

---

**(2011) 06 BOM CK 0071**  
**In the Bombay High Court**  
**Case No : Arbitration Petition No. 394 of 2007**

Union of India (UOI)

APPELLANT

Vs

Sun Media Services

RESPONDENT

---

**Date of Decision :** 30-06-2011

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 31(7), 34  
Constitution of India, 1950 — Article 229  
Contract Act, 1872 — Section 32, 7, 8

**Citation :** (2011) 5 BomCR 634 : (2011) 5 MhLj 749

**Hon'ble Judges :** Anoop V. Mohta, J

**Bench :** Single Bench

**Advocate :** Suresh Kumar and Deepak Rai, for the Appellant; Shyamli Hajela, instructed by H and M Legal Associates, for the Respondent

**Final Decision :** Allowed

---

## Judgement

Anoop V. Mohta, J.—By this petition, u/s 34 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act) a challenge is made to the Award dated 31 May 2007, passed by the Arbitral Tribunal in favour of the Respondent (the Contractor) against the Petitioner (Western Railway, Mumbai).

**BASIC FACTS:**

2. To the tender, as invited by the Petitioner on behalf of the President of India, for sole advertising rights of Borivali Station for one year, the Respondent's bid was accepted on 15 December 2003. The terms and conditions reflected in form No. 3 of the tender document.

3. The basic conditions of the tender notice were as under:

1. The licensee shall admit/show the plan/text/design of all the advertisements to be displayed at BORIVALI Railway Station, to the Sr. Divisional Commercial Manager and obtain his prior approval for all such displays.

(Condition 2 of Special Conditions, page 9 of Tender document).

2. This contract is entered into on the express understanding that if for any reasons/cause, the Railway administration is unable to provide the space to exhibit either in full or in part for the full terms of the contract, the Railway administration will allow from the display charges, a proportionate refund of the unexpired period of the contract and no other claim on account of such non-exhibition shall be made or be maintained by the licensee against the Railway Administration.

(Condition 20 of Special Conditions, page 12 of Tender document).

3. Until a formal agreement is prepared and executed, acceptance of this tender shall constitute a binding contract between us subject to modification as may be mutually agreed to between Railway Administration and Licensee in terms of the form of agreement attached herewith and indicated in the letter of acceptance of my/our offer for this work.

(Condition "C" of Form-III page 20 of Tender Document).

4. Admittedly, no formal document/contract was executed, but the parties pursuant to the acceptance letter had acted upon and proceeded.

5. The Respondent inspected the site of work on 26 December 2003 in pursuance to the letter of acceptance. The area of the display at site was less for Show Case, Wall paint and Glow Sign media, therefore, objected vide its letters dated 31 January 2004 and 25 February 2004. Therefore, requested for alternate site and/or reduction in the licence fee. The Petitioner vide letter dated 10 February 2004, admitted the less area of display. The Respondent replied and again reiterated about the non-availability of site and reduction of licence fee, which was rejected by the Petitioner vide letter dated 12 March 2004.

6. The parties, treated the letter of acceptance as a deemed contract agreement, till the execution of the formal contract. The Respondent made the payment of first installment of Rs. 8 lacs, towards the licence fee, which was admittedly received by the Petitioner.

7. In view of the Arbitration clause as dispute arose between the parties, the matter was referred to the Arbitral Tribunal. The parties had filed their written pleadings supported by the documents. No evidence was led by both the parties. The sole arbitrator gave them all the opportunities and based upon the oral submissions, has passed the Award.

8. The Respondent made seven claims. The Arbitral Tribunal, after considering the material available on record, has granted four claims in favour of the Respondent, totaling of Rs. 14,20,860/- with a simple interest of 12% from the date of award till the actual date of payment. The counter claims of the Petitioner have been rejected.

9. The preliminary objection, that there exists no contract between the parties,

as no formal written contract executed, has no substance in the present facts and circumstances of the case. The Arbitrator has dealt with the said aspect by referring to the contract condition (C) of form - III of the tender document and held that there was a deemed contract agreement between the parties. The Respondent admittedly made payment of first installment of Rs. 8 lacs. The Petitioner demanded the other installments also. The Petitioner even resisted the claim/request of the Respondent to provide the site and/or to decrease the licence fees, as per the tender condition itself. The correspondences/vouchers so exchanged show that both the parties proceeded upon the tender after acceptance of the same.

10. Importantly, if there was no agreement or contract between the parties of any kind, there was no occasion and/or reason for the Petitioner to resist and/or reiterate and/or reject the request of the Petitioner apart from acceptance of the first installment. In absence of any contract or agreement in a given the case, the Petitioner is not at all entitled even to retain the said 8 lacs rupees.

11. Both the parties pursuance to the agreement, as acted upon, bound to comply with their reciprocal obligations. Any breach of such obligations/terms and conditions, therefore, play important role in deciding the dispute between the parties, as recorded by the Arbitrator even while rejecting the counter claims of the Petitioner.

