent illegality”. What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them.”

33. The award does not suffer from any illegality leave alone a patent illegality that goes to the root of the matter. The view taken by the Arbitrator is a reasonable and plausible one. Learned Single Judge has examined the award in detail and after scrutinizing the same has found the findings and reasoning to be justified and has declined to interfere in the findings arrived at by the learned Arbitrator. Even on examination of the material before us, we are of the view that the findings of the Arbitrator are reasonable and justified in the facts of the present case.

34. There is no infirmity in the Impugned award of the Arbitrator or the Judgment of the learned single judge rejecting the objections of the Appellant under Section 34 of the Arbitration Act.

35. We accordingly, find no merit in the appeal. Consequently, the same is dismissed.

SANJEEV SACHDEVA, J

TUSHAR RAO GEDELA, J

JANUARY 06, 2023

HJ