12. I have already observed in Union of India (UOI) Vs. Arctic India and Shri K.P. Nair, The Sole Arbitrator, C.E., . as under:

48. The submission, therefore, so raised by the learned Counsel based upon Sections 7, 8 and 32 of the Indian Contract Act, 1872 revolving around the principle of concluded contract or accepted with material alteration by the Second party are of no assistance in view of the facts and circumstances of the case itself, specially when admittedly the work was done by the Respondents and the bills up to the 5th RAR were paid. Therefore, to submit, now that there was no valid and binding contract in view of the change of condition of the original offer is unacceptable.

13. Recently, the Apex Court in State of U.P. and Others Vs. Combined Chemicals Company Private Limited, has considered very aspect of "tender", "offer" and "acceptance" as contemplated under the Contract Act. It is observed that merely because the agreement was not specifically executed, that itself is not sufficient to hold that there exists no contract between the parties; on merits directed the Arbitrator/ Court to reconsider the claims.

14. The reliance of the Petitioner on State of Punjab and Others Vs. Om Parkash Baldev Krishan, , and Article 229 of Constitution of India is of no assistance. In that case, the letter of acceptance was signed by the Executive Engineer, but not in the name of Governor. In the present case, there is no denial that the tender was invited in the name of the President. Though written document was not executed, but both the parties acted upon the same and the Respondent even

deposited the first installment. The demand was also made by the Petitioner for the second installment. The Respondent did not deposit the security deposit as per the terms and conditions. As dispute arose and as the Petitioner failed to appoint an Arbitrator, an Arbitration Petition moved by the Respondent and the Arbitrator was appointed based upon the same agreement between the parties. The Arbitrator accordingly proceeded, before whom even the counter claim was also raised by the Petitioner.

15. It is relevant to note the arbitration clause in question which is reproduced as under:

In the event of any dispute or differences between the parties as to the construction or interpretation of any of the terms and conditions of this agreement or to the application and as to the rights, duties and obligations of the parties hereto (except the decision whereof is herein expressly provided for), the same shall together with counter-claim or set off be referred to the sole arbitration of the General Manager or a gazetted officer of the Railway not below in the rank of Administrative grade nominated by General Manager in that behalf and the decision of the general manager or the person so appointed shall be final and binding on the parties hereto and shall be subject to the provisions of Indian Arbitration and Conciliation Act, 1996 and the rules thereunder and any statutory modification thereof. The sole arbitrator so appointed shall give award on all the matters referred for arbitration, indicating therein the breakup of sums awarded separately on each individual item of dispute.

16. In view of above, therefore, the dispute or difference between the parties as to the construction or interpretation of the terms and conditions of this agreement or to the application and as to the rights and duties and the obligations of the parties, was rightly considered with counter claims as referred before the sole Arbitrator, whose binding decision was subject to the Arbitration Act.

17. The Petitioner who invited the tender is bound to provide the contractor/tenderer the full and clear described sites as advertised. It was always the expectation of the Respondent that the Petitioner must comply with the terms and conditions of the contract as announced and published. Though joint inspection was never carried out after acceptance of letter, the Petitioner was under obligation to provide the area of display of wall paint and show cases, as stated in the tender notice. The earlier contractor never utilised Show Cases or Wall Paint and Glow Sign media as were never available. The Petitioner, therefore, inspite of this, having invited the tender, was under obligation to provide these sites. The Respondent, even requested to reduce the licence fee, in view of the above non-availability of site, the Petitioner did not consider the request also. Therefore, the Petitioner, in the facts and circumstances, cannot insist to retain the amount of Rs. 8 lacs as deposited towards the first installment. The Respondent could not proceed further with the contract in view of this basic breach committed by the Petitioner. The Respondent was under no

obligation to continue with such contract though the first installment was paid. The Arbitrator, has not committed any error in awarding the refund of first installment of Rs. 8 lacs.

18. The claim of Rs. 50,000/- the payment made to other agencies towards the fixed charges as claimed by the Respondent, in the present case, cannot be granted for want of supporting evidence. Admittedly, the Respondent failed to lead evidence to support documentary evidence produced on record. The Arbitrator, however, based upon the unproved and the disputed documents, awarded the claim which is impermissible.

19. The loss of profit so awarded by the Arbitrator in favour of the Respondent to the tune of Rs. 2,82,816/- is also unsustainable, as there was no admitted or undisputed material/document and or no oral evidence was led to support the same. Though there is a finding given by the Arbitrator with regard to the breach committed by the Petitioner, but that itself is not sufficient to grant the loss of profit in such fashion, by awarding one forth of the total amount of loss of profit so claimed. Such approach, in my view, is arbitrary, unjust and as based on no prior agreement or legal foundation. Mere filing of document is not sufficient to accept the contents of the same, specially when the contents are disputed by the opposite side. It is, therefore, necessary for the party, who wants to claim benefit of these documents to prove the same as per the law, unless admitted by the opponent. The assessment of damages cannot be speculated. The role of mitigation in the assessment of damages just cannot be avoided. It applies even to the claim of loss of profit / income or expenses incurred and or such other claims.

20. I have already observed in Arbitration Petition No. 178 of 2007, Sealand Shipping & Export Pvt. Ltd. v. Kin-ship Services (India) Pvt. Ltd. dated 6 June 2011, on the basis of the decision of the Supreme Court that the Arbitrator is under obligation to award the claims or measure of damages, based upon the proved material on the record and not otherwise. The Arbitrator is under obligation to follow the basic law, as well as, the procedural law. Paragraph 41 of the same reads as under:

41. It is relevant to note that the importance of leading evidence to decide the quantum of amount of compensation/damages to be paid in any type of adjudication proceedings including the Arbitration. The Apex Court has observed in State of Rajasthan and Another Vs. Ferro Concrete Construction Pvt. Ltd., as under:

55. While the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the arbitrator to decide, if there was no evidence at all and if the arbitration makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to say that the entire award under this head is wholly illegal and

beyond the jurisdiction of the arbitrator, and wholly unsustainable.

Therefore, any award if passed, based upon no material or evidence on record, the entire award can be stated to be illegal and unsustainable.

21. The Arbitration clause nowhere permits the parties to claim such loss of profit, in such fashion, in such circumstances. The grant of one forth of the amount towards the loss of profit without supporting evidence on record, specially as the contract was terminated by the Respondent himself, therefore, also is unsustainable.

22. Another aspect is that the Respondent himself by letter dated 1 June 2004 made the representation to the Petitioner that apart from other background the reason for not depositing the second quarterly payment and that there was no buyers for the advertisement space and therefore, could not display advertisement till date and lastly submitted as under:

In view of all above, we do not have any option other than to request you to forfeit our Earnest money Deposit of Rs. 3,20,000/- (Rupees Three Lacs Twenty Thousand only) which will be a dead loss to us. However, balance amount of Rs. 4,80,000/- (Rupees Four Lacs Eighty Thousand only) may please be refunded to us. Our offer may please be treated as cancelled at this stage without any prejudice to either side and no further financial repercussion on our side.

23. The Respondent, therefore, as per the letter of Petitioner deposited the first installment i.e 25% of the annual licence fee, ultimately by this letter requested to cancel the contract in question and asked only for refund of balance amount of Rs. 4,80,000/- and permitted them to forfeit the earnest money/deposit of Rs. 3,20,000/-.

24. In spite of this letter, the Respondent made huge claims. The Arbitrator, in view of above, ought not to have awarded the loss of profit, as well as, the fixed amount paid to the agency.

25. The award of compensation on the claim of interest on capital i.e Rs. 8 lacs which was deposited by the Respondent for three years from the date of termination i.e. 11 June 2004 up to the date of award i.e 31 May 2007 is sustainable, in view of the finding given with regard to the refund of Rs. 8 lacs. However, considering the facts and circumstances, I am inclined to reduce the rate of interest at 9% instead of 12% as awarded. The Respondent, in my view, is entitled to 9% simple interest in such type of contract and specially when he himself terminated the contract as recorded above at all stages.

I have observed in *Union of India v. Arctic India and Anr.*, (Supra) as under:

53. Claim No. 2 with regard to the interest (Compounded Quarterly), as awarded u/s 31(7) of the Arbitration Act, I am inclined to interfere with the same and restrict it to 9% p.a. (simple interest) at all stages. The Apex Court in *Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy and Anr.* AIR 2007 SCW 527,

held as under:

Here also we may add that we do not wish to interfere with the Award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the Arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%.

26. Assuming for a moment that the submission of the Petitioner is accepted that for want of execution of the contract, there exists no agreement/contract between the parties, in that case also, the Petitioner is not at all entitled to retain the amount of Rs. 8 lacs which was admittedly deposited by the Respondent. There was no question of even counter claims so raised by the Petitioner. The award of amount of refund, as awarded, along with interest in the present facts and circumstances, needs no interference.

27. Therefore, taking overall view of the matter and as case is made out, I am inclined to modify the award as the claims are severable from each other and as it is permissible under the Arbitration Act to do so. The Apex Court has observed in J.G. Engineers Pvt. Ltd. Vs. Union of India (UOI) and Another, as under:

25. It is now well settled that if an award deals with the decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the award on Items 2, 4, 6, 7, 8 and 9 was upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to Claims 2, 4, 6, 7 8 and 9 of the Appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to Claims 2, 4, 6, 7, 8 and 9.

28. Resultantly, the Petition is partly allowed. The claim of refund of first installment and the interest thereon at the rate of 9% instead of 12% is maintained. The future rate of interest is also 9% till realization. All other claims of fixed charges to agency and the loss of profit are rejected.

29. The award with regard to the counter claims of the Petitioner and the cost, for the reason recorded above itself and as not awarded by the Arbitrator need no interference.

30. The Petition is accordingly partly allowed in the above terms. There shall be no order as to costs.